

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

2012 NY Slip Op 33107(U)

December 21, 2012

Sup Ct, New York County

Docket Number: 103720/2011

Judge: Lucy Billings

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

PRESENT: BILLINGS
Justice

PART 46

RAMIREZ, GERARDO

INDEX NO. 103720/11

MOTION DATE _____

THE DEPT. OF CITYWIDE ADMINISTRATIVE SERVICES, ETAL.

MOTION SEQ. NO. 01

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	
_____	<u>1</u>
_____	<u>2</u>
_____	<u>3-5</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:
The court denies the petition and dismisses this proceeding pursuant to the accompanying decision. C.P.L.R. §§ 7803(3) and (4), 7806.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 12/21/12

Luigi Billings
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 46

-----x

In the Matter of the Application of
GERARDO RAMIREZ,

Index No. 103720/2011

Petitioner

DECISION AND ORDER

For a Judgment under and pursuant to
Article 78 of the CPLR

- against -

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

Respondents

UNFILED JUDGMENT
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appear in person at the Judgment Clerk's Desk (Room
141B).

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Petitioner seeks to annul respondent New York City
Department of Buildings' denial dated November 29, 2010, of his
application for a New York City Master Plumber license, after
reconsideration of the Department's original denial October 19,
2009. The parties agree that, since petitioner originally
applied for the license before July 1, 2008, when the New York
City Administrative Code provisions governing the license were
recodified, the prior statutes govern respondents'
determinations. Respondent Department of Buildings (DOB) based
its denial on petitioner's insufficient practical experience
under the code, which requires seven years of experience in
designing and installing plumbing systems. N.Y.C. Admin. Code §§
26-141, 26-142, 26-146(b) (effective through June 30, 2008).

In this proceeding pursuant to C.P.L.R. Article 78, petitioner challenges DOB's denial of his application for a Master Plumber license on the ground that the determination is arbitrary. C.P.L.R. § 7803(3). Petitioner also seeks an order that DOB produce records he requested under the New York State Freedom of Information Law (FOIL). N.Y. Pub. Off. Law §§ 87(2), 89(3). After oral argument, for the reasons explained below, the court denies the relief petitioner seeks and dismisses the petition.

II. DOB'S DENIAL OF PETITIONER'S APPLICATION FOR A MASTER PLUMBER LICENSE

The court must uphold DOB's denial of petitioner's license if the determination is rationally based and therefore not arbitrary. Chilson v. Hein, 94 A.D.3d 517, 518 (1st Dep't 2012); Rasole v. Department of Citywide Admin. Servs., 83 A.D.3d 509 (1st Dep't 2011); Arbuiso v. New York City Dept. of Bldgs., 64 A.D.3d 520, 522 (1st Dep't 2009); Cardone v. City of N.Y. Dept. of Bldgs., 31 A.D.3d 253, 255 (1st Dep't 2006). Petitioner bears the burden to demonstrate that he satisfies the statutory and regulatory requirements for the license he seeks. 55 R.C.N.Y. § 11-02(d)(1); Reingold v. Koch, 111 A.D.2d 688, 690 (1st Dep't), aff'd, 66 N.Y.2d 994 (1985); Chilson v. Hein, 94 A.D.3d at 518. See San Filippo v. New York City Dept. of Bldgs., 68 A.D.3d 421 (1st Dep't 2009).

The parties do not dispute that Administrative Code § 26-146(a) (effective through June 30, 2008) required proof of at least seven years of experience in designing and installing

plumbing systems in the United States to support a Master Plumber license application. Plumbing work must be performed under the supervision of a licensed master plumber, as "evidenced by such licensee's signature and seal upon any required statements, applications and/or permits." N.Y.C. Admin Code § 26-141(c) (effective through June 30, 2008). Although no Administrative Code or regulatory provision requires an applicant to show the seven years of experience through permits, DOB used permits simply as a measure because all such work experience, at least in New York City, must have been performed under a permit. N.Y.C. Admin. Code § 26-142(a)(1)(a). Conversely, no such work experience was allowed without a permit. N.Y.C. Admin. Code § 27-147.

Petitioner nonetheless contends that DOB's denial of his application for a Master Plumber license was arbitrary because DOB based its denial on supervising licensees' insufficient number of permits during petitioner's employment under their supervision, without a statutory or regulatory basis. He further contends that DOB unfairly denied his FOIL request for other applications, which demonstrated licenses granted without imposing a similar permit standard.

A. Petitioner's Proof of Experience

Petitioner relied on affidavits of his former employers to substantiate his plumbing work experience. In a letter dated June 25, 2009, Marvin Gross of G&G Village Plumbing attested that petitioner worked for his company from October 1982 to February

1983, June to October 1983, August 1985 to February 1986, and November 1987 to March 1989. Gross described petitioner's work as installing boilers, hot water heaters, bathroom fixtures, and gas pipes. V. Pet. Ex. N.

