

Panessa v Limandri

2011 NY Slip Op 32365(U)

August 12, 2011

Sup Ct, NY County

Docket Number: 101322/11

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Gene PANESSA

INDEX NO. 101322/11

MOTION DATE _____

- v -
Robert D. Limanoni

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

~~Notice of Motion/ Order to Show Cause~~ petition – Affidavits – Exhibits ... Memo
Answering Affidavits – Exhibits memo
Replying Affidavits memo

PAPERS NUMBERED

1, 2
3, 4

UNFILED JUDGMENT

Cross-Motion: Yes No

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).

Upon the foregoing papers, It is ordered that this motion appear

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 8/12/11
AUG 12 2011

[Signature]
BARBARA JAFFE 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 5

-----X
GENE PANESSA,

Index No. 101322/11

Petitioner,

Argued: 6/7/11
Motion Seq. No.: 001

- against -

DECISION AND JUDGMENT

UNFILED JUDGMENT

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

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).

Respondent.

-----X
BARBARA JAFFE, JSC:

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By order to show cause and verified petition dated February 4, 2011, petitioner brings this Article 78 proceeding seeking an order vacating and setting aside respondent's determination revoking his license, directing respondent to adopt the Report and Recommendation of the Office of Hearing and Administrative Trials and Hearings (OATH), and awarding him costs and attorney fees. By verified answer dated April 11, 2011, respondent opposes.

I. BACKGROUND

A. Applicable Statutes

Pursuant to New York City Administrative Code § 28-401.4, no person may engage in work covered by the New York City Construction Codes unless he or she is licensed to do so by the New York City Department of Buildings (DOB). All applicants for a license must be, among

other things, of good moral character. (Administrative Code § 28-401.6). The Commissioner of the DOB may suspend or revoke a license based on the licensee's "poor moral character that adversely reflects on his or her fitness to conduct work regulated by the code." (Administrative Code § 28-401.19). When the DOB seeks to suspend or revoke a license, the disciplinary proceeding is conducted by OATH. (48 RCNY 205-05).

Correction Law § 752 provides that a person's license may not be denied or acted adversely upon by reason of the licensee's prior criminal conviction or by a finding of a lack of good moral character unless: (1) there is a direct relationship between the prior criminal offense and the specific license held or (2) the continuation of the license would pose an unreasonable risk to the safety or welfare of others. In considering the effect of a criminal conviction on a license, the public agency must consider:

- (a) the state's public policy encouraging the licensure and employment of previously-convicted persons;
- (b) the specific duties and responsibilities necessarily related to the license or employment;
- © the bearing, if any, the criminal offense for which the person was convicted will have on his or her fitness or ability to perform one or more of such duties or responsibilities;
- (d) the lapse of time since the criminal offense;
- (e) the person's age at the time of the criminal offense;
- (f) the seriousness of the offense;
- (g) any information produced by the person or on his or her behalf regarding his or her rehabilitation and good conduct; and
- (h) the public agency's legitimate interest in protecting the safety and welfare of others.

(Correction Law § 753[1]).

B. Factual background

Sometime in 2003, petitioner was indicted, as part of a larger criminal enterprise, for

conspiracy to commit extortion, extortion, and mail fraud. (Verified Answer, dated Apr. 12, 2011 [Ans.], Exh. E). On September 22, 2004, he pleaded guilty to mail fraud for participating in a fraudulent scheme whereby members and associates of the Genovese organized crime family directed members of union Local 14 to assign him to work as an engineer at a construction site in August 2002, thereby depriving Local 14 members of the right to have honest services performed by Local 14 elected officials. (*Id.*, Exh. F). Although the crime carries a maximum prison sentence of 20 years (*id.*), petitioner was sentenced to a probationary term of two years along with a \$2,000 fine (*id.*, Exh. P).

In 2004, petitioner first applied for a Class C-1 Hoisting Machine Operator License (license), which DOB approved in July 2005. (Ans., Exhs. A, B). In 2006 and 2007, petitioner's renewal applications were approved. (*Id.*, Exh. C). Prior to July 2008, an applicant was not required to disclose prior criminal convictions or offenses. (*Id.*).

On January 4, 2007, petitioner completed his probation. (*Id.*, Exh. H). On his 2008 license renewal application, he disclosed that he had been convicted of a criminal offense. (*Id.*, Exh. D).

By letter dated September 22, 2009, the Buildings Special Investigations Unit of the DOB directed that petitioner appear for a meeting on October 7, 2009 to discuss matters relating to his license. (Petition, dated Feb. 2, 2011 [Pet.], Exh. A). Petitioner appeared for the meeting and provided several letters attesting to his good character; DOB interviewed him and demanded that he surrender his license or it would be revoked; petitioner refused to surrender his license. (*Id.*, Exh. B).

