

Matter of Thau v Kelly
2005 NY Slip Op 30552(U)
November 29, 2005
Supreme Court, New York County
Docket Number: 106621/05
Judge: Lewis Bart Stone
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

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In the Matter of the Renewal License Application of :
ALAN. F. THAU, :

Petitioner, : DECISION AND
: ORDER

For a Judgment Pursuant to Article 78 of the :
Civil Practice Law and Rules Granting Petitioner : Index Number
a Renewal Pistol License, : 106621/05

-against

RAYMOND KELLY, as Commissioner of the City of :
New York and his successors in office, :

Respondent. :

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For Respondent: Melanie Sadok, Corporation Counsel

For Petitioner: Pro Se

Hon. Lewis Bart Stone, J.

Alan F. Thau ("Thau"), an attorney at law of the State of New York, commenced this proceeding pro se, under Article 78 of the Civil Practice Law and Rules ("CPLR") to review a decision of respondent Raymond Kelly, as Police Commissioner of the City of New York ("NYPD"), which denied Thau's application to renew his pistol carry permit, on the grounds that such denial was arbitrary and capricious.

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New York Penal Law, Article 4 and New York City Administrative Code (“Code”), Section 10.131, authorizes NYPD to grant licenses for keeping and carrying guns. Title 38 of the Rules of the City of New York (“Rules”) detail the rules of NYPD pertaining to licensing. There are a number of different types of gun licenses issued by NYPD under this statutory scheme, which licenses relate to different gun uses and conditions. The license at issue here is known as a “concealed carry license,” as described in Penal Law §400.00(2)(f) (“have and carry concealed, without regard to employment or place of possession by any person, when proper cause exists for the issuance thereof”). The standards to be applied by NYPD under this provision, are spelled out in 88 RCNY §§5-02 and 5-03, which place the burden of proof upon the applicant to show proper cause. Under §5-03(a), proper cause may be established by showing that the applicant, in connection with his business activities, “routinely engages in transactions involving substantial amounts of cash...In these instances, the applicant shall furnish documentary proof...that he routinely engages in such transactions.”

Thau is a criminal defense lawyer who receives his fees in cash. He has previously held a concealed carry permit, which has been renewed eleven times. As a result of financial problems of recent date he no longer maintains a bank account, but conducts his affairs in cash. This change occurred since his last license renewal.

On the initial return of this petition, the Court attempted to ascertain whether NYPD had seized upon Thau's lack of a bank account as the reason for denial, or whether there was another basis. The NYPD agreed to reconsider Thau's diary entries and other material to be submitted by Thau to establish his need for a license, but subsequently reiterated its decision.

Based on the final record, including the hearing on this motion, this Court finds that NYPD's decision not to renew Thau's license was not arbitrary and capricious. Thau's present law practice is not large, and at best, showed only a few cash fees paid in any month. Further, the records submitted by Thau, initially, and later for reconsideration, were a mess. While Thau protests to this Court that NYPD improperly interpreted his less than clear diary entries, (and they may have), the burden was on Thau as the applicant under RCNY §5-03(a) to show proper cause.

The Rules make it clear that a proper cause for a permit requires a showing of a "routine engagement in transactions involving substantial amounts of cash." [Emphasis added]. NYPD has the initial responsibility to apply such standards. A few payments each month, at best and perhaps \$11,000 to 12,000 in a month does not, per se, constitute a routine engagement in transactions involving substantial cash payments, nor does the record show that other applicants with such intermittent receipts or fewer and such volume of cash or less were granted licenses. Accordingly, on such record, this Court cannot find the decision of NYPD to have been arbitrary

or capricious.

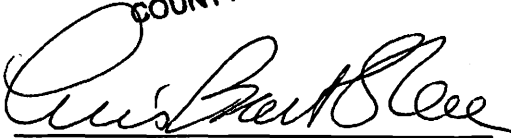
Thau has argued at length as to a somewhat testy series of communications with NYPD personnel involving his application. However, these communications do not change the outcome of this proceeding as this proceeding may only include a review of the record of the licensing determination, and the person who made the determination was not one of the personnel involved in the alleged communications. This petition was submitted to this Court under CPLR §7803(3). While a petitioner could, under a different portion of Article 78, challenge a determination on the grounds that it was not supported by substantial evidence on the record (See CPLR §7803(4)), Thau did not do so. Had he done so, this Court would have been required, in any event, to forthwith the matter to the Appellate Division for its review. Thus, before this Court is solely the question as to whether the NYPD decision was arbitrary or capricious, and not whether it is supported by substantial evidence, and as set forth above, this Court has found that it was not arbitrary or capricious.

The petition is dismissed.

This is the Decision and Order of the Court.

DATED: NOVEMBER 29, 2005
NEW YORK, NEW YORK

FILED
DEC - 9 2005
NEW YORK
COUNTY CLERK'S OFFICE



Hon. Lewis Bart Stone
Justice of the Supreme Court