

Matter of Gonzalez v Kelly
2013 NY Slip Op 30435(U)
February 26, 2013
Sup Ct, New York County
Docket Number: 103984/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART 55

FREDDIE GONZALEZ

INDEX NO. 103984/12

-v-

MOTION DATE _____

RAYMOND KELLY, et. al.

MOTION SEQ. NO. 21

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

is decided in accordance with the annexed decision.

FILED

MAR 05 2013

NEW YORK
 COUNTY CLERK'S OFFICE

RECEIVED

FEB 27 2013

MOTION SUPPLY OFFICE
 NYS SUPREME COURT - CIVIL

Dated: 2/26/13

 J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of

FREDDIE GONZALEZ,

Petitioner,

Index No. 103984/12

For a Judgment Pursuant to Article 78 of the
Civil Practice Laws and Rules,

DECISION/ORDER

-against-

RAYMOND KELLY, as the Statutorily Designated
Handgun Licensing Officer, and as the Police
Commissioner of the City of New York, and his
successors in Office, THOMAS M. PRASSO,
Director of the NYPD License Division and the
NEW YORK CITY POLICE DEPARTMENT,

FILED

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Respondents.

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-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

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NYS SUPREME COURT - CIVIL

Petitioner Freddie Gonzalez brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to annul and reverse respondents Raymond Kelly, Thomas Prasso and the New York City Police Department's (hereinafter the "respondents") determination denying petitioner's application for a Premises Residence Handgun License (the "handgun license") and directing respondents to grant petitioner's application for the handgun

license. For the reasons set forth more fully below, the petition is denied.

The relevant facts are as follows. On September 26, 2011, petitioner applied to the NYPD License Division (the "License Division") for a handgun license (the "License Application"). In accordance with the License Division's procedures and as part of its evaluation of the License Application, Investigator Police Officer Oliveras-Diaz ("PO Oliveras-Diaz") conducted an investigation into petitioner's background. In reviewing petitioner's application, PO Oliveras-Diaz discovered four separate arrests of petitioner that occurred on January 17, 1998, December 18, 1999, June 1, 2002 and October 13, 2003. Specifically, on January 17, 1998, petitioner was arrested and charged with violation of Vehicle and Traffic Law ("VTL") § 511.1 for operating a vehicle with a suspended license. On February 23, 1998, petitioner pled guilty to VTL § 509.1 and was sentenced to a \$100 fine which was paid on March 10, 1998. On December 18, 1999, petitioner was arrested again for a violation of Penal Law § 120.15, for menacing in the third degree, and subsequently arraigned and charged with a violation of Penal Law §§ 120.14, for menacing in the second degree with a weapon, and 240.26, for harassment in the second degree with physical contact. On May 17, 2000, the matter was adjourned in contemplation of dismissal pursuant to New York Criminal Procedure Law ("CPL") § 170.55 and on November 16, 2001, the matter was dismissed pursuant to CPL § 170.55. On June 1, 2002, petitioner was arrested and charged with a violation Penal Law § 120.00(1), for assault in the third degree. Although the District Attorney's Office declined to prosecute the case, the petitioner was held on a Criminal Court Warrant from Bronx Criminal Court. On October 13, 2003, petitioner was arrested for assault in the third degree, in violation of Penal Law § 120.00(1). Petitioner was arraigned on the charge of Penal Law § 120.00(1), for assault in the

third degree and intentionally causing physical injury and the related charges of Penal Law §§ 120.(2), for assault in the third degree, recklessly causing physical injury, 265.01, for criminal possession of a weapon in the fourth degree with intent to use and 240.26, for harassment in the second degree with physical contact. On February 17, 2004, petitioner was granted an adjournment in contemplation of dismissal and on August 16, 2004, the matter was dismissed pursuant to CPL § 170.55.

On October 18, 2011, at petitioner's appearance for his application interview, he submitted an addendum to his License Application, signed and notarized on October 1, 2011 (the "Addendum"). In the Addendum, petitioner disclosed his arrests from January 17, 1998 and December 18, 1999. However, petitioner failed to disclose his October 13, 2003 arrest in its entirety and he falsely explained his June 1, 2002 arrest. Petitioner described his June 1, 2002 arrest as follows: "I was given a slop ticket for picking up garbage without the necessary permit. The company I worked for at the time did not have the permit. I paid the summons." However, petitioner failed to disclose that he was also arrested on June 1, 2002 for assault in the third degree in violation of Penal Law § 120.00.

During petitioner's October 18, 2011 interview conducted as part of the application process, petitioner answered "yes" when asked by PO Oliveras-Diaz whether he had ever been arrested. However, petitioner did not provide any additional information than what was included in his License Application and Addendum. Petitioner did not disclose his October 13, 2002 arrest or the actual circumstances of his June 1, 2002 arrest during the interview. After the interview, petitioner was given an opportunity to review the Interview Form in which PO Oliveras-Diaz had recorded petitioner's answers from the interview. After review, petitioner

signed the Interview Form in the space provided for his confirmation of the accuracy of the Interview Form.

On April 27, 2012, based on the investigation, review of the License Application and Addendum and petitioner's interview, PO Oliveras-Diaz recommended disapproval of petitioner's application for a handgun license. The basis of PO Oliveras-Diaz's disapproval was petitioner's arrest history and his failure to fully disclose his arrest history. PO Oliveras-Diaz's recommendation stated, in pertinent part,

Based upon applicant's lack of honesty, and the circumstances surrounding his arrests, grave doubt is cast upon the moral character, lack of good judgment and fitness to possess a Premises Residence License. Applicant has also demonstrated a lack of candor by lying on the notarized statement...

By Notice of Disapproval dated April 27, 2012, the License Division informed petitioner that his License Application was disapproved. The Notice of Disapproval advised petitioner that he could appeal the determination by submitting a sworn statement to the Director of the License Division setting forth the grounds for appeal within thirty days of the date of the notice.

On May 31, 2012, in response to petitioner's attorney's "Request for Clarification & Extension to File Appeal of Freddie Gonzalez Notice of Disapproval #160/12" dated May 19, 2012, the License Division sent petitioner an Amended Notice of Disapproval which outlined the reasons for disapproval and advised petitioner that he could appeal the determination by submitting a sworn statement to the Director of the License Division setting forth the grounds for appeal within thirty days of the date of the Amended Notice. By letter signed by petitioner's attorney and sworn to by petitioner on June 21, 2012, petitioner appealed the License Division's denial of his application. In the appeal, petitioner's attorney argued that petitioner had forgotten

his October 13, 2003 arrest, that the License Division was aware of the arrest and as such should have questioned him about it. According to petitioner's appeal, petitioner's attorney "thoroughly reviewed [her] client's arrest history with him and at that time he remembered the missing Manhattan arrest, was sure that it was dismissed, but was unsure as to the exact time period. Again as it was a job related arrest, he had forgotten about it." Petitioner also failed to explain the circumstances of his June 1, 2002 arrest for assault other than stating it was "an entirely bogus claim" and that the District Attorney declined to prosecute it.

By Notice of Disapproval After Appeal dated July 5, 2012, Thomas Prasso, Director of the License Division ("Director Prasso") denied petitioner's appeal of the License Division's determination. Specifically, Director Prasso stated,

Your arrest history, the circumstances surrounding these arrests, your failure to disclose your full arrest history, and the false statements you made in your notarized addendum were all taken into consideration when making this determination...On your notarized addendum you stated that your June 2002 arrest was the result of your picking up garbage without the necessary permit. NY DCJS...records indicate that this arrest was for an assault...Your arrest history, false statements, and failure to disclose your complete arrest history cast doubt upon your moral character and fitness for a license to possess a handgun.

The Disapproval Notice advised petitioner that he had the right to challenge the denial by filing an Article 78 proceeding within four months from the date of the Disapproval after Appeal. By Notice of Petition filed October 16, 2012 and Verified Petition dated October 9, 2012, petitioner commenced the instant Article 78 proceeding seeking to annul and reverse the License Division's determination denying petitioner's License Application, mandating the issuance of the handgun license to petitioner and awarding petitioner costs, disbursements and attorney's fees.

On review of an Article 78 petition, “[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious.” *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep’t 1982). “In applying the ‘arbitrary and capricious’ standard, a court inquires whether the determination under review had a rational basis.” *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep’t 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974) (“[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.”) “The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.’ Arbitrary action is without sound basis in reason and is generally taken without regard to facts.” *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, this court finds that respondents’ determination denying petitioner’s application for a handgun license was made on a rational basis. Pursuant to 38 RCNY § 5-10, an application for a handgun license may be denied based upon an applicant’s arrest history, false statement(s) on her/his application and any other information that demonstrates an applicant’s “unwillingness to abide by the law, a lack of candor towards lawful authorities, a lack of concern for the safety of oneself and/or other persons and/or for public safety, and/or other good cause for the denial of the license.” 38 RCNY § 5-10(a),(e) and (n). Moreover, the Premises Residence Handgun License Application explicitly warns applicants that “A FALSE STATEMENT SHALL BE GROUNDS FOR DENIAL OF A N.Y.C. HANDGUN LICENSE” and that by signing the application the applicant affirms that “the statements made and answers given herein are accurate

and complete...False written statements in this document are punishable under Section 210.45 of the New York Penal Law.” Pursuant to Penal Law § 400.00(1), applicants for firearms must be of good moral character and concerning whom no good cause exists for the denial of the license.

Respondents’ decision was made on a rational basis as it was based on petitioner’s failure to disclose his October 13, 2003 arrest and the circumstances of his June 1, 2002 arrest in his License Application, Addendum and interview, all of which is undisputed. Further, the fact that petitioner has an arrest history that includes four arrests in approximately four years for assault, menacing, harassment and weapons possession charges, among others things, is certainly relevant to petitioner’s moral character and his application for a handgun license. Thus, it was rational for respondents to deny petitioner’s application for a handgun license on these grounds.

Petitioner’s assertion that his petition should be granted because he merely forgot about the October 13, 2003 arrest and the circumstances of his June 1, 2002 arrest and that PO Oliveras-Diaz was under an affirmative obligation to confront petitioner with his entire arrest history is without merit. It is a petitioner’s obligation to answer truthfully in his application and to disclose his entire arrest history. *See* 38 RCNY § 5-10(a) and (e). Moreover, although the License Division is required to “investigate” the License Application, an investigation of the License Application submitted by petitioner would not involve petitioner’s October 13, 2003 arrest as petitioner failed to include any information about that arrest on the License Application. Further, petitioner’s assertion that his petition should be granted because his arrests were ultimately dismissed is also without merit. As an initial matter, petitioner’s January 17, 1998 arrest was not dismissed as petitioner pled guilty to VTL 509.1 and paid a \$100 fine. Further, the eventual dismissal of an arrest does not make the arrest itself a nullity to the License Division

when determining whether to approve an application for a handgun license. *See* CPL § 160.60.

Thus, the fact that petitioner's three other arrests were eventually dismissed is immaterial as petitioner was still required to disclose all arrest information to the License Division and failed to do so.

Accordingly, petitioner's Article 78 petition is denied in its entirety. This constitutes the decision and order of the court.

Dated: 2/26/13

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J.S.C.

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