

**Matter of Pazian v Department of Citywide Admin.
Serv.**

2013 NY Slip Op 32109(U)

September 9, 2013

Sup Ct, New York County

Docket Number: 112500/11

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

IN THE MATTER OF THE APPLICATION OF
RICHARD PAZIAN,

Petitioner,

INDEX NO. 112500/11

MOTION SEQ. NO. 001

FOR A JUDGMENT PURSUANT TO ARTICLE 78
OF THE CIVIL PRACTICE LAW AND RULES

-against-

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

Respondents.

FILED

SEP 10 2013

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1-4 were considered on this Article 78:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>
Cross-Motion: [] Yes [X] No	_____

Upon the foregoing papers, it is ordered that this Article 78 is decided as indicated below.

Petitioner Richard Pazian seeks an order pursuant to Article 78 of the Civil Practice Law and Rules (CPLR), reversing respondents Department of Citywide Administrative Services (DCAS) and the New York City Department of Buildings's (DOB) determination, dated February 16, 2012, denying petitioner's application for a Master Plumber's License (License), and directing respondents to issue the License.

BACKGROUND

Respondent DCAS is the agency charged with the administration of examinations for the License. Respondent DOB is the agency charged with the investigation of candidates' background and experience for the License, and issuance of the License. Petitioner applied for the License in October

2006 and took the required examinations. By letter dated April 3, 2008, respondent DOB informed petitioner that he passed such examinations. Thereafter, petitioner submitted the documentation requested by respondent DOB to support his application for the License, which included, *inter alia*, a list of over nine years of practical work experience. Respondent DOB denied petitioner's License application by letter dated November 5, 2009. Respondent DOB's letter states that the period of time petitioner worked at "Metro [Sewer & Drain could] not be counted toward the required practical experience since the maintenance-type work performed by that entity is not considered work in the design and installation of plumbing or gas systems[, and that they] could not verified that [petitioner was] employed full-time under the direct and continuing supervision of a licensed plumber at Scarponi [& Sons Plumbing and Heating]." Verified Petition, Exh. D, p. 2. The letter further stated that all of petitioner's work experience at All County, and a portion of his experience at Scarponi & Sons Plumbing and Heating (Scarponi & Sons), could be credited towards the seven years of required experience to obtain the License. *Id.* Thus, respondent DOB credited petitioner for five years and one-month work experience at All County, and one year and four months work experience at Scarponi & Sons, for a total of six years and four months of credited work experience.

Petitioner requested reconsideration of his application in January 2010. By letter dated December 23, 2010, respondent DOB sought additional information and documents from petitioner to consider his application, including documentation related to petitioner's work experience at All County. In February 2011, petitioner and Mr. Scarponi appeared before DOB's Master Plumber and Master Fire Suppression Piping Contractor Board (Board) regarding petitioner's claimed experience at Metro Sewer & Drain (Metro), which was later converted, by Scarponi, into Scarponi & Sons. By letter dated July 20, 2011 (Final Determination), respondent DOB denied petitioner's request for reconsideration, stating that petitioner's experience at All County, which was previously credited, could not now be credited, as

petitioner failed to provide supporting documentation to verify the type of work he performed at All County from 1984 through 1989. *See* Verified Petition, Exh. A, p. 2. The Final Determination also stated that, “without compensation from Scarponi, full-time employment at Scarponi could not be verified.” *Id.* Petitioner was however, credited for two months of qualifying experience at Metro. Thereafter, petitioner commenced this Article 78 proceeding.

DISCUSSION

Judicial review of an administrative determination is limited to whether the “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, including abuse of discretion as to the measure or mode of penalty or discipline imposed”. CPLR § 7803 (3). In deciding whether an agency’s determination was arbitrary, capricious or an abuse of discretion, courts are limited to an assessment of whether a rational basis exists for the administrative determination and their review ends when a rational basis has been found. *See Heintz v Brown*, 80 NY2d 998, 1001 (1992); *Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 (1972). The Court of Appeals explained the “arbitrary and capricious” standard in *Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 (1974) as follows:

“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’ (1 N.Y. Jur., Administrative Law, § 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.”

Here, it is undisputed that the 1968 City of New York Administrative Code (Administrative Code), which was in effect until July 1, 2008, applies. Pursuant to Administrative Code § 26-146, “all applications for a master plumber certificate shall submit satisfactory proof establishing that the applicant: 1. has had at least seven years’ prior experience in the design and installation of plumbing systems in the United States”. Further, Administrative Code § 26-141(c) requires that the plumbing work be performed under the direct and continuing supervision of a licensed plumber.

Petitioner argues that respondents' determination to deny his application for the License was arbitrary and capricious, and made in bad faith, as petitioner's application included sworn statements which specifically detailed practical experience, as required by the Administrative Code, and that the applicable Administrative Code did not reference "full-time" employment or define it. Further, petitioner argues that a Board recommendation is typically issued for each applicant. However, such Board recommendation is missing from petitioner's file. Notably, respondent DOB's Final Determination specifically references such missing Board recommendation, stating that "[b]ased on the Board's recommendation, the [DOB] has determined that [petitioner] has not sufficiently demonstrated that he has obtained the requisite seven years of experience". See Verified Petition, Exh. A, p. 3.

According to petitioner, respondent DOB questioned his experience at All County, after his experience was previously credited towards the seven year experience requirement, and ignored the sworn statements of both petitioner and licensed plumber Richard Ruderman (Ruderman) regarding petitioner's experience at All County, in retaliation against petitioner's threat of legal action, as the DOB waited nearly one year to issue the Final Determination. Further, petitioner contends that respondent DOB arbitrarily and capriciously required him to produce documentation to demonstrate the quality of his work at All County despite the fact that the regulation requiring such documentation, 1 RCNY § 19-04, did not go into effect until approximately nine months after petitioner submitted his application for the License, and, thus, did not apply to petitioner's application. In support, petitioner proffers, *inter alia*, the applications of fifteen individuals whose applications for the License were approved without any supporting documentation. Petitioner also argues that respondent DOB unlawfully presumed a lack of complexity based on permits submitted by Scarponi, an arbitrary standard not found in the applicable Administrative Code.

In its Verified Answer, respondents argue that petitioner failed to demonstrate the requisite seven

years of experience in design and installation of plumbing systems required by Administrative Code § 26-146(a). Respondents contend that, after reviewing petitioner's request for reconsideration, respondents sent a letter to petitioner, dated December 23, 2010, providing petitioner with the opportunity to submit additional documentation in support of his application, which included a request for "contemporaneous documentation to demonstrate the quality of [petitioner's] work experience while at All County", from December 8, 1984 through December 20, 1989. *See Verified Answer, Exh. G, December 23, 2010 letter, p.2.* Respondents state that, as no such documentation was provided, petitioner could not be credited with qualifying experience at All County in the Final Determination. Further, in the Final Determination, respondent DOB found that, although petitioner was previously credited with one year and four months of practical experience while working at Scarponi & Sons, he would now be credited with only one year of experience based on a review of the permits submitted by Scarponi. Respondent DOB also found that the one year and seven month period in which petitioner worked at Scarponi & Sons without compensation could not be credited as the Board did not find the testimony of petitioner, or Scarponi, to be credible. In the Final Determination, petitioner was also denied credit for the one month of claimed experience while working at All County under Richard Ingber, as no supporting documentation was provided to respondents. Respondents argue that the Final Determination was rational and reasonable, and a proper exercise of its discretion. Respondents further argue that the licensing records of other applications are irrelevant to the instant proceeding, and to petitioner's application.

Applying the above standards as to the review of an agency's determination here, the Final Determination is arbitrary and capricious. It is undisputed that the applicable Administrative Code does not specifically require full-time employment, based on proof of verifiable compensation, however, the Final Determination specifically mentions that full-time employment at Scarponi could not be verified

based on the lack of verifiable compensation, notwithstanding other documentation - including uncontested affidavits - submitted to show qualifying employment. Thus, respondents abused its discretion by adding an extraneous condition to petitioner's application, not required by the Administrative Code and not considering the documentation provided. Moreover, respondents argue that the letters and affidavit of Ruderman were informative, but insufficient, without other corroborating documentation, to demonstrate petitioner's experience at All County. *Significantly*, respondents fail to address why petitioner was originally credited with such five-year and one-month experience at All County, without any additional corroborating documentation, but was then denied such experience, upon reconsideration, based on the same documentation - a sworn un rebutted affidavit. As such, petitioner's five-year and one-month experience at All County should have been credited to petitioner. It is arbitrary and capricious for an agency, relying on the same documentation, to reach a different outcome upon such reconsideration. Further, applying a regulation, 1 RCNY § 19-04, which was not in effect at the time of plaintiff's application submission was arbitrary and capricious. Thus, the Final Determination was arbitrary and capricious, and the petition must be granted.

Accordingly, it is

ORDERED that the petition is granted to the extent that this proceeding is remanded to respondent Department of Buildings for a new hearing and a new determination in accordance with this decision; and it is further

ORDERED that within 30 days of entry of this order petitioner shall serve a copy upon respondents with notice of entry.

Dated: 9/9/13


DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

FILED

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