Matter of Gorenitsyn v Department of Citywide Servs.
2009 NY Slip Op 30440(U)
February 25, 2009
Supreme Court, New York County
Docket Number: 110786/08
Judge: Michael D. Stallman
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[* 1]

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

PRESENT: HON. MICHAEL D. STALLMAN, Justice — PART 7

Gorenitsyn
-v-
NYC DEPT OF CITYWIDE Administrative Services

INDEX NO. 110786/08
MOTION DATE 10/24/08
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this ~~motion~~ Article 78 petition

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-S.	1-4
Answering Affidavits — Exhibits A-Ce	5
Replying Affidavits — Exhibits A-D	6-7
Sur-Reply	8

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ and adopted Article 78 proceeding is decided in accordance with the annexed decision and judgment.

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).

HON. MICHAEL D. STALLMAN

Dated: 2/25/09

J.S.C.

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

Check one: ☒ 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 7

----------X

In the Matter of Application of

Index No. 110786/08

DMITRY GORENITSYN

Decision and Judgment

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil
Civil Procedure Law and Rules

-against-

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

Respondents.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this Article 78 proceeding, petitioner Dmitry Gorenitsyn seeks judicial review of a determination made by respondents the Department of Citywide Administrative Services (the DCAS) and the New York City Department of Buildings (the DOB), which denied petitioner's application for a Master Plumber license and a Master Fire Suppression Contractor license. Petitioner asserts that respondents' decision denying his license applications was arbitrary, capricious, and an abuse of discretion. Petitioner seeks an order reversing the determination, directing that respondents grant him the requested licenses, and directing respondents to produce the documents requested by him pursuant to New York State Public Officers Law § 89

BACKGROUND

Applicants for both of the licenses at issue must meet the general license requirements applicable to all licensed applicants, as set forth in Administrative Code for the City of New York (Administrative Code) §§ 26-132, 26-133 and 26-134. Pursuant to these sections, all applicants for

licenses must submit forms furnished by the DCAS, and the required fee. In addition, every applicant is subject to an examination, and must meet the qualifications prescribed for the particular licenses sought.

Pursuant to Administrative Code § 26-146 (a), an applicant for a Master Plumber license must submit proof of either seven years of experience in the design and installation of plumbing systems, or receipt of a bachelor's degree in engineering, along with three years of experience. Pursuant to Administrative Code § 26-146 (b), the same qualifications are required of applicants for the Master Fire Suppression Piping Contractor license. Pursuant to Administrative Code § 26-141 (c), the DOB requires that the relevant experience be obtained under the direct and continuing supervision of a licensed plumber or licensed fire suppression contractor.

Pursuant to Administrative Code § 12-202 and NYC Charter § 820, the Commissioner of the DCAS is responsible for administering examinations that determine the "merit and fitness" of applicants who apply for Master Plumber and Master Fire Suppression Piping Contractor licenses. Under § 11-02 (d) (1) of title 55 of the Rules of the City of New York (RCNY), the applicant has the burden of proving that he meets the minimum qualifications required. Pursuant to § 11-02 (h) (1) of the RCNY, an investigation of each candidate shall be made to determine the candidate's fitness and qualification for the license, and the DCAS may refuse to certify a candidate who does not meet the requirements.

On June 16, 2005, petitioner applied to take the Master Plumber license examination. On the application (*see* Petition, Exh B), petitioner listed the two companies where he claimed to have obtained the statutorily required plumbing experience: Access Mechanical Corporation (Access Mechanical), where he worked from May 2, 2001 to January 27, 2004 under the supervision of

Daniel Agius, License No. 1089, and Access Plumbing Corporation (Access Plumbing), where he worked from January 28, 2004 to the date of the application under the supervision of Edward Khavin, License No. 1688. Petitioner listed his experience at both Access Mechanical and Access Plumbing as "design and installation of plumbing systems" (*see id.*).

On December 23, 2005, petitioner applied to take the Master Fire Suppression Piping Contractor license examination. On the application (*see* Petition, Exh B), petitioner listed the same two companies that he had listed on his Master Plumber license application to show that he had the requisite fire suppression experience: Access Mechanical from April 16, 2001 to January 27, 2004 under the supervision of Agius, License No. 275B, and Access Plumbing from January 28, 2004 until the date of the application under the supervision of Khavin, License No. 711B. Petitioner listed his experience at both locations as "design and installation of fire suppression piping systems" (*see id.*).

On April 29, 2007, petitioner submitted translated copies of his diploma from the Minsk Institute of Radio Technology to the DOB. Petitioner's degree is a bachelor of science degree in engineering specializing in "Microelectronics and Semiconductor Instruments." According to the paperwork submitted by petitioner from Globe Language Services, this degree is equivalent to a bachelor of science degree in engineering from a regionally accredited educational institution in the United States (*see* Petition, Exh C).

Petitioner passed both the Master Plumber and the Master Fire Suppression Piping Contractor examinations (*see* Petition, Exh D).

On April 10, 2007, the DOB verified that Agius had been issued permits for plumbing and fire suppression work during the time of petitioner's employ with Access Mechanical Group. As

a part of the application review process, the DOB requested that petitioner's supervising licensees verify the work experience petitioner claimed on his applications. However, Agius, petitioner's supervising licensee at Access Mechanical, stated in an affidavit submitted to the DOB that petitioner did not perform plumbing or any other mechanical work while at Access Mechanical:

> [Petitioner] was never my Partner in Access Mechanical Corp. He had no official title. He was a relative of one of the partners. His duties were as follows [:] [a]nswer the phones, open the mail, deliver supplies, pick up lunch for the men, and go for coffee. He was a gofer [and] I never supervised him on any job. I never saw him pick up any tool, ever. [Petitioner] was never under my direct supervision for plumbing work

(4/17/07 Agius Aff. [Petition, Exhibit G]). In a separate affirmation of the same date, Agius also declined to recommend petitioner to become a Master Fire Suppression Contractor (4/17/07 Agius Aff. [Petition, Exh G] ["I have never witnessed or supervised (petitioner) perform any type of fire suppression field work" and "only witnessed (petitioner) to get coffee, answer the phone and make deliveries"]).

On July 31, 2007, the DOB notified petitioner of its final determination that petitioner did not meet the requirements for a Master Plumber or a Master Fire Suppression Contractor license. In the notification letter (*see* Petition, Exh F), the DOB marked "insufficient practical experience" as the reason for the denial of his application. The DOB stated that petitioner's engineering degree would not count toward his experience, and that petitioner's qualifications with Access Mechanical could not be verified (*see id.*).

On September 6, 2007, petitioner commenced an Article 78 proceeding challenging the DOB's determination denying his applications for Master Plumber and Master Fire Suppression Piping Contractor licenses. In the answer, respondents conceded that petitioner's engineering degree

was valid, and met the requirements of the Administrative Code, but stated that petitioner's work experience with Access Mechanical was unsatisfactory.

On November 28, 2007, the parties stipulated to have the license determination remanded to the DOB for reconsideration and further investigation. As agreed to in the stipulation, the DOB reconsidered petitioner's license applications. In addition to reexamining the information previously submitted by petitioner and obtained by the DOB, the DOB conducted further investigation and requested additional documentation from petitioner.

The DOB's Buildings Special Investigations Unit (the BSIU) interviewed petitioner on January 4, 2008. In his interview, petitioner stated he had experience in the design and installation of plumbing and fire suppression piping (*see* Answer, Exh K).

At petitioner's request, the BSIU also interviewed Dmitri Dits, who is now a plumbing inspector for the DOB, about petitioner's work experience. In the interview, Dits stated that he had worked with petitioner at Access Mechanical in 2003, but that petitioner never performed the design or installation of plumbing or fire suppression systems. Rather, Dits stated, petitioner worked in the office at Access Mechanical performing general office tasks, such as ordering supplies and materials (*see* Answer, Exh M).

Dits also informed the BSIU investigators that Dmitri Gorelik of Access Plumbing had asked him to sign an affidavit on behalf of petitioner stating that he had personally observed petitioner perform the installation of plumbing and fire suppression systems, but that he had refused to sign such affidavit (*see id.*). In an e-mail from Dits to Gorelik, Dits stated that he could not sign the affidavit on petitioner's behalf because he was unwilling to "violate my Code of Ethic/Conduct toward my employer and put myself in conflict with my current duties" (*see* Answer, Exh N).

