

Matter of DaCruz v Banking Dept. of the State of N.Y.
2012 NY Slip Op 30255(U)
February 1, 2012
Supreme Court, New York County
Docket Number: 106833/11
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 106833/2011
 DACRUZ, CHARLES
 vs.
 NYS BANKING DEPARTMENT
 SEQUENCE NUMBER : 002
 OTHER RELIEFS

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

is decided in accordance with the annexed decision.

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NEW YORK
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Dated: 2/1/12

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

CHARLES DACRUZ,

Petitioner,

Index No. 106833/11

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

DECISION/ORDER

-against-

BANKING DEPARTMENT OF THE STATE OF
NEW YORK, RHOLDA RICKETTS, DEPUTY
SUPERINTENDENT OF BANKS,

Respondents.
-----X

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

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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>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>3</u>

Petitioner Charles DaCruz brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to annul a determination made by the New York State Banking Department ("NYSBD") dated October 4, 2011 (the "Denial Letter"). In the Denial Letter, the NYSBD denied petitioner's application for a Mortgage Loan Originator ("MLO") license under Article 12 of the Banking Law § 599-e. Respondents cross-move to dismiss the petition for failure to state a claim. For the reasons set forth below, respondents' cross-motion to

dismiss the petition is granted and the petition is dismissed in its entirety.

The relevant facts are as follows. Petitioner applied to the NYSBD for a license to engage in MLO activities. In early 2011, the NYSBD's Legal Division evaluated petitioner's background pursuant to the character and fitness requirements set forth in Banking Law § 599-e(1)(c) and Superintendent's Regulations § 420.6(d). During its evaluation, the Legal Division learned that petitioner had been involved in regulatory proceedings related to misconduct that he had engaged in between June 1998 and June 1999 while he was registered as a securities representative at a firm regulated by the National Association of Securities Dealers ("NASD").

Specifically, the Legal Division learned that following a 2004 complaint against petitioner, an NASD Hearing Panel held a six-day hearing in late 2004 and early 2005. At the hearing, petitioner testified on his own behalf, was represented by counsel and had the opportunity to cross-examine witnesses. In September 2005, the NASD Hearing Panel issued its Decision, finding that petitioner had violated § 10(b) of the Securities Exchange Act of 1934, the Securities and Exchange Commission Rule § 10b-5 and the NASD Conduct Rules 2120 and 2110 by failing to disclose to customers compensation earned from the sale of a particular stock and by making baseless price predictions related to that stock. Petitioner received a one-year suspension and was fined \$67,000.

Petitioner appealed the NASD Hearing Panel's Decision. On January 3, 2007, NASD's National Adjudicatory Council ("NAC") issued a Decision upholding the Hearing Panel's Decision. The NAC concluded that, by "failing to disclose" this compensation to his customers, as well as by "making baseless predictions" of the stock's price, petitioner had "engaged in fraudulent misconduct." The NAC also ordered petitioner to "disgorge the financial benefit from

[his] misconduct as a fine to NASD in the amount of \$67,000." The NAC modified the sanctions against the petitioner by extending his one-year suspension to a bar "in all capacities."

Furthermore, the Legal Division learned that the NAC made numerous findings regarding petitioner's "egregious misconduct." Among the findings were that petitioner "engaged in...fraudulent sales practices over an extended period of time through which [he] obtained a sizable monetary benefit"; his "misconduct involves a voluminous number of transactions involving many customers"; he "willingly accepted the sales incentives [and] provided the baseless predictions to customers"; and he "totally ignored [his] general duty of fair dealing" to his customers. Thus, the NAC Decision concluded that "a bar is necessary to prevent [petitioner] from inflicting similar harm to customers in the future." The NAC stated that petitioner's "customers placed their trust and confidence in [him] to recommend stocks without secret inducements for those recommendations and without baseless predictions of future value," and that petitioner "violated that trust." The NAC further stated that petitioner "engaged in fraudulent sales tactics in complete disregard of...[his] obligations to...[his] customers."

