

**Matter of Georgakis v Kelly**

2008 NY Slip Op 31134(U)

April 16, 2008

Supreme Court, New York County

Docket Number: 0111962/2007

Judge: Herman Cahn

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

PRESENT: Cahn

PART 49

Justice

Index Number : 111962/2007  
GEORGAKIS, JACK  
vs.  
KELLY, RAYMOND  
SEQUENCE NUMBER : # 001  
ARTICLE 78

INDEX NO. 111962-07

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

MOTION SEQ. NO. #001

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

\_\_\_\_\_ vere read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

**FILED**

APR 18 2008

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 4/16/08

Steven Cahn

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 49

-----X  
In the Matter of the Denial of the Premises Residence Pistol  
License Application of JACK GEORGAKIS,

Petitioner,

For a Judgment Under Article 78 of the CPLR,  
Granting Petitioner a Premises Residence Handgun License,

-against-

Index No. 111962/07

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,

Respondent.

**FILED**  
APR 18 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**Herman Cahn, J.:**

In this CPLR Article 78 proceeding, Petitioner Jack Georgakis applies for an order annulling and vacating respondent's denial of his application for a premises residence handgun license, as arbitrary, capricious and an abuse of discretion. Petitioner seeks an order directing respondent Raymond Kelly, as the Statutorily Designated Handgun Licensing Officer, and as the Police Commissioner of the City of New York, to issue Petitioner the license or, in the alternative, remanding this matter back to respondent for further investigation into Petitioner's background and character, and an administrative hearing.

By application dated August 21, 2006, Petitioner applied for a premises residence handgun license (see Rules of the City of NY Dept of Police [38 RCNY] §§ 5-01 [a], 5-02). In the application, Petitioner conceded that he had been arrested, and attached a copy of his plea agreement and a notarized explanation regarding the circumstances underlying the arrest.

By notice dated March 20, 2007, respondent advised Petitioner that the application had been disapproved for the following reasons:

[o]n 01/10/2003 you were issued a summons for disorderly conduct. On 10/07/2005 you were issued a traffic ticket for improper cell phone use. On 01/18/2006 you were issued a summons for disorderly conduct. On 02/19/2006 you were arrested for speeding and driving with a suspended license. Your license was suspended as a result of your receiving 3 speeding tickets within an 18 month period. The above circumstances cast grave doubt on your moral character in obeying the rules and regulations of a government agency.

Petitioner timely appealed the disapproval to the Director of the License Division. In his appeal, Petitioner maintained that the violations, citations and arrest cited by respondent were "more matters of accidental circumstances, not purposeful actions in which I wished to flagrantly disobey [sic] the law." Petitioner also provided explanations for each of the incidents cited by respondent.

By notice dated May 1, 2007, respondent advised Petitioner that the appeal had been denied upon review of the entire record. Respondent further advised Petitioner that it found that: "[y]our arrest history, history of moving violations and the history of domestic violence incidents in your home make you an unacceptable candidate for a handgun license."

Petitioner subsequently commenced this special proceeding to annul and vacate respondent's denial on grounds that respondent failed to weigh the positive aspects of his lifestyle and background against the negative, failed to recognize that Petitioner's violations of the law were neither serious nor intentional, and held Petitioner to standards higher than those applied to other handgun license applicants.

In opposition, respondent contends that the denial is rationally based in law and fact and

that Petitioner's repeated violations, which include misdemeanor violations, suggest a pattern of disregard for duly enacted and enforced governmental rules and regulations and run afoul of the good moral character required for the issuance of a pistol license.

In an Article 78 proceeding, the scope of the court's review is limited to whether the administrative agency's determination is arbitrary and capricious or is supported by a rational basis in the record (Matter of Fondacaro v Kelly, 234 AD2d 173, 177 [1<sup>st</sup> Dept 1996], lv denied 89 NY2d 812 [1997]; see Matter of Pell v Board of Educ., 34 NY2d 222, 230 [1974]). In addition, "the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (Matter of Howard v Wyman, 28 NY2d 434, 438 [1971]).

It is well settled that "possession of a handgun license is a privilege rather than a right" (Sewell v City of New York, 182 AD2d 469, 472 [1<sup>st</sup> Dept], appeal denied 80 NY2d 756 [1992]). The privilege is subject to reasonable regulation (Matter of Caruso v Ward, 160 AD2d 540, 540 [1<sup>st</sup> Dept 1990]). Further, the police commissioner is vested with broad discretion, and has been granted "extraordinary power," in granting licenses and regulating the possession of firearms within New York City (Matter of Perlov v Kelly, 21 AD3d 270, 270 [1<sup>st</sup> Dept 2005]; Sewell v City of New York, 182 AD2d at 472; see Penal Law § 400.00; Administrative Code of the City of New York [Administrative Code] § 10-131 [a] [1]).

In petitioning to vacate the denial of the handgun license application, Petitioner bears the burden of showing that there is "no good cause" for the denial (see Penal Law § 400.00 [1] [g]; 38 RCNY § 5-02 [h]). Petitioner has failed to do so.

Here, Petitioner seeks a premises handgun license. This type of license is restricted and is

issued only for a specific business or residence location (38 RCNY § 5-01 [a]). It also permits the holder to transport an unloaded handgun directly to and from an authorized small arms range (id.). To qualify for a premises license, the applicant "shall . . . [b]e of good moral character . . . [and] . . . [b]e an applicant concerning whom no good cause exists for the denial of such license" (38 RCNY §§ 5-02 [a], 5-02 [h]).

The administrative record demonstrates the existence of sufficient good cause to deny Petitioner's application. The record includes Petitioner's repeated violations of the law and an arrest that, as respondent correctly found, collectively suggest a pattern of disregard of duly enacted and enforced rules and regulations of a governmental agency and cast doubt on Petitioner's good moral character.

On December 21, 2001, Petitioner received a summons for a violation of the general provisions regarding the use of public parks. On January 10, 2003, he was charged with disorderly conduct, a violation subjecting violators to up to 15 days' imprisonment (see Penal Law § 240.20). On May 12, 2003, he received a summons for excessive noise (see Administrative Code § 24-218). On October 7, 2005, Petitioner received a summons for improper cell phone use while driving (see Vehicle & Traffic Law [VTL] §§ 1225-c [2], 1225-c [4]). On January 18, 2006, Petitioner was issued six citations for illegal towing, operating a tow truck without a license, operating a towing business without a license and operating a tow truck without proper license plates. These are all misdemeanors (see Administrative Code §§ 20-496 [a], 20-496 [b], 20-503, 20-522 [a] [1], 20-522 [b] [1]).

Petitioner was issued four citations for traffic infractions, including speeding on February 26, 2003, March 23, 2003 and May 1, 2004, and disobeying a traffic control device on September

13, 2005 (see VTL § 1110).

As a result of the traffic violations, his driving privileges were either suspended or revoked on four separate occasions. By order issued October 30, 2005, Petitioner's driver's license was revoked (see VTL § 510 [2] [a] [iv] [mandatory revocation of driving privileges following three speeding violations in an 18-month period]). He was issued a restricted license on February 22, 2006. By order issued March 6, 2006, less than two weeks later, Petitioner's license was suspended for failure to answer a summons. By two orders issued on April 24, 2006, Petitioner's driver's license was suspended for again failing to answer a summons and failing to pay a fine.

In addition, on February 19, 2006, Petitioner was issued a fourth citation for speeding. While checking Petitioner's driver's license, the ticketing officer discovered the October 30, 2005, license revocation. Accordingly, Petitioner was arrested and charged with third-degree aggravated unlicensed operation of a motor vehicle, a misdemeanor (see VTL §§ 511 [1] [a], 511 [1] [b]).

Petitioner does not deny the basis for these charges, but instead offers excuses for his behavior. For example, he contends that he did not know that he was speeding because he was an inexperienced driver or that he did not know his license had been revoked. With regard to the cell phone use violation, Petitioner at first claimed that he was lost and needed to ask for directions and, at a later time, claimed that the call was an urgent one, involving a serious family issue. With regard to the towing-for-profit charges, Petitioner contends that he was merely helping out a friend who needed his vehicle towed and did not intend to charge for the service.

The Court notes that many of these violations were either dismissed or resolved on pleas

to lesser charges and by payment of a fine. However, respondent is not barred from considering the circumstances surrounding the incidents or from noting an overall pattern of disregard for governmental rules and regulations (see e.g. Matter of Tolliver v Kelly, 41 AD3d 156, 158 [1<sup>st</sup> Dept], lv denied 9 NY3d 809 [2007]).

