

**Matter of Lederman v New York City Police Dept.
Licensing Div.**

2011 NY Slip Op 30765(U)

March 31, 2011

Supreme Court, New York County

Docket Number: 112434-10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Lederman

INDEX NO.

112434/10

MOTION DATE

- v -

MOTION SEQ. NO.

001

MOTION CAL. NO.

NY C Police Dept. Licensing
Division

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

UNFILED JUDGMENT

Upon the foregoing papers, it is ordered that ~~the motion~~ ~~and cross-motion~~ ~~of entry~~ cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1411B).

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Dated: MAR 31 2011

[Signature]
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X

In the Matter of the Application of
CHARLES O. LEDERMAN, ESQUIRE,

Plaintiff (s),

DECISION/ ORDER
Index No.: 112434-10
Seq. No.: 001

-against-

PRESENT:
Hon. Judith J. Gische
J.S.C.

**NEW YORK CITY POLICE DEPARTMENT
LICENSING DIVISION,**

Defendant (s)
This judgment has not been entered by the County Clerk and notice of entry cannot be given based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419) of the Court.
UNFILED JUDGMENT

Recitation, as required by CPLR § 2214(b),
this (these) motion(s):

Papers

- Notice of Ver Pet and Pet w/COL affirm, exhs 1
- Ver Answer, exhs 2

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action brought pursuant to Article 78. Petitioner Charles O. Lederman, Esquire ("Lederman") seeks an order annulling the decision by the Licensing Division of the New York City Police Department ("NYPD") which disapproved of his application for a license to carry a concealed handgun in New York City. This petition is timely and NYPD has answered, seeking the summary denial of the petition without the need for a testimonial hearing.

Since an Article 78 proceeding is a special proceeding, it may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised (CPLR § 409 [b]; CPLR §§ 7801, 7804 [h]). Therefore, the

court will decide the issues raised on the papers and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial (CPLR § 7804 [h]; York v. McGuire, 99 A.D.2d 1023 [1st Dept 1984] aff'd 63 N.Y.2d 760 [1984]; Battaglia v. Schumer, 60 A.D.2d 759 [4th Dept 1977]).

Facts Alleged and Background

Lederman is an attorney admitted to practice in New York and other states. His practice is exclusively in the area of criminal defense and criminal appeals. He is licensed to carry a concealed weapon in the States of New York, Connecticut, Florida and 20 other states. He is not, however, presently licensed to carry a concealed gun in the five boroughs of New York City. Lederman applied for such a license and his application was denied by respondent. According to NYPD's Notice of Disapproval dated July 9, 2010 ("disapproval"), the license was disapproved for the following reasons:

"Your request for a special carry license is disapproved due to a lack of showing of proper cause for the need to carry a concealed handgun in New York City. As a criminal defense attorney in Westchester County, you indicate that you conduct your own investigations and that your occupation mandates that you travel between courthouses in Westchester County and the five boroughs of NYC. There have not been any specifications as to the frequency in which you enter this city for purposes justifying the need for a concealed handgun. Nor have you provided any proof of the alleged threats that you profess were made towards you and your family. Before we can endorse your outside county license to enter the NYC jurisdiction you must submit conclusive documentation that would individualize yourself in similar profession in your domain who performs equivalent legal services."

Lederman appealed the disapproval, providing a one and a half page letter dated

August 5, 2010 ("appeal") in support of his appeal. Lederman explained that he is an attorney and that a large percentage of his clients live in the 5 boroughs. He investigates his cases personally, and according to Lederman, he does "exactly what your department's detectives do...except I go alone, without backup, a weapon, or any assurance that the police would even help me."

In his appeal, Lederman referenced conversations he had with NYPD's investigator ("P.O. Scott") who did a background check of petitioner. Lederman said he told P.O. Scott about past threats that were made on his life. One was at gun point. In response to the request for documentation, Lederman stated he comes to New York City once every seven (7) or eight (8) days and only has a diary of his appointments with clients. He explained that he could not – and would not – provide copies of his calendar because it was "none of the government's business" and, in any event "[would be] like divulging a list of my clients' identities." Finally, Lederman distinguished himself from other lawyers stating that "I actually investigate crimes..." and "If anyone in NY besides a cop needs to carry a gun, I'm probably him."

Lederman's appeal was denied. In its Notice of Disapproval after Appeal dated September 7, 2010 ("administrative appeal"), NYPD wrote the following:

"Your application for a Special Carry License was disapproved for failing to demonstrate proper cause and failing to document alleged death threats and have stated that you travel to New York City "once every 7 or 8 Days on average." Given the infrequency of your visits and your refusal to provide specific information to substantiate your claims, your appeal is denied."

Lederman claims that the denial of his application was arbitrary and capricious and not supported by any evidence before the NYPD. He also claims that he paid fees

in excess of \$340 for the application which, he contends, was pre-judged by NYPD because of his role as "professional adversary" to law enforcement. He argues that not only is the application fee excessive, it should be refundable. Finally, Lederman argues that in light of recent legal authority from the United States Supreme Court, NYPD's licensing requirements violate the Second Amendment to the U.S. Constitution.

Discussion

Article 400 of the Penal Law "is the exclusive statutory mechanism for the licensing of firearms in New York State" (O'Connor v. Scarpino, 83 N.Y.2d 919, 920 [1994]). Penal Law § 400.00 [1] identifies persons who are eligible for a gun license and Penal Law § 400.00 [2] identifies the kinds of licenses available. Lederman's application comes within Penal Law § 400.00 [2] [f], which allows any person to have and carry a concealed weapon without regard to employment or place of possession... when proper cause exists for the issuance thereof..." The licensing proceeding is a rigorous process, beginning with the submission of a signed and verified application to a local licensing officer (Penal Law § 400.00 [3]), entailing a personal investigation of the applicant (Penal Law § 400.00 [4]) and, if granted, requiring registration of the firearm with local authorities (Penal Law § 400.00 [12-c]). "Proper cause" for issuance of a permit has been interpreted to mean "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession" (Matter of Klenosky v. NYC Police, 75 AD2d 793, 793 [1st Dept 1981] aff'd 53 NY2d 685 [1981])

In each of its decisions (the disapproval and subsequent administrative appeal), NYPD set forth detailed, specific and rational reasons for why it found that Lederman

had not set forth "proper cause" for issuance of the permit he applied for, noting that he had not distinguished his needs for security from the public at large. Contrary to Lederman's present assertions, there is no support in this record, nor does it appear that, NYPD pre-judged his application or was pre-disposed to not granting it right from the outset.

Lederman's statement, that he is no different than someone employed in law enforcement, is little more than his personal opinion. While Lederman may chose (or may have no choice) to investigate his own criminal cases personally, although these investigations may place him in physical danger, he is not an arm of law enforcement, but an attorney at law and officer of the court. The potentially dangerous situations he describes are indistinguishable from those faced by other attorneys who primarily maintain a criminal law practice.

Lederman did not, to the licensing division's satisfaction, explain why he must carry a concealed weapon when he is in New York City. By refusing (or being unable) to provide more details about his activities when he is the five boroughs, Lederman did not show proper cause for the issuance of the permit (Kaplan v. Bretton, 249 A.D.2d 199 [1st Dept., 1998]). While Lederamn has described other hardships he faces on a daily basis because he cannot bring his gun into New York City (i.e. he has to secure it in a gun locker at home in White Plains before coming into the City), a gun permit is not merely a matter of convenience. In any event, he presented these extenuating circumstances to the licensing division for its consideration when he filed his application.

In an Article 78 proceeding, the applicable standard of review is whether the

administrative decision being challenged has a rational basis (CPLR 7803 [3]). Thus, where it is alleged the decision was arbitrary and capricious, or without a rational basis, the petitioner must set forth facts that establish it is "without sound basis in reason" (Matter of Pell, Jr. v. Board of Educ. of Union Free School District No., 1 of the Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222 at 231 [1974]; Matter of Colton, Jr. v. Berman, 21 N.Y.2d 322 [1967]). The court cannot and must not disturb such a decision, even if it would have arrived at a different decision itself. None of the arguments raised by Lederman justify the relief sought by him, which is annulment or vacature of the licensing board's disapproval of his application.

Although Lederman separately argues that NYPD's licensing requirements are an infringement on his constitutional right to bear arms, his reliance on the case of District of Columbia v. Heller (554 US 570 [2008]) ("Heller") and McDonald v. City of Chicago (— US —, 130 S.Ct. 2783 [2008]) ("McDonald") is misplaced. In Heller, the court struck down as unconstitutional a District of Columbia statute prohibiting firearms in the home and ordered the District to issue Mr. Heller a license to carry his gun at home. In McDonald, the court held that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of Fourteenth Amendment. Here, Lederman did not apply for such a gun permit, rather he is looking to carry a concealed weapon in public. The court in Heller observed that the rights conferred by the Second Amendment are not absolute and may be limited by reasonable governmental restrictions, citing various founding father era laws that placed restrictions on guns and their use as early as the late 1700's. Neither Heller nor McDonald stand for the principal that states cannot regulate firearms.

Other plaintiffs in cases brought in New York State since Heller have raised very arguments to those raised by Lederman without success (see, People v. Perkins, 62 A.D.3d 1160 [3rd Dept.,2009]; People v. Njvar, —Misc3d—, 915 N.Y.S.2d 801 [Sup Ct . Bx 2011]; People v. Foster, 30 Misc.3d 596 [N.Y.City Crim.Ct.,2010]; Matter of Bastian, NYLJ 1/13/09 p. 29 c. 1 [Crim Ct Rockland Co. 2009] *n.o.r.*; Vasiliou v. Kelly, 2009 WL 1604482 (Sup Ct N.Y. Co. 2009) *n.o.r.*; Llanes v. Kelly, 2009 WL 1672848 (Trial Order) [Sup Ct, New York 2009]).

By statute, NYPD is allowed to charge an application fee for processing an application for a gun carrying license. As explained by respondent and evident from the Penal Law, such fees defray the cost of the investigation necessary. Lederman presents no legal authority for why he should obtain a refund of these fees. The mere fact that they are costly (upwards of \$340) does not make them unfair nor is it unfair to make them non-refundable if the applicant is denied the license applied for.

Respondent's decision to deny Lederman's application is rationally based. The license division correctly required that petitioner establish a "proper cause" for why he needs to carry a concealed weapon. Lederman failed to show an extraordinary threat to his safety and, NYPD pursuant to its own regulations rationally concluded that his general allegations about the time he spends in New York City were insufficient to grant him the license he applied for (Kaplan v. Bratton, 249 A.D.2d 199 [1st Dept 1998]). Consequently, the petition is denied, and this proceeding is dismissed, without the need for a hearing as there are no triable issues.

Conclusion

In accordance with the foregoing,

It is hereby


ORDERED ADJUDGED AND DECLARED that the petition is denied and this proceeding is dismissed; and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
March 31, 2011

ENTER:



Hon. Judith J. Gische, JSC

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).