

Matter of Beach v Kelly
2007 NY Slip Op 31313(U)
May 18, 2007
Supreme Court, New York County
Docket Number: 0113372/2006
Judge: Jane S. Solomon
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SCANNED ON 5/23/2007

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

DAVID BEACH

INDEX NO. 113372/00

MOTION DATE 2-5-07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

RAYMOND KELLY

The following papers, numbered 1 to 9 were read on this ~~_____~~ Article 78 Petition.

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-5

6-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~_____~~ Petition is decided in accordance with the annexed memorandum decision, order and judgment.

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

Dated: 5/18/07

J.S.
J.S.C.
JANE S. SOLOMON

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 55

-----X
In the Matter of the Revocation of
the Piston License of

DAVID BEACH

Petitioner,

INDEX NO. 113372/06

For a Judgment under Article 78 of
the Civil Practice Law and Rules
Directing Respondent to Grant a
Restoration of Petitioner's
Pistol License

-against-

RAYMOND KELLY, as the Statutorily
Designated Handgun Licensing Officer,
and as the Police Commissioner of
the City of New York, and his
Successors in Office

DECISION, ORDER and
JUDGMENT

UNFILED JUDGMENT
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
141B).

Respondent
-----X
JANE S. SOLOMON, J.

Petitioner David Beach petitions this court for a judgment pursuant to CPLR Article 78 compelling and directing Respondent Raymond Kelly, as the statutorily designated Handgun Licensing Officer and as the New York City Police Commissioner, and his successors to (1) grant Petitioner a continuation of his pistol permit on the grounds that Respondent ignored, and/or misinterpreted the 1986 federal law known as the Firearm Owners' Protection Act; and (2) grant Petitioner a continuation of his pistol permit based upon the grounds that the revocation of this permit by Respondent is

"shocking to one's sense of fairness." For the reasons described herein, the Petition is granted.

Background

Petitioner is a naturalized U.S. citizen and a resident of New York City, who works as an unarmed security doorman at a lower Manhattan restaurant. In or about March 2001 he applied to Respondent's License Division for a Premises Resident pistol license. This is a restricted license, issued for a specific residence location. See 38 Rules of the City of New York § 5-01(a). It differs from other types of licenses, which permit a licensee to carry a loaded handgun, either during specified times for certain business reasons or without restrictions. See *id.*

A Premises Resident pistol license does, however, permit the licensee to transport an unloaded handgun that is secured unloaded in a locked container directly to and from authorized small arms ranges/shooting clubs. *Id.* Ammunition needs to be carried separately. *Id.* Transportation to and from areas designated by the New York State Fish and Wildlife Law is also permitted if the licensee has a separate hunting authorization. See 38 RCNY §§ 5-23(a)(1)-(4). Other than these specific exceptions, the handgun must be safeguarded at the specific address indicated on the license. Petitioner's license clearly reads "RESTRICTED - NOT FOR CARRY."

By a letter dated September 10, 2001, the License Division approved Petitioner's Premises Residence license. It renewed his

application the subsequent two years. On or about July 25, 2003, Petitioner's pistol was stolen from his vehicle. Petitioner reported the incident to the License Division, and following an investigation into the matter, Petitioner's license was continued.

On or about January 9, 2004, Petitioner went to have his pistol inspected by the License Division. It was discovered that Petitioner carried his ammunition in the same box as his newly purchased pistol and that he had an expired purchase order in violation of 38 RCNY §§ 5-24(5) and (6). As a result of an investigation, Petitioner's license was suspended until June 9, 2004.

When Petitioner attempted to renew his license in August 2004, the License Division became aware that he transported a handgun by plane to Las Vegas, Nevada, in 2003 to attend security related seminars, conventions and training sessions. Petitioner also held the equivalent of a full carry pistol license in Nevada, and he states that he required licenses from both States in order to check his handgun with the airline. Prior to his trip, Petitioner contacted the License Division regarding taking his pistol to Nevada, but testified that he never receive a clear answer. He states that he checked his handgun in a locked container, unloaded and without ammunition.

Following an investigation, the License Division revoked Petitioner's license by letter dated December 1, 2004. Upon Petitioner's request, the License Division scheduled a hearing for

January 11, 2006.¹ Hearing Officer Arlynn Lowell ("H.O. Lowell") presided over the hearing, and Petitioner and Investigator Patsy Brewster both testified. On January 13, 2006, H.O. Lowell notified Petitioner it misinterpreted 18 U.S.C. § 926 during the January 11, 2006 hearing, and that a second hearing would be required. Commonly known as the Firearm Owners' Protection Act, 18 U.S.C. § 926A provides:

Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully **possess and carry** such firearm to any other place where he may lawfully **possess and carry such** firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console. (*emphasis added*).

Following the second hearing in March 2006, H.O. Lowell recommended that Petitioner's pistol license remain revoked. On May 17, 2006, the License Division agreed, informing Petitioner by letter of the same. On September 19, 2006, Petitioner commenced this Article 78 Proceeding. He asserts that the reasoning

¹The License Division originally scheduled a hearing for May 10, 2005, but rescheduled it following Petitioner's request.

underlying the final agency action was arbitrary and capricious, and in violation of 18 U.S.C. § 926A.

Discussion

CPLR § 7804(g) requires this Court to transfer to the Appellate Division any Article 78 case where there is an issue raised of substantial evidence, as specified in CPLR § 7803(4). See Al Turi Landfill v. N.Y. State Dep't of Env'tl. Conservation, 98 N.Y.2d 758 (2002). It is well settled that possessing a handgun license in New York is a privilege rather than a right (Sewell v. City of New York, 182 A.D.2d 469 [1st Dep't 1992]), and it is therefore unnecessary to furnish a quasi-judicial or formal adversarial hearing before revoking a pistol license (Burke v. Colabella, 113 A.D.2d 794 [2nd Dep't 1985]).

"Accordingly, no question of substantial evidence is properly raised in a proceeding to review the revocation of a pistol license, and it is not appropriate to transfer the matter to the Appellate Division." Shapiro v. New York City Police Dep't, 157 Misc. 2d 28 (Sup. Ct. New York County, 1993). Moreover, in the case at bar there is no substantial evidence question as there is no disagreement on the facts. The only issue is whether H.O. Lowell's interpretation of the Firearm Owners' Protection Act is correct. Thus, this Court rejects Respondent's argument that this case should be transferred to the Appellate Division for a substantial evidence analysis.

Respondent argues that Petitioner's Premises Resident license did not authorize him to "carry" a handgun in New York, and thus the federal statute does not apply. It states that he used poor judgment in carrying his pistol to Nevada because he never received a definitive answer from it as to whether or not he was permitted to do so. Respondent contends that this error in judgment, combined with his two previous incidents, was a rational reason to deny his license.

As opposed to some other States, New York requires a specific carry license for both the open and concealed carrying of firearms. See Bach v. Pataki, 408 F.3d 75 (2d Cir. 2005). On the other hand, New York law permits holders of a Premises Resident pistol license to transport a handgun in a locked container to and from small arms ranges/shooting clubs and specified hunting locations. 38 RCNY §§ 5-23(a)(1)-(4). Thus, although named a "premise" license, it allows for transportation of handguns under some circumstances.

The question is the definition of the word "carry" under the Firearm Owners' Protection Act. 18 U.S.C. § 921 unfortunately does not provide a definition. In Muscarello v. United States, 524 U.S. 125 (1998), the Supreme Court held that although the word "transport" is a broader category that includes the word "carry", the word "carry" should not be construed so narrowly as to undercut the statute's basic objective. "[I]n the words of its

sponsor, [§ 926A] 'confers upon all law-abiding citizens a right to transport their firearms in a safe manner in interstate commerce.'" City of Camden v. Beretta U.S.A. Corp., 81 F.Supp. 2d 541 (D.N.J. 2000), *quoting* 131 Cong. Rec. S9101-05 (July 9, 1985) (statement of Sen. Hatch).

18 U.S.C. § 927 explicitly states that the Firearm Owners' Protection Act is intended to coexist with State laws affecting firearms "unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together." Based on the Supreme Court's direction and the intent of the Act's sponsor, this Court holds that the definition of "carry" under the Firearm Owners' Protection Act includes the transportation of handguns permitted for Premises License holders in New York.

Administrative agencies enjoy broad discretionary power when determining matters they are empowered to decide. This Court cannot substitute its own judgment, even if it might have reached a different conclusion on the evidence. See Mid-State Mgt. Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72 (1st Dep't 1983), *aff'd* 66 N.Y.2d 1032 (1985).

However, it is also settled law that while a New York handgun license is a privilege and may be revoked at any time, the License Division must act rationally, and free from arbitrariness and capriciousness. See Sheriff v. Codd, 83 Misc. 2d 625 (Special

Term, Sup. Ct. New York County, 1975). Since this Court has concluded that the License Division misinterpreted the definition of "carry" under Firearm Owners' Protection Act, the Petition is granted in its entirety.

Accordingly, it hereby is

ADJUDGED that the Petition is granted; and it further is

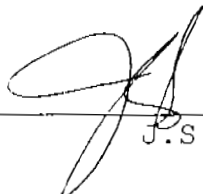
ORDERED that Respondent's determination to revoke

Premises Resident pistol license is annulled and Respondent is directed to restore Petitioner's license pursuant to Penal Law Section 400.00.

This constitutes the decision and judgment of this court.

Dated: May 18 2007

ENTER:



J.S.C.

JANE S. SOLOMON

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).