On or about May 5, 2009, DOB filed a petition with OATH seeking a hearing on two

charges against petitioner, both related to his guilty plea: (1) a violation of New York City Administrative Code § 28-401.19(13) (poor moral character that adversely reflects on his fitness to conduct work regulated by the Code); and (2) a violation of New York City Administrative Code § 28-401.19(7) (failure to comply with the code or any order, rule or requirement lawfully made by the commissioner including failure to cooperate with investigations related to the trade for which the individual is licensed, conducted by the commissioner or other government entity). (*Id.*, Exh. C).

On or about June 30, 2010, petitioner filed an amended answer to the petition, and on or about July 12, 2010, DOB filed a reply to his answer. (*Id.*, Exhs. D, E). By stipulation dated August 24, 2010, DOB withdrew charge two. (*Id.*, Exh. F).

On November 4, 2010, a hearing was held before OATH, and by Report and Recommendation dated December 17, 2010 (Report), an OATH Administrative Law Judge (ALJ) found petitioner guilty of the charge against him and recommended a one-year suspension. Although observing that in several recent cases before OATH, the licenses of other hoist machine operators had been revoked based on their convictions for federal crimes related to the construction industry, the ALJ also noted that revocation of an operator's license is not mandatory and that the appropriate penalty must be determined on a case-by-case basis and in light of Correction Law 753. (*Id.*, Exh. K). The ALJ determined that the following factors warranted only a one-year suspension in petitioner's case:

- (1) New York State's public policy in favor of employing ex-offenders;
- (2) petitioner's perfect safety record in operating a hoist machine;
- (3) the facts that petitioner's crime occurred eight years ago, that after his arrest he admitted his guilt, served his sentence, and paid his fine, and that he obtained his license after he was sentenced and DOB repeatedly renewed it;

- (4) that petitioner had no prior or subsequent arrests or convictions;
- (5) that although the criminal offense was serious, petitioner, who could have received up to 20 years in prison, only received a \$2,000 fine and probationary term with home confinement and no incarceration, which suggested that his role in the criminal enterprise was minor; and
- (6) extensive evidence of petitioner's good character and rehabilitation.

Based on these factors, the ALJ concluded that:

Viewed in its entirety, the record demonstrates that [petitioner] is a hard-working skilled professional who made a serious error in judgment when he received preferential treatment for his job in 2002. As a result of his actions, he pled guilty to a crime and served his sentence. He has presented a wealth of mitigation that demonstrates his rehabilitation. Despite the nature of his offense and [DOB]'s legitimate interests in honest licensees, a penalty less than revocation would strike the proper balance between [DOB]'s mission and the state's policy of encouraging rehabilitation. A lesser penalty would reflect [petitioner's] current moral fitness to hold a license.

(*Id.*, Exh. K).

By letter dated January 5, 2011, respondent notified petitioner that he had reviewed the Report and determined that revocation of petitioner's license was the appropriate penalty, as follows:

Your acts of participating in a mail fraud scheme on a construction job site are sufficient to establish poor moral character that adversely reflects on your fitness to hold a licensed position in the construction industry . . . Your age at the time of the conviction (38), the seriousness of the crime and its direct relationship to and involvement in the construction industry all support my determination . . .

Respondent disagreed with the ALJ's determination that petitioner's criminal punishment had been relatively lenient, and observed that revocation of petitioner's license did not bar him from all employment in the construction industry but only those jobs requiring a hoist machine operator's license. Respondent also found that despite the passage of time between petitioner's conviction and the license revocation proceeding, the conviction "involves a crime of corruption, fraud and dishonesty and is indicative of poor moral character." (*Id.*).

II. CONTENTIONS

Petitioner contends that respondent's determination was arbitrary and capricious and irrational as respondent ignored the ALJ's recommendation and the majority of the factors in petitioner's favor cited therein and instead focused on the factors that weighed against him. Petitioner also alleges that it was improper for respondent to both initiate the charges against him and then render the final determination. (Memo. of Law, dated Jan. 20, 2011).

Respondent maintains that as petitioner raised an issue of substantial evidence, the proceeding must be transferred to the Appellate Division, First Department. He also argues that his determination was rational and reasonable and supported by substantial evidence, and that the revocation of petitioner's license is not so disproportionate to his offense as to be shocking to one's sense of fairness. Respondent denies that he improperly rendered the final determination after initiating the charges against petitioner. (Memo. of Law, dated Apr. 12, 2011).

In reply, petitioner asserts that respondent ignored evidence of his good moral character and that respondent routinely ignores and overrides ALJ determinations, and denies that any substantial evidence issue has been raised. (Reply Memo. of Law, dated May 31, 2011).

III. ANALYSIS

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, the determination of an administrative agency, "acting pursuant to its

authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record."

(Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 [1st Dept 2007], *aff'd* 11 NY3d 859 [2008]).

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of E.W. Tompkins Co., Inc. v State Univ. of New York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 701; *Matter of Mankarios v New York City Taxi and Limousine Commn.*, 49 AD3d 316, 317 [1st Dept 2008]; *Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1st Dept 2006]; *Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]).

If the court determines that the administrative determination has a rational basis, the court's inquiry is complete; it may not substitute its judgment for that of the administrative agency. (*Paramount Communications, Inc. v Gibraltar Cas. Co.*, 90 NY2d 507 [1997]).

Moreover, where a determination is supported by a rational basis, "an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions are entitled to great deference." (*Matter of Arif v New York City Taxi and Limousine Commn.*, 3 AD3d 345 [1st Dept 2004], *lv granted* 2 NY3d 705, *appeal withdrawn* 3 NY3d 669).

As petitioner does not argue that respondent's determination was not supported by

substantial evidence, but that respondent did not properly render the determination, there is no need to transfer this proceeding to the Appellate Division, First Department.

Here, while Correction Law § 753 requires the consideration of eight factors in deciding the impact of a criminal conviction on a license, respondent's determination does not reflect that he did so. Rather, respondent focused solely on petitioner's crime in deciding that petitioner had poor moral character, and there is no evidence that he evaluated the other factors. (*See eg Matter of Acosta v New York City Dept. of Educ.*, 16 NY3d 309 [2011] ["A failure to take into consideration each of these factors results in a failure to comply with the Correction Law's mandatory directive"]; *Matter of Arrocha v Bd. of Educ. of City of New York*, 93 NY2d 361 [1999] [licensing body must consider all statutory factors in deciding whether to grant license to applicant with prior conviction]; *Matter of Gallo v State, Office of Mental Retardation and Developmental Disabilities*, 37 AD3d 984 [3d Dept 2007] ["(w)hen all eight factors are considered and the positive factors are balanced against the negative factors, the resulting decision is neither arbitrary nor capricious nor does it constitute an abuse of discretion"]).

In contrast, the ALJ considered all of the factors, which preponderated in petitioner's favor: New York's public policy of encouraging the licensing of previously-convicted people, petitioner's duties and responsibilities as a hoist machine operator and the minimal bearing, if any, that petitioner's criminal offense had on his ability to perform such duties, the eight years that had elapsed since the criminal offense, the fact that petitioner was 36 years old at the time, that while the crime was serious, petitioner had received a relatively lenient sentence, and the facts that petitioner had no subsequent arrests, that he had a perfect safety record since receiving his license, and that numerous people, including work supervisors and co-workers, had attested

to his good character. And he concluded that a one-year suspension was the appropriate penalty.

Respondent's focus on petitioner's crime in evaluating petitioner's fitness to maintain his license contravenes the express purpose of the Correction Law, which prohibits the loss of a license based solely on a previously-committed crime. (*See Matter of Acosta*, 16 NY3d at 309 [observing that Correction Law § 752 enacted to promote goals of "the rehabilitation of those convicted" and "the promotion of their successful and productive reentry and reintegration into society," and that pro forma denial of application based on prior conviction without consideration of each factor "is precisely what (Correction Law § 753) prohibits"]). Petitioner committed his crime before he obtained his license and that since being licensed, his safety record has been perfect and he has not been arrested, thus rendering purely speculative any belief or allegation that petitioner's criminal background poses a risk to public safety.

In light of petitioner's showing that the majority of the factors weigh in his favor and absent any indication that respondent considered them in making his determination, petitioner has established that respondent's decision to revoke his license was irrational and arbitrary and capricious. (*See Matter of Formica Constr., Inc. v Mintz*, 65 AD3d 686 [2d Dept 2009] [court properly annulled determination as papers did not reflect that agency considered all eight factors]; *Matter of Gallo*, 37 AD3d at 984 [as respondent did not consider two statutory factors, determination was arbitrary]; *compare Greenberg v Wrynn*, 2011 NY Slip Op 05872 [1st Dept 2011] [finding that respondent considered and properly balanced all factors]).

In light of this result, I need not address the parties' remaining contentions except that petitioner has not set forth any legal ground upon which to grant him attorney fees and costs.

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED and ORDERED, that the petition is granted and respondent's January 5, 2011 determination is vacated and annulled; and it is further

ADJUDGED and ORDERED, that the matter is remanded with the directive that respondent accept the recommendation of the ALJ, and when the one-year suspension is completed, respondent must renew petitioner's hoist machine operator's license at issue here.

ENTER:

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Barbara Jaffe, JSC

BARBARA JAFFE

UNFILED JUDGMENT

DATED: August 12, 2011
New York, New York

AUG 12 2011

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