On February 6, 2008, the BSIU interviewed Khavin, who owns and operates Access Plumbing. Khavin stated that, during the time that petitioner worked for Access Plumbing, petitioner worked partially in the office and partially in the field, and that petitioner's duties included dispatching, ordering materials, and working as a mechanic (*see* Answer, Exh P).

The BSIU also examined the affidavits of Dmitriy Gorelik, Garik Gurevich, Nikolay Patskevich and Wieslaw Wilczewski that had been submitted by petitioner in connection with his original Article 78 application. Each of the affidavits is from a co-worker of petitioner, and each states that petitioner performed the design and installation of plumbing and fire suppression systems while working for Access Mechanical (*see* Petition, Exh H).

On February 28, 2008, the BSIU interviewed Gorelik, Gurevich, Patskevich and Wilczewski. In his interview, Gorelik stated that he worked with petitioner at Access Mechanical, and that petitioner had performed plumbing and fire suppression piping work. He also stated that petitioner would only be in the Access Mechanical office to order the supplies he needed for the field. Gorelik also stated that he had been convicted of giving an unlawful gratuity to a Department of Environmental Protection inspector in 1998 (*see* Answer, Exh S).

In their interviews, Gurevich, Pastkevich and Wilczewski all stated that they had worked with petitioner at Access Mechanical, that petitioner did both fire suppression and plumbing work, and that petitioner never worked in the office, but only in the field (*see* Answer, Exhs T, U and V),

By letter dated February 29, 2008, the BSIU informed petitioner that it would need additional time and information to complete the evaluation of petitioner's license application (*see* Answer, Exh W).

On April 11, 2008, the DOB notified petitioner that, after full reconsideration, his applications for his Master Plumber and Master Fire Suppression Piping Contractor's licenses were denied:

> Mr. Gorenitsyn failed to demonstrate that the plumbing work and fire suppression work on which his applications are based were performed under the supervision of a licensee as required by the Administrative Code ... thus, his applications must be denied

(Petition, Exh A). The BSIU did not credit petitioner with any experience in the installation of plumbing or fire suppression piping during the time he worked at Access Mechanical because both Agius and Dits stated that petitioner had performed no qualifying work for the company (*id.* at 2 [Agius "states in correspondence to the Department that Mr. Gorenitsyn did not perform plumbing or fire suppression work"]; *id.* [Dits "stated during his BSIU interview that Mr. Gorenitsyn was a secretary/office worker who ordered supplies and materials"]). The DOB also stated that it found the testimony of Wilczewski, Gurevich, Patskevich and Gorelik to not be credible because "the statements made by the affiants were so substantially similar that it was reasonable to conclude that their testimonies were coordinated," and because "according to the Department's records, Mr. Gorelik was convicted of bribing a Department of Environmental Protection inspector in 2000 while working in the trade, which also calls into question his credibility" (*id.*). The DOB concluded that "[t]herefore, Gorenitsyn cannot be credited with the experience he has claimed under Daniel Agius at Access Mechanical" (*id.*).

With respect to petitioner's work at Access Plumbing, the DOB found that because Khavin had stated that petitioner spent about half of his time performing administrative work, "Mr. Gorenitsyn may only be credited with up to 8 months and one week of the experience he listed under

his Master Plumber license application" and "up to 1 year of the experience claimed under the Master Fire Suppression Piping Contractor license application" (*id.* at 3).

Following the denial of petitioner's applications, petitioner's attorney filed a request for information under the Freedom of Information Law (FOIL). Petitioner requested copies of sound and video recording as well as notes taken by the BSIU investigators during the interviews of Dits, Khavin, Gorelik, Gurevich, Pastkevich and Wilczewski (*see* Petition, Exh N).

By letter dated April 30, 2008, DOB Records Access Officer Angela Orridge denied petitioner's FOIL request, stating in part:

> Your request is denied under § 87(2)(e)(i) of the Public Officer's Law because documents requested are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings

(*see* Petition, Exh 0).

By letter dated May 28, 2008, petitioner appealed the denial of his FOIL request (*see* Petition, Exh P). By letter dated June 12, 2008, DOB again denied petitioner's request for information:

> The Department reviewed your letter dated May 28, 2008 and confirmed that there is an ongoing and open investigation regarding this case. Your request for information is again denied

(*see* Petition, Exh Q).

