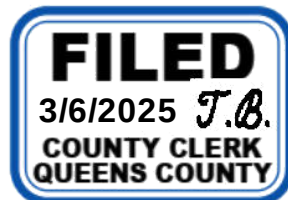


Rosenwach v City of New York
2025 NY Slip Op 35625(U)
March 5, 2025
Supreme Court, Queens County
Docket Number: Index No. 721316/2024
Judge: Kevin J. Kerrigan
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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE KEVIN J. KERRIGAN Part 10
 Justice

-----X

Henry Rosenwach,

Index
 Number: 721316/24

Petitioner,

- against -

Motion
 Date: 2/24/25

Motion Seq. No.: 1

City of New York, NYC Buildings and
 CPS HR Consulting,

Respondents.

-----X

The following papers numbered E1-E15 read on this application by Petitioner in this Article 78 proceeding for an order challenging the denial of Petitioner's appeal to change his score from fail to pass on the Copper Project portion of his practical project for the New York City Master Plumbers licensing examination.

	Papers Numbered
Notice of Petition-Petition-Exhibits.....	E1-8
Answer-Exhibits-Memorandum of Law.....	E9-14
Reply.....	E15

Upon the foregoing papers it is ordered that the motion is decided as follows:

Application by Petitioner in this Article 78 proceeding for an order challenging the denial of Petitioner's appeal to change his score from fail to pass on the "Copper Project" portion of the practical project for the New York City Master Plumbers licensing examination is denied.

Individuals who seek to perform plumbing work in New York City are required to acquire a "master plumbing license." Applicants are required to pass a practical and written exam for said license (see NYC Admin. Code §24-408; RCNY §104-01). Petitioner took the practical examination for his master plumbing license on June 24, 2024. The practical examination is comprised of the "black steel

pipng assembly portion" and the "copper sweat assembly portion." Plaintiff failed the copper portion of the practical exam, resulting in a failure of the entire practical exam.

Petitioner appealed the results on August 16, 2024. The appeal packet signed by Petitioner provides that his failing grade was "arbitrary, capricious, and repleat [sic] with manifest error..." He states that he completed the copper portion with enough time, "without blemish or flaw and held pressure. The quality of joints in my copper project was outstanding..." Petitioner goes on to criticize the administration and rating process of the exam in more general terms, alleging bias, fraud, discrimination, and "manifest error." In support, Petitioner claims that the examination site was dusty, hot, and humid. He also speculates that his project may have been damaged after submission and reiterates that his submission was exceptional. Petitioner claims that the rating scheme presented failed to identify what criteria the evaluators use in their scoring. The appeal was denied on September 4, 2024 by Cheryl Leon, "Assistant Commissioner - Borough Operations" at the New York City Department of Buildings. Leon opined that the Petitioner's work product did not meet the criterion for a passing score since there was evidence of solder drips more than 1/4 inch from the joint. There was no evidence that an error was made, and thus, the failing score was appropriate.

A copy of Petitioner's exam and score sheet are annexed to the petition and the answer. The "Official Score Report" provides more information on Petitioner's score. Photographs of the physical copper project are annexed and demonstrate the solder drip more than 1/4 inch from the joint. On the score sheet there is a "rating guide" for copper sweat assembly which includes the specific criterion to pass that portion of the project. The remainder of the packet includes the instructions for the exam. Notably, Petitioner concluded the exam by stating "yes" to questions regarding whether the test administration process was effective and organized, whether that the proctor and raters were courteous, whether the exam site was set up in a way that made it possible for Petitioner to demonstrate his skills, and whether he was satisfied with the overall process. Petitioner added an additional comment as follows: "Thank you! Great experience with professional and courteous staff."

A CPLR Article 78 proceeding is the appropriate vehicle to seek review of actions taken by a government agency as to whether they were arbitrary, capricious, or without legal authority (see CPLR 7803[3]; Matter of Gottlieb v. City of New York, 129 A.D.3d 724, 725 [2d Dept. 2015]; Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 N.Y.2d 753, 758 [1991]). "An

arbitrary determination is one that is without a sound basis in reason, and is made without regard to the facts" (see Matter of Hollander v. Suffolk County Dept. of Social Services, 140 A.D.3d 1064, 1065 [2d Dept. 2016], quoting Matter of Gottlieb, 129 A.D.3d at 725). "Courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (see Peckham v. Calogero, 12 N.Y.3d 424, 431 [2009]; see also, Matter of Deerpark Farms, LLC v. Agricultural and Farmland Protection Bd. of Orange County, 70 A.D.3d 1037, 1038 [2d Dept. 2010]). "When there is conflicting evidence or different inferences may be drawn, 'the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists'" (see Kelly v County of Dutchess, 176 A.D.3d 1060 [2d Dept. 2019], quoting Matter of Berenhaus v. Ward, 70 N.Y.2d 436, 444 [1987]). If the Court finds that the determination was not irrational or unlawful, a court cannot second guess that determination (see West 58th Street Coalition, Inc., v City of New York, 37 N.Y.3d 949 [2021]).

Here, the Respondent has sufficiently demonstrated that, contrary to Petitioner's contentions, the determination to fail Petitioner was rational and reasonable and was not arbitrary, capricious (see West 58th Street Coalition, Inc., v City of New York, 37 N.Y.3d 949 [2021]). The rational basis for failing Petitioner was provided in the Official Score Report. Petitioner failed to proffer any evidence beyond his own self-serving statements that his failing grade was arbitrary or capricious. In fact, the Official Score Report and the photographs annexed to the exam support the failing grade. The Court may not insert its own opinion into the rational decision making of the agency or department which is expert in the administration of the master plumbing license.

Petitioner's argument that he was not provided with the scoring criteria was never raised in his initial appeal, and is thus, not preserved for Article 78 review.

Finally, Petitioner's argument that the manner in which the test is administered is, among other things, biased and fraudulent, is similarly not proper for Article 78 review. Mandamus is available "only to enforce a clear right where the public official has failed to perform a duty enjoined by law (see CPLR 7801; N.Y. Civ. Liberties Union v. State, 4 N.Y.3d 175 [2005]). Mandamus "does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial (see id. at 184). The administration of the master plumbing license involves policymaking, and is therefore

a discretionary act rather than a ministerial one (see Bonner v City of New York, 73 N.Y.2d 930 [1989]; Pope v State, 19 A.D.3d 573 [2d Dept. 2005])). Accordingly, any claim for mandamus challenging the actual testing criterion or administration thereto must be denied. Petitioner's remaining contentions are without merit.

Accordingly, the petition is denied and the action is hereby dismissed.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: March 5, 2025



KEVIN J. KERRIGAN, J.S.C.

