

Matter of Dellaporte v New York City Dept. of Bldgs.
2012 NY Slip Op 30750(U)
March 22, 2012
Sup Ct, New York County
Docket Number: 111622/11
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice _____

PART _____

- Index Number : 111622/2011
DELLAPORTE, CIRO
vs.
NYC DEPT OF BUILDINGS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

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).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

is decided in accordance with the annexed decision.

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

RECEIVED

MAR 26 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED

MAR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/22/12

PK, 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
COUNTY OF NEW YORK: Part 55

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

CIRO DELLAPORTE,

Petitioner,

Index No. 111622/11

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

DECISION/ORDER

-against-

THE NEW YORK CITY DEPARTMENT OF
BUILDINGS and AISHA NORTLETT, Director,
Licensing Unit,

Respondents.

FILED

MAR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

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 Ciro Dellaporte brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to vacate, reverse and annul a determination made by the New York City Department of Buildings (the "DOB") dated June 13, 2011. In its decision, the DOB denied petitioner's application to renew his Stationary Engineer License. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. The DOB first issued petitioner a Stationary Engineer License in 1995 and continued to renew petitioner's Stationary Engineer License, upon

petitioner's application, until his final renewal in 2010. Pursuant to Chapter 4 of Title 28 of the Administrative Code, disclosure of convictions on license renewal applications became required for all license renewals beginning in 2008. However, DOB phased in its review of this newly required information and its review of disclosures of past convictions by Stationary Engineers began in July 2010.

By application submitted to the DOB on or about February 10, 2011, petitioner applied for renewal of his Stationary Engineer License. In the section of the application entitled "Convictions and Fines," petitioner marked an "X" in the "Yes" box for the question asking whether petitioner has ever been convicted or pled guilty to a violation, misdemeanor or a felony anywhere. Petitioner explained on a supplemental affidavit form attached to the renewal application that he was charged with "misappropriation of funds," sentenced to three years probation and paid a fine. Petitioner also disclosed that he received a "certificate of relief of civil liabilities."

By letter dated February 22, 2011, the DOB stated, in part:

Pursuant to Section 28-401.1.12 of the [Administrative 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 a license."

These bas[e]s, listed in Section 28-401.19 of the Code, include:

(12) "Conviction of a criminal offense where the underlying act arises out of the individual's professional dealing[s] with the city or governmental entity;

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

The letter requested that petitioner explain the circumstances that led to his arrest and conviction

[* 4]

and provide any other evidence that petitioner believed would assist the DOB in its determination. In response, petitioner submitted a letter dated March 6, 2011 explaining the circumstances surrounding his arrest and conviction. In addition, petitioner submitted copies of a Certificate of Relief from Disabilities, dated March 16, 2009 and a notice from the New York City Department of Citywide Administrative Services ("DCAS") dated December 8, 2010, qualifying petitioner for consideration for employment as a Stationary Engineer. Petitioner's letter stated, in part:

I was employed by the Board of Education in 1995 as a Custodian Engineer and worked for them for ten years. As a Custodian Engineer I was a quasi contractor for the Board of Ed and given a budget. I was responsible for all the hiring, payroll, supplies, vendors, contractors, building mechanicals, boilers, air conditioning equipment and for the cleanliness and safety of the building.

On May 5, 2005 the FBI arrested me on a complaint for dealing with a vendor giving kickbacks...

On June 6, 2006 I pleaded guilty to misappropriation of funds and [was] sentence[d] to three years probation and paid a fine...

By letter dated March 15, 2011, the DOB again requested additional information regarding petitioner's arrest and conviction such as his Plea Allocution, Indictment and/or Probation report in order to "assist the Department in understanding the reason [he was] charged and convicted of Misappropriation of Funds." On or about March 29, 2011, in response to the DOB's second request for additional information, petitioner submitted copies of: (i) the information relating to the criminal proceeding commenced against him in the United States District Court of the Eastern District of New York; (ii) a letter dated October 7, 2008 from petitioner's probation officer stating that on June 8, 2006, petitioner was sentenced to three years probation following petitioner's plea of guilty to "Theft From An Agency Receiving Federal

Funds,” in violation of 18 U.S.C. § 666(a)(1)(A), a Class C Felony; and (iii) the Court Judgment and outline of the Probation terms. The information provided, in pertinent part, the following:

The United States Attorney Charges:

In or about and between June 2003 and February 2005...within the Eastern District of New York and elsewhere, the defendant CIRO DELLAPORTE, an agent of the New York City Department of Education (“DOE”), did knowingly and intentionally embezzle, steal, obtain by fraud and misapply property valued at \$5,000 or more, that was owned by and under the care, custody and control of the DOE, which agency received benefits in excess of \$10,000 each of the years 2003, 2004, and 2005 under a Federal program involving a grant, subsidy and other form of Federal assistance.

By letter dated June 13, 2011, the DOB informed petitioner that his application for renewal of his Stationary Engineer License was denied. The DOB explained that based on a review of petitioner’s application and the information provided by petitioner, the DOB determined that petitioner did not meet the requirements for renewal of his Stationary Engineer License pursuant to Section 28-401.12 of the Administrative Code. By letter dated June 28, 2011, petitioner requested reconsideration of the DOB’s denial of his renewal application. By letter dated September 1, 2011, the DOB informed petitioner that his request for reconsideration was denied. Petitioner then commenced this Article 78 proceeding with the filing of a Notice of Petition, dated October 11, 2011 and Verified Petition, dated October 12, 2011 challenging the DOB’s decision.

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 the DOB’s determination not to renew petitioner’s Stationary Engineer License was made on a rational basis. Under § 752 and § 753 of the Correction Law enacted to establish procedures to prevent unreasonable discrimination against former criminal offenders in regard to licenses and employment, a standard of review is set forth for determining the “good moral character” of an applicant. Section 753 of the Correction Law enumerates eight factors to be considered:

- (a) The public policy of this state, as expressed in this act, 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 or employment 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

[7]
individuals or the general public.

The DOB rationally determined after analyzing the above statutory factors that petitioner displayed poor moral character and thus, his Stationary Engineer License should not be renewed. The DOB found that although it is the policy of this state to employ previously convicted, yet rehabilitated, criminals, there exists an exception to this policy when there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual. The DOB noted that petitioner's Stationary Engineer License made petitioner responsible for ensuring that high pressure boilers operate safely by performing routine maintenance, shutting down equipment, making repairs, and regulating machinery as necessary. The Stationary Engineer License also requires that petitioner retain truthful and accurate records of boiler pressure, temperature, power output, and fuel consumption and to submit annual low pressure boiler inspection reports to the DOB on behalf of building owners. As a Stationary Engineer licensee, petitioner is authorized to submit inspection reports to the DOB and it is imperative that these submissions are reliable in order to protect the safety and welfare of the public. In petitioner's previous job as a Custodial Engineer, he was required to keep certain books and records and provide documentation of his expenditure of funds. However, petitioner misused this position of trust. Thus, the DOB determined that petitioner's criminal activity bears a direct relationship to his fitness and ability to perform the duties and responsibilities of a Stationary Engineer as it is a job that requires petitioner to be trustworthy and honest.

Although the DOB noted that petitioner's conviction occurred almost seven years ago, petitioner was forty-one years old at the time, presumably a responsible adult who should not have engaged in such conduct. While petitioner provided a Certificate of Relief from Disabilities

and additional documentation, the DOB rationally found that petitioner failed to present sufficient evidence of rehabilitation in light of the above conduct which stemmed directly from the position of trust and authority he was given by the City of New York. Therefore, the DOB found that petitioner displayed poor moral character and that his conviction arose out of his professional dealings with the City of New York, specifically, the NYC Department of Education. Thus, the DOB determined that its interest in public safety and hiring honest employees outweighs petitioner's entitlement to the renewal of his Stationary Engineer License. The court finds that the DOB had a rational basis for such determination as it was supported by the administrative record.

Petitioner's argument that the DOB's decision was arbitrary and capricious because "three other stationary engineers...who were convicted of either the same or similar kickback type crimes had their licenses renewed without as much as a question or challenge," is without merit. The DOB alleges that at the time those engineers' applications were renewed, it was unaware of their convictions due to the timing of the applications. Furthermore, the process of reviewing an application's qualifications and fitness for a Stationary Engineer License renewal is a case-by-case determination.

Accordingly, petitioner's request for relief under Article 78 of the CPLR vacating, reversing and annulling the DOB's denial of his renewal application for a Stationary Engineer License is denied. The petition is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 3/22/12

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J.S.C.

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