

<b>Polakoff v New York City Dept. of Bldgs.</b>
2020 NY Slip Op 32684(U)
August 18, 2020
Supreme Court, New York County
Docket Number: 151499/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM**

*Justice*

-----X

TODD POLAKOFF,

Petitioner,

- v -

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

Respondent.

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INDEX NO. 151499/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 25, 26, 27, 60, 61, 62, 63, 64, 65, 66, 67, 68

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

Background

Relevant Statutes

New York City Administrative Code § 28-404.1 states:

It 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 the direct and continuing supervision of a person licensed as a rigger under the provisions of this article. The provisions of this article shall apply to the erection or dismantling of a tower crane or a climber crane on a building and to the use of a derrick in their removal, except that such erection or dismantling may be performed by or under the direct and continuing supervision of a licensed climber or tower crane rigger in accordance with rules promulgated by the department.

Exception: The provisions of this article shall not apply to the hoisting or lowering of signs if the person so doing possesses a license as a sign hanger, as provided in this chapter, or to the loading and unloading of any building materials or equipment, other than boilers and tanks, from a delivery truck.

New York City Administrative Code § 28-404.3, "Definitions," states, in pertinent part:

**DIRECT AND CONTINUING SUPERVISION.** Responsible control exercised by a licensed individual, either personally or through one or more, but no more than three, levels of competent supervision over individuals performing the actual work of the licensee's trade who are (i) in the direct employ of an individual who is a licensee, or (ii) in the direct employ of the city agency employing the licensee or

(iii) in the direct employ of a business employing the licensee, as allowed by the department, or (iv) where the licensee uses his or her license on behalf of a business, in the direct employ of such business provided that such business is disclosed to the department pursuant to this chapter. Such control shall be evidenced by such licensee's signature, and seal where applicable, upon any required statements, applications and/or permits and by demonstrating involvement of the licensee in the operations of the business, including hiring of employees, responsibility for financial matters, and oversight of work performance. Direct and continuing supervision includes field inspection, supervision of job sites, and the maintenance of records of such supervision and such other requirements as the commissioner may prescribe by rule for a particular license type.

**DIRECT EMPLOY.** An individual is in the direct employ of a licensee or business or a city agency when such individual is on the payroll of such licensee or business or city agency and under the usual common law rules applicable in determining the employer-employee relationship has the status of an employee. The work performed by such employee shall not exceed the class of license held by the licensee.

New York City Administrative Code § 28-404.3.1, "Master rigger qualifications," states its requirements as follows, in pertinent part:

All applicants for a master rigger license shall submit satisfactory proof establishing that the applicant:

1. Has at least five years of practical experience in the hoisting and rigging business within the seven years prior to application;
2. Has knowledge of and is able to explain the risks incident to such business and precautions to be taken in connection therewith, safe loads and computation thereof, types of rigging, size and strength of ropes, cables, blocks, poles, derricks, shear legs and other tools used in connection with such business; and
3. Has satisfactorily completed a department approved training course of not less than thirty hours.

Title 1 of the Rules of the City of New York ("RCNY"), Chapter 104-01(d) states, in pertinent part: "the term experience refers to that experience gained in the relevant trade as the result of full-time compensated employment, unless otherwise determined by the Commissioner."

New York City Administrative Code § 3316.9.1, "Supervision," outlines exceptions to "constant direct supervision" and is e-filed as NYSCEF Doc. 61. Select exceptions include hoisting or lowering of articles on the outside of a building (1) "by or under the supervision of a competent person;" (2) in conjunction with the construction...[or] full demolition" of buildings; and (3) all workers involved are certified or trained pursuant to § 3316.9.2 (Exhibit A, NYSCEF Doc. 61).

New York City Administrative Code § 3302.1 defines “competent” as “one who is capable of identifying existing predictable hazards in the surroundings or conditions that are unsanitary, hazardous or dangerous, and who has authorization to take prompt corrective measures to eliminate such hazards.”

#### Petitioner’s Application for a Master Rigger’s License

On July 10, 2017, petitioner, Todd Polakoff, applied to co-respondent, the New York City Department of Buildings (“DOB”), for a Master Rigger’s License. He provided evidence that he passed the Master Rigger’s License examination, and he submitted documents demonstrating the rigging and hoisting work that he allegedly completed as an employee of Perlen Steel Corp. & Richard Perlen Erectors (“Perlen”); TPH-Project (“TPH”); and Adam America Real Estate (“Adam America”). (NYSCEF Doc. 32).

#### The First Denial

On September 28, 2017, DOB denied petitioner’s application (the “First Denial”), asserting that petitioner had failed DOB’s “experience evaluation” (Exhibit G, NYSCEF Doc. 10). Specifically, DOB found that Perlen “was not authorized to operate as a rigging business as no licensed riggers were registered at that business” (NYSCEF Doc. 10, at 2). DOB also asserted that, although petitioner submitted Experience Verification Forms (“EVFs”) from Master Rigger Patrick Tarrant and non-licensed supervisor Richard Perlen, which claimed that petitioner performed hoisting and rigging work through a “corporate alliance,” “Perlen was never Mr. Tarrant’s licensed business and therefore Mr. Tarrant could not have supervised any of the rigging work” that petitioner claims to have performed there (NYSCEF Doc. 10, at 2). Additionally, DOB claimed that it was unable to verify petitioner’s alleged experience at TPH due to petitioner’s low reported earnings (below full-time wages) (NYSCEF Doc. 10, at 2).

#### The March 27, 2019 Decision and Order of the Hon. Andrea Masley

Rather than applying for reconsideration, petitioner commenced a CPLR Article 78 Special Proceeding (under Index No. 150828/2018) to challenge the First Denial.

On March 27, 2019, the Hon. Andrea Masley granted petitioner’s CPLR Article 78 petition “to the extent of remanding this matter to the [DOB]” to “render a determination based on a more comprehensive consideration” (Exhibit M, NYSCEF Doc. 16). In her Decision and Order, Judge Masley stated that the First Denial “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’” (NYSCEF Doc. 16, at 4). She stated that “the lack of ‘direct and continuous supervision’ language in the special requirements of master rigger’s license is curious” (NYSCEF Doc. 16, at 4). Judge Masley also stated that “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” (NYSCEF Doc. 16, at 5).

As Judge Masley stated in her Decision and Order, petitioner claimed that the type of hoisting experience that he acquired while working at Perlen did not require a Master Rigger’s constant supervision. Petitioner also asserted that some of his hoisting work for Perlen occurred in New Jersey; however, § 28-404.1 guides the licensing of riggers in New York City only. (NYSCEF Doc. 16, at 6).

Judge Masley also stated that “there is nothing in the record that shows that DOB considered affidavits or requested any additional information” about petitioner’s employment at TPH (NYSCEF Doc. 16, at 7). Judge Masley found 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” to be arbitrary and capricious (NYSCEF Doc. 16, at 7-8).

In discussing petitioner’s work with Adam America, Judge Masley stated that “there is nothing in the administrative record showing that DOB actually considered the submitted EVF [from Adam America] or the written statement of the investigator when it made a decision” (NYSCEF Doc. 16, at 8).

#### The Second Denial

On October 9, 2019, DOB again denied (the “Second Denial”) petitioner’s application for a Master Rigger’s License as it could not confirm that petitioner met the experience requirement (NYSCEF Doc. 4). In its denial letter, DOB asserted that, upon remand, it requested, inter alia, the following supplemental documentation from petitioner: proof of compensation at TPH; copies of work records demonstrating alleged rigging experience at Perlen and Adam America; and documentation of his October 2008 criminal conviction for extortion (NYSCEF Doc. 4, at 2). DOB asserted that petitioner replied by submitting, inter alia, photographs from Facebook of himself at various worksites; an online printout of National Commission for the Certification of Crane Operation’s (“NCCCO”) Practical Examiner Program and Testing Locations listing petitioner as an accredited practical examiner; and an affidavit from Richard Perlen (NYSCEF Doc. 4, at 3). DOB found that the aforementioned photographs “did not establish that [petitioner was] engaged in rigging and hoisting” on a full-time basis (NYSCEF Doc. 4, at 4).

According to DOB’s searches, Perlen is a steel distribution and fabrication company, and Adam America is a real estate management and development business, neither of which were registered as holders of Master Rigger’s Licenses (NYSCEF Doc. 4, at 4). DOB asserted that petitioner failed to submit “contemporaneous documentation” demonstrating that he received compensation for the work that he allegedly completed (NYSCEF Doc. 4, at 4).

Additionally, DOB asserted that, despite DOB’s request (NYSCEF Doc. 4, at 3), petitioner failed to submit records demonstrating his full-time, compensated employment at TPH, the only employer that held a Master Rigger’s License (see Exhibit H, NYSCEF Doc. 29).

DOB acknowledged that petitioner “emphasized [his] participation in the Department’s Crane Rules committee, [his] experience as an instructor at the Safety Group, the credentials/certifications [he] allegedly received from NCCCO, the State of New Jersey, and OSHA, and [his] issuance of a rigging Foreman card.” However, DOB claimed that “none of this experience involved the performance of any actual rigging or hoisting work and did not consist of fulltime compensated employment” (NYSCEF Doc. 4, at 5).

#### The Instant CPLR Article 78 Special Proceeding

On February 10, 2020, petitioner commenced the instant CPLR Article 78 Special Proceeding against co-respondents DOB and the City of New York (“NYC”), requesting an order [1]

reversing, annulling, and setting aside respondents' denial of petitioner's Application for the Master Rigger's License and remanding to DOB with a directive to issue the Master Rigger's License to petitioner; or, in the alternative, [2] pursuant to CPLR 7804(h), directing a trial on issues of fact and upon hearing of said trial, remanding to DOB with a directive to issue the Master Rigger's License to petitioner (NYSCEF Doc. 2).

Petitioner asserts that respondents overlook Building Code § 3316.9.1, which outlines types of hoisting and lowering work that does not require a licensed rigger's "direct and continuous" supervision (NYSCEF Doc. 1, at 4).

On April 17, 2020, respondents jointly answered with various admissions, denials, and three Affirmative Defenses (NYSCEF Doc. 29).

In reply, petitioner alleged that respondents issued the Second Denial "not because [petitioner] offers insufficient proof of his qualifying experience, but because [DOB] fails to consider competent evidence before it, and instead insists on crediting only certain types or kinds of documents" (NYSCEF Doc. 60, at 18).

#### Discussion

It is well-settled that in an Article 78 proceeding, the scope of judicial review is limited to the issue of whether the administrative action is rational. Pell v Board of Educ., 34 NY2d 222, 230-231 (1974). This Court may not disturb respondents' determination unless there is no rational basis for the exercise of discretion or it was arbitrary and capricious. Id. at 231. "The arbitrary or capricious test chiefly relates to ... whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id.

DOB was not arbitrary and capricious in finding that Perlen and Adam America are not licensed as rigging companies (NYSCEF Doc. 35 and 38). Furthermore, this Court finds that DOB was rational in determining that petitioner was entitled to credit for one year (2016) of practical experience at TPH but that petitioner did not earn minimum wage at TPH in 2014, 2015, and 2017 (NYSCEF Doc. 19, at 24). Respondents have established that petitioner failed to submit "proof of compensation at TPH, copies of any contemporaneous work records demonstrating [his] alleged rigging experience while employed at Perlen and Adam American, and documentation regarding [his] criminal conviction" as DOB requested in an April 1, 2019 letter to petitioner.

Respondents acknowledge petitioner's citation to Building Code 3316.9 in their joint Answer, which states in footnote 11, "per Building Code Chapter 3302.1 and 3316.9, a competent person may supervise rigging operations in certain situations" (NYSCEF Doc. 29, at 36). However, respondents assert that, pursuant to 1 RCNY § 104-20(h)(i) and (j), "if a Master Rigger is not personally supervising the work then he/she can designate a rigging foreman (i.e., a competent/qualified supervisor). A rigging foreman must be designated by a licensed Master Rigger and must meet a threshold requirement of experience and knowledge." Respondents rationally concluded that petitioner "failed to submit any documentation demonstrating that [he]

worked as a competent person or [was] otherwise engaged in rigging related work on a fulltime basis” (NYSCEF Doc. 29, at 36).

Thus, this Court finds that DOB thoroughly considered petitioner’s application and exerted sufficient effort to retrieve and review additional documentation upon Judge Masley’s remand. This Court disagrees with Judge Masley’s finding that DOB does not have “special expertise” in this area, but this Court’s holding would be the same in any event.

This Court has reviewed petitioner’s arguments and finds them to be unavailing and/or non-dispositive.

This Court finds that, in sum, DOB did not act arbitrarily and/or capriciously in reviewing the documents that petitioner submitted and/or, more importantly, in again denying petitioner’s July 10, 2017 application for a Master Rigger’s License. Whether or not DOB has “special expertise” in interpreting the aforesaid relevant statutes, it certainly has experience in choosing the people it finds to be qualified to own a Master Rigger’s License.

This Court notes in passing that New York spends approximately \$61.5 billion annually on construction. The *New York Times* has cited “the resilience of corruption in the construction industry in New York.”

Conclusion

Thus, for the reasons stated herein, Todd Polakoff’s CPLR Article 78 petition against respondents, the City of New York, and the New York City Department of Buildings, is hereby denied and dismissed, and the Clerk is hereby directed to enter judgment accordingly.

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