

Matter of Acosta v Kelly
2005 NY Slip Op 30488(U)
April 5, 2005
Sup Ct, NY County
Docket Number: 101573/04
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 62

In the Matter of the Application of
SANITATION POLICE OFFICER EFRAIM ACOSTA,

Petitioner,

For a Judgment pursuant to Article 78
of the Civil Practice Laws and Rules,

INDEX NO. 101573/04
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL.NO.

- against -

RAYMOND KELLY, Police Commissioner
of the City of New York,

Respondent.

**COPY
UNFILED JUDGMENT**

The following papers, numbered 1 to 8 were read on this Article 78 Proceeding to: annul respondent's determination denying petitioner's application for a carry pistol license.

<u>Papers</u>	<u>Numbered</u>
Notice of Petition/Order to Show Cause - Petition - Exhibits	1,2
Answering Affidavits - Exhibits (Memo) _____	3
Replying Affidavits (Reply Memo) _____	4
Additional Submissions: Petitioner's Letters (w/enclosures) dated June 2, 2004 and August 10, 2004, Affirmation of Melanie V. Sadok, Esq., dated July 1, 2004, on behalf of Respondents, Petitioner's Second Reply Affirmation	5,6,7,8

Cross Motion: Yes No

Upon the foregoing papers, it is ordered that this petition is denied and the proceeding is dismissed.

Background

Petitioner, Efraim Acosta, had been employed by the New York City Department of Sanitation (DOS) since 1981. He served as a member of the Sanitation Police of DOS since in or about 1986. On or about March 28, 2003, petitioner retired as a sergeant from the Sanitation Police (Respondent's Verified Answer [Answer], Ex. L). Petitioner possessed a pistol license while employed by the Sanitation Police.

Shortly before his retirement, petitioner submitted to the License Division of the New York City Police Department (NYPD) an application for a pistol license, dated March 24, 2003 (Answer, Ex. D). His application indicated that he was seeking a “Retired Police Officer” license or a “Carry Business” pistol license, both of which are unrestricted licenses allowing the holder to carry a concealed weapon at all times (*id.*). Petitioner described both his business and his occupation as “Retired NYC Sanitation Police Officer” (*id.*). In support of petitioner’s application, Chief James Moss of the Sanitation Police F. T. U. (Firearms Tactics Training Unit) & Training Section submitted a letter, dated March 20, 2002 (should be 2003), describing petitioner’s duties during his years of service with the Sanitation Police (Answer, Ex. D). Chief Moss indicated that petitioner’s last assignment prior to his retirement was as instructor with the F. T. U. training officers and cadets, including training in the use of firearms. He also auctioned vehicles that had been impounded for illegal dumping (*id.*). Prior to his training assignment, petitioner was assigned to the Night Task Force, in which his duties included impounding vehicles that had illegally dumped waste materials and arresting individuals involved in such activities. Chief Moss stated that, during petitioner’s tenure with the Sanitation Police, “he was personally involved in countless numbers of vehicle impounds and arrests, some of which were organized crime related, along with countless numbers of summonses to the Private Carting Industries” (*id.*). Chief Moss further described petitioner as an “exemplary officer” who “is deserving of the 24 hour firearms carry for his and his family (sic) protection” (*id.*).

Petitioner’s attorney characterized the letter from Chief Moss as a “good guy” letter, which the License Division and respondent Police Commissioner Raymond Kelly (respondent or Commissioner) allegedly “customarily ha[ve] accepted from Retired Sanitation Police Officers” in support of their applications for unrestricted carry pistol licenses (Reply Affirmation of Jerold E. Levine, Esq. [Levine Reply Aff.], at ¶¶ 6,7). Petitioner submitted, in further support of his pistol license application, additional letters from supervisors and colleagues in the Sanitation Police and other documents substantiating the quality of his work and his good character (Answer, Ex. E).

In accordance with the applicable regulations and procedures, the License Division conducted an investigation of petitioner's background, including a personal interview. Petitioner indicated that he was seeking an unrestricted carry business pistol license for protection, based upon his prior occupation as a Sanitation Police Officer (SPO) (*see* Answer, Exs. H and I). The License Division sent to petitioner a Notice of Disapproval of his handgun license application, dated August 7, 2003. The Notice provided the following reasons for denying petitioner's application:

“ACCORDING TO TITLE 38, CHAPTER 5-03, YOU ARE REQUIRED TO SHOW PROPER CAUSE PURSUANT TO 400.00 (2)(f) OF THE NEW YORK STATE PENAL LAW. BASED ON YOUR RETIREMENT FROM THE NYC SANITATION POLICE, YOU HAVE FAILED TO SHOW SUFFICIENT NEED TO DISTINGUISH SELF FROM COUNTLESS OTHERS IN EVERY TYPE OF OCCUPATION IN NEW YORK CITY WHOM (sic) WORK WITHOUT A LICENSE TO CARRY A CONCEALED WEAPON.”

(Answer, Ex. K). The Notice of Disapproval advised petitioner of his right to an administrative appeal.

Petitioner had apparently learned, in advance, that his pistol license application would be disapproved. In anticipation of the disapproval, he sent to the License Division an “advance appeal” letter, dated July 15, 2003 (Answer, Ex. J). In this one-page notarized letter, petitioner challenged the conclusion of the License Division that he had failed to show sufficient need for a carry business handgun license to distinguish himself from countless other New York City residents who work without a license to carry a concealed weapon (*id.*). He referred to the description of his duties while employed by the Sanitation Police in the letter from Chief James Moss, a copy of which he enclosed. Petitioner explained, in his July 15 letter, that he was seeking the handgun license for the safety of his family and himself, due to the fact that he had made thousands of impounds and numerous arrests for illegal dumping during the years he was employed by the Sanitation Police (*id.*). Petitioner described his need for a license to carry a concealed weapon, as follows, “While carrying out my daily activities on and off duty, on occasion, I have seen defendants who were involved in impoundments/arrests” (*id.*). In further support of petitioner's appeal, DOS Chief of Staff Michael A. Bimonte submitted a letter, dated September 19, 2003,

describing petitioner's duties while employed by the Sanitation Police and citing instances of his exemplary service (Answer, Ex. L). This is another example of a letter, characterized by petitioner as a "good guy" letter.

On or about September 19, 2003, the License Division offered petitioner a "premises residence" handgun license, a more restricted license than the carry business license he had applied for. Petitioner declined to accept the premises residence license (Answer, Ex. M). In a letter dated September 30, 2003, Thomas M. Prasso, director of the License Division, advised petitioner that his appeal of his carry business license application was denied, based upon review of the entire record (Answer, Ex. N). Petitioner was notified of his right to appeal this determination by commencing an Article 78 Proceeding in Supreme Court, within four months of the date of the denial letter. Accordingly, petitioner commenced the instant proceeding, seeking to annul respondent's determination denying his application for an unrestricted carry handgun license.

Discussion

1. Relevant Statutory and Regulatory Provisions

Petitioner asserts that he is entitled to an unrestricted carry handgun license, based upon his status as a retired Sanitation Police Officer. He attempts to analogize his situation to that of a retired New York City police officer. There are, however, significant distinctions between the eligibility of police officers and Sanitation Police Officers for handgun licenses, pursuant to the applicable statutory and regulatory provisions and NYPD policies. Active police officers, as defined by Criminal Procedure Law (CPL) § 1.20, do not require a license to carry a handgun (*see* Affirmation of Melanie V. Sadok, Esq. [Sadok Aff.], Submitted by Respondent in further Opposition to the Petition, Ex. D). Officers and members of the Sanitation Police of the New York City DOS, however, are not considered to be "police officers, but, rather, are classified as "peace officers" pursuant to CPL § 2.10 (59). That statutory provision further states, in pertinent part, "nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section

400.00 of the penal law” (CPL § 2.10 [59]). Accordingly, in contrast to an active police officer, who is eligible for to carry a handgun without applying for a license, an active Sanitation Police Officer must apply to the License Division for a handgun license and must fulfill the requirements for such a license set forth in Section 400.00 of the Penal Law and the applicable regulations.

