

**Morse v Shea**

2021 NY Slip Op 30630(U)

March 3, 2021

Supreme Court, New York County

Docket Number: 157936/2020

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM**

*Justice*

-----X

JONATHAN MORSE,

Plaintiff,

- v -

DERMOT SHEA, MICHAEL BARETTO, JONATHAN DAVID,  
NEW YORK CITY POLICE DEPARTMENT, THE CITY OF  
NEW YORK

Defendant.

-----X

INDEX NO. 157936/2020  
MOTION DATE 09/26/2020  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Jonathan Morse (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

In this Article 78 proceeding, petitioner Jonathan Morse (Morse) seeks an order to vacate a determination of the license division (LD) of the respondent New York City Police Department (NYPD) as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied, and this proceeding is dismissed.

#### FACTS

On June 20, 2019, Morse submitted an application to the LD for a “Rifle/Shotgun” permit. *See* verified answer, ¶ 72; exhibit A. On March 19, 2019, Morse was involved in an automobile-related incident in which NYPD officers removed from the scene and transported him to the psychiatric emergency room of Long Island Jewish Medical Center, where he was admitted and briefly held for psychiatric evaluation. *Id.*, ¶ 73; exhibit C. On February 6, 2020, the LD issued a “Notice of Application Disapproval” that denied Morse’s rifle/shotgun permit application (the denial). *Id.*, ¶ 76; exhibit B. On February 14, 2020, Morse submitted an appeal of his application disapproval to the LD. *Id.*, ¶ 78; exhibit C. On May 26, 2020, issued Morse a “Notice of Disapproval After Appeal” that upheld the original denial (the appeal denial). *Id.*, ¶ 79; exhibit D. The relevant portion of the LD’s appeal denial stated as follows:

“Pursuant to §§10-303 (a) (2) and (9) of the New York City Administrative Code, an application for a Rifle/Shotgun permit may be denied when an applicant is not of good moral character, and/or when good cause exists for the denial of the permit. Title 38 of the Rules of the City of New York (RCNY), §3-03, provides a list of what shall be considered in assessing moral character and whether good cause exists for a denial.

“As stated in 38 RCNY §3-03(n), an applicant can be denied a Rifle/Shotgun permit if there is good cause to do so. Here, you were in violation of NY Administrative Code § 10-303 as you were in possession of six rifle/shotguns without an active permit (note - This ground of disapproval was not one of the grounds listed In the February 6, 2020 Notice of Disapproval. If you choose to, you have thirty (30) days from the date of this letter to provide a written statement to the License Division addressing this new ground of disapproval). You had a Rifle Shotgun permit under Permit # 656692, which expired on August 31, 2018. There were five rifle/shotguns listed under that permit, which are as follows: 1) .22 caliber 995 Marlin serial #10348349; 2) .22 caliber Survival Hemy serial # US22588; 3) 12 caliber 870 Marine Remington serial # D512839M; 4) .22

caliber XXII Weatherby serial #11457; and 5) 12 caliber 500 Flex Mossberg serial #U640763.

“On March 19, 2019, you were involved in an incident which required your removal from the scene to a local hospital for a psychiatric evaluation. While in the Emergency Room, you notified authorities that there were guns at your residence. The Rifle/Shotgun unit of the License Division was notified and went to your residence to retrieve all guns. The aforementioned five rifle/shotguns were retrieved as well as a sixth rifle/shotgun not previously listed on your expired permit - a 12 caliber Toppe HR serial #HE298894.

“As delineated in N.Y. Administrative Code §10-303, it ‘shall be unlawful for any person to have in his or her possession any rifle or shotgun unless said person is the holder of a permit for the possession...of rifles and shotguns.’ Here, your permit under #656692 expired on August 31, 2018. From August 31, 2018 until the March 19, 2019 incident, you were in possession of six rifle/shotguns without an active permit. Further, the Toppe HR rifle was not listed on your permit at all. Your illegal possession of these six rifle/shotguns evidences your disregard for the law and complete inability to follow the rules. In your appeal, you stated that you have ‘owned guns dating back 30 years.’ Therefore, you were completely aware that you needed a valid permit to possess such guns but failed to do so. You were also aware of the responsibilities of possessing these guns but failed to fulfill these responsibilities. In fact, your possession of a sixth rifle/shotgun not listed on your old permit was another violation of the rules.

“Your current June 20, 2019 application for a new Rifle/Shotgun permit does not mitigate the fact that you did not have a valid permit at the time that six rifle/shotguns were retrieved from your residence in March 2019.

“In light of these circumstances, the License Division determined that you do not display the ability to abide by the rules set forth for gun possession and therefore your appeal is denied.”

*Id.*, exhibit D.

Aggrieved, Morse then commenced this Article 78 proceeding on June 4, 2020. *See* verified petition. On June 24, 2020 Morse’s counsel responded to the foregoing findings in a letter which averred that: 1) Morse encountered difficulties in obtaining the new type of proof of residence that the LD now requires, which prevented him from meeting the August 31, 2018 permit renewal deadline; and 2) LD clerical error was to blame for the omission of Morse’s Toppe HR rifle from the list of firearms on Morse’s permit. *See* verified answer; exhibit E. The NYPD eventually filed an answer on November 20, 2020. *See* verified answer. This matter is now fully submitted (motion sequence number 001).

#### DISCUSSION

The Appellate Division, First Department recognizes that possession of a firearms license is a privilege, not a right, and as such, it is subject to the broad discretion of the Police Commissioner. *See e.g., Matter of Campbell v Kelly*, 85 AD3d 446, 446 (1<sup>st</sup> Dept 2011); citing *Matter of Tolliver v Kelly*, 41 AD3d 156, 158 (1<sup>st</sup> Dept 2007). The Second Department recently reiterated that, under New York's firearms licensing regime:

“A pistol licensing officer has broad discretion in ruling on permit applications and may deny an application for any good cause. Where an applicant challenges a determination that either revokes a firearm license or denies an application for a firearm license, the court can only review whether a rational basis exists for the licensing authority's determination, or whether the determination is arbitrary or capricious.” *Matter of Harrison v Warhit*, 190 AD3d 735, 736 (2d Dept 2021) (internal quotation marks and citations omitted). A reviewing court's role in any Article 78 proceeding is to determine, upon the facts before an administrative agency, whether the agency's determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1<sup>st</sup> Dept 1996). The court will only find an agency's determination to be arbitrary and capricious if it is “without sound basis in reason, and in disregard of the [facts].” *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the agency's determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

The rifle/shotgun licensing procedures applicable in New York City are drawn from Penal Law § 400.00, the relevant portion of which provides as follows:

“No license shall be issued or renewed pursuant to this section except by the licensing officer, and then *only after investigation and finding that all statements in a proper application for a license are true*. No license shall be issued or renewed except for an applicant . . . (b) *of good moral character*; . . . and (n) concerning whom no good cause exists for the denial of the license.”

Penal Law § 400.00 (1) (emphasis added). New York City Administrative Code § 10-303, the regulation which governs “permits for possession and purchase of rifles and shotguns,” further provides that:

“It shall be unlawful to dispose of any rifle or shotgun to any person unless said person is the holder of a permit for possession and purchase of rifles and shotguns; it shall be unlawful for any person to have in his or her possession any rifle or shotgun unless said person is the holder of a permit for the possession and purchase of rifles and shotguns.

\* \* \*

“a. Requirements. No person shall be denied a permit to purchase and possess a rifle or shotgun unless the applicant:

\* \* \*

“(2) is not of good moral character; or

\* \* \*

“(9) unless good cause exists for the denial of the permit.”

NYC Admin Code § 10-303. Finally, 38 NYCRR § 3-03, entitled “Grounds for Denial of Permit” provides that:

“In addition to other bases for disqualification pursuant to federal, state, and local law and this chapter, an application for a rifle/shotgun permit may be denied where it is determined that an applicant lacks good moral character or that other good cause exists for denial, pursuant to section 10-303 of the Administrative Code of the City of New York. Such a determination shall be made based upon consideration of the following factors:

\* \* \*

“(e) The applicant made a false statement on her/his application . . .

\* \* \*

“(i) The applicant has failed to comply with federal, state or local law or with Police Department rules governing possession and use of handguns, rifles, shotguns or ammunition.

\* \* \*

“(n) Other information demonstrates an 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 permit.

“In evaluating incidents or circumstances pursuant to this section, the License Division shall consider all relevant factors, including but not limited to the number, recency and severity of incidents and the outcome of any judicial or administrative proceedings.”

38 NYCRR § 3-03.

Here, the LD's May 26, 2020 appeal denial found that Morse was "not of good moral character, and/or [that] good cause exists for the denial of the permit" pursuant to NYC Admin Code § 10-303. *See* verified answer, exhibit D. The LD based this finding on the evidence that:

"Here, your permit under #656692 expired on August 31, 2018. From August 31, 2018 until the March 19, 2019 incident, you were in possession of six rifle/shotguns without an active permit. Further, the Toppe HR rifle was not listed on your permit at all.

