

**Matter of Papaioannou v Kelly**

2003 NY Slip Op 30131(U)

July 14, 2003

Supreme Court, New York County

Docket Number:

Judge: Lewis Bart Stone

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

PRESENT: HON. LEWIS BART STONE

PART 505

0126191/2002

INDEX NO. 126191/02

PAPAIOANNOU,  
vs  
KELLY, RAYMOND

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

SEQ 1

MOTION CAL. NO. \_\_\_\_\_

ARTICLE 78

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with  
attached decisions & order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

Dated: 14 July 2003

JUL 14 2003  
*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50S

-----X		
In the Matter of the Application of	:	
CONSTANTINOS PAPAIOANNOU,	:	
	:	
Petitioner,	:	DECISION AND
	:	ORDER
For a Judgment pursuant to Article 78	:	
of the Civil Practice Law and Rules	:	Index Number
	:	126191/02
-against-	:	
RAYMOND KELLY, Police Commissioner of	:	
the City of New York	:	
	:	
Respondent.	:	
-----X		

Justice Lewis Bart Stone:

Petitioner moves for a judgment pursuant to Article 78 of the Civil Practice Law and Rules annulling and reversing the determination of Respondent (“License Division”) which revoked Petitioner’s pistol license, mandating that Respondent issue said license. The Respondent opposes petitioner’s application.

**STATEMENT OF FACTS**

Section 10-131 of the New York City Administrative Code (“Administrative Code”) gives the New York City Police Department (“NYPD”) the authority to grant licenses for keeping or carrying pistols within the City of New York. Penal Law §400.00 sets forth the requirements that must be met for an applicant to be issued a

license and to keep or carry a pistol and describes the various types of licenses that can be issued.

Petitioner is thirty-six years old and is a “financial consultant” for a brokerage house. He previously worked for a car dealership. Petitioner obtained a target pistol license on October 16, 1989 and continued to renew the license with NYPD approvals. His last approved application was in 1999 and was to expire on September 8, 2001. Due to revisions in NYPD Rules, Petitioner’s target pistol license was converted to a premises/residence handgun license on June 30, 2001.

On October 29, 2000, in Nassau County, Petitioner was arrested for Driving While Impaired, VTL § 1192.1. Petitioner states that “a couple of days later,” he called NYPD, informed them of the arrest, and was told that “he did not have to report this type of violation.” On December 19, 2000, Petitioner plead guilty to Driving While Impaired, VTL § 1192.1, a violation, and received a sentence of one year conditional discharge, a \$300 fine and his driver’s license was suspended for ninety days.

On September 1, 2001, Petitioner sent a renewal application for the pistol license to the NYPD which contained information regarding the arrest and also contained his new address. NYPD returned this application to Petitioner due to the arrest information and they began an investigation. Since Petitioner’s permit was about to expire, Petitioner surrendered his two pistols as well as his license to NYPD

on September 8, 2001. On September 24, 2001, NYPD gave notice to Petitioner of the suspension of the pistol license and formally rejected the renewal application. On that date Petitioner received a letter from NYPD which advised him to take certain actions regarding his permit, including surrendering his pistols and license, calling NYPD and advised him to immediately forward certain documents regarding his arrest and conviction to NYPD.

On September 28, 2001, Petitioner and Police Officer Murch spoke by telephone regarding the arrest. Petitioner was advised to send the documents referred to in the September 24<sup>th</sup> letter.

On December 28, 2001, NYPD advised Petitioner by letter that his license had been revoked based upon his arrest, his failure to notify the License Division about the arrest at the time of the arrest, and “the failure to cooperate and comply with the investigation.” On March 15, 2002, Petitioner forwarded the remaining documents referred to in the September 24<sup>th</sup> letter to NYPD.

The record indicates that on April 15, 2002, the NYPD sent a duplicate December 28<sup>th</sup> revocation letter to Petitioner’s correct address because Petitioner never received that notice. On April 24, 2002, Petitioner’s request for a hearing was granted and held on June 3, 2002, and is presided over by Hearing Officer Stephanie Zimberg. Petitioner was represented by counsel; Petitioner testified, as did P.O. Murch and Sophia Papaioannou, Petitioner’s wife. The decision issued on August

8, 2002 concluded that the license should be revoked because Petitioner failed to timely notify the License Division of a change of address, because his arrest and conviction for Driving While Impaired indicated a lack of good moral character and fitness to possess a firearm, and that he failed to cooperate with the investigation after his arrest because he waited several months to forward the certificate of disposition and notarized statement. The decision also held that Petitioner lacked fitness to possess a gun because he moved the guns to his new address without permission from the License Division.

On or about November 15, 2002, Petitioner commenced the instant Article 78 proceeding challenging the revocation of his pistol license.

### **CONCLUSIONS OF LAW**

The sole issue this Court may consider is whether the administrative decision to deny Petitioner's application for a pistol license was arbitrary and capricious or an abuse of discretion. See Matter of Pell v. Board of Education, 34 NY2d 222, 230 (1974); Matter of Lipton v. Ward, 116 AD2d 474 (1<sup>st</sup> Dept. 1986). The judicial function is limited to ascertaining whether there is a rational basis for the agency's determination. Sewell v. City of New York, 182 AD2d 469, 473 (1<sup>st</sup> Dept. 1992). A rational basis exists for revoking an application for a premises permit when the evidence adduced is adequate to support the Commissioner's action. See Sewell v.

City of New York, 182 AD2d at 473.

A court may overturn an administrative action only if the record reveals no rational basis for it. See Matter of Pell v. Board of Education, 34 NY2d at 230. The Court may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated. Purdv v. Kreisberg, 47 NY2d 354,358 (1979).

The Police Department Rules are codified in the Rules of the City of New York ("RCNY"), Title 38. Section 5-01 provides for three types of licenses that allow the licensee to carry a hand gun concealed on the person, carry business, limited carry business and carry guard. Section 5-01 provides, in pertinent part, that a license for a residence or business shall be a restricted license, issued for a specific business or residence and shall be safeguarded at the specific address.

A licensee must comply with the rules while holding a license which includes immediately notifying the Division of a change of address, notifying them of any arrests or convictions other than a traffic infraction, as well as other requirements. Penal Law §400.00 permits the Police Department to revoke a handgun licence at any time with notice to the licensee.

The issuance of a license to carry a gun is a privilege, not a right. See In re Williams v. Bratton, 238 AD2d 269 (1<sup>st</sup> Dept. 1997); Sewell v. City of New York,

182 AD2d at 472. The New York City Police Commissioner has broad discretion to grant licenses in accordance with the provisions of Penal Law §400.00 and Administrative Code of the City of New York (10-13 I[1]). Ordinarily the court would defer to the License Division in its exercise of administrative discretion in evaluating a pistol permit application, especially since public safety and general welfare is at issue. Matter of Foster, Index No. 127701/94 (Sup. Ct. N.Y., 1995, Freedman, J.)

The basis upon which the License Division concluded that Petitioner lacked fitness to be licensed for a pistol is as follows: he failed to notify them in a timely manner of his arrest and address change, and he did not “cooperate with the investigation.” In addition, the Hearing Officer concluded that Petitioner lacked the fitness to have a permit. While it is true that Petitioner has this one conviction, and may have been less than perfect in providing complete documentation, the License Division’s decision was not rational and the reasons articulated were not appropriate considering Petitioner’s overall history and compliance.

The claim that Petitioner “did not cooperate with the investigation” is tenuous at best. The September 24\* letter required Petitioner to take six steps regarding his suspension; Petitioner had at that point already done four of the six requested procedures, at that point only failing to provide a copy of the certificate of conviction and a notarized letter. These documents were sent to NYPD in March 2002, about

three months after his conviction. Petitioner explained the not uncommon difficulty in obtaining a certificate from Criminal Court. Furthermore, the NYPD's conclusion that Petitioner failed to timely notify them of an address change is also not reasonable since Petitioner notified NYPD in his September 5, 2001 renewal application which was acknowledged by NYF'D. The evidence is equivocal as to when Petitioner actually moved out of the home he shared with his wife and it cannot be said to be conclusive.

Numerous courts in similar situations have found the License Division to have acted arbitrarily and capriciously in denying a pistol permit to an individual who had been convicted of minor offenses. Furthermore, the License Division has failed to take into account the underlying circumstances, and Petitioner's unblemished record in the twelve years he had a license without incident. See Schelker v. Safir, Index Number 11'7069-97 (Sup. Ct. N.Y. Co., 1998, Abdus-Salaam, J.); Ferrara v. Kelly, Index Number 13075-93 (Sup. Ct. N.Y. Co., 1994, Parness, J.); Henley v. Bratton, Index Number 129682-94 (Sup. Ct. N.Y. Co., 1996, Cahn, J.).

The rejection of Petitioner's application because Petitioner was convicted for a violation without considering his prior and subsequent societal behavior or the circumstances of the delay in providing documentation results in the determination being arbitrary and capricious and it is hereby vacated. Accordingly, the petition pursuant to CPLR Article 78, reversing the decision of the License Division revoking

Petitioner's pistol license is granted. The License Division is directed to reinstate  
Petitioner's license for the period beginning 2001 through 2004.

This constitutes the Decision and Order of this Court.

DATED: JULY 14, 2003  
NEW YORK, NEW YORK

A handwritten signature in black ink, reading "Lewis Bart Stone", is written over a light gray rectangular background. The signature is cursive and fluid.

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Hon. Lewis Bart Stone  
Justice of the Supreme Court