

**Matter of Davis v License Div., Police
Dept. of N. Y. City**

2008 NY Slip Op 31244(U)

April 17, 2008

Supreme Court, New York County

Docket Number: 0100188/2008

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT: _____ **J.S.C.**

PART 5

Index Number : 100188/2008

DAVIS, JAMES O.

INDEX NO. _____

vs

LICENSE DIVISION, NYC POLICE

FILED DATE _____

Sequence Number : 001

FILED SEQ. NO. _____

ARTICLE 78

FILED 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	
1	_____
2, 3	_____
4	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
 APR 22 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

**DECIDED IN ACCORDANCE WITH
 ACCOMPANYING DECISION / ORDER**

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

Dated: April 17, 2008


EILEEN A. RAKOWER 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 5

-----X
In the Matter of the Application of
JAMES O. DAVIS,

Petitioner

Index No.
100188/08

- against -

LICENSE DIVISION, POLICE DEPARTMENT
of NEW YORK CITY,

Defendant.

Decision
and Order

FILED

APR 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. EILEEN A. RAKOWER,

Petitioner, James Davis, (Davis) applied to the License Division of the New York City Police Department (PD) for a premises pistol permit in September, 2006. As required by the application, Davis answered numerous questions pertaining to his qualification for a pistol permit. These included questions as to whether he had ever been arrested and was an Order of Protection ever issued against him. Davis answered "yes" to these questions. Also as required, Davis submitted notarized statements describing the circumstances of his two arrests.

Davis's first arrest was in July, 1998, when he was in college. He states that he fraudulently applied for and received unemployment benefits at a time when he was paid for his student internships. He pled guilty to petit larceny, paid full restitution and was awarded a certificate of relief from civil disabilities.

Davis's second arrest occurred at a random traffic checkpoint. When the officers checked his licence, he discovered that it was suspended pursuant to a Family Court Child Support Enforcement Unit Order. Davis states that this was an error because he had already appeared before a Family Court Judge and made all current and retroactive payments. He obtained the necessary documentation to substantiate his claim and the suspension was taken off his licence.

Davis's application also states that an Order of Protection was issued against him "sometime in mid to late 1999" by Brooklyn Family Court. He states that the complainant in that matter was his child's mother and the Order issued because he was upset over the break-up of their relationship.

The PD wrote to Davis in January, 2007 requesting additional information in anticipation of a meeting with one of its investigators. At the meeting, Davis was informed that the investigator uncovered a juvenile arrest that was not mentioned in the application. Davis explains that he did not include this arrest information because, at the time it was resolved, he was informed that the matter was sealed. He obtained a certificate of disposition which states that on August 8, 1988, Davis was tried and found not guilty of all charges that were pending in the Supreme Court, Kings County.

Davis received a Notice of Disapproval, dated July 31, 2007, which listed three reasons for the disapproval. Those reasons pertain to 1) the aforementioned undisclosed arrest and acquittal; 2) his 1995 arrest for Grand Larceny which resulted in the 1999 plea to petit larceny, and 3) "three domestic violence incidents on 5/26/01, 11/17/01 and 11/24/01 which were not revealed to the licence division."

In August, 2007, Davis filed an appeal of the decision which addressed each of the three reasons for the disapproval. Davis explained that he did not disclose the 1988 acquittal because he had been assured by his attorney and the District Attorney that the file would be sealed. The letter reiterated the circumstances of his 1999 petit larceny conviction. Davis also stated that the three domestic violence incidents were revealed to the PD by his answer "yes" to the question "Have you ever, or do you now have an Order of Protection issued against you?" Davis states in his appeal letter that his child's mother sought the Order of Protection after he filed a Family Court petition seeking visitation and joint custody. He further explains that there was never any finding in the Family Court that substantiated the underlying allegations.

By letter dated September 12, 2007, Davis was informed that his appeal was denied because he failed to disclose his complete arrest history on his application and, because of his history of domestic violence incidents in "question #27" of the handgun licence application. The letter also stated that Davis's recourse was to seek review by way of an Article 78 proceeding in the Supreme Court. Thereafter, he filed this petition.

The "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the

agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

Davis argues that he already explained the misunderstanding regarding the juvenile arrest and he denies any history of domestic violence incidents. He notes that question #27 asks "Have the police ever responded to an incident of domestic violence in which you were involved?" Davis states that he answered the question truthfully because police officers never responded to any incident of domestic violence in which he was involved. Rather, the three dates for the Orders of Protection pertain to court appearances where the Order was issued and merely extended through the pendency of the Family Court action. In fact, he offers as evidence copies of the Orders of Protection which indicate that the Orders were issued on completely different dates than those indicated by the PD. Davis states that PD's decision was arbitrary, capricious and an abuse of discretion and he urges the court to direct PD to issue him a pistol licence permit.

