

Matter of Agonian v City of New York

2011 NY Slip Op 33036(U)

November 14, 2011

Supreme Court, New York County

Docket Number: 400104/2011

Judge: Saliann Scarpulla

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Sarah Agoman
-v-
City of New York

INDEX NO. 400104/2011
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

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

[Faint, illegible text, possibly a stamp or bleed-through]

Dated: 11/14/11

Saliann Scarpulla
J.S.C.

SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
IN THE MATTER OF THE APPLICATION OF
SETRAK AGONIAN,

Petitioner,

Index No.: 400104/2011

Submission Date: 07/20/2011

- against-

THE CITY OF NEW YORK & RAYMOND KELLY,
as Police Commissioner of NYPD,

DECISION AND ORDER

Respondents.

----- X
For Petitioner:
Glenn H. Ripa, Esq.
225 Broadway, Suite 1200
New York, NY 10007

For Respondent:
Michael A. Cardozo, Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

Papers considered in review of this petition:

- Verified Petition. 1
- Affidavit of Setrak Agonian 2
- Verified Answer 3
- Respondent's Mem. of Law. 4
- Petitioner's Reply Aff. 5

HON. SALVANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Setrak Agonian ("Agonian") challenges the August 11, 2009 determination of respondents The City of New York and Raymond Kelly, as Police Commissioner of NYPD (collectively "City respondents") revoking Agonian's carry business pistol licence. Agonian held a carry business pistol license in conjunction with his employment as owner/president of International Creative Metal, an architectural ornamental fabrication business.

Agonian first obtained a pistol license in 1981. On November 24, 2007, Agonian called the police after he spotted trespassers in the lot behind his property. Although the police arrived and arrested the trespassers, Agonian was also arrested and charged with Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03(03)), Menacing in the Second Degree (Penal Law § 120.14(01)), Obstruction of Government Administration (Penal Law § 195.05), Resisting Arrest (Penal Law § 205.30), and License Violation: Carrying a Concealed Weapon (Penal Law § 400.00(02)).

According to the Arrest Report, Agonian threatened to shoot and kill the two perpetrators who were being arrested for trespassing on Agonian's property. The report stated that Agonian reached into his waistband, grabbed a loaded .38 caliber pistol and attempted to pull it out while the police officers were escorting the trespassers from the scene. The report also stated that Agonian resisted being handcuffed while the officers were arresting him. The officers confiscated Agonian's handgun after the arrest.

The 108th Precinct notified the New York City Police Department License Division (the "License Division") about the November 24, 2007 incident through an arrest notification dated November 25, 2007. Agonian did not notify the License Division of the arrest or the confiscation of his firearm. By a Suspension Notice dated December 3, 2007, the License Division informed Agonian that his pistol license was suspended pending an investigation of the arrest.¹

¹ Pursuant to Title 38 of the Rules of the City of New York ("RCNY") a licensed handgun owner is prohibited from drawing, exposing or displaying the handguns unnecessarily. 38 RCNY § 5-22. Further, pistol licensees must immediately report

On January 16, 2008, the criminal charges against Agonian were adjourned for six months in contemplation of dismissal. The Court later dismissed and sealed the matter. As a condition of Agonian's plea agreement, the Court prevented him from applying for a pistol license for one year.

After reviewing the circumstances surrounding the November 24, 2007 incident, the License Division revoked Agonian's carry business pistol license by Amended Notice of Determination dated December 2, 2008. Agonian demanded, and was afforded, a hearing pursuant to 38 RCNY §§ 15-22 *et seq.* to challenge the revocation of his pistol license.

At the administrative hearing, Investigator Brewster ("Brewster"), Police Officer Kohard ("Kohard"), Sergeant Burke ("Burke") and Police Officer Matthes ("Matthes") testified. All four stated that Agonian was in the process of reaching for his firearm when they arrested him. They also testified that Agonian resisted arrest.

In his testimony, Agonian denied that he attempted to pull out his firearm or resist arrest. He testified that when the officers were escorting the two trespassers off the premises, the trespassers threatened Agonian, and he responded that he would defend himself and his family. Agonian admitted that he knew he was required to notify the License Division of the incident.

arrests to the License Division. 38 RCNY § 5-22. The License Division has the authority to revoke a license after any Title 38 violation. 38 RCNY § 5-21.

Private Investigator John Bruno ("Bruno") also testified for Agonian. Bruno stated that he interviewed an eyewitness to the incident, Dhendup Chadotsng ("Chadotsng"). According to Bruno, Chadotsng told him that Agonian did not resist arrest. Kenneth Podziba ("Podziba") and Joseph M. Downs ("Downs") testified as character witnesses for Agonian.

On August 10, 2009, hearing officer Margaret Shields ("Shields") issued a hearing report upholding the revocation of Agonian's pistol license. In her report, Shields stated that she found the police officers' testimony concerning the incident to be consistent and more credible than that of Agonian. Based upon the uncontradicted testimony, her credibility determinations in connection with the conflicting testimony, and the documents submitted at the hearing, Shields found that: Agonian was attempting to menace the trespassers on November 24, 2007 while in the presence of four armed police officers; Agonian was in no personal danger at the time; Agonian knew that he was supposed to, but failed promptly to notify the License Division of his arrest and the confiscation of his firearm; and that Agonian provided false and misleading testimony at the administrative hearing. Shields also found "that the reason the testimony of [Chadotsng] was not provided at hearing [was] that it would not have corroborated the licensee's account."

Though Shields found Podziba and Downs to be credible character witnesses, she stated that "[i]t is not the licensee's character so much as his judgment that is at issue." In a footnote to the report, Shields gave as an example of Agonian's flawed judgment an off-

the record incident where Agonian allegedly approached the officers outside the hearing room and asked one of them about his newborn baby. Though Agonian stated that he was attempting to be friendly, the officer interpreted this question as a subtle threat.

Based upon her factual findings, Shields concluded that Agonian had displayed “an appalling lack of judgment” on November 24, 2007, and that “[n]o justification exists for the licensee’s actions taken in the presence of four armed police officers.” Shields then held that Agonian “lacks the essential temperament to possess a permit to carry firearms,” and recommended revocation of Agonian’s carry business pistol license. On August 11, 2009, Thomas M. Prasso, the License Division’s Director, adopted Shields’s recommendation, and the pistol license revocation became final.

Agonian then commenced this Article 78 proceeding requesting that the Court annul the License Division’s determination. He argues that the determination was made in violation of lawful procedure, was affected by errors of law, was arbitrary and capricious and was an abuse of discretion. Agonian maintains that there was insufficient evidence that Agonian violated the rules and regulations by not notifying the Licensing Division of the arrest. Agonian also argues that there was insufficient evidence to support the determination that he lacked the temperament to own a firearm. He further argues that it was unreasonable for the License Division to revoke his license permanently and that the temporary suspension was sufficient punishment.

In their verified answer, the City respondents argue that the Court is required by law to transfer this proceeding to the Appellate Division for review of whether there was

substantial evidence to support the License Division's determination. They maintain that, in any event, the City respondents' determination was rational, reasonable and supported by substantial evidence.

Discussion

Courts will uphold an administrative hearing determination if the decision was supported by substantial evidence. See CPLR § 7803(4); *Charles Q. v. Constantine*, 85 N.Y.2d 571, 575 (1995). Where an Article 78 petitioner challenges the sufficiency of evidence at an administrative hearing, the Supreme Court must transfer the proceeding to the Appellate Division. CPLR § 7804(g); *Mason v. Dep't of Bldgs.*, 307 A.D.2d 94, 98 (1st Dept. 2003). The Court may, however, decide any other issues which would terminate the proceeding. *Al Turi Landfill v. N.Y. State Dep't of Env'tl. Conservation*, 98 N.Y.2d 758, 760 (2002).

Agonian concedes that he challenges the sufficiency of evidence at the License Division hearing, but he argues that the determination was also predicated on an error of law. Specifically, Agonian first argues that Shields impermissibly relied on Agonian's off the record interaction with the testifying officers in making her determination, and, thus, the Court should annul her decision instead of transferring the proceeding to the Appellate Division.

"[I]t is not proper for an administrative agency to base a decision of an adjudicatory nature, where there is a right to a hearing, upon evidence or information outside the record." *Simpson v. Wolansky*, 38 N.Y.2d 391, 396 (1975). Nevertheless,

where there is substantial evidence in the record to support the decision, consideration of evidence outside the record will not necessarily annul the decision. *See 49th St. Mgmt. Co. v. New York City Taxi & Limousine Comm'n*, 277 A.D.2d 103, 106 (1st Dept. 2000).

Here, and as plainly shown in her report, Shields relied primarily on the witness testimony that she found credible and the exhibits submitted at the hearing in making her determination. Indeed, the only mention of Agonian's interaction with the police officers was in a single footnote to the report. Because Shields relied primarily on the testimony and exhibits submitted at the administrative hearing, Shields brief reference in a footnote to an off the record discussion does not amount to an error of law sufficient to require vacatur of the License Division's determination.

Agonian also argues that it was an error of law for Shields to infer that Agonian did not produce Chadotsng as a witness because Chadotsng would have provided unfavorable testimony. But an administrative hearing officer may draw an adverse inference from a party's failure to call a witness where that party would support that party's case and the party has access to the witness. *See Ciccone v. Waterfront Com. of New York Harbor*, 52 N.Y.2d 913, 915 (1981); *Jarrett v. Madifari*, 67 A.D.2d 396, 407 (1st Dept. 1979). Thus, Shields did not err in drawing this conclusion.

Further, the decision to revoke Agonian's license was not disproportionate to the violation. Courts may set aside an administrative agency determination "only if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." *Pell v. Board*

of Education, 34 N.Y.2d 222, 233 (1974). Given the State's substantial interest in ensuring the public's safety from individuals lacking the necessary judgment and temperament to own firearms, *Lipton v. Ward*, 116 A.D.2d 474, 477 (1st Dept. 1986), the punishment the License Division imposed does not shock this Court's sense of fairness.

As this Court holds that the License Division's determination to revoke Agonian's pistol license was not affected by an error of law, the appropriate procedure is to transfer this proceeding to the Appellate Division for a determination as to whether the License Division's determination is supported by substantial evidence. *See Mason*, 307 A.D.2d at 98.

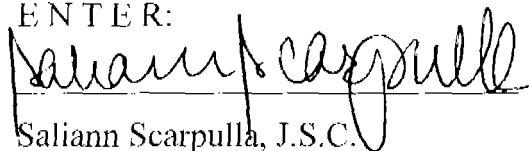
In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the petition of Sctrak Agonian to vacate the determination of respondents The City of New York and Raymond Kelly, as Police Commissioner of NYPD to revoke his pistol license is denied and dismissed with respect to the issue of whether the determination was affected by an error of law, and transferred to the Appellate Division for a determination of whether respondents' determination was supported by substantial evidence.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
November 14, 2011

ENTER:


Saliann Scarpulla, J.S.C.