

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

2012 NY Slip Op 30385(U)

February 16, 2012

Supreme Court, New York County

Docket Number: 110705/2011

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Joan B. Lobis  
Justice

PART 6

Index Number : 110705/2011  
LICATA, PETER  
vs.  
DEPT. OF CITYWIDE  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 12/2/11  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1-33  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 34-48  
Replying Affidavits \_\_\_\_\_ No(s) 49-52

Upon the foregoing papers, it is ordered that this motion is

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

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER &  
JUDGMENT

FILED

FEB 21 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/16/12

Joan B. Lobis, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
In the Matter of the Application of

PETER LICATA

Petitioner,

Index No. 110705/11

For a Judgment under Article 78 of the  
Civil Practice Law and Rules

**Decision, Order, and Judgment**

-against-

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

Respondents,

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

**FILED**

FEB 21 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Petitioner Peter Licata brings this proceeding under Article 78 of the C.P.L.R., seeking an order annulling a determination by respondent Department of Buildings ("DOB") to deny him a master plumber's license. The other respondent is the Department of Citywide Administrative Services ("DCAS"), which administers the written and practical examinations for master plumber's license applicants. For the reasons discussed below, the petition is denied.

The record indicates that on February 15, 2006, petitioner submitted an application for a master plumber's license examination. Under the section for experience, petitioner wrote that he had been employed as follows: from September 1978 to December 1979 at Tag Pipe Inc. ("Tag Pipe"), operating threading machines and fabricating pipe; from January 1980 to December 1980, at Licata Piping & Heating ("Licata P&H"), designing and installing plumbing in the United States; from January 1981 to December 1982, at Five Brothers Piping & Heating ("Five Brothers"),

designing and installing plumbing in the United States; from January 1986 to May 1986, at Normandy Construction Corp. ("Normandy"), designing and installing plumbing in the United States; from May 1986 to December 1987, at March Plumbing & Heating ("March P&H"), designing and installing plumbing in the United States; from January 1988 to December 1988, at Leo Hecht Inc. ("Leo Hecht"), designing and installing plumbing in the United States; and from January 2004 to "present" (February 2006), at TPC II Contracting Inc. ("TPC"), designing and installing plumbing in the United States. By notice dated June 20, 2007, DCAS informed petitioner that he had passed the examination. By letter dated August 14, 2007, DOB set forth that in order to obtain his license, petitioner must appear before the Master Plumber and Master Fire Suppression Piping Contractor License Board (the "Board"). Prior to that, however, petitioner would need to submit documentation proving that he met the qualifications for the license, including proof of his claimed practical experience in the form of sealed affidavits from the master plumbers who directly supervised his work; an official statement from the Social Security Administration ("SSA") indicating the periods of his employment and earnings from each employer; and copies of W-2 forms for any years not listed on the SSA statement of earnings but included on the license application. The August 14, 2007 letter further informed petitioner that the basic Administrative Code requirements for licensure, in pertinent part, were seven (7) years' experience in the design and installation of plumbing systems, earned by the application date, under the direct and continuing supervision of a licensed master plumber, in the United States. See Administrative Code § 26-146(a)(1).<sup>1</sup>

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<sup>1</sup> Petitioner's application was submitted in February 2006, prior to revisions to the Administrative Code made on July 1, 2008. The parties agree that the petition should be evaluated as the Code existed at the time petitioner submitted his application.

Petitioner's appointment before the board was scheduled for October 22, 2007. He submitted a number of documents in support of his application, including his SSA statement and one W-2 from 2005. Petitioner also submitted his own letter, dated January 16, 2008, stating that he worked for his father Joseph Licata from January 1980 to September 1981, at Licata P&H, as a plumber's helper, and that his father had died in September 1981; a letter from his brother, Joseph Licata, dated December 27, 2007, stating that petitioner had worked under his direct and continuing supervision as a journeyman plumber from January 1982 through December 1987, and that his duties included design and installation of plumbing systems; a second letter from Joseph Licata dated January 16, 2009, stating that petitioner was employed under his supervision and that his duties included designing and installing plumbing systems at Five Brothers from June 1982 to December 1986, at Normandy from January 1986 to May 1986, and at March P&H from May 1986 to December 1987; a letter from Eugene R. Hecht, president of Leo Hecht, dated March 24, 2008, stating that petitioner had worked under his direct and continuing supervision as a journeyman plumber for a period in 1988, and that his duties included design and installation of plumbing systems; and a letter from Eugene Toback dated December 27, 2007, stating that petitioner had worked under his direct and continuing supervision as a journeyman plumber from May 2004 through the present, and that his duties included design and installation of plumbing systems. Petitioner also submitted copies of permits pulled by Licata P&H.

By letter dated December 1, 2009 (the "2009 Denial Letter"), DOB denied petitioner a master plumber's license on the grounds that he did not meet the requirements under New York City Administrative Code § 26-148. The 2009 Denial Letter set forth that Eugene Toback's letter

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provided little information about the type of work that petitioner performed at TPC, and that the salary he received at TPC was inconsistent with full-time employment especially in light of the fact that most of his income while working at TPC was earned from other sources. The Board, therefore, did not credit his time at TPC towards the requirement of seven years' experience. The 2009 Denial Letter also set forth that petitioner would only be credited with one and a half years of experience under Five Brothers because that was the only verifiable time period; that the wages that petitioner earned in 1980 (\$3,125) and 1981 (\$1,600) did not support his claim that he was employed full-time in the design and installation of plumbing systems; and that petitioner's experience at Tag Pipe could not be verified. Thus, DOB stated that the information that petitioner provided did not support his claim that he had seven years' experience under the direct supervision of a licensed master plumber.

By letter dated January 28, 2010, petitioner requested reconsideration of his application. By his attorney, petitioner stated that he is an owner of TPC and chose to receive little salary so that a greater percentage of the profits could be put back into his business. He argued that Mr. Toback's letter was sufficient proof of his experience at TPC because the information he provided conformed with the requirements of the Administrative Code. Accordingly, petitioner asked that his work at TPC be credited in full. He also referenced other plumbing design and installation work that he performed in 2005 and 2006 under supervision of a master plumber, and submitted documentation of that work, which he believed should be credited towards the experience requirement. Further, he argued that he should at least be credited with some experience for his work at Licata P&H, because although his wages were not substantial, he was compensated in other ways by working in his father's business, such as room and board.

By letter dated November 3, 2010, DOB asked petitioner to supplement his application. DOB asked petitioner to submit a detailed affidavit regarding his work at Licata P&H from January 1980 until September 1981. Additionally, DOB contended that petitioner had not submitted documentation, such as permits or work orders, supporting his contention that he performed plumbing design and installation at Normandy and March P&H. DOB rescinded its initial determination crediting petitioner with one and one-half years at Five Brothers due to "insufficient evidence," wages discrepancies, and discrepancies between petitioner's and Joseph Licata's statements. DOB also requested additional supporting documentation in order to credit petitioner with his work at Leo Hecht because Mr. Hecht had stated that he supervised petitioner's work "for a period in 1988" and because petitioner had not submitted permits or work orders indicating that he performed design and installation of plumbing systems during that time period. DOB also asked for further documentation regarding the other plumbing design and installation work that petitioner claimed he performed in 2005 and 2006.

By letter dated December 3, 2010, petitioner's attorney wrote back to DOB, arguing that there is no wages threshold for crediting work towards the seven years requirement and reiterating that petitioner had worked for his father at Licata P&H and that he was compensated in ways other than wages. By letter dated December 21, 2010, DOB wrote back to petitioner's attorney, maintaining that petitioner's wages in 1980 and 1981 were below minimum wage and were not consistent with full-time employment at plumbing firms. Therefore, they were asking petitioner to submit a detailed statement regarding the nature of his employment and the reasons he was paid so little during this time period.

Petitioner submitted an affidavit stating that he worked full-time for under his father's supervision for Licata P&H from January 1980 to January 1981, and that he was paid \$175 per week, and compensated in other ways. He then detailed his work under the supervision of his brother, Joseph Licata, between the time their father died and 1986, first at Five Brothers, then at Normandy. He stated that when Normandy dissolved in 1986, his brother and he started March P&H, and that he continued to perform design and installation of plumbing systems under his brother Joseph's supervision through December 1987. Then, he performed plumbing design and installation for Leo Hecht under Mr. Hecht's supervision between January 1988 through December 1988. He reiterated that it was a business decision not to draw a salary from TPC, but that his work at TPC was full-time plumbing installations under the supervision of a licensed plumber. Additionally, he requested an opportunity to plead his case before the Board.

By letter dated May 24, 2011, DOB denied petitioner's request for reconsideration (the "Determination"). DOB stated that there were inconsistencies in the work that petitioner had reportedly performed at Licata P&H, as petitioner had initially described his position as "plumber's helper," but later he submitted statements stating that he installed and designed plumbing systems while working at Licata P&H. Due to the inconsistencies and lack of contemporaneous documentation, DOB would not credit petitioner's experience at Licata P&H. Additionally, DOB determined that there was insufficient evidence to support one and one-half years experience at Five Brothers, due to discrepancies in the duration of his employment and a failure to submit documentation (permits) showing that he performed design and installation of plumbing systems for Five Brothers. DOB set forth that, based on his brother's letters, it would credit petitioner with six

months of experience at Five Brothers. DOB further determined not to credit petitioner's work at Normandy, March P&H, or Leo Hecht, because there were no permits or contemporaneous documentation provided to demonstrate design and installation experience. DOB did credit petitioner with one year, nine months, and two weeks of experience at TPC. This proceeding to challenge the Determination followed shortly after it was issued.

Petitioner argues that the Determination was arbitrary and capricious and without basis in law, and asks that this court reverse, annul, and set aside the Determination and direct DOB to grant petitioner the license. First, he argues that there is no requirement under the Administrative Code that an applicant for a master plumber's license must prove full-time employment in demonstrating seven years' experience, and that DOB has no basis in law to discount his experience. Regardless, he maintains that DOB's determination that his work experience did not appear to be consistent with full-time employment, because he did not make enough money, was arbitrary, since DOB has no method for determining what qualifies as full-time employment. Second, petitioner argues that denial of his application because he worked on too few permits is arbitrary, capricious, and without basis in law. He argues that DOB failed to properly investigate whether he performed work outside New York or for which permits were not required. Further, he maintains that DOB's policy of reviewing the number of permits that an employer works on is not found in the law. He argues that the number of permits is not an accurate indicator of whether an applicant's work should count towards the experience requirement, and that other applicants have been granted licenses on fewer permits than petitioner worked on. Third, petitioner argues that DOB's determination to discredit experience where there were minor discrepancies in length of employment was arbitrary

and capricious, especially because petitioner could have explained the discrepancies if he were permitted to present his case to the Board. Petitioner believes that the Determination was the result of a bias against petitioner and unfair treatment, primarily citing the long length of time that it took DOB to reach its determination. He asks this court to order a trial on the issues of fact pursuant to C.P.L.R. § 7804(h).

In answering, respondents argue that DOB's determination that petitioner failed to satisfy the work experience requirement in Administrative Code § 26-146(a) was rational and reasonable in light of the administrative record. Respondents maintain that the applicant bears the burden of establishing that the work experience requirement is satisfied. When evaluating an application, respondents set forth that DOB and the Board look at the permits issued to the supervising master plumber during the applicable time and estimate how much experience the applicant could have obtained therefrom. They maintain that work that can be legally performed without a permit is not work that qualifies as design or installation of plumbing systems. Respondents assert that DOB reasonably and rationally did not credit petitioner with experience at Licata P&H because there were inconsistent statements about the type of work he performed there and the length of time he worked there, and because he failed to submit any permits issued during this time; that DOB reasonably and rationally concluded that petitioner could only be credited with, at most, six months of qualifying work at Five Brothers, because of the inconsistent statements regarding the time period that he worked there and the lack of supporting documentation to verify the type of work that petitioner performed there; that DOB reasonably and rationally did not credit petitioner with time at Normandy or March P&H because of the inconsistent statements regarding

the time period that he worked there and the lack of supporting documentation to verify the type of work that petitioner performed there; that DOB reasonably and rationally did not credit petitioner with time at Leo Hecht because there was a lack of a definitive statement regarding how long he worked there under Mr. Hecht's supervision and a lack of documentation to support his experience; that DOB reasonably and rationally concluded that petitioner could only be credited with, at most, one year, nine months, and two weeks of qualifying work at TPC because of inconsistent statements as to when he started working there; and that DOB reasonably and rationally did not credit petitioner with time at the other jobs he cited upon reconsideration, because there was a lack of a definitive statement regarding how long he worked there and a lack of documentation to support his experience. DOB also argues that petitioner's citing to other applicants' license approvals has no bearing on the record of his individual case.

In an Article 78 proceeding to review an administrative agency's determination, the court must determine "whether there is a rational basis for the action in question or whether it is arbitrary and capricious." In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), quoting In re Gilman v. New York State Div. of Hous. & Comm. Renewal, 99 N.Y.2d 144, 149 (2002). An arbitrary and capricious action is one "taken without sound basis in reason or regard to the facts." Peckham, 12 N.Y.3d at 431 (citations omitted). The courts must uphold an agency's determination if it has rational support. Id.

Petitioner's first argument is the Board should not consider how much he earned or whether he worked full- or part-time when evaluating his work experience, and that its reliance on

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these factors is arbitrary and capricious. The court notes that the Board did not reach the Determination on the basis of petitioner's low wages or nonexistent wages. In the Determination, the Board generally accepted petitioner's explanation that he was paid lower wages in exchange for noncash perquisites or so that his business could grow. Since "wages inconsistent with full-time employment" was not a basis for this Determination, the court declines to review whether a license denial based solely on this factor would be arbitrary or capricious.

Petitioner's second argument is that DOB's policy of examining the number of permits that an employer works on in order to verify whether the employee worked in the design and installation of plumbing systems is arbitrary, capricious, and without basis in law. The court does not find this argument persuasive. Administrative Code § 26-146(a)(1) states that an applicant for a master plumber's license "shall submit satisfactory proof" that he or she has at least seven years' design and installation experience. An agency's construction of a statute or regulation it administers, "if not unreasonable or irrational, is entitled to deference." In re Salvati v. Elmicke, 72 N.Y.2d 784, 791 (1988), rearg. denied, 73 N.Y.2d 995 (1989). See also Arbuiso v. New York City Dept. of Bldgs., 64 A.D.3d 520, 523 (1st Dep't 2009); City of New York v. Love Shack, 286 A.D.2d 240, 241-42 (1st Dep't 2001). The number of permits that a licensed supervisor pulls in a given year is not the only contemporaneous or supporting documentation that an applicant may submit in providing satisfactory proof that he or she has the requisite experience. Regardless, it is not irrational or unreasonable for the DOB rely on the number of permits issued to the supervising licensee in order to evaluate whether the license applicant has submitted satisfactory proof of seven years' experience, since the type of work that qualifies as design and installation would necessarily require that a permit be issued in order for the work to be performed legally.

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Finally, petitioner argues that "minor" discrepancies should not have been resolved against him. Petitioner's paperwork contained a number of inconsistencies about his time working under licensed master plumbers. DOB relies on the information submitted by applicants to determine whether that applicant is qualified for the license. It is not irrational for the DOB to examine statements for consistency and to discredit inconsistent statements that indicate that an applicant does not have the requisite experience. Accordingly, it is hereby

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

Dated: February 16, 2012

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JOAN B. LOBIS, J.S.C.