

Matter of Ryan v Limandri

2012 NY Slip Op 32546(U)

September 28, 2012

Sup Ct, New York County

Docket Number: 116328/10

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of
KERRY M. RYAN,

Petitioner,

INDEX NO. 116328/10

For a Judgement Pursuant to the Provisions of
Article 78 of the New York Civil Practice Law and Rules,

MOTION SEQ. NO. 001

FILED

-against-

**ROBERT D. LIMANDRI, AS COMMISSIONER OF
THE NEW YORK CITY DEPARTMENT
OF BUILDINGS, AND THE CITY OF NEW YORK,**
Respondents.

OCT 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

The following papers numbered 1 to 5 were read on this motion by petitioner for an order and judgement pursuant to Article 78 of the Civil Practice Law and Rules.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

PAPERS NUMBERED

1,2

3,4

5

Cross-Motion: Yes No

In this Article 78 proceeding, Kerry M. Ryan (petitioner) seeks a judgment annulling the October 20, 2010 determination made by the New York City Department of Buildings (DOB), which denied his renewal application for his Stationary Engineer license. Petitioner seeks a declaration that he is eligible for his renewal, and a declaration that respondents the DOB, Robert D. LiMandri as Commissioner of the DOB and the City of New York (collectively, DOB), failed to perform a duty enjoined upon them by the New York State Correction Law, the New York Human Rights Law, and section 28-401.12 of the New York City Administrative Code (Administrative Code). Petitioner further requests attorneys' fees and an evidentiary hearing.

BACKGROUND

From 1995 until 2003, petitioner was employed with the Department of Education and his duties consisted of, among other things, custodial upkeep and maintenance of the boiler system. He possessed a valid license for High Pressure Operating Engineer (Stationary

Engineer license). In 2003, petitioner was arrested and charged with the Class A misdemeanor of Offering a False Instrument for Filing in the Second Degree. In sum, petitioner was part of a group of custodians who allegedly received kickbacks for hiring certain contractors to clean windows in schools (see DOB's Exhibit D, at 1).

As part of a plea agreement, petitioner was barred from working for the Department of Education but was free to work with other New York City agencies. He was also provided with a Certificate of Relief from Civil Disabilities. After his plea agreement, also in 2003, petitioner applied for, and was hired to work for the New York City Police Department (NYPD) as a Stationary Engineer. On his job application petitioner listed his prior conviction. Petitioner's job requirements included operating and maintaining the boilers and their maintenance logs.

Also as part of his job requirements with the NYPD, petitioner had to maintain his license as a Stationary Engineer. Prior to 2010, petitioner had renewed his Stationary Engineer license with the DOB successfully every year. In July 2010, petitioner applied to the DOB for a renewal of his license. Petitioner's license had actually expired in February 2010 and he submitted a late application. As with his past applications to the DOB for a license renewal, he listed his conviction. However, instead of approving his license renewal, as the DOB consistently did in the past, the DOB requested that petitioner provide an explanation about the conviction which he listed on his application.¹ The August 25, 2010 letter to petitioner stated the following, in pertinent part:

In section 9, "Convictions and Fines," of your application you indicated that you plead guilty in 2003 to Misdemeanor "Offering a False Instrument for Filing." Although you previously disclosed this information, it is within the Department [s/c] discretion to conduct a further investigation and evaluation of your character as it relates to your duties as a licensee. The submission of true and accurate inspection reports to the Department is an essential part of a Stationary Engineer's duties.

¹ The DOB maintains that, effective July 1, 2008, pursuant to new Construction Codes, applicants for license renewal applications were required to disclose convictions and fines.

A copy of your application is being returned to you at this time. Please submit an explanation, in writing, of the circumstances surrounding your arrest and subsequent guilty plea (Petitioner's Exhibit 14).

On September 1, 2010, petitioner responded to the letter and described the details of his conviction, in pertinent part:

In 2003, I was employed as a school custodian in charge of the operation and maintenance of certain school buildings. One of the requirements of my position was to hire contractors to perform certain maintenance services. In August 2000, on one occasion, I accepted the lowest bid submitted by a maintenance contractor who appeared to be legitimate. I failed, however, to confirm the contractor was in fact on the authorized list of contractors (Petitioner's Exhibit 15, at 1).

Petitioner also explained how it was a one-time mistake and that this mistake should not "serve to diminish my moral character or ability to properly serve the City of New York" (*id.* at 2). Additionally, he enclosed his performance evaluation from 2009, which indicated that petitioner had been performing his job satisfactorily and was an asset to the NYPD.

Pursuant to a letter dated October 20, 2010, DOB advised petitioner that it was not going to renew his license. In its letter, the DOB explained that, pursuant to Administrative Code § 28-401.19, it is authorized to refuse to renew a license if the applicant displays "[p]oor moral character that adversely reflects on his or her fitness to conduct work regulated by this code." The DOB further explained that petitioner's conviction is directly correlated with his abilities to perform the duties of a Stationary Engineer. The DOB also explained its assessment of petitioner's conviction and how it relates to the criteria in Correction Law § 753. It stated the following, in pertinent part:

On June 19, 2003, you pled guilty to NYS Penal Law Section 175.30, Offering a False Instrument for Filing ... You accepted a bid from a contractor who was not on the Department of Education authorized list of maintenance contractors. Based on the Department's review, you have not satisfied the requirement of good moral character.

As a Stationary Engineer, you are responsible for ensuring that high pressure boilers operate safely by performing routine maintenance, shutting equipment down, making repairs, and regulating machinery as necessary. You must keep

truthful and accurate records of boiler pressure, temperature, power output, and fuel consumption. Additionally, you are authorized to submit annual low pressure boiler inspection reports to the Department on behalf of building owners.

Your conviction for Offering a False Instrument for Filing bears a direct relationship to your fitness and ability to perform the duties and responsibilities of a Stationary Engineer. Since as a licensee you must submit inspection reports to the Department, it is imperative that these submissions are reliable in order to protect the safety and welfare of the public. Additionally, this incident occurred less than ten years ago and you were thirty-three years old, presumably a responsible adult who should engaged [*sic*] in such conduct. Although you provided performance reviews from your current employer, the New York Police Department, and a Certificate of Relief from Disabilities, you have not presented sufficient evidence of rehabilitation in light of the above (Petitioner's Exhibit 12, 1-2).

Although the letter did not provide petitioner with a chance to appeal the determination, by letter dated November 22, 2010, petitioner requested reconsideration of DOB's determination. With his letter, among other items, petitioner submitted letters of recommendation from the NYPD. In his letter, petitioner alleges that he had "learned that at least one individual, who pled guilty to the same offense, under similar circumstances, applied for and received a renewal of his Stationary Engineer's license" (DOB's Exhibit H, at 1).

Petitioner also wrote that he has been trusted, for the past seven years, "with the responsibility of the safety and welfare of the building and its occupants without incident" (*id*).

Pursuant to a letter dated December 23, 2010, the DOB reiterated its decision to petitioner that it would not be renewing his Stationary Engineer license. The letter also indicated that the DOB took the certificate of relief into consideration and that, despite this certificate, petitioner's crime involved moral turpitude. As such, the DOB would not change its position with respect to its decision not to renew petitioner's license.²

In December 2010, petitioner filed this instant Article 78 petition. Petitioner argues that the DOB's decision not to renew his Stationary Engineer license was arbitrary and capricious in

² The DOB maintains that any correspondence after its October 20, 2010 is not part of the record since the October 20, 2010 is the final determination by the agency.

that petitioner was qualified for the renewal. Petitioner further maintains that he has received favorable annual performance reviews since he was convicted in 2003, and that the DOB knew about the conviction since 2003 and had been renewing his license without incident, up until 2010. Petitioner also claims that the DOB has renewed licenses of other similarly situated individuals. In its Answer, the DOB argues that the petition should be denied since the DOB's determination denying his application for license renewal was rational, reasonable and within DOB's discretion.

DISCUSSION

The standard of review in this Article 78 proceeding is whether the respondent's determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; *see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of an agency within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; *see also Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

Moreover, an "[a]gency determination of a license application requires a certain amount

of discretionary judgment-making which courts will not disturb absent a finding that such judgments were arbitrary or capricious" (*Matter of Montanez v City of N. Y. Dept. Of Bldgs.*, 8 Misc3d 405, 407 [Sup Ct NY County 2005]; see *Matter of Pell*, 34 NY2d at 231).