"Your illegal possession of these six rifle/shotgun evidences your disregard for the law and complete inability to follow the rules. In your appeal, you stated that you have 'owned guns dating back 30 years.' Therefore, you were completely aware that you needed a valid permit to possess such guns but failed to do so. You were also aware of the responsibilities of possessing these guns but failed to fulfill these responsibilities. In fact, your possession of a sixth rifle/shotgun not listed on your old permit was another violation of the rules."

*Id.*, exhibit D. Morse initially responded to these findings in the June 24, 2020 letter. *Id.*, exhibit

E. The LD argues that its appeal denial was rationally based, and that its finding that Morse's actions evinces lack of good moral character deserve deference. *See* respondents' mem of law at 7-10. The court agrees. Firstly, the expiration date of Morse's rifle/shotgun permit and the absence of his Toppe HR rifle from that permit are troubling, and Morse has not identified any evidence to contradict or explain those deficiencies. Secondly, the First Department has squarely recognized that continuing to possess firearms after their permit has expired is evidence of lack of good moral character that justifies denying a subsequent application. *See Matter of Ullah v Kelly*, 29 AD3d 432 (1<sup>st</sup> Dept 2006). Therefore, the court finds that the LD's decision to deny Morse's rifle/shotgun permit application on the grounds of lack of good moral character was rationally based on the administrative record. Morse's petition nevertheless raises three arguments that the LD's findings were arbitrary and capricious.

Morse's first argument, which he styles as a "cause of action for relief under Article 78," asserts that "respondents acted arbitrarily and capriciously" by "fail[ing] to exercise appropriate

investigatory and/or oversight” functions, which would have disclosed that he “did not have a psychiatric episode or history.” *See* verified petition, ¶¶ 41-49. However, it is plain that the LD’s May 26, 2020 appeal denial was based solely on the finding that Morse lacked good moral character, as evidenced by his possession of unlicensed firearms and/or firearms with an expired license. *See* verified answer, exhibit D. The appeal denial did not mention Morse’s psychiatric admission at all. Therefore, the court rejects Morse’s first argument as inapposite to the challenged LD ruling.

Morse’s second argument, which he styles as a “cause of action for declaratory relief under CPLR Article 30,” requests the court to find that the LD’s “rifle/shotgun licensing system as applied to Petitioner violates the New York State and United States Constitutions.” *See* verified petition, ¶¶ 50-55. However, the United States Court of Appeals for the Second Circuit has already considered and rejected the argument that a denial of a firearms permit based on a violation of the “good moral character” requirement in New York’s licensing regime is unconstitutional. *See Libertarian Party of Erie County v Cuomo*, 970 F3d 106 (2d Cir 2020). Further, the LD correctly notes that, although “a court has a broader power to grant a declaratory judgment than it does in a proceeding pursuant to CPLR article 78 . . . ‘[a]s a general rule, a court should not entertain an action for declaratory judgment where there is no necessity for doing so.’” *See Holtzman v Supreme Ct. of State of N.Y.*, 152 AD2d 724, 725 (2d Dept 1989), quoting *Elmsford Props. Corp. v Daitch Crystal Dairies*, 13 AD2d 1026 (2d Dept 1961). Here, there is no need to consider Morse’s request for declaratory relief, since New York’s firearms licensing regime specifically provides for the appeal of LD permit application denials through Article 78 proceedings. Penal Law § 400.00 (5) (6). Therefore, the court rejects Morse’s second argument.

Morse’s third argument, which he styles as a “cause of action for violation of the Second and Fourth Amendments,” has also been considered and rejected by the Second Circuit. *See* verified petition, ¶¶ 56-59; *Libertarian Party of Erie County v Cuomo*, 970 F3d at 106; *see also Matter of Delgado v Kelly*, 127 AD3d 644 (1<sup>st</sup> Dept 2015). Therefore, this court rejects it as well.

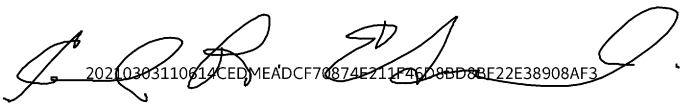
Finally, as regards the arguments in Morse’s June 24, 2020 letter, the court notes he has failed to present any evidence to support his conclusory and self-serving assertions that he had difficulty in obtaining proof of his residency and that the omission of the Toppe HR rifle from his permit was due to the LD’s own clerical error. *See* verified answer, exhibit E. Therefore, there is nothing in the administrative record to contradict the LD’s finding regarding Morse’s expired rifle/shotgun permit, and the court rejects his argument.

As a result of the foregoing, the court concludes that Morse has failed to meet his burden of proving that the LD’s appeal denial was an arbitrary and capricious ruling. Accordingly, the court finds that Morse’s Article 78 petition should be denied as meritless.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby  
 ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Jonathan Morse (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



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 CAROL R. EDMOAD, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE