

**Matter of Lewis v New York City Police Department
License Division**

2008 NY Slip Op 33520(U)

December 31, 2008

Supreme Court, New York County

Docket Number: 400410/08

Judge: Joan A. Madden

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

PRESENT: HON JOAN A. M. DEER
Justice

PART 11

Index Number : 400410/2008

LEWIS, RICHARD

INDEX NO. _____

vs

NEW YORK POLICE DEPT.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

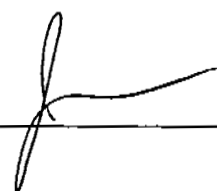
Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion relief is decided in accordance with the checked Memorandum Decision Order + Judgment. *petition for Article 78*

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: December 31, 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

RICHARD LEWIS,
Petitioner,

ORDER & JUDGMENT

For an Order and Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

Index No.: 400410/08

LICENSE DIVISION/PISTOL LICENSE SECTION
RM 110 ONE POLICE PLAZA N.Y. N.Y. 10038

Respondent.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based thereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

MADDEN, J.:

This is an Article 78 proceeding commenced by the petitioner, Richard Lewis
(Petitioner), seeking to reverse a determination by the New York City Police Department License
Division (the License Division)¹ denying Petitioner's application for a carry guard pistol license.

Respondent, the License Division, opposes the petition and contends that the
determination to deny the application was not unreasonable, arbitrary, capricious, or an abuse of
discretion as the administrative record supports the License Division's determination that
Petitioner lacked the moral character to possess a pistol license due to his arrest history and his
false statement regarding the arrests on his application.

FACTUAL ALLEGATIONS

Petitioner has worked as a security guard for Alante Security Group, Inc. (Alante) since

¹ Although the caption for this case identifies respondent as "LICENSE
DIVISION/PISTOL LICENSE SECTION RM 110 ONE POLICE PLAZA N.Y. N.Y. 10038,"
Respondent states in its Verified Answer that its proper name is New York City Police
Department License Division.

March 29, 2005. By a sworn application dated March 20, 2007, Petitioner applied for a carry guard pistol license. According to a March 20, 2007 letter from Luis Lopez, president of Alante, which was submitted to the License Division, it was necessary for Petitioner to carry a firearm as Petitioner's "duties will include protecting life and property in Federal buildings." (Verified Answer, ex. A).

Section B of the application states:

Applicants must answer Questions 10 through 24. Additionally Questions 29 through 31 must be answered chronologically and in detail. If you have answered YES to question(s) 10 through 28 you MUST attach a notarized sheet of paper (8 ½ x 11) explaining such answer(s) in complete detail. A FALSE STATEMENT SHALL BE GROUNDS FOR DENIAL OF A N.Y.C. HANDGUN LICENSE.

(Verified Answer, ex. A) (emphasis in original).

Question 23 of the application asks whether the applicant has ever "[b]een arrested, indicted, or summonsed, for ANY offense other than Parking Violations, in ANY jurisdiction, federal, state, local or Foreign?" (emphasis in original) to which the Petitioner placed an "x" in the "No" column. (Verified Answer, ex. A). Question 23 also asks applicants to list the date, time, charge(s), disposition, court and police agency regarding any offenses and specifically states that "([f]alse statements are grounds for disapproval)" (*Id.*). Along with the application, Petitioner was provided with "Instructions to All Handgun License Applicants." Paragraph 7 (A) of the instructions states;

If you were ever arrested, indicted or summonsed (other than parking violations) for any reason you must answer Yes to question-23 and 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 an applicant. **DO NOT** rely on anyone's representation that you need not list a previous arrest. . . .

(Verified Answer, ex. B) (emphasis in original).

Following the filing of Petitioner's application, the License Division conducted an investigation of Petitioner's background. During the course of this investigation, the License Division obtained an arrest history report from the New York State Division of Criminal Justice Services (NYSD CJS) which disclosed that Petitioner was arrested twice, once in 1982, for two Class B Misdemeanors, Criminal Possession of Marijuana and Loitering, and the Class A Misdemeanor of Resisting Arrest, and in November 1999, for two Class E Felonies, Fourth Degree Criminal Possession of Stolen Property, and Fourth Degree Grand Larceny.²

The NYSD CJS report further states that a bench warrant was issued based on Petitioner's failure to appear at a hearing in 1982 connection with the marijuana arrest. The charges were adjourned in contemplation of dismissal in November 1999 and the charges were dismissed and the record sealed in November 2000. As to the felony arrests, the report indicates all charges against petitioner were dismissed in December 2000, and thereafter the record sealed. Pursuant to the investigation, the License Division also made an inquiry with the Department of Motor Vehicles which revealed that Petitioner's drivers license has been suspended as of July 12, 2006 for failure to pay child support. After completing the background investigation and as a result of Petitioner's arrest record and suspended drivers license for failure

²Petitioner was arraigned on November 10, 1999 on two counts: Third Degree Criminal Possession of Stolen Property, a Class D Felony (Penal Law § 165.50); and Third Degree Grand Larceny, a Class D Felony (Penal Law § 155.35). These charges were dismissed on December 15, 2000.

to pay child support, the License Division disapproved Petitioner's application. The Notice of Disapproval dated July 13, 2007 states:

APPLICANT HAS EXTENSIVE ARREST HISTORY DATING BACK TO 1982. ARRESTS INCLUDE CPSP, GRAND LARCENY, RESISTING ARREST, LOITERING, AND CRIMINAL POSSESSION OF MARIHUANA. APPLICANT WAS ALSO RETURNED ON A BENCH WARRANT IN 1999. APPLICANTS NEW YORK STATE DRIVERS LICENSE IS CURRENTLY SUSPENDED FOR FAILURE TO PAY CHILD SUPPORT. APPLICANT SHOWS BLATANT DISREGARD FOR THE CRIMINAL JUSTICE SYSTEM, THE COURTS, AND HIS PERSONAL RESPONSIBILITIES. RECOMMEND DISAPPROVAL.