Article 23-A encompasses sections 750–755 of the Correction Law. Section 752 prohibits the unfair discrimination against persons previously convicted of criminal offenses who are applying for a license or employment, and states the following:

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or
- (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Section 753(1) of the Correction Law sets forth factors to be considered when denying or approving a license or job application for any individual with a criminal conviction. The factors are:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure... of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license ... sought or held by the person.
- (c) 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.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) 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.

Section 753(2) of the Correction Law also states the following:

In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

As set forth in Correction Law § 701, a Certificate of Relief is issued to eligible offenders so that they are not automatically barred from employment based on the conviction. Section 701(1) states the following, in pertinent part:

A certificate of relief from disabilities may be granted as provided in this article to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein.

Section 701(3) of the Correction Law explains that the Certificate of Relief does not prevent any "judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege."

The DOB, among other things, approves or denies initial and renewal license applications for Stationary Engineers. According to Administrative Code § 28-401.12, the DOB "may, following notice and an opportunity to be heard, refuse to renew a license or certificate of competence on any grounds on the basis of which it could deny, suspend or revoke such license." The DOB may suspend or revoke a license if the applicant demonstrates "[p]oor moral character that adversely reflects on his or her fitness to conduct work regulated by this code" (Administrative Code § 28-401.19[13]). The DOB notes that prior to 2010, although the petitioner listed his prior conviction on his license renewal application, the DOB had never asked for an explanation of his conviction. According to the DOB, it was only in 2010 that it understood the details of the conviction.

As set forth below, the Court finds that the DOB's decision to deny petitioner's 2010

application for renewal of his Stationary Engineer license was rational and should be upheld. After receiving an explanation about petitioner's conviction, the DOB decided that petitioner's conviction showed "poor moral character" as it relates to his Stationary Engineer license. The DOB reviewed the letters of recommendation as well as the other items in petitioner's application. After review, the DOB wrote to petitioner and explained how, despite the other positive indicators in his record, petitioner has not satisfied the requirement of good moral character.

The DOB also listed the factors from Correction Law § 753, which an agency must take into consideration when making a determination concerning a previous conviction. One of the factors includes the bearing, if any, the conviction will have on the applicant's fitness to perform the job duties. After reviewing its own regulations set forth in Administrative Law § 28-401.19 (13), and also those of the Corrections Law, the DOB explained to petitioner that his ability to provide truthful and accurate records of boiler activity are in question. The DOB noted that petitioner was already a responsible adult when his conviction occurred. In making this determination the DOB took into consideration the certificate of relief and all of petitioner's recommendations and performance reviews. As such, the DOB's explanation and decision for its denial was rational and reasonable and will not be overturned.

Petitioner argues that the DOB's decision to deny his license because of his past conviction violated Article 23 of the Correction Law. He claims that the DOB did not adequately demonstrate that it "considered all eight of the statutorily-required factors in light of the specific evidence presented by the petitioner in this case" (Petitioner's memorandum of law, at 26). However, as set forth below, petitioner's arguments are without merit.

"When all eight factors are considered and the positive factors are balanced against the negative factors, the resulting decision is neither arbitrary nor capricious nor does it constitute an abuse of discretion and reviewing courts may not reweigh the factors and substitute their

judgment for that of the agency" (*Matter of Gallo v State of N.Y., Off. of Mental Retardation and Dev. Disabilities*, 37 AD3d 984, 985 [3d Dept 2007]). After receiving the petitioner's application, the DOB set forth the eight factors to be considered when deciding to renew his license and then proceeded to address the factors. This is contrary to the cases cited to by petitioner, including *Matter of Gallo*, in which the Court found that the agency's determination was arbitrary as it did not consider two statutory factors (*Compare Matter of Greenberg v Wrynn*, 86 AD3d 437 [1st Dept 2011]).

Although the DOB did not delineate every factor in its discussion, its correspondence with petitioner indicates that it considered every factor. For instance, as previously mentioned, the DOB directly acknowledged the positive aspects of petitioner's application such as his certificate of relief as well as his positive work history and recommendations, in comparison with the petitioner's age at the time of the conviction, the type of crime committed and the nature of petitioner's job. Despite the positive aspects of petitioner's application, the DOB concluded that its interest in protecting "the safety and welfare of the public" outweighed petitioner's entitlement to his license renewal (Petitioner's Exhibit 12, at 2).

"[T]he presumption of rehabilitation does not preclude [respondents] from considering any of the other seven factors, unrelated to rehabilitation, including prior convictions in the context of the license or employment being sought" (*Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 366 [1999]). Even the case cited by petitioner, *Matter of El v New York City Dept. of Educ.* (23 Misc 3d 1121[A], 2009 NY Slip Op 50883[U] Sup Ct, NY County [2009], *12), mentions that a Certificate of Relief "does not establish a *prima face* entitlement to the employment ...". Moreover, although Correction Law § 752 prohibits unfair discrimination against a convicted person, a license application can still be denied if there is a direct correlation between the prior conviction and the license sought. Accordingly, the Court finds that the DOB reasonably weighed the factors set forth in the Correction Law and the Court will

not "reweigh" the factors.

Petitioner also claims that the DOB failed to explain how his past conviction relates to his current job and that the DOB failed to consider his recommendations and performance reviews. Petitioner maintains that his past conviction has no direct bearing on his fitness or ability to perform the duties correlated with the license. While the petitioner may believe that his conviction has no relationship to his current job responsibilities and that he has been sufficiently rehabilitated, it is well settled that, "an agency's determination, acting pursuant to legal authority and within its area of expertise, is entitled to deference" (*Matter of Tockwotten Assoc., v New York State Div. of Hous. and Community Renewal*, 7 AD3d 453, 454 [1st Dept 2004]). As such, the DOB's finding that the petitioner lacked "good moral character" was rationally based on the facts of the case, was not arbitrary and capricious, and the Court will not substitute its judgment for that of the DOB.

Petitioner also contends that the DOB has used the same language verbatim when denying other individuals' licenses and provides a copy of another applicant's letter to the Court in his reply papers. Since this letter was not part of the original record before the DOB, it cannot be considered at this time. It is well settled that "[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency" (*Matter of Rizzo v New York State Div. of Hous. & Community Renewal*, 6 NY3d 104, 110 [2005] [internal quotation marks and citation omitted]).

Petitioner alleges that the DOB has recently renewed the licenses of similarly situated individuals. Likewise to the allegations cited above, as noted by the DOB, this correspondence was submitted to the DOB after it made its final determination which is the subject of this Article 78 review. As such, it will not be considered at this time. Moreover, even after receiving this correspondence, the DOB acknowledged its receipt but that it was still denying his renewal request. Additionally, *Matter of Inglese v LiMandri* (29 Misc 3d 1234[A] 2010 NY Slip Op

52136[U] Sup Ct, NY County [2010]), which is one of the cases cited to by petitioner in support of his argument that the DOB's decision should be annulled, as well as being distinguishable, was recently reversed. Specifically, the Appellate Division, First Department, held that the DOB's determination to revoke the applicant's hoist machine operator license should be reinstated (*see Matter of Inglese v LiMandri*, 89 AD3d 604 [1st Dept 2011]).

Petitioner is Not Entitled to a Hearing

Petitioner claims that, if the DOB had suspended his license, he would have been entitled to a hearing at the New York City Office of Administrative Trial Hearings (OATH).³ As noted by the DOB, petitioner let his license expire and applied for a late renewal. Therefore, his license had not been suspended. Even so, the Administrative Code § 28-401.12 does not entitle petitioner to a hearing, but does entitle him to notice and an opportunity to be heard prior to the denial of a renewal of a license. Petitioner had an opportunity to be heard in that he explained his conviction and submitted documentation in support of his application. The record indicates that the DOB reviewed this material yet still denied petitioner's application. As such, under Administrative Code § 28-401.12, petitioner "was entitled to reasonable notice and a fair opportunity to be heard with respect to the reasons for the denial of the renewal" (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 274 [1st Dept 2010]).

The Court has considered petitioner's other contentions, including petitioner's allegations that respondents violated the New York Human Rights Law and his request for a evidentiary hearing, and finds them without merit.

CONCLUSION

Accordingly, it is hereby

³ In his petition, he also seeks an evidentiary hearing on the matter.

ORDERED that the petition is denied and the proceeding is dismissed without costs or disbursements to the respondents, and it is further,

ORDERED that respondents are directed to serve a copy of this Order with Notice of Entry upon petitioner and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 9/28/12

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PAUL WOOTEN, J.S.C.

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