In a letter dated July 3, 2008, John Curley attested that he employed petitioner full time from May 17, 2004, to February 7, 2008, as a "jobbing mechanic" who performed repair work. V. Pet. Ex. O. Curley specifically denied supervising petitioner, however, and explained that he worked directly for customers. Yet, even assuming Curley's supervision, petitioner failed to comply with DOB's request to provide evidence of where Curley was licensed, since he was not licensed in New York City.

In a letter notarized July 1, 2009, Lucas Gentile attested that petitioner's work under Gentile included repiping house sewers and drains with traps, soil stacks, soil branch lines, vent stacks, vent branch lines, and gas manifolds; installing domestic water overhead risers and branches; and setting plumbing fixtures. V. Pet. Ex. M. In a letter notarized December 14, 2009, presented with petitioner's request for reconsideration, Gentile clarified that he "obtained dozens of permits for plumbing work in New York City during the period of time in which Mr. Ramirez was employed and supervised by me" and that "a great deal of my firm's work was plumbing work performed for city agencies, notably HPD." V. Pet. Ex. F. Gentile listed addresses where petitioner performed work. Petitioner testified at the hearing before DOB July 15, 2009, that he worked for the New York

City Department of Housing Preservation and Development (HPD) for six or seven years, but his work was monitoring other contractor plumbers' work. Therefore he did not claim his experience with HPD in his license application.

B. DOB's Grounds for Denial of the License

Although petitioner claims respondent DOB rejected letters of his former employers because the letters lacked a company seal or letterhead, DOB did consider them in evaluating petitioner's experience, but found they did not support the required experience. Petitioner further contends that he presented evidence adequately demonstrating the required experience.

Qualifying experience, however, does not include either minor alterations or ordinary repairs, which do not require a permit. N.Y.C. Admin. Code §§ 27-124, 125. Minor alterations are "minor changes or modifications in a building or any part thereof." N.Y.C. Admin. Code § 27-124. Ordinary repairs are "replacements or renewals of existing work in a building, or of parts of the service equipment therein, with the same or equivalent materials or equipment parts." N.Y.C. Admin. Code § 27-125. The paucity of permits in DOB's records for Gross and Gentile during the periods petitioner worked for these supervisors indicates that the work they supervised constituted minor alterations or ordinary repairs and thus explains DOB's conclusion in its denials, both initially and upon reconsideration, that petitioner performed primarily repair work, meaning ordinary repairs.

Nonetheless, even assuming all the work during petitioner's employment with Gross was design and installation and not ordinary repairs or minor alterations, the time petitioner worked for Gross amounted to a maximum of 34 months: less than three years. Rasole v. Department of Citywide Admin. Servs., 83 A.D.3d 509. Making the same assumption regarding petitioner's work with Curley and Gentile does not avail petitioner any further. At the hearing July 15, 2009, petitioner not only acknowledged that Curley rarely supervised petitioner, but further failed to demonstrate that Curley was licensed and acknowledged that Curley's other employee who supervised petitioner was not licensed. While unlike Curley Gentile as well as Gross specifically attested to supervising petitioner, Gentile did not specify the amount of time he supervised petitioner, and petitioner's testimony at the hearing did not remedy this deficiency either. Petitioner's application attests to the dates he worked for Gentile, but Gentile's lack of corroboration and petitioner's testimony that the duration of his work for Gentile overlapped with the work for Gross, and petitioner alternated between working for each supervisor, amply justified finding a lack of quantifiable qualifying experience under Gentile as well as Curley. See Aranda v. New York City Dept. of Bldgs., ___ A.D.3d ___, 955 N.Y.S.2d 27, 28 (1st Dep't Dec. 4, 2012).

Viewing the petition in this light, petitioner's complaint regarding DOB's requirement for permits is of little consequence. Although DOB may not impose licensing requirements beyond

statutory mandates, Cardone v. City of N.Y. Dept. of Bldgs., 31 A.D.3d at 255; Kreitzer v. New York City Dept. of Bldgs., 24 A.D.3d 374, 375 (1st Dep't 2005), it nevertheless uses permits as a rational and fair method to evaluate whether petitioner has gained the required work experience for the license. Chilson v. Hein, 94 A.D.3d at 518; Blatt v. New York City Dept. of Citywide Admin. Servs., 12 A.D. 164 (1st Dep't 2004). See Reingold v. Koch, 111 A.D.2d at 691, aff'd, 66 N.Y.2d 994; Arbuiso v. New York City Dept. of Bldgs., 64 A.D.3d 520, 523 (1st Dep't 2009). Petitioner complains he lacked notice of such an evaluation method. Yet when he requested reconsideration, after DOB's initial denial October 19, 2009, pointed to his lack of experience under permits, he submitted only a new affidavit from Gentile that again failed to specify how much time petitioner worked with Gentile under his plumbing permits (while alternating with Gross) to demonstrate the extent to which it met the experience requirement. Aranda v. New York City Dept. of Bldgs., __ A.D.3d __, 955 N.Y.S.2d at 28. See Rasole v. Department of Citywide Admin. Servs., 83 A.D.3d 509. In the reconsideration request dated December 15, 2009, petitioner's attorney details the complexity, scope, and duration of the work petitioner performed at the addresses he and Gentile identified, but there is no support in the record for this second hand account, other than Gentile's affidavits and petitioner's testimony delineated above.

In fact, as early as April 13, 2008, after petitioner passed

the license examination, DOB advised him of the documentation needed, including supervising licensed master plumbers' affidavits specifying petitioner's job title, the dates petitioner worked with the licensee, and that the licensee directly supervised petitioner and describing his duties in detail. V. Answer Ex. B. Moreover, even if DOB did fail to disclose the documentary requirements at the outset, preventing petitioner from securing relevant documents from Gentile before he retired and closed his business, petitioner still bore the burden, at minimum by specifying qualifying work for the requisite duration, to demonstrate the mandated experience for the license. Chilson v. Hein, 94 A.D.3d at 518.

C. Petitioner's Claim of Inequitable Treatment

Petitioner attempts to support a claim of inequitable treatment by presenting other master plumber license applications to show that DOB granted them without the documentation he was required to provide. Respondent explains that the applications petitioner relies on all predated the invalidation by the Appellate Division, First Department, of DOB's requirement that applicants for master plumber licenses be directly employed by the supervising licensed master plumber. Kreitzer v. New York City Dept. of Bldgs., 24 A.D.3d at 375. To comply with that decision, DOB now reviews the work performed under supervising licensees' permits.

Insofar as petitioner claims a constitutional due process or equal protection violation due to DOB's inequitable issuance of

licenses to other applicants, such a claim fails. Because issuance of a license is discretionary, petitioner possesses no property interest in the license he seeks. Daxor Corp. v. State of N.Y. Dept. of Health, 90 N.Y.2d 89, 98 (1997); Testwell, Inc. v. New York City Dept. of Bldgs., 80 A.D.3d 266, 274 (1st Dep't 2010); Solomon v. Department of Bldgs. of City of N.Y., 46 A.D.3d 370, 371-72 (1st Dep't 2007). Because he is not in a protected class, DOB's rational basis for treating license applicants differently, depending on the strength of their applications, and its legitimate government interest in issuing licenses to only qualified applicants sustain its procedures. See Walton v. New York State Dept. of Correctional Servs., 13 N.Y.3d 475, 492-93 (2009); City Servs. v. Neiman, 77 A.D.3d 505, 507-508 (1st Dep't 2010).

III. PETITIONER'S FOIL REQUEST

Finally, petitioner requests that DOB produce records encompassed by his FOIL request. This proceeding, however, does not seek judicial review of any denial of a FOIL request. See, e.g., Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v. Mills, 18 N.Y.3d 42 (2011); Beechwood Restorative Care Ctr. v. Signor, 5 N.Y.3d 435, 439 (2005); Burtis v. New York City Police Dept., 294 A.D.2d 315 (1st Dep't 2002). Nor has petitioner moved for disclosure. C.P.L.R. § 408. Insofar as he requests review of his FOIL request in this proceeding, that relief is premature since he fails to demonstrate exhaustion of administrative remedies. Covington v.

Sultana, 59 A.D.3d 163, 164 (1st Dep't 2009); Braxton v. Commissioner of N.Y. City Police Dept., 283 A.D.2d 253 (1st Dep't 2001). In fact, DOB points out that it was responding to his FOIL request when he filed this petition. Insofar as DOB now has responded to his FOIL request by providing documents or informing him that DOB does not possess the documents requested, his FOIL request is also unripe for review. Covington v. Sultana, 59 A.D.3d at 164; Orange County Publs., Div. of Ottaway Newspapers, Inc. v. Metropolitan Transp. Auth., 22 A.D.3d 290 (1st Dep't 2005); Braxton v. Commissioner of N.Y. City Police Dept., 283 A.D.2d 253.

IV. CONCLUSION

Upon this record, petitioner has not established that respondent New York City Department of Buildings' denial November 29, 2010, of his application for a New York City Master Plumber license violated lawful procedure, was affected by an error of law, was arbitrary, lacked a rational basis, or was unsupported by the evidence presented. C.P.L.R. § 7803(3) and (4). Therefore the court denies the petition and dismisses this proceeding. C.P.L.R. § 7806. The court also denies petitioner's request to review his FOIL request, without prejudice to separate proceeding for that review. This decision constitutes the court's order and judgment of dismissal.

DATED: December 21, 2012

UNFILED JUDGMENT

Lucy Billings

LUCY BILLINGS, J.S.C.

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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LUCY BILLINGS
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