Polakoff v New York City Dept. of Bldgs.
2019 NY Slip Op 30774(U)
March 29, 2019
Supreme Court, New York County
Docket Number: 150828/2018
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY **PART** IAS MOTION 48EFM

Justice

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TODD POLAKOFF,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF BUILDINGS, and THE CITY OF NEW YORK

Defendant.

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INDEX NO. 150828/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 32, 52, 53, 54, 71, 72

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Petitioner Todd Polakoff, moves pursuant to CPLR Article 78, for an order reversing, annulling, and setting aside respondents the New York City Department of Buildings (DOB) and the City of New York's denial of petitioner's application for a master rigger's license and remanding matter back to the DOB with a directive to grant petitioner's license or, in the alternative, remanding to the matter back to the DOB for reconsideration of the application.

Petitioner submitted his application for a master rigger's license to the DOB on July 10, 2017 (NYSCEF Doc. No. 33, amended petition, ¶ 10). As a part of his application for the master rigger's license, petitioner submitted documents showing the rigging and hoisting work he performed and the dates of his employment at Perlen Steel Corp & Richard Perlen Erectors ("Perlen"), TPH-Project (TPH), and Adam America (*id.* at ¶ 10; see NYSCEF Doc. Nos., 20-26).

By letter dated September 29, 2017, the DOB denied petitioner's application on the grounds that petitioner failed to work under the "direct and continuing supervision" of

a licensee (i.e. one who already holds the license); that he failed to substantiate experience at one employer; and that some of his earnings were purportedly not indicative of full-time employment (*id.* at ¶ 12). In its letter denying petitioner's application for a license, the DOB stated that petitioner's work in the three firms is not qualified experience for the purposes of the New York City Administrative Code (Administrative Code) § 28-404.3.1 (NYSCEF Doc. No. 29). The DOB asserted that there was not a licensed master rigger working for Perlen during petitioner's employment, and thus, petitioner's unsupervised work there would not count towards the five years of practical experience as required by § 28-404.3.1 (*id.*). Furthermore, the DOB concluded that it was unable to verify petitioner's experience at TPH because he did not work for TPH on a full-time basis (*id.*). Lastly, the DOB, claiming that petitioner never submitted an Experience Verification Form ("EVF") from Adam America, refused to consider petitioner's experience there as well (*id.*).

Petitioner asserts that his work at these three firms fulfils the qualifying experience requirement under Administrative Code § 28-404.3.1. He claims that the DOB wrongfully disregarded his experience at Perlen because the Administrative Code does not require direct and continuous supervision as a qualifying requirement to become a licensed master rigger. Furthermore, petitioner asserts that he had submitted sufficient documentation to establish his qualified experience at TPH and Adam America, but the DOB wrongfully rejected taking these documents into account when it refused to credit petitioner's work experience in those two firms.

Article 78 enables a petitioner to raise the question of "whether a determination was made in violation of lawful procedure, was affected by an error or law or was

arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). As a preliminary matter, the court notes that "the issuance of a license is an exercise of discretion" (*Testwell, Inc. v New York City Department of Buildings*, 80 AD3d 266, 274 [1st Dept 2010]). Accordingly, the standard for judicial review is limited to whether the DOB's decision denying petitioner's application for a license was arbitrary or capricious (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). A decision is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts" (*id.*). The decision must be "supported by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination" (*id.*).

In New York City, it is "unlawful to hoist or lower any article on the outside of any building . . . unless such work is performed by or under the direct and continuing supervision of a person licensed as a rigger" (Administrative Code § 28-404.1). An applicant for a master rigger's license, in addition to fulfilling the general requirements for all licenses under Administrative Code § 28-401.6, must submit documents establishing that he or she meets the additional qualifications of § 28-404.3.3. If the documentation provided by the applicant is found satisfactory, the DOB issues the license to the applicant (*see* Administrative Code § 28-401.10).

This case concerns the requirement for the applicant to submit proof establishing that he "[h]as at least five years of practical experience in the hoisting and rigging business within the seven years prior to application" (Administrative Code § 28-404.3.1).

Perlen Experience

The DOB's rejection of petitioner's experience at Perlen solely relies on the inference that the definition of "practical experience," as required by Administrative Code § 28-404.3.1, includes "direct and continuous supervision of a licensed rigger." The type of experience to be credited as qualified experience under § 28-404.3.1 is "practical experience in the hoisting and rigging business"; there is no mention in this section that of "direct and continuous supervision."

To support its claim that the master rigger's license applicants are required to prove that they worked under direct and continuous supervision of a master rigger, the DOB draws upon § 28-404.1 of the Administrative Code which enumerates the types of rigging work that require a rigger's license. Section 28-404.1 states that "[i]t shall be unlawful to hoist or lower any article on the outside of any building in the city unless such work is performed by or under direct and continuous supervision of a person licensed as a rigger under the provisions of this article." The DOB reasons that, because direct supervision of a licensed rigger is required to engage in rigging activities in the city, any unsupervised rigging work would be unlawful and does not qualify as experience for the purposes of a master rigger's license.

However, the lack of "direct and continuous supervision" language in the special requirements of master rigger's license is curious. As petitioner points out in his amended petition, the Administrative Code, explicitly requires applicants for some licenses such as Class A, B, and C Hoisting Machine Operator Licenses or Master Sign Hanger's License to establish that they have gained sufficient experience under the direct and continuing supervision of a licensee (*see* Administrative Code §§ 28-405.3.1,

28-405.3.2.1, 28-405.3.3, 28-408.3.1, 28-410.4.1.1, 28-415.4.1, 28-415.4.2). On the other hand, "direct and continuing supervision" language cannot be found in the experience requirements of several licenses including those of a master rigger's license (*see* Administrative Code §§ 28-403.2, 28-404.3, 28-406.1, 28-407.2, 28-412.3, 28-416.1, 28-418.3, 28-421.2, 28.422.2).

