

Matter of Donovan v Limandri
2012 NY Slip Op 31287(U)
May 10, 2012
Supreme Court, New York County
Docket Number: 100289/12
Judge: Alexander W. Hunter Jr
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. BRINTON JR.
Justice

PART 33

Index Number : 100289/2012
DONOVEN, MICHAEL
vs.
LIMANDRI, ROBERT D.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 22, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-12
Answering Affidavits — Exhibits _____ | No(s). 13-2-1
Replying Affidavits _____ | No(s). 22

Upon the foregoing papers, it is ordered that this motion is

See memorandum decision and judgment annexed hereto.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/10/12

Alexander W. Brinton Jr., J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X

In the Matter of the Application of
Michael Donovan.

Index No.: 100289/12

Petitioner.

Decision and Judgment

For an Order pursuant to C.P.L.R. Article 78,

-against-

Robert D. Limandri, as Commissioner of The
New York City Department of Buildings, and
The City of New York.

UNFILED JUDGMENT

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Respondents.

-----X

HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order pursuant to C.P.L.R. Article 78, declaring respondents' determination to deny renewal of petitioner's Stationary Engineer License as arbitrary and capricious, and in violation of the New York State Correction Law, the New York State Human Rights Law, the New York City Administrative Code, and Executive Order 151, is denied and the petition is dismissed, without costs and disbursements to either party.

Petitioner's Stationary Engineer License was first issued on January 25, 1996. On or about July 1, 2008, Title 28 of the New York City Administrative Code ("Administrative Code") went into effect. The Administrative Code undertook new strategies to ensure that all trade licensees possessed good moral character. To that end, all applicants for a Stationary Engineer license were required to disclose prior criminal convictions and offenses on renewal applications.

On June 20, 2008, petitioner pled guilty to Conspiracy to Misapply Property of and Defraud the New York City Department of Education ("DOE"). He was sentenced to five years of probation. According to the Complaint, nine public school custodian engineers, including petitioner, misapplied approximately \$357,3000.000 of DOE funds from 1999-2003. Petitioner used DOE funds to purchase products from a vendor for items that were never sold or delivered.

On June 23, 2011, petitioner applied to the Department of Buildings ("DOB") for a renewal of his license. On his application, he indicated that he had been convicted of conspiracy in Brooklyn Federal Court on June 20, 2008 and sentenced to probation. On or about July 12, 2011, respondent DOB requested additional information and documentation regarding his federal conviction. By letter dated September 15, 2011, the DOB denied petitioner's renewal application pursuant to Administrative Code § 28-401.12. The denial letter reads in pertinent part that: "[Y]our conviction for Misapplication of Property bears a direct relationship to your

fitness and ability to perform the duties and responsibilities of a Stationary Engineer....This conduct also clearly stemmed directly from the position of trust and authority you were given by the city.”

Petitioner asserts that respondents arbitrarily and capriciously denied his application even though he was competent and fully qualified for renewal. Petitioner argues that respondents failed to consider all eight factors enumerated in Correction Law § 753. He maintains that respondents categorically denied his license renewal based solely on his prior federal conviction. Petitioner further argues that respondents violated the NYS Human Rights Law, the Administrative Code and Executive Order 151 by determining that he displayed poor moral character based upon his prior conviction. He also contends that respondents failed to establish that his federal conviction was directly related to his position as a Stationary Engineer or that the renewal of his license would pose an unreasonable danger to individuals or the general public in accordance with the holding in **Acosta v. New York City Dept. of Educ., 16 N.Y.3d 309 (2011)**. Moreover, petitioner argues that his due process rights were violated because he was not afforded a full evidentiary hearing.

Respondents assert that its decision to deny petitioner’s application to renew was rational, reasonable, and a proper exercise of the DOB’s discretion in licensing matters. Administrative Code § 28-401.12 permits the DOB to refuse to renew a license based on any ground upon which it could deny, suspend, or revoke a license. Respondents argue that the facts and circumstances surrounding his prior conviction evidence a lack of good moral character and it arose from petitioner’s dealings with the City. Moreover, petitioner’s theft of DOE funds is directly related to his employment as a Stationary Engineer. As a Stationary Engineer licensee, petitioner is responsible for maintaining truthful records and to submit inspection reports to the DOB to ensure the safety and welfare of the general public. The conviction involved dishonesty and fraudulent dealings with the City of New York and raises doubts as to petitioner’s veracity, integrity, and susceptibility of accepting bribes.

Respondents argue that the DOB weighed the factors set forth in Correction Law § 753 and ultimately determined that petitioner did not satisfy the requirements for renewal. Finally, respondents argue that an application for a license is not a property right but simply an application for a privilege. Therefore, petitioner does not have a property right which would trigger the protections of procedural due process. Moreover, petitioner was given notice and an opportunity to be heard; respondents maintain that he has no right to an in-person hearing.

In reply, petitioner reiterates that the DOB failed to analyze the eight enumerated factors of Correction Law § 753 when evaluating his application. Petitioner argues that the reasons provided by the DOB for the denial of his license are speculative, conclusory, and irrational. He contends that there is no direct relationship between his conviction and his abilities to perform his duties as a Stationary Engineer or that he would pose a threat to the general public. Petitioner argues that a formal hearing was required because non-renewal of a license is the functional equivalent of revocation. He further argues that licenses cannot be taken away without

procedural due process.

Correction Law § 752 prohibits public agencies or private employers from denying a license or employment to an applicant based solely on his or her status as an ex-offender. However, there are two exceptions to this general rule either: 1) where there is a direct relationship between the prior criminal offense and the license or employment being sought; or 2) where the granting of the license or employment would pose an unreasonable risk to property, safety of specific individuals or the general public. **Correction Law §§ 752(1) and (2)**. In making its determination, an employer must consider the following eight factors: 1) “the public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses”; 2) “the specific duties and responsibilities necessarily related to the license or employment sought or held by the person”; 3) “the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities”; 4) “the time which has elapsed since the occurrence of the criminal offense or offenses”; 5) “the age of the person at the time of occurrence of the criminal offense or offenses”; 6) the seriousness of the offense or offenses”; 7) “any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct”; and 8) “the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.” **Correction Law § 753**.

The revocation or suspension of license cannot be effectuated without notice and a hearing in accordance with procedural due process guaranteed by the Fourteenth Amendment. **Bell v. Burson, 402 U.S. 535 (1971)**. However, there is no property interest in the renewal of a license and therefore petitioner has no constitutional due process right to a hearing. **Matter of Daxor Corp. v. State of N.Y. Dept. of Health, 90 N.Y.2d 89 (1997)**; **Testwell, Inc. v. New York City Dept. of Bldgs., 80 A.D.3d 266 (1st Dept. 2010)**. In the instant case, petitioner was provided with notice and an opportunity to be heard pursuant to Administrative Code § 28-401.12. He submitted letters and other documentation to support his renewal application. As such, petitioner’s procedural due process rights were not violated when he was not afforded a hearing regarding his renewal.

It is well settled that a determination is arbitrary and capricious when it is made “without sound basis in reason and is generally taken without regard to the facts.” **See Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974)**. “Even though the court might have decided differently were it in the agency’s position, the court may not upset the agency’s determination in the absence of a finding, not supported by this record, that the determination had no rational basis.” **In the Matter of Mid-State Mgt. Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72, 76 (1st Dept. 1985)**. Therefore, this court’s role is limited to whether or not respondents’ final determination was made without a rational basis.

In the case at bar, this court finds that there was a rational basis for respondents to deny

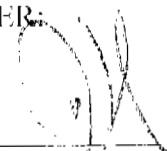
renewal of petitioner's Stationary Engineer License. Respondents denied petitioner's license because he failed to satisfy the requirement of good moral character and his offense was directly related to his dealings with the City of New York. In reviewing petitioner's renewal application, the DOB considered the time that had elapsed since the criminal offense, petitioner's age at the time of the offense, and documentation provided by petitioner evidencing his rehabilitation. While petitioner provided numerous letters of character reference, eight out of the eleven letters were written before the date of his conviction. Ultimately, respondent DOB found that the letters of reference were insufficient in light of the seriousness of the criminal offense of theft of DOE funds as it relates to the duties and responsibilities of a Stationary Engineer. Respondents considered all eight factors and balanced the positive factors against the negative factors when making its determination. See e.g., Acosta v. New York City Dept. of Educ., 16 N.Y.3d 309 (2011); Matter of Arrocha v. Board of Educ. of City of N.Y., 93 N.Y.2d 361 (1999); Matter of Bonacorsa v. Van Lindt, 71 N.Y.2d 605 (1988). Moreover, respondents had no obligation to provide a detailed analysis of the eight factors in its denial letter. See, Acosta, 16 N.Y.3d at 318-319 (2011). Annuling respondents' determination would require a reweighing of the factors and that is beyond the limits of judicial review. Therefore, respondents' determination was not arbitrary and capricious.

Accordingly,

ADJUDGED, that the petition is denied and the proceeding is dismissed, without costs and disbursements to either party.

Dated: May 10, 2012

ENTER:



J.S.C.

UNFILED JUDGMENT

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