

<b>Matter of Chell v Kelly</b>
2008 NY Slip Op 31349(U)
May 2, 2008
Supreme Court, New York County
Docket Number: 0117286/2007
Judge: Lewis Bart Stone
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: STONE  
HON. LEWIS BART STONE Justice

PART 505

CHELL, DAVID

INDEX NO. 117286/07

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

- v -

RAYMOND KELLY

MOTION SEQ. NO. 01

MOTION 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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*is decided in accordance with attached Reason & Order.*

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

**FILED**

MAY 13 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 2 May 2008

Lewis Bart Stone  
HON. LEWIS BART STONE 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 50S

-----X  
 :  
 In the Matter of the Pistol Application of  
 DAVID CHELL :  
  
 Petitioner :  
  
 For a Judgment under Article 78 of the : Index Number  
 Civil Practice Law and Rules Granting : 117286/07  
 Petitioner a Pistol License :  
  
 -against- : DECISION AND  
 : ORDER  
 RAYMOND KELLY, as the statutorily Designated :  
 Handgun Licensing Officer, the New York City :  
 Police Commissioner and his successors in office, :  
  
 Respondents.

**FILED**  
 MAY 13 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Hon. Lewis Bart Stone:

Petitioner, David Chell ("Chell") moves pursuant to Article 78 of the Civil Practice Laws and Rules for a judgment reversing the determination of respondent, Raymond Kelly, the New York City Police Commissioner ("Kelly") who denied Chell's application for a Premises Residence pistol license ("pistol license"), and requesting that this Court mandate Kelly issue him a license. Kelly opposes Chell's application.

## STATEMENT OF FACTS

Chell, a thirty-seven year old resident of New York City applied on May 31, 2007 for a pistol license. He previously had a pistol license which he surrendered on September 15, 2006.

An investigation of Chell's background was made which included inquiries to the New York State Division of Criminal Justice Services, which confirmed Chell's criminal history. Chell had disclosed in his application a certificate of disposition from an arrest and explanations as to the circumstances of other arrests and orders of protection

On December 2, 2007, at the end of the investigation, Chell was sent a "Notice of Disapproval" whereby he was informed that he was disapproved for a handgun license for the following reasons:

Active Order of Protection - Expiring October 4, 2007.

Arrest on September 18, 2006 for violating Order of Protection.

Wife having a "breakdown" as stated by Applicant is questionable for safety and stability of a firearm in the home.

On or about October 29, 2007 Chell filed an administrative appeal. His file was reviewed, and by letter dated November 14, 2007, Thomas M. Prasso, Director

of the License Division of the New York City Police Department, denied Chell's appeal on the following grounds:

- History of domestic violence incidents in your home.
2. Multiple Orders of Protection issued against you.
3. NPSPIN records indicate that the most recent temporary Order of Protection against you did not expire until October 4, 2007.
4. You were arrested for violating a temporary Order of Protection on January 18, 2006.

Or about October 15, 2002, Chell commenced this proceeding to annul and reverse Kelly's decision to deny him a license

### **CONCLUSIONS OF LAW**

Chell seeks to vacate the denial on the grounds that the determination was arbitrary and capricious and "shocking to one's sense of fairness." CPLR §7803(3); Matter of Pell v. Bd. of Educ., 34 NY2d 222 (1974).

This Court may only consider whether the administrative decision to grant or deny Chell's application for a pistol license was arbitrary and capricious or an abuse of discretion. See Matter of Pell v. Board of Educ., *supra*, Matter of Lipton v. Ward, 116 AD2d 474 (1<sup>st</sup> Dept. 1986). The judicial function is limited to ascertaining whether there is a rational basis for the denial. Sewell v. City of New York, 182 AD2d 469, 473 (1<sup>st</sup> Dept. 1992). A rational basis exists for denying an application

for a full carry gun permit when the evidence adduced is adequate to support the action. See Sewell v. City of New York at 473.

The issuance of a license to carry a gun is a privilege, not a right. See In re Williams v. Bratton, 238 AD2d 269 (1<sup>st</sup> Dept. 1997); and Sewell v. City of New York at 472. The New York City Police Department has broad discretion to grant or deny gun carry licenses in accordance with Penal Law Section 400.00 and the New York City Administrative Code Section 10-131 (“Administrative Code”) authorizes the Police Commissioner to grant licenses for the keeping and carrying of pistols within the City of New York. Penal Law §400.00 sets forth the requirements an applicant must meet for such a license. Specifically, P.L. §400.00(1) states:

No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No licence shall be issued or renewed except for an applicant (a) of a good moral character; (b) who has not been convicted anywhere of a felony or a serious offense; (c) who has stated whether he has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness; and (d) concerning whom no good cause exists for the denial of the license...

The Court must defer to Kelly in his exercise of administrative discretion in evaluating a pistol permit application, especially since public safety and general welfare is at issue. This Court may only set aside his decision to deny Chell’s

\* 6 ]  
application if it was “so disproportionate to the offense in light of all the circumstances as to be shocking to one’s sense of fairness.” Matter of Pell v. Board of Education at 233, citing Stolz v. Board of Regents, 4 AD2d 361 (3<sup>rd</sup> Dept. 1957).

A Court may not overturn an agency’s decision merely because it would have reached a contrary conclusion. In reviewing an administrative decision which turns on the exercise of discretion, “the Court cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is “arbitrary or capricious.” Pell v. Board of Education at 230-231.

Chell claims in substance that Kelly acted in an “arbitrary and capricious” manner by failing to consider 1) that he had a previous license for a handgun for almost 17 years with no violations; 2) that he had only one dismissed misdemeanor arrest; 3) instances where applicants with worse records have been granted pistol licenses.

Kelly responds that his decision was rationally based because Chell does not possess the four statutory requisites listed above in PL §400.00(1)(a)through(d) and asks this Court to pay deference to his discretion in evaluating pistol permit applications. “[T]he welfare and safety of the general public is a factor of great weight in the issuance of a pistol permit. Harris Codd, 57 AD2d 778, 779 (1<sup>st</sup> Dept. 1977); aff’d 44 NY2d 973 (1978); Sheriff v. Codd, 83 Misc2d 625 (Sup. Ct., N.Y.

Co. 1975). Kelly points to the multiple Orders of Protection issued against Chell on behalf of his wife and the incidents of domestic violence which by themselves provide Kelly with sufficient "good cause" to deny the application.

While Chell's one arrest is for a "single incident," the License Division the entirety of Chell's record and the history of domestic disputes in his home, particularly the multiple Orders of Protection issued against him on behalf of his wife, were considered. This Court cannot therefore find that Kelly acted in an "arbitrary and capricious manner" when making his final determination after a review of the entire administrative record.

Chell cites cases where, he contends, applicants with similar or worse backgrounds were granted pistol permits. These cases, however, are distinguishable from the case at bar in that any criminal record of these applicants had taken place several years prior and the circumstances surrounding the arrests were considered. Here, Chell's incidents took place immediately prior to and contemporaneous with the denial of the application.

This Court finds that Kelly's decision to deny Chell a pistol license was a proper and lawful exercise of Kelly's discretion, was not arbitrary or capricious, and was rationally based.

Petition is denied. This constitutes the decision and order of the Court.

DATED: MAY 2, 2008  
NEW YORK, NEW YORK



Hon. Lewis Bart Stone  
Justice of the Supreme Court

**FILED**

MAY 13 2008

COUNTY CLERK'S OFFICE  
NEW YORK