

Matter of Lehman v Kelly

2007 NY Slip Op 33639(U)

October 30, 2007

Supreme Court, New York County

Docket Number: 0108675/2007

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE R. PAYNE
Justice

PART 4

GLENN LEHMAN

INDEX NO. 100675/07

- v -

RAYMOND KELLY

MOTION DATE _____

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

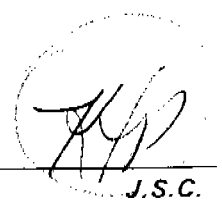
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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 30, 2007


J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4**

In the Matter of the Application of
GLENN LEHMAN,

Index No. 100675/07

Petitioner,

Motion Seq. 001

For a Judgment Pursuant to CPLR Article
78,

Judgment

-against-

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

Respondent.

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 his application for a license to possess a firearm. Respondent opposes the petition, arguing that the determination is not arbitrary and capricious nor an abuse of discretion.

Petitioner filed an application for a law enforcement retiree concealed handgun license on January 17, 2005. On February 21, 2007, respondent License Division of the New York City Police Department (License Division) disapproved petitioner's application on the grounds: "The circumstances of your arrest history which casts grave doubt of your character and

fitness to possess a firearms [sic] license and you refused a chemical test and you have a Conditional NYS Drivers License [sic]." Thereafter, petitioner filed an administrative appeal to the Director of License Division. On April 16, 2007, the Director of the License Bureau reviewed the record and upheld the license disapproval. Subsequently, petitioner commenced this proceeding seeking to annul the License Division's determination.

The court will not disturb the determination absent a showing that it was "arbitrary and capricious" (see Matter of Pinella v Safir, 5 AD3d 316 [2004]; Matter of Eddy Kirk, 195 AD2d 1009, 1010-1011 [1993]; see also, Matter of Pell v Board of Education, 34 NY2d 222, 231 [1974]). In this case, petitioner retired from the New York City Department of Corrections (Department) after twenty-five years of service as a correction officer. The record below indicates that petitioner's service in the Department was satisfactory, and the Department recommended the petitioner's permit application. The Department's Chief of Administration expressly indicated that: "Mr. Lehman was permitted to possess and carry a personal protection firearm, and demonstrated the ability to perform his duties in an outstanding manner; as well as maintain an excellent record with respect to employment and personal character." Petitioner's possession of a personal firearm while employed as a correctional officer is not disputed by respondent. Additionally, there is nothing in the

record indicating that the Department revoked petitioner's privilege to carry a concealed firearm following his 2004 traffic violation conviction of operating a motor vehicle under the influence. At no time was this petitioner convicted of any crime or any serious offense, nor does the record indicate he suffers from any mental illness or alcoholism. Petitioner's only contact with the criminal justice system as a defendant stems directly from the 2004 incident for which he was arrested and subsequently pled guilty.

The respondent's April 16, 2007 final determination expressly indicated " . . . your Retired Police Officer license is denied due to: Your conviction for DWAI [sic], VTL Section 1192(1) on 2/19/04 Demonstrates a lack of character and fitness to posses firearms." Clearly, but for petitioner's guilty plea and conviction of the Vehicle and Traffic Law there is no other incident in petitioner's entire history demonstrating any event of petitioner's lack of moral character. The record is devoid of any proceeding legal or disciplinary which would tend to impugn petitioner's moral character. And most importantly a psychiatric examination of petitioner indicated that the petitioner " . . . was not a danger to himself or others and is fit to return to work full duty and to carry a firearm." Under the totality of circumstances I find that respondent's determination that petitioner lacked good moral character to possess a firearm was

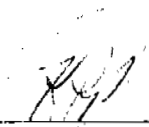
arbitrary and capricious.

This matter is remanded to respondent agency for consideration as to whether petitioner has demonstrated proper cause for the issuance of a permit under Penal Law §400(1)(g). Accordingly, it is

ORDERED that this petition is granted only to the extent indicated.

The foregoing constitutes the decision and judgment of the court.

Date: *October 30, 2007*


Kibbie F. Payne, J.S.C.

UNFILED JUDGMENT

his 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)