

Matter of Cann v Limandri

2011 NY Slip Op 31932(U)

June 20, 2011

Sup Ct, NY County

Docket Number: 101445/11

Judge: Alice Schlesinger

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SCANNED ON 6/24/2011

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

PRESENT: Hon. ALICE SCHLESINGER
Justice

PART 1A PART 16

Robert Cann
- v -
Robert D. LiMaurri

INDEX NO. 101445/11
MOTION DATE _____
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits— Exhibits _____ | No(s). _____
Replying Affidavits — Exhibits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this ~~motion is~~ 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: JUN 20 2011

Alice Schlesinger
_____, J.S.C.
ALICE SCHLESINGER

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

- 1. Check one:
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
In the Matter of the Application of
ROBERT CANN,

for a Judgment Pursuant to Article 78 of the CPLR,

Petitioner,

Index No. 101445/11
Motion Seq. No. 001

-against-

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

UNFILED JUDGMENT

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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
SCHLESINGER, J.:

In this Article 78 proceeding, petitioner Robert Cann seeks to reverse the October 20, 2010 decision by respondent New York City Department of Buildings (DOB) denying his application to renew his Stationary Engineer license. He claims that the decision is arbitrary and capricious and was issued in violation of due process of law. In addition to the license renewal, Cann seeks reinstatement to the job from which he was fired when his license was not renewed and an award of back pay. Respondent opposes all aspects of the petition, asserting that its determination was rationally based on the particular facts of Mr. Cann's case as applied to the controlling provisions of the New York State Correction Law and the New York City Administrative Code. Those provisions, DOB argues, allow for the denial of a license renewal upon evidence such as that presented here that the applicant lacks "good moral character" as it relates to the license requirements.

Background Facts

Robert Cann is a member of the International Union of Operating Engineers, Local 30. He has been married for over twenty years and is the primary breadwinner for

his wife and three teenage children. At issue here is Mr. Cann's continued livelihood and ability to adequately support his family. That livelihood depends in large part on his license as a Stationary Engineer, which he earned in or about the year 1990 and held until the DOB denied his renewal application in 2010.

Although Mr. Cann maintained his license for approximately twenty years, he did not activate or work under the license until about 2007 when he was hired by the New York City Health and Hospitals Corporation (HHC) to work as a Stationary Engineer. As a condition of his employment, Cann was required to renew his license annually with the DOB. He did so successfully in 2008 and 2009 continuing into 2010. However, a problem arose in connection with the renewal application he filed in July 2010.

By letter dated August 26, 2010 (Exh D to petition), the DOB returned Cann's application with a request that additional information be provided within fifteen days.

The reason for the request was explained as follows:

Pursuant to Section 28-401.12 of the NYC Administrative Code ("Code"), the Department is authorized to "refuse to renew a license ... on any grounds on the basis of which it could deny, suspend or revoke such license." The basis, listed in Section 28-401.19(13) of the Code includes:

"Poor moral character that adversely reflects on his or her fitness to conduct work regulated by this code."

In section 9 of your application, you indicated that you plead[ed] guilty in 2005 to Felony "Third Degree Bribery Receiving." Although you previously disclosed this information, it is within the Department's discretion to conduct a further investigation and evaluation of your character as it relates to your duties as a licensee. The submission of true and accurate inspection reports to the Department is an essential part of a Stationary Engineer's duties. Therefore it is of utmost importance that the integrity of Stationary Engineers is not compromised.

The referenced Felony was, in fact, the conviction of Mr. Cann on December 10, 2004 after trial for Third Degree Bribery Receiving in violation of Penal Law §200.10. The sentence issued in February 2005 included restitution in the amount of \$6,368 plus a term of imprisonment from one to three years (Exh B to Petition). The conviction and sentence were based on Cann's arrest in 2003, along with seventeen others, all of whom were New York City public school custodians charged with purchasing goods and services for their schools pursuant to the City's competitive bidding process. The custodians were arrested and indicted for rigging bids on window washing contracts; i.e., they entered into an agreement with a particular contractor to award him the contracts in exchange for kick backs ranging from \$1,000 to \$4,000 in cash. The \$6,368 restitution directed by the judge as part of the sentence was based on the finding that Cann had received a kick back on a bid of that amount for a particular window cleaning contract during his employment in 2000 (Answer ¶¶ 68-70 and Exh B).

In response to the DOB's request for additional information, Mr. Cann provided a substantial amount of information to support his renewal application and persuade the DOB of his "good moral character" and entitlement to the license. Specifically, Mr. Cann's counsel submitted a five-page letter dated September 9, 2010 that began by explaining the circumstances of his arrest and emphasizing that, unlike the other school custodians arrested at the same time, Mr. Cann maintained his innocence, refused to accept a plea deal, and went to trial (Petition Exh E). After his release from prison, Cann worked for a private maintenance company but then applied to Metropolitan Hospital, run by HHC, so as to obtain employment using his Stationary Engineer license. He disclosed his conviction and, consistent with the law barring employment

discrimination against persons with criminal convictions, Metropolitan Hospital hired Mr. Cann based on his work qualifications. As demonstrated by the three letters of recommendation that Mr. Cann submitted to DOB with the September 2010 letter, Mr. Cann's work performance and work ethics at HHC were outstanding.

In the letter, Cann's counsel also explained Cann's daily responsibilities and argued that the work Cann performed at Metropolitan was "unrelated to the circumstances of his arrest [as he] does not contract out work as part of his functions as a Stationary Engineer, nor does he take custody or control of money for the Hospital." Rather, he inspects and maintains HVAC equipment, including boilers, and keeps records and makes reports. Counsel concluded the letter by noting that years had passed since Cann's conviction and that public policy favors employing previously convicted individuals who have been rehabilitated and are able to contribute to society.

After reviewing these materials, the DOB issued a letter dated October 20, 2010 denying Mr. Cann's request for renewal of his Stationary Engineer's License pursuant to Code §28-401.12. That section allows the DOB to refuse to renew a license on any ground that would justify denial, suspension or revocation, including: "Poor moral character that adversely reflects on [the applicant's] fitness to conduct work regulated by this code." The DOB explained its determination as follows:

On December 10, 2004, you pled guilty to NYS Penal Law Section 200.10, Felony Third Degree Bribery Receiving.¹ This conviction stemmed from your actions while you were employed as a Custodial Engineer at Public School 31 in

¹ As indicated in counsel's letter referenced above, Cann did not enter a plea but maintained his innocence and was convicted after trial. DOB's error, while relevant, has minimal significance in the overall analysis here as to Cann's entitlement to a license.

Brooklyn. You accepted a "kick-back" from a contractor in exchange for accepting his bid for a window washing job. Based on the Department's review, you have not satisfied the requirement of good moral character.

The DOB then went on to note that NYS Correction Law § 752 empowers DOB to deny a license application where "there is a direct relationship between one or more of the [applicant's] previous criminal offenses and the specific license ... sought" or where "the issuance of the license would involve an unreasonable risk to property or to the safety or the welfare of ... the general public." The DOB further enumerated the factors in Corrections Law §753(1) that an agency must consider when deciding a license application:

- (a) The public policy of the state ... 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 ... ;
- (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 of such duties or responsibilities;
- (d) The time which has elapsed since the occurrence of the criminal offense ... ;
- (e) The age of the person at the time of occurrence of the criminal offense ...;
- (f) The seriousness of the offense ...;
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and
- (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.

Applying these factors to Mr. Cann's case, the DOB concluded its explanation of its determination, stating that:

As Stationary Engineer you are responsible for ensuring that high pressure boilers operate safely by performing routine maintenance, shutting equipment down, making repairs, and regulating machinery as necessary. You must keep truthful and accurate records of boiler pressure, temperature, power output, and fuel consumption. Additionally, you are authorized to submit annual low pressure boiler inspection reports to the Department on behalf of building owners.

Your felony conviction for Bribery Receiving bears a direct relationship to your fitness and ability to perform the duties and responsibilities of a Stationary Engineer. Since as a licensee you may perform annual low pressure boiler inspections, you are susceptible to building owners offering bribes to prepare false annual boiler inspection reports reflecting the absence of defects. This is extremely serious given that public safety is at risk where such boiler defects go unreported and therefore, unrepaired. Additionally, this incident occurred less than ten years ago and you were forty-three years old, presumably a responsible adult who should not have engaged in such conduct. Although you provided letters of recommendation from your current employer, Metropolitan Hospital Center, you have not received a Certificate of Relief from Disabilities and therefore, have not presented sufficient evidence of rehabilitation in light of the above.

Based on the foregoing, the Department is unable to renew your Stationary Engineer license.

This Article 78 proceeding ensued.

Discussion

It is well established that judicial review of an administrative agency decision such as the one made by the DOB here is limited. As the Court of Appeals stated in the oft-cited case *Pell v Board of Education*, 34 NY2d 222, 231 (1974): "The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious'." In explaining that standard in a recent Article 78 proceeding upholding the DOB's denial of a license renewal, the First

Department, citing *Pell*, stated as follows in *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 (2010): "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." Further, when reviewing the agency's exercise of discretion with respect to the penalty imposed, the courts must defer to the agency unless the penalty "shocks the judicial conscience." *March v Rhea*, 82 AD3d 487, 488 (1st Dep't 2011), citing *Matter of Featherstone v Franco*, 95 NY2d 550, 554 (2000).

