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

PRESENT: O. PETER SHERWOOD PART 61
Justice

In the Matter of the Application of,
LAWRENCE B. CONNOLLY

Petitioner,

-against-

NEW YORK POLICE DEPARTMENT
LICENSE DIVISION,

Respondent.

INDEX NO. 100138/2010

MOTION DATE March 18, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. 38

The following papers, numbered 1 to 6 were read on this petition for a judgment pursuant to CPLR Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, the petition for a judgment pursuant to CPLR Article 78 is decided pursuant to the accompanying decision and judgment.

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: 6/11/10

O. PETER SHERWOOD, J.S.C.

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 STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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In the Matter of the Application of
LAWRENCE B. CONNOLLY,

Petitioner,

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

-against-

NEW YORK POLICE DEPARTMENT
LICENSE DIVISION,

Respondent.

----------X

DECISION AND
JUDGMENT

Index No. 100138/2010

O. PETER SHERWOOD, J.:

In this proceeding pursuant to Article 78 of the Civil Practice Law and Rules (CPLR), petitioner Lawrence B. Connolly proceeding *pro se* seeks an order and judgment annulling respondent's determination, dated October 20, 2009, which denied his application for a premises residence handgun license. Respondent opposes the petition. For the reasons stated below, the petition is denied.

Background

On or about May 19, 2009, petitioner submitted an application to the New York Police Department ("NYPD") License Division ("License Division") seeking a premises residence handgun license. Question No. 23 on the license application asks if the applicant has "[b]een arrested, indicted, or summonsed for **ANY** offense other than Parking Violations, in **ANY** jurisdiction, federal, state, local or foreign? List the following: date, time, charge(s), disposition, court and policy agency. (False statements are grounds for disapproval)." The application further provides at the top of that page that if the applicant "answered **YES** to question(s) 10 through 28 [he/she] **MUST** attach a notarized sheet of paper (8 ½ x 11) explaining such answer(s) in complete detail."

Petitioner answered "yes" to Question 23. In his notarized statement, sworn to on March 20, 2009, petitioner stated that: "On 14 March 90, I was given a desk appearance ticket for a totally false

assault charges [sic] (120.00, 240.25) that were investigated thoroughly and subsequently dismissed by the Queens Asst. District Attorney and Judge J. Latella."

The License Division responded to petitioner's application with a form notice dated June 30, 2009, in which it requested certain additional documentation including a copy of petitioner's rifle and shotgun permit and a notarized statement concerning the 1990 assault arrest. The following warning was printed in bold large print at the foot of the letter: "Failure to respond to this notice of request of additional documents will result in Disapproval of your Pistol License Application." (Ex. "B")

Petitioner failed to respond to the notice for additional documentation. The Licensing Division followed up by letter dated July 14, 2009, which indicated that petitioner had contacted the Licensing Division on July 6, 2009 seeking clarification as to some requested documents. The letter bearing a legend **FINAL NOTICE** in bold capital letters, advised petitioner to contact the Licensing Division to set up an interview, which it noted was mandatory, and warned that petitioner's failure to respond to the letter by July 28, 2009 would result in the disapproval of his application. A copy of the June 30, 2009 notice for additional documents was appended to the letter. (Ex. "C").

In a notarized statement sworn to on August 4, 2009, petitioner stated that "the notarized statement I previously provided to the Pistol Licensing Division of the New York City Police Department, License Division complies fully with NY State Criminal Procedure Law Article 160.50 (d) iii . . . In terms of precedence, the New York Police Department License Division, Rifle/Shotgun Division accepted the same notarized statement and issued a Rifle/Shotgun permit." (Ex. "D"). Petitioner provided other documents requested by the License Division (Ex. "E").

On August 12, 2009, petitioner was interviewed by an investigator of the License Division. On the preprinted interview form asking "Have you ever been arrested?" a check mark appears next to the "Yes" response. However, no other details are noted on the form. The reason petitioner gave for applying for the license was "target and home protection."

The investigator also conducted a background check on petitioner with respect to the license application. In the course of that investigation, respondent obtained petitioner's fingerprints on file with the New York State Division of Criminal Justice Services (DCJS) which reflected that petitioner had been arrested on March 14, 1990 on a charge of assault with intent to cause physical

injury. The NYPD arrest report, which had been sealed, revealed that while the complainant was trying to prevent petitioner from entering a certain premises, petitioner pushed the complainant down a flight of stairs causing him to sustain injuries to his head, shoulder and neck (Ex. "G"). In his final report, the investigating officer recommended disapproval of petitioner's license application stating in summary that: "Applicant has not cooperated since the beginning of the process and refuses to disclose specific details of his 1990 assault arrest." (Ex. "H").

By notice dated September 15, 2009, the License Division advised petitioner that his application had been denied. The reasoning given for the disapproval reads as follows:

> You have been reluctant throughout this entire investigation to submit the requested documents necessary to complete this process. A letter was mailed to your residence on 06/30/09 and you had some issues with some of the items that were requested, specifically providing a notarized explanation for your 1990 arrest for Assault 3rd degree. You appeared at the License Division on 08/12/09 for an interview. You still would not disclose details of this arrest nor give a written detailed explanation for this incident. This is a serious and intense investigation and it cannot proceed without your total cooperation and assistance. (Ex. "I").

Petitioner filed an administrative appeal of the license denial. He again contended that the statement he provided concerning his 1990 arrest, which he had previously submitted to the Shotgun and Rifle Licensing Division from which he obtained a license, was sufficient for purposes of his handgun application. He challenged the License Division investigator's characterization of him as "reluctant" and instead averred that he "merely refused to be bullied to comply with an unauthorized demand." (Ex. "J"). Petitioner argued that the License Division did not have the authority to demand a notarized statement concerning a sealed arrest and New York's Criminal Procedure Law (CPL) § 160.50 (d) (iii) provides no such authority. Petitioner claimed that by disapproving his license application, the License Division has abrogated his rights under the Second Amendment of the United States Constitution. Petitioner addressed the details of the 1990 arrest by stating that "the totally false allegations of assault" were "part of a malicious campaign of harassment by a landlord and his adult son in order to effectuate an extra-judicial eviction" and that such allegations had been

fully investigated by the Queens County District Attorney's Office. The charges were ultimately dismissed and the record sealed.

By letter dated October 20, 2009, the Director of the License Division, Thomas M. Prasso, denied petitioner's appeal and adhered to the original decision disapproving petitioner's application for a handgun license stating: "Your failure to provide a detailed notarized statement describing the circumstances of your arrest in 1990 and a copy of the Certificate of Disposition for the charges as required by License Division rule 38 RCNY 5-05 (b) (6)." (Ex. "K").

Petitioner then commenced this CPLR article 78 proceeding to annul and vacate respondent's determination. In support thereof, petitioner raises no new arguments. He again asserts that CPL § 160.50 (d) (iii) provides no authority to the License Division to demand a statement detailing the circumstances of a sealed arrest and further avers that respondent's disapproval of his application contravenes his rights under the Second Amendment of the United States Constitution and under Article 400 of the New York State Penal Law.[1]

Respondent generally denies the allegations of the petition and contends that its denial of petitioner's application for a premises residence handgun license was rational and neither arbitrary nor capricious. Respondent contends that the Police Commissioner is vested with broad authority to regulate the possession of firearms in New York City. Petitioner's failure to comply with its demand for a notarized statement detailing his arrest and to cooperate with its investigator provided sufficient good cause to deny petitioner's application. Although the arrest record was sealed, respondent was entitled to inquire into the circumstances of the arrest so that it could adequately consider petitioner's fitness to possess a handgun license. Respondent argues that its decision fully comports with the United States Constitution since the rights secured under the Second Amendment are not unlimited and it allows for the reasonable regulation of the right to bear arms.

Petitioner replies to respondent's opposition essentially repeating the arguments asserted in the petition. His arguments, in large part, rest upon the claimed lack of rationality of respondent's

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[1]Petitioner attaches to the petition the Certificate of Disposition for his March 1990 arrest. To the extent that petitioner submits this Certificate of Disposition for the first time, such evidence cannot be considered as it was not part of the administrative record (*see, Rizzo v New York State Div. of Hous. & Community Renewal,* 16 AD3d 72, 75 [1st Dept 2005]; *72A Realty Assocs. v New York City Envtl. Control Bd.,* 275 AD2d 284, 286 [1st Dept 2000]).

disapproval of his handgun license application since he had already been issued a residential rifle and shotgun permit.

Discussion

The court's role in reviewing a decision of an administrative agency such is limited. The standard of review is whether or not the administrative determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious and without a rational basis in the administrative record (*see,* CPLR 7803; *Pell v Board of Education,* 34 NY2d 222, 231 [1974]). The court may not conduct a de novo review of the facts and circumstances or substitute its own judgment for that of the administrative agency (*see, Greystone Management Corp. v Conciliation and Appeals Bd.,* 94 AD2d 614, 616 [1st Dept 1983], *affd.* 62 NY2d 763 [1984]). Rather, the court should review the record as a whole to determine whether a rational basis exists to support the findings of the administrative agency (*see, Nelson v Roberts,* 304 AD2d 20 [1st Dept 2003]). Moreover, where the administrative determination requires an evaluation of the facts within an area of the administrative body's expertise, the determination must be accorded great weight and judicial deference (*see, Flacke v Onondaga Landfill Systems, Inc.,* 69 NY2d 335, 363 [1987]). In this regard, the court also defers to the construction given statutes and regulations by the agency responsible for their administration if not irrational or unreasonable (*see, Bernstein v Toia,* 43 NY2d 437, 448 [1977]; *Albano v Kirby,* 36 NY2d 526, 532 [1975]). An action is arbitrary and capricious when the action is taken "without regard to the facts" (*Pell v Board of Education, supra*).

Pursuant to section 10-131 of the Administrative Code of the City of New York ("Administrative Code") and Article 4 of the Penal Law, the sole authority to issue licenses to keep or carry pistols within the City of New York is vested in the NYPD (*see also, Sewell v City of New York,* 182 AD2d 469 [1st Dept 1992, *appeal denied* 80 NY2d 756 [1992]). Penal Law § 400.00 (1) 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. The License Division has also adopted rules and regulations governing the issuance of pistol licenses which contain language similar to that contained in section 400.00 (1) of the Penal Law and essentially echo the criteria provided therein (38 Rules of the City of New York [RCNY] § 5-02). The License Division rules governing the application form specifically provide that if an applicant has ever been arrested, even if the case was

dismissed and the record sealed, he or she must submit a Certificate of Disposition showing the offense and disposition of the charges , as well as "a detailed, notarized statement describing the circumstances surrounding [the] arrest" (38 RCNY § 5-05 [b] [6]).

The issuance of a handgun license has been held to constitute a privilege and not a right (*see, Matter of Papaioannou v Kelly,* 14 AD3d 459, 460 [1st Dept 2005]; *Matter of Kaplan v Bratton,* 249 AD2d 199, 201 [1st Dept 1998]). Accordingly, the Police Commissioner and the NYPD License Division have broad discretion in deciding whether or not to issue such a license (*see, Matter of O'Brien v Keegan,* 87 NY2d 436, 439-440 [1996]; *Matter of Trimis v New York City Police Dept.,* 300 AD2d 162, 163 [1st Dept 2002], *lv denied* 100 NY2d 503 [2003]). While such discretion is not unbridled, the licensing agency's determination concerning an application for a handgun license will generally be upheld where a rational basis in the record exists for the agency's determination even if the court might reach a contrary result (*see, Papaioannou,* 14 AD3d at 379; *Kaplan,* 249 AD2d at 201).

In reviewing the record of the instant matter, this Court defers to the respondent's judgment that in the exercise of its expert discretion and considering the requisite criteria set forth in its regulations, petitioner has not demonstrated that he is of proper character and fitness or other good cause for receipt of a handgun license. Even though the charge on which his 1990 arrest was predicated was ultimately dismissed, respondent has the discretion to consider the facts and circumstances surrounding the arrest to determine his eligibility for a license (*see, Matter of Ostrowski v City of New York,* 55 AD3d 471, 472 [1st Dept 2008]; *Matter of Peric v New York City Police Dept.*, 5 AD3d 142 [1st Dept 2004]; *Matter of Abramowitz v Safir,* 293 AD2d 352 [1st Dept 2002]). Here, respondent's determination does not appear to be based upon the circumstances of the 1990 arrest to the extent that such information may be derived from the record, but rather upon petitioner's repeated failure to comply with its regulations by submitting a notarized statement detailing the facts and circumstances of such arrest. Although petitioner, in reliance upon CPL § 160.50 (1) (d) (iii), clearly believed he had basis for not adhering to the License Division's regulations concerning its request for a detailed statement of his arrest, his reliance upon that statutory provision is misplaced. CPL § 160.50 (1) (d) (iii) simply provides that a sealed record shall be made available to an agency responsible for issuing gun licenses when an application is made

therefor. This provision in no way precludes the License Division from promulgating its own regulation in compliance with its statutory authority under the CPL, to obtain information necessary for it to make a considered decision on the license application. Petitioner's refusal to adhere to respondent's regulation in spite of repeated warnings that such refusal could result in denial of his license application casts doubt upon his character and fitness to possess a handgun and was properly considered by respondent.

Reviewing the record as a whole, the court finds respondent's determination to deny petitioner's application has a rational basis in the administrative record and is neither arbitrary nor capricious. Nor is a contrary result required by the fact that petitioner was issued a rifle/shotgun license without providing a detailed statement of his 1990 arrest since the standards for granting such a license (38 RCNY § 3-03) are less stringent that those for granting a handgun permit (38 RCNY § 5-02) (*see, Matter of Abramowitz,* 293 AD2d at 353; *Matter of Nash v Police Dept. of the City of New York*, 271 AD2d 384 [1st Dept 2000]).

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.

DATED: 6/11/10

ENTER,

O. PETER SHERWOOD
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).