

Anderson v New York City, N.Y.

2023 NY Slip Op 30248(U)

January 25, 2023

Supreme Court, New York County

Docket Number: Index No. 152782/2021

Judge: Frank P. Nervo

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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. FRANK P. NERVO PART 04

Justice

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ANDRE ANDERSON,

Plaintiff,

- v -

NEW YORK CITY, NEW YORK, NEW YORK CITY
DEPARTMENT OF CORRECTION, SARENA TOWNSEND,
RUBEN BENITEZ

Defendant.

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INDEX NO. 152782/2021

MOTION DATE 03/19/2021

MOTION SEQ. NO. 001

**DECISION AND ORDER UPON
REHEARING FOLLOWING
ANSWER AND REPLY**

By Interim Order on respondents’ cross-motion (see November 16, 2022, Interim Order, NYSCEF Doc. No. 47), and following oral argument on the petition and cross-motion, the Court denied dismissal of the petition and directed that respondents file an answer, and the matter be re-heard on paper submissions. Upon consideration of respondents’ answer and petitioner’s reply, the Court issues the following Decision and Order.

The facts underlying this petition are not in dispute, and the interested reader is referred to the Court’s Interim Order of November 16, 2022, more fully outlining same (*id.*). Briefly, and as relevant here, petitioner, a Correction Officer, had his firearm privileges suspended and his weapon confiscated by respondents following an off-duty incident where petitioner detained a fleeing motorist involved in several hit-and-run accidents until police arrived.

Notably, petitioner's firearm privileges were suspended by respondents *solely* pending psychological evaluation and clearance (NYSCEF Doc. No. 11). The next day, petitioner underwent a psychological evaluation by respondent's own psychologist, Dr. Cope, and was cleared to return to full duty – including firearm privileges (NYSCEF Doc. No. 10). Thereafter, an independent psychologist, Dr. Bryant, also cleared petitioner to return to full duty – including firearm privileges, reporting that petitioner was “free from any mental disorder, personality disorder or substance use disorder that would interfere with his ability to possess and safely handle firearms” (NYSCEF Doc. No. 12). Dr. Cope then performed the third psychological review of petitioner, and again cleared petitioner to return to full duty with firearm privileges (NYSCEF Doc. No. 13). Notwithstanding three separate psychological evaluations, by both independent and respondent's own psychologists in which petitioner was cleared to have firearm privileges, respondents failed to return petitioner's firearm or firearm privileges.

The standard of review of an agency determination via an Article 78 proceeding is well established. The Court must determine whether there is a rational basis for the agency determination or whether the determination is arbitrary and capricious (*Matter of Gilman v. New York State Div. of Housing and*

Community Renewal, 99 NY2d 144 [2002]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Peckham v. Calogero*, 12 NY3d 424 [2009]; see also *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]). When an agency determination is supported by a rational basis, this Court must sustain the determination, notwithstanding that the Court would reach a different result than that of the agency (*Peckham v. Calogero*, 12 NY2d at 431).

Here, it is inescapable that respondents’ failure to return petitioner’s firearm and firearm privileges is arbitrary and capricious. Respondents are bound by their notice of revocation of petitioner’s firearm privileges which solely predicated revocation upon psychological fitness grounds. Petitioner was, thereafter, thrice psychologically cleared for firearm privileges, by both independent and respondent’s own psychologists. Notwithstanding being found psychologically fit to carry his on-duty firearm, petitioner’s firearm and firearm privileges were not restored by respondents. Instead, respondents claim an independent basis – not identified in the notice of revocation – to support their continued confiscation of petitioner’s firearm. This *post hoc* justification is arbitrary and capricious (see *New York State Chapter, Inc. v. New York State*

Thruway Authority, infra; L & M Bus Corp. v. New York City Dept. of Educ., infra).

Stated simply, although respondents revoked petitioner's firearm privileges for psychological reasons, three psychological examinations found petitioner psychologically fit; consequently, continued revocation of petitioner's firearm privileges has no sound basis in reason.

To the extent that respondents contend that continued revocation of petitioner's firearm privileges is nevertheless warranted due to his failure to surrender a weapon used for his duties as a National Guardsman with the United States Army at the time his Correction Officer firearm was confiscated by the notice of revocation at issue here, same is entirely without merit. The firearm used by petitioner as a National Guardsman is the subject of a separate federal action, raising Constitutional claims,¹ and is not properly the subject of this Article 78 state court action (NYSCEF Doc. No. 47). The instant action addresses respondents' revocation of petitioner's on-duty firearm utilized as a Correction Officer under Article 78, therefore, petitioner's National Guardsman weapon is not at issue here. In any event, and as an interesting aside, the United States Department of the Army has sought the immediate

¹ Consequently, as the claims at issue here and in the federal action are premised upon different legal theories, collateral estoppel is inapplicable, and respondents' contention otherwise flatly rejected.

return of petitioner's National Guardsman weapon from respondents
(NYSCEF Doc. No. 82).

When faced with complete dearth of any evidence supporting their revocation on psychological grounds, respondents now claim revocation on a new basis, the failure to surrender petitioner's National Guardsman firearm, a basis not identified in the notice of revocation. It is beyond cavil that respondents' *post hoc* justification for revocation raises serious due-process concerns; and is, at best, inappropriate (*see e.g. New York State Chapter, Inc. v. New York State Thruway Authority*, 88 NY2d 56 at 75 [1996] [agency justification limited to that proffered at time of agency action]; *L & M Bus Corp. v. New York City Dept. of Educ.*, 71 AD3d 127 [1st Dept 2007] [*post hac* agency justification improper]). Indeed, the appearance of scienter motivating respondents' continued revocation of petitioner's firearm privileges is manifest and inescapable given respondents' shifting justifications for revocation once indisputable proof disproves their initial justification for revocation. Accordingly, respondents' continued revocation and *post hoc* justification for same amounts to a textbook example of arbitrary and capricious agency action.
[continued on following page]

It is, therefore,

ORDERED that following oral argument, post-argument briefing, and rehearing following respondents' answer and petitioner's reply, the petition is **GRANTED** in its entirety; and it is further

ORDERED that respondent City of New York and Department of Correction shall, within five (5) days of this order, return petitioner's on-duty Glock firearm and restore petitioner to full-duty status, with all concomitant firearm privileges; and it is further

ORDERED that failure to comply with this order may result in sanctions, including but not limited to a finding of contempt, in the Court's discretion; and it is further

ORDERED that any requested relief requested herein not expressly addressed by the Court has nevertheless been considered and is hereby denied; and it is further

[continued on following page]

ORDERED that the matter shall be marked disposed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

1/25/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN



HON. FRANK P. NERVO

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE