

Matter of Farrell v Kelly
2007 NY Slip Op 33454(U)
October 16, 2007
Supreme Court, New York County
Docket Number: 0106021/2007
Judge: Kibbie F. Payne
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KIBBJE F. PAYNE
Justice

PART 4

In the Matter of the Application of

TREVOR FARRELL,

INDEX NO. 106021/07

Petitioner,

MOTION DATE 8/17/07

For and Order pursuant to Article 78 of the New York Civil Practice Law and Rules,

- v -

RAYMOND KELLY, as Statutorly Designated Handgun Licensing Officer, and as the Police Commissioner of the City Of New York, and His Successors In Office,

MOTION SEQ. NO. 001

Respondents.

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that petitioner's application to annul the determination of the New York City Police Department, License Division is granted as indicated in the attached memorandum.

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 11B)

Dated: October 16, 2007

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 4**

In the Matter of the Application of
TREVOR FARRELL,

Index No. 106021/07

Petitioner,

Motion Seq. 001

For an Judgment Pursuant to Article 78
of the Civil Practice Law,

JUDGMENT

-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,

Respondents.

KIBBIE F. PAYNE, J.:

In this CPLR article 78 proceeding, petitioner seeks a judgment annulling the determination of the New York City Police Department, License Division that denied him a carry guard pistol license.¹ Respondent opposes the application, arguing that the determination is rational, not arbitrary or capricious.

¹ A carry guard license is "valid when the holder is actually engaged in a work assignment as a security guard or gun custodian" (Handgun Licenses [38 RCNY] § 5-01 [d]). "This license is restricted to the days and hours that the licensee is actually engaged in employment, or when a licensee is travelling from her/his residence to employment, or from employment to her/his residence. . . . This means that the handgun may be carried only when the licensee is actually engaged in employment by the security company the name of which appears on the face of the license. This does not permit 'freelancing' on the licensee's day off . . ." (Handgun Licenses [38 RCNY] § 5-24 [b] [1]).

Petitioner is an employee of non-party Brink's, Inc. (Brink's), working as an unarmed security guard. Petitioner submitted an application for a carry guard license to the New York City Police Department, License Division (License Division). Among other things, petitioner disclosed that he was previously arrested for an offense other than a parking violation. The application provided that, when not in use, the handgun would be safeguarded in a gun locker on his employee's premises. The gun custodian at Brink's submitted a letter to the License Division, which stated that it was necessary for petitioner to carry a firearm because his "duties will include working as a courier clerk and Armored Guard" ² The letter further provided that Brink's "assumes responsibility of the disposition of the pistol and return of the license to the License Division when the applicant's business or employment is terminated for any reason."

Upon receiving the application, the License Division performed a background check on petitioner. The License Division discovered that petitioner was arrested on July 7, 2001 and May

² "Once a company employs and intends to arm additional employees, [the company shall designate] a gun custodian and alternate custodian . . ." (Handgun Licenses [38 RCNY §] 5-24 [a] [1]). The gun custodian has several responsibilities, including submitting certain reports to the License Division concerning the licensee's employment record and the company's handgun inventory (see 38 RCNY § 5-24 [a] [3]). The gun custodian is required "to permit . . . the New York City Police Department to examine company records pertaining to handgun licensees" (38 RCNY § 5-24 [a] [3] [iv]).

31, 1999. In connection to the 2001 arrest, petitioner was arraigned on charges of robbery in the first degree, robbery in the third degree, petit larceny and grand larceny in the fourth degree. All charges were dismissed and the case was sealed upon termination in favor of petitioner (see CPL 160.50). In 1999, petitioner, then 23-years-old, was arrested for criminal possession of marijuana in the fifth degree and unlawful possession of marijuana. These charges were also dismissed and the record was sealed. Petitioner has no other arrest history. At the close of the investigation, the License Division issued petitioner a notice of disapproval on the ground that he has a "violent felon[y] arrest history."

