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

PRESENT: HON Joan A. Madden PART 11

Index Number : 116083/2006

LANGSTON, BRUCE

INDEX NO. _____

vs

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Article 78 relief

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and order.

FILED
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: January 22, 2008

_____ J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

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In the Matter of the Application of

BRUCE LANGSTON,

Petitioner,

For an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

Index No.:116083/06

-against-

THE CITY OF NEW YORK (Michael R. Bloomberg, Mayor) and NEW YORK CITY POLICE DEPARTMENT (Raymond W. Kelly, Commissioner),

Respondents.

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MADDEN, J.:

This is an Article 78 proceeding commenced by the petitioner, Bruce Langston, seeking to reverse a determination by the New York City Police Department (NYPD) that denied Langston's application for a special patrolman's license which would enable him to assume a permanent position with the Department of Parks and Recreation (DPR) as an urban park ranger. Langston seeks an order annulling the NYPD's decision and requiring the NYPD's License Division (the License Division) to issue him the license. Langston also seeks an order declaring that the respondents failed to perform a duty required by law by not considering a Certificate of Relief from Disabilities he was granted in connection with criminal conduct and discriminated against him by denying his application. In the alternative, Langston asks that the matter be remanded back to the License Division for a hearing to consider evidence as to his character and fitness for the position.

Respondents, the City of New York (the City) and the NYPD, oppose Langston's petition

and contend that the determination to deny the application was reasonable and rational as Langston's character was called into question after he failed to report his full arrest history to the License Division and as he was convicted of violating Penal Law 265.02 (4), criminal possession of a weapon in the third degree.

FACTUAL ALLEGATIONS

On August 29, 2005, Langston began training for a permanent position in the DPR's Parks Enforcement Patrol and in June of 2006, he received a certificate stating that he had completed the required training to become an urban park ranger. In order to receive permanent appointment as an urban park ranger, provisional appointees must qualify for deputization as special patrolman by the NYPD.[1]

On March 22, 2006, Langston submitted a special patrolman application to the License Division. A box at the top of the application states, "FALSE STATEMENTS CONSTITUTE PERJURY AND WILL RESULT IN DISAPPROVAL OF THIS APPLICATION" (Verified answer, ex. A). Question 23 of the application asks applicants whether he/she have been previously "arrested, indicted or convicted for any crime or offense, in any jurisdiction, federal, state, or local" (*Id.*). Langston was also provided with an attachment for question 23 which states:

> If you were ever arrested, indicted, or summonsed for any reason, you must answer **YES** to question # 23. Then submit a certificate of disposition, and a detailed notarized statement, describing the circumstances surrounding each arrest. **YOU MUST DO SO EVEN IF THE CASE WAS DISMISSED AND SEALED**, or the case nullified by law. The License Division has access to sealed records.

(*Id.*, ex. B).

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[1] Langston argues that if the petition is dismissed, he faces termination from his provisional appointment as an urban park ranger.

Langston disclosed that he had been arrested on September 19, 1990 for criminal possession of a weapon in the third degree, was sentenced on February 11, 1992 to five years probation.[2] On January 7, 1993, Langston probation was revoked and he was sentenced to one year and three months in jail. Langston submitted a Certificate of Relief from Disabilities for the conviction, which was issued on February 22, 2002. Although Langston signed an authorization for release of information including confidential and sealed records, he failed to submit a detailed notarized statement regarding the arrest.

On March 26, 2006, the License Division notified Langston that a criminal background check on Langston revealed in addition to the disclosed September 19, 1990 arrest, three other arrests on January 8, 1992, December 21, 1992, and October 18, 1997.

On or about April 20, 2006, Langston submitted certificates of disposition for the disclosed September 19, 1990 arrest and the non-disclosed arrests of December 21, 1992, and October 18, 1997, which indicated that the charges in connection with the two arrests were dismissed. As for the January 8, 1992 arrest, Langston alleged it was due to a warrant issued in connection with the September 19, 1990 arrest, and Langston submitted a form dated April 20, 2006 from the Clerk of the Criminal Court of King's County, which indicated that it was an "undocketed arrest" and that "prosecution was declined" (Verified answer, ex. G).

The December 21, 1992 arrest charged Langston with violating Penal Law § 265.03, criminal possession of a weapon in the second degree, criminal possession of a loaded firearm in

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[2]Respondents submit the arrest report which indicates Langston's arrest was the result of a traffic stop. After Langston and the others exited the car as ordered by the arresting officer, the arresting officer noticed a bulge in Langston's clothing, and upon searching Langston, found that he was in possession of a gun.

the third degree, § 120.14, menacing in the second degree-weapon, and § 215.50(3), criminal contempt in the second degree. The charges were dismissed on January 7, 1993.

The October 18, 1997 arrest charged Langston for violating Penal Law § 120.00(1), assault with the intent to cause physical injury, a Class A misdemeanor, the matter was adjourned in contemplation of dismissal and was dismissed on June 8, 1998.

By Notice of Dismissal dated May 8, 2006, the License Division informed Langston that his application for the position of special patrolman was denied due to his arrests.

By letter dated May 26, 2006, Langston appealed the License Division's denial of his application. Langston submitted dispositions for his arrests as well as the Certificate of Relief from Disabilities for his September 19, 1990 arrest. In this letter, Langston claimed that any information which he failed to include on the application was unintentional. Langston further stated that he submitted everything he could remember, that he believed that "the background check conducted by Parole [in 2002, before he was granted a Certificate of Relief from Disabilities] would have cove[re]d everything," that "he went to the court system and asked for a complete list of all actions taken against me and all documents that he received he [will] submit," and that he never withheld information which would prevent his application from being approved (Verified petition, ex.11). Langston also indicated that he served in the military and went to college.

By letter dated June 23, 2006, the License Division notified Langston that his appeal was denied. The letter signed by Thomas M. Prasso, Esq., director of the License Division, states that his appeal was denied due to his "failure to disclose all prior arrests and conviction for criminal possession of a loaded firearm-3rd Degree (PL265.02(4), a class D felony) demonstrates a lack of

character and fitness to be a Special Patrolman" (*Id.*, ex. 12).

By petition dated October 26, 2006, Langston seeks an order annulling the License Division's June 23, 2006 determination and requiring the License Division to issue him a special patrolman's license. Langston also seeks an order declaring that the respondents failed to perform a duty enjoined upon them by law and discriminated against him by denying his application. Langston requests that, in the alternative, the matter be remanded back to the agency for a hearing to consider evidence as to Langston's character and fitness.

DISCUSSION

CPLR 7803 (3) provides that one of the questions which can be raised in an article 78 proceeding is "whether a 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, including abuse of discretion as to the measure or mode of penalty or discipline imposed." The Court of Appeals has explained that the arbitrary and capricious test "relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (citations and quotations omitted)." *Pell v Board of Educ.*, 34 NY2d 222, 231 (1974); *see also Sewell v New York*, 182 AD2d 469, 473 (1st Dept 1992).

The responsibilities and duties of an urban park ranger are set forth in exhibit 1 to the petition and are described as follows:

> Under supervision [an urban park ranger] patrols city parks and park facilities, performs crowd control functions; enforces compliance with City park rules and regulations and health and sanitary codes; issues summonses; makes arrests; provides safety services to the public; provides educational services through tours,

> lectures, field trips, and conferences; serves as staff assistant to immediate supervisor; serves as dispatcher and communications operator; performs related work.

It is noted while qualifications require a candidate to qualify for deputization as a Special Patrolman by the New York City Police Department, urban park rangers do not carry firearms and there is no requirement that they must be licensed to carry firearms.

The rules and regulations which govern the appointment of special patrolmen are included under Chapter 13 of Title 38 of the Rules of the City of New York. Section 13-01 of Title 38 gives the Police Commissioner authority to grant or deny applications submitted for special patrolman positions. Based on the reasons indicated in the June 23, 2006 letter, section 13-01(e)(3) and (g) are relevant to the issues herein. Section 13-01 (c) discusses the necessity of "good character" and section 13-01(c)(3) discusses factors to be considered where a candidate has a felony conviction and has been granted a Certificate of Relief from Disabilities for past convictions.[3] Section 13-01(g) provides that a special patrolman applicant "may be disapproved

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[3]Section 13-01 provides:

> c) To be eligible for appointment as a Special Patrolman, an applicant shall be of good character, as more specifically defined in these rules, cooperate in a background investigation by the License Division of the Police Department and possess the following qualifications:
>
> * * *
>
> (e)(3) No record of convictions for any felony or serious offense as enumerated in § 265.00(17) of the New York State Penal Law. If an applicant presents a Certificate of Relief from Disabilities for a conviction as aforesaid, consideration shall be given to the circumstances of the underlying arrest, the age of the applicant when arrested, the time elapsed since the occurrence of the act which led to the arrest and conviction, and the subsequent conduct of the applicant.

if a false statement is made on the application." 38 RCNY 13-01(g).

Also relevant is section 752 of New York's Correction Law which prohibits a public agency from denying employment to a person convicted of one or more crimes by reason of the applicant having been convicted, or by reason of finding a lack of "good moral character" when based upon criminal convictions, unless there is a direct relationship between the crimes and the employment, or the employment would involve unreasonable risk to property or to the safety or welfare of specific individuals or the general public. When an agency or employer relies either on the direct relationship or the unreasonable risk exception, the respondents are required to consider certain enumerated factors set forth in section 753(1). *Bonacorsa v. Lindt,* 71 NY2d 605, 613 (1988).

These factors are:

> (a) 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.
> (b) The specific duties and responsibilities necessarily related to the license or employment sought.
> (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.

Furthermore, section 753(2) of the Correction Law states, "[i]n 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."

Here, it is clear that Langston was entitled to a presumption of rehabilitation based the Certificate of Relief from Civil Disabilities, that the License Division had to make a determination regarding a direct relationship and/or unreasonable risk and, if so, consider the eight factors enumerated in Correction Law § 753(1).

Respondents argue that they are entitled to a presumption that the License Division considered the eight factors, and in support of this argument cite, *Bevacqua v. Sobol*, 176 AD2d 1, 2 (3d Dept 1992).[4] Respondents' reliance on *Bevacqua v. Sobol*, is misplaced as in that case, the issue was one of substantial evidence in connection with a hearing conducted pursuant to the Education Law, a quasi-judicial proceeding, as opposed to the administrative proceeding herein. The holding of the court in *Bevacqua* was based on the nature and scope of the hearing, where witnesses testified and were subject to cross examination and the presumption arose that the determination was based on the evidence. The present case is distinguishable as at issue here is an administrative proceeding where the determination was not based on a hearing, but rather on the submission of documents.[5] In any event, even if the presumption applies, it is rebutted, as the

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[4]Respondents also cite *Matter of Sang Moon Kim v. Ambach*, 62 AD2d 986 (3rd Dept 1979) and *Matter of Werter v. Board of Regents*, 18 AD2d 1032, *lv denied*, 13 NY2d 595 (1963). Both cases are distinguishable from the instant one as the determination being reviewed was made after a hearing.

[5]Both petitioner and respondents cite to *Davis-Elliot v New York City Dept. of Educ.* (Sup Ct, New York County, Oct. 28, 2004, Tolub, J., Index No. 121705/03), *modified*, 31 AD3d 266

June 23, 2006 letter is devoid of any reference to the certificate of relief from disabilities or the enumerated factors.

The court notes that the implementation of the policy considerations of the Correction Law and the presumption of rehabilitation afforded by a certificate of relief from disabilities requires that a candidate's application be evaluated in light of factors enumerated in section 753 in a meaningful way. This court concludes that the record here indicates the determination was not based on a consideration of the enumerated factors.

Based on this conclusion that the certificate of relief from disabilities was not properly considered, this court further concludes that this failure may have impacted on the fair consideration of Langston's application, including the second reason given for denying it, that is Langston's failure to report all of his arrests. For these reasons, and the circumstances here, including that Langston was convicted of a crime more than 15 years before he applied for the relevant position and the charges underlying his three arrests since that time, (with the most recent arrest occurring more nine years before he applied for the position), were each dismissed, the court concludes that this matter should be remanded.

At the administrative level, Langston indicated that he relied on an inquiry by the Division of Parole, that he asked the court for all the records, and did not intentionally withhold

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(1st Dept 2006). In this case, petitioner's employment as a parent support coordinator with the Board of Education was denied after she disclosed five arrests for shoplifting. The court held that the respondents' letter revoking petitioner's employment established that only two of the eight factors of Correction Law § 753 were considered. To the extent that the letter was found insufficient to establish consideration of the enumerated factors, the holding in *Davis-Elliot* supports the conclusion herein. However, this court respectfully disagrees with that part of the holding that the *Bevacqua* presumption applies in Correction Law cases like the instant one.

information regarding his arrests. In this proceeding, Langston offers explanations for this failure[6] which respondents correctly argue are not properly considered as they were not part of the administrative record below. However, properly considered is that Langston obtained all the necessary records when asked about the other arrests. The court notes that although 38 RCNY section 13-01(g) states an applicant may be disapproved if a false statement is made on an application, it does not mandate disapproval for any initial failure to list all arrests. This court makes no determination as to how Langston's answers and subsequent submissions should be evaluated on remand, only that the different aspects of Langston's application should be considered in the light of the presumption of rehabilitation and policy considerations underlying Correction Law § 752, et seq.

Respondents also argue that they can rely on their verified answer to explain what the License Division considered in denying their application. *See Application of New York City Hous. & Redevelopment Bd. v Foley*, 23 AD2d 84 (1st Dept), *affd* 16 NY2d 1071 (1965); *215 East 72nd St. Corp. v Klein*, 58 AD2d 751 (1st Dept 1977); *see also Iwan v Zoning Bd of Appeals*, 252 AD2d 913 (3d Dept 1998).

Respondents' argument is without merit. Notably, none of the above cases relied on by respondents involve the Correction Law, which provides a presumption of rehabilitation be afforded to the candidate and that when there is a finding of a direct relationship or unreasonable

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[6] As to the January 1992 arrest, Langston alleges it was in connection with a warrant for the 1990 gun possession after the original indictment was dismissed and unknown to him, he was re-indicted. As to the December 1992 arrest, it was dismissed on the same day he was resentenced for the September 19, 1990 arrest, and Langston alleges that he thought it was subsumed in the first arrest which he did disclose. As to the 1997 arrest, Langston argues it is a nullity and alleges that he went to the precinct and was told that "if he heard nothing from court he should not worry about it," and records confirm that the charges were in fact dismissed.

risk, that there be a consideration of eight enumerated factors. Furthermore, section 13-01(e)(3) requires that same type of evaluation. Thus, a mere recitation of certain facts as stated in the answer here, without addressing petitioner's presumption of rehabilitation, lacks the evaluative process and deliberation mandated by the relevant provisions. The court further notes that to the extent respondents rely on *Application of New York City Hous. & Redevelopment Bd. v Foley*, this case is not relevant for the additional reason that, unlike this case, it involved a hearing where witnesses testified and were subject to cross examination.

Finally, as the court is remanding the matter back to the agency for reconsideration, it need not consider Langston's argument that License Division's denial of his application was shocking to the conscience.

CONCLUSION

Accordingly, it is

ORDERED that the petition is granted to the extent of remanding this matter back to the License Division for a hearing to consider evidence as to Langston's character and fitness for the position of permanent position with the Department of Parks and Recreation as an urban park ranger.

Dated: January 23, 2008

J.S.C.