

Matter of Inglese v Limandri

2011 NY Slip Op 31326(U)

May 17, 2011

Supreme Court, New York County

Docket Number: 101251/11

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 52

Inglesse, Pasquale

INDEX NO. 101251/11

MOTION DATE _____

- v -
Limandi, Robert D.
NYC Dept. of Buildings

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for APR 20

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 is decided in accordance with the attached 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: 5/17/11

CK
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: Part 52

-----X
In the Matter of the Application of

PASQUALE INGLESE,

Petitioner,

Index No. 101251/11

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

ROBERT D. LIMANDRI AS COMMISSIONER OF
NEW YORK CITY BUILDINGS,

Respondent.

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
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Pasquale Inglese brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to vacate and set aside a determination made by Robert D. LiMandri, Commissioner of the Department of Buildings (the "DOB"), revoking petitioner's HMO license dated December 3, 2010. For the reasons set forth below, the petition is hereby dismissed.

The relevant facts are as follows. In 2006, the DOB approved petitioner's application for a Class A Hoisting Machine license ("HMO license" or "cherry picker license"). With this

license, petitioner was allowed to operate cranes with booms under 200 feet in length. On September 12, 2007, petitioner applied to the DOB to renew his HMO license and the DOB approved petitioner's application. On or about July 1, 2008, when the new construction codes became effective, the DOB undertook new enforcement strategies to ensure that all licensees for trades licensed by the DOB, including HMO licensees, possessed "good moral character" as required by the Administrative Code. Thus, effective July 1, 2008, the DOB required that applicants for HMO licenses disclose prior convictions and offenses on renewal applications.

On or about October 3, 2008, petitioner applied to the DOB to renew his HMO license. On petitioner's renewal application, which required petitioner to provide information about his criminal history, petitioner indicated that he had two prior convictions. One conviction was from September 2, 1986, when petitioner was charged with and convicted of possession of heroin and sentenced to 5 years in prison. The other conviction was from November 22, 2004, when petitioner was charged with and convicted of mail fraud and sentenced to 15 months in prison.

By letter dated November 28, 2008, the DOB notified petitioner of the following:

Your cherry picker license renewal application was received by the Licensing Unit on November 5, 2008. In section 9, "Conviction and Fines," of the application you indicated that you have been convicted of possession of heroin and mail fraud. However, the results of our background check indicate that in 1978 you pled guilty to criminal possession of stolen property. Your payment and a copy of your application are being returned to you at this time. Please submit an explanation in writing describing what occurred in connection with your mail fraud conviction and why you failed to disclose the 1978 conviction for stolen property.

In response to the DOB's request, petitioner submitted a notarized statement stating the following:

I'm writing this letter in regard to the letter that was sent to me about my cherry picker license renewal application, [sic] In reference to the mail fraud conviction it was hours paid to me from owners and contractors...on construction site[.] [M]y construction hoist was being used without me physically being there and being used in a emergency on that site in which was charged a no show job, as for the conviction of stolen property in 1978, I honestly forgot to report it. I purchased a television set off someone on the street without realizing it was a stolen good, which later the police office [sic] came to my home after the person I bought it from was arrested, and I was charged with possession of stolen property and sentenced to one year of probation.

The DOB approved petitioner's 2008 renewal application on January 6, 2009. The DOB later discovered, however, that the criminal indictment for mail fraud alleged that petitioner violated the Hobbs Act by conspiring with others from 1997 through approximately February 2003 to extort Local 14 of the International Union of Operating Engineers ("Local 14") by assigning preferential and/or no show jobs to individuals selected or associated with the Genovese crime family. The DOB also learned that on September 29, 2004, petitioner pled guilty to that charge. During petitioner's plea allocution, he admitted that while working as an operating engineer for Local 14, he conspired with others who had already pled guilty to receiving preferential job treatment on construction jobs at the Museum of Modern Art. Further, petitioner stated that he understood at the time that his actions violated the law and that the conspiracy would cause economic harm to others. Although petitioner was facing up to 20 years in prison if convicted at trial, petitioner was sentenced to 15 months of incarceration, 3 years of supervised release and a \$3,000.00 fine.

By a petition filed with the New York City Office of Administrative Trials and Hearings ("OATH") dated May 4, 2010, the DOB initiated proceedings seeking to revoke petitioner's

HMO license, charging that the conduct underlying petitioner's guilty plea on September 29, 2004 reflected poor moral character under Administrative Code § 26-133, the provision in effect at that time of such conduct. Administrative Law Judge Tynia Richard ("ALJ Richard") conducted a hearing at OATH on October 20, 2010, at which representatives for the DOB and petitioner and his attorney appeared. In support of its allegation that petitioner's HMO license should be revoked, the DOB submitted into evidence copies of the following documents: (1) a November 22, 2004 Judgment in *United States of America v. Pasquale Inglese*, 03 Crim 229; (2) petitioner's plea allocution; (3) the criminal indictment in *United States of America v. Muscarella et al.*, 03 Crim 229; (4) petitioner's sentencing minutes; and (5) petitioner's HMO license file. Additionally, the DOB presented testimony from Aisha Norflett, the Director of Licensing for the DOB. Ms. Norflett testified as to the reasons why the DOB requires a licensee to possess good moral character:

[T]he Department depends on the licensees to be truthful and honest so the Department - or the Department inspectors cannot be at all the crane sites or any construction site or job site all the times. [sic] So we have to depend on our licensees to make sure that they are doing what they are supposed to do. They are notifying the Department about accidents. They are notifying their supervisors and whoever needs to be notified about defects or whatever is going on with the equipment. So those are reasons why we have to make sure that they are of good moral character.

Furthermore, Ms. Norflett testified that petitioner's HMO license became inactive on October 1, 2009, prior to the DOB's determination to revoke the license, because petitioner failed to fulfill the national recertification requirements of the National Commission for Crane Certification Organization and the Crane Institute Certification agency.

In opposition to the DOB's case for revocation, petitioner attempted to explain the

incident that led to his criminal conviction. Petitioner testified that while working as an operating engineer for Local 14, he conspired with others by receiving preferential job treatment and/or no show jobs from individuals associated with organized crime. Petitioner testified that he conspired with Carl Carrara, Sr., an individual with known connections to the Genovese crime family but that he was unaware that Mr. Carrara, Sr. was associated with organized crime. Petitioner further admitted receiving payment for three hours during which he did not work and he testified that although his HMO license is currently inactive, he has been able to obtain many other jobs and health insurance through his union. Finally, petitioner submitted into evidence a doctor's letter, dated May 28, 2010, stating that petitioner's wife has a medical condition and "her medical benefits cannot be interrupted."

ALJ Richard permitted both parties to submit closing memoranda before issuing a final Report and Recommendation. In her Report and Recommendation dated December 1, 2010, ALJ Richard made the following findings of fact and conclusions of law:

Here, [petitioner] pled guilty to conspiracy to commit extortion, having admitted to participating in a scheme to extort his union by receiving preferential treatment on a construction job and receiving pay for work he did not perform...The testimony of the Department's Director of Licensing - that the truthfulness and honesty of its licensees help to ensure the integrity and safety of city construction sites - established that [petitioner's] conviction for conspiracy to commit extortion adversely impacts his fitness for the job...When he was paid for three hours that he did not work, he explained that it was because an emergency prior to his normal work hours created the need to use the hoist elevator that he normally operated, and others on site utilized it and charged the hours of work to him even though he was not there. Permitting unauthorized users to operate the hoist elevator, either to expedite the work or for other reasons, had the potential to undermine site safety...I find that [petitioner's] participation in a conspiracy to extort his union, by receipt of a preferential job and by receipt of payment for work he did not

perform, is directly related to his business or trade as a hoist machine operator, had the potential to undermine the integrity and safety of city construction sites, and is sufficient proof of poor moral character.

By letter dated December 3, 2010, the DOB notified petitioner of the revocation of his

HMO license, stating as follows:

I hereby adopt Judge Richard's December 1, 2010 Report and Recommendation in its entirety, including [the] findings of fact and penalty of recommendation, and find you in violation of the provisions of law cited in such Report and Recommendation. Therefore, effective immediately, the sanction imposed upon you is revocation of your Hoist Machine Operator's license. You must surrender your license immediately to the Department.

Petitioner then commenced the instant proceeding challenging the DOB's final determination revoking his HMO license.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or 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 facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the court finds that the DOB's determination to revoke petitioner's HMO license was made on a rational basis. Under § 752 and § 753 of the Correction Law enacted to establish procedures to prevent unreasonable discrimination against former criminal offenders in regard to licenses and employment, a standard of review is set forth for determining the "good moral character" of an applicant. Section 753 of the Correction Law enumerates eight factors to be considered:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license or employment sought.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

ALJ Richard rationally determined after analyzing the above statutory factors that petitioner displayed poor moral character and thus, his HMO license must be revoked. ALJ Richard found that although it is the policy of this state to employ previously convicted, yet rehabilitated, criminals, there exists an exception to this policy when there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual. ALJ Richard noted that petitioner's HMO license entitled him