Petitioner appealed to the License Division, Administrative Appeal Unit. Petitioner argued that he is responsible and has respect for the law. Petitioner explained the circumstances of his arrests. Petitioner stated that, in 2001, he was suspected of having robbed a taxi cab driver of \$100.00 at knife point. Petitioner further stated that the cab driver was waiting for him to pick up an order at a restaurant when the robbery took place. Petitioner was arrested and found to have a large sum of money on his person. No knife or other weapon was found on petitioner. Bank records allegedly established that petitioner had withdrawn hundreds of dollars from his own account that night. The taxi driver did not pick petitioner out of the line up, and the

District Attorney declined to prosecute. The case was dismissed. With respect to his 1991 arrest, petitioner explained that police officers stopped him in their search for a robbery suspect. The alleged victim did not identify petitioner as the culprit; petitioner then wore his hair in dread locks, and the perpetrator did not have dread locks. However, petitioner was charged for marijuana possession. The charges were dismissed and the case sealed.

In support of his administrative appeal, petitioner submitted four letters from retired law enforcement officials, attesting to his character and work ethics. The retired New York City Police Officers, Police Detective and Correction Officer were all employees of Brink's, who have worked with petitioner. They described petitioner as responsible, hard-working and trustworthy. The License Division issued petitioner a notice of disapproval after appeal. It reasoned that petitioner's "arrest history demonstrates a lack of character and fitness to possess firearms."

Petitioner commenced this CPLR article 78 proceeding, challenging the License Division's determination. Petitioner argues that the denial of his application is irrational as the violent felony arrest history to which the License Division refers concerns one arrest, remote in time, on charges that were dismissed in his favor. Petitioner further contends that he has

never been convicted of any crime and seeks a handgun license solely for use at work. In opposition, respondent argues that the two arrests were good cause to deny petitioner a restricted handgun license.

"Penal Law § 400.00 is the exclusive statutory mechanism for the licensing of firearms in New York State" (Matter of O'Connor v Scarpino, Jr., 83 NY2d 919, 951 [1994]). Subdivision [1] [g] provides that a licensing officer shall not issue a firearm license to an applicant where "good cause exists for the denial of the license." Possession of a firearm license is a privilege, not a right, which is subject to the broad discretion of the New York City Police Commissioner (see Matter of Papaioannou v Kelly, 14 AD3d 459, 460 [1st Dept 2005] [citations omitted]; see also Matter of Tolliver v Kelly, 41 AD3d 156, 158 [1st Dept 2007] [citations omitted]). A court may annul an administrative determination denying an application for a pistol license "only if the record reveals no rational basis for" the determination (Tolliver, 41 AD3d at 158 [citations omitted]; see also CPLR 7803 [3]). The annulment may be in whole or in part and the judgment may direct the administrative agency to take specified action (see CPLR 7806; Siegel, NY Prac § 570, at 983 [4th ed.]).

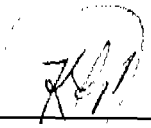
Applying this standard here, the denial of petitioner's application for a carry guard license must be annulled. Petitioner's arrests, several years ago, both led to charges that were dismissed. Each case was sealed, making the circumstances surrounding petitioner's arrests unavailable (cf. Matter of

Evangelista v Kelly, 16 AD3d 172 [1st Dept 2005]). While the administrative record is clear that petitioner was arrested in 2001 and 1999, it is factually blind as to the details of those arrests. There is no indication that petitioner resisted arrest, failed to cooperate with the investigating Police Officers or engaged in any other troubling behavior. An arrest alone provides no rational basis to conclude that petitioner is lacking in character and unfit to hold a restricted carry guard license.

Accordingly, the petition is granted and the determination denying petitioner his application for a carry guard license is annulled, and the administrative agency is directed to grant petitioner's application for a carry guard license.

The foregoing constitutes the decision and judgment of the court.

DATE: October 16, 2007



Hon. Kibbie F. Payne, J.S.C.

UNFILED JUDGMENT
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