Contrary to Petitioner's contention, his full-time employment in the family business and enrollment as a part-time college student, while laudable, do not render respondent's denial of the handgun license application arbitrary or capricious. Respondent, in its discretion, may refuse to issue or may revoke a handgun license even where arrest charges were dismissed and the Petitioner has a commendable career or holds other licenses that were not revoked (see Matter of Nash v Police Dept. of City of New York, 271 AD2d 384, 384-85 [1<sup>st</sup> Dept 2000]; Matter of D'Onofrio v Kelly, 4 Misc 3d 1016[A], \*2, 2004 NY Slip Op 50911 [u] [Sup Ct, NY County 2004], affd 22 AD3d 343 [1<sup>st</sup> Dept 2005]).

Petitioner next contends that respondent's denial is arbitrary and capricious on the ground that, in the past, it has issued handgun licenses to applicants with criminal records more serious than his record. He further argues that administrative agencies must maintain continuity in their decisions or provide explanations for changes in position or policies.

Administrative agencies are obligated to decide like cases in the same way or explain the reason for the departure (Matter of Charles A. Field Delivery Serv., Inc. [Roberts], 66 NY2d 516, 520 [1985]; Matter of Goldstein v Brown, 189 AD2d 649, 651 [1<sup>st</sup> Dept 1993]). Thus, if the facts underlying distinctly different determinations are "essentially the same," then the agency's determinations in both cases should be the same or the later determination may be deemed arbitrary or capricious (id.; Matter of Goldstein v Brown, 189 AD2d at 651). Here, Petitioner's

contacts with law enforcement agencies are factually distinguishable from the circumstances surrounding respondent's issuance of licenses to the two individuals to whom Petitioner refers. The criminal records and life choices of both these individuals demonstrate that their last negative contact with the law occurred three and four years prior to their submission of handgun license applications and that they had each taken responsibility for, and reformed, their previous negative behavior. By contrast, Petitioner's most serious contacts, including his arrest for driving without a license, occurred within six months before his submission of the written application. Petitioner's record thus evidences a pattern of disregard of governmental rules and regulations existing close in time to the submission date. Given this pattern of behavior, respondent's denial of Petitioner's application is rationally based in law and on the facts.

Petitioner next contends that, to the extent that respondent's denial after appeal is based on evidence of domestic violence incidents in Petitioner's home that did not involve Petitioner, the denial is arbitrary, capricious and violated his due process rights.

In the notice of denial after appeal, respondents advised Petitioner that "[y]our Premises Residence license is denied due to: [y]our arrest history, history of moving violations and the history of domestic violence incidents in your home make you an unacceptable candidate for a handgun license."

Assuming without deciding that respondent's reference to domestic violence incidents in Petitioner's home was not appropriate and does not form a rational basis for the denial, the petition would still be denied. Significantly, respondent's denial is primarily based on Petitioner's own behavior and contact with law enforcement agencies, which, as mentioned above, is a valid basis for the denial. Therefore, while remand to an administrative agency for

reconsideration of a license application is an appropriate remedy where the cited basis for the denial is not sufficient (see Klapper v Codd, 78 Misc 2d 377, 379 [Sup Ct, NY County 1974]), remand is not necessary here, where a valid basis does exist and was cited by respondent.

Next, and contrary to Petitioner's contention, the reference to domestic violence in respondent's denial after appeal did not violate Petitioner's due process rights. In general, procedural due process rights require that a deprivation of life, liberty or property be preceded by notice and an opportunity to be heard (Mullane v Central Hanover Bank & Trust Co., 339 US 306, 313 [1950]; see USCA Const. Amend. 14). Notice and an opportunity to be heard are mandated only where an individual has been deprived of a liberty or property interest subject to due process protection, *i.e.*, one in which the individual has a legitimate claim of entitlement (Board of Regents of State Colleges v Roth, 408 US 564, 569-570, 577 [1972]). A handgun license is a privilege, rather than a right (Sewell v City of New York, 182 AD2d at 472). Therefore, a license applicant or holder is entitled to reasonable notice and a fair opportunity to be heard, in accordance with the applicable statutes, with respect to the reasons for the denial or revocation (Torres v New York City Taxi & Limousine Commn., 268 AD2d 340, 340 [1<sup>st</sup> Dept 2000]; see Penal Law § 400.00 [4-a]; 38 RCNY §§ 5-07 [e], 5-07 [f]). The record below amply demonstrates that Petitioner received reasonable notice by respondent's written specific and concisely stated reasons for the denial and an opportunity to be heard.

The Court notes that nothing in this decision prevents Petitioner from submitting a second handgun license application after a reasonable period of time has passed.

Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed; and it is further  
ORDERED that the Clerk shall enter judgement accordingly.

Dated: April 16, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
APR 18 2008  
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