

**Chilson v Hein**

2011 NY Slip Op 30594(U)

March 11, 2011

Supreme Court, New York County

Docket Number: 103454/2010

Judge: Alice Schlesinger

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

**IA** PART 16  
PART \_\_\_\_\_

PRESENT: ALICE SCHLESINGER  
*Justice*

Index Number : 103454/2010
CHILSON, JR. GUY D.
VS.
HEIN, JAMES
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 petition is granted in accordance with the accompanying memorandum decision.

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).

Dated: MAR 11 2011  
March 11, 2011

*Alice Schlesinger*  
ALICE SCHLESINGER 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):

**UNFILED JUDGMENT**

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 16

-----X  
GUY D. CHILSON, JR.,

Petitioner,

-against -

Index No. 103454/2010  
Motion Seq. No. 001

JAMES HEIN, as Deputy Commissioner of the New York City Department of Citywide Administrative Services, Division of Citywide Personnel Services, MARTHA K. HIRST, as Commissioner of the New York City Department of Citywide Administrative Services, and BEVERLY SESSION-KELLY as Director of Investigations of the New York City Department of Citywide Administrative Services, and ROBERT LIMANDRI as the Commissioner of the New York City Department of Buildings,

Respondents.

-----X  
**SCHLESINGER, J:**

Petitioner Guy D. Chilson, Jr. commenced this Article 78 proceeding challenging the November 25, 2009 determination by respondent James Hein, as Deputy Commissioner of the New York City Department of Citywide Administrative Services (DCAS), which denied Mr. Chilson's application for a Hoisting Machine Operator (Basic) License. (Petition, Exh 10). The stated basis for the denial was as follows: "CANDIDATE DOES NOT MEET EXPERIENCE REQUIREMENTS. LACKS 2 MONTHS CABLE CRANE EXPERIENCE AND 1 YEAR, 7 MONTHS EXPERIENCE ON OTHER HOISTING EQUIPMENT." Mr. Chilson contends here that the determination was arbitrary and capricious in that it failed to credit him with years of actual experience for various specious reasons. Respondents oppose the petition, arguing that it properly credited Mr. Chilson for all experience that he had adequately documented, rejecting only claimed experience that the agency could not satisfactorily confirm.

### Background Facts

By application dated June 16, 2008 and revised July 16, 2008, Guy Chilson filed a voluminous written application with the City of New York for a Hoisting Machine Operator (Basic) License. (Answer, Exh A). The application was governed by the New York City Construction Codes, set forth in Title 28 of the Administrative Code of the City of New York (the Code). The license sought by Mr. Chilson would allow him "to operate cranes with total boom less than 200 feet (60 960 mm) in length, derricks and cableways, excluding truck-mounted tower cranes that exceed 200 feet (60 960 mm) in height." Code § 28-405.2.

To receive a hoisting machine operator license, Mr. Chilson was required to demonstrate the following qualifications: "at least three years experience within the five years prior to application under the direct and continuing supervision of a licensed hoisting machine operator." Code §28-405.3.1.<sup>1</sup> According to the application form, this requirement can be satisfied with one year experience as an operator or assistant to an operator on cable operated cranes (including clamshell and dragline) or double drum derricks, with the remaining time as an operator or assistant to an operator on any hoisting equipment that would require either a Class A or Class C (Special) License issued by the Department of Buildings. (Petition, Exh 1). To establish the requisite experience, an applicant must list on the form specific information about the qualifying experience, such as the name, address and license number of the employer, the employment dates, the supervisor's name and license, the applicant's title and equipment used, and the length of employment. (Petition, Exh 11). In addition, the applicant must attach to the application a copy of the W-2 form for each of the required years of experience.

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<sup>1</sup> An applicant must also pass a written examination, be proficient in the English language (written and oral), and demonstrate good character. Those qualifications are not at issue here.

Following his submission of documents, Mr. Chilson was called in for an interview about his experience, which is customary. The interviewer thereafter sent Mr. Chilson a letter requesting 1040 tax forms for each year of experience (2003-2007) and telephone numbers for each company for which he had worked as a crane operator. (Exh 7). As part of his response, Mr. Chilson submitted a letter from his Union representative in Maine where he had worked, detailing dates of employment with particular companies and the particular equipment he had used. (Exh 8). He further submitted his Union Contribution Report (Exh 14) and letters of recommendation (Exh 15).

On or about October 1, the agency sent Mr. Chilson a "Notice of Proposed Disqualification" with a three-page attachment. The attachment listed very specifically the reasons why the agency had found, after its investigation, that Mr. Chilson's proof of experience was inadequate (Exh 9). For example, while Gould Crane Services did verify the dates of Mr. Chilson's part-time employment, it did not verify the type of crane he had operated. Therefore, the agency gave Mr. Chilson no credit for the work. In other cases, no credit was given because the business had closed and no verifying information had been provided by the employer in response to the agency's request. In a few instances, the agency denied credit because the employer had reported that Mr. Chilson's work was unsatisfactory.

In total, the agency gave Mr. Chilson credit for only 10 months of cable experience and no credit with respect to other equipment (Exh 9). Mr. Chilson was given a set time to provide additional information to address the found deficiencies and establish his qualifications. After further investigation, the agency credited Mr. Chilson with an additional five months of qualifying experience on hydraulic equipment (Exh 1), but he remained short

two months on cable operated crane experience and 19 months on hydraulic equipment. Despite Mr. Chilson's assertion that he had documented far more experience than that, the agency denied his application by letter dated November 24, 2009 (Exh 1). This Article 78 proceeding ensued.

At oral argument, this Court suggested that it appeared unreasonable for the agency to disregard completely experience documented by Mr. Chilson simply because the employer had gone out of business or had otherwise failed to respond to the agency's request for verification. The Court asked that respondents' counsel discuss the matter with the agency and re-examine the calculations, giving more appropriate weight to the documents submitted by Mr. Chilson. In response, respondents' counsel made a further written submission that expressed a willingness to give Mr. Chilson some additional credit, but the agency nevertheless still maintained that Mr. Chilson was not qualified for the license based on his failure to establish sufficient qualifying experience. Petitioner's counsel objected to counsel's "new" method of calculation as not in keeping with the law. While the papers will remain as part of the court file, they will not be analyzed in detail in this decision as they consist only of comments by counsel and not a reviewable agency determination and therefore are largely irrelevant.

#### Discussion

Although the issue of license eligibility is governed by regulation, the agency's determination whether to grant a particular license application requires "a certain amount of discretionary judgment-making which courts will not disturb absent a finding that such judgments were arbitrary or capricious." *Montanez v The City of New York Department of Buildings, et al.*, 8 Misc. 3d 405, 407 (Sup. Ct., NY Co. 2005), citing *Matter of Pell v Bd. of*

*Ed. of Union Free School Dist.*, 34 NY2d 222 (1974); see also *Arrocha v Board of Educ. of City of NY*, 93 NY2d 361 (1999). An action is considered arbitrary if it is "is without sound basis in reason and is generally taken without regard to the facts." *Pell*, 34 NY2d at 231.

The agency's decision-making authority is further circumscribed by the terms of the governing statute or regulation. Simply put, "the licensing officer may not arbitrarily impose limitations not contained in the statute upon [an applicant's] right to do business."

*Picone v Commissioner of License*, 241 NY 157, 161 (1925). Thus, in *Picone*, the Court of Appeals reversed the lower court and found it was an abuse of discretion for the agency to deny the applicant a junk boat license on the ground that he lacked a junk shop license, when the statute did not require a junk shop license as a condition of eligibility. Similarly, in *Auringer v Department of Bldgs. Of City of New York*, 24 AD3d 162 (1<sup>st</sup> Dep't 2005), the Appellate Division held that DCAS could not exclude part-time experience when considering an application for a hoisting machine operator's license, when the Code required relevant experience but did not mandate that it be full-time.

In *Sullivan v Miele*, 226 AD2d 308 (1<sup>st</sup> Dep't 1996), the Appellate Division went so far as to reverse and remand the matter to the agency with a direction to grant petitioner's application, finding that the agency had wrongfully denied petitioner's application for a Master Electrician license. Specifically, the agency had erred in disregarding experience where the applicant had not been directly employed by the supervising electrician, even though the Code did not require a direct employment relationship, as opposed to an independent contractor relationship, between the parties. The Supreme Court reached a similar result in *Montanez v The City of New York Department of Buildings, et al.*, 8 Misc.

3d 405 (Sup. Ct., NY Co. 2005), and remanded petitioner's application for a master plumber's license, finding that the agency had wrongfully discounted supervised experience on the ground that there was no direct employment relationship between the supervisor and the applicant, where the Code required supervised experience but not a direct employment relationship.

These cases and others make clear the rule of law to be applied in this case; that is, the agency is authorized to evaluate the sufficiency of an applicant's experience, "so long as that evaluation is not arbitrary, capricious, irrational or unlawful," and the agency "may not add requirements not stated in the statute." *In re Solomon*, 46 AD3d 370, 371 (1<sup>st</sup> Dep't 2007), *lv denied* 10 NY3d 712 (2008), citing *Sullivan v Miele*, *supra*. This Court finds in the case at bar that respondents have violated that well-established principle of law. Not only was the agency's evaluation of Mr. Chilson's experience arbitrary, but the agency added requirements not stated in the statute.

A prime example is Mr. Chilson's three months of experience with Prolerized New England & Hugo (also known as Schnitzer Steel of New England), for which he received no credit. While respondents' counsel offers it as an example of proper decision-making (Verified Answer at ¶ 88), it in fact demonstrates the opposite. On his application, Mr. Chilson indicated the employer's contact information, the dates of employment, and the type of equipment used, and he also submitted the W-2 provided by the company. The agency verified two months of employment but gave no credit whatsoever to Mr. Chilson for his experience because the employer did not verify the type of equipment used. However, that information had been provided by Mr. Chilson with great specificity – he operated both a 700 Series American and a 4100 Manitowoe cable crane. (Petition ¶ 36,

citing Exh 4). Therefore, the agency had before it all the information needed to determine whether the work constituted qualifying experience under the Code.

It was wholly arbitrary for the agency to completely disregard Mr. Chilson's experience based on the employer's failure to verify a single piece of information relating to the type of equipment used, when Mr. Chilson had provided the information himself. No reason existed to doubt or discredit the information provided by Mr. Chilson, and all other information had been verified and documented by his W-2. The agency also arbitrarily failed and refused to credit Mr. Chilson for experience with various other employers listed on his application under similar circumstances where Mr. Chilson and/or his Union had supplied the specific information and no reason existed to doubt its accuracy or authenticity. Despite the thoroughness of the information provided by Mr. Chilson, the agency repeatedly refused to give Mr. Chilson credit for his work experience simply because the employer had not verified every piece of information.

Particularly irrational was the agency's decision to penalize Mr. Chilson and disregard otherwise qualifying experience simply because the employer had failed to respond to the agency's inquiries because the business had closed or because the employer chose not to respond. For example, Mr. Chilson received no credit for his experience with Arctic Construction only because the employer returned the verification form with a note that said: "Business closed 2007. Got a divorce and have no access to records." (Answer, Exh C). Mr. Chilson had supplied all the necessary information himself, including the W-2, but the agency arbitrarily refused to give that evidence appropriate consideration because the employer was unable to verify it. In all, the agency declined to credit Mr. Chilson for work experience with five different employers either because the

agency's letter to the employer was "returned to sender" or not answered, without even considering the information provided by Mr. Chilson.

In further violation of the governing law, the agency apparently added requirements that were not included in the Code. Specifically, it appears from the calculations included in the supplemental papers submitted by respondents' counsel that the agency evaluates work experience in terms of full-time work only. Thus, for example, relating to the work for New York Crane and Equipment, Mr. Chilson asserted that he had worked for nearly four months from March 24, 2008 through "present", which was the July 16, 2008 date of his application. He provided a W-2 statement from the employer confirming wages totaling \$19,865.87. Rather than simply credit Mr. Chilson for four months of work based on the "year/months" schedule in the application form, respondents' counsel calculated the time by dividing the gross wages in the W-2 by the \$56 hourly rate and then dividing that amount further based on a full-time, forty-hour work week to reduce the experience to 8.87 weeks. (See Ex A to counsel's November 10, 2010 Aff, item 10). By so doing, Mr. Chilson's actual experience was reduced by about 50%, even though he had provided a W-2 and the employer when contacted confirmed the dates as March 24 through the present.

Another example of how this "hourly" calculation yields erroneous results can be seen in connection with Sims Crane & Equipment Co. Mr. Chilson asserted that he had worked for about eight months from January 1, 2005 through August 20, 2005. He provided a W-2 statement from the employer confirming wages totaling \$17,666.17. In the above-referenced chart prepared by respondents' counsel, the time was calculated by dividing the gross wages in the W-2 by the \$28 hourly rate and then dividing that amount further based on a full-time, forty-hour work week to reduce the experience to 15.57 weeks,

which is about four months or 50% less than the time confirmed by Mr. Chilson and his employer. While counsel acknowledged that these calculations were “not consistent with” the time confirmed by the employer and Mr. Chilson, she nevertheless – and somewhat surprisingly – continued to insist that the “hourly” methodology was a valid one. (See Ex A to counsel’s November 10, 2010 Aff, item 14).

As the Appellate Division made clear in *Auringer, supra*, DCAS cannot exclude or otherwise discount part-time experience when considering an application for a hoisting machine operator’s license, when the Code requires only supervised experience and makes no distinction between full-time and part-time experience. Similarly here, the agency cannot add to the requirements set forth in the law by calculating time worked based on a strained formula that calculates work experience based on full-time work of 40 hours per week and thereby reduces the actual experience earned. The Code speaks in terms of “years” and the application form speaks in terms of “years” and “months.” No basis whatsoever exists for the “hourly” calculations urged by counsel.

The Appellate Division was so troubled by the agency’s evaluation of the license application in *Auringer* that it concluded its decision by stating that “the agency would be well advised, upon petitioner’s resubmission of his application, to reconsider its interpretation [of the statutory requirement relating to experience.]” 24 AD3d at 164. The Appellate Division’s decision in *Sullivan, supra*, similarly suggests that the agency’s goal should be to ascertain whether the applicant actually has qualifying experience, rather than to demand particular proof not mandated by the Code and thereby deprive otherwise qualified applicants of a license. Documents such as W-2 forms and statement from the employer, the Union, and the applicant himself, if authentic, are competent evidence.

In sum, the agency's determination denying Guy Chilson's application for a hoisting machine operator's license must be annulled as arbitrary and capricious and in violation of law in that the agency added requirements not set forth in the Code. The matter shall be remanded to agency for a new evaluation of Mr. Chilson's work experience consistent with the terms of this decision. Before that evaluation is commenced, the agency shall afford Mr. Chilson a final opportunity to submit additional information, as it had done previously, addressing any issues raised by this litigation. Further, when the application is finally determined, the agency shall set forth its reasoning in detail in the final determination so the determination may be fully understood and reviewed, as necessary.

Accordingly, it is hereby

ADJUDGED that this Article 78 petition is granted, the agency's November 25, 2009 determination denying petitioner's application for a Hoisting Machine Operator License is annulled, and the matter is remanded to the agency for a new determination consistent with this decision.

Dated: March 11, 2011

MAR 11 2011



J.S.C.

**ALICE SCHLESINGER**

**UNFILED JUDGMENT**

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