

Matter of Funicello v Passo

2009 NY Slip Op 31380(U)

June 16, 2009

Supreme Court, New York County

Docket Number: 100059/09

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

Justice

Index Number : 100059/2009

FUNICELLO, ALEX V.

VS.

PASSO, THOMAS

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 100059-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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 granted as
requested per attached

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: 6/16/09

J.S.C.
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
In the Matter of the Application of
ALEX FUNICELLO, MD,

Petitioner,

Index No.: 100059/09

-against-

NYPD and THOMAS PRASSO, Director of
Pistol License Division.

UNFILED JUDGMENT

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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).**

Respondents:

-----X
EMILY JANE GOODMAN, J.:

BACKGROUND

Petitioner is a physician who is appealing the denial of his application for a Special Carry Business Licence, pursuant to CPLR Article 78.

On September 28, 2007, petitioner applied for a Special Carry Business License, which, as required by Title 38 of the Rules and Regulations of the City of New York (RCNY) § 5-05 (8), included a Letter of Necessity. In his Letter of Necessity, petitioner stated that he works at hospitals in New York City, and cashes and transports his bi-weekly paycheck, which is a substantial amount of money, for which he wished to carry a handgun for protection. He further stated that he provides ambulatory care to patients in Brooklyn, visiting hospital satellite centers throughout the borough, as well as home visits.

These visits entail petitioner dispensing Class 3 drugs that he may have to carry, for which he wished to carry a handgun for protection.

According to respondent's administrative procedures, an investigation of the application was conducted. As part of this investigation, petitioner was interviewed and was requested to provide pay stubs to verify his employment. Petitioner provided the investigator with two pay stubs, which reflect payment by direct deposit to petitioner's bank account.

By the time the investigation took place, petitioner's place of employment had changed, and he is now working full time at Our Lady of Mercy Medical Center in Manhattan. The investigator noted that neither petitioner nor his business had ever been robbed, although his home had been burglarized.

After completing the investigation, the investigator recommended denial of petitioner's application. The denial stated:

"Applicant has failed to show sufficient need to distinguish himself from countless others in every type of occupation in New York City, [sic] who work without a license to carry a concealed handgun Applicant has failed to submit bank statements or deposit slips, applicant stated that his need the license for transporting his personal check when it is dispensed from the medical center every two week."

Petitioner instituted an administrative appeal of this initial decision, arguing that he is a trauma surgeon who is on call 24 hours a day, 7 days a week, for all kinds of medical

emergencies. To support this contention, petitioner provided telephone bills to evidence the volume of calls he receives. He further argued that the initial denial was based only on his statement regarding his carrying of large sums of cash, but failed to reflect that he is constantly called for emergencies in the middle of the night, and that he carries drugs and hypodermic needles, items that are sought by the criminal elements in the community. Petitioner attached three "Interdisciplinary Patient Admission Assessment" forms, which indicated that the patients' complaints included assault, falling down stairs, and a stab wound. These forms reflect that petitioner was the attending physician, but do not indicate that he was making house calls to these patients. Petitioner also argued that other physicians at the hospital had previously been issued the license that he was seeking.

On September 5, 2008, a Notice of Disapproval After Appeal was issued to petitioner, affirming the initial denial. The Notice reads, in relevant part:

"...this appeal of the determination denying your Special Carry License is denied due to You clearly stated in your letter of necessity that you cash your check every 2 weeks You claim that you make numerous visits to patients and hospital satellite centers and occasionally dispense class 3 drugs but submitted no documentation as to frequency of visits. Your application does not establish 'proper cause' for a Special Carry License."

On January 5, 2009, petitioner instituted the instant

proceeding.

DISCUSSION

It is well settled that "a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaronack, Westchester County*, 34 NY2d 222, 232 (1974). The test is whether the action taken is justified or without foundation in fact. *Id.* at 231. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.*

Section 400.00 of the Penal Law is the statutory framework regulating the issuance of firearm licenses. Penal Law § 400.00(1) sets forth the general eligibility requirements for firearm licenses, including: that the applicant has no prior convictions of a felony or a serious offense; that the applicant is of good moral character; that the applicant has disclosed whether he or she has suffered from a mental illness or has been confined to a hospital or institution for such an illness; and that no good cause exists for the denial of the license. Penal Law § 400.00(1)(b), (c), (d) and (g).

Penal Law § 400.00 (2) describes the types of licenses which may be issued to possess a handgun (pistol or revolver). The categories of license include restricted licenses, allowing the holder to possess a handgun in his or her home, or authorizing a merchant or storekeeper to possess a handgun in a place of business. Penal Law § 400.00 (a) and (b). In addition, the statute authorizes the issuance of an unrestricted license for a handgun "to have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof (Penal Law § 400.00 [2] [f])," which is the type of license for which petitioner applied.

