

Matter of Donadio v Kelly

2008 NY Slip Op 32235(U)

July 31, 2008

Supreme Court, New York County

Docket Number: 0104129/2008

Judge: Lewis Bart Stone

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

PRESENT: HON. LEWIS BART STONE

PART 505

Index Number : 104129/2008

DONADIO, FRANK

vs

KELLY, RAYMOND W.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were 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 *is denied in accordance with the annexed Decision and Order*

FILED
AUG 11 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 31 July '08

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 Application of :
FRANK DONADIO, :

Petitioner, :

DECISION AND
ORDER

For a Judgment Pursuant to Article 78 of :
the Civil Practice Law and Rules :

Index Number
104129/08

-against- :

:
RAYMOND W. KELLY, as Police Commissioner of :
The New York City Police Department, :
THOMAS M. PRASSO as Director, License Division :
and THE CITY OF NEW YORK :

Respondents. :
-----X

H. Lewis Bart Stone, J.

Petitioner, Frank Donadio (“Donadio”), moves pursuant to Article 78 of the Civil Practice Laws and Rules (“CPLR”), to challenge and set aside the determination of respondent New York Police Department (“NYPD”) and of the License Division made on December 22, 2006, to revoke his gun license (the “Revocation”). NYPD opposes this application.

FILED
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STATEMENT OF FACTS

Penal Law Article 4 and Section 10-131 of the New York City Administration

Code authorize the NYPD to grant licenses for keeping and carrying pistols. Title 38 of the Rules of the City of New York (“RCNY”) further regulates these licenses.

RCNY § 5-22 requires licensees immediately to report to NYPD the occurrence of incidents listed in RCNY § 5-30, which include arrests and protection orders issued against the licensee. RCNY § 5-30C(5)(g) states that “Failure to comply with the license division’s direction may result in permanent revocation.” RCNY Title 38 § 3-05 also sets forth similar requirements and grounds for suspension or revocation of a rifle/shotgun permit.

On May 2, 1967, Donadio applied to the NYPD for a target pistol license, his application was approved, and such license was issued.¹ In June of 2001, the License Division converted all Target licenses to Premises Residence Licenses. As such, renewal applications for Target pistol licenses submitted after June of 2001 were automatically converted to renewal applications for Premises Residence Licenses. The License Division approved Donadio’s 2004 renewal application on September 10, 2004, and issued him a Premises Residence license pursuant to the conversion process described above.

¹ Donadio has held several different pistol licenses issued by the License Division between 1963 and 2008.

On June 29, 2006, NYPD received notification that Donadio was involved in a domestic dispute on June 27, 2006, and that Donadio's firearms had been removed. The incident report indicated that Donadio's wife, Elena Donadio, stated that she and petitioner had a verbal dispute and that Donadio punched and kicked her, and that Mrs. Donadio punched and kicked him. The report also indicated that upon removal of Donadio's licensed handguns on June 27, 2006, NYPD discovered that Donadio also had two rifles in his home for which he had no permit. On or about July 2006, NYPD notified Donadio that his pistol license was suspended pending investigation of this incident. An NYPD domestic incident report further indicated that Donadio had several additional domestic disputes with his wife.

An NYPD investigation further revealed that a Temporary Order of Protection ("TOP") was issued in Kings County on June 30, 2006 against Mrs. Donadio on behalf of Donadio and another TOP was issued against Donadio on behalf of Mrs. Donadio on September 14, 2006.² Donadio, after engaging in a verbal dispute with Mrs. Donadio in a restaurant, was arrested on September 19, 2006, for violating the TOP, however, this arrest was ultimately voided. Following an NYPD Investigation

² The TOP recited that it is a federal offense to possess a handgun, rifle, shotgun, or other firearm while an order of protection which protects an intimate partner against assault, harassment, threatening and/or stalking, remains in effect (18 U.S.C. §§ 922(g)(8), 9229(g)(9), 2261, 2261A, 2262).

Report which also concluded that Donadio had a history of domestic violence and had illegally possessed long arms in his home, Donadio's license was revoked.

On December 30, 2006, Donadio requested an administrative hearing to appeal such Revocation. Donadio asserted that Mrs. Donadio caused the domestic violence incident of June 19, 2006 and that NYPD never informed him of a renewal date for his long guns. Donadio also asserted that he was unaware that he had to notify NYPD of his arrest and order of protection. In a hearing on May 15, 2007, NYPD found Donadio to have violated RCNY and Penal Law in that he 1) violated the terms and conditions of issuance of pistol permits by failing to notify the License Division of his confiscated firearms; 2) illegally possessed two rifles; 3) failed to notify the License Division that he had become the recipient of a temporary order of protection; 4) failed to notify the License Division of his arrest; 5) failed to notify the License Division of the police response to Domestic Incident Reports; 6) failed to familiarize himself with the rules and regulations concerning his pistol permit.

Donadio commenced this proceeding to challenge the Revocation as arbitrary and capricious.

CONCLUSIONS OF LAW

The sole issue this Court may consider is whether the Revocation was arbitrary and capricious or an abuse of discretion. See Matter of Pell v. Board of Education, 34 NY2d 222, 230 (1974); Matter of Lipton v. Ward, 116 AD2d 474 (1st Dept. 1986). In doing so, the Court's function is limited to ascertaining whether NYPD had a rational basis for the Revocation. Sewell v. City of New York, 182 AD2d 469, 473 (1st Dept. 1992). A rational basis exists where the administration's determination rests on adequate evidence. Id. This Court may not disturb the Revocation if a rational basis is found.

Under Penal Law § 400.00, the NYPD has broad discretion to grant or revoke licenses, and the court must give great weight to its decision, particularly when public safety is at issue. The Court may set aside the Revocation only if it finds it to be so "disproportionate to the offenses in light of all the circumstances as to be shocking to one's sense of fairness." See Pell, 34 NY2d at 233 (1974). The Court must review all records before it is to determine whether the Revocation stands upon a sound exercise of discretion. Even if the court could have reached a contrary conclusion if the case were actually brought before it for a determination, the court may not overturn the Revocation without finding that the Revocations lacks a rational basis.

Donadio argues in substance that NYPD acted in an arbitrary and capricious manner by failing to consider that 1) Donadio is a person of “good moral character” because there have been no incidents for the past 43 years that would affect his pistol license; 2) NYPD found that the domestic violence incident did not cast doubt on his character and fitness to possess a firearm 3) the final Revocation rejected the hearing officer’s recommendation of suspension and instead revoked Donadio’s license; 4) his arrest was voided; 5) he was not aware of the terms and conditions of his permit.

Donadio asserts that NYPD could not rationally base the Revocation on his arrest because the arrest was subsequently voided. While an arrest record by itself might not constitute adequate ground for the revocation of a license, Michael v. Arato Safir, Index No. 109242/99 (Sup. Ct., N.Y. Co. Zweibel, J.), the Revocation was not solely based on Donadio’s failure to report the arrest. The Revocation also considered Donadio’s TOP, his possession of illegal rifles, and his failure to notify the License Division of police response to domestic violence incidents.

Donadio further argues that he was not familiar with the terms and conditions of his permit. However, his license required him to be familiar with these terms and conditions, and to notify the License Division if police were summoned to his residence, if he has any TOPs against him, and if his firearms are ever confiscated.

Failing to report these various incidents may be properly considered by NYPD within the framework of the licensing scheme. These considerations provide a rational basis for the Revocation and is not “shocking to one’s sense of fairness and equity.”

After a full review of the record, this Court finds that the Revocation was neither arbitrary nor capricious.

The issuance of license to carry a gun is a privilege, not a right. In re Williams v. Bratton, 238 AD2d 269 (1st Dept. 1997) the Court stated that NYPD may well consider a licensee’s behavior and suspend or revoke a license if the licensee fails in any material way to comply with the regulations. RCNY Title 38, § 5-22 clearly provides “licensees shall cooperate with all reasonable requests by the Police Department” for information and assistance in this matter.

The Revocation was based on many factors and was a proper and lawful exercise of NYPD’s discretion and was not arbitrary and capricious.

The petition is denied.

This is the Decision and Order of the Court.

DATED: JULY 31, 2008
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court

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