

Matter of Tsang v Kelly
2012 NY Slip Op 31366(U)
May 14, 2012
Sup Ct, New York County
Docket Number: 112392/11
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
DAVID TSANG,**
Petitioner,

INDEX NO. 112392/11

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

MOTION SEQ. 001

-against-

FILED

**RAYMOND KELLY, as Police
Commissioner of the City of New York,
THE CITY OF NEW YORK and THE NEW
YORK CITY POLICE DEPARTMENT,**
Respondents.

MAY 22 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

The following papers, numbered 1 to 5, were read on this motion by petitioner for an order and judgment 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

Cross-Motion: ☐ Yes ☒ No

David Tsang (petitioner) commenced this proceeding, pursuant to CPLR Article 78, seeking a judgment annulling and reversing respondents' final determination denying his application for a Carry Business or Carry Guard handgun license. Petitioner also seeks an order directing respondents to issue petitioner a Carry Business or Carry Guard handgun license. Respondents oppose petitioner's application and assert that the New York Police Department (NYPD) License Division's decision to deny petitioner's application for a Carry Business or Carry Guard handgun license should be upheld because it was rendered after a thorough investigation and full review of the petitioner's history and past employment record with the NYPD, and it was not arbitrary, capricious or an abuse of discretion.

BACKGROUND

From 1990 to 1996 petitioner served as an NYPD police officer, and he has since received a New York State Watch Guard and Patrol Agency License. Petitioner is a duly registered security guard with the New York State Department of State Division of Licensing and allegedly works for his own security company. Petitioner submitted an application for a Carry Business or Carry Guard handgun license with the NYPD License Division on January 18, 2011. His application was denied by a Notice of Disapproval, dated April 6, 2011, in which the Deputy Inspector noted that his application was disapproved after an investigation revealed the following: Prior disapproval of a target permit application and prior dismissal from the NYPD (see Notice of Petition, exhibit D). Petitioner appealed this determination and received a Notice of Disapproval After Appeal, dated July 1, 2011, wherein the Appeal Board sustained the determination to deny petitioner's application (see Notice of Petition, exhibit F). Specifically, the Appeal Board found that petitioner "demonstrates a lack of character and fitness for a license to possess firearms" due to petitioner's dismissal from the NYPD "for violating your oath of office in that you wrongfully accepted sums of US currency in connection with your brother's illegal house of prostitution" (see Notice of Petition, exhibit F). Upon reviewing the petitioner's employment history, the License Division found that he had been terminated from the NYPD after a departmental trial in which he was found guilty of improper conduct, including accepting money "for his brother, Peter Tsang, in connection with said Peter Tsang's partnership in an illegal house of prostitution. . . ." (see Verified Answer, exhibit A).

On October 31, 2011, petitioner then commenced this Article 78 proceeding seeking a judgment reversing the denial of his handgun license application on the basis that respondents' conclusions regarding his moral character were arbitrary and capricious. Petitioner relies, in part, on two Article 78 decisions by our sister Courts in which the denial of various operator

licenses by the Department of Buildings was appealed (see *Matter of Cann v Limandri*, 2011 NY Slip Op 31932 [Sup Ct, New York County 2011, Schlesinger, J.]; *Matter of Penessa v. Limandri*, Sup Ct, New York County, Aug. 12, 2011, Jaffe, J. index No. 101322/11). Petitioner alleges that it was improper for the License Division to deny his application based upon his unfavorable termination from the NYPD because it occurred almost 15 years ago and also because petitioner has never been charged or convicted of a crime. Moreover, petitioner asserts that the License Division failed to take into consideration that petitioner was issued a Watch, Guard and Patrol Agency license from the Department of State, which requires that he be a person of "good character, competency and integrity" (see Verified Petition, ¶ 18). He alleges that the determination of the New York Department of State to issue him the Watch, Guard and Patrol Agency license should be conclusive as to his "good character" and that the NYPD should be estopped from making any contrary determination (*id.* at ¶ 19).

STANDARD

"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 Court may not substitute its own judgment for that of the agency (see *Matter of Tolliver v Kelly*, 41 AD3d 156, 158 [1st Dept 2007]). "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]). "A rational basis exists when the evidence adduced is sufficient to support the Commissioner's action" (*Papaioannou v. Kelly*, 14 AD3d 459, 460 [1st Dept 2005]).

"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, 472 [1st Dept 1992] [internal citations omitted]; see *Campbell v Kelly*, 85 AD3d 446 [1st Dept 2011] ["Possession of a handgun license is a privilege, not a right, and as such, it is subject to the broad discretion of the Police Commissioner"]). Moreover, pursuant to Penal Law § 400.00(1) and 38 RCNY § 5-02, which sets forth the parameters for issuance of a premises license, no license shall be issued where the applicant lacks good moral character (see Penal Law § 400.00[1][b]; 38 RCNY § 5-02[a]).

DISCUSSION

This Court determines upon a review of the record that respondents' decision to deny petitioner's application for a Carry Business or Carry Guard handgun license was not arbitrary and capricious or an abuse of discretion and had a rational basis (see CPLR 7803[3]; *Matter of Rucker*, 78 AD3d at 535). The License Division reviewed petitioner's application, in accordance with Penal Law § 400.00 and 38 RCNY § 5-10, and determined that in light of the circumstances of his dismissal from the NYPD, petitioner lacked the moral character and fitness required for the issuance of the Carry Business or Carry Guard pistol license. As there was a rational basis for denying petitioner's application for a Carry Business or Carry Guard handgun license, respondents' determination should not be disturbed (see e.g. *Matter of Tolliver v Kelly*, 41 AD3d 156 [1st Dept 2007]).

CONCLUSION

Accordingly, it is

ORDERED that petitioner's Article 78 petition is denied and the proceeding is dismissed,

without costs or disbursements to respondents; it is further,

ORDERED that the respondent the New York City Police Department shall serve a copy of this order, with notice of entry, upon petitioner and upon the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

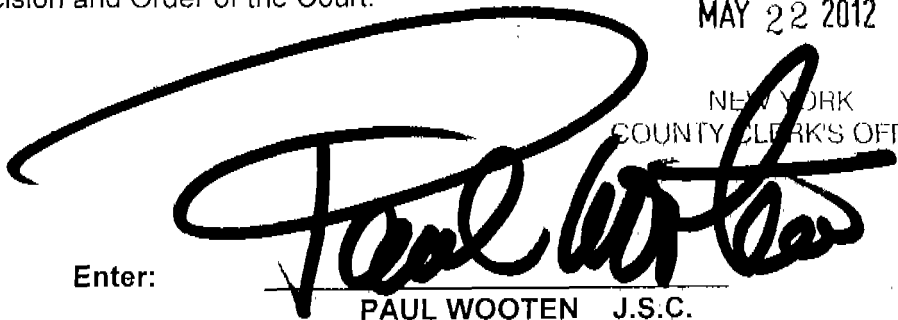
FILED

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NEW YORK
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Dated: 5-14-12

Enter:


PAUL WOOTEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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