The respondent is authorized to grant and issue licenses to carry or possess handguns within the City of New York pursuant to the provisions of Penal Law § 400.00, and the License Division of the NYPD is delegated the responsibility to review applications for original and renewal handgun licenses.

Title 38 of the RCNY prescribes the rules for the issuance of handgun licenses by the NYPD within the City of New York. The various types of handgun licenses which may be issued are described in 38 RCNY § 5-01, including a Special Carry Business License.

Title 38 RCNY § 5-02 prescribes the criteria for the issuance of a premises handgun license, which include many of the eligibility standards set forth in Penal Law § 400.00(1). The regulations in 38 RCNY § 5-03 ("Carry and Special Handgun

Licenses") provide that "[i]n addition to the requirements in § 5-02, an applicant seeking a carry or special handgun license shall be required to show 'proper cause' pursuant to § 400.00(2)(f) of the New York State Penal Law." Additionally, the regulations state that "proper cause" is determined by a review of all relevant information bearing on the claimed need of the applicant for the license." Section 5-03 provides the following examples of factors to be considered in a review of the information to determine whether an applicant has shown the requisite "proper cause" for the issuance of a carry or special handgun license:

"(a) Exposure of the applicant by reason of employment or business necessity to extraordinary personal danger requiring authorization to carry a handgun."

"Example: Employment in a position in which the applicant routinely engages in transactions involving substantial amounts of cash, jewelry or other valuables or negotiable items." ...

"(b) Exposure of the applicant to extraordinary personal danger, documented by proof of recurrent threats to life or safety requiring authorization to carry a handgun."

(Examples of proof to be considered by the License Division include Police Department records demonstrating "that the life and well being of an individual is endangered".)

Section 5-05 of the regulations requires an applicant for a handgun license to submit a "letter of necessity," which is a signed, notarized typewritten letter explaining the need for the license and containing information, including "(a) detailed description of the applicant's employment and an explanation of why

the employment requires the carrying of a concealed handgun." 38 RCNY § 5-05 (b) (8) (I) and (ii) (A).

Respondent's reason for denying petitioner's application for an unrestricted carry business handgun license is that he failed to show "proper cause", as required by Penal Law § 400.00(2)(f) and 38 RCNY § 5-03. In such circumstances, the applicant has the burden to demonstrate "proper cause" for the issuance of an unrestricted carry handgun license. The Appellate Division has interpreted "proper cause" to mean "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Matter of Klenosky v New York City Police Dept.*, 75 AD2d 793, 793 (1st Dept 1980), *affd* 53 NY2d 685 (1981); *Matter of Bando v Sullivan*, 290 AD2d 691 (3d Dept 2002).

In the instant matter, petitioner has submitted supplemental information with his petition to support his contentions. However, a fundamental tenet of CPLR Article 78 review is "that [j]udicial review of administrative determinations is confined to the 'facts and record adduced before the agency' [internal citations omitted]." *Matter of Featherstone v Franco*, 95 NY2d 550, 554 (2000). Therefore, these submissions will not be considered.

"Extraordinary power has been delegated to the Police Commissioner in matters of handgun licensing. Insofar as petitioner challenges a determination rendered following a hearing, this Court's scope of review in handgun license cases only extends to whether substantial evidence supports the challenged determination, and our obligation is limited

to insuring that respondent has met the very minimal evidentiary requirement necessary to uphold its determination [internal quotation marks and citations omitted]."

Matter of Perlov v Kelly, 21 AD3d 270, 270-271 (1st Dept 2005).

In the instant matter, petitioner has failed to demonstrate the need for him to carry a handgun. His statement that he carries large sums of cash every two weeks (which his attorney at the administrative level claimed was not the basis for the application) was not only not supported by the pay stubs he submitted, which indicate direct deposit, but was too vague to constitute "proper cause" within the meaning of Penal Law 400.00 (2) (f) "absent documentation substantiating the case carried or a showing of particular threats, attacks, or other extraordinary danger to personal safety." *Matter of Matinek v Kerik*, 294 AD2d 221, 222 (1st Dept 2002). In any event, no reason was proffered as to why Petitioner had to cash his salary checks, as opposed to having his salary directly deposited into his bank.

Further, as petitioner has not demonstrated that he is in greater danger than others engaged in a similar occupation, there is no reason to disturb the administrative agency's determination. *Matter of Sumowicz v Kelly*, 14 AD3d 407 (1st Dept 2005). The agency rationally concluded that petitioner's general allegations about his work hours and location was insufficient to support his application. *Matter of Kaplan*, 249 AD2d 199 (1st Dept 1998).

[* 10]

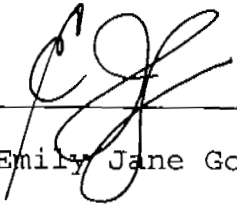
CONCLUSION

Based on the foregoing, it is hereby

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

Dated: June 16, 2009

This Constitutes the Decision and Judgment of the Court.



Emily Jane Goodman

J.S.C.

EMILY JANE GOODMAN

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