

Barrett v O'Neill

2019 NY Slip Op 30497(U)

February 27, 2019

Supreme Court, New York County

Docket Number: 157833/2018

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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RICHARD BARRETT,

Petitioner,

- v -

JAMES O'NEILL, THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT

Respondent.

INDEX NO. 157833/2018

MOTION DATE 08/22/2018

MOTION SEQ. NO. 001

DECISION, ORDER and
JUDGMENT

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15,
38, 39, 40

were read on this proceeding to/for RELIEF UNDER CPLR ART 78

In this CPLR article 78 proceeding, the petitioner, a retired New York City Police
Department (NYPD) officer and disbarred attorney, seeks judicial review of an NYPD
determination revoking his pistol license. The respondent opposes the petition. The petition is
denied.

Upon the petitioner's conviction of and disbarment for misappropriation of escrow funds,
the NYPD first suspended, and then revoked, his Law Enforcement Unlimited Carry Handgun
License. On August 18, 2015, the NYPD sent the petitioner a notice that his carry license had
been suspended pending investigation and directed him to "immediately" surrender his firearms
to a local police station for vouchering. Although the notice was not returned as undeliverable,
the petitioner claimed not to have received it. He admitted receiving a follow-up notice in 2017
revoking his license for his failure to comply with the initial notice. In a final determination dated
April 27, 2018, made after a hearing, the NYPD declined to credit the petitioner's excuse that he
did not receive the 2015 suspension notice, and fully revoked his carry license.

In the first instance, contrary to the respondent's contention, the matter should not be
transferred to the Appellate Division to review whether the determination was supported by

substantial evidence. CPLR 7803(4) authorizes judicial review of “whether a determination made as a result of a hearing held, and at which evidence was taken, *pursuant to direction by law* is, on the entire record, supported by substantial evidence” (emphasis supplied). A transfer under CPLR 7804(g) is warranted only where “the substantial evidence issue specified in question four of section 7803 . . . is raised” (see *Matter of Al Turi Landfill v New York State Dept. of Env'tl. Conservation*, 98 NY2d 758 [2002]). “The possession of a handgun license is a privilege rather than a right” (*Matter of Sewell v City of New York*, 182 AD2d 469, 472 [1st Dept 1992]). Accordingly, “it is well-settled that a formal adversarial hearing is not required before a pistol license is revoked” (*Matter of Gordon v LaCava*, 203 AD2d 290, 290 [2d Dept 1994]; see *Matter of Burke v Colabella*, 113 AD2d 794, 795 [2d Dept 1985]; *Matter of Carroll v Hastings*, 64 AD2d 843 [4th Dept 1978]). With respect to whether the hearing conducted by the NYPD here was one held “pursuant to direction by law,”

“[t]he ‘law’ is found in Penal Law § 400.00 (11) and Administrative Code of the City of New York § 10-131(a)(1). The Penal Law merely prescribes automatic revocation upon the conviction of the licensee of a serious offense. Moreover, in the City of New York the licensing officer is authorized to revoke and cancel licenses at any time. This authority is uncircumscribed. The only statutory duty the official has is to notify various agencies of the revocation without delay. Section 10-131 of the Administrative Code vests in the Police Commissioner of the City of New York the authority to grant licenses under Penal Law § 400.00. The only reference to any hearing whatever is found in section 5-30(h) of the Rules of the Police Department (38 RCNY 5-30[h]): if suspended or revoked, the licensee may submit a written request for a hearing to appeal the decision.”

(*Shapiro v New York City Police Dept.*, 157 Misc 2d 28, 31-32 [Sup Ct, N.Y. County 1993] [S. Crane, J.], *affd* 201 AD2d 333 [1st Dept 1994]). “It would be a mistake . . . to assume from the trappings accorded a hearing by the grace of the licensing authority that it is one given by direction of law . . . Accordingly, no question of substantial evidence is properly raised in a proceeding to review the revocation of a pistol license, and it is not appropriate to transfer the matter to the Appellate Division” (*id.* at 32; see *Matter of McAvoy v Klein*, 117 AD3d 1058 [2d Dept 2014]; *Matter of Beach v Kelly*, 16 Misc 3d 807, 810 [Sup Ct, N.Y. County 2007], *rev'd other grounds* 52 AD3d 436 [1st Dept 2008]). Consequently, the hearing conducted by the

NYPD here was not one “held . . . pursuant to direction by law,” even if it was a hearing “at which evidence was taken” and “[t]he only issue for consideration by the court is whether the administrative decision to revoke petitioner’s pistol license was arbitrary and capricious or an abuse of discretion” (*Matter of Sewell v City of New York*, 182 AD2d at 473). “This conclusion is unaltered by any inadvertent references to the substantial evidence rule in responding papers or in the petition itself” (*Shapiro v New York City Police Dept.*, 157 Misc 2d at 32).

CPLR 7803(3) authorizes the court to review “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” The arbitrary or capricious standard “chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact . . . the proper test is whether there is a rational basis for the administrative orders” (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Here, there is ample basis in the record to support the NYPD’s discretion in revoking the license.

The petitioner did not timely voucher his firearms, as required by the initial suspension letter and 38 RCNY 5-30(f) and did not notify the NYPD’s License Division of his arrest, as required by 38 RCNY 5-22(c)(1) and 5-30(c) (*see Matter of Broadus v. City of New York Police Dept. [License Division]*, 62 AD3d 527 [1st Dept 2009]). Any violation of these rules forms a proper basis for revocation (*see id.*; 38 RCNY 5-21). Even if the court were to assume that the NYPD had actual knowledge of the petitioner’s arrest, thus vitiating his need to report it, the determination to revoke this license would still be rational. There was a factual basis in the administrative record supporting the determination to revoke the license under Penal Law § 400.00(1), based on the petitioner’s lack of good moral character, as demonstrated by his conviction of the misdemeanor of petit larceny, based on his commingling of attorney escrow funds and personal funds (*see Matter of Tolliver v Kelly*, 41 AD3d 156 [1st Dept 2007]; *Matter of*

Fastag v Kerik, 295 AD2d 114 [1st Dept 2002]; *Matter of Sewell v City of New York*, 182 AD2d 469 [1st Dept 1992]).

Accordingly, it is


ORDERED that the petition is denied; and it is

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

2/27/2019

DATE



JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE