

Matter of Friedman v Kelly

2008 NY Slip Op 31177(U)

April 17, 2008

Supreme Court, New York County

Docket Number: 0110367/2007

Judge: Joan Madden

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

PRESENT: Hon Joan A. Middleton

PART 11

Index Number : 110367/2007

FRIEDMAN, JASON

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 12-18-07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this ^{motion} ~~motion~~ to/for Article 78 relief

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

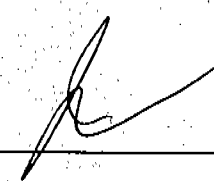
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum Decision, order & Judgment.

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

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 141B).

Dated: April 17, 2008



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: PART 11

-----X
In the Matter of the Application of
JASON FRIEDMAN,
Petitioner,

For a Judgment under Article 78 of the Civil Practice Law
and Rules Granting Petitioner a Pistol License,

-against-

Index No. 110367/07

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,

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
4432),
Respondent.

-----X
JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner seeks an order and judgment annulling the
respondent's determination to deny petitioner a premises residence pistol license (License),¹ and
directing respondent to issue to petitioner a License or, in the alternative, remanding this matter
to respondent for further investigation. Respondent opposes the petition, which is granted to the
extent of remanding this matter to the petitioner for further consideration in accordance with this
decision, order and judgment.

BACKGROUND

It is undisputed that petitioner, Jason Friedman, over the past eight years, has successfully
apprenticed and worked as an elevator mechanic for the New York City Transit Authority.
Petitioner has also qualified for an "unarmed security guard" license, after taking 8- and 16-hour

¹This License is a restricted handgun license issued for a specific business or residence
(38 RCNY § 5-01).

required courses, and seeks to expand his career horizons in the security field. In order to do so, petitioner seeks to complete a 47-hour course for which he enrolled, which requires that he have a license to possess a handgun.

In connection with his application for the License, dated December 1, 2005, petitioner disclosed to the License Division of the New York City Police Department (License Division) that he had been arrested in December 2004 and that, in early 2005, a temporary order of protection (order of protection) was issued against him, both of which concerned a telephone dispute with his cousin. Petitioner further disclosed that in September 2004, he applied and participated in an examination for the position of correction officer with the New York State Department of Correctional Services ("DOC"), but was advised by DOC, on December 16, 2004, that he was "psychologically unsuited" to assume the duties of the position.

Regarding the 2004 arrest, petitioner's fingerprint response, obtained by respondent, showed a misdemeanor charge, as disclosed by petitioner, for "Aggravated Harassment-2d: Telephone." The fingerprint response also showed that the criminal action was adjourned in contemplation of dismissal, to be sealed upon termination of the action in the accused's favor. The action was ultimately dismissed, the file sealed, and there is no indication that defendant has ever been convicted of a crime, or otherwise arrested.

The "Investigator Case Summary," submitted by respondent, notes that petitioner was interviewed on June 30, 2006 and that his case was completed that day. The investigator summarized the following:

"LICENSEE HAS PROVIDED THE REQUIRED DOCUMENTS NECESSARY FOR A PREMISE RESIDENCE LICENSE. LICENSEE HAS DISCLOSED ALL RELEVANT INFORMATION PERTAINING TO HIS MENTAL HEALTH

HISTORY. LICENSEE IS CURRENTLY EMPLOYED BY NYCTA AS AN ELEVATOR MECHANIC. LICENSEE FURTHER STATES HE HAD TO BE ~~INS[T]ITUTIONALIZED AS A CHILD DUE TO HIM HAVING PROBLEMS WITH HIS MOTHER.~~ LICENSEE FURTHER STATES IN DECEMBER 2004 UNTIL JANUARY 2005, HE SOUGHT MEDICAL HELP DUE TO HAVING PROBLEMS WITH A MEMBER OF HIS FAMILY AND A NASTY BREAKUP. HE NEEDED TO HAVE MEDICATION IN ORDER TO STABILIZE HIM. HE WAS PLACED ON SEROQUEL WHICH IS A PSYCHOT[R]OPIC MEDICINE FOR MENTAL ILLNESS. HE ALSO APPLIED FOR NYS CORRECTIONS IN 2004 AND WAS DISAPPROVED FOR BEIN[G] PSYCHOLOGICALLY UNSUITED. ALL CHECKS CONDUCTED WITH NEGATIVE RESULTS. BASED ON THIS INFORMATION, IT IS THE RECOMMENDATION OF THE UNDERSIGNED FOR LICENSEE TO RECEIVE DISAPPROVAL DUE TO HIS MENTAL HEALTH HISTORY. CASE CLOSED.”

