

Matter of Solomon v Department of Buildings of City of New York
2006 NY Slip Op 30426(U)
October 25, 2006
Supreme Court, New York County
Docket Number: 109661/06
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

JANE S. SOLOMON

PRESENT:

PART 55

Index Number: 109661/2006

ZANE & RUDOFISKY

vs

DEPT OF BUILDINGS OF THE CITY

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 9/22/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-5

6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the amended memorandum decision, order and judgment.

N.B. -- this matter is calendared in Part 55 for December 11, 2006 at 10 AM for compliance with the production of documents under FOIL as required herein.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based thereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

Dated: 10/25/06

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
In the Matter of the Application of

JEFFREY SOLOMON and
ZANE and RUDOFISKY,

Index No. 109661/06

Petitioner,

DECISION, ORDER
AND JUDGMENT

-against-

THE DEPARTMENT OF BUILDINGS
CITY OF NEW YORK, and PATRICIA
LANCASTER as Commissioner of
Buildings of the City of New York

Defendant.

-----X

JANE S. SOLOMON, J.:

Petitioners Jeffrey Solomon and Zane and Rudofsky bring this Article 78 proceeding, seeking: (i) an order directing respondents to provide, for in camera inspection by the court, documents responsive to petitioners' Freedom of Information Law (FOIL) requests that were withheld by respondents; (ii) an order directing respondents either to promulgate rules of procedure to govern Master Electrician Licensing Board (MELB) hearings, as assertedly required by New York City Charter (Charter) § 1046 (b), or to grant Solomon's application for a master electrician license without a further hearing by the MELB; and (iii) an order barring MELB from investigating whether Solomon was adequately supervised by a master electrician for the requisite time, and directing respondents and MELB to consider only Solomon's character and fitness as an applicant.

Toward the end of 2001, Solomon applied to respondent New York City Department of Buildings (DOB) for a license as a

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master electrician. By letter dated December 29, 2003, respondent Patricia Lancaster, as Commissioner of Buildings of the City of New York, denied Solomon's application. Solomon challenged that denial in an Article 78 proceeding. By order and judgment, dated October 5, 2004, the court (Abdus-Salaam, J.) granted the petition, on the grounds that the MELB that had denied Solomon's application lacked a quorum, and that one of its members, who was an official of IBEW, Local 3, had a conflict of interest, inasmuch as he was in competition with Solomon, who was a principal of a nonunion shop. Justice Abdus-Salaam directed that any new MELB considering Solomon's application not include a member of any electrical worker's union. By order dated June 30, 2005, the Appellate Division, First Department, modified Justice Abdus-Salaam's order by providing that no official of an electrical worker's union, rather than no member of such a union, should sit as a member of a new MELB considering Solomon's application, and otherwise affirmed the order. Matter of Solomon v Lancaster, 19 AD3d 334 (1st Dept 2005).

Thereafter, Zane and Rudofsky, acting on behalf of Solomon, made a written request to the DOB records access officer, pursuant to FOIL, for records pertaining to Solomon, and requested from the assistant general counsel of DOB, who chairs the MELB, a copy of the rules of procedure governing MELB hearings, as well as an opportunity to review DOB's entire file on Solomon. In the course of further correspondence, the MELB chair wrote that "there are no promulgated rules of procedure

governing the Board's meetings," and DOB provided Zane and Rudofsky with a number of documents, but withheld others, characterizing groups of the withheld documents as covered by one or another FOIL exemption, without any discussion of individual documents.

The first branch of the petition will be granted. It is established that an agency subject to FOIL has the "burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 (1986); see also Matter of Gould v New York City Police Dept., 89 NY2d 267 (1996). A mere recital of the "statutory phrasing of an exemption [is] insufficient to establish the requirement of particularity." Matter of DJL Restaurant Corp. v Department of Buildings of City of New York, 273 AD2d 167, 168-169 (1st Dept 2000).

The second branch of the petition will be denied, because the requirement in New York City Charter § 1046 (b), that "[a]gencies shall adopt rules governing agency procedures for adjudications and appeals," is inapplicable to MELB licensing proceedings. Charter § 1041 (1) defines "adjudication" as "a proceeding in which the legal rights, duties or privileges of named parties are required by law to be determined by an agency on a record and after an opportunity for a hearing." Administrative Code of City of NY § 27-3009 (c), which governs MELB proceedings, provides in relevant part that:

[t]he license board shall investigate the character and fitness of all applicants for licenses ... and shall report to the commissioner the results of such examination. It shall investigate and hear all written complaints against holders of such licenses ... and report to the commissioner its findings and recommendations.

(Emphasis added.) Thus, a hearing and findings are required in the case of complaints against the holders of licenses, as a result of which a license may be revoked, but they are not required in connection with applications for a license. Consequently, when the license board's investigation of the character and fitness of an applicant for a license includes a hearing, such hearing is not an adjudication, within the meaning of Charter § 1040 (1), and Charter § 1046 (b) is inapplicable to such hearing. While petitioners also rely upon the State Administrative Procedure Act (SAPA), that act is applicable only to state agencies. SAPA § 102 (1); Matter of 1777 Penfield Road Corp. v Morrison-Vega, 116 AD2d 1035 (4th Dept 1986); Incorporated Village of Great Neck Plaza v Nassau County Rent Guidelines Bd., 69 AD2d 528 (2d Dept 1979).

Petitioners' argument to the contrary notwithstanding, Solomon's right to due process, under the state and federal constitutions, is not implicated by the absence of rules of procedure governing MELB licensing hearings, because he lacks a property interest in obtaining the license that he seeks. While Solomon is, nonetheless, entitled to a fair hearing (Matter of Solomon v Lancaster, 19 AD3d 334, supra; Matter of Reynolds v City of New York, 294 AD2d 162, 163 [1st Dept 2002]), petitioners

have not shown that the absence of promulgated rules of procedure will deny him such a hearing. DOB might be well-advised to adopt rules of procedure, compliance with which might reduce litigation against it, but there is no basis for this court to order DOB to do so.

Nor, as should go without saying, will the court order respondents to violate the Electrical Code, by issuing Solomon a master electrician's license without the investigation that Code § 27-3009, as well as Code § 27-3012, requires for the issuance of all electrician licenses.

With regard to the third branch of their petition, petitioners argue that Code § 27-3010, which sets forth the qualifications required of an applicant for a master electrician license, including seven-and-a-half years of qualifying experience, did not, prior to its amendment by Local Law 81 of 2003 (LL 81), which became effective on January 1, 2004, allow DOB to investigate whether the applicant had been adequately supervised during those years; and that, at the time that DOB's decision on Solomon's 2001 application was pending, DOB committed itself to ruling on the petition in accordance with then existing law. At present, Code § 27-3010 provides that the satisfactory experience that is required "have been obtained while under the direct supervision of a master electrician"

In general, just as a reviewing court rules on the basis of the law in effect at the time of its decision (People v Favor, 82 NY2d 254 [1993]; Matter of Demisay, Inc. v Petito, 31

NY2d 896 [1972]), so, too, "a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation." Ziffrip, Inc. v United States, 318 US 73, 78 (1943).

The result may be different where a party has detrimentally relied upon an existing regulation or law that is then amended (cf. Matter of Amdur v Village of Quogue, 156 AD2d 679 [2d Dept 1989]), and, here, DOB's commitment, which was made in December 2002, may have been reasonable, coming, as it did, after the MELB had commenced its proceeding. However, petitioners do not contend that Solomon relied upon that commitment with regard to anything other than his participation in the then-ongoing proceeding. Moreover, while pre-LL 81 versions of Code § 27-3010 did not expressly refer to supervision, it has been held that, under those earlier versions, licensing boards were warranted in requiring that the applicant's work during the required years of experience have been adequately supervised by an appropriately licensed electrician. See Diaz v Paduano, NYLJ, May 23, 1953, col. 6F (Sup Ct, NY County 1953); see also In re Sullivan v Miele, 226 AD2d 308 (1st Dept 1996) (directing issuance of master electrician license, on ground that the appellant had been supervised by a master electrician for more than the required seven and a half years); but see Amabile v Simins, 51 AD2d 930 (1st Dept 1976). Indeed, the Commissioner's December 29, 2003 decision denying Solomon's application, on the

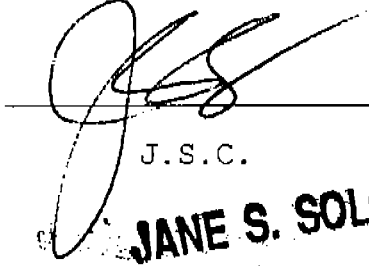
ground that Solomon had not been adequately supervised during the years preceding his application, was issued before LL 81 became effective, and it was based on the Code as it then stood.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted only to the extent that respondent Department of Buildings is directed to provide to the court, for in camera inspection, within 30 days of service of a copy hereof with notice of entry, or by December 11, 2006, whichever is earlier, all documents that are responsive to petitioners' FOIL requests that have not been provided to petitioners for which this matter shall be calendered in Part 55 at 10 AM on December 11, 2006.

Dated: October 25, 2006

ENTER:


J.S.C.
JANE S. SOLOMON

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