

Holihan v Limandri

2013 NY Slip Op 33548(U)

November 13, 2013

Sup Ct, 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: ~~MR. PETER H. MOULTON~~
Justice

PART 40B

Index Number : 103986/2012
HOLIHAN, EDWARD
vs.
LIMANDRI, ROBERT D.
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

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 denied

per attached

FILED

NOV 19 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/13/13

~~MR. PETER H. 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;

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Respondents.

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

Petitioner moves for leave to reargue the court's Decision and Order dated June 26, 2013 (the "Decision") on the basis that the court overlooked recent Appellate Division, First Department cases. Petitioner also seeks leave to renew the proceeding because he has been informed that he cannot obtain a Certificate for Relief from Disabilities under the Criminal Procedure Law because he only pled guilty to a violation. Respondents oppose the motion. Leave to renew and reargue is granted, but upon reargument and renewal, the court adheres to its prior determination.

In the prior Decision, the court found that respondents did not act arbitrarily or capriciously in denying petitioner renewal of a Private Elevator Agency Inspector ("PEAI") license. Respondents maintained 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. Petitioner disclosed to the agency that he had surrendered to the Department of Investigations “for overlapping Hours for the work that I was performing on two jobs.” The record included a Daily News article indicating that petitioner had submitted time records indicating that he worked overtime for both the Metropolitan Transportation Authority and for respondents, when in fact he was only working for the Metropolitan Transportation Authority.

The court did not err in concluding that the agency did not act irrationally in finding that the facts surrounding petitioner’s guilty plea involved the willingness to falsify records, which had a direct relationship to the PAEI’s requirement of producing true and accurate records. In denying the renewal, respondents reasoned:

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 PAEI. The obligations and responsibilities of a PAEI 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.

In reaching its Decision, the court did not overlook the four cases cited by petitioner.

In fact, the court cited one of the those cases, *Matter of Dellaporte v New York City Dept. of Bldgs* (2013 NY Slip Op 03281 [1st Dept 2013]), even though that decision was rendered after submission of the papers in this proceeding. The court cited the case as a "cf" cite, noting that First Department found that the denial of the renewal of a stationary engineer license was arbitrary and capricious because the conviction for theft of funds (i.e., kickbacks related to the misuse of administrative powers in connection with hiring, payroll, and selection of vendors) bore no direct relationship to the duties of a stationary engineering license. Although the stationary engineers in the cited four cases committed crimes of dishonesty, the First Department found that those crimes did not bear a direct relationship with the statutory duties and responsibilities attendant to a stationary engineer.

Here, however, it was not arbitrary for the agency to conclude that petitioner's actions bear a direct relationship to the duties of the job.¹ Petitioner admitted that he submitted time records indicating that he was working at times when in fact, he was not working. The duties and responsibilities attendant to an elevator inspector are, by definition, not being performed

¹Contrary to respondents' argument, the court did not find that the agency rationally concluded that petitioner posed an unreasonable safety risk to the public. The First Department has made clear that speculation regarding public endangerment is not sufficient. Petitioner correctly notes that the reinspection of 100 elevators did not result in any evidence of safety problems, and therefore any assumed risk is speculative and improper.

when petitioner is not working. Petitioner points to favorable recommendations, his unblemished record doing subsequent, similar work for CBA Consultants, as well as with J. Martin Associates, and the fact that reinspection of 100 elevators failed to reveal any safety problems. While the First Department has looked at these factors and found in favor of stationary engineers in the cited cases, none of those cases involved a direct correlation between the unlawful act and the duties of the job. Petitioner's remedy is not reargument but rather, an appeal. The court carefully considered the cited cases (and another case which was recently decided, *Matter of Gil v New York City Dept. Of Bldgs*, 107 AD3d 632 [1st Dept 2013]) and concluded that they were distinguishable.²

Petitioner's argument that respondents acted improperly by effectively forcing him to disclose a sealed criminal offense was not previously argued and therefore, will not be addressed. Petitioner's argument that a hearing was required to determine whether respondents obtained information from sealed records as opposed to from petitioner or the

²In the Decision the court also relied on *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"]) and *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]).

Daily News article or the agency investigation, is unpersuasive. Petitioner cites no evidence that the information was obtained from sealed records and all the evidence respondents needed to consider was already available to the agency. Moreover, even if petitioner cannot obtain a Certificate of Relief from Disabilities, that fact would not alter the court's determination.

It is hereby

ORDERED that leave to renew and reargue is granted, but upon reargument and renewal, the court adheres to its prior determination.

This constitutes the Decision and Order of the Court.

Dated: November 13, 2013

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NOV 19 2013

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ENTER:



J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE