

**Matter of Marchese v Department of Citywide Admin.
Servs.**

2010 NY Slip Op 31085(U)

May 3, 2010

Supreme Court, New York County

Docket Number: 100363/10

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

MARCHESE, MARIO, ETAL.

INDEX NO. 100363/10

MOTION DATE _____

THE N.Y.C. DEPT. OF CITYWIDE
ADMINISTRATIVE SERVICES, ETAL.

MOTION SEQ. NO. 01

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

1-19

20-37

38-40

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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 1412).

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 5/3/10

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
In the Matter of the Application of
MARIO MARCHESE, and NICHOLAS MARCHESE

Petitioners,

Index No. 100363/10

For a Judgment under Article 78 of the
Civil Practice Law and Rules

Decision, Order, and Judgment

-against-

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

Respondents,

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).

-----X
JOAN B. LOBIS, J.S.C.:

Petitioners Mario and Nicholas Marchese, who are brothers, bring this proceeding under Article 78 of the C.P.L.R. Article 78 to annul the decision by respondent Department of Buildings ("DOB") to deny them master plumber licenses. The other respondents are the Department of Citywide Administrative Services ("DCAS"), which administers the written and practical examinations for master plumber license applicants, and the City of New York. For the reasons discussed below, the petition is denied.

On or about February 12, 2006, petitioners submitted applications for master plumber licenses. Both had previously passed the written and practical exams for the license. In their nearly identical applications, petitioners set forth that from January 1998 until February 2006, they worked for Marquis Plumbing and Heating Company ("Marquis") under Phillip Marchese (a third brother), a master plumber license holder. In a letter dated August 14, 2007, the DOB notified Nicholas

Marchese that he was eligible to apply for a master plumber license. The letter directed him to make an appointment with the DOB's Licensing Unit in order to submit several items, including an affidavit from Phillip Marchese detailing the work done by Nicholas Marchese. The letter also informed Nicholas Marchese that he needed to demonstrate "7 years' prior experience in the design and installation of plumbing systems." Nicholas Marchese would then have to appear before the DOB's Master Plumber Board (the "Board"). Mario Marchese received an identical letter at about the same time.

Petitioners submitted documents responsive to the DOB's request for further information, including affidavits from Phillip Marchese, who informed the DOB that petitioners' "daily duties consist of installing new plumbing systems, consisting of waste, vent, water lines, installation of gas lines, and repairs of existing plumbing systems." On March 19, 2008, petitioners appeared separately before the Board. Nicholas Marchese informed the Board that he worked full-time at Marquis and performed general plumbing as well as new installations. The Board informed him that design and installation is generally high level plumbing work that requires a permit. The Board notified Nicholas that Marquis "didn't file so many permits during those years [he] was supervised, [so] it is unclear . . . to what extent [he was supervised] in the design and installation of plumbing work." The Board found that Nicholas Marchese presented insufficient information on his experience in the design and installation of plumbing work, but gave him time to produce more documentation to elaborate on his experience. During Mario Marchese's appearance, the Board informed him that, after reviewing the permits given to Marquis, "it doesn't seem that many permits were pulled over the course of [his] experience there . . . [and] it seemed like a lot of those

applications were for small jobs[.]” The Board then gave Mario Marchese instructions similar to the ones given to Nicholas Marchese.

On April 9, 2008, an attorney for petitioners submitted a letter to the DOB requesting clarification of its instructions to petitioners. By a letter dated May 1, 2008, the DOB informed the attorney that Mario Marchese had to submit further “documentation verifying his experience in the *design and installation of plumbing systems.*”¹ (emphasis in original). Petitioners then submitted a voluminous amount of receipts for the work they performed while employees of Marquis. By identical letters dated September 29, 2009, the DOB denied petitioners’ applications. The DOB found that “[b]ased on the documentation presented and [the] testimony before the Board, the work [they] performed was repair work, consisting primarily of installing fixtures, changing shower heads, and washers, and fixing leaks.” This documentation was insufficient to demonstrate “seven years practical experience in the design and application of plumbing systems[.]” This proceeding to challenge the DOB’s determination followed.

Petitioners argue that the DOB’s determination was arbitrary, capricious, and made in error of law. Petitioners argue that by conditioning their experience on plumbing permits, respondent DOB has altered Administrative Code § 26-146(a).² Petitioners further argue that the

¹ In an apparent misreading of petitioners’ attorney’s letter, the DOB failed to address Nicholas Marchese, but it is likely that the same was required of him.

² The provisions of Title 26 of the Administrative Code, pursuant to which petitioners’ license applications were processed, were repealed by Local Law 33 in 2007. The parties do not dispute that Title 26 governs the disposition of this case because petitioners’ applications pre-dated the enactment of Local Law 33. The provisions of Title 26 will be cited herein as though they are still in effect.

DOB did not provide them with sufficient notice of what was required to prove seven years' design and installation experience.

Pursuant to Administrative Code § 26-146(a), as is relevant to petitioners, an applicant for a master plumber license must pass the written and practical examinations and have "at least seven years prior experience in the design and installation of plumbing systems in the United States." According to an affidavit from Arthur Cordes, a supervisor with the DOB's Plumbing Operations division who is familiar with DOB policy as well as petitioners' applications, an applicant is automatically credited for one year's installation and design for every year his or her supervising master plumber obtained ten or more DOB permits. An applicant's experience during the years that the supervisor did not meet the ten permit threshold is scrutinized. In doing so, the DOB reviews permit descriptions and estimates the time frame for completion.

Mr. Cordes sets forth that, after reviewing petitioners' applications, the DOB noted that Marquis was issued less than ten permits per year between the years 1998 and 2004. The DOB reviewed the permits issued during this six year period and determined that petitioners had gained about eight and a half months' design and installation experience. The DOB credited petitioners for one year's experience for 2005, as Marquis had obtained more than ten permits that year, and for two months' experience for 2006. Additional documentation submitted by petitioners after their March 2007 appearance before the Board revealed minor repair work as well as three more months of design and installation experience. But since the latter work was performed in New York City without permits, it was not credited.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). The court "may not . . . choose between conflicting proof . . . or substitute its assessment of the evidence or witness credibility for that of the administrative fact finder." In re Porter v. New York City Housing Authority, 42 A.D.3d 314 (1st Dep't 2007).

Petitioners' argument that the DOB's policy for evaluating whether an applicant has seven years of qualifying experience is not contained in the statute, and is therefore arbitrary and capricious, is unconvincing. The DOB is the agency charged with enforcing the provisions governing the licensing of master plumbers. An agency's construction of a statute or regulation it administers, "if not unreasonable or irrational, is entitled to deference." In re Salvati v. Eimicke, 72 N.Y.2d 784, 791 (1988), rearg. denied, 73 N.Y.2d 995 (1989); see also District Council 37, Am. Fed'n of State, County, & Mun. Employees, AFL-CIO v. City of New York, 22 A.D.3d 279, 283 (1st Dep't 2005); In re Feigenbaum v. Silva, 274 A.D.2d 132, 136 (1st Dep't 2000). It is not irrational or unreasonable for the DOB to examine the work performed by the supervising licensee, under whom the applicant is working, in order to determine whether the applicant obtained the requisite seven years' experience in designing and installing plumbing systems. Further, it is not irrational or unreasonable for the DOB to rely on the number of permits issued to the supervising licensee, since the type of work that qualifies as design and installation would necessarily require that a permit be issued in order for the work to be performed legally. Neither is it irrational or unreasonable for

the DOB to determine that smaller repair jobs do not count towards experience in designing and installing plumbing systems, which is generally a more complex area of plumbing. The DOB's policy that it will credit one year of qualifying experience to an applicant when the supervising licensee is issued ten or more permits in a year, without scrutinizing the experience, but that it will more closely scrutinize the experience when fewer than ten permits are issued, supports their duty to enforce the rules regarding the licensing of master plumbers and is entitled to deference.

Furthermore, the DOB's determination that petitioners do not have seven years' installation and design experience has a rational basis and is not arbitrary or capricious. It automatically credited petitioners with one year of qualifying experience for the one year where Marquis was issued more than ten permits, and then, for the remaining years, scrutinized the exhaustive amount of documents provided by petitioners; examined Marquis' permits; and interviewed petitioners. Ultimately, the DOB determined that petitioners did not yet have seven years of plumbing design and installation experience, and there is no basis to disturb this determination, even in light of the affidavit submitted by Phillip Marchese. See In re Porter, 42 A.D.3d at 314.

Similarly unavailing is petitioners' argument that they were not on notice of the fact that the supervising licensees' work would be examined by the DOB in evaluating petitioners' applications. The court finds this argument untenable since Administrative Code § 26-146(a) clearly sets forth that the applicant must submit proof that the work he or she performed under the supervising licensee qualifies as "experience in the design and installation of plumbing systems[.]"

Nevertheless, the record indicates that the DOB, on several occasions, adequately notified petitioners of the requirements for master plumber licenses.

For the reasons discussed above, the petition is denied and the proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: May 3, 2010



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

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