Respondents assert that "the criminal investigation related to this matter concluded on August 12, 2008," and that "therefore, the law enforcement privilege no longer serves as a basis for withholding the requested documents" (Answer, ¶ 94). Respondents also assert that all requested documents were provided to petitioner's attorney on October 7, 2008, and that all requested documents are annexed to the Answer as Exhs L, M, O, P, R S, T, U and V.

I

It is well settled that possession of a license is a privilege, not a right, which is subject to reasonable regulation (*see Papaioannou v Kelly*, 14 AD3d 459 [1st Dept 2005] [gun license]; *Westside Pub Corp. v New York State Liq. Auth.*, 20 Misc 3d 1106(A), 2008 NY Slip Op. 51252[U] [Sup Ct, NY County 2008] [liquor license]; *Montanez v City of N.Y. Dept. of Bldgs.*, 8 Misc 3d 405 [Sup Ct, NY Country 2005 [Master Plumber license]). Judicial review of a discretionary administrative action, such as the issuance of a license, is limited to finding whether there was a rational basis for the administrative action (*Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269 [1972]). Thus, the only issue for consideration by the court is whether the administrative determination – in this case whether petitioner qualifies for the licenses in question – was arbitrary and capricious, or an abuse of discretion (*Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361 [1999]; *Pell v Bd. of Educ.*, 34 NY2d 222 [1974]; *Sewell v City of New York*, 182 AD2d 469 [1st Dept], *lv denied* 80 NY2d 756 [1992]). An action is arbitrary if it "is without sound basis in reason and is generally taken without regard to the facts" (*Pell v Bd. of Educ.*, 34 NY2d, at 231). Once a rational basis for the administrative determination is shown, the function of judicial review has ended, and the agency's determination must be upheld, even where the court might have reached a contrary result (*Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, *supra*; *Royal Realty Co. v New York State Div. of Hous. and Community Renewal*, 161 AD2d 404 [1st Dept 1990]).

The DOB's determination denying petitioner's applications for Master Plumber and Master Fire Suppression Contractor licenses was not arbitrary or capricious. Rather, it was a reasonable application of the law to the facts, which was well within the DOB's broad discretion in the issuance of Master Plumber and Master Fire Suppression Piping Contractor licenses in the City of New York.

Respondents' denial of petitioner's applications was a rational application of the experience requirements set forth in the Administrative Code and the RCNY. Pursuant to RCNY § 11-02 (h)(1), an investigation of each candidate shall be made to "determine the candidate's fitness and qualification for the license, and [DCAS] may refuse to certify a candidate who does not meet the requirements." Here, petitioner's applications were denied because, after full reconsideration, respondents found that petitioner did not meet the experience requirement for either license.

In order to qualify for a Master Plumber or Master Fire Suppression Piping Contractor license, an applicant with a bachelor's degree in engineering must have three years experience in the design and installation of plumbing systems or fire suppression piping work (*see* Administrative Code, § 26-146). Although petitioner stated in his application that he had the requisite experience, respondents determined that the record, which consists of the documents submitted by petitioner and the records maintained by respondents, shows that petitioner does not have the requisite experience as either a plumber or fire suppression piping contractor.

According to Agius's affidavit, petitioner had worked for Access Mechanical, but had not performed any plumbing or fire suppression work for the company. Agius declined to recommend petitioner for a Master Plumber's license. Dits, who worked at Access Mechanical at the same time as petitioner, stated that petitioner performed office tasks, and did not design or install plumbing or fire suppression systems. Dits also stated that he had refused to sign an affidavit for petitioner stating that he had performed plumbing and fire suppression work at Access Mechanical because doing so would violate his code of ethics.

While four Access Mechanical employees testified that petitioner had designed and installed plumbing and fire suppression systems for the corporation, the DOB investigators examining

petitioner's application found this testimony not credible because it was so substantially similar that it appeared to have been coordinated. Thus, the DOB investigator decided to credit the testimony of Agius and Dits, and to reject that of the other witnesses.

Petitioner contests that determination, arguing that the DOB should have completely discredited Agius's testimony, based on the case entitled *Kleimenov v Department of Citywide Adm. Servs.* (Sup Ct, NY County, July 20 2005, Cahn, J., Index No. 108246/04), which was also an Article 78 proceeding for denial of a plumbing license. The licensee in that case had submitted an affidavit from Agius, in which Agius gave sworn statements that he personally supervised the applicant in the performance of plumbing work. Respondent the DOB denied the applicant in *Kleimenov* his license, in part, because it did not find Agius credible due to his extensive disciplinary record.

Petitioner also alleges that, in evaluating Gorelik's credibility, the DOB's consideration of Gorelik's conviction for unlawfully giving a gratuity to a DEP inspector was improper (*see* Petition, ¶ 60).

The court rejects petitioner's contentions. It is well-settled that an agency's decision "to credit the testimony of a given witness is largely unreviewable by the courts" (*Berenhaus v Ward*, 70 NY2d 436, 443 [1987]; *accord Rodriguez-Rivera v Kelly*, 2 NY3d 776 [2004]). Thus, petitioner's challenges to the credibility determinations of the administrative agency are unavailing because, in an Article 78 proceeding, the reviewing court may not weigh the evidence, choose between conflicting proof, or substitute its assessment for that of the administrative fact finder (*see Porter v New York City Hous. Auth.*, 42 AD3d 314 [1st Dept 2007]; *Pelayo v Safir*, 288 AD2d 133 [1st Dept 2001]; *see also O'Connor v New York City Police Dept.*, 22 AD3d 425 [1st Dept 2005])

Petitioner also argues that the DOB should not have evaluated petitioner's work with Access Plumbing in the reconsideration of petitioner's application (Petition, ¶¶ 56-58). This argument is misplaced, as the stipulation of settlement did not limit the scope of the reconsideration of petitioner's license applications (*see* Answer, Exh I).

Petitioner also challenges the way in which the DOB evaluated the time he spent working with Access Plumbing, contesting that fact that the DOB did not credit him with experience in the design and installation of plumbing or fire suppression systems for the full one year and four months he worked at Access Plumbing. The DOB found that petitioner could be credited with up to one year of experience for his work at Access Plumbing because petitioner spent half of his time on administrative tasks. As Administrative Code § 26-145 requires that an applicant have three years of experience in the design and installation of plumbing and fire suppression systems, experience performing administrative tasks clearly does not satisfy the statutory experience requirement.

As the DOB's records clearly indicate that petitioner failed to demonstrate that he possessed the requisite experience for either a Master Plumber or Master Fire Suppression Piping Contractor license, the DOB's denial of petitioner's license applications was not arbitrary or capricious, and clearly had a rational basis. Therefore, it must be upheld, and the petition dismissed (*see Blatt v New York City Dept. of Citywide Admin. Serv.*, 12 AD3d 164, 164 [1st Dept 2004] [denying petitioner's application to set aside DCAS determination to reject petitioner's application for a Master Plumber license, on ground that denial of application "was both a rational and a reasonable exercise of the agency's discretion"]).

II

Petitioner also challenges the denial of his FOIL request, and the subsequent denial of his appeal. Petitioner's FOIL-related claims fail because the denial of petitioner's FOIL request was rational and reasonable. Public Officer Law § 87 (2) (e) (i) states that the agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations (*see DeLuca v New York City Police Dept.*, 261 AD2d 140 [1st Dept 1999]). It is undisputed that the BSIU conducted a criminal investigation related to this matter, which was resolved on August 12, 2008. Making the information public before that date would have interfered with the criminal investigation. As such, the denial of petitioner's FOIL request was proper.

Petitioner also seeks an order directing respondents to produce copies of sound and video recording as well as notes taken by the BSIU investigators during the interviews of Dits, Khavin, Gorelik, Gurevich, Pastkevich and Wilczewski. It is undisputed that respondents provided petitioner with copies of all requested documents on October 7, 2008. In addition, copies of all of the requested documents are annexed as exhibits to the Answer. As the documents have already been provided to petitioner, petitioner's request for an order requiring the DOB to produce the requested documents is now moot, and must be dismissed.

The Court has considered the remaining arguments, and finds them to be without merit.

CONCLUSION

Accordingly, it is

ADJUDGED that the petition is denied, and the special proceeding is dismissed.

This constitutes the decision and judgment of this Court.

Dated: February 25, 2009
New York, New York

ENTER:

J.S.C.