PD argues that Penal Law §400.00 and Title 38 of the Rules of the City of New York (RCNY) § 5-02 provide support for its denial of Davis's application. It states that all applicants are warned that "[f]alse statements are grounds for disapproval." The PD argues that the instruction form for the application states that even sealed arrests must be disclosed. In its answer, the PD concedes that Davis accurately answered the application questions that pertain to the Orders of Protection. It states that it does not rely on the evidence of domestic issues as support for its denial of a pistol permit.¹ The PD Investigator's Case Summary Report concludes "[b]ased on the circumstances of the above arrests and the applicant's domestic incidents cast grave doubt on the moral character, judgment and fitness of the applicant to obtain a handgun licence." (sic.) PD argues that "[d]espite the acquittal of the 1987 arrest and

¹In fact, PD offers as an exhibit in its papers copies of three "NYPD Domestic Incident Reports," the dates of which correspond to the PD investigator's erroneous Order of Protection dates. These reports name petitioner, James Davis, as the "victim" and the child's mother as the "suspect" in incidents where she failed to produce the child for court ordered visitation.

the plea to lesser charges in the 1998 arrest, and petitioner's failure to report one of them, provided the Licence Division with sufficient 'good cause' to deny petitioner's application for a pistol licence." PD urges this court to uphold its decision as rational.

Penal Law § 400.00(1) states, in pertinent part,

1. Eligibility. No licence shall be issued or renewed pursuant to this section except by the licencing officer, and then only after investigation and finding that all statements in a proper application are true. No licence shall be issued or renewed except for an applicant . . . (b) of good moral character . . .and (g) concerning whom no good cause exists for the denial of the licence . . .

38 RCNY §5-02 lists the requirements for the issuance of a pistol premises licence and 38 RCNY § 5-05(b)(6) states the procedures that applicants must follow when reporting prior arrests to the PD. The language in the application directions supplied to all applicants mirrors the dictates of 38 RCNY § 5-05(b)(6). The application directions state, in pertinent part

Arrest Information: If you were ever arrested, indicted or summonsed (other than parking violations) for any reason you must ... submit a certificate of disposition showing the offense and the disposition. Also, you must submit a detailed, notarized statement describing the circumstances surrounding each arrest. **YOU MUST DO THIS EVEN IF:** the case was dismissed, the record sealed or the case nullified by operation of law. The New York State Division of Criminal Justice Services will report to us every instance involving the arrest of the applicant. **DO NOT** rely on anyone's representation that you need not list a previous arrest. (Emphasis in the original.)

Here, Davis accurately reported the matters pertaining to the Orders of Protection and PD now states that it has no bearing on the denial of the application. Additionally, there has never been any question that Davis accurately reported his petit larceny conviction and the erroneous arrest pertaining to his child support obligations. However, Davis's failure to report the 1987 arrest, while understandable due to the inflammatory nature of the charges and his ultimate acquittal, is, nonetheless, fatal to his application here.

The directions give a clear statement regarding disclosure,

YOU MUST DO THIS EVEN IF: the case was dismissed, the record sealed or the case nullified by operation of law. The New York State Division of Criminal Justice Services will report to us every instance involving the arrest of the applicant. **DO NOT** rely on anyone's representation that you need not list a previous arrest.

Davis's compliance with the application directions regarding his other two arrests amply demonstrates his understanding of the instructions. Moreover, it belies his claim that he "did not read [the directions] closely or think that they applied to his particular situation."

Penal Law §400.00(1) requires that a pistol permit may only be issued to an applicant after a "finding that all statements in a proper application are true." The application itself warns that "[f]alse statements are grounds for disapproval."

"The possession of a handgun is a privilege, not a right, that is subject to the broad discretion of the New York City Police Commissioner." (*Tolliver v. Kelly*, 41 AD3d 156 [1st Dept. 2007]). Davis's failure to comply with the requirement to disclose all arrests provides a rational basis for PD's determination. (*Id.*) Accordingly, it cannot be said that the decision of the Licence Division of the New York City Police Department was arbitrary, capricious or an abuse of discretion. Wherefore, it is hereby

ORDERED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court.

Dated April 17, 2008


EILEEN A. RAKOWER, J.S.C.

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5