

**Matter of Torres v Prasso**

2009 NY Slip Op 31688(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 105476/2009

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 105476/2009

**TORRES, MARK A.**

VS.

**PRASSO, THOMAS M.**

SEQUENCE NUMBER : 001

ARTICLE 78

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

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

MOTION SEQ. NO. \_\_\_\_\_

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

his motion to/for \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**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).*

Upon the foregoing papers, it is ordered that this motion

The instant application is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of Petitioner Mark A. Torres for an order and judgment pursuant to CPLR Article 78: (1) annulling the determination of the respondent Thomas M. Prasso, as Director of the New York Police Department denying petitioner's application for a New York City Premises Residence Handgun license, **is denied and the instant Petition is dismissed**; and it is further

ORDERED that counsel for respondent shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

Dated: 7/29/07



**HON. CAROL EDMEAD** 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 35

\_\_\_\_\_ x  
In the Matter of the Application

MARK A. TORRES,

Index No. 105476/2009

Petitioner

**DECISION/ORDER**

For a Judgment under Article 78 of the Civil Practice  
Law and Rules Granting Petitioner's New York City  
Premises Residence Handgun License,

-against-

THOMAS M. PRASSO, as Director of the  
New York Police Department,

Respondent.

\_\_\_\_\_ x  
EDMEAD, J.S.C.

**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).

**MEMORANDUM DECISION**

Petitioner Mark A. Torres ("petitioner") moves for an order and judgment pursuant to CPLR Article 78: (1) annulling the determination of the respondent Thomas M. Prasso, as Director of the New York Police Department ("respondent") denying petitioner's application for a New York City Premises Residence Handgun license.

*Background*

Petitioner was first granted a New York City Premises Residence handgun license on October 23, 1995. It expired on December 29, 1997. Petitioner was granted renewed handgun licenses for the periods January 1, 1997 to December 29, 1999; January 5, 2000 to December 29, 2001; October 29, 2001 to December 29, 2004; and September 10, 2004 to December 29, 2007.

A renewal application is sent to every handgun licensee sixty days before the license expiration date. If the licensee fails to submit the renewal application by the expiration date, the

license is deemed cancelled.

A License Division record indicates that a renewal application was sent to the address of petitioner's most recent license, no renewal application had been received by the License Division and the license was no longer in effect by operation of law. On March 18, 2008, the License Division recorded the cancellation of petitioner's expired handgun license in its Automated License Processing System. Apparently, petitioner attempted to submit the renewal application at some point in April 2008. The renewal application cannot be located in the License Division's files. Presumably triggered by the receipt of petitioner's renewal application, the License Division sent petitioner a Notice of Cancellation dated April 14, 2008, notifying petitioner that his license had been cancelled because his application had been submitted after the expiration date.

Petitioner then applied as a new applicant, and vouchered his handgun on April 29, 2008.

After investigation, petitioner's application was denied because petitioner unlawfully continued to possess his firearm without a valid license for 5 months.

*Petitioner's Contentions*

Petitioner asserts that he has been a law abiding licensed pistol owner since October 23, 1995, has never been arrested, and has religiously renewed his pistol license for several years without any problem.

Petitioner states that he has a right to bear arms guaranteed by the United States Constitution.

*Respondent's Contentions*

Respondent appropriately considered the administrative record and lawfully determined

that petitioner had failed to renew the application by the expiration date, thus resulting in his possessing a handgun without a license for several months. It was therefore appropriate to deny petitioner's application for a new handgun license.

#### Analysis

CPLR 7803 states that the court review of a determination of an agency, such as License Division, consists of whether the 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, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1<sup>st</sup> Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1<sup>st</sup> Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1<sup>st</sup> Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988] ). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the License Division's determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971] ). Where the administrative interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1<sup>st</sup> Dept.], *aff'd* 66 N.Y.2d 1032 [1985] ).

It has been longstanding in New York State that the New York Penal Law, Article 4, and the New York City Administration Code, Section 10-131, authorize the NYPD to grant licenses

for keeping and carrying pistols.

Under Penal Law § 400.00, the License Division has broad discretion to grant or revoke licenses, and the court has been required to give great weight to the decision in this regard, particularly when the public safety is at issue, and the court lacks the expertise required for such decision. The standard has been that 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 License Division determination without finding that the decision lacks a rational basis.

It has been consistently held that the issuance of license to carry gun is a privilege, not a right. *In re Williams v Bratton*, 238 A.D.2d 269, 656 N.Y.S.2d 626 (1st Dept.1997). 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 issue herein is whether *Heller* has modified the above-outlined longstanding standard.

The issuance of a pistol permit for self-protection in one's home has recently been held by the U.S. Supreme Court to be a right protected by the Second Amendment of the United States Constitution: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." (*District of Columbia v Heller*, 554 US -, -, 128 S Ct 2783, 2799 [2008].) However, in so holding the Supreme Court also recognized that the individual right to bear arms is limited: "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases,

commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose..” (*Heller*, 554 US at -, 128 S Ct at 2816 [citations omitted].)

In *Heller*, the Supreme Court narrowly ruled (5-4) that the District of Columbia's prohibition on the possession of usable handguns in the home violates the right to keep and bear arms secured by the Second Amendment. First, the *Heller* decision was based on a federal statute, and, therefore, the Supreme Court did not rule on whether the Second Amendment's protections apply to state and local laws. Second, the United States Court of Appeals for the Second Circuit issued a decision on January 28, 2009 stating that the Second Amendment applies only to limitations the federal government seeks to impose on the right to bear arms. Third, the Supreme Court's decision in *Heller* did not reach the issue of whether and under what circumstances a pistol licensing scheme is constitutional.

Thus, New York's pistol licensing procedures and the License Division's discretionary authority to issue or deny a pistol license stands even after the *Heller* decision.

As to petitioner's argument that the Licensing Division failed to consider that petitioner has lawfully possessed a handgun and properly registered same for thirteen years, where, as here, the agency's determination involves factual evaluation within an area of the agency's expertise and is supported by the record, the determination must be accorded great weight and judicial deference. See *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to “resolve [any] reasonable doubts in favor of the administrative findings and decisions” of the responsible agency. *Town of Henrietta v Department of Env'tl. Conservation*, 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4<sup>th</sup> Dep't 1980).

*See also Jackson*, 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v Department of Health Dept.*, 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4<sup>th</sup> Dep't 1978), *lv. To app. denied*, 46 NY2d 713, 416 NYS2d 1027 (1979).

This court finds that the License Division was well within its discretion to consider the untimeliness of petitioner's renewal application. Even accepting as legitimate petitioner's explanation that financial reasons led to the delay, petitioner violated the prohibition against possessing a handgun without a handgun license. It was proper for the License Division to consider this factor in making its decision.

Conclusion

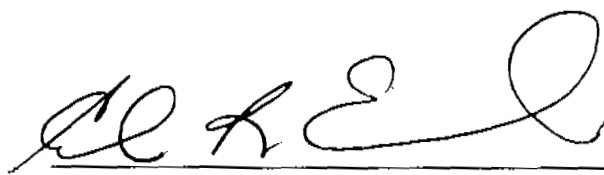
Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Petitioner Mark A. Torres for an order and judgment pursuant to CPLR Article 78: (1) annulling the determination of the respondent Thomas M. Prasso, as Director of the New York Police Department denying petitioner's application for a New York City Premises Residence Handgun license, **is denied and the instant Petition is dismissed**; and it is further

ORDERED that counsel for respondent shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: July 29, 2009



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**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).