

**Matter of Schneider v Mulvey**

2007 NY Slip Op 34031(U)

December 5, 2007

Supreme Court, Nassau County

Docket Number: 3596-07/

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY

Justice.

IAS PART 8  
NASSAU COUNTY  
INDEX NO. 13596/07

In the Matter of the Application of  
ROBERT SCHNEIDER,

Petitioner,

MOTION DATE: 10/2/07  
MOTION SEQUENCE NO. 1  
X X X

- against -

LAWRENCE W. MULVEY,

Respondent (s).

The following papers read on this motion:

Notice of Motion/Order to show cause . . . . .	1-4
Answering Affidavits . . . . .	5-7
Replying Affidavits . . . . .	8,9

Upon the foregoing papers, it is ordered that this application by petitioner for a judgment pursuant to CPLR Article 78 reviewing the determination of and vacating the revocation of the petitioner's pistol license and reinstating same upon the ground that the respondent's determination was arbitrary and capricious in violation of CPLR § 7803(3) and was not supported by substantial evidence in the record in violation of CPLR § 7803(4) is determined as follows.

This is an Article 78 proceeding to review the determination of the Nassau County Police Commissioner's revoking Petitioner's Nassau County Pistol License.

By letter dated March 1, 2006, Anthony W. Rocco, Chief of Department of the Nassau County Police Department, revoked petitioner's Nassau County pistol license. The letter stated in part:

"If you wish to appeal this determination, either you or your attorney must forward written notice to the undersigned within 30 days of this notice requesting an administrative hearing. Sworn testimony may be presented at such hearing regarding any relevant facts, circumstances, and incidents, which might reflect upon your suitability to hold a Nassau County pistol license."

An administrative hearing was held on May 31, 2006. The officer who filed the initial complaint describing the incident that resulted in the revocation of the pistol permit did not appear at the hearing. After strenuous objections by petitioner's attorney on the record, the Hearing Officer refused to allow said attorney the right to cross-examine at the hearing.

After the hearing on May 31, 2006, by letter dated May 30, 2007, addressed to petitioner, Robert W. McGuigan, First Deputy Commissioner, stated:

"I have reviewed the record and findings of fact submitted by Inspector Robert M. Turk, the department hearing officer at your May 31, 2006, pistol license hearing. Said administrative hearing was held at your request after our Pistol License Section revoked your pistol license.

At the proceeding arguments were heard from you, your attorney Milton Grunwald and Police Officer Sal Mistretta of the Pistol License Section. Inspector Turk after hearing the arguments and examining the documentary evidence issued a written recommendation that your revocation be sustained.

I agree with Inspector Turk's recommendation and find the Pistol License Section was correct in revoking your pistol license."

The possession of a handgun license is a privilege rather than

a right (*Sewell v City of New York*, 182 AD2d 469; *Matter of Caruso v Ward*, 160 AD2d 540). While a New York handgun permit is a privilege and may be revoked at any time, the Nassau County Police Commissioner must act rationally, and free from arbitrariness and capriciousness (*Hayden v Suffolk County Police Department*, 143 AD2d 752; see also *Pacicca v Allesandro*, 19 AD3d 500; *Shapiro v New York City Police Department*, 157 Misc.2d 28).

Respondent's statement to the effect that "the Court of Appeals has held that a determination to revoke a driver's license without permitting cross-examination did not violate the licensee's due process" (see *Gary v Adduci*, 73 NY2d 741) is incorrect in the opinion of this court, both the majority and the dissent agreed that in the first instance fundamental due process requires affording the right to cross examination. In *Gary* (supra), the petitioner had the right to call the officer as a witness, but failed to seek an adjournment to subpoena the officer. In the within action, the Hearing Officer arbitrarily and without any reason prohibited any cross-examination, even of the respondent's witnesses who appeared at the hearing. Thus, it would have been an exercise in futility for petitioner to request an adjournment to subpoena the officer involved in the incident that led to the revocation of the pistol permit.

The Hearing Officer stated on the record:

"As a Hearing Officer, this is the procedure we've been proceeding under. You'll be able to hear all of the information for today. You will be able to present your case and the information. And if we have further questions or problems with that-I have about seven hearings to conduct today that are all ready all running late." (Transcript of Hearing pp. 8-9, Notice of Petition, Exhibit C).

The attorney for the petitioner replied as follows:

"Because I have done many of these in the past and this is the first time that I'm denied the right to cross-examine the

witnesses. And that's a significant change and the denial of due process.

I hope you'll be objective. I'm sure that you will. However, the ability to be able to probe what the Department's case is and my ability to cross-examine the witness, to isolate him without subjecting his presentation to any kind of scrutiny, is a denial of due process." (Transcript of Hearing, pp. 9-10, Notice of Petition, Exhibit C).

Without the right to cross-examine the witnesses, holding an "administrative hearing" is a waste of time and a deprivation of the petitioner's fundamental right to due process. The petitioner should have an effective opportunity to defend by confronting adverse witnesses. These rights are important in cases such as the within action, where the petitioner challenges the proposed revocation as resting on incorrect or misleading factual allegations made by a police officer. This is the law regardless of whether a pistol license is a privilege or a right,

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They

find expression in the Sixth Amendment"  
 (*Greene v McElroy*, 360 U.S. 474, 496-497).

The courts have zealously protected against the erosion of fundamental due process rights, not only in criminal cases but all cases where administrative actions are under scrutiny.

The petitioner must be given the opportunity to confront and cross-examine the witnesses relied on by the Nassau County Police Department (*Gray v Adduci, supra*).

Furthermore, it appears that the respondent misconstrued *Guddemi v Rozzi* (210 AD2d 479). In *Guddemi* the petitioner failed to exhaust his administrative remedies before seeking judicial intervention claiming that to do so would have been futile. Where an Article 78 proceeding is one of pure statutory analysis and no factual issues are raised, exhaustion is not required. However, where the issue turns on applying statutory language to unresolved issues of fact, a petitioner's failure to exhaust remedies would warrant a dismissal of an Article 78 petition (*Kallenberg Meat Prods. v O'Cleireacain*, 209 AD2d 381). It is the opinion of this court that the petitioner did exhaust all his administrative remedies (i.e., a hearing was held) before seeking judicial intervention.

Therefore, respondent's determination is vacated and the matter is referred to the Nassau County Police Department to conduct a *de novo* hearing with the right of cross-examination.

Settle judgment on notice.

Dated:

DEC 05 2007

*Ullrich*  
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**ENTERED** T.S.C.

DEC 10 2007

**NASSAU COUNTY  
 COUNTY CLERK'S OFFICE**

schneider