

Matter of Carrara v Limandri

2011 NY Slip Op 30937(U)

April 7, 2011

Supreme Court, New York County

Docket Number: 116777/10

Judge: Alice Schlesinger

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

PRESENT: SCHLESINGER ALICE SCHLESINGER
Justice

PART ~~A~~ PART 16

CARRARA, CARL S.

INDEX NO. 116777/10

ROBERT D. LITANORI

MOTION DATE _____
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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion Article 78 petition
is denied and the proceeding is dismissed
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: APR 07 2011
April 7, 2011

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

-----X
In the Matter of the Application of CARL S. CARRARA,
for a Judgment Pursuant to Article 78 of the CPLR,

Petitioner,

Index No. 116777/10
Motion Seq. No. 001

-against-

ROBERT LIMANDRI as Commissioner of the New
York City Department of Buildings,

Respondent.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
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appear in person at the Judgment Clerk's Desk (Room
1418)

SCHLESINGER, J.:

Before the Court is another unfortunate case where a hoist machine operator is about to have his license revoked by the Commissioner of the New York City Department of Buildings (DOB), and the Court pursuant to law is helpless to prevent it. Specifically, this is an Article 78 petition wherein the petitioner Carl S. Carrara is arguing that the respondent's determination to adopt the findings and recommendations of Administrative Law Judge Alessandra F. Zorngiotti and revoke his hoist license was arbitrary and capricious and not supported by the particular facts and circumstances of his case. The revocation was based on Mr. Carrara's plea of guilty on October 4, 2004 in the United States District Court for the Southern District of New York to the crime of conspiracy to commit extortion. The predicate for the plea was his assignment to a preferential job as an operating engineer at a Local 14 job site.

As his counsel points out, Carrara was not charged on any racketeering counts. Nor was he alleged to have been a member or associate of a criminal enterprise. In fact, he was characterized by the presiding judge in the criminal case as a minimal participant, and

on March 5, 2005 he was sentenced to both a minimal term of imprisonment of a year and a day, a minimal term of supervised release of two years, and a minimal fine of \$3,000. He was released in February 2006 and paid his fine.

Carrara's hoist machine operators's license was renewed in 2006, after his release from prison. It was also renewed in 2007 and 2008. In 2008, for the first time the renewal application asked about criminal convictions. Carrara answered truthfully. Also, the license renewal was for three years rather than the one year it had been before.

On February 23, 2009 DOB directed Mr. Carrara to appear at their Special Investigation Unit on March 11, 2009 with regard to matters concerning his license. Thereafter, on May 10, 2009, a petition was sent to him wherein he was charged by this Unit with misconduct and specifically with having violated Administrative Code (Code) §28-401.19(13), i.e., having "poor moral character that adversely reflects on his or her fitness to conduct work regulated by this Code." Specification 1, which followed the charge, provided its predicate. Carrara's October 4, 2004 plea in federal court was then referenced and he was informed that:

Such conduct constitutes poor moral character and is a violation of New York City Administrative Code Section 26-133, which was in effect at the time of the conduct and has been renumbered as Section 28-401.6, which mandates that a person who is given a Hoist Machine Operator license from the Department of Buildings "shall be of good moral character."

There was a second charge and specification under Code §28-401.19(7), an alleged failure to cooperate with investigations, which was based on the same predicate, his 2004 plea.

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

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In response, counsel for petitioner moved to dismiss the charges in a letter of November 1, 2010 sent to Administrative Law Judge (ALJ) Kevin Casey. First, counsel Mr. Froccaro stated that he understood that only the first charge would be heard. The thrust of the letter was devoted to challenging the component of "poor moral character" as lacking in definition or clarity. He argued that the statute under which Mr. Carrara had been charged was unconstitutionally vague and violative of due process guarantees in the federal and state constitutions.

On November 3, 2010, a hearing was held before ALJ Alessandra F. Zorziotti. Attorneys for DOB placed into evidence four exhibits, three of which concerned the federal case and Carrara's plea there. The fourth was his license application. Then the DOB called a witness, Annmarie Walters. She held the title of Deputy Director of Licensing for DOB, the office that handled hoisting machine operator applications.

On page 19 of the hearing, in answer to an inquiry as to why DOB requires licensees to have good moral character, she stated:

The reason the Department requires licensees to have good moral character is that we rely heavily on their trustworthiness, their professionalism at the various job site, because unfortunately we are not able to be the eyes and ears at every single construction site. So we rely heavily on the licensees to perform and do their duties diligently in terms of being honest, trustworthy, and having good moral character.

On cross-examination, petitioner's counsel established that Ms. Walters did not know Mr. Carrara or have any personal knowledge of him. What followed was a stipulation between counsel that there had never been any complaints about Mr. Carrara in his file. The Department then rested.

On the defense case, counsel first submitted two exhibits into evidence, a copy of the applicable section of the U.S. Sentencing Guidelines and a copy of a docket sheet which showed that Carrara had paid the \$3,000 fine immediately upon his release from prison. Sections of the Guidelines were then referenced to show that Mr. Carrara had been charged with one out of sixty-one counts and in that one count, his offense made him substantially less culpable than the average participant. Finally, the ALJ was informed that Carrara had been sentenced to a minimum prison term and fine of a year and a day when he could have received twenty years and that he had been assessed a \$3,000 fine when he could have been fined up to \$250,000. Further, no restitution had been required.

Then Mr. Carrara took the stand and gave sworn testimony. He discussed his charitable work for the Police Athletic League and his various jobs before he received a hoist license in 2001. On page 47 of the transcript, the following exchange took place between Carrara and his counsel:

- Q. Okay. Are you sorry about the crime that you committed many years ago?
A. Yes.
Q. You paid your debt to society?
A. Yes.

On cross-examination, counsel for the Department established that Mr. Carrara had been 31 years old when he pled guilty and that he had been in the construction industry for six years up to then. He also testified that he had a college education. He admitted having been aware that the Department had a good moral character requirement at the time he pled guilty. Then the respondent rested.¹

¹Carrara, the petitioner here, was the respondent before the ALJ. His attorney remarked, after his client had stepped down, that he had not really prepared him to testify. The ALJ said she would have given him a few minutes if he had asked for it.

The hearing concluded with the ALJ agreeing to keep the record open for 30 days until December 3, 2010, so that counsel could make written submissions.

On December 14, 2010 the ALJ issued her Report and Recommendation which was submitted to Commissioner LiMandri. There ALJ Zorigniotti stated that she had found that DOB had established that respondent Carrara had violated Code § 28-401.6, and she recommended that his hoist machine operator's license be revoked. Her analysis followed.

First, the ALJ reviewed the testimony and specifically referred to Annmarie Walters, whose testimony on page 19 was referenced by this Court. She then cited a number of similar licensing cases where "good moral character" had been considered "an integral qualifier" for the issuance of a license. Further, she stated that she agreed with the opinion of another ALJ that "good moral character was not unconstitutionally vague". Specifically with regard to Carrara, she found (at p 4) that "his participation in a conspiracy to extort his union, by receipt of a preferential construction job, is directly related to his business or trade as a hoist machine operator, has the potential to undermine the integrity of city construction sites, and is sufficient proof of poor moral character."

In assessing Ms. Walters' testimony, she said (at p 4) that while it was "cursory", it "was sufficient to establish that respondent's conviction for conspiracy to commit extortion adversely impacts his fitness to hold a hoist machine operator license."

As to her recommendation regarding penalty, the ALJ first pointed out that the Department's consistent position in similar cases had been that revocation was appropriate. She also opined (at p 6) that "Respondent did not offer much in the form of mitigation". She then reviewed his testimony and stated (at p 6): "In a perfunctory manner respondent claimed that he was sorry for his crime and that he has paid his debt to society."

ALJ Zorgniotti further pointed out (at p 6) that despite the fact that six years had passed since Carrara's conviction, "by his own admission, respondent participated in an extortion scheme with an organized crime family and obtained a preferential job for four years thereby contributing to corruption on the job site."

The Report and Recommendation was sent to Commissioner Robert LiMandri who reviewed and adopted it "in its entirety, including [the ALJ's] findings of fact and penalty recommendation." He informed Mr. Carrara of this decision in a letter dated December 15, 2010 and advised him that the revocation was effective immediately and his license was to be surrendered.

In arguing that the revocation here was improper and unduly harsh, counsel for petitioner relies in part on this Court's October 19, 2010 decision in *Department of Buildings v. Louis Inglese, Jr.*, Index No. 107806/10. There, ALJ Ingrid Addison hearing the Inglese case found that petitioner DOB had established that respondent Inglese had demonstrated poor moral character in violation of Section 26-133 of the Administrative Code by pleading guilty in 2004 to the federal crime of conspiracy to commit extortion. She nonetheless recommended a penalty of a one year suspension rather than the revocation recommended by the Department.

While opining that an evaluation of these cases should be done on a case by case basis and that a criminal conviction is but one factor, though an important one, this ALJ pointed out (at p 6 of her decision) that at the hearing, "petitioner presented no evidence of the job responsibilities of a hoist machine operator, or whether it required elements of integrity or trust." In this regard, she stated that "petitioner did not assert that there was a nexus between the crime for which respondent was convicted and his license." And she added (at p 7): "Nor was one apparent."

ALJ Addison then enumerated all the relevant factors, including respondent's conviction eight years earlier, and her finding (at p 8):

Moreover, I find that the crime for which he was convicted, albeit one of moral turpitude, was sufficiently attenuated to his duties as a hoist machine operator, and neither adversely affected his duty to perform the job nor endangered public safety.

The recommendation of suspension for Inglese was not accepted by the Commissioner, though he accepted the ALJ's findings as to poor moral character, and he chose revocation instead as the penalty. Inglese's Article 78 followed.

In the decision granting the Article 78, this Court fully discussed the ALJ's analysis, case citations, and rationale and upheld it, reversing the DOB's revocation penalty. However, in my decision I clearly distinguished the other hearing conclusions relied upon by the Commissioner in which the DOB had established, via witnesses, the critical link between poor moral character and an adverse impact upon fitness to perform the job. The Department, in resting its case solely on records associated with Inglese's criminal conviction, had failed to do that. I stated that despite the wide discretion the Commissioner had in deciding on a penalty, he could not abuse that discretion by relying on testimony given at a later hearing with a different factual basis.

But in the case before the Court now, the Department did present a witness, Annmarie Walters, who gave testimony which "while cursory", was found by ALJ Zoragniotti to be sufficient to establish that Carrara's criminal conviction adversely impacted on his fitness to hold a hoist machine operator's license.

Petitioner's counsel argues that the facts here are even more compelling than in *Inglese*. I take no position on that issue except to emphasize that my decision was based

on the insufficiency of evidence and the impropriety of relying on a factual record made in a different, subsequent case.

Here, as the Department argues, the Commissioner's decision was based on their administrative record. Additionally, one could say and I find that the ALJ findings and recommendations here were not unreasonable or irrational or based on insufficient evidence. Further, as I emphasized in *Ingløse*, the Commissioner has wide discretion in deciding on license revocation. Finally, as I am constantly reminded, it is not proper for a court to substitute its judgment for that of the agency delegated with that authority.

Therefore, I am dismissing the petition. However, having said all of the above, I remain very critical of a policy, which this clearly is, of taking away a worker's license for a mistake made in the past for which he has already been punished. While I am sure the Commissioner and his Department have their reasons and now know how to make a proper hearing record, in this Court's opinion this policy is not only vindictive but serves no positive good, either for the individual directly involved or for the community. These individuals are hard working, skilled and productive men. They had hoped and believed, for good reason based on the renewal of their licenses year after year, that they could put their dishonorable past behind them. But sadly, that has not proven to be so.

Accordingly, it is hereby

ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed without costs or disbursements. The Clerk is directed to enter judgment in favor of 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 11B).
Dated: April 7, 2011
APR 15 2011
Alice Schlesinger
J.S.C.
ALICE SCHLESINGER