

Matter of Ortiz v City of New York

2009 NY Slip Op 33466(U)

July 6, 2009

Supreme Court, New York County

Docket Number: 103761/2009

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

_____ X
In the Matter of the Application of

ANDRES ORTIZ,

Petitioner,

Index No. 103761/2009

DECISION/ORDER

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

-against-

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

Respondents.

_____ X
EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Andres Ortiz ("petitioner") moves for an order and judgment pursuant to Article 78, in the nature of mandamus, directing respondents The City of New York and The Department of Citywide Administrative Services of the City of New York ("DCAS") (collectively "respondents") to award petitioner a license to operate as a High Pressure Boiler Engineer in the City of New York.

Respondents cross move for an order, pursuant to CPLR 3211(a)(7) dismissing the Petition on the ground that the Petition fails to state a cause of action.

Background

In June, 2007, petitioner applied to take exam number 6822 for a High Pressure Boiler Operating Engineer ("HPBOE") license examination on September 29, 2007. Petitioner received a score of 48.8880 out of 100.00 on the multiple choice test for exam number 6822, failing by

more than 20 points. On January 8, 2008, DCAS mailed the results of the multiple choice test for exam number 6822 to all of the applicants. After petitioner was sent the notice that he failed the multiple choice test for exam number 6822, petitioner submitted an application dated February 20, 2008 to take the multiple choice test again under exam number 7804 on June 14, 2008. However, petitioner failed to appear to take the exam on that date. Petitioner's name was allegedly erroneously included on a list of passing applicants for exam number 6822 dated July 31, 2008, which resulted in petitioner mistakenly be invited to take the practical portion of exam number 6822, which he passed.

When the error was discovered, petitioner's name was crossed off of the "pass" list, and petitioner was never contacted for investigation by DCAS.

Petitioner alleges that he contacted DCAS and was advised that nothing was wrong with his application, that they were backed up and he should remain patient. Petitioner states that he left his then current position based on the notice that he had passed and that nothing was wrong with his application.

On or about December 3, 2008, petitioner was advised that he would not be receiving an HPBOE license.

Petitioner's Contentions

Based upon DCAS's written and oral notification that petitioner passed, petitioner, in reliance thereof, left his job for other employment, the future of which was contingent upon respondents' issuance of said license. Further, petitioner has never received any reason for the denial of his license.

Respondents' Opposition and Contentions

Although petitioner passed the practical portion of exam number 6822, that alone does not qualify him for the issuance of an HPBOE license. The examination for an HPBOE license consists of a multiple choice test and a practical-oral test. A candidate must attain a score of at least 70 percent in each test to qualify for an HPBOE license. A candidate who fails either the multiple choice or the practical portion of the exam will not be called for investigation by the investigating agency. Here, petitioner clearly failed the multiple choice test.

Further, the fact that petitioner applied to take the multiple choice test again under exam number 7804, by application dated February 20, 2008, serves as evidence that petitioner knew that he failed the multiple choice test under exam number 6822.

Moreover, assuming petitioner did pass both portions of the test. That does not guarantee that an HPBOE license would have been issued to petitioner. The outcome of the investigation is an additional factor.

And, as to petitioner's "reliance/estoppel" argument, estoppel against a governmental body performing its statutory duty is appropriate only in the rarest of cases, under exceptional circumstances, and only to prevent manifest injustice. Here, no manifest injustice has taken place.

Petitioner's Opposition to the Cross Motion

Because counsel for respondent avers in Paragraph 16 of her supporting affirmation that the practical portion of the test: *is only supposed to be administered if an individual passes the written/multiple choice portion of the exam*, this fact serves as conclusive proof that petitioner did pass the written portion of the examination.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as DCAS, consists of whether the 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 imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. dén.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the DCAS's determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], *affd* 66 N.Y.2d 1032 [1985]).

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." *Pell v Board of Ed. Union Free School District*, 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974) "The arbitrary and capricious test chiefly '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.” 34 NY2d at 231, 356 NYS2d at 839 *See also Jackson v New York State Urban Dev Corp.*, 67 NY2d 400, 417, 503 NYS2d 298, 305 (1986) (on review of agency action under CPLR Article 78, the courts may not “second guess the agency’s choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence”).

