

Matter of Caputo v Kelly
2013 NY Slip Op 30068(U)
January 11, 2013
Supreme Court, New York County
Docket Number: 113232/10
Judge: Alice Schlesinger
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

ALICE SCHLESINGER

IA PART 16

PRESENT: _____
Justice

PART _____

Index Number : 113232/2010
CAPUTO, JAMES P.
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 003
RESTORE ACTION TO CALENDAR

INDEX NO. _____
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 28 petition*
is denied and the proceeding is dismissed
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).

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

Dated: JAN 11 2013

Alice Schlesinger
_____, J.S.C.
ALICE SCHLESINGER

- 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

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

JAMES P. CAPUTO, JR.,

Petitioner,

Index No. 113232/10
Motion Seq. No. 003

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

-against-

RAYMOND KELLY, as Police Commissioner of the
City of New York, and His Successors in Office,

Respondent.

-----X
SCHLESINGER, J.:

This Article 78 proceeding brought by James P. Caputo, Jr., who is seeking a restrictive home premise pistol license, has a somewhat extended history, which is recounted in this Court's February 8, 2011 decision and will be summarized and updated here. A copy of the 2011 decision is attached to the Petition as Exhibit A.

Caputo, a former officer with the New York City Police Department (NYPD), first applied for a home pistol license by application dated December 15, 2009. On April 16, 2010, the application was denied based on Caputo's prior arrest record, which included two felonies, one of which was violent. With the assistance of counsel, Caputo filed an administrative appeal. There he explained the circumstances relating to his convictions and also emphasized that he had been awarded a Certificate of Relief from Disabilities by Supreme Court Justice S. Barrett on November 20, 2009. Consistent with Correction Law §753, the Certificate created a presumption of rehabilitation and relieved Mr. Caputo of "all disabilities and bars to employment, excluding the right to be eligible for

public office.” With respect to the most significant conviction, relating to Caputo’s arrest in September 1999 while an NYPD officer, Caputo explained as follows:

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.

On June 24, 2010, the Director of the License Division denied the appeal, pointing solely to the above-described September 17, 2001 felony conviction when Caputo was a member of the NYPD force. The Director indicated in his decision that the conviction and Caputo’s subsequent dismissal from the NYPD demonstrated a “lack of character and fitness for a license to possess firearms.” Caputo then commenced an Article 78 proceeding, which this Court granted by decision dated February 8, 2011 to the extent of remanding the matter for further processing. The Court found that the Director had ignored Caputo’s good record before and after the conviction, which included service in the Marines and with the NYPD, and had also failed to give appropriate significance to the remoteness of the conviction and the Certificate of Relief from Disabilities.

By decision dated July 19, 2011 (Petition, Exh B), Thomas M. Prasso, Director of the NYPD License Division, again denied Caputo’s application. Prasso states in his decision that he reviewed this Court’s 2011 determination and “conducted a more

thorough review of the applicant's character and fitness for a handgun license," including his employment record and the Certificate of Relief from Disabilities. Director Prasso explained the reasons for his denial as follows:

The applicant was convicted of a felony following his plea of guilty in connection with a crime he committed while he was performing his duties as a sworn police officer employed by the City of New York. This conviction led to his automatic dismissal from the Department pursuant to Public Officers Law § 30 (1)(e). Although the conviction occurred in 2001, his behavior constitutes a flagrant violation of his oath of office which strongly reflects a lack of good moral character, a requirement for anyone seeking to be licensed for firearms possession in the State of New York (Penal Law § 400.00 (1)(b)). The Certificate of Relief from Disabilities which he received from the court operates to remove the automatic bar against firearms possession imposed on convicted felons by 18 USC §922 (g)(1); however, it is not a pardon, and does not mandate a licensing authority with discretionary power to issue a license to a person who has received one. (See *Hines v Kelly*, 1995 N.Y App. Div. LEXIS 12867, *motion to appeal denied* by 1996 N.Y. LEXIS 345.) For these reasons, I decline to issue James Caputo, Jr. a handgun license.

This Article 78 proceeding ensued.

Discussion

Caputo argues in his petition that the denial is arbitrary and capricious in that it ignores the fact that the incident occurred thirteen years ago and he has had an unblemished record since that time. According to Caputo, the Licensing Division has given undue weight to the conviction and is biased because the incident occurred while Caputo was employed by NYPD, and the Licensing Division is part of NYPD.

In opposition, respondent emphasizes the limitations on judicial review. Where, as here, the determination is based on an exercise of discretion by the agency that involves factual evaluations in the area of the agency's expertise, as opposed to pure

statutory construction, the courts must defer to the agency if the determination is a reasonable one. *Pell v Board of Educ.*, 34 NY2d 222, 231 (1974); *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355 (1987). The reviewing court "may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated." *Purdy v Kreisberg*, 47 NY2d 354, 358 (1979). With respect to license applications, the courts may not direct that a license be issued unless it appears, "as a matter of law, that no valid ground exists for its denial." *Barton Trucking Corp.*, 7 NY2d 299, 308 (1959), quoting *Matter of Elite Dairy Prods. v Ten Eyck*, 27 NY 488, 493.

Considering the scope of judicial review, this Court declines to annul the agency's determination. No one has an absolute right to a handgun license; an applicant must establish his entitlement to the license by satisfying the various requirements of law. What is more, the agency on remand here indicated that it considered all the relevant factors before reaching its determination, and the determination has a rational basis in the record. Director Prasso in his determination specifically acknowledged that the conviction is a decade old and that Caputo has had a good record since that time. Although this Court might have concluded otherwise, the agency's conclusion that the conviction nevertheless demonstrates a lack of good moral character is not arbitrary and capricious as a matter of law.

Nor did the agency fail to give appropriate consideration to the Certificate of Relief from Disabilities; while the Certificate lifts the absolute bar against licensing, it does not nullify the conviction or nor "prevent respondent from relying on the

convictions in the exercise of his statutory discretion to deny a license for lack of 'good moral character' or 'good cause.'" *Hines v Kelly*, 222 AD2d 277, 278 (1st Dep't 1995), citing Penal Law §400.00(1)(a)(d) and Correction Law § 701(3).

In sum, as in *Hines*, this Court cannot say as a matter of law that there is no rational relationship between petitioner's criminal history and his fitness for the handgun license he seeks. Accordingly, it is hereby

ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed without costs or disbursements. The Clerk may enter judgment accordingly in favor of the respondent.

Dated: January 11, 2013

JAN 11 2013



J.S.C.
ALICE SCHLESINGER