SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYNN R. KOTLER** **PART** **08**

Justice

----------X

MAGNI AMERICA, LLC,ED MCQUADE

Petitioner,

- v -

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

Respondent.

----------X

INDEX NO. 160289/2024

MOTION DATE 11/06/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 24, 26, 28, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

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

Upon the foregoing documents, this motion is decided as follows. This is a special proceeding brought pursuant to CPLR Article 78 arising from a set of rules related to the licensing of hoisting machine operators adopted by the New York City Department of Buildings ("DOB") on July 25, 2024. Petitioners Magni America, LLC ("Magni") and Ed McQuade ("Magni", "McQuade" or "petitioners") seek an order pursuant to CPLR Article 78 annulling, vacating, and declaring invalid a portion of the rules related to the requirements to become a licensed telehandler operator. The City of New York and the DOB (collectively, "respondents") oppose the motion and argue that petitioners do not have standing to challenge the governmental action and that the hoisting machine licensing rule being challenged is rational and consistent with the enabling statute. For the reasons that follow, the petition is denied.

Facts

The relevant facts, which are based on the Amended Verified Petition and the Verified Answer, are as follows. Magni is a telehandler distributor. Telehandlers are heavy duty

construction machinery that have an extendable arm which can be fastened with personnel work platforms, hooks, jibs, winches, or forks. Telehandlers offer similar uses as a crane but are much smaller and can work in tighter spaces. Magni does not operate the telehandlers themselves and is only a manufacturer and distributor of the equipment. McQuade is an individual who had worked in the construction industry for 33 years and has approximately 100 hours of experience operating telehandlers.

On November 7, 2021, the New York City Council enacted NYC Local Law 126 which amended Chapter 4 of Title 28 of the Administrative Code, which contained Article 405 that expanded the licensing requirements for hoisting machine operators. The law created new classes of operator licenses for articulating boom cranes and mini cranes and granted the DOB the authority to establish additional regulation for limited licenses for other hoisting machines. Article 405 became effective as of November 7, 2022.

Administrative Code § 28-405.3.4 sets forth the experience qualifications for a limited license and requires the "applicant for a limited hoisting machine operator license shall have at least two (2) years of experience, within the three (3) years prior to application, in the presence of and under the direct supervision of a licensed hoisting machine operator." It also created an exception that states "[t]he commissioner may, by rule, establish alternative pathways for individuals who, on or before the date that is two years after the effective date of this provision, apply for a limited license for articulating boom cranes, a limited license for mini cranes, or other limited license established by rule."

On January 26, 2024, the DOB published proposed rule amendments for 1 Rules of the City of New York ("RCNY") § 104-09 and on February 28, 2024, a hearing was held for

comments. Comments included the recommendation that the rule allow operators to qualify for the license based on experience gained in New York City before November 7, 2024.

On July 25, 2024, the DOB adopted Amended Rule 1 RCNY § 104-09 which contained the licensing requirements for limited Hoisting Machine Operator ("HMO") licenses. 1 RCNY § 104-09 (a)(4)(ii) outlines the experience requirements for "Class C and limited hoisting machine operator license applicants". Telehandler licenses are a class of limited HMO licenses. This subsection requires:

> (A) That at least one (1) year of the two (2) years of experience required by Section 28-405.3 of the New York city administrative code was acquired in New York City in the operation of hoisting machines as specified for each license in Table 1, and that such operation was in connection with building or infrastructure construction, alteration, or demolition work, or the installation or removal of temporary structures or temporary construction installations, or the delivery or retrieval of materials, equipment, or other items to or from a building; but excluding work in industrial or commercial plants or yards;
> (B) That all experience obtained in New York City was acquired operating mobile or tower cranes or rotating telehandlers in the presence of and under the direct supervision of a New York City licensed Hoisting Machine Operator in accordance with section 104-23 of these rules; and
> (C) That experience obtained outside of New York City was acquired in the United States operating mobile or tower cranes or rotating telehandlers in the presence of and under the direct supervision of a hoisting machine operator licensed, registered, or certified in good standing to operate such equipment within the relevant jurisdiction. Applicants who are duly licensed, registered, or certified in good standing to operate the equipment in the relevant jurisdiction for which the experience is being credited may credit self-supervision toward this requirement.

Subsection (ii) also contains two exceptions. Of relevance to the current petition is the second exception which states in part:

> Applicants for a Limited Hoisting Machine Operator license for an articulating boom crane, mini crane, or telehandler may credit experience earned in New York City operating an articulating boom crane, mini crane, or rotating telehandler neither in the presence nor under the direct supervision of a New York City licensed Hoisting Machine Operator, provided, however, that such experience was earned prior to November 7, 2024 and no more than three (3) years prior to the date of application for licensure, and provided further that such operation was performed in connection with building or

> infrastructure construction, alteration, or demolition work, or the installation or removal of temporary structures or temporary construction installations, or the delivery or retrieval of materials, equipment, or other items to or from a building, but excluding work in industrial or commercial plants or yards. Such experience will be credited as satisfying the provisions of clause (A) of this subparagraph at a rate of 125 hours of operator experience equaling one month of experience.

The amended rules incorporated the comments from the hearing and created a "temporary alternative pathway" to licensure for individuals who obtained at least 1,500 hours of experience prior to November 7, 2024, if they applied by November 6, 2024, stating:

> (iii) Limited license alternate pathway. Individuals who submit an application for a Limited Hoisting Machine Operator license for articulating boom cranes, mini cranes, or telehandlers on or before November 6, 2024, may, in lieu of the requirements set forth in subparagraph (ii) of this paragraph, provide proof in the form of an affidavit provided by the department and signed by the applicant and the applicant's employer or union, attesting that the applicant:
> (C) for a limited license for a telehandler, has obtained 1,500 hours of experience on or after January 1, 2019, operating, in New York City, rotating telehandlers, with the operation performed in connection with building or infrastructure construction, alteration, or demolition work, or the installation or removal of temporary structures or temporary construction installations, or the delivery or retrieval of materials, equipment, or other items to or from a building; but excluding work in industrial or commercial plants or yards.

On November 5, 2024, petitioner filed an Order to Show Cause, Verified Petition and supporting documents. On November 6, 2024, Magni's application for a temporary restraining order was denied. On November 19, 2024, Magni filed an Amended Petition which added McQuade as a petitioner.

Discussion

At the outset respondents oppose the motion arguing that petitioners do not have standing to sue. In order to have standing in an action challenging a governmental action, the plaintiff must show (1) injury in fact, and (2) that "the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under

which the agency has acted" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *see also Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991] ["a party must show that the in-fact injury of which it complains… falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted"]). Injury in fact requires a showing of "cognizable harm" to the plaintiff (*Novello*, 2 NY3d at 214) and cannot be speculative (*Lotaj v City of New York*, 127 AD3d 605, 606 [1st Dept 2015]).

Respondents argue that the challenged rule does not have any direct impact on Magni's business nor on McQuade's ability to obtain a limited HMO license. Magni claims that their business has been compromised by the rule as the demand for telehandler machines has been uncharacteristically depressed and that they had not sold a single telehandler between November 2024 and January 2025 when they typically sell between 10 and 20 machines during that quarter. Petitioner McQuade claims that the rule prevents him from operating a telehandler in New York as it makes it impossible for him to satisfy the requirements.

The court agrees with respondents that petitioners lack standing to challenge this government action. In order to show injury in fact, petitioner must show they "have an actual legal stake in the matter in dispute" (*Novello*, 2 NY3d at 212). Here, as a distributor of telehandlers, Magni has no stake in the licensing procedures or requirements for the operators of their product. While the licensing procedure for the operation of telehandlers may reduce demand for telehandlers, this speculative economic harm does not amount to an injury in fact.

Assuming, *arguendo*, Magni had suffered an injury in fact, that injury would still not fall into the zone of interest of the rule. Magni argues that the intent of the statute includes "the environment, and with due regard for building construction and maintenance costs", and

therefore includes Magni in the zone of interest as they develop "safe, efficient, and environmentally-friendly Telehandler[s] in lieu of the traditional ad more costly cranes" (Administrative Code § 28-101.2).

Respondents cite *Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead* as evidence that where the statute contemplates balancing market interest with regulatory objectives a party may have standing if the regulation frustrates the economic viability of the business (69 NY2d 406, 413 [1987]). In *Sun-Brite*, the determination was specifically related to standing in zoning cases, finding that "an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury" (*id.* at 414). However, even in that case petitioner lacked standing because the threat of business competition was not an interest protected by the zoning laws (*id.* at 415). Administrative Code § 28-101.2 does not contemplate the viability of hoisting machine distributors effected by the construction codes, and therefore Magni does not have standing even if their reduced sales of telehandlers was considered an injury in fact.

While respondents do not contest that McQuade would fall into the zone of interest as a potential applicant for the limited HMO license, he has not shown an injury in fact. McQuade has only 100 total hours of telehandler experience in his 33 plus year career, and 40 of those hours were earned prior to 2020. The fact the McQuade does not qualify for the license under the new rules does not mean he has an injury in fact. Here, McQuade doesn't even allege that he applied for a license or that it was denied or how he has been harmed by the rule. McQuade's conclusory statement that it will be practically impossible for him to get a license because of the rule is insufficient to establish that he has suffered an injury in fact.

The court disagrees with petitioner that McQuade is prevented form operating a telehandler. McQuade may still operate a telehandler under the supervision of a licensed HMO operator, and any experience operating other hoisting machines would be credited toward the hours required for the limited HMO license should he wish to apply in the future. Based on the foregoing, the petition is denied as neither Magni nor McQuade have standing to challenge the governmental action.

Even if the petitioners had standing, the court finds that the DOB rule was not arbitrary and capricious or an abuse of discretion.

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi*-judicial hearings required by statute or law" (*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]) (emphasis removed); *see also Matter of Colton v. Berman*, 21 NY2d 322, 329 (1967).

"Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell*, 34 NY2d at 231; *see also Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 [2010]; *Matter of Ferrelli v State of New York*, 226 AD3d 504, 504 [1st Dept 2024]). If the agency determination is supported by a rational basis, it must be upheld even if a different conclusion could have been reached by the court (*Matter of Ferrelli*, 226 AD3d at 504; *see also Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

Here, DOB published the rule publicly on January 26, 2024, and gave industry participants over a month to submit comments on the rule. On February 28, 2024, DOB held a public hearing and incorporated suggestions from the industry participants into the rule, including the alternative pathway which provided an easier track to licensure for existing telehandler operators. Respondents provided the temporary alternative pathway that balances the public interest of ensuing the safe operation of large hoisting machines with the need to ensure the existence of licensed telehandlers to continue working in New York City. Moreover, the rule accomplishes that goal and the court may not substitute its own judgment in place of the DOB given their expertise in construction safety (*see Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987] [where, as here, the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference]; s*ee also City Services, Inc. v Neiman*, 77 AD3d 505, 507 [1st Dept 2010]).

Conclusion

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

4/3/2025
DATE

LYNN R. KOTLER, J.S.C.

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