Mandamus

“Fundamentally, mandamus is an extraordinary remedy, available, as against an administrative agency, only to compel the performance of a duty enjoined by law (*see Klostermann v Cuomo*, 61 N.Y.2d 525, 539-540 [475 N.Y.S.2d 247, 463 N.E.2d 588] [1984])” (*Matter of Hachamovitch v Off. of Professional Med. Conduct*, 227 A.D.2d 686, 687, 641 N.Y.S.2d 757 [1996], *lv. denied* 88 N.Y.2d 814, 651 N.Y.S.2d 16, 673 N.E.2d 1243 [1996]). Accordingly, “article 78 relief in the form of mandamus to compel may be granted only where a petitioner establishes a ‘clear legal right’ to the relief requested (*Brusco v Braun*, 84 N.Y.2d 674, 679 [621 N.Y.S.2d 291, 645 N.E.2d 724] [1994])” (*Matter of Council of City of New York v Bloomberg*, 6 N.Y.3d 380, 388, 813 N.Y.S.2d 3, 846 N.E.2d 433 [2006]).

As the City correctly asserts, mandamus relief is unavailable herein because no “clear and absolute legal right to the relief sought” has been established. See Resp. Memo at p. 6 citing *Altamore v Barrios-Paoli*, 90 N.Y.2d 378, 384, 660 N.Y.S.2d 834, 683 N.E.2d 740 (1997); see also *Matter of Ronald W.*, 25 A.D.3d 4, 11, 801 N.Y.S.2d 312 (1st Dep’t 2005).

Here, petitioner fails to cite any statute or regulation which supports his claim that he had a clear legal right to obtain the HPBOE license, or that DCAS had an absolute duty to issue such license to him.

Estoppel

Initially, it is well established that estoppel is unavailable against a public agency (*see*, *Matter of Parkview Ass. v City of New York*, 71 N.Y.2d 274 [1988]; *Granada v. City of Kingston*, 58 N.Y.2d 705 [1982]; *Public Improvements, Inc. v Board of Education of the City of New York*, 56 N.Y.2d 850 [1982]). However, estoppel is not impossible to obtain:

[I]t can safely be said that equitable estoppel is applicable to all units of local government in exceptional cases to promote the ends of justice.... [W]here a governmental subdivision acts or comports itself wrongly or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice, that subdivision should be estopped.... Equitable estoppel is a vital doctrine now more actively invoked than in years past.... It is the principle of estoppel that brings flexibility and justice to the law of municipal corporations.... Its application to these [petitioners] is limited and will prevent a 'manifest injustice.' I can conceive of no more important function of our courts, than shielding our citizens from an overbearing (or as here, a negligent) governmental agency (*Brennan v New York City Housing Authority*, 72 A.D.2d 410, 412-414 [1st Dept 1980], citations omitted).

That being said, estoppel is inappropriate herein. Here, no manifest injustice has taken place. And, petitioner has not demonstrated that he had a clear right to the issuance of an HPBOE license.

Conclusion

Based on the foregoing, it is hereby

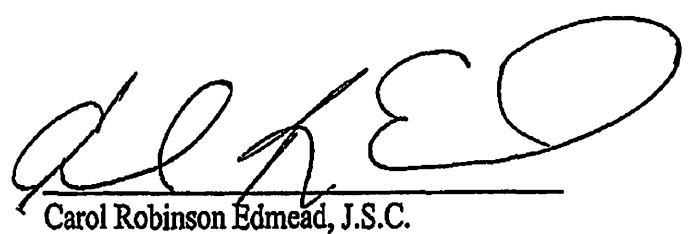
ORDERED and ADJUDGED that the application of petitioner Andres Ortiz for an order and judgment pursuant to Article 78, in the nature of mandamus, directing respondents The City of New York and The Department of Citywide Administrative Services of the City of New York to award petitioner a license to operate as a High Pressure Boiler Engineer in the City of New York, is denied; and it is further

ORDERED and ADJUDGED that the cross motion of respondents for an order, pursuant to CPLR 3211(a)(7) dismissing the instant Petition is granted and the instant Petition is dismissed; and it is further

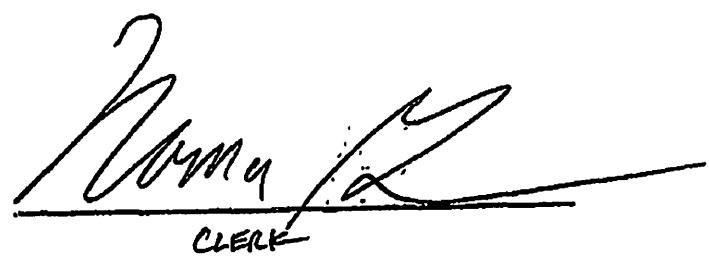
ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: July 6, 2009


Carol Robinson Edmead, J.S.C.

HON. CAROL EDMÉAD


CLERK

FILED

JUL 13 2009
NEW YORK
COUNTY CLERK'S OFFICE