Volpe v New York City Dept.of Bldgs.
2019 NY Slip Op 33811(U)
December 26, 2019
Supreme Court, New York County
Docket Number: 151276/2019
Judge: Verna L. Saunders

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART 5**

Justice

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INDEX NO. 151276/2019

JOSEPH VOLPE,

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY DEPARTMENT OF BUILDINGS and THE CITY OF NEW YORK,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for **ARTICLE 78**.

Petitioner seeks an order reversing, annulling, and setting aside the September 27, 2018 Office of Administrative Trials and Hearings (OATH) Appeals Unit decision which affirmed Hearing Officer Deborah Mbabazi's March 28, 2018 decision finding petitioner in violation of five OATH summonses issued in connection with a fatal accident at 364 Meredith Avenue, Staten Island, New York.

On March 10, 2017, petitioner was the master rigger responsible for rigging operations on the asphalt plant located at 364 Meredith Avenue, Staten Island, N.Y. An employee of the asphalt company was struck and killed by material hoisted by petitioner which became loose and fell. The Department of Buildings (DOB) issued five summonses returnable to the OATH Hearings Division (formerly known as the New York City Environmental Control Board ["ECB"]). DOB subsequently filed a petition at OATH Trials Division in connection with the accident. Petitioner and DOB entered into a stipulation of settlement resolving the OATH petition, however, the summonses remained pending. Thereafter, DOB served petitioner with a second set of summonses and followed-up with correspondence alerting petitioner that it was withdrawing the first set of summonses as they had been deemed "technically, legally, or otherwise insufficient to warrant further prosecution." Petitioner's attorney contacted DOB seeking clarification on the specific reason the first set of summonses were not prosecuted and how they differ from the second set of summonses as they are identical. Petitioner asserts the DOB never responded and a hearing commenced in connection with the second set of summonses.[1]

At the hearing, petitioner submitted a motion to dismiss each summons on the ground of *res judicata* asserting that the same charges were resolved in the Stipulation of Settlement dated June 27, 2017. The motion was noted for the record but Hearing Officer Mbabazi declined to rule on the

[1] Violations of Building Code §§ 3316.3 (failure to notify DOB following an accident); 3316.3(1) (continued use of hoisting equipment after accident); 3316.2 (inadequate safety measures, operation of crane, derrick/hoisting equipment in unsafe manner); and 1 RCNY§ 104-20 (c) and (f) (master rigger failed to adequately plan for rigging operations at the site and use of unqualified rigging personnel).

motion. Petitioner also moved to preclude DOB's evidence not disclosed prior to the hearing, the motion was granted, and any evidence not produced prior to the hearing, including photographs taken by DOB, was precluded. At the hearing, both petitioner and the Issuing Officer, D. McCuen testified. At the conclusion, Hearing Officer Mbabazi issued a decision dated March 28, 2018 finding petitioner in violation of the charges in connection with each summons and imposed a civil penalty for each.

Petitioner then appealed to the OATH Appeals Unit arguing: 1) the doctrine of *res judicata* and/or collateral estoppel barred the hearing of the summonses; 2) the hearing officer improperly considered precluded evidence and hearsay testimony; 3) the hearing officer erred by granting DOB's motion to amend the summons to charge Building Code § 3316.3 in the stead of § 3316.1; 4) Building Code § 3316.2 and 1 RCNY§ 104-20(c) summonses are duplicative; 5) petitioner rebutted DOB's charge asserting that petitioner failed to immediately notify DOB of the accident; and 6) that the hearing officer's credibility determinations were not supported by the record.

The OATH Appeals Unit rendered its decision on September 27, 2018 affirming the determination of Hearing Officer Mbabazi. Petitioner now asserts that the OATH appeals decision was in violation of lawful procedure, affected by an error of law, was arbitrary and capricious and an abuse of discretion warranting an order reversing and annulling it pursuant to CPLR § 7803.

Respondents oppose the motion arguing that the matter should be transferred to the Appellate Division, First Department to determine whether the hearing officer's determination was supported by substantial evidence in the record; or in the alternative, the court should find that the OATH Appeals Unit's decision was rational, reasonable, supported by substantial evidence and in accordance with applicable law.

In an Article 78 proceeding, the scope of judicial review is limited to whether an administrative agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law. (CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991].) Generally, judicial review of an administrative determination made after a hearing at which evidence was taken is limited to whether that determination is supported by substantial evidence. (CPLR § 7803[4]; *Matter of Pell*, at 230.)

Substantial evidence is a minimal standard that consists of such relevant proof that a reasonable mind may accept as adequate to support a conclusion or ultimate fact. Substantial evidence requires less than clear and convincing evidence; less than proof by a preponderance of evidence; less than overwhelming evidence; and less than evidence beyond a reasonable doubt. As a burden of proof, it demands only that a given inference is reasonable and plausible, not necessarily the most probable. Further, courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists. See *Matter of Seon v New York State Dept. of Motor Vehs.*, 159 AD3d 607 (1st Dept 2018); *Matter of Shuman v New York State Racing & Wagering Bd.*, 40 AD3d 385 (1st Dept 2007).

As an initial matter, this court finds that the administrative record as presented is sufficient to assess whether the OATH Appeals Unit's affirmation of Hearing Officer Mbabazi's decision to impose civil penalties upon petitioner was arbitrary and capricious. Accordingly, the motion to refer this action to the Appellate Division is denied.

With respect to the OATH Appeal Unit's decision, this Court finds that the Board's determination was reasonable, rational, supported by substantial evidence, and in accordance with the applicable law.

The Board held that the stipulation between petitioner and DOB did not bar adjudication of the summonses, which sought to impose civil penalties against petitioner, as the petition returnable in the OATH Trials Division did not charge petitioner with the same sections of law citied in the summonses; the stipulation resulted in suspension of petitioner's license, a sanction/remedy not available at this forum; and the stipulation is devoid of language establishing its intention to settle all claims arising out of the accident. A review of the stipulation annexed to the petition as Exhibit E, indicates that petitioner was resolving the charge against him as to violation of New York City Administrative Code § 28-401.19(6) (negligence, incompetence, lack of knowledge or disregard of this code and related law and rules) by pleading guilty and consenting to a suspension of his Hoisting Machine Operator Class B license followed by probation of said license after the suspension. No other charges or violations are mentioned in the stipulation. In contrast, the summonses indicate violations of different sections of law to wit: violations of Building Code §§ 3316.3 [failure to notify DOB following an accident); 3316.3(1) (continued use of hoisting equipment after accident]; 3316.2 [inadequate safety measures, operation of crane, derrick/hoisting equipment in unsafe manner]; and 1 RCNY§ 104-20 (c) and (f) [master rigger failed to adequately plan for rigging operations at the site and use of unqualified rigging personnel]. Furthermore, the penalty imposed as a result of the summonses were in fact civil penalties, not license suspension or revocation, as such the Board correctly held that the doctrine of *res judicata* and/or collateral estoppel did not bar the adjudication of the summonses.

With respect to petitioner's assertions that the hearing officer improperly considered hearsay and permitted the Issuing Officer to refer to precluded evidence during his testimony, the Board held that the hearing officer, as the fact finder, can consider only admissible evidence and the record reflects that the hearing officer properly based her decision on admissible evidence. The Court concurs with the Board and finds its determination to be supported by the record, as the hearing officer undoubtedly states that evidence submitted by DOB, not previously exchanged, was precluded and her decision reflects that her determinations were based upon the testimony of the petitioner and the issuing officer. Moreover, inasmuch as hearsay is permissible at OATH hearings, pursuant to 48§RCNY 6-12(c), the hearing officer's determinations were in accordance with the law.

As to the hearing officer's decision to grant DOB's application to amend to charge BC §3316.3 in the stead of §3316.1, the Board found this decision to be proper as the amendment was reasonably within the scope of the original summons and did not allege additional violations or acts which occurred after the accident. The Board further found that the amendment did not affect petitioner's right of adequate notice of the allegations against him since BC § 3316.1 states that hoisting equipment must be in accordance with BC § 3316.3. Regarding this charge, DOB sought to amend the charge as the details of the occurrence more appropriately conform to BC§ 3316.3 as the accident resulted in a fatality. As the amendment involved the same violation and was not based upon an additional action or violation, the petitioner was not deprived of notice and the amendment was permissible pursuant to 48 RCNY§6-13 (e).

Additionally, the Board determined that the BC §3316.2 and 1 RCNY§ 104-20 (c) summonses were not duplicative as they cite different provisions of law and require different

elements of proof. BC §3316.2 is a violation for failure to operate hoisting equipment to eliminate hazard while 1 RCNY§ 104-20(c) is a failure to have all members of the rigging crew under direct and continuing supervision of the licensee. As these provisions are undoubtedly different, the Board's determination on this ground was reasonable.

As to petitioner's assertion that he notified DOB immediately after the accident, the Board opined that as petitioner admittedly was unable to reach the DOB Chief, despite attempts to reach him on his personal cell phone, and petitioner failed to report the incident to the DOB Cranes & Derricks Unit directly at the telephone designated for such purpose, petitioner was in violation. Here, the Board concedes that had petitioner's calls to his chief been successful that he would have arguably met this requirement but as he was unable to reach the chief and failed to contact the Cranes & Derricks Unit directly, he was in violation of Building Code § 3316.3 (failure to notify DOB following an accident). As this determination is fair and based in sound logic it is not arbitrary or capricious.

Lastly, the Board held that petitioner's arguments that the hearing officer erroneously credited the Issuing Officer's testimony as it was incredible and based on hearsay is unavailing as the Board defers to the hearing officer's credibility determinations and there is nothing in the record warranting otherwise and furthermore, hearsay is admissible in OATH hearings pursuant to 48 RCNY § 6-12(c). Insofar as it is well-settled that "the decision by an administrative officer to credit the testimony of a given witness is largely unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record" this court finds the Board's decision to defer to the hearing officer's credibility determinations rational.

Based upon the foregoing, the court finds that the Board's decision to affirm the hearing officer's determination was not in violation of lawful procedures, arbitrary or capricious, or affected by an error of law. To the contrary the decision was well-reasoned and supported by law. Petitioner's dissatisfaction with the outcome is not sufficient to reverse the Board's determination. As such, it is hereby

ORDERED and ADJUDGED that the court denies petitioner's Article 78 Petition seeking to annul the September 27, 2018 Office of Administrative Trials and Hearings (OATH) Appeals Unit decision affirming Hearing Officer Deborah Mbabazi's March 28, 2018 decision finding petitioner in violation of five OATH summonses issued in connection with the fatal accident at 364 Meredith Avenue, Staten Island, New York and said determination stands; and it is further

ORDERED that the proceeding is dismissed, without costs; and any relief not expressly addressed herein has nonetheless been considered and is expressly denied.

December 26, 2019

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE