

**Matter of Flannery v Prasso**

2009 NY Slip Op 30029(U)

January 6, 2009

Supreme Court, New York County

Docket Number: 106689/08

Judge: Shirley Werner Kornreich

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

HON. SHIRLEY WERNER KORNREICH

PRESENT: \_\_\_\_\_

Justice

PART 54

Index Number : 106689/2008

FLANNERY, JOSEPH L.

vs

PRASSO, THOMAS M.

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 10/16/08

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

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

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

**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: 1/6/09

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

----- X  
In the Matter of the Application of  
JOSEPH L. FLANNERY,

Petitioner,

Index No.: 106689/08

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

DECISION  
and ORDER

-against-

THOMAS M. PRASSO,

Respondent.

----- X  
KORNREICH, SHIRLEY WERNER, J.:

**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).

Pro se petitioner Joseph L. Flannery, a retired New York City Police Officer, brings this Article 78 proceeding and seeks a judgment reversing and annulling the January 15, 2008, determination of New York City Police Department License Division (License Division) Director Thomas L. Prasso, which denied his application for a Retired Police Officer's Handgun License (Handgun License). Respondent Opposes. For the reasons which follow, the petition is denied.

*I. Background*

Mr. Flannery became a New York City Police Officer on January 26, 1982. He retired twenty years to the day on January 26, 2002. On or about October 4, 2007, Mr. Flannery applied with the License Division for a Handgun License. In response to questions numbered 23 and 24 on the application, petitioner indicated that he had been arrested twice and had several Orders of Protection issued against him surrounding complaints made by his ex-wife Patricia Flannery.

Petitioner's application, and a subsequent investigation by Police Officer Jason Offner, provides the following details surrounding these incidents.

Regarding the arrests on May 8, 2003, petitioner was arrested and charged in violation of Penal Law § 240.30(1), Aggravated Harassment in the Second Degree. The charges were dismissed on August 12, 2003. On February 13, 2005, Mr. Flannery was arrested and charged in violation of Penal Law § 215.50(3), Criminal Contempt in the Second Degree. These charges were dismissed on June 14, 2005.

The numerous Orders of Protection issued against Mr. Flannery began in March of 2002. On March 14, 2002, Orange County Family Court Judge Andrew P. Bivona issued a Temporary Order of Protection (TOP) against petitioner. This order, which modified a previous TOP issued on March 8, 2002, ordered Mr. Flannery to remain 1000 feet away from his ex-wife, her home and the school of their two sons Michael and Joseph. Mr. Flannery was also ordered to "[r]efrain from assault, harassment, menacing, reckless endangerment, disorderly conduct, intimidation, threats or any criminal offense against Patricia Flannery."

On December 3, 2002, Judge Bivona issued an Order of Protection against petitioner (December 2002 OOP). The December 2002 OOP, which amended an Order of Protection issued on July 10, 2002, ordered Mr. Flannery to remain 1000 feet away from his ex-wife and/or her home, except to pick up and drop off their children for visitation purposes. This order also directed that petitioner could only communicate with his ex-wife regarding issues surrounding their children per a previously issued custody order. Once again, Mr. Flannery was ordered to "[r]efrain from assault, harassment, menacing, reckless endangerment, disorderly conduct, intimidation, threats or any criminal offense against Patricia Flannery." Two additional Orders of

Protection were issued by the Orange County Family Court against petitioner on July 19 and November 30, 2004.

In a decision dated February 3, 2005, Judge Bivona found that Mr. Flannery's conduct constituted harassment as defined by the Penal Law. Judge Bivona also held that Mr. Flannery's committed a family offense. In addition, Judge Bivona found that petitioner "willfully violated" a custody and protection order previously issued by the Supreme Court. Judge Bivona then proceeded to issue a further Order of Protection against petitioner on February 4, 2005, which directed him to:

Stay away from (a): Patricia M. Flannery...by 1000 feet except for pick up and drop off for visitation; (b) the home of Patricia M. Flannery...at 36 Lakewood Road, Greenwood Lake, NY 10925 by 1000 feet; (c) the place of employment of Patricia Flannery by 1000 feet;

Refrain from assault, harassment, menacing, reckless endangerment, disorderly conduct, intimidation, threats or any criminal offense against Patricia Flannery.

On May 18, 2005, Judge Bivona issued another Order of Protection. This order contained nearly identical language as the February 2005 order except for the direction that Mr. Flannery could not exit his car when dropping off or picking up his children.

During the license investigation, Officer Offner discovered that between October 2002 and July 2007, Ms. Flannery filed three Domestic Incident Reports against petitioner. The first, filed on October 4, 2002, alleged that petitioner neglected their children. The investigating officer found no signs of abuse or neglect. In the second, filed on August 14, 2004, Ms. Flannery alleged petitioner, *inter alia*, was "brain washing" their sons, and confusing their son Joseph by refusing to bring him home as scheduled. The investigating officer found that Joseph had no signs of any injuries and that it was the child's decision not to go home to his mother. In the

third, filed on July 19, 2007, Ms. Flannery accused petitioner of drinking in front of Joseph. The investigating officer at the scene found that petitioner "did not appear to be intoxicated."

Petitioner filed a Domestic Incident Report against his ex-wife on May 24, 2007, alleging that she violated their custody conditions by refusing to speak with him. The investigating officer found that when Ms. Flannery arrived at petitioner's home to pick up their son, no one answered the door. Ms. Flannery then proceeded to go to the 114<sup>th</sup> precinct station and have officers escort her back to petitioner's home. Upon their return, Mr. Flannery indicated that the child had already left and was on his way back to her house. Ms. Flannery then indicated that she would not speak with petitioner unless there were officers present.

On November 14, 2007, following an interview and review of Mr. Flannery's application, Officer Offner recommended that the License Division deny petitioner's application for a handgun license. That same day, the License Division issued a Notice of Disapproval to petitioner informing him that his application for a handgun license was denied. The License Division cited the following reasons for the denial: "The circumstances of this applicant's arrest history coupled with numerous Family Court Orders of Protections (5), and NYPD Domestic Incident Reports are indicative of a pattern of Domestic Violence on the part of the applicant. These factors cast grave doubt on the applicant's character and fitness to possess a firearms license."

In a letter dated December 11, 2007, petitioner appealed the License Division's decision. By Notice of Disapproval After Appeal dated January 15, 2008, respondent Thomas L. Prasso, Director of the License Division, informed petitioner that his appeal had been denied. Mr. Prasso denied petitioner a retired police officer handgun license due to his "arrest history, history

of Orders of Protection...and history of domestic incident reports filed...demonstrate a lack of character and fitness to possess firearms.” Mr. Flannery challenges Mr. Prasso’s determination.

## II. *Conclusions of Law*

A court reviewing an Article 78 proceeding must judge the propriety of an administrative action solely on the reasons cited by the administration. *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Such an action must be upheld unless it “shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law.”

*Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000). CPLR section 7803 states that the following questions may be raised in an Article 78 proceeding: “Whether a determination was made in violation of lawful procedure, was effected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.”

Pursuant to Penal Law § 400.00(1), the statutory requirements for a handgun license are that the applicant: be at least 21 years of age; be an individual of good moral character; has not been convicted of a crime or “serious offense”; has not had a license revoked; has not been disqualified by reason of mental illness or a pursuant to an order of protection; and be a person “concerning whom no good cause exists for the denial of a license.” See Donnino, Practice Commentaries, McKinney’s Cons Laws of NY, Book 39, at 67.

The issuance of a handgun license is a privilege, not a right, and the License Division has broad discretion in deciding whether or not to issue a license. *Kaplan v. Bratton*, 249 A.D.2d 199, 201 (1<sup>st</sup> Dept 1998); *Papaioannou v. Kelly*, 14 A.D.3d 459, 460 (1<sup>st</sup> Dept 2005); *Servedio v. Bratton*, 268 A.D.2d 356 (1<sup>st</sup> Dept 2000). The only matter subject to judicial review is whether

or not the denial of the license was arbitrary, capricious or an abuse of discretion and whether a rational basis exists for the determination. *Id.* A rational basis exists when the proffered evidence is sufficient to support the agency's determination. *Papaioannou*, 14 A.D.3d at 460; *Kaplan*, 249 A.D.2d at 201 (agency's decision must be upheld if record displays rational basis for it, even if court might reach contrary result).

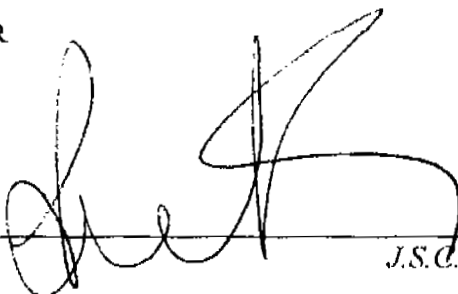
Here, respondent's denial of petitioner's application was neither arbitrary nor capricious. Mr. Flannery argues that he is of proper character and fitness for receipt of the license since the charges arising from both of his arrests were subsequently dismissed. This argument is without merit. Even where the charges surrounding an arrest are ultimately dismissed, the agency is entitled to examine the circumstances surrounding the arrests to determine petitioner's eligibility for a license. *Servedio*, 268 A.D.2d at 265. Here, respondent determined that based upon Mr. Flannery's arrest history, the numerous orders of protection issued against him and the history surrounding the Domestic Incident Reports, petitioner lacked the character and fitness to possess a firearm. Based upon the record, a rational basis exists for this determination. *Ostrowski v. City of New York*, 55 A.D.3d 471 (1<sup>st</sup> Dept 2008) (petitioner's arrests and violations of orders of protection cast doubt on his character and ability to possess firearm, despite fact that arrests were adjourned in contemplation of dismissal); *Panaro v. County of Westchester*, 250 A.D.2d 616 (2d Dept 1998) (denial of pistol license upheld where "uncontroverted evidence [existed] that [petitioner] was involved in a deteriorating, emotionally-volatile marriage, that was punctuated by episodes of domestic violence. Furthermore, coupled with the dearth of any evidence in the record that [petitioner], a retired police officer, had any current employment-related or other cognizable need to possess concealed weapons during this period of marital upheaval, the

determination revoking his pistol permit was not arbitrary, capricious, or an abuse of discretion.”); *Peric v. New York City Police Dept.*, 5 A.D.3d 142 (1<sup>st</sup> Dept 2004). Accordingly, it is

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

This constitutes the decision and judgment of the Court

ENTER

  
J.S.C.

DATE: January 6, 2009  
New York, NY

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