

**Matter of Wyler v Limandri**

2011 NY Slip Op 32809(U)

October 25, 2011

Sup Ct, NY County

Docket Number: 104779/11

Judge: Joan B. Lobis

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Joan B. Lobis  
*Justice*

PART 6

Index Number : 104779/2011  
WYLER, THOMAS  
vs.  
LIMANDRI, ROBERT D.  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 8/16/11  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motlon to/for \_\_\_\_\_

PAPERS NUMBERED

1-17  
18-28  
29

venue 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~~ *petition* is decided  
in accordance with accompanying decision,  
order, and judgment.

**FILED**

OCT 26 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/25/11

JBL  
**JOAN B. LOBIS**  
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  
NEW YORK COUNTY: IAS PART 6**

-----X  
In the Matter of the Application of  
THOMAS G. WYLER,

Petitioner,

Index No. 104779/11

-against-

Decision, Order, and Judgment

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

Respondents.

-----X  
JOAN B. LOBIS, J.S.C.:

**FILED**

**OCT 26 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Petitioner Thomas G. Wyler brings this special proceeding under Article 78 of the C.P.L.R. against respondents Robert D. Limandri, as Commissioner of the New York City Department of Buildings ("DOB") and the City of New York, primarily seeking a judgment annulling respondents' January 10, 2011 determination that petitioner did not meet the requirements for renewal of his stationary engineering license ("Determination"). Respondents answer and assert that the Determination was rational and lawful, and thus should not be disturbed.

Petitioner has maintained a stationary engineering license in New York City since 1990. In 1994, he began working for the New York City Board of Education ("BOE"), now the New York City Department of Education ("DOE"), as a custodian engineer. In February 2003, petitioner was indicted and arrested in connection with an investigation by the Attorney General into New York City public school custodians accepting kickbacks for awarding window-cleaning contracts to one particular company. On August 4, 2003, in full and final satisfaction of all twelve counts against him, petitioner pled guilty to one count of offering a false instrument for filing in the second degree

in connection with a false expenditures report that he submitted to the BOE on August 5, 1999. See Penal Law § 175.30. Petitioner's sentence consisted of a conditional discharge for one year; permanent bar from employment with BOE/DOE; resignation from BOE/DOE within thirty (30) days of the plea; and payment of \$10,000 as restitution. Petitioner was issued a certificate of relief from disabilities and fully complied with the terms and conditions of his plea arrangement.

On March 21, 2005, petitioner was hired by MTA New York City Transit ("MTA"). He has always disclosed his conviction to MTA and he has now worked there for six years. Maintaining a stationary engineering license is a requirement of his position. In order to maintain the license, petitioner must apply for renewal and DOB must approve the renewal annually. In 2008, DOB changed the application so that applicants must answer whether they have ever been convicted or pled guilty to a violation, misdemeanor, or felony. In his 2008 and 2009 applications, which DOB approved, petitioner truthfully answered that he had pled guilty to a misdemeanor and attached a brief description. When he tried to renew in September 2010, DOB responded to petitioner's application with a letter dated October 25, 2010, stating that although petitioner had previously disclosed his conviction, it was within DOB's discretion to conduct a further investigation and evaluation of petitioner's character as it relates to his duties as a licensee. DOB returned his application and asked him to submit a written explanation of the circumstances of his conviction and evidence of rehabilitation. Petitioner resubmitted his application with a letter explaining that in 1996, his job at BOE/DOE included reviewing and submitting bids for window cleaning. A contractor had submitted a bid to him that was misleading and inaccurate, and petitioner had submitted the bid knowing that the information contained therein was false. Petitioner

acknowledged that he made a poor choice at the time that was out of character for him. Petitioner set forth that since the incident, he has rehabilitated himself, spent time working hard in the trucking industry, worked for MTA for five years without taking one sick day, and strived to advance himself to the position of chief engineer. He also pursued a bachelors degree at Nyack College and graduated in May 2010.

By letter dated January 10, 2011, DOB issued a determination that petitioner does not meet the requirements for renewal of his stationary engineering license. DOB stated that based on its review of the circumstances of petitioner's conviction, he has not satisfied the requirement that licensees possess good moral character. As a stationary engineer, petitioner must ensure that high pressure boilers operate safely; must retain truthful and accurate records of boiler readings; and is authorized to submit annual low pressure boiler inspection reports to DOB. DOB set forth that petitioner's conviction bears a direct relationship to his fitness and ability to perform these duties, particularly to submitting inspection reports, in that "it is imperative that these submissions are reliable in order to protect the safety and welfare of the public." Further, DOB stated that the conviction occurred less than ten years ago when petitioner was forty-four (44) years old, "presumably a responsible adult who should not engaged [*sic*] in such conduct." While petitioner had presented a certificate of relief from disabilities, DOB determined that he had not presented "sufficient evidence of rehabilitation in light of the above."

By letter dated March 9, 2011, petitioner requested that DOB reconsider his renewal application. He included copies of work evaluations in 2005 and 2009 describing his services at

MTA as satisfactory, recommending his continued employment, and indicating zero sick leave days or absences without pay; a letter from his supervisor, Raymond Takacs, dated February 2, 2011, describing him as "bright, conscientious, honest, hard working, industrious, and eager to solve any problems" and heartily attesting to his capabilities as a stationary engineer; a letter from James Loiacono, Superintendent of MTA at the time petitioner was hired, stating that petitioner fully disclosed his misdemeanor when he was hired by MTA and that since he was hired, he has been a dedicated, reliable, and exemplary employee that Mr. Loiacono approved for a promotion in 2009; and a letter from petitioner's psychotherapist, Steven Barlow, Ph.D., attesting to petitioner's constant efforts to better himself and his good moral character and work ethic. On April 19, 2011 (after this petition had already been filed), DOB responded to petitioner's request that it reconsider his application, stating that the additional materials submitted did not change DOB's position regarding its evaluation of petitioner's conviction under the NYS Corrections Law, "given that the criminal offense took place while Mr. Wyler was employed as a school custodian for the City of New York and in light of the fact that Mr. Wyler's conviction is for a crime involving moral turpitude related to the duties and responsibilities of the licensee."

The operation of a high-pressure steam boiler (i.e., the work of a stationary engineer) is work regulated by Article 413 of New York City's Construction Code (Title 28 of the New York City Administrative Code). Under Admin. Code § 28-401.4, anyone engaged in work covered by the Construction Code must obtain a license from DOB. In pertinent part, "[a]ll applicants for a license . . . shall be of good moral character, and shall meet additional qualifications that may be prescribed for the particular license or certificate of competence." Admin. Code § 28-401.6. DOB

“may, following notice and an opportunity to be heard, refuse to renew a license or certificate of competence on any grounds on the basis of which it could deny, suspend or revoke such license.”

Admin. Code § 28-401.12. Under section 28-401.19, DOB may suspend or revoke a license for a number of reasons, including “[c]onviction of a criminal offense where the underlying act arises out of the individual's professional dealings with the city or any other governmental entity,” or “[p]oor moral character that adversely reflects on his or her fitness to conduct work regulated by this code.”

Under New York’s Correction Law, unfair discrimination against persons previously convicted of one or more criminal offenses is prohibited. Correction Law § 752 sets forth that

[n]o application for any license . . . shall be denied . . . by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of “good moral character” when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license . . . sought or held by the individual; or

(2) the issuance or continuation of the license . . . would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Id. “Direct relationship” is defined in Correction Law § 750 as meaning “that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question.” “Unreasonable risk” is not defined in the Correction Law, but “a finding of unreasonable risk depends upon a subjective analysis of a variety of considerations relating to the nature of the license . . . sought and the prior misconduct.” In re Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 612 (1988).

In making a determination pursuant to Correction Law § 752, the public agency shall consider eight factors:

(a) The public policy of this state, as expressed in this act, to encourage the licensure . . . of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license . . . sought or held by the person.

(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.

Correction Law § 753(1). A certificate of relief from disabilities creates a presumption of rehabilitation with regard to the offense. Correction Law § 753(2); see also Bonacorsa, 71 N.Y.2d at 614. If an agency relies on the “direct relationship” exception, the “agency . . . must consider the factors mentioned in section 753 (1) to determine whether in fact the direct relationship is sufficiently attenuated to warrant issuance of the license.” Id. at 612 (italics omitted). If an agency relies on the “unreasonable risk” exception, it must consider and apply the factors in section 753(1) “to determine if in fact an unreasonable risk exists. The . . . agency may not assume that the exception applies and then consider the factors to determine whether . . . the license should nevertheless be granted.” Id. at 613. Further,

[i]f the employer or agency considers all eight factors listed in section 753 (1), it need not in every case produce independent evidence to

rebut the presumption of rehabilitation before denying a license or employment. In some cases, consideration of other factors such as severity of the criminal offenses, the age of the offender at the time of the offenses, the passage of time between the offenses and the application, and the nature of the license . . . sought can warrant denial of the license notwithstanding the absence of new evidence specifically addressed at overcoming the presumption of rehabilitation. In other cases failure of the agency . . . to rebut the presumption of rehabilitation with evidence suggesting that there has been no rehabilitation will result in an arbitrary and capricious determination.

*Id.* at 614 (italics omitted). An agency's failure to consider each of the factors in section 753(1) "results in a failure to comply with the Correction Law's mandatory directive." *In re Acosta v. New York City Dep't of Educ.*, 16 N.Y.3d 309, 316 (2011). The exceptions to the general rule that it is unlawful to deny an application for a licence on the basis of a prior conviction "may be resorted to only upon a consideration of each of the eight factors enumerated in [section 753(1)]." *Id.* at 320.