In its evaluation, the Legal Division also learned that petitioner was subject to an additional state regulatory action by the New Jersey Bureau of Securities (the "Bureau"). The Bureau reviewed the NAC Decision and the NASD Hearing Panel Decision and, as a result, issued a February 26, 2007 Summary Revocation Order (the "Order") revoking petitioner's registration as an agent with an NASD broker-dealer. The Order stated that it was based upon findings that revocation was "in the public interest" and that petitioner was "the subject of an order...suspending or expelling him from a national securities or commodities exchange." Additionally, as a separate ground for revocation, the Bureau also found that the misconduct

described in the 2007 NAC Decision and the 2005 NASD Hearing Panel Decision "constituted dishonest or unethical practices in the securities business, which are good cause...to revoke [petitioner's] registration as a securities agent." The Bureau also stated that the Order was "necessary for the protection of investors."

Additionally, the Legal Division learned of various dispute-resolution awards and settlements related to petitioner's actions as an NASD registrant. In an arbitration proceeding, petitioner and others were found jointly and severally liable to certain claimants for approximately \$56,781 following allegations of breach of contract, breach of fiduciary duty, misrepresentation, fraud, and violations of multiple securities laws and regulations. Further, FINRA documentation appeared to indicate that petitioner settled for \$5,000 a claim that related to the events underlying the above-noted NASD case. FINRA documentation also indicated that a complaint was received alleging "unauthorized trades, inappropriate use of margin and lack of diversification in account." The documentation also indicated that a \$20,000 settlement was paid, of which petitioner's "Individual Contribution Amount" was \$10,000. Further, the Legal Division learned that a FINRA BrokerCheck Report for petitioner indicated that a \$150,000 settlement was paid, of which petitioner's "Individual Contribution Amount" was \$75,000, following allegations that a client's impaired mental faculties were taken advantage of. Finally, in 2005, a customer initiated an arbitration claim against petitioner alleging breach of contract, breach of fiduciary duty and misrepresentations. An "Addendum" submitted as part of petitioner's MLO license application indicated that on an unspecified date, petitioner "may have contributed \$2,500" to a \$5,000 settlement of this claim.

In performing its analysis and evaluation of petitioner's application for an MLO license,

the Legal Division reviewed the NASD Hearing, petitioner's appeal thereof and the subsequent NAC decision, as well as the various dispute resolution awards and settlements described above. In doing so, the Legal Division balanced the "relevant factors" pursuant to the character and fitness provisions of Banking Law § 599-e(1)(c) and Superintendent's Regulations § 420.6(d). Specifically, Banking Law § 599-e(1)(c) provides:

1. Findings. Notwithstanding any other law, the superintendent shall not issue a mortgage loan origination license unless he or she makes, at a minimum the following findings:

(c) Character and fitness. That the applicant has demonstrated financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the MLO will operate honestly, fairly, and efficiently within the purposes of this article.

Superintendent's Regulations § 420.6(d) provides:

The Superintendent must deny an application unless he or she finds that the applicant possesses the general character and fitness...and other factors set forth in Section 599-e of the Banking Law. In making such determination the Superintendent may consider all relevant factors, including but not limited to, employment history; educational background; financial responsibility; history of complaints or consumer abuse relating to real estate transactions; regulatory fines and enforcement actions; revocation, suspension or denial of licenses, certifications, authorizations or registrations in this state or any other state.

Accordingly, the Legal Division made several findings concerning petitioner's prior conduct.

The Legal Division found that petitioner's misconduct was closely related to the duties and responsibilities of holding an MLO license. It determined that petitioner engaged in fraudulent conduct aimed at numerous customers for his own financial benefit in complete disregard of his obligations toward these customers.

The Legal Division also balanced petitioner's prior conduct with the following factors:

petitioner was born in 1971 and was thus fully an adult in 1998 and 1999 when he engaged in the misconduct described above. The Legal Division also noted that despite the misconduct occurring approximately twelve years ago, the NAC's decision was issued in 2007, thereby indicating that despite the passage of time, petitioner's misconduct was deemed to be so serious that petitioner's original one-year suspension was increased to a complete bar. The Legal Division also took note of the fact that following its own review of the NAC Decision, the New Jersey Bureau of Securities issued a 2007 revocation of petitioner's registration as an agent with an NASD broker-dealer which was deemed "necessary for the protection of investors."

Finally, the Legal Division considered information provided by petitioner in regard to his purported good conduct and rehabilitation. Such information included, among other things, letters of recommendation from multiple customers for whom petitioner had served as a loan officer or mortgage specialist and an explanatory letter, dated September 29, 2010, which stated, among other things, that petitioner had during more than three years in the mortgage industry, never received a complaint from a borrower. Despite this information, however, the Legal Division concluded that these mitigating factors did not outweigh either the evidence of extensive customer abuse or the explicit concerns regarding future abuse detailed in the 2007 NAC Decision. Thus, the Legal Division concluded that there was a sufficient legal basis to deny petitioner an MLO license pursuant to the character and general fitness provisions of Banking Law §599-e(1)(c) in that he had not demonstrated the character and general fitness necessary to be issued an MLO license. By letter dated April 4, 2011, the Deputy Superintendent denied petitioner's application, which was deemed to be a final determination.

In or around June 2011, petitioner commenced this Article 78 proceeding by filing a Notice of Petition seeking an order annulling the NYSBD's April 4, 2011 denial of petitioner's

application to engage in business as an MLO. Through counsel, the NYSBD subsequently requested that petitioner withdraw his petition without prejudice. On or about August 29, 2011, the petition was withdrawn by stipulation. Following withdrawal of the petition, the NYSBD performed an additional review of petitioner's MLO license application. Petitioner's application and the factors discussed above were analyzed and the NYSBD affirmed the evaluation of petitioner's character and fitness. It was again determined that petitioner had not demonstrated the requisite character and fitness pursuant to Banking Law §599-e(1)(c). Thus, by letter dated October 4, 2011, the NYSBD denied petitioner's MLO application. Petitioner then commenced this Article 78 proceeding with the filing of an Amended Notice and Petition on November 14, 2011 challenging the NYSBD's denial of his application for an MLO 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 there was a rational basis for the NYSBD's

decision to deny petitioner's application for an MLO license. As stated above, the NYSBD made its determination on the ground that petitioner failed to establish the requisite character and general fitness required by Banking Law § 599-e(1)(c), which mandates that an MLO applicant demonstrate "financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the MLO will operate honestly, fairly, and efficiently." The NYSBD reviewed petitioner's application while taking into consideration petitioner's NASD Hearing, petitioner's appeal thereof and the subsequent NAC Decision, as well as the various dispute resolution awards and settlements in which petitioner had to pay considerable amounts of money. It was rational for the NYSBD to determine that petitioner's conduct amounted to a showing of a lack of character and general fitness for an MLO license.

While petitioner asserts that the amount of time that has elapsed between his misconduct and his application for an MLO license should mitigate, if not override, the seriousness of his actions, this argument is without merit. It was rational for the NYSBD to decide that although some time had passed between petitioner's egregious misconduct and his application for an MLO license, there remained concerns about petitioner's conduct in the future. Furthermore, while New York State adheres to a policy of fair treatment of rehabilitated offenders, it was rational for the NYSBD to determine that petitioner was unfit to receive an MLO license as the Legal Division found that there was a direct relationship between petitioner's demonstrated character and fitness and the license sought.

Further, petitioner's reliance on *Matter of Robert Warner v. New York State Racing and Wagering Board*, 143 A.D.2d 500 (4th Dept 1988) for the proposition that the lapse of time and

other evidence of rehabilitation justifies the granting of petitioner's application is misplaced as the facts of this case are distinguishable. In this case, there is evidence of extensive misconduct on the part of petitioner prior to his application for an MLO license whereas in *Warner*, the court found significantly less misconduct.

Accordingly, petitioner's request for relief under Article 78 of the CPLR annulling the NYSBD's Determination, dated October 4, 2011, is denied and respondents' cross-motion to dismiss the petition is granted. The petition is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 2/1/12

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J.S.C.

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