Given the detailed codification of each license requirement by the legislature, it is reasonable to conclude that the "direct and continuing supervision" requirement for a master rigger's license was purposefully omitted by the legislature, and because the issue does not require special knowledge of operational practices or evaluation of factual data, this court need not accord deference to the DOB's statutory interpretation activities (*Matter of Guido v New York State Teachers' Retirement Sys.*, 94 NY2d 64, 68 [1999] [stating that deference need not be accorded the agency interpretation of the statutes when the central question does not implicate knowledge of underlying practices or evaluation of data]; *see also Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459; *Kreitzer v New York City Dept of Bldgs*, 24 AD3d 374, 375 [1st Dept 2005], *lv denied*, 6 NY3d 715 [2006]). Although, public policy considerations and Administrative Code § 28-404.1 give some support to DOB's assertion that it cannot give credit to unlawful rigging work, it does not mean that the DOB is authorized to read a non-existent requirement into Administrative Code (*Kreitzer*, 24 AD3d at 375 [stating that DOB cannot "engraft" language from one Code provision into another Code provision]).

Respondents' theory relies on the assertion that all unsupervised rigging work is unlawful. Section 28-404.1 prohibits anyone from hoisting or lowering articles on the outside of any building without supervision of a licensed rigger. On the other hand,

some similar activities, such as "loading or unloading of a material delivery truck if the material loaded or unloaded is not raised more than 12 feet (3658 mm) above the bed of the truck during the loading or unloading process" are exempted (Administrative Code § 28-404.1).

Petitioner claims that the type of hoisting experience he gained at Perlen does not require constant supervision by a master rigger. He claims that he was engaged in hoisting and lowering articles inside buildings as well as the erection or dismantling of crawler cranes. Furthermore, he claims that some of the hoisting experience he gained at Perlen, which is headquartered in New Jersey, was in New Jersey and § 28-404.1 only concerns rigging work in New York City.

Rather than refusing to consider petitioner's experience for the reason that it is unsupervised and unlawful, the DOB should have inquired and assessed petitioner's particular situation and determined whether experience outside New York City or rigging work inside the buildings would qualify as "practical experience in the hoisting and rigging business" under the Administrative Code. If the DOB is going to take the position that "practical experience" includes only supervised work, it was unreasonable for it not to inquire or consider that the work at Perlen included work outside the City and work that petitioner claims is exempt from supervision. A decision is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell,* 34 NY2d at 231). The decision must be "supported by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination" (*id.*). The DOB's detachment from reviewing the particular facts of the matter renders its decision arbitrary and capricious.

TPH

Petitioner contends that his work at TPH satisfies the experience requirement, yet the DOB unreasonably rejected consideration of petitioner's qualified experiences there. The DOB refused to credit petitioner's experience in TPH on the basis that petitioner only worked part-time there, and title 1, § 104-0 of the New York City Rules (RCNY) requires qualified experience to be gained as a result of full-time compensated employment. Petitioner, in his application, stated that he worked at TPH full-time, earning four hundred dollars a week, under the supervision of Patrick Tarrant. Mr. Tarrant's submitted an affidavit corroborated petitioner's claim. However, the Social Security History of FICA Earnings ("SSHE") submitted by petitioner showed that petitioner was earning below full-time wage.

Both affidavits and SSHE are required by the DOB to be submitted as documentation of experience (1 RCNY § 104-01[e]), and the DOB already developed a rule to deal with situations where the SSHE does not show required compensation. In those situations, the DOB may ask for clarification and consider the experience if additional evidence providing "a detailed explanation of the nature of the employer-employee relationship, which may include, but is not limited to, written agreements between the applicant and the employer, the employer's workers compensation records, time-keeping records, work logs, or other contemporaneous documentation as the Department may require" (1 RCNY § 104-01[e][5]). There is nothing in the record that shows that the DOB considered affidavits or requested any additional information.

The DOB's refusal to consider the evidence it requires for the master rigger application and its unwillingness to request clarification in violation of its own regulations

demonstrates that the decision regarding petitioner's work in TPH-Project is arbitrary and capricious (*Auringer v Dept of Bldgs*, 24 AD3d 162, 163 [1st Dept 2005] [concluding that there is no sufficient ground for respondent's refusal of recognizing the names of the applicant's supervisors on the petitioner's application for a hoisting operator license had submitted]).

Adam America

Lastly, claiming that petitioner never submitted proof regarding his work in Adam America, the DOB refused to credit petitioner's experience there. Petitioner asserts the EVF was sent to the DOB by Adam America, and the DOB concurs with this assertion in its memorandum of law. The DOB now claims that the statement in the denial letter is incorrect, and in fact, it considered the EVF submitted by Adam America and refused to credit petitioner's experience there on the basis that Adam America is not licensed to do rigging work. To support its claim, the DOB submits a statement by one of its inspectors. This court's review is limited to the record. However, there is nothing in the administrative record showing that the DOB actually considered the submitted EVF or the written statement of the investigator when it made a decision. Again, the DOB's failure to consider the documentation submitted by petitioner when it made a determination on petitioner's work experience at Adam America renders that decision arbitrary and capricious as it was taken without regards to facts (*Matter of Pell,* 34 NY2d at 231).

A remand to the DOB is appropriate. The court declines to mandate that the DOB issue a master rigger's license to petitioner, but it requires the DOB to render a determination based on a more comprehensive consideration.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent of remanding this matter to the New York City Department of Buildings and the proceeding is remanded for further proceedings consistent with this decision.

3/27/19
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE