

**Matter of Rizzuto v Limandri**

2012 NY Slip Op 32868(U)

October 23, 2012

Sup Ct, New York County

Docket Number: 113418/11

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

In the Matter of the Application of  
**JOSEPH M. RIZZUTO, JR.,**  
Petitioner,

INDEX NO. 113418/11

For a Judgement Pursuant to the Provisions of  
Article 78 of the New York Civil Practice Law and Rules,

MOTION SEQ. NO. 001

**FILED**

-against-

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

NOV 23 2012

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers numbered 1 to 5 were read on this motion by petitioner for an order and judgement pursuant to Article 78 of the Civil Practice Law and Rules.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3, 4</u>
Replying Affidavits (Reply Memo) _____	<u>5</u>

Cross-Motion:  Yes  No

In this Article 78 proceeding, Joseph Rizzuto, Jr. (petitioner) seeks a judgment annulling the determination by the New York City Department of Buildings (DOB or respondent), dated January 11, 2012, not to renew petitioner's Hoist Machine Operator Class A License (HMO License) on the basis that its denial was arbitrary and capricious, directing the respondent to renew petitioner's HMO License, and awarding petitioner restitution pursuant to CPLR 7806, including attorneys fees and costs.

BACKGROUND

Petitioner was first issued an HMO License on November 21, 1985. His HMO License was thereafter renewed various times, and ultimately expired on November 30, 2011. In 2003, petitioner was arrested and charged in a federal racketeering action brought against many members of the International Union of Operating Engineers Local 14-14b (Local 14). On December 3, 2009, petitioner pled guilty in the United States District Court, Southern District of New York to counts of "Mail Fraud and Unlawful Labor Payments Conspiracy, Mail Fraud, and

Receiving Unlawful Labor Payments” (Amended Verified Petition, exhibit 6). In his plea allocution, petitioner admitted that while an officer and employee of Local 14 he accepted payments from contractors who had signed collective bargaining agreements with Local 14, received illegal cash payments from contractors, and gave preferential treatment for employment to individuals recommended by organized crime members (*see id.*, exhibit 12 ¶¶ 4,5).

In April 2011, the DOB began an investigation into petitioner’s previous criminal convictions, and on July 6, 2011, the Respondent submitted a petition to the Office of Administrative Trials and Hearings (OATH) to revoke the petitioner’s HMO license based upon the charge of “New York City Administrative Code § 28-401.19(13): Poor moral character that adversely effects on his or her fitness to conduct work regulated by this Code.” The basis for this charge was petitioner’s convictions for conspiracy to commit mail fraud and unlawful labor payments, mail fraud, and receiving unlawful labor payments (*see id.*, exhibit 2, p. 3). The matter was scheduled for a settlement conference on October 31, 2011 and an OATH hearing before Administrative Law Judge Tynia Richard (ALJ Richard) on November 7, 2011. However, prior to the hearing, the DOB requested to withdraw its petition, without prejudice, which was granted by ALJ Richard on October 27, 2011.

In an application submitted to the DOB, dated November 15, 2011, petitioner sought to renew his HMO License, which subsequently expired on November 30, 2011.<sup>1</sup>

On November 29, 2011, petitioner commenced this Article 78 petition by Order to Show Cause (OSC) seeking a Temporary Retraining Order (TRO) that pending the hearing and determination of his petition, respondent was required to maintain petitioner’s HMO License, such that it would not be allowed to expire on November 30, 2011. In his petition, petitioner

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<sup>1</sup> The Court notes that petitioner’s application is notarized in places on November 28, 2011 and the DOB receipt of payment for the late application is dated November 30, 2011.

sought an order directing respondent to make an immediate determination on his renewal application, overturning respondent's determination not to renew his license by failing to timely issue a decision on his renewal application, and for restitution. This Court denied petitioner's request for a TRO and set the matter down for a hearing (see OSC, dated November 29, 2011).

On December 6, 2011, respondent sent petitioner a letter requesting additional information in order to consider his license renewal application, including, among other things, an explanation of the circumstances surrounding his arrest and subsequent convictions, a copy of his plea agreement, and evidence of rehabilitation (see Amended Verified Petition, exhibit 13). On December 20, 2011, petitioner provided the requested information, including a notarized explanation of his arrest and reasons why his application should be renewed, a copy of the plea agreement, and various letters of recommendation. On January 11, 2012, the DOB denied petitioner's application to renew his HMO License, finding that he did not meet the requirements of the New York City Administrative Code (Admin Code) § 28-401.12. Specifically, in reaching its determination the DOB relied upon the grounds for denial listed in Admin Code § 28-401.19: "(5) Fraudulent dealings; [and] . . . (13) Poor moral character that adversely effects on his or her fitness to conduct work regulated by this Code" (*id.*, exhibit 12).

Now before the Court is petitioner's Amended Verified Petition in which he seeks an order overturning respondent's determination not to renew petitioner's HMO License, directing respondent to renew his license, and restitution, pursuant to CPLR 7806.

#### DISCUSSION

The standard of review in this Article 78 proceeding is whether the respondent's determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; see also *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the

Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; see also *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of an agency within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; see also *Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

Moreover, an "[a]gency determination of a license application requires a certain amount of discretionary judgment-making which courts will not disturb absent a finding that such judgments were arbitrary or capricious" (*Matter of Montanez v City of N.Y. Dept. Of Bldgs.*, 8 Misc3d 405, 407 [Sup Ct NY County 2005]; see *Matter of Pell*, 34 NY2d at 231).

Article 23-A encompasses sections 750–755 of the Correction Law. Section 752 prohibits the unfair discrimination against persons previously convicted of criminal offenses who are applying for a license or employment, and states the following:

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely 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 or employment sought or held by the individual;
- or

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

Section 753(1) of the Correction Law sets forth factors to be considered when denying or approving a license or job application for any individual with a criminal conviction. The factors are:

- (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.

The DOB, among other things, approves or denies initial and renewal license applications for Hoist Machine Operator Class A Licenses. According to Admin Code § 28-401.12, the 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." The DOB may suspend or revoke a license if the applicant demonstrates "[p]oor moral character that adversely reflects on his or her fitness to conduct work regulated by this code" (Admin Code § 28-401.19[13]).

The Court finds that the DOB's decision, dated January 11, 2012, which denied petitioner's application for renewal of his HMO License was rational and should be upheld. In reaching its determination, the DOB listed all the factors from Correction Law § 753, which an agency must take into consideration when making a determination concerning a previous conviction. After reviewing its own regulations set forth in Admin Code § 28-401.19(5) and (13),

and in addressing those of the Corrections Law, the DOB concluded, among other things, that his convictions for conspiracy to commit mail fraud, mail fraud, and receiving unlawful labor payments "bear a direct relationship to [his] fitness and ability to perform the duties and responsibilities of an HMO" (Amended Verified Petition, exhibit 12, p. 3). Specifically, the DOB explained that "Licensed HMOs are [ ] responsible for maintaining logs and the sign offs of equipment safety. . . The Department depends on the integrity of these licensees to accurately report accidents and be truthful in their dealings with the Department" (*id.* at 2-3). In addition, the DOB found that "Rizzuto's overt acts demonstrate a misuse of the responsibilities and trust bestowed on him [and]. . . the charges to which he pled guilty involved an organized crime family influencing his union activities" (*id.* at 3).

Respondent also noted that petitioner was a responsible adult, forty-two years old, when he engaged in such illegal conduct and should have appreciated the consequences of his acts. Moreover, respondent asserted that petitioner failed to present sufficient evidence of rehabilitation, nor did he present a Certificate of Relief from Disabilities and thus, he was not entitled to the presumption of rehabilitation.

Accordingly, the Court finds that respondent reasonably weighed the factors set forth in the Correction Law and the Court will not "reweigh" the factors. The respondent's determination to deny petitioner's application to renew his HMO License was rational and reasonable and will not be overturned.

Moreover, the Court finds that respondent's decision to withdraw the OATH action it initiated for the revocation of petitioner's HMO License and to address petitioner's conviction at renewal was not irrational or capricious, and was within the respondent's discretion. Under Admin Code § 28-401.12, petitioner "was entitled to reasonable notice and a fair opportunity to be heard with respect to the reasons for the denial of the renewal" (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 274 [1st Dept 2010]). The Court finds that petitioner had

notice and every opportunity to be heard regarding renewal of his HMO License via his initial application, and a subsequent letter to the respondent dated December 20, 2011, in which he explained his convictions and submitted additional documentation, including letters of recommendation attesting to his good moral character. The record indicates that the DOB reviewed this material, yet still denied petitioner's application. As such, the requirements of Admin Code § 28-401.12 were satisfied.

CONCLUSION

Accordingly, it is hereby

ORDERED that Joseph M. Rizzuto, Jr.'s Article 78 petition is denied, and the proceeding is dismissed without costs or disbursements to the respondent; and it is further,

ORDERED that counsel for respondent is directed to serve a copy of this Order with Notice of Entry upon petitioner and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

**FILED**  
NOV 23 2012  
NEW YORK  
COUNTY CLERK'S OFFICE  
*Paul Wooten*  
Enter: Paul Wooten  
PAUL WOOTEN, J.S.C.

Dated: 10/23/12

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