(Am. Ver. Ans., Exh. J).

By notice dated October 15, 2006, the License Division advised petitioner that his application had been denied. The notice states:

“DUE TO YOUR RECENT DISAPPROVAL FROM THE NYS DEPT OF CORRECTIONS FOR BEING PSYCHOLOGICALLY UNSUITED TO ASSUME THE DUTIES OF A CORRECTIONS OFFICER AND YOUR RECENT MENTAL HEALTH HISTORY, CAST GRAVE DOUBT UPON YOUR ABILITY TO MAINTAIN THE REQUISITE GOOD CHARACTER FOR POSSESSION OF A FIREARM LICENSE. BASED ON THIS INFORMATION, YOUR APPLICATION FOR A PREMISE RESIDENCE LICENSE IS DISAPPROVED. CASE CLOSED.

(Am. Ver. Ans., Exh. C).

Petitioner filed an administrative appeal of the License denial. Presumably based on the denial notice, the focus of the petitioner’s brief from that appeal was his psychological health, including his voluntary confinement at a mental health facility as a relatively young child, approximately two decades ago. Petitioner also provided to the License Division the evaluations/opinions of several mental health professionals, including one psychologist who opined that petitioner has Asperger’s Syndrome, and had theretofore been mis-diagnosed. The

License Division's Director, Thomas M. Prasso (Prasso), requested that petitioner supplement his submission with information concerning licensing an applicant who has been diagnosed with

Asperger's Syndrome, which petitioner did.

After the administrative appeal was concluded, the License Division sent petitioner a "NOTICE OF DISAPPROVAL AFTER APPEAL," dated March 28, 2007, stating that the appeal was denied due to:

- Your arrest history for Aggravated Harassment and Harassment.
- You were the subject of an Order of Protection in 2005.
- You were psychologically disqualified from employment by the Department of Correction in 2004"

(Am. Ver. Ans., Exh. A).

DISCUSSION

Section 10-131 of the Administrative Code of the New York City, gives the Police Commissioner the authority to grant licenses for the keeping or carrying of pistols within the City of New York (see also *Sewell v City of New York*, 182 AD2d 469 [1st Dept], appeal denied 80 NY2d 756 [1992]). Penal Law § 400.00 (1) provides that the Police Commissioner may not issue a firearm license except to an applicant: who is "of good moral character" (Penal Law § 400 [1] [b]); "who has not been convicted anywhere of a felony or a serious offense" (Penal Law § 400 [1] [c]); "who has stated whether he or she has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness" (Penal Law § 400 [1] [d]); and "concerning whom no good cause exists for the denial of the license" (Penal Law § 400.00 [1] [g]). Similarly, the License Division has adopted rules and regulations governing the issuance of gun licenses, that require that an applicant be of "good moral character" (38 RCNY §

5-02 [a]), “[b]e free from any disability or condition that may affect the ability to safely possess or use a handgun” (38 RCNY § 5-02 [f]), and “[b]e an applicant concerning whom no good cause exists for the denial of such license” (38 RCNY § 5-02 [h]).

Because the issuance of a pistol license is a privilege and not a right (*see Matter of Kaplan v Bratton*, 249 AD2d 199, 201 [1st Dept 1998]), the licensing agency has broad discretion in evaluating an applicant’s moral character (*see Matter of Servedio v Bratton*, 268 AD2d 356 [1st Dept 2000]; *Matter of Biganini v Gallagher*, 293 AD2d 603 [2d Dept 2002]). While such discretion is not unbridled (*Matter of Davis v Clyne*, 58 AD2d 947 [3d Dept 1977]), the agency’s determination concerning a pistol license generally will be upheld where there exists in the record a rational basis for it (*Matter of Fastag v Kerik*, 295 AD2d 114 [1st Dept 2002]; *Matter of Kelley v Kelly*, 1 Misc 3d 903 [A], 2003 NY Slip Op 51485[U] [Sup Ct, NY County 2003]).

Furthermore, “[j]udicial review of the propriety of an administrative determination is limited to those grounds invoked by the agency in its determination” (*Matter of 72A Realty Assoc. v New York City Envtl. Control Bd.*, 275 AD2d 284 [1st Dept 2000]). Here, the License Division denied petitioner’s appeal to the License Division because of his arrest, the order of protection, and the DOC disqualification.

Petitioner acknowledges the considerable discretion afforded the respondent in making License determinations, but argues that notwithstanding that discretion, respondent’s denial of the License because of a single, ultimately dismissed and sealed, misdemeanor arrest and the DOC disqualification is, under the circumstances here, both arbitrary and capricious and without a rational basis in the record. The circumstances to which petitioner alludes include his claim of

a lack of evidence of instability or violence on his part and his assertion that the License Division ~~may not have taken into account that he may have been found psychologically unqualified for~~ correction officer work because he is an openly homosexual man. Petitioner further argues that the respondent failed to weigh the positive aspects of his lifestyle and background against the circumstances surrounding his arrest.

Concerning the arrest, petitioner avers that it involved an oral dispute with his cousin. He further avers that although his cousin threatened him, vowed she would send someone to hurt him, and complained to authorities that petitioner had called and annoyed her, he never threatened her in any manner, but merely returned her calls. Petitioner states that the lack of specific information in the generic criminal complaint against him demonstrates that his cousin “gave nothing specific to the police or the Office of the District Attorney” (Pet., ¶ 43). The record indicates that the March 14, 2005 order of protection referenced in the determination was in connection with complaint against petitioner by his cousin.

Petitioner further contends that the incident involving his cousin has been his only encounter with the criminal justice system. The record also reveals that, as part of the application procedure, petitioner sent the License Division a notarized letter stating that his arrest was a consequence of his having filed a complaint against his cousin for aggravated harassment after receiving a particularly menacing call from her. Indeed, in February 2005, it appears that petitioner was granted an order of protection against his cousin (Am. Ver. Ans., Exh. H, at 4), which predated the March 14, 2005 order against petitioner.

While respondent correctly argues that the License Division has the discretion to consider the facts and circumstances surrounding petitioner's arrest (*Matter of Abramowitz v Safir*, 293

AD2d 352, 353 [1st Dept 2002]; *Servedio*, 268 AD2d at 356), the record does not sufficiently articulate that this was done. Moreover, arrests which in the context of the time and

circumstances in which they occurred are of a minor nature, will not necessarily support a denial if the evidence demonstrates that the petitioner's character at the time of the application was good (*see e.g. Matter of Sheriff v Codd*, 83 Misc 2d 625 [Sup Ct, NY County 1975]).

Regarding the arrest, respondent points only to a computer printout of its date and the charges, but to nothing else that concerns the circumstances surrounding the event, and respondent fails to rebut petitioner's assertion that he was essentially the victim. While respondent argues that the circumstances surrounding the charge demonstrated that petitioner "had difficulty dealing with people, and thus, cast gave doubt on petitioner's character and fitness to possess a pistol license" (Res. Memo. of Law, at 7), this assertion is merely that of respondent's counsel, in a memorandum of law, and not the License Division, and thus does not demonstrate that the License Division considered the circumstances of the arrest.

The record does not indicate whether respondent reviewed any records concerning DOC's psychological evaluation of petitioner, nor does respondent explain the relationship between DOC's determination that petitioner was not psychologically qualified to be a corrections officer and petitioner's qualification for a pistol license. Furthermore, absent from the record is any statement detailing the reasons DOC concluded that petitioner was psychological unqualified. Thus, it appears that respondent did not conduct an independent examination of the underlying basis of DOC's determination.²

²To the extent that petitioner appears to argue that respondent's reliance on the DOC psychological evaluation holds him to a higher standard than other License applicants who have not undergone such an evaluation, the argument has been rejected by the First Department (*see*

For the foregoing reasons, respondent has failed to establish a rational basis for its denial of a license permit based on the arrest, order of protection, and DOC determination, and the matter should be remanded for reconsideration.³ (see *Matter of Fulco v McGuire*, 81 AD2d 509, 510 [1st Dept 1981] [“a more informative statement of the controlling considerations is necessary for us to determine the reasonableness of the actions taken”])

CONCLUSION

Accordingly, it is

ORDERED AND ADJUDGED that consistent with this decision, the petition is granted to the extent of remanding this matter to the respondent to expand the record concerning the investigation and the reasoning underlying respondent’s determination.

DATED: April 7, 2008


J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served by mail. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

Matter of Hernandez v Safir, 281 AD2d 164 [1st Dept 2001]).

³Petitioner also argues that the License Division has issued pistol licenses to many applicants with far worse records than his, and thus it has changed its position in this case and failed to explain such change. To support his argument, petitioner includes documents concerning two other applicants with a history of criminal arrests who were granted Licenses. While a “decision [that] neither adheres to the agency’s own precedent nor indicates any reason for reaching a different result on essentially the same facts” may be found to be arbitrary and capricious (*72A Realty Assocs.*, 275 AD2d at 287), here, petitioner has failed to establish any precedent based on the two examples cited.