

Matter of Lugo v New York City Dept. of Inv.
2011 NY Slip Op 30352(U)
February 14, 2011
Supreme Court, New York County
Docket Number: 111498/2010
Judge: Martin Schoenfeld
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Schoenfeld
Justice

PART 28

Index Number : 111498/2010
LUGO, ANIBAL
vs.
NYC DEPT OF INVESTIGATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED
1-3
4-5
6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the accompanying memorandum decision.*

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: 2/14/11 _____ Jak
J.S.C.

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: IAS PART 28

----- X
In the Matter of the Application of
ANIBAL LUGO,

Petitioner,

Index No.:

111498/2010

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

-against-

THE NEW YORK CITY DEPARTMENT OF
INVESTIGATION, CITY OF NEW YORK,
JOHN KANTOR,

Respondents.
----- X

UNFILED JUDGMENT

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HON. MARTIN SCHOENFELD, J.:

In this Article 78 proceeding, Petitioner Anibal Lugo seeks a judgment overturning the determination of the New York City Department of Investigation's (DOI) peace officer incident review panel, which revoked Petitioner's peace officer status and, subsequently, secured his firearms and Carry Business License. DOI, City of New York and John Kantor, Assistant Deputy Commissioner of the DOI (herein sometimes collectively referred to as Respondents), seek dismissal of the petition, and contend that they acted reasonably, properly, and in conformance with all applicable laws and regulations.

[* 3]

BACKGROUND AND FACTUAL ALLEGATIONS

In June 2006, Petitioner was hired to work for the City of New York as a confidential investigator assigned to DOI. Petitioner, being a special investigator, was designated through DOI to become a peace officer. A peace officer is an official who performs law enforcement functions for an agency where policing is not its main function. Some DOI employees are given the peace officer status so that they can perform additional investigations such as investigating criminal misconduct. DOI peace officers have to comply with certain minimum eligibility requirements, such as psychological testing and firearms training.

As set forth in the DOI investigative policies and procedures manual, section 1000.05, the DOI peace officer committee designates peace officers on a discretionary basis. Respondents' Exhibit B, at 2. Not every DOI investigator is designated as a peace officer. DOI can take away the peace officer title at any time, without any advance notice to the employee. According to the manual, DOI can also take away an employee's permission to carry a firearm while performing DOI business without any advance notice to the employee.

In 2007, Petitioner applied for his handgun license, in connection with his appointment as a peace officer, so that he could perform special investigations. Petitioner filled out a

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handgun license application, seeking a Carry Business License. Along with his application, the Deputy Commissioner of DOI provided a letter on Petitioner's behalf. The letter stated, in pertinent part:

At my direction, the Peace Officers named on the attached list, will begin making application to the New York City Police Department License Division for a carry pistol permit. This letter shall constitute the requisite "letter of necessity" in support of these applications.

Upon termination from employment, the investigator will be instructed in the proper procedures concerning the disposal of any firearms and the return of pistol permits to the License Division.

Respondents' Exhibit E, at 1-2.

Although initially denied, Petitioner's application for a Carry Business License was eventually approved in October 2008.

On March 16, 2010, Respondents claim that Petitioner was insubordinate to his supervisor. According to Respondents, Petitioner had an angry outburst. As a result of this incident and other concerns, Petitioner was transferred to a different office within DOI.

On March 18, 2010, Petitioner met with DOI's Chief of Staff and the Assistant Deputy Commissioner to discuss his transfer. During the meeting, Petitioner alleged that he had been transferred in retaliation for remarks that he made about the misconduct of his supervisors. Respondents denied that

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Petitioner ever reported incidents of misconduct prior to being accused of insubordination. Respondents' Exhibit J, Report of the Incident Review Panel, at 4.

On March 22, 2010, the Chief of Staff and the Assistant Deputy Commissioner again met with Petitioner, this time to discuss the allegations of Petitioner's supervisors' misconduct. During this meeting, Petitioner made several admissions about his own misconduct as well as discussing the misconduct of others.

On April 21, 2010, pursuant to the DOI investigative policies and procedures manual, section 1000.40, the incident review board met to discuss the March 2010 incidents and Petitioner's status. The incident review board conducts investigations of incidents related to the ability of a peace officer to carry a firearm. After an investigation is completed, a report is sent to the Deputy Commissioner for Investigations, who then determines what consequences should be applied as a result of the DOI employee's actions. This may include the loss of peace officer status.

In the present case, the incident review board concluded that Petitioner had been insubordinate to his supervisor with his angry outburst and that he had violated the DOI Code of Conduct. The Code of Conduct mandates that employees must not conduct themselves in a "manner prejudicial to good order and discipline," and that they must be courteous to the public and to

[*6]
other employees. The Code of Conduct also states that employees must obey the work orders of their supervisors.

The incident review board also found that Petitioner violated Mayoral Executive Order 16 and the DOI Code of Conduct by not reporting the misconduct happening in his unit in a timely manner. It found that he failed to report violations of the City's conflict of interest laws and only reported them in response to the allegations of insubordination. The board found that Petitioner waited approximately a year before reporting a supervisor's alleged solicitations of the staff for a financial scheme. It also found that Petitioner was involved in some inappropriate conduct and that Petitioner violated various City Charter provisions when he sold his laptop computer and food to a DOI supervisor.

At the end of the report, the incident review board recommended that Petitioner's "status as a peace officer should be revoked" and that "a copy of this memorandum should be placed in [Petitioner's] personnel file." Respondents' Exhibit J, at 5.

On April 29, 2010, Petitioner's firearms were secured and he was given an official receipt for them. The DOI Assistant Deputy Commissioner then met with Petitioner to inform him of the decision to revoke his peace officer status, and to take back his firearms and his Carry Business License.

On August 27, 2010, Petitioner commenced this Article 78

proceeding, challenging the incident review panel's finding to revoke his peace officer status as being arbitrary and capricious, and seeking the return of his firearms and license.

Petitioner contends that his firearm license was illegally revoked because he did not receive a hearing pursuant to New York Criminal Procedure Law (CPL) § 530.14 (7). Further, he argues that he should have been given a report explaining why his firearms were taken as per the Uniformed Firearms Protocol for Peace Officers, which is issued by the office of the Mayor and the City of New York. Petitioner also maintains, without further elaboration, that his license to carry a firearm was approved independently from his employment with DOI and was not contingent on his employment.

In addition, Petitioner claims that his senior managers coerced him into financial transactions and that he feared that he would be retaliated against if he did not participate. Petitioner alleges that he was upset by the situation and that he suffered stress and anxiety as a result. Petitioner then claims that his whistle-blowing and complaints about DOI are what led to the accusation of insubordination and the revocation of his peace officer status.

Respondents argue that, contrary to Petitioner's contentions, they have not revoked his license to carry a firearm. Rather, they contend that they have revoked his peace

officer status, and that, as this status is discretionary, it can be revoked without any advance notice. According to Respondents, once this status was revoked, Petitioner had no right or need to carry a firearm during the course of his employment.

DISCUSSION

In the context of an Article 78 proceeding, "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Soho Alliance v New York State Liquor Authority*, 32 AD3d 363, 363 (1st Dept 2006) (citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974)); see CPLR 7803 (3). An agency's decision is only considered arbitrary if it is "without sound basis in reason and is generally taken without regard to the facts." *Pell*, 34 NY2d at 231. "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." *Arrocha v Board of Education of City of New York*, 93 NY2d 361, 363 (1999) (internal quotation marks and citations omitted).

Petitioner's Peace Officer Status Was Revoked

At the outset, the record indicates that Petitioner's peace officer status, not his license to carry a firearm, was revoked. As a consequence of this revocation, DOI secured his firearms and license because Petitioner was no longer allowed to carry firearms while performing his job.

Section 2.10 (38) of the CPL provides that a DOI special investigator who receives firearms training, and also receives a firearms permit, shall be designated as a peace officer. However, although DOI is entitled to select certain investigators on a discretionary basis to receive peace officer status, it is also empowered to revoke such status. See DOI investigative policies and procedures manual, section 1000.05. Peace officer status can be revoked at any time, without any advance notice to the employee. *Id.* Similarly, permission to carry a firearm is at the discretion of the Commissioner of the DOI, and may also be withdrawn without any advance notice to the employee. Thus, Respondents, by meeting with Petitioner and then taking away his firearms and license, did not breach any pertinent regulations.

Revocation Was Not Arbitrary and Capricious

It is well settled that "[a]n agency's interpretation of its own regulations is entitled to deference if that interpretation is not irrational or unreasonable [internal quotation marks and

citations omitted]." *IG Second Generation Partners L.P. v New York State Division of Housing and Community Renewal*, 10 NY3d 474, 481 (2008).

Here, Respondents determined that Petitioner's workplace behavior violated several codes of conduct because it included insubordination, angry outbursts and inappropriate financial transactions. Petitioner alleges that he was coerced by supervisors to engage in illegal financial transactions and this coercion led him to experience extreme anxiety. He also claims that he received intimidating messages. The incident review panel, having considered Petitioner's contentions, concluded that Petitioner's peace officer status should be revoked and that he should no longer be allowed to carry and use a firearm while at work. In light of the Petitioner's job responsibilities, the decision to revoke Petitioner's peace officer status and to secure his firearms and firearm license was not unreasonable or irrational, and, thus, should not be disturbed.

Petitioner Was Not Entitled to a Hearing

Petitioner's reliance on CPL 530.14 (7) is misplaced. CPL 530.14, in pertinent part, governs the suspension and revocation of a license to carry a firearm. It states that the defendant shall have the right to a hearing before the court "regarding any revocation, suspension, ineligibility or surrender order issued

pursuant to this section, provided that nothing in this subdivision shall preclude the court from issuing any such order prior to a hearing."

In the instant case, Petitioner's need for a firearm and his ability to obtain a Carry Business License was directly and solely related to his employment with the DOI as a special investigator. His license was apparently not approved independently from his employment with DOI. Petitioner's employer wrote a "letter of necessity" to the licensing board on Petitioner's behalf, explaining why he required a firearm license for his employment. Pursuant to Penal Law § 400.00 (2) (f), Petitioner was only granted a Carry Business License for "proper cause" when he required a firearm to be a special investigator with the additional DOI investigative responsibilities of a peace officer. Once DOI revoked Petitioner's peace officer status, there was no need for him to carry a firearm. Accordingly, CPL 530.14 (7) is irrelevant, and Petitioner is not entitled to a hearing.

Petitioner Was Required to Surrender Firearms under 38 RCNY § 5-29

Title 38 of the Rules and Regulations of the City of New York (RCNY), which governs the licensing of firearms, describes the Carry Business License in section 5-01. 38 RCNY section 5-03

explains that before a person can obtain a Carry Business License, he has to comply with the requirements of 38 RCNY section 5-02, and also demonstrate that he can prove "proper cause" as set forth in Penal Law section 400.00 (2) (f). "Proper cause" is defined in 38 RCNY section 5-03 as the following:

"Proper cause" is determined by a review of all relevant information bearing on the claimed need of the applicant for the license. The following are examples of factors which shall be considered in such a review.

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

38 RCNY section 5-29 (6) (b) states that if the nature of the licensee's responsibilities at his business has changed, or if he ends his association with the business, the licensee shall surrender his firearms and license within 10 days. Thus, pursuant to 38 RCNY section 5-29, Petitioner herein was required to surrender his Carry Business License because the nature of his work responsibilities had changed.

Agencies May Develop Their Own Policies and Procedures

Petitioner's assertion that he is entitled to a judgment overturning Respondents' decision because DOI did not provide him with a written report of its decision and thereby failed to follow the Uniform Firearms Protocol for Peace Officers is without merit. The Uniform Firearms Protocol for Peace Officers

merely provides guidance, not statutory imposition, for the DOI.

It states:

This Uniform Firearms Protocol (UFP) provides guidance for all New York City agencies employing peace officers who carry firearms in the course of their duties with respect to the following issues: revocation and restoration of firearm privileges, firearm discharge review, carrying and safeguarding firearms, and off-duty employment. Agencies should modify their existing protocols-and if necessary, adopt new protocols to incorporate the guidelines found in the UFP while addressing the specific needs of their respective agency.

Respondents' Exhibit C, at 2.

Accordingly, DOI may develop its own policies and procedures. See *Rizzo v New York State Division of Housing and Community Renewal*, 16 AD3d 72, 79 (1st Dept) (holding "an agency's interpretation of the operational practices attendant to the statute that it administers is entitled to deference"), *aff'd* 6 NY3d 104 (2005).

Here, it was sufficient that Respondents spoke to Petitioner about his peace officer status revocation, as there was no specific statutory requirement that the agency provide him with a written report.

Therefore, for all of the above stated reasons, this court finds that Respondents' determination to revoke Petitioner's peace officer status, resulting in the forfeiture of his firearms

and license to carry same, was neither arbitrary nor capricious.

Accordingly, it is hereby

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



J.S.C.

Dated: New York, New York
February 14, 2011

UNFILED JUDGMENT

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