

**Holihan v Limandri**

2013 NY Slip Op 31413(U)

June 26, 2013

Supreme Court, New York County

Docket Number: 103986/2012

Judge: Peter H. Moulton

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

PRESENT:   HON. PETER B. MOULTON    
Justice

PART   40B  

Index Number : 103986/2012  
HOLIHAN, EDWARD  
vs.  
LIMANDRI, ROBERT D.  
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~~ petition is decided  
for attached.

**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).

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

Dated:   6/26/13  

  HON. PETER B. MOULTON  , 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 40 B

-----X  
EDWARD HOLIHAN,

Petitioner,

Index No. 103986 /2012

-against-

ROBERT D. LIMANDRI, Commissioner of  
the New York City Department of the New York  
City Buildings; NEW YORK CITY DEPARTMENT OF  
BUILDINGS; AISHA NORFLEET, Director of Licensing  
Unit of the New York City Department of  
Buildings;

Respondents.

-----X  
PETER H. MOULTON, J.S.C.:

Petitioner worked for respondent New York City Department of Buildings (“Buildings”) from 2004 until his resignation in 2008. Petitioner seeks to vacate respondents’ determinations, dated February 29, 2012 and June 29, 2012, which denied him a Private Elevator Agency Inspector (“PEAI”) license. Petitioner alternatively seeks a determination that respondents violated Corrections Law Article 23 and/or the New York State or New York City Human Rights laws.

Respondents maintain that petitioner was properly denied a license because 1 RCNY 11-01 (b) (2) (ii) requires that an applicant possess “good moral character” which petitioner lacked. Petitioner lacked such character, respondents concluded, because in 2008 he plead guilty to Disorderly Conduct (a violation) and paid restitution, in connection with a criminal proceeding involving his submission of false time sheets to his employer.

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## Arguments

Petitioner maintains that it was improper for respondents to base their decisions on his conviction. Petitioner further notes that subsequent to his guilty plea, he worked without complaints for CBA Consultants, as well as with J. Martin Associates under that company's Director's License. Petitioner additionally maintains that the minor criminal offense had no bearing on his fitness to perform the duties of a PAEI. Petitioner also contends that he was not a risk to the public and cites to a Daily News story to support this assertion. The story noted that Building's reinspection of 100 elevators on which he worked revealed no problems. Petitioner also cites to letters of recommendation to demonstrate his rehabilitation.

Respondents counter that petitioner was properly denied a license, because in response to a question on the license application, he disclosed that he was convicted on September 25, 2008 of Disorderly Conduct. Moreover, in response to a request for further explanation, petitioner explained that:

On September 25, 2008 I surrendered [sic] myself to the Dept of Investigations for overlapping Hours for the work that I was performing on two jobs. I pleaded guilty to disorderly conduct a violation and paid 3544 dollars restitution and a 250 dollar fine and I was released the same day. My case was expunged [sic] after 1 year of the date of conviction.

Respondents note that they carefully considered the factors under Article 23-A Corrections Law §753 (1) and concluded in relevant part:

A PAEI license authorizes an individual to inspect new or altered elevators and their devices to determine compliance with applicable laws, rules and standards. These licensees are responsible for preparing forms relating to elevator inspections, maintenance logs and elevator certificates . . . As a City

employee, your willful submission of false time sheets in violation of city laws, and Department regulations, reflects poorly on your character. These illegal acts also bear a direct relationship to your fitness and ability to perform the duties of a licensed PAE1. The obligations and responsibilities of a PAE1 licensee are similar to that of a Department inspector, in that there is an ethical obligation to report unsafe conditions accurately and to truthfully complete all submissions to the Department. Your arrest and subsequent conviction demonstrates a propensity to mislead the Department and the likelihood of your willingness to risk the safety of the public for your own convenience and profit. Additionally, this conviction occurred less than four years ago . . . the reference letters, written on your behalf, did not overcome the Department's evaluation of your criminal conduct in relation to the duties of a Private Elevator Inspector.

Petitioner argues for the first time in reply (for which the court permitted a sur-reply), that respondents violated the Executive Law § 296 (16) because they based their decisions on petitioner's offense which was "sealed" pursuant to Criminal Procedure Law § 160.55. In connection with sealed violations under CPL § 160.55, an agency is prohibited from making criminal inquiries "whether in any form of application or otherwise." CPL § 160.55 also provides that "no person shall be shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending." Petitioner also maintains that four other named individuals, who were in the "same situation in that they were convicted of similar crimes" were permitted to keep their licenses. Petitioner does not describe the facts of those cases.

In their sur-reply, respondents maintain that they based their decisions on information which petitioner voluntarily provided about the circumstances of his arrest and conviction. Moreover, respondents argue that the court is confined to the agency record which contains

no information regarding the “unsubstantiated” assertions of the four individuals. They further argue that the fact that petitioner continued to work is not relevant to respondents’ prior determinations, nor is it relevant that he worked under another person’s license, because that person supervises petitioner and vouches for his character.

### Discussion

The standard of review of an agency decision denying the privilege of a license is whether the decision is arbitrary and capricious (see *Arrocha v. Board of Educ. of City of N.Y.*, 93 NY2d 361 [1999] [it was not arbitrary or capricious for the agency to deny a teaching license based on the conclusion that the applicant posed a risk to the safety of the student population and school employees, where the applicant was convicted of sale of cocaine nine years prior and was sentenced to a prison term of 2-6 years]).

CPL § 752, which is entitled “Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited” provides:

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 [fig 1] 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.

(CPL § 752).

Under CPL § 753, the following specific factors must be considered in making the determination under CPL § 752:

(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 individuals or the general public.

(CPL § 753).

In making this determination it is important for the agency to carefully analyze all the factors and to consider that:

The Legislature has determined that, as a general rule, it is unlawful for a public or private employer to deny an application for a license or employment on the ground that the applicant was previously convicted of a crime. This general prohibition advances the rehabilitation and reintegration goals of the Penal Law. Furthermore, barring discrimination against those who have paid their debt to society and facilitating their efforts to obtain gainful employment benefits the community as a whole.

(*Matter of Acosta v New York City Dept. of Ed.*, 16 NY3d 309, 320 [2011]).

Further, an applicant who has a certificate of relief from disabilities or a certificate of good conduct is entitled to a presumption of rehabilitation in regard to the specified offense (*see* CPL § 735 [2]). Petitioner does not have such a certificate.

Review of respondents' determinations reflect that respondents considered all the requisite elements. The court cannot find that respondents acted arbitrary or capriciously in concluding that the facts which surrounded petitioner's plea involved the willingness to falsify records which had a direct relationship to the license's requirement of producing true and accurate records (*see, e.g., Matter of Al Turi Landfill v New York Dept. of Entl. Conservation* (98 NY2d 758 [2002] [denial of license to expand a landfill was not arbitrary and capricious where petitioner pled guilty to tax related crimes; although petitioner's criminal activities did not involve the violation of environmental laws, "the elements inherent in the criminal conduct for which the petitioner and its principals were convicted, to wit, dishonesty, lack of integrity in conducting business, and a willingness to mislead the government, have a direct relationship to the duties and responsibilities inherent in the license sought, including accurate record keeping . . . and honest self-reporting to the

government”]; *see also Matter of Association of Surrogates & Supreme Ct. Reporters Within the City of N.Y.*, 48 AD3d 228 [1st Dept 2008] [employee’s termination was not arbitrary and capricious because there was a direct relationship between the offense of identity theft and fraud and the employee’s duties of producing true and accurate records of court proceedings]; *cf. Matter of Dellaporte v New York City Dept. of Bldgs.*, 2013 NY Slip Op 03281 [1st Dept 2013] [denial of the renewal of a stationary engineer license, which had previously been renewed 15 times, was arbitrary and capricious because the conviction for theft of funds bore no direct relationship to the duties of a stationary engineering license; respondent also failed to afford petitioner with the mandatory presumption of rehabilitation attendant to petitioner certificate of relief from disabilities.<sup>1</sup>

Moreover, respondents did not violate New York City Human Rights law Section 296 (16). Although not pointed out by either side, the application seeks information on criminal history, but specifically provides that “You do not have to disclose any material sealed, expunged, or set aside under Federal or State law or Juvenile Delinquent or Youthful Offender Adjudication.”<sup>2</sup> Additionally, the court cannot find that the agency enforced its

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<sup>1</sup>Petitioner does not have a certificate of relief from disabilities or certificate of good conduct. To be eligible petitioner must be an “Eligible Offender” which is a person “who has been convicted of a crime or offense, but who has not been convicted more than once of a felony” (*see* Corrections Law § 700). Petitioner pled guilty to a violation. Penal Law § 55.10 lists a violation an offense. Accordingly, it appears that petitioner can apply for such relief, which will be taken into consideration on any new application.

<sup>2</sup>While it does appear that respondents possessed some facts which were outside of what petitioner volunteered (such as the fact that petitioner time sheets sought overtime and that the other employer was the Metropolitan Transportation Authority), that

rules in a discriminatory manner where petitioner has not provided facts to support his contention that the four individuals who were approved for a license where similarly situated.

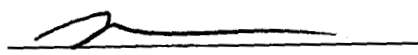
It is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed without costs and disbursements.

**This constitutes the Decision and Judgment of the Court.**

Dated: June 26, 2013

ENTER:

  
J.S.C.

**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).  
**HON. PETER H. MOULTON**  
**SUPREME COURT JUSTICE**

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information could have been gleaned from sources other than the sealed records, including newspapers. Notably, the Daily News article cited by petitioner himself contained this information.

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