

<b>Matter of Caputo v Kelly</b>
2011 NY Slip Op 30289(U)
February 8, 2011
Sup Ct, NY County
Docket Number: 113232/10
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

IA PART 16

PRESENT: ALICE SCHLESINGER  
Justice

PART 16

JAMES CAPUTO, JR.,  
- v -  
Raymond Kelly.

INDEX NO. 113232/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_  
Notice of Motion/ Order to Show Cause  
Answering Affidavits — Exhibits  
Replying Affidavits

**UNFILED JUDGMENT**  
This judgment and not obtain in person at the Judgment Clerk's Desk (Room 141B).  
PAPERS NUMBERED \_\_\_\_\_  
by the County Clerk \_\_\_\_\_  
representative must \_\_\_\_\_  
Clerk's Desk (Room \_\_\_\_\_)

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion Article 78 proceeding  
is granted in accordance with the  
accompanying memorandum decision.

Dated: FEB 08 2011

Alice Schlesinger  
ALICE SCHLESINGER <sup>S.C.</sup>

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

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

-----X  
In the Matter of the Denial of the Pistol License  
Application of,

James P. Caputo, Jr.,

Petitioner,

Index No. 113232/10  
Motion Seq. No. 001

-against-

Raymond Kelly, as the Statutorily Designated Handgun  
Licensing Officer, and As the New York City Police  
Commissioner, and His Successors in Office,

Respondent.  
-----X

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry has not been served based hereon. To  
obtain a copy of this judgment, the authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1100) in the County Clerk's Office.

SCHLESINGER, J.:

James P. Caputo, Jr. has applied for a restrictive home premise handgun license pursuant to §400.00 of the Penal Law. Pursuant to phase one of the process, he submitted a five-page, 24-paragraph application dated December 15, 2009.

On the application, he gave his age as 37 and his occupation as Sanitation Supervisor for New York City. (Exh. A to Petition). On page two, he listed "yes" to the following questions:

- #10 - Have you ever applied for a Handgun License issued by any Licensing Authority in N.Y.S.?
- #11 - Been discharged from any employment?
- #13 - Been subpoenaed to, or testified at, a hearing or inquiry conducted by any executive, legislative or judicial body?
- #15 - Served in the armed services of this or

any other country?

#19 - Had or applied for any type of license or permit issued to you by any City, State or Federal agency?

#23 - Been 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 police agency. (False statements are grounds for disapproval).

#24 - Have you ever, or do you now have an Order of Protection issued against you?

On page three, Mr. Caputo wrote that he had worked with the New York City Sanitation Department since 11/04. He also stated, in answer to question #30, that he intended to safeguard the handgun "in a locked box at my current residence."

On the final page of the application, Caputo explained his "yes" answers. He wrote:

#10 - 11/95 Putnam County/withdrawn due to address change to NYC.

#11 NYPD 09/17/01 Terminated

#13 Yes as a NYC Police Officer

#15 U.S.M.C. Honorably Discharged DD14 Attached

#19 N.Y.S. Security Guard License

ID: 10009496391 Exp:01/27/11

N.Y.S. Commercial Driver License

ID: 298949570 Exp:07/07/10

#23 I was Arrested Twice in 1993 for an incident that occurred on 10/21/92.

Sometime on 10/21/92 I accompanied my girlfriend at the time, Danielle Lepore to the Local Mall. Unknown to me she was in possession of a friends credit card that she did not have authorization to use. She

proceeded to make clothing purchases for herself on this day with this credit card. On 01/23/93 I was arrested for Grand Larceny relating to the credit card use. I pleaded Not Guilty and explained that I did not have knowledge of the credit card. Danielle later corroborated this. The charges were Dismissed and the Record Sealed.

On 05/15/93 I was arrested and charged with obstructing Governmental Administration in the Second Degree, relating to the credit card incident on 10/21/92. The Sheriff came to my apartment looking for Danielle. He questioned me about her whereabouts. I informed him that we were no longer together and did not have knowledge of her whereabouts. The O.G.A. charge was later reduced to Disorderly Conduct and Sealed. I was arrested on 03/01/00 for an incident that occurred on 09/28/99. The arrest arose out of my employment as a New York City Police Officer. While on duty my partner and I responded to a report that a female was being assaulted by her boyfriend. When we arrived at the scene the complainant was intoxicated and uncooperative. She subsequently reported that she was assaulted by the Police. I believe these allegations were made to protect her boyfriend. On 09/17/01 I pled guilty on the advice of counsel to avoid having to face more serious charges at a time when several allegations of assault by police officers were before the public. I received a sentence of probation and have since received a Certificate of Relief From Disabilities Signed by the Original Sentencing Judge.

#24. Order of Protection issued in relation to the above arrest on 03/01/00. Issued by Bronx Supreme Court on 11/02/01. Expired on 11/02/06. Complainant's name is Cherae

Williams. Other particulars are unknown, I have enclosed an Original Copy of this order for Inspection.

On April 16, 2010, Deputy Inspector Andrew Lunetta disapproved the application. (Exh. B). The reasons were given as follows:

The Applicant has an Arrest History as follows: (1) Arrest 9/28/99 Arrest #B00015121 charged with Assault 1<sup>st</sup> Degree (F)... Official Misconduct: Public Servant Performing Illegal Function 09/17/01. Convicted Upon Plea of Guilty to Assault 3<sup>rd</sup> Degree Sentenced to Probation 5 years. (2) Arrested 05/15/93 in Putnam County charged with Obstructing Governmental Administration. On 11/04/93 he was convicted upon Plea of Guilty to Disorderly Conduct. (3) Arrested on 10/21/92 in Town of Kent, Putnam County, NY charged with Grand Larceny 4<sup>th</sup> Degree credit card (F) 03/18/93 sentenced to 10 days Community Service. Due to the Applicant prior arrest record which includes two felonies one of which a violent felony the Applicant has been disapproved for a Premises Residence Handgun License.

Mr. Caputo, with counsel, then submitted an Administrative Appeal Affirmation dated May 15, 2010. (Exh. C) In a lengthy and comprehensive affirmation from that counsel, first an overview of the cited arrests was given. It was pointed out that the 1992-93 arrests were linked and occurred when Caputo was 19 years old. It should also be noted that those arrests were known and were essentially disregarded by the New York City Police Department when Caputo was appointed to the Force. As a

member of the force, he was given a gun to carry. The felony alluded to in the Disapproval was the Grand Larceny related to his girlfriend's unauthorized use of a credit card. That charge was dismissed against him. In other words, he has had only one felony conviction.

A long, detailed account was then given of the 1999 arrest and its aftermath, which included the reasons behind Caputo's plea of guilty to the Non-Violent "E" Felony of Filing a False Document, for which he was sentenced to a term of Probation for five years, as well as to the reduced charge of Assault in the 3<sup>o</sup>, a misdemeanor. The plea took place in 2001. At the same time Caputo was terminated by the Department.

Also, counsel included relevant documents including the "sloppy" initial report written by Caputo (counsel's words), the investigation conducted by Internal Affairs, and the Certificate of Relief From Disabilities signed by Supreme Court Justice S. Barrett on November 20, 2009, wherein the "b" box is checked. That box reads: "Relieve the holder of all disabilities and bars to employment, excluding the right to be eligible for public office."

The above appeal was unsuccessful. On June 14, 2010, the Director of the License Division disapproved the appeal and stated the following (at Exh. D):

Your conviction for violating PL175.35, an E Felony on 9/17/2001 in connection with your duties as a police officer and subsequent dismissal from the NYPD demonstrates a lack of character and fitness for a license to

possess firearms.

No reference was made to the other arrests. No reference was made to the remoteness of the 1999 incident, eleven years earlier, and no mention was made of Caputo's exemplary record in the intervening years. And finally, no mention was made of the 2009 Certificate of Relief From Disabilities which Caputo had received from his sentencing judge in 2009.

In this final disapproval, Caputo was told he could appeal the determination by filing an Article 78 proceeding. That is precisely what Caputo did, the Petition now before this Court.

John Chambers, petitioner's counsel in his administrative appeal and here, puts forth compelling arguments as to why, at the very least, a remand is necessary. While acknowledging that the Police Commissioner has vast discretionary power in matters such as this, it is urged that those powers are not unlimited and that in a situation such as this one, the powers were abused.

Interestingly, counsel first argues that the United States Supreme Court's recent interpretation of the Second Amendment to the United States Constitution in two cases, *District of Columbia, et al. v. Heller*, 128 S. Ct. 2783 (2008) and *McDonald v. Chicago*, 138 S. Ct. 1317 (2009), changes an individual's possession of a gun from a "privilege" to a "right", which he believes shifts the burden to the Agency to disprove eligibility, whereas before, the applicant had the burden of proving his eligibility.

I am not prepared at this time to accept this interpretation, but I am prepared to say that the decision here was arbitrary and capricious. I base this conclusion on the facts, concerning Caputo's past and present along with cases cited by counsel showing that prior felons in New York have been granted handgun licenses by the Department. This refutes respondent's claim that such a conviction is an absolute bar.

I further make this determination because the Department seems to have made its decision wearing blinders. The Director ignored Caputo's unblemished record both before and after the 1999 incident. This would include his honorable service in the Marines, and his almost five years as a New York City Police Officer without any problem, until this complaint. After his leaving the Force, he joined the NYC Sanitation Department, rising to the level of Supervisor of 30-40 men. Is it not arbitrary to completely ignore these parts of one's life and is it not clear that they speak to character as well?

And most significantly, the Director totally ignored the significance of the 2009 granting of Caputo's application for a Certificate of Relief from Disabilities, which can only be granted and was granted here at the time his sentence of Probation was completed. At that time, the sentencing judge had the opportunity to review the applicant's activities and character since the time he took his plea. The Director also ignored the actual words of this Certificate "relieving the holder of all disabilities...."

Counsel points out that the Department, in the past, has recognized this Certificate as lifting the legal bar against handgun licensing. New York State Correction Law, Article 700, placed Caputo in the category of an "eligible offender", one qualified to apply for this Certificate. Other parts of this section speak of the public policy of NYS to "encourage" the licensure of persons previously convicted of criminal offenses [§753(1)(a)] and state that such a certificate "shall create a presumption of rehabilitation" [§753(2)].

Accordingly, it is hereby

ADJUDGED that this petition is granted to the extent of remanding the matter to the Commissioner and directing him to conduct a more thorough review of Mr. Caputo's fitness and character. During that review, special attention to the remoteness of the 2001 conviction for a non-violent felony and to Mr. Caputo's clear rehabilitation since that time, taking note of his employment and the Certificate of Relief from Disabilities, all toward the end of reversing the prior denial.

Dated: February 8, 2011 FEB 08 2011

*Alice Schlesinger*  
J.S.C.  
ALICE SCHLESINGER

**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 1015).  
FEB 08 2011  
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