Petitioner argues that the Determination is arbitrary and capricious because DOB denied his renewal application solely on the basis of the prior conviction without properly evaluating the statutory factors set forth in Correction Law § 753. He maintains that DOB failed to consider his certificate of relief from disabilities as presumptive evidence of his rehabilitation. He further alleges that the Determination violates the New York City and New York State Human Rights laws making it an unlawful discriminatory practice to deny a license or employment based on a criminal conviction when such denial violates the Correction Law. Petitioner also argues that the "poor moral character" standard is an impermissibly vague standard susceptible to multiple and varied meanings in violation of due process principles.

Respondents argue that the Determination is rational because the circumstances of petitioner's conviction implicate the two exceptions set forth in Correction Law § 752. They aver that, as petitioner's guilty plea was for filing a false document with a government entity, DOB cannot rely on petitioner to keep or file truthful and accurate records of boiler maintenance. Respondents maintain that the Determination reflects that in finding that both exceptions applied to petitioner's circumstances, DOB properly considered the statutory factors set forth in Correction Law § 753. Respondents also argue that the "good moral character" requirement in Admin. Code § 28-401.19 is not impermissibly vague, as it is well settled that a licensing official has discretion to pass upon the fitness of applicants, guided by the history and purpose of the licensing statute. Respondents argue that when read in conjunction with Admin. Code § 28-101.2, which sets forth that the Construction Code regulates building construction and service equipment in the interest of public safety, health, and welfare, the relevant factors in determining poor moral character as set forth in Section 28-401.19 are clearly implied and necessarily include petitioner's conviction from less than ten years ago, the age at which he was convicted, and the nature of the offense.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974); C.P.L.R. § 7803(3). "In this regard, the court's scope of review is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing the underlying factual determinations." In re Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992) (citation omitted). A determination is considered "arbitrary" when it is

made “without sound basis in reason and is generally taken without regard to the facts.” Pell, 34 N.Y.2d at 231 (citation omitted). If the court finds a rational basis for the determination, its inquiry is over and the determination must be sustained. See In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009) (citation omitted). Further, the “court[] must defer to an administrative agency’s rational interpretation of its own regulations in its area of expertise.” Id. (citation omitted).

Given the facts of this case, the court is constrained to deny petitioner’s request that the Determination be annulled. The record shows that DOB considered the eight factors in Correction Law § 753(1) and, in considering the factors, arrived at a determination that has some rational basis. While the certificate of relief from disabilities is presumptive evidence of petitioner’s rehabilitation, precedent in New York permits the agency to consider “other factors such as severity of the criminal offenses, the age of the offender at the time of the offenses, the passage of time between the offenses and the application, and the nature of the license[,]” even when there is no new evidence that the applicant has not been rehabilitated. In re Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 614 (1988). DOB’s consideration of these other factors—i.e., that petitioner was a mature adult at the time of the offense, that the length of time that has passed since the conviction is not that long, that petitioner was convicted of offering a false instrument for filing, and that his responsibilities as a licensee would include filing inspection reports to DOB—rationally supports the Determination. It was not irrational for DOB to find that the nature of the offense has a direct relationship to the responsibilities of the license, or that, given the implications involving safety and boiler inspections, issuing the license may involve an unreasonable risk to property or public safety. Petitioner was given a full and fair opportunity to be heard and although the court disagrees with the weight that

respondent gave to some of the factors over other factors in that were petitioner's favor, the court may not disturb the Determination without engaging in an impermissible re-weighting of the factors. In re Arrocha v. Bd. of Educ., 93 N.Y.2d 361, 367 (1999). Further, the fact that DOB has issued license renewals to petitioner every year except for the most recent application, even after his guilty plea, does not bar it from declining to renew the license this time, since it is well settled that the principle of estoppel does not apply to municipal agencies.

Petitioner's contention that the "poor moral character" standard articulated in Admin. Code §§ 28-401.12 and 28-401.19 is impermissibly vague is without merit. A statute or regulation is "unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement." People v. Foley, 94 N.Y.2d 668, 681 (2000). Petitioner contends that the words "poor moral character" are subject to multiple and varied meanings. However, the statute limits the words "poor moral character" to that which "adversely reflects on his or her fitness to conduct work regulated by this code." Admin. Code § 28-401.19(13). Further, when sections 28-401.12 and 28-401.19 are read in conjunction with the requirements, qualifications, and responsibilities of all licensees and specifically stationary engineers set forth in the Construction Code, the words are sufficiently clear as to apprise a person of ordinary intelligence with a reasonable opportunity to know what is prohibited and do not implicate issues of arbitrary or discriminatory enforcement.

Finally, given the court's decision that the Determination was rational with respect to the Correction Law, petitioner's argument that the Determination violates the New York City and New York State Human Rights also fails.

Accordingly, it is hereby

ORDERED that the petition is denied and the proceeding is dismissed.

Dated: Oct. 25, 2011

ENTER:

**FILED**

**OCT 26 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.