

**Matter of MacPherson v City of New York**

2020 NY Slip Op 32078(U)

June 28, 2020

Supreme Court, New York County

Docket Number: 160147/2019

Judge: Eileen A. Rakower

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER**

**PART**

*Justice*

**In the Matter of the Petition of  
*Alan MacPherson,***

**Petitioner,**

**INDEX NO. 160147/2019  
MOTION DATE  
MOTION SEQ. NO.  
MOTION CAL. NO. 1**

**For an Order or Judgment Pursuant to CPLR Article 78,**

- v -

***THE CITY OF NEW YORK, JAMES P. O'NEILL,*  
as Police Commissioner of the City of New York, and  
the Police Department of New York City,**

**Respondents.**

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits

**PAPERS NUMBERED**



**Cross-Motion:    Yes    X No**

Petitioner Alan MacPherson (“Petitioner”), a retired police officer, brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules (“Article 78”), to nullify and vacate the New York City Police Department’s (“NYPD”) June 19, 2019 denial of Petitioner’s “Application for a Retired Officers’ Pistol License.” Respondents, the City of New York, James O’Neill, as Police Commissioner of the City of New York, and the NYPD (collectively, “Respondents”) oppose.

Background/Factual Allegations

Petitioner retired from the NYPD on June 30, 2009 with the rank of Detective Second Grade. (Verified Petition at 5).

Prior to his retirement, in October 2007, Petitioner “sustained a head injury as a result of being ‘headbutted’ by a violent prisoner.” (Verified Petition at 6).

Petitioner suffered a “grand mal seizure” 11 days later. (Verified Petition at 6). In January 2008, Petitioner was put on restricted duty until his retirement in June 2009. (Verified Petition at 7). Between January 2009 and June 2009, Petitioner continued to carry his weapon. (Verified Petition at 8).

On April 16, 2018, Petitioner applied for a “Retired Officer’s Pistol License” from the NYPD’s “License Division.” (Verified Answer at 21; Exhibit C). Petitioner responded to Step 9, question 12 of the application, which asked whether the applicant had “ever had any disability, condition, illness, or impairment that may interfere with his ability to safely possess or use a firearm,” by marking “Yes.” (*Id.*) Petitioner provided documentation from two doctors stating that he had not suffered a seizure in 11 years, that he was taking anti-convulsion medication to keep his seizures under control, and supported his carrying of a firearm. (Verified Answer, Exhibit C).

Petitioner, in response to a form asking if his “firearm(s) had every been removed from him or surrendered for any reason throughout his law enforcement career,” marked “yes.” *See id.* Petitioner explained:

On 10-29-2007 while working in the 15th Precinct Detective Squad I suffered a seizure from a line of duty injury which occurred on 10-18-2007 and is carried under LOD# 7142. When I put in my papers for retirement I was contacted by Capt. James Donnelly from the NYPD Medical Division who told me that I had to have my Identification Card stamped “No Firearms.” On 5-28-2009 the Medical Division contacted the 115 Precinct where I was told that I had to voucher my firearms. I officially retired on 06-30-2009. (*See id.*)

By Notice of Disapproval dated August 23, 2018, the License Division notified Petitioner that his application was disproved. The Notice of Disapproval states, in relevant part:

Your application for Handgun License has been DISAPPROVED for the following reasons:

1). As part of an application for an Unrestricted Carry License retiree process, it is required to submit a letter from their agency indicating they have left in good

standing, otherwise known as a “good guy” letter, in which the NYPD must verify that the applicant:

- a. has no record of mental illness and is presently authorized to carry firearms;
- b. is not presently under investigation which would preclude the issuance of a pistol license
- c. Has no disciplinary action pending

2). your retired ID with no restrictions.

The applicant has a retired ID with restriction indication “No Firearms” and was unable to submit the required document from his agency describe[sic] above, therefore his application to be granted an Unrestricted Carry License has been recommended for DISAPPROVAL. (Verified Answer, Exhibit D.)

On March 21, 2019, Petitioner appealed the License Division’s denial of his application for a pistol license. (Verified Answer, Exhibit F).

By Notice of Disapproval After Appeal, on June 19, 2019, Petitioner was informed that his appeal of the License Division’s denial of his application for a pistol license was denied. (Verified Answer, Exhibit I). The Notice of Approval After Appeal states, in relevant part:

Mr. MacPherson retired as a uniform member of service from the NYPD in June 2009. Upon retirement, he received an Identification Card, which was stamped “No Firearms.” Upon his 2018 application for a retired law enforcement officer handgun license, he failed to provide a “Pistol License Inquiry Response” form, also known as a “good guy letter.” Pursuant to Department policy, as delineated in the Patrol Guide, a “good guy letter” and an Identification Card that is not stamped “No Firearms” are required in order to receive a retired officer handgun license. As such, Mr. MacPherson’s failure to provide a “good guy letter” and a proper ID card to License Division as part of his application is, by itself, a sufficient ground to deny a retired law enforcement officer handgun license.

Further, as noted in documents submitted with your appeal, by Dr. Shieong Ye of Winthrop Neuroscience Associates, Mr. MacPherson is currently taking seizure medication, to wit: Keppra 1500 mg. “He is taking medication that is controlling his seizure.” Based on the information provided, a safety issue arises in possessing a firearm if Mr. MacPherson fails to take his seizure medication, as directed. As such, this is another denial ground of his handgun license. (Verified Answer, Exhibit I).

On October 18, 2018 Petitioner commenced this Article 78 proceeding. On December 10, 2018, Petitioner filed a FOIL request with the NYPD Legal Bureau seeking his Pistol License Inquiry Response. Petitioner states that he received copies of his records and states that “[t]here was no ‘good guy’ letter in the file, and no explanation for its absence.” (Verified Petition at 13).

#### Parties’ Contentions

Petitioner contends that Respondents’ denial of his application for a pistol license based on his seizure history is “contrary to law, and hence arbitrary and capricious.” Petitioner contends that the denial is “violative of federal law (Americans With Disabilities Act, 42 U.S.C. 1202(1)), the State Human Rights Law Section 292(21), and the New York City Human Rights Law (Administrative Code Section 8-102).” Petitioner also contends that the denial violates his Second Amendment rights.

Respondents argue that there was a rational basis for their decision. Respondents contend that the arbitrary and capricious standard is a very stringent standard and gives extreme deference to the agency making a decision. Respondents cite the relevant statutes and rules regarding retired officers pistol licenses, stating, “Pursuant to Section 10-131 of the New York City Administrative Code (‘Administrative Code’) and Penal Law Section 400.00, the Police Commissioner has full authority to grant or deny firearm permits.”

Respondents contend that in order to receive a Retired Officer’s Pistol License as per the New York Police Department Patrol Guide (“Patrol Guide”) §255-44, the applicant must comply with the following:

Report to Pistol License Section, Police Headquarters with the following documents:

- a. PISTOL LICENSE APPLICATIONS and photographs
- b. Fingerprint forms
- c. Certificate of Service
- d. Money Order
- e. Copy of PROPERTY CLERK INVOICE (PD521-141) if firearms are in custody of Property Clerk. (Verified Answer, Exhibit A.)

Respondents state that Petitioner did not provide a Certificate of Service and therefore failed to comply with the requirements. Respondents argue that while Petitioner's seizure condition was a factor in not granting him a Retired Officer's Pistol License, it is only secondary to him failing to meet the requirements listed in the Patrol Guide, namely his failure to produce a proper identification and a Certificate of Service or "Good Guy Letter."

Further, Respondents argue that a court may overturn an administrative action only if the record reveals no rational basis for it and this denial based on the Patrol Guide is not in violation of lawful procedure, in excess of jurisdiction, or an abuse of discretion and that Petitioner's Police identification card stamped with "no firearms" provides a rational basis to deny his application.

Respondents further argue that mandamus relief may not be sought under the circumstances. Respondents maintains that mandamus is an extraordinary remedy used to compel performance and is "available only where there is a clear and absolute right to the relief sought, and the body or officer whose duty it is to enforce such right has refused to perform such duty." Respondents argue that in the case at bar, Petitioner is seeking to compel administrative officials to exercise their discretion in a particular manner and there is no absolute right to such relief.

Respondents argue that the License Division was not required to grant Petitioner's application for a Retired Police Officer pistol license since: (1) Petitioner failed to submit a Certificate of Service/Good Guy letter, as is required by Section 205-44 of the Patrol Guide; and (2) Petitioner's NYPD Identification card states "No Firearms." Respondents argue that Petitioner is asking the NYPD to waive application of its rules with respect to Petitioner's request for an order directing Respondents to issue him a new NYPD Identification Card. Respondents argue that the NYPD cannot be compelled to perform a discretionary act (namely-issue Petitioner a Retired Police Officer's pistol license). Further, Respondents

points out that Petitioner has not exhausted all administrative remedies as he has not challenged the “No Firearms” designation on his identification card.

### Legal Standard

“In a proceeding under N.Y. C.P.L.R. art. 78, neither the New York Appellate Division nor the New York Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence.” *Matter of Pell v. Board of Education*, 34 NY2d 222, 231 (1974). “The courts cannot interfere unless there is no rational basis for the exercise of discretion, or the action complained of is arbitrary and capricious. *Matter of Pell*, 34 NY2d at 231. “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.” *Id.*

“New York courts have upheld the constitutionality of the City’s licensing scheme under the Second Amendment.” *Matter of Knight v Bratton*, 48 Misc 3d 536, 540 [Sup Ct 2015]. The First Department has held that “[t]he licensing scheme at issue satisfies the requisite constitutional standard, intermediate scrutiny, as it serves a governmental interest in maintaining public safety.” *Delgado v Kelly*, 127 AD3d 644, 644 [1st Dept 2015]. “Because the issuance of a license is an exercise of discretion, there is no property interest in the renewal of an expired license and no constitutional due process right to a hearing.” *Testwell, Inc.*, 80 AD3d 266, 274 (1st Dept 2010).

### Discussion

Here, Petitioner failed to meet two of the Patrol Guide requirements for obtaining a license. First, Petitioner failed to submit a Certificate of Service/Good Guy letter as is required by Section 205-44 of the Patrol Guide. Secondly, Petitioner submitted a NYPD identification card that was marked “No Firearms” which also made him ineligible. 38 RCNY § 5-02(e) states a license cannot be granted if one was previously revoked. Respondents followed both statutory and department guidelines to reach their decision in denying Petitioner’s application for a pistol license. (Verified Answer, Exhibit A)

The record here demonstrates that there exists a rational basis for the License Division’s denial of Petitioner’s application as he has failed to meet the threshold requirements for a Retired Officer’s Pistol License. Further, on appeal,

the agency expressed concerns about Petitioner's medication. Where an agency's deliberations are rational, as here, the Court will not interfere with the agency's decision.

Petitioner argues the ruling in *Pesce v. New York City Police Department* where a plaintiff with a seizure condition sued the NYPD over its policy regarding applicants with seizure conditions substantiates his claim that the Licensed Division's decision to deny his application because of his seizure condition was arbitrary and capricious and should be overturned. (Verified Petition at 16). However, in *Pesce*, the plaintiff was applying to become a police officer, not for a pistol license. *Pesce v. New York City Police Department*, 159 F.Supp 3d 448 (S.D.N.Y. 2016). The NYPD's policy regarding applicants who suffered from seizure conditions was the issue at bar, not whether or not the plaintiff could have a pistol license. *Pesce*, 159 F.Supp 3d at 451.

Further, while the Second Amendment "confers a constitutionally protected individual right to keep and bear arms as a means of self-defense within the home," the Supreme Court has "also held that the right conferred by the Second Amendment ... is not absolute and may be limited by reasonable governmental restrictions." *People v Perkins*, 62 AD3d 1160, 1161 [3d Dept 2009] (citing to *District of Columbia v Heller*, 128 S. Ct. 2783 at 2816 [2008]).

Petitioner requests mandamus as relief. Mandamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought. *Klostermann v. Cuomo*, 61 NY2d 525 (N.Y. 1984). While mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion. *Klostermann*, 61 NY2d at 525. Here, the License Division made a discretionary ruling regarding Petitioner's fitness for a pistol license. Petitioner did not meet the required threshold for a Retired Officers Pistol license and therefore Petitioner cannot establish a clear right to relief.

Accordingly, Petitioner fails to meet his burden of demonstrating that the License Division's determination should be disturbed by the Court.

Wherefore it is hereby

ORDERED that the Petition is denied; and it is further

ORDERED that the Petition is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order, along with notice of entry on all parties within 15 days of entry.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

**Dated: June 28, 2020**

ENTER:   
\_\_\_\_\_ J.S.C.

**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION