

**Morawiec v New York City Police Dept.**

2007 NY Slip Op 33769(U)

November 23, 2007

Supreme Court, New York County

Docket Number: 0107466/2007

Judge: Marcy L. Kahn

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OP

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

PRESENT: Hon. Marcy L. Kahn PART 50K  
*Justice*

MORAWIEC, EDWARD

INDEX NO. 107466/07

- vs -

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

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

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

NYC POLICE DEPARTMENT  
Sequence Number: 001

ARTICLE 78

The following papers, numbered 1 to 3 were read on this motion.

Article 78 relief

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

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION**

Dated: NOV 23 2007

ENTER: *Marcy Kahn*  
HON. MARCY KAHN J.S.C.

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

**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 1418).

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: CIVIL TERM: IAS PART 50K

-----x  
EDWARD MORAWIEC, :

Petitioner, : DECISION AND ORDER  
: Index No. 107466/07

-against-

NEW YORK CITY POLICE DEPARTMENT

Respondent

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

MARCY L. KAHN, J.:

By notice of petition and verified petition, dated 2007, petitioner Edward Moraweic seeks an order and judgment pursuant to CPLR §7803(3) annulling and setting aside a determination of the License Division of respondent New York City Police Department (the "License Division") which denied the application of the petitioner for a carry business handgun license ("carry business license") on grounds that the determination was arbitrary and capricious. Petitioner also requests that the court direct the respondent to approve his application for a carry business license and issue the license to petitioner. Respondent opposes the petition. For the reasons stated, the petition is denied.

I. FACTUAL BACKGROUND

The pertinent facts are as follow. Petitioner is an owner of several rental properties in Kings County, and currently maintains his principal place of business in Brooklyn, New York. (Petition ["Pet."], ¶2). Petitioner contends that he requires a

carry business license in order to protect himself while transporting large amounts of cash between his place of business and his residential rental properties. (Pet., ¶16). Petitioner previously held a carry business license from approximately November 21, 1985 (see Respondent's Verified Answer dated August 10, 2007, ["Verified Answ."], Exh. A) until approximately September 30, 2003. (Pet., ¶3).

On September 8, 2003, petitioner was arrested and charged with assault in the third degree (PL \$120.00), attempted assault in the third degree (PL \$\$110/120.00), harassment in the second degree (PL \$240.26) and menacing (PL \$120.15), for allegedly shoving one of his tenants and causing her to fall down a set of stairs. (Verified Answ., ¶3 and Exh. A, at 1; Exh. F, ¶6). A temporary order of protection was issued against the petitioner in relation to this incident. (Verified Answ., ¶43 and Exh F, ¶6).

The License Division was notified of the arrest by the NYS Division of Criminal Justice Services (Verified Answ., Exh. A, at 1). On September 30, 2003, Police Officer Ada Levine, assigned to investigate the case, notified petitioner that his carry business license had been suspended pending the investigation of his arrest. (Verified Answ., Exh. A). She advised him that he was obligated to immediately surrender his firearm to the Police Department, provide a notarized letter explaining the incident, and provide a certificate of

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disposition from the court. (Verified Answ., Exh. A, at 2). On October 6, 2003, the petitioner informed Officer Levine that he was unable to furnish the letter of explanation until the criminal case had been resolved, but would do so at that time.

(Id.). Petitioner vouchered his firearm on October 8, 2003.

(Id.). Petitioner's criminal case proceeded to a bench trial and on March 31, 2004, petitioner was acquitted of all charges.<sup>1</sup> No letter was provided to Officer Levine at that time, however.

On June 16, 2004, Officer Levine contacted petitioner regarding his failure to comply with her requests for a letter of explanation and a certificate of disposition of the criminal case. (Id., at 3). She also questioned petitioner's falsely listing a Brooklyn home address on his license renewal applications in light of the Nassau County residence address which appeared on his arrest report and which petitioner informed her had been his residence for 18 years. He responded that he had been advised by an individual at the Licensing Division whom he was unable to identify to list his Brooklyn business address as his home address. (Id., at 2). On June 17, 2004, the petitioner forwarded a copy of the certificate of disposition in the criminal case and provided an explanatory letter which was not notarized. (Id.).

The next day, Officer Levine declared her investigation

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<sup>1</sup> The record was sealed pursuant to CPL §165.50 and the temporary order of protection was vacated.

[\* 5 ]

complete, and recommended revocation of the petitioner's permit due to false statements on his renewal application. On July 7, 2004, the commanding officer of the License Division issued a determination revoking his carry business license. (See Verified Answ., Exh. A, at 1).

Petitioner appealed the determination and an administrative hearing was held on October 6, 2004 before Hearing Officer Margaret L. Shields. (Id.). On December 28, 2005, Hearing Officer Shields issued her findings of fact and conclusions of law, recommending that petitioner's carry license be cancelled. (See Verified Answ., Exh. A).<sup>2</sup> On January 3, 2006, her recommendation of license cancellation was adopted by Captain Michael T. Endall, Executive Officer of the Licensing Division, as respondent's final agency determination action on petitioner's existing license. (See Verified Answ., Exh. A). In

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In her conclusions of law, Officer Shields found that petitioner had violated the rules and regulations governing his permit by moving his home address in 1986 without notifying the Licensing Division, by failing to familiarize himself with the rules and regulations and consequently failing to notify the Licensing Division of his address change and of his arrest, and by failing to maintain a principal place of business in New York City. The report concluded that the incident underlying his arrest did not reflect adversely on his good character; that his failure to notify the Licensing Division of the termination of his criminal case and to provide a timely letter of explanation were not deliberate violations, but rather attributable to his attorney's error; and that the inclusion of incorrect address information on his applications was not done intentionally but was attributable to petitioner's difficulty with the English language.

a letter dated January 9, 2006, Thomas M. Prasso, Director of the License Division, notified petitioner of the agency's final determination of the matter. (Id.). Petitioner did not challenge this determination by commencement of an Article 78 proceeding.

Petitioner applied for a new carry business license on May 5, 2006. (See Verified Answ., Exh. B). On September 7, 2006, petitioner was interviewed by Police Officer Esther Olivo, an investigator for the License Division. (See Verified Answ., Exh. C). Upon concluding her investigation, Officer Olivo recommended disapproval of petitioner's application, based upon petitioner's 2003 arrest, the issuance of the order of protection, petitioner's failure to follow applicable City regulations in conjunction with that incident, and due to "insufficient funds and sporadic bank transactions." (Verified Answ., Exh. D). In a letter dated November 28, 2006, Deputy Inspector Roy T. Richter of the License Division notified petitioner that his license application had been disapproved due to petitioner's arrest history, the order of protection issued against him and "insufficient funds," meaning that the amounts of cash he routinely carried with him in the course of his business were not substantial enough to create extraordinary personal danger to himself and thereby justify possession of a handgun. (See Verified Answ., Exh. E).

Petitioner filed an affidavit of appeal on December 22, 2006. (See Verified Answ., Exh. F). By letter titled "Notice of Disapproval After Appeal" and dated January 31, 2007, License Division Director Prasso notified petitioner that, upon review of the "entire record," petitioner's appeal was denied due to his failure "to abide by the License Division rules which resulted in the cancellation of [his] previous firearms license," and for "insufficient funds to qualify for a Carry Business license." (Verified Answ., Exh. G).

Petitioner now moves for an order annulling and setting aside the determination of the License Division denying his application for a carry business license and seeks an order of this court directing respondent to issue such license to petitioner.

II. APPLICABLE LAW

A. CPLR Article 78 Standard of Review

Pursuant to CPLR §7803(3), this court's review of the License Division's determination must be limited to whether the decision:

was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . .

(CPLR §7803[3]). An agency determination is arbitrary and capricious if it is without rational basis. (Pell v. Board of Educ., 34 NY2d 222, 231 [1974]). The arbitrary and capricious

standard set forth in CPLR §7803(3) chiefly "relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact." (Id.). Where a rational basis in the record exists for the agency action, its determination is dispositive and the judicial function is at an end. (Sullivan County Harness Racing Ass'n Inc. v. Glasser, 30 NY2d 269, 277-278 [1972]; Tockwotten Assoc., LLC v. New York State Div. of Hous. & Cmty. Renewal, 7 AD3d 453 [1<sup>st</sup> Dept. 2004]). A reviewing court in an Article 78 proceeding "may not overturn an agency's decision merely because it would have reached a contrary conclusion." (Sullivan County Harness Racing Ass'n Inc. v. Glasser, supra at 278 [citation omitted]). The court's review is "confined to the facts and record before the agency" (Yarbough v. Franco, 95 NY2d 342, 347 [2000]; Slesinger v. Dept. of Housing Preservation and Development, 39 AD3d 246 [1<sup>st</sup> Dept. 2007]), and is limited to an examination of questions of law. (Pell v. Bd. of Educ., supra, 34 NY2d at 230). Where the agency is acting within its authority, its judgment is entitled to deference. (Tockwotten Assoc., LLC v. New York State Div. of Hous. & Cmty. Renewal, supra, 7 AD3d at 453). Nonetheless, judicial review of an administrative determination is limited "solely to the grounds invoked by the agency, and if those grounds are insufficient or improper, the court is powerless to sanction the determination

by substituting what it deems a more appropriate or proper basis." (Trump-Equitable Fifth Avenue Co. V. Gliedman, 57 NY2d 588, 593 [1982]).

B. Administrative Provisions Relating to Firearms in New York City

The issuance of a pistol license is not a right, but a privilege subject to reasonable regulation. (Kaplan v. Bratton, 249 AD2d 199, 201 [1<sup>st</sup> Dept. 1998]). The Commissioner of the New York Police Department ("Commissioner") acting through the Licensing Division has broad discretion in determining whether to issue such a license. (Servedio v. Bratton, 268 AD2d 356 [1<sup>st</sup> Dept. 2000]; Matter of St. Oharra v. Colucci, 67 AD2d 1104 [4<sup>th</sup> Dept. 1979]).

Section 10-131 of the New York City Administrative Code vests in the Commissioner the authority to grant licenses for the keeping or carrying of pistols within the City of New York in accordance with article 400 of the Penal Law. Section 400.00(2)(f), to the extent relevant here, provides:

A license for a pistol or revolver . . . shall be issued to . . .

(f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof . . . .

(Penal Law §400.00[2][f])

Title 38, section 5-02 of the Rules of the City of New York

("RCNY") governs the issuance of premises licenses for handguns and also applies to carry licenses. It provides in pertinent part:

The applicant shall:

. . .

(c) Disclose whether s/he has been the subject or recipient of an order of protection or a temporary order of protection;

. . .

(g) Reside or maintain a principal place of business within the confines of New York City;

(h) Be an applicant concerning whom no good cause exists for the denial of such license . . . .

(38 RCNY §5-02).

The regulations further require that a licensee immediately report to the License Division any arrest, change of business or residence address or receipt of an order of protection. (38 RCNY §5-22[c]). The License Division is permitted to examine and consider sealed criminal records in the course of determining whether an applicant should be granted a handgun license. (CPL §160.50[1][d]). Additionally, carry business licensees are required to be familiar with the rules and regulations governing their licenses. (38 RCNY §5-33).

Section 5-03 of Title 38 provides that in addition to these requirements, an applicant seeking a carry business license must show "proper cause" for the issuance of such license pursuant to

PL §400.00(2)(f). (38 RCNY §5-03). Proper cause is determined from a "review of all relevant information bearing on the claimed need of the applicant for the license" (id.), and it is the applicant who bears the burden of demonstrating that he or she has "'a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.'" (Kaplan v. Bratton, supra, 249 AD2d at 201, quoting Klenosky v. New York City Police Dept., 75 AD2d 793 [1<sup>st</sup> Dept. 1980], aff'd, 53 NY2d 685 [1981]). The regulation lists as one of two factors relevant to establishing proper cause:

- (a) Exposure of the applicant by reason of employment or business necessity to extraordinary personal danger requiring authorization to carry a handgun.

(38 RCNY §5-03[a]). By way of example, the provision offers employment requiring the applicant routinely to engage in transactions involving substantial amounts of cash. (Id.). Documentary proof of such routine responsibility is required.

### III. DISCUSSION

The issue before this court is whether the determination of the Commissioner, acting through the Licensing Division, which denied petitioner's 2006 carry business license application was arbitrary and capricious, an abuse of discretion or legally erroneous.

In this case, this court must examine the determination of the licensing agency which is the subject of this proceeding,

namely, the January 31, 2007 notice of disapproval after appeal issued by License Division Director Prasso, in terms of the grounds asserted for the determination (Trump-Equitable Fifth Avenue Co. V. Gliedman, supra), and determine whether the ruling had a rational basis in the record and was in accordance with applicable law. (CPLR §7803[3]; Yarbough v. Franco, supra; Pell v. Board of Educ., supra; Sullivan County Harness Racing Ass'n Inc. v. Glasser, supra; Slesinger v. Dept. of Housing Preservation and Development, supra). Here, Director Prasso's 2007 notice of disapproval cited two grounds for denial of the carry business license, those being petitioner's failure to abide by License Division rules which resulted in the cancellation of his earlier license, and his involvement with "insufficient funds" in performing his business duties to qualify for a carry license. Each ground will be examined separately.

A. Rules Violations

Although this case has a long, and sometimes inconsistent history, the rule violations referenced in the first ground cited in the 2007 Prasso notice of disapproval are specified as being those which resulted in the cancellation of petitioner's first license. Those violations are the ones set forth in the recommended findings and conclusions of Hearing Officer Shields and adopted by the Executive Officer and conveyed to petitioner

in the 2006 Prasso final determination letter.<sup>3</sup> As noted, they include findings that petitioner had changed his home address without notifying the Licensing Division, that he had failed to familiarize himself with the rules and regulations governing his permit, and that he had failed to notify the Licensing Division of his arrest and of the temporary order or protection.<sup>4</sup>

(Verified Answ., Exh. A). As noted by Shields, any violation of the rules governing licenses may result in license suspension or revocation. (38 RCNY §5-21).

The record before Hearing Officer Shields, in which Executive Officer Endall concurred and upon which Director Prasso relied in issuing his 2007 notice of disapproval, supports the agency's conclusion that petitioner violated the rules governing his carry license. Specifically, petitioner admitted to Investigating Officer Levine that he had changed his home address to Nassau County in 1986 without making an immediate report of that fact to the License Division as

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On this review pursuant to CPLR §7803(3), this court is considering the 2007 denial of petitioner's 2006 license application, and not the 2006 cancellation of his original license and the 2004-5 hearing record underlying it made before Hearing Officer Shields. The instant decision considers whether the 2007 determination, which was based, in part, on the 2005 conclusions, was arbitrary and capricious or in violation of law.

The additional ground cited by Hearing Officer Shields, that petitioner no longer maintained a principal place of business in New York City, had been cured by the time he filed the instant application. (Verified Answ., Exh. B).

required by 38 RCNY §5-22(c)(2). (Verified Answ., Exh. A). Further, he again violated agency rules by neglecting to provide an immediate report to the agency of his arrest and the issuance of the temporary order of protection. (38 RCNY §§5-22(c)[1],[8]; 5-30(c)[1],[d]). The arrest only became known to the License Division upon its receipt of notice from the Division of Criminal Justice Services. The record supports Shields' conclusions that petitioner failed to familiarize himself with the rules and regulations promulgated by the Police Department which are applicable to his license. (38 RCNY §5-33). Violation of the rules limiting handgun possession subjects the license holder to possible suspension or revocation of the license (38 RCNY §5-21), as found by Officer Shields.

Under these circumstances, respondent rationally relied on these undisputed violations by petitioner of the conditions of his handgun license in making the finding that Morawiec failed to abide by License Division rules governing his license. This court's review is at an end once a rational basis, such as a rules violation, is found for the agency's determination. (See Ricatto v. Kelly, 303 AD2d 240 [1<sup>st</sup> Dept. 2003]; Trimis v. New York City Police Dept., 300 AD2d 162 [1<sup>st</sup> Dept. 2002]; Abramowitz v. Safir, 293 AD2d 352 [1<sup>st</sup> Dept. 2002]). For this reason, the petition must be denied and the proceeding dismissed.

B. Insufficient Funds

The second ground in the 2007 Prasso notice is that the petitioner did not demonstrate that he handled sufficient funds on a routine basis to justify the issuance of the permit. Petitioner claims that he has demonstrated "proper cause" for the issuance of a carry business license in that, as a landlord who collects rent, he carries substantial amounts of cash with him and makes bank deposits. As noted, in order to establish "proper cause" within the meaning of PL §400.00(2)(f), petitioner bears the burden of showing that he has a special need for self-protection distinguishable from others in the general community or in the same profession as petitioner. (Kaplan v. Bratton, supra; Matter of Klenosky v. NYC Police Dept., supra), and that such special need may be established by documentation of the carrying of substantial amounts of cash. Where the applicant fails to make such a showing, denial of the license will be upheld. (See Martinek v. Kerik, 294 AD2d 221, 222 [1<sup>st</sup> Dept. 2002][expressed fear of petitioner, a bank president, of traveling through high crime areas transporting large sums of cash held "too vague" to establish "proper cause"]; Williams v. Bratton, 238 AD2d 269, 270 [1<sup>st</sup> Dept. 1997][real estate and estate attorney's documentation of amount of sums carried, totaling less than \$74,000 in certified and bank checks, determined to demonstrate "low cash flow"

insufficient to establish "proper cause"])).

Here, petitioner proffered documentation of his bank deposits, which totaled \$48,432.78 over a six-month period (Verified Answ., Exh. C). The License Division analyzed this showing in terms of the average amount transported on a daily basis, which amounted to less than \$1000, and concluded that petitioner carried insufficient funds to establish special need and proper cause.

Petitioner has clearly made a far greater and more detailed showing than did the applicants in Williams and Martinek of his responsibility for transporting thousands of dollars in cash on a regular basis, in that he provided copies of deposit receipts showing that he made bank deposits averaging \$25,491 in cash each month. (See Verified Answ., Exhs. C, D). The investigator's conclusion that these deposits were "sporadic" (Verified Answ., Exh. D) is contradicted by the record. Petitioner has been engaged in this same business involving the same properties and the same responsibilities since he first was granted a carry license in 1985. And the fact that he was issued a license by respondent, and regularly secured its renewal by respondent until 2003, strongly suggests that the Police Department had for eighteen years concluded that petitioner did have a special need for a handgun in connection with his business duties of transporting these very same (or

likely smaller, given the conditions of the New York City residential real estate market during the past two decades, of which this court can take judicial notice) amounts of cash, and had shown proper cause for the issuance of a carry business license. Moreover, respondent has nowhere indicated the objective standard by which it determines the dollar amounts of cash necessary to be deemed "sufficient" to establish special need.

The Williams case does not persuade this court that petitioner has failed to make the necessary showing. In that case, the applicant showed no more than that he transported two certified checks and a bank check involving one estate. Here, by contrast, petitioner regularly-indeed, routinely, several days each month-transportes thousands of dollars in cash between his place of business and the several banks at which he maintains accounts. Again, this showing had previously been deemed sufficient by the Commissioner.

Accordingly, I find that the second ground for denial of the carry license, insufficient funds, is arbitrary and capricious and without a rational basis in fact. It cannot properly serve as the basis for denial of the carry business license to petitioner.<sup>5</sup>

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<sup>5</sup> Hearing officer Shields did not cite insufficient funds as a basis for cancelling petitioner's license.

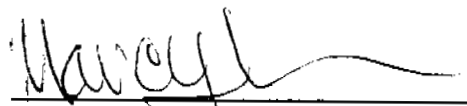
Nonetheless, because respondent has broad discretion to grant or deny licenses, and because the holder of a handgun license is required to conform his or her behavior to the rules and regulations governing the holding of such licenses, and because petitioner failed to do so in the particulars noted above, this court finds that respondent had a rational basis supported by law to render its January 31, 2007 determination denying the issuance of the permit on the ground of the petitioner's failure to abide by the rules of the Licensing Division.

IV. CONCLUSION

For all the foregoing reasons, the petition is denied and this proceeding is dismissed.

This opinion constitutes the decision, order and judgment of the court.

ENTER:



\_\_\_\_\_  
Marcy L. Kahn, J.S.C.

Dated: New York, New York  
November 23, 2007

**UNRECORDED JUDGMENT**  
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