(Verified Answer, ex. F).

By letter dated August 26, 2007, Petitioner appealed the License Division's denial of his application. Petitioner states that he seeks the license for work purposes only, that he has a good reputation at his job, and that the charges for which he was arrested, including the bench warrant for his failure to appear, were either false or erroneous charges and were all dismissed. He further maintains that his drivers license was suspended in May of 2007 only because his employer did not deduct the proper amount from his paycheck for court-ordered child support payments. By letter dated September 27, 2007, the License Division notified Petitioner that his appeal was denied. The Notice of Disapproval After Appeal states:

[Y]our Carry Guard license is denied due to:

- You failed to disclose your arrest history on your application
- Your failure to pay child support.

(Verified Answer, ex. H).

On November 26, 2007, by Notice of Petition and Verified Petition, Petitioner brought this proceeding pursuant to Article 78 of the CPLR, seeking an order annulling the License

Division's determination which denied Petitioner's application.

DISCUSSION

CPLR 7803 (3) provides that one of the questions which can be raised in an Article 78 proceeding is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion as to the measure or mode or penalty or discipline imposed." The Court of Appeals has explained that the arbitrary and capricious test "relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell v Board of Educ.*, 34 NY2d 222, 231 (1974) (citations and quotations omitted); *see also Sewell v City of New York*, 182 AD2d 469, 473 (1st Dept 1992).

Section 400.00 (1) of the New York State Penal Law states that an applicant for a pistol license must be "of good moral character" and must not have demonstrated any "good cause" for denial of the license. Title 38, Chapter 5 of the Rules of the City of New York further provides that an applicant for a pistol license must possess certain criteria including that he/she "[b]e of good moral character" and "[b]e an applicant concerning whom no good cause exists for the denial of such license." *See* 38 RCNY § 5-02. As the issuance of a pistol license is a privilege and not a right, the licencing agency has broad discretion when evaluating the applicant's moral character. *See Matter of Servedio v Bratton*, 268 AD2d 356 (1st Dept 2000); *Matter of Kaplan v Bratton*, 249 AD2d 199, 201 (1st Dept 1998).

Section 400.00 (1) of the New York State Penal Law provides that a license shall be issued "only after investigation and finding that all statements in a proper application for a

license are true.” Paragraph 7 (A) of the instructions clearly provides that a detailed notarized statement, describing the circumstances surrounding each arrest must be listed and arrests must be listed even if the case was dismissed. (Verified Answer, ex. B). Petitioner’s explanation for his failure to disclose the arrests, that the charges were dismissed, is questionable in light of the specific instruction on the application that all arrests must be listed even if the charges were dismissed.³

The License Division maintains that Petitioner’s application was also denied as his New York State drivers license is currently suspended for failure to pay child support. Petitioner contends in his appeal that his drivers license is currently suspended only because in May of 2007, his employer did not directly provide the correct payment amount from his paycheck to the child support unit. However, the investigation performed by the License Division revealed that Petitioner’s drivers license was actually suspended in July of 2006 for failure to pay child support.

Notwithstanding the dismissal and sealing of the records in connection with petitioner’s two arrests, petitioner failed to fully address the questions on the application regarding his arrest history. Additionally, petitioner’s New York State drivers license is suspended based on his failure to pay child support. The court notes that respondent’s characterization of petitioner’s arrest history as extensive is inaccurate, and that petitioner has no criminal convictions, is

³Petitioner attaches to his petition the Certificate of Disposition for his November 1999 arrest. To the extent which Petitioner submits this Certificate of Disposition and documents for the first time, such evidence cannot be considered as they were not submitted at the time of Petitioner’s application and are not part of the administrative record. *72A Realty Assocs. v New York City Envtl. Control Bd.*, 275 AD2d 284, 286 (1st Dept 2000).

employed and seeks the license in connection with his employment. However, under the circumstances here, where petitioner failed to truthfully respond to questions regarding his prior arrests and where petitioner's license is suspended for failure to pay child support, it cannot be said given the standard required of pistol license holders that respondent's decision was arbitrary or capricious

The License Division also contends that to the petition can be construed as raising a claim that the denial of the application constitutes a penalty so disproportionate as to shock the conscience, such claim must be denied. When considering if an agency's decision shocks the conscience, "[t]he question is not whether [the Court] might have imposed another or different penalty, but whether the agency charged with disciplinary responsibility reasonably acted within the scope of its powers." *Pell v Board of Educ.*, 34 NY2d at 238. Here, there is no evidence that the License Division acted outside of its authority in denying Petitioner's application.


CONCLUSION

Accordingly, it is

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

This constitutes the decision and judgment of this court.

Dated: December 31, 2008



J.S.C.

UNFILED JUDGMENT
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