

**Karagioros v Kelly**

2009 NY Slip Op 32920(U)

December 9, 2009

Supreme Court, New York County

Docket Number: 114137/2009

Judge: Carol R. Edmead

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SCANNED ON 12/16/2009

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

PRESENT: HON. CAROL EDMEAD

Justice

PART 35

Index Number : 114137/2009

KARAGIOROS, FOTIOS J.

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

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

MOTION DATE 12/7/09

MOTION SEQ. NO. 001

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

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

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

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

**ORDERED and ADJUDGED** that the application of Petitioner Fotios J. Karagioros for an order annulling the order of respondents Raymond Kelly, Police Commissioner of the New York City Police Department, Thomas M. Prasso, Deputy Commissioner, Licensing Division of the Police Department of the City of New York and the New York City Police Department, denying petitioner's license to possess and carry a firearm, pursuant to Section 400 of the New York State Penal Law and Section 7803 of the CPLR, is **DENIED in its entirety, and the instant Petition is DISMISSED**; and it is further

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

Dated: 12/9/09

  
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 of

FOTIOS J. KARAGIOROS,

Petitioner,

Index No. 114137/2009

For a Judgment under Article 78 of the  
Civil Practice Law and Rules,

**DECISION/ORDER**

-against-

RAYMOND KELLY, Police Commissioner  
of the New York City Police Department and  
THOMAS M. PRASSO, Deputy Commissioner  
Licensing Division of the Police Department of  
the City of New York, and the NEW YORK  
CITY POLICE DEPARTMENT

Respondents.

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

**MEMORANDUM DECISION**

Petitioner Fotios J. Karagioros (Petitioner) seeks an order annulling the order of respondents Raymond Kelly, Police Commissioner of the New York City Police Department (Commissioner Kelly), Thomas M. Prasso, Deputy Commissioner, Licensing Division of the Police Department of the City of New York (Deputy Commissioner Prasso) and the New York City Police Department (NYPD) (collectively, respondents), denying petitioner's license to possess and carry a firearm, pursuant to Section 400 of the New York State Penal Law and Section 7803 of the CPLR.

**JUDGMENT**  
This judgment has been entered by the County Clerk  
and notice of entry thereof is served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

### *Background*

By application, sworn to on January 9, 2009, and submitted on January 16, 2009, petitioner applied for a Premises Residence pistol license. To the questions on the application related to conviction, arrest, indictment or summonses, petitioner answer "yes." The License Division requires applicants to submit notarized explanations if the applicant answers "yes" to any questions.

Petitioner submitted a letter, sworn to January 9, 2009, explaining his affirmative responses to questions 19 and 23. In reference to question 23, petitioner stated that he was arrested for driving under a suspended license. Petitioner asserted that at the time he was pulled over, he had not known his license as suspended, because the notice of suspension was mailed to his former address.

On January 22, 2009, petitioner's application was assigned to police officer Richard Ochetal (P.O. Ochetal). As part of the application process, the License Division conducts interviews with applicants. Prior to petitioner's interview, the License Division mailed petitioner a list of documents for petitioner to bring to the interview. On February 17, 2009, P.O. Ochetal conducted the interview with petitioner, and requested additional documents. In accordance with the License Division's procedures, and as part of its evaluation of petitioner's application, P.O. Ochetal conducted an investigation into petitioner's criminal background. On February 27, 2009, P.O. Ochetal disapproved petitioner's application.

The Notice of Disapproval, dated May 13, 2009, the License Division advised petitioner that his license application was denied because:

- he had a prior arrest for aggravated unlicensed operation of a vehicle on November 25, 2006;
- he was convicted with regard to the November 25, 2006 arrest; and
- he had his driver's license suspended on two prior occasions.

By letter dated May 29, 2009, petitioner appealed the License Division denial of his pistol license application. In the letter, petitioner averred that he had "paid all of [the] fines and [had] learned that it is very [important] to follow all the laws to any license that [I] have [been issued]." Petitioner also noted that he held a mobile food vendor license, which he regarded as "important" and carried "great responsibility."

By Notice of Disapproval After Appeal, dated June 18, 2009, the License Division notified petitioner that his appeal was denied based on a review of the entire record. The Notice reads, in relevant part:

Your conviction for Aggravated Unlicensed Operation of a Motor Vehicle in 2006 and your D.M.V. history demonstrates [sic] your inability or unwillingness to follow rules and lack of character and fitness to be licensed for firearm possession.

The Notice of Disapproval After Appeal advised petitioner that he had the right to challenge the denial by filing an Article 78 proceeding in State Supreme Court within four months of the date of the denial.

*Petitioner's Contentions*

At the time of petitioner's conviction, he was 19 years of age and an immature, rebellious and unformed individual. During the past 3 years, he has developed a maturity which belies the

irresponsible behavior he displayed in his earlier years. It should be noted that in 2008 when petitioner was issued a summons for a traffic violation, he immediately answered the summons and paid the fine. This is in sharp contrast to his behavior in 2006. On August 27, 2009, petitioner was granted a multi state Concealed Weapon or Firearm license in the State of Florida. He has applied for and been granted a Certificate of Qualification as a Bow hunter; he has taken a firearm training course at the Seneca Sporting Range under the direction of Richard J. Mendez, a noted firearms expert. In the face of petitioner's impressive knowledge of firearms and the rules regulating the ownership and use of firearms, to suggest that a single incident of neglect in failing to pay a small fine makes him morally deficient, cannot stand.

*Respondents' Contentions*

The License Division's denial of petitioner's Premise Residence pistol license application was reasonable and rational, and in all respects conforms with the applicable statutes, laws, and rules. Respondents denied petitioner's application for a Premises Residence pistol license after full consideration of petitioner's application and the entire administrative record. Accordingly, respondents' determination was not arbitrary and capricious or an abuse of discretion.

Further, petitioner attempts to assert additional facts and documents that were not submitted to the License Division. Even if the court were to review petitioner's new documentation, the additionally submitted documents would not nullify the License Division's finding that petitioner lacked the requisite good moral character to possess a pistol license. The License Division is not required to issue a pistol license to an applicant merely because another jurisdiction has issued the applicant with a similar license.

*Discussion*

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.

As to petitioner's argument that the Licensing Division failed to consider that petitioner: is also currently licensed to carry a concealed weapon in the State of Florida, which is honored in 28 states across America; where, as here, the agency's determination involves factual evaluation within an area of the agency's expertise and is amply 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).

And, "Where evidence conflicts, issues of credibility are the province of an

administrative hearing officer, since 'the decisions by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts.' " *Wooten v Finkle*, 285 AD2D 407, 408 (1<sup>st</sup> Dept 2001) (quoting *Berenhaus v Ward*, 70 NY2d 436, 443 (1987)). And the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists ( *Berenhaus*, 70 N.Y.2d at 444, 522 N.Y.S.2d 478, 517 N.E.2d 193; *Matter of Stork Rest. v Boland*, 282 N.Y. 256, 267, 26 N.E.2d 247 [1940]; *Matter of Acosta v Wollett*, 55 N.Y.2d 761, 447 N.Y.S.2d 241, 431 N.E.2d 966 [1981]; *Matter of Verdell v. Lincoln Amsterdam House, Inc.*, 27 A.D.3d 388, 390, 813 N.Y.S.2d 68 [2006] ).

Conclusion

Based on the foregoing, it is hereby

**ORDERED and ADJUDGED** that the application of Petitioner Fotios J. Karagioros for an order annulling the order of respondents Raymond Kelly, Police Commissioner of the New York City Police Department, Thomas M. Prasso, Deputy Commissioner, Licensing Division of the Police Department of the City of New York and the New York City Police Department, denying petitioner's license to possess and carry a firearm, pursuant to Section 400 of the New York State Penal Law and Section 7803 of the CPLR, is **DENIED in its entirety, and the instant Petition is DISMISSED**; and it is further

**ORDERED** that counsel for respondents 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: December 9, 2009



Carol Robinson Edmead, J.S.C.  
**HON. CAROL EDMOAD**

**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).