Petitioner contends that the DOB decision here is arbitrary and capricious in that the agency misconstrued certain facts and misapplied the various factors set forth in Correction Law §753(1) that are detailed above. In each and every instance, DOB responds by pointing to its detailed analysis of Mr. Cann's case.

As to the first factor, petitioner suggests that the DOB's "cookie-cutter" analysis circumvents the public policy encouraging the employment of persons convicted of crimes. The policy is indeed an important one, but the DOB respected it by giving petitioner a full and fair opportunity to be heard before finding a lack of good moral character based on a direct relationship between Cann's bribery conviction and the license sought and the risk to public safety that the renewal of the license would pose.

The DOB also addressed the second and third factors, relating to Cann's specific duties and the bearing his offense would have on his fitness to perform his duties. Specifically, the DOB found that Cann's conviction for Bribery Receiving directly related to his reliability in connection with the inspection of boilers and the preparation of accurate reports and the safety risks should defects not be properly reported. Wholly

unpersuasive is Cann's assertion that the decision is faulty because the DOB mistakenly assumed that he works on low pressure boilers, when his work at HHC involves only high pressure boilers. As respondent's counsel correctly notes, the Stationary Engineer's license authorizes one to work on low pressure boilers, and once licensed Cann could obtain a job that includes those duties. Further, his work with high pressure boilers is equally significant.

Cann further argues that six years have passed between his conviction and the license renewal and that his license was repeatedly renewed in the interim. However, the time period is not extraordinary. Further, that the DOB issued Cann prior license renewals following his conviction, or that it issued renewals to other applicants with similar convictions, does not bar the agency from denying Cann's renewal at this time. As the DOB correctly asserts, license renewals are asserted on a case-by-case basis and the principle of estoppel does not in any event apply to a municipal agency.

What is more, as the DOB explains in its Answer (at ¶74), the new Construction Code was enacted effective July 1, 2008 to require the disclosure of convictions for all license applications, and DOB began to review the newly required information in a phased approach. Its review of these disclosures on the part of Stationary Engineers began in July 2010, when Cann submitted the application at issue here.

With respect to the fifth and sixth factors, Cann was a mature individual in his forties when he was found to have committed the offense of Bribery Receiving in the Third Degree, which is a serious felony. The DOB reasonably concluded that at age 43, Cann was "presumably a responsible adult who should not have engaged in such conduct.

As to the seventh factor, the DOB in its determination did acknowledge the outstanding recommendations submitted by Cann's employer. However, it noted as well that Cann had not received a Certificate of Relief from Disabilities confirming his rehabilitation. Addressing the final factor and considering the public welfare, Cann emphasizes that his work has been without incident and that he is in any event supervised throughout his employment. However, reviewing the record as a whole, this Court cannot say that the DOB's determination is "without sound basis in reason or regard to the facts" or that the denial of the license renewal "shocks the judicial conscience."

Wholly misplaced is Cann's argument that this Court's decision in *Inglese v LiMandri*, 2010 NY Slip Op. Index No. 107806/10, compels a finding that the DOB denied Cann due process and failed to follow precedent. First of all, *Inglese* is distinguishable because it involved an evidentiary hearing pursuant to law; whereas such a hearing is required for a license revocation midstream as in *Inglese*, it is not required here in Cann's case which involves only the denial of a renewal application. See Respondent's Memorandum at p 16, citing Section 28-401.19. *Inglese* is further distinguishable because the Department there had relied on evidence outside the hearing record for its key findings that a relationship existed between Inglese's crime and his job responsibilities and that he lacked good moral character.

In sum, considering the particular facts of this case, the Court cannot find that the DOB's decision to deny Cann's license renewal application is arbitrary and capricious or an abuse of discretion. While Cann offered compelling evidence of his

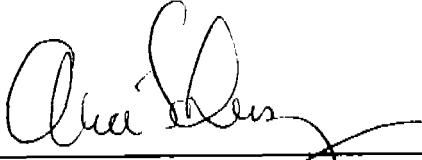
excellent work and that his continued performance of his duties would not pose a safety risk to the public, the DOB's finding of a relationship between Cann's crime of Bribery Receiving and the duties authorized by his license is not irrational. However, this decision is not intended in any way to bar Cann from applying for a license renewal based on new additional facts, such as the continued passage of time since the conviction and the issuance of a Certificate of Relief from Disabilities.

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed without costs or disbursements to either party.

Dated: June 20, 2011

JUN 20 2011



J.S.C.

ALICE SCHLESINGER
UNFILED JUDGMENT

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