

Matter of James v Kelly
2011 NY Slip Op 32613(U)
September 30, 2011
Supreme Court, New York County
Docket Number: 113219/10
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**In the Matter of the Application of
NATHANIEL JAMES JR.,**
Petitioner,

INDEX NO. 113219/10
103219/10

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

MOTION DATE _____

-against-

MOTION SEQ. NO. 001

**RAYMOND KELLY, Police Commissioner of
the City of New York,**
Respondent.

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion by petitioner for an order and judgement pursuant to Article 78.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1,2

3,4

5

FILED

OCT 07 2011

Cross-Motion: ☐ Yes ☒ No

Petitioner Nathaniel James Jr., petitions this Court for a judgment pursuant to CPLR Article 78 annulling respondent's denial of a residential handgun license. Petitioner is a former Corrections Officer with the New York City Department of Corrections (DOC). His initial application was denied by a Notice of Disapproval, dated May 4, 2010 (see Notice of Petition, Exhibit A). He appealed the decision and received a Notice of Disapproval After Appeal, dated June 21, 2010. Respondent's investigator found that petitioner resigned from the DOC after he had a random drug test and was facing departmental charges rather than for medical reasons as he claimed. Respondent thereafter concluded that petitioner's "lack of candor" and misstatement "demonstrate a lack of character and fitness" for a fire arm license (see Notice of Petition, Exhibit B). Penal law § 400.00(1) requires that applicants for a pistol license must possess good moral character.

DISCUSSION

Petitioner proffered by sworn statement, dated December 2, 2009, that he "resigned from the NYC Department of Corrections on May 11, 2004, due to injuries sustained on the following dates: November 21, 2004 and February 24, 2004" (Respondent's Answer, Exhibit E). However, respondent's investigators discovered that he resigned from the DOC pending an investigation for a failed illegal drug test and not for the medical reasons he stated in the application. Respondent concluded he withheld important information, and thus, was not of good moral character as required by Penal law § 400.00(1). Respondent seeks to support its position that denial of petitioner's application was proper, by submitting an *uncertified* copy of the police investigation case history record. The record contains a conversation between investigators and petitioner which contains petitioner's admission to investigators that he resigned from the DOC pending an investigation for a failed illegal drug test (see Exhibit F, NYC case history sheet, p. 3, entry dated April 21, 2010). However, uncertified police records which contain petitioner's admission cannot be considered here (*see Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525 [1st Dept 2010]; *Coleman v. MacIsaac*, 61 AD3d 569 [1st Dept 2009]).

"Judicial review of an administrative determination is limited to whether it was arbitrary or capricious or without a rational basis in the administrative record, and once it is determined that the agency's conclusion had a sound basis in reason, the judicial function comes to an end" (*Matter of Rucker v NYC/NYPD License Div.*, 78 AD3d 535, 535 [1st Dept 2010]). "The agency's determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result" (*Kaplan v Bratton*, 249 AD2d 199, 201 [1st Dept 1998]).

"The possession of a handgun license is a privilege rather than a right. The New York City Police Commissioner has broad discretion to grant licenses in accordance with the

provisions of Penal Law 400.00 and Administrative Code of the City of New York (10-131[a][1]" (*Sewell v City of New York*, 182 AD2d 469 [1st Dept 1992] [internal citations omitted]); see *Campbell v Kelly*, 85 AD3d 446 [1st Dept 2011]). "Eligibility for a license in the first instance or for renewal is contingent upon an investigation by the licensing officer, and a finding that all statements in the application are true" (*Matter of O'Brien v Keegan*, 87 NY2d 436, 439 [1996]; see also Penal § 400.00(1) ["No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true"]).

In this case, petitioner did not inform the licensing division about his decision to resign from the DOC because of disciplinary charges pending against him. Petitioner only submitted a sworn statement on December 2, 2009 that he resigned due to injuries sustained on the job, without any mention of the pending charges. During the license division's investigation the DOC informed the respondent that petitioner resigned from the DOC while charges were pending against him for testing positive for cocaine use. Petitioner's failure to inform the investigator about the disciplinary charges, which respondent stated indicated a "lack of candor," and because petitioner was facing termination from his employment for failing a drug test, the respondent concluded that petitioner showed a "lack of character and fitness" and affirmed the denial of his residential pistol license.

This Court finds that respondent was acting within its discretion in denying petitioner's request for a handgun license, and respondent's conduct was not "arbitrary and capricious or an abuse of discretion" pursuant to CPLR § 7803. The evidence in the record establishes a "substantial basis upon which the respondent could conclude that petitioner lacks the good moral character required for possession of a pistol permit" (*Matter of Perlov v Kelly*, 21 AD3d 270, 271 [1st Dept 2005]; see also *Matter of Romanoff v Kelly*, 23 AD3d 212 [1st Dept 2005]

[“respondent's additional finding that petitioner lacks the requisite character to possess firearms under Penal Law § 400.00 (1) (b) is supported by evidence that petitioner failed to inform licensing authorities regarding his license revocation in another jurisdiction and is a sufficient basis, in and of itself, for revocation”]]. There was a rational basis for denying petitioner's application for a premises residence handgun license, accordingly, the respondent's determination should not be disturbed (*see Matter of Tolliver v Kelly*, 41 AD3d 156, 157-158 [1st Dept 2007]).

Finally, the petitioner's request for hearing pursuant to CPLR § 7804(h) is denied. Petitioner's request for a hearing is raised for the first time in petitioner's reply papers and is not supported or even referenced in the petition. Petitioner had ample opportunity to raise the request in his *prima facie* case, but improperly argues that an issue of fact exists in this proceeding only in his reply (*see Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624 [1st Dept 1995]; *Ritt v Lenox Hill Hosp.* 182 AD2d 560, 562 [1st Dept 1992] [“the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion”]; *Lazar v Nico Indus.*, 128 AD2d 408, 409-410 [1st Dept 1987]).

Moreover, the petitioner does not raise a triable issue of fact by competent admissible evidence. The petitioner's application is labeled a verified petition and signed by petitioner's attorney with two attached exhibits (the decisions of the respondent). The petitioner fails to submit an affidavit of fact or even verify the labeled verified petition to raise a triable issue of fact. The affirmation by plaintiff's counsel, who had no personal knowledge of the facts is not admissible evidence and therefore is insufficient to establish a prime facie case for a triable issue of fact (*see Johnson v. Phillips*, 261 AD2d 269, 270-271[1999]). Moreover, an affidavit that is “not based on personal knowledge, and [is] otherwise conclusory ... [is] insufficient to

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satisfy [the movant's] prima facie burden on the motion" (*Bartee v D & S Fire Protection Corp.*, 79 AD3d 508, 508 [1st Dept 2010]; see also *Casey v New York El. & Elec. Corp.*, 82 AD3d 639, 640 [1st Dept 2011]).

CONCLUSION

Accordingly, it is

ORDERED that petitioner's Article 78 petition is denied and the proceeding is dismissed, without costs or disbursements to respondent; it is further,

ORDERED that petitioner's request for a hearing pursuant to CPLR 7804(h) is denied; it is further,

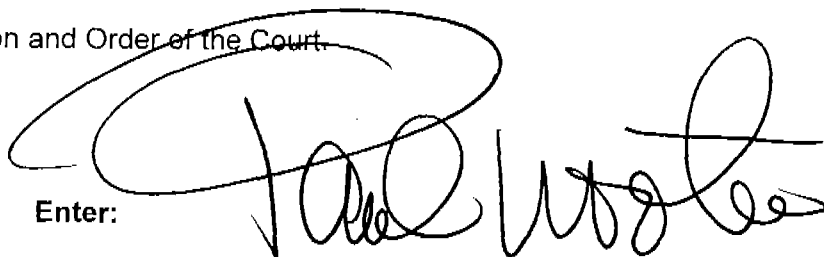
ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED that the respondent shall serve a copy of this order, with notice of entry, upon petitioner.

This constitutes the Decision and Order of the Court.

Dated: 9-30-11

Enter:


PAUL WOOTEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: : ☐ DO NOT POST ☐ REFERENCE

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