

Ostrowski v City of New York

2007 NY Slip Op 33185(U)

October 3, 2007

Supreme Court, New York County

Docket Number: 0108388/2007

Judge: Carol R. Edmead

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THOMAS M. PRASSO EDMEAD

PRESENT: _____

PART 35

Index Number : 108388/2007

OSTROWSKI, BOGDAN

vs

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. 108388/07

MOTION DATE 10/02/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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 _____

FILED
PAPERS NUMBERED
OCT 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

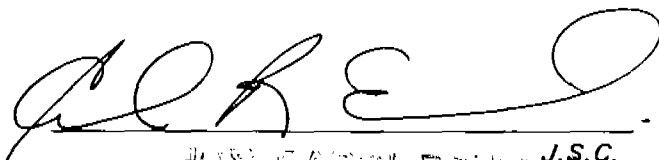
Upon the foregoing papers, it is ordered that this motion

the within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the application of Petitioner Bogdan Ostrowski for a final judgment, pursuant to CPLR Article 78, compelling respondents The City of New York, The Police Department of the City of New York and Thomas M. Prasso to reinstate and restore to the petitioner's premises residence license petitioner's rifle and shotgun permit and petitioner's pistol surrendered to respondents, as demanded in this Petition, is **denied in its entirety, and the Petition is dismissed.** It is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

Dated: 10/3/07


THOMAS M. PRASSO EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

BOGDAN OSTROWSKI, x

Petitioner,

Index No. 108388/07

-against-

DECISION/ORDER

THE CITY OF NEW YORK, THE POLICE
DEPARTMENT OF THE CITY OF NEW YORK and
THOMAS M. PRASSO,

Respondents.

EDMEAD, J.S.C. x

FILED
OCT 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Petitioner Bogdan Ostrowski ("petitioner") moves for a final judgment, pursuant to CPLR Article 78, compelling respondents The City of New York, The Police Department of the City of New York ("NYPD") and Thomas M. Prasso ("Prasso") (collectively "respondents") to reinstate and restore the petitioner's premises residence license petitioner's rifle and shotgun permit and petitioner's pistol surrendered to respondents, as demanded in this Petition.

Petitioner is appealing the final determination of the License Division of Police Department of the City of New York (the "License Division"), dated February 15, 2007, under the signature of Prasso, as Director, wherein it was determined that petitioner's premises residence pistol license and rifle/shotgun permit remain revoked.

Petitioner's Contentions

Respondents based their final determination upon the unsubstantiated allegations of petitioner's daughter, Anna Ostrowski, which purportedly occurred on or about February 21, 2005 that petitioner assaulted and beat her. Petitioner was arrested on February 23, 2005 and was

charged with violating Penal Law section 120.01 (assault in the third degree), and was again arrested on or about June 27, 2005 and charged with violation of Penal Law 215.5 (criminal contempt in the first degree) for allegedly being in violation of an Order of Protection obtained by petitioner's daughter Anna Ostrowski. Anna made these unsubstantiated allegations with malice and evil motive to damage petitioner's name and reputation and to gain unfair advantage during divorce proceedings.

Petitioner argues that he is a graduate of Tytul Inzyniera Elektronika, having the equivalent of a Bachelor's Degree in electrical engineering technology awarded by a regionally-accredited military academy in the United States. He has an exemplary history of service, work and responsibility. The respondents totally ignored his unblemished prior record and unilaterally, arbitrarily and capriciously revoked and took away his premises residence pistol without any cause and/or justification. In effect, the NYPD found petitioner guilty of criminality where in fact, none existed. This action was a travesty of justice and without constitutional justification and/or foundation in law.

Respondents acted in an arbitrary and capricious manner because they totally ignored the fact that petitioner received and ACD (adjourned in contemplation of dismissal) for the charges, made reference to in the opinion of hearing officer Arlynn Lowell, Esq. ("Lowell" and/or "hearing officer"). Further evidence of respondents' arbitrary and capricious action is the fact that an ACD is a favorable termination of criminal charges and is sealed.

Respondents' Contentions

On February 15, 2001, the License Division granted petitioner's premises residence handgun license and rifle/shotgun permit application, issuing petitioner License Number PR

2001000486 and RS 2000900541. These licenses were renewed until their suspension and ultimate revocation in 2007.

After petitioner's arrest on February 21, 2005 for Assault of his daughter, petitioner did not immediately report his arrest, or the issuance of an Order of Protection against him to the License Division, as required by 38 RCNY 3-05.

On June 21, 2005, a Domestic Incident Report was filed by petitioner's ex-wife, Jolanta Ostrowski, for violating the Order of Protection. She stated that the petitioner came up to her on the street and threatened her, stating, "If you don't drop the Order of Protection charges that our daughter has against me you will see what will happen." The case was ultimately Adjourned in Contemplation of dismissal.

On June 27, 2005, the petitioner was arrested for a second time, and according to an Arrest Report, was charged with Criminal Contempt in the first degree. The petitioner did not immediately notify the License Division of his second arrest.

Based on the above incidents, by a letter dated February 23, 2007, the petitioner was informed that his pistol and rifle permit were suspended. The letter directed him to immediately surrender his firearms to his local precinct, contact the investigator and forward the license, property clerk invoice, and a written notarized statement explaining the incident and the Certificate of Disposition to the License Division.

On February 24, 2005, petitioner surrendered his license and firearm. Petitioner failed to provide a notarized statement in response to the Suspension Letter.

On November 16, 2007, Anna Ostrowski and her mother, Jolanta Ostrowski, were present at the License Division in response to a subpoena. Police Officer Levine interviewed both of

them on this date. Officer Levine testified that at the interview, Anna Ostrowski stated that on the date of the incident, her mother was in Poland caring for her grandfather. As she was leaving, he blocked the doorway to prevent her from leaving, and a struggle ensued. She stated that she could not call the police from her home because her father had ripped the phone wires out. She also stated that she was afraid to testify against her father in court and that the case was dismissed; however, the Order of Protection against him was continued.

Officer Levine also testified regarding her interview of Jolanta Ostrowski, stating that she had been married to the petitioner for twenty five years. She filed for divorce three years ago and is still in litigation with petitioner regarding property issues. She stated that there had been abuse in the home for some time, but they never called the police.

According to the Hearing Report and Recommendation, the District Attorney was provided with audio and video recordings that were taken by the petitioner's sixteen hidden cameras in their home. The petitioner rigged speakers and the phones in the home to hear everyone's conversation. He also had cameras in front of the house that he monitored from his home office in the basement.

Petitioner testified that he felt that Anna was not concentrating on her studies and on the day of the incident, he wanted her to stay home and study. He also said he did not want her to have the car keys because he believed she had been drinking. He said he was not aware of any notification requirements and did not deliberately attempt to circumvent the rules and regulations governing his firearm licenses.

By failing to immediately notify the License Division of his arrest, petitioner violated 38 RCNY §§ 5-30. Thus, it was rational and reasonable for the License Division to revoke

petitioner's premises residence pistol license and rifle/shotgun permit on the violation of this rule alone.

By not notifying the License Division of the Order of Protection against him, petitioner violated 38 RCNY §§ 5-30(c)(5) and 3-05(a)(4), and the terms and conditions of his license. Therefore, the License Division's decision to revoke petitioner's premises residence pistol license and rifle/shotgun permit was reasonable and rational, not arbitrary and capricious, was based upon substantial evidence, and in all respects conforms with the statutes, laws and regulations related to the possession of handgun licenses and rifle/shotgun permits.

As a condition of licensure, petitioner is charged with knowing the laws and rules relating to his premises residence pistol license and rifle/shotgun permit. Because petitioner failed to familiarize himself with the terms and conditions of his premises residence pistol license and rifle/shotgun permit and comply with those terms, it was rational and reasonable for the License Division to revoke petitioner's premises residence license and rifle/shotgun permit.

The Administrative Proceedings

On January 24, 2007 an administrative hearing was held at the License Division before Hearing Officer Lowell. Petitioner and Investigator Levine testified at the hearing. After considering the testimony and documentation, Hearing Officer Lowell prepared a Hearing Report and Recommendation, dated February 8, 2007. Said report includes findings of fact, conclusions of law and recommendations. Lowell concluded that just cause existed given that the licensee (petitioner) violated a number of rules that govern his Premise Residence license and Rifle/Shotgun permit. Consequently, Lowell recommended that petitioner's permit remain revoked.

On February 15, 2007, the License Division issued a final determination revoking petitioner's premises residence pistol license and rifle/shotgun permit. The final determination stated in part that "[a]s a result of an administrative hearing held on November 17, 2006 [petitioner's] Premises Residence Pistol License and Rifle/Shotgun Permit will remain REVOKED... You may appeal this determination by commencing an Article 78 proceeding..."

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as License Division, consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. den.*: 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the License Division's determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the administrative interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], *aff'd* 66 N.Y.2d 1032 [1985]).

Pell v Board of Ed. of Union Free School Dist. No...., 356 N.Y.S.2d 833

N.Y. 1974, is instructive on the basic standard of Article 78 review:

In article 78 proceedings: 'the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; 'the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence. "' (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see Matter of Halloran v. Kirwan, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). 'The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'" (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; Matter of Colton v. Berman, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681--682).

Pell at 839.

The New York Penal Law, Article 4, and the New York City Administration Code, Section 10-131, authorize the NYPD to grant licenses for keeping and carrying pistols. These licenses are further regulated by Title 38 of the Rules of the City of New York ("RCNY"). RCNY § 5-22, which sets forth such conditions of issuance and revocation of licenses requires licensees to immediately report to the NYPD the occurrence of incidents listed in RCNY Section 5-30, which include arrests and protection orders issued against the licensee. RCNY Section 5-30C(5)(g) states that "Failure to comply with the license division's direction may result in permanent revocation. RCNY Title 38 Section 3-05 sets forth similar requirements and grounds for suspension or revocation of Rifle/Shotgun permit.

This Court will not disturb the administrative determination if a rational basis is found. Under Penal Law § 400.00, the License Division has broad discretion to grant or revoke licenses,

and the court must give great weight to the decision in this regard, particularly when the public safety is at issue, and the court lacks the expertise required for such decision. Even if the court could have reached a contrary conclusion if the case were actually brought before it for a determination, the court may not overturn the License Division determination without finding that the decision lacks a rational basis.

The issuance of license to carry gun is a privilege, not a right. *In re Williams v Bratton*, 238 A.D.2d 269, 656 N.Y.S.2d 626 (1st Dept.1997). NYPD may well consider a licensee's behavior and suspend or revoke a license if the licensee fails in any material way to comply with the regulations. RCNY Title 38, § 5-22 clearly provides "licensees shall cooperate with all reasonable requests by the Police Department" for information and assistance in this matter.

Conclusion

This court concludes that respondents' determination in the instant matter was rational, reasonable and sound. Therefore, it is hereby


ORDERED that the application of Petitioner Bogdan Ostrowski for a final judgment, pursuant to CPLR Article 78, compelling respondents The City of New York, The Police Department of the City of New York and Thomas M. Prasso to reinstate and restore to the petitioner's premises residence license petitioner's rifle and shotgun permit and petitioner's

pistol surrendered to respondents, as demanded in this Petition, is **denied in its entirety, and the Petition is dismissed.** It is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: October 3, 2007



Carol Robinson Edmead, J.S.C.

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