

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

2011 NY Slip Op 31624(U)

June 15, 2011

Supreme Court, New York County

Docket Number: 116423/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER

PART **IA** PART 16

Index Number : 116423/2010

BABINO, MARCO

vs

D.C.A.S.

Sequence Number : 001

ARTICLE 78

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

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

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

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 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).

JUN 15 2011

Dated: June 15, 2011

*Alice Schlesinger*

ALICE SCHLESINGER <sup>S.C.</sup>

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  
 MARCO BABINO,

Petitioner,

Index No. 116423/10  
 Motion Seq. No.001

-against-

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

**UNFILED JUDGMENT**

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 appear in person at the Judgment Clerk's Desk (Room  
 141B).-----X  
 Respondents

-----X  
 SCHLESINGER, J.:

On December 22, 2006, Marco Babino applied to the New York City Department of Buildings (DOB) for a Master Fire Suppression Piping Contractor's License. The specific qualifications for this license are found in §26-146 of the Administrative Code of the City of New York. Essentially, in addition to passing a written examination, an applicant must have at least seven years of prior experience in the design and installation of fire suppression piping systems or four years in the design and installation of plumbing systems plus three years doing fire suppression work. Pursuant to §26-141(c) of the Code, the work must be performed under the direct and continuing supervision of a licensed plumber or licensed fire suppression contractor, which shall be evidenced by the licensee's signature and seal upon any required statements, applications and/or permits.

Since Mr. Babino had already received his Master Plumber's License from the DOB on May 1, 2001, he only needed to show three years of experience in the design and installation of fire suppression systems. He has tried to do this time and again, but without success.

Mr. Babino was first denied a license on April 1, 2009, on the basis of insufficient experience. However, he was given 60 days to resubmit, which he did on May 27, 2009. This resubmission overwhelmingly documented evidence of the requisite experience. Not only that, but Mr. Babino's resubmission was almost identical to one submitted by a colleague of his, Giuseppe Rapisardi. Mr. Rapisardi's resubmission had been successful! Rapisardi had been granted a license and Babino was again denied one by letter dated August 31, 2010, even though, based on an objective view of their relative relevant experience, their work experience was almost identical.

In this Article 78 proceeding brought in December 2010, Mr. Babino argues that the August 31, 2010 denial was arbitrary and capricious in its failure to credit him with the 36 months of requisite experience without any real explanation and because of the DOB's refusal to call him in to further elaborate on his work and/or give him an opportunity to obtain proof of fire suppression work done years before a license was required or for a governmental entity, as he had specifically requested in his May resubmission letter. In addition, he argues that the DOB's failure to approve him for a license, in the face of granting Mr. Rapisardi one on virtually the same experience, made absolutely no sense and was clearly arbitrary and capricious.

So what did the Department of Buildings do in the face of these arguments? Within weeks of being served with Mr. Babino's petition, respondent went to its files and then sent Mr. Rapisardi a letter, dated January 26, 2011, telling him that the Department had decided to nullify HIS license (emphasis added) "unless adequate proof is presented that would demonstrate why the MFSPC License was not issued in error."

In other words, instead of using the Rapisardi experience to rethink Mr. Babino's application and award him a well-deserved, well-earned license, the DOB manufactured reasons why Mr. Rapisardi's license had been issued in error. So Mr. Rapisardi now lacked the requisite experience which the DOB had acknowledged six months earlier, and additionally he had a moral character issue, which arose from an obviously mistaken answer on a document he had filed after the license had been awarded.

This Court, for reasons stated in a decision dated March 11, 2011, granted Mr. Rapisardi's request for a Temporary Restraining Order made when he filed an Article 78 petition contesting the DOB's changed position. On page 6 therein, while discussing the criteria for injunctive relief, I said with regard to his likelihood of success on the merits that "I believe there is a good chance petitioner will ultimately prevail". And he will. But so will Mr. Babino for the reasons now to be discussed.

In Mr. Babino's original application filed in December 2006, he stated that he had been employed by Lafata-Corallo Plumbing & Heating Co. since June 20, 1989. He relied for his experience in fire suppression systems on his work under Vincent Chiofalo. However, the DOB found this experience wanting and briefly explained why. In the concluding paragraph of its April 1, 2009 denial letter, the DOB said:

If you have additional relevant information or documentation that you would like to submit in furtherance of your application, please submit a request to the Department's Licensing Unit within sixty (60) days from the date of this letter. Please address the reasons for your denial, and include all supporting documentation with your request for reconsideration.

Giuseppe Rapisardi received a similar denial letter soon thereafter, dated April 7, 2009. Both men had worked for Lafata-Corallo Plumbing & Heating since 1989 and both had primarily relied on their work under Vincent Chiofalo for the requisite experience with fire suppression systems. The denial letter to Mr. Rapisardi was somewhat more explanatory than the one to Mr. Babino, but both applications met with the same result. The final paragraph in both denial letters was identical. Both men took advantage of the 60 day window to submit additional information, and finally and most importantly, both men relied on work experience with the same licensed fire suppression contractor Edward Corallo.

In a letter dated May 27, 2009, Mr. Babino explained that Lafata-Corallo had "employed another licensed fire suppression piping contractor, Edward Corallo, LMFSC #8 from 1989 through 2000." Mr. Babino apologized for this omission in his original application, but explained that Mr. Corallo had left the company in 2000. Edward Corallo had obtained 28 fire suppression permits under which Mr. Babino had worked in the design and installation of the systems under his direct supervision. In this regard, Mr. Babino attached a sworn statement from Mr. Corallo supporting his own account.

Mr. Babino then calculated that with the 12 permits worked under Mr. Chiofalo with which the DOB had already credited him, when added to the 28 permits under Mr. Corallo, the total was 40 permits which "constituted far greater than 36 months of satisfactory work experience." He concluded with his offer to send in additional proof of fire suppression experience obtained before 1990 when licensing began. He reiterated that such additional proof should not be necessary as the 40 permits were more than sufficient and added that obtaining the decades old information would be both time-consuming and cost-intensive.

Nevertheless, if the Board wanted more documentation, Mr. Babino indicated that he would provide it.<sup>1</sup>

Fifteen months later, on August 31, 2010, Mr. Babino's reconsideration letter was denied. In a relatively brief letter, the Director of Licensing Unit, Aisha Norflett, devoted the second through fourth paragraphs to recalling the history of Mr. Babino's application process and the experience needed by statute. Then in the fifth and final paragraph, Ms. Norflett offered the rationale for the denial. The DOB had examined all the permits (there were 40) during the period between 1992 and December 22, 2006 (the application date), "assessed each of the permits issued to the supervising licensees", their "nature and complexity" including the number of "sprinkler heads among other factors, in evaluating your potential involvement in the design and installation of fire suppression systems."

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<sup>1</sup> Mr. Rapisardi wrote his reconsideration letter to the same person as Mr. Babino, Ms. Danielle Grillo, Director of Licensing for the Department, but his was dated May 19, 2009. There, Mr. Rapisardi first reviewed what he had been credited with in the denial letter, nine fire suppression permits under his work with Franco Belli, LMFSC#291-B, and one permit for his work under Chiofalo, LMFSC #11.

Rapisardi then mentioned Edward Corallo who had "filed approximately 25 fire suppression permits" under which he designed and installed fire suppression work. He also submitted a letter from Mr. Corallo verifying his application. Further, like Mr. Babino, he calculated the 35 permits under which he had worked (Babino had calculated 40) as being "far greater than 36 months of satisfactory work experience," but he nevertheless offered to provide evidence of work experience prior to the inception of licenses if the above was not enough.

Essentially, the only meaningful difference between the two men's letters was that Mr. Rapisardi "highlighted" several jobs and the time he had spent designing and installing fire suppression systems on them. For the first at "126 Avenue C" he had worked 17 months, for the second at "12-55 Queens Boulevard" he had worked 9 months, and for the third at "989 2<sup>nd</sup> Avenue," he had worked 5 months. He then concluded his letter by saying: "on these jobs alone, irrespective of the other 32 permits, I obtained 31 months of satisfactory work experience in fire suppression." Marco Babino did not do this.

Without any further explanation, the DOB credited Mr. Babino with “approximately ten months of qualifying experience under Mr. Chiofalo’s department permits and sixteen months under Mr. Corallo’s department permits”. This added up to twenty-six months and since he needed thirty-six months, it was deficient.

There was no elaboration as to how 40 permits worked under over the course of 16 years could result in a mere two years and two months of credit. Finally, there was no acknowledgment of or response to Mr. Babino’s request to provide additional pre-1990 work experience.

About one month earlier, on July 23, 2010, the same Aisha Norflett had approved Mr. Rapisardi’s reconsideration letter, finding that he had met the qualification requirements. As she had done in the Babino letter, Ms. Norflett used the first two paragraphs of this brief letter to recite the statutory requirements and Mr. Rapisardi’s earlier inability to meet them. Then in the final paragraph, Ms. Norflett first referred to Edward Corallo’s confirmation letter that he had supervised Mr. Rapisardi’s work between 1989 and 2000. She then referred to Mr. Rapisardi’s highlighting of three of the 25 Corallo permits “under whom you worked as jobs you worked on for significant time periods.” She then indicated that based on a review of this documentation of Mr. Corallo’s permit history, “the Department has determined that you may be credited with three years of fire suppression experience...”

As noted earlier, Mr. Corallo submitted sworn and notarized letters on behalf of both Mr. Babino and Mr. Rapisardi. Though the letters are not identical, in both he recommended that licenses be given. With regard to Mr. Babino, he stated that he had “personally supervised Mr. Babino with respect to the design and installation of fire suppression systems through New York City.” He noted that Mr. Babino had 23 years in

the plumbing industry and that “he has displayed great expertise and skill in the installation of fire suppression systems.”

As part of the petition, in a chart he attached as Exhibit K, Mr. Babino attempts to deal specifically with the generalized conclusion in the DOB’s final denial letter. The DOB there states that: “The Department has examined all permits issued under both Mr. Chiofalo’s and Mr. Corallo’s MFSPC licenses” and “assessed each” leading to the determination that Mr. Babino was only entitled to 26 months credit. In contrast, Mr. Babino’s calculations show that he had worked for approximately five years under these permits.

Further in this regard, in a sworn affidavit attached to the petition (at ¶13), Mr. Babino explains his calculations “derived from [his] own memory and experience” of the time spent on each job, as well as the number of sprinkler heads installed and other piping required. He calculates 17 months and two weeks under Mr. Chiofalo and 43 months and three weeks under Mr. Corallo, for a total of 60 months or five years.

The DOB’s response to these sworn assertions and multiple arguments by counsel, is self-serving, conclusory, and lacking in any convincing probative evidence. First of all, though the Answer is verified, that verification is by an attorney, the General Counsel to the Department who is authorized to verify pleadings. She identifies the source of her information as books and records and statements or affidavits from other persons.

But there are no statements or affirmations or affidavits from other persons or in fact from anyone. Specifically, nothing is submitted from anyone in the Department to show how the DOB assessed the permits and arrived at the 26 months number or in fact whether the DOB actually did this. As pointed out in the Reply by counsel, in ¶3, no information is provided as to who performed the examination and whose expertise was relied upon.

Further, there is no mention in the denial letter of the involvement Of the DOB's Fire Suppression Board in the reconsideration. In fact, counsel points out in ¶18 that while in Mr. Rapisardi's file there is a letter recommending approval of his license signed by the Chairperson of the Board, Virginia Sullivan, there is nothing in the Babino file, to show who if anyone ever reviewed his application or his additional submission.

What is contained in the Answer? The DOB presents printouts of the permits issued to Mr. Chiofalo and printouts of the locations of the jobs (Exh F and G). Presumably those were reviewed for the initial denial letter. Then in ¶54, the respondent states that the DOB concurred with the Board's findings with regard to this denial. However, nothing of this nature is provided vis-a-vis the findings in the final denial letter which is the predicate for this Article 78 petition.

Rather, in ¶¶ 67 and 68 in the Answer, respondent simply repeats the conclusion reached in the August 31, 2010 denial letter and in fact cites to it. But again no attempt is made to explain how the Department reached its conclusion, i.e., the process utilized and/or the standards applied and who did this evaluation. This omission is particularly striking in the face of the impressive documentation Mr. Babino submitted in his reconsideration letter, 16 years working under 40 permits as well as his own analysis in Exhibit K to the petition and his affidavit of the kind of work he had performed, amounting to approximately 5 years. While this analysis may be self-serving, it stands alone. In other words, respondent makes no attempt to explain its own calculations or to refute petitioner's.

### Discussion

While the Department may have some discretion in deciding who is worthy of receiving a license for fire suppression, that discretion is not unlimited. There must be some serious attempt to justify a denial, and here there was none.

Therefore, I find, similar to the decision reached by the Appellate Division of this Department in *Sullivan v. Miele*, 226 AD2d 308 (1996), that the denial by the DOB Commissioner of an application for a license — here for fire suppression and in *Sullivan* for a Master Electrician — on the ground that the applicant's experience was insufficient was arbitrary and capricious and cannot be sustained. In *Sullivan*, there was uncontested evidence that there was supervision by a Master Electrician over the requisite period of seven and one-half years. Here, there was uncontested evidence that there was supervision by an individual licensed in fire suppression for sixteen years.

Further, in reaching my decision that the finding against Mr. Babino is arbitrary and capricious, I cannot be blind to the companion Rapisardi case. There, on virtually the same evidence, Mr. Rapisardi was approved. Further, based on his submissions he should have been approved. It was and is arbitrary and capricious to have reached that correct conclusion in Rapisardi's case and yet find an opposite conclusion in Mr. Babino's.

We are dealing here with people's lives and livelihoods. Public servants are expected to act with consistency and rationality. The respondent's approval of Mr. Rapisardi's application and its almost simultaneous disapproval of Mr. Babino's was inconsistent, irrational and grossly unfair.

Mistakes of course can be made. But when they are, it is honorable to acknowledge such and seek to make amends. But that did not occur here; instead, the opposite occurred. When Mr. Babino showed convincing evidence that his denial was improper and unfair and could not be justified in light of Mr. Rapisardi's approval on the same facts, the Department looked for a way to justify the denial. It then seized on disingenuous and improper reasons for changing their decision vis-a-vis Rapisardi. Rather than correct Mr. Babino's decision,

it recalled Mr. Rapisardi's. This kind of official misbehavior is further proof that the Department's decision is arbitrary, capricious, irrational and unfair.

The DOB's decision cannot be allowed to stand. Mr. Babino has waited long enough for his license. I am therefore annulling the August 31, 2010 denial and remanding the matter to the Department with a direction to grant petitioner his license for fire suppression.

Accordingly, it is hereby

ADJUDGED the petition is granted, the August 31, 2010 denial by the Department of Buildings of the application by Marco Babino for a Master Fire Suppression Contractor license is annulled, and the matter is remanded to the DOB with a direction to grant petitioner his license consistent with the terms of this decision.

Dated: June 15, 2011

JUN 15 2011

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**

**UNFILED JUDGMENT**

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