Section 400.00 of the Penal Law is the statutory framework regulating the issuance of firearm licenses. Penal Law § 400.00 (1) sets forth the general eligibility requirements for firearm licenses, including: no prior convictions of a felony or a serious offense, “good moral character”, disclosure of whether the applicant has suffered from a mental illness or has been confined to a hospital or institution for such an illness and “no good cause exists for the denial of the license” (*see* Penal Law § 400.00 [1] [b], [c], d] and [g]). Penal Law § 400.00 (2) describes the types of licenses which may be issued to possess a handgun (pistol or revolver). The categories of licenses include restricted licenses, allowing the holder to possess a handgun in his or her home or authorizing a merchant or storekeeper to possess a handgun in a place of business (Penal Law § 400.00 [2] [a] and [b]). In addition, the statute authorizes the issuance of an unrestricted license for a handgun “to have and carry concealed, without regard to employment or place of possession, by any person *when proper cause exists for the issuance thereof*” (Penal Law § 400.00 [2] [f]) (emphasis supplied). Petitioner applied for such an unrestricted carry handgun license.

The respondent Police Commissioner is authorized to grant and issue licenses to carry or possess handguns within the City of New York pursuant to the provisions of Penal Law § 400.00 (Administrative Code of City of NY § 10-131 [a]). The License Division of the NYPD is delegated the responsibility to review applications for original and renewal handgun licenses.

Title 38 of the Rules and Regulations of the City of New York (RCNY) prescribes the rules for the issuance of handgun licenses by the NYPD within the City of New York. The various types of handgun licenses which may be issued are described in 38 RCNY § 5-01. These include various restricted licenses, including a “Premises License – Residence or Business” (“a restricted handgun license issued for a specific business or residence location”) (38 RCNY § 5-01 [a]) and a “Carry

Guard License/Gun Custodian License” (“restricted types of carry licenses, valid when the holder is actually engaged in a work assignment as a security guard or gun custodian”) (38 RCNY § 5-01 [d]). Petitioner, however, has applied for a “Carry Business License”, defined as an “unrestricted class of license which permits the carrying of a handgun concealed on the person” (38 RCNY § 5-01 [b]). The regulations further provide, “In the event that an applicant is not found by the License Division to be qualified for a Carry Business License, the License Division, based upon its investigation of the applicant, may offer a Limited Carry Business License or a Business Premises License to an applicant” (38 RCNY § 5-01 [b]).

The regulations in 38 RCNY § 5-02 prescribe the criteria for the issuance of a premises handgun license, which include many of the eligibility standards set forth in Penal Law § 400.00 (1). The regulations in 38 RCNY § 5-03 (“Carry and Special Handgun Licenses”) provide that “[i]n addition to the requirements in § 5-02, an applicant seeking a carry or special handgun license shall be required to show ‘proper cause’ pursuant to § 400.00 [2] [f] of the New York State Penal Law.” The regulations further state, “‘Proper cause’ is determined by a review of all relevant information bearing on the claimed need of the applicant for the license.” Section 5-03 provides the following examples of factors to be considered in a review of the information to determine whether an applicant has shown the requisite “proper cause” for the issuance of a carry or special handgun license:

“(a) Exposure of the applicant by reason of employment or business necessity to extraordinary personal danger requiring authorization to carry a handgun.”

“Example: Employment in a position in which the applicant routinely engages in transactions involving substantial amounts of cash, jewelry or other valuables or negotiable items.” ...

“(b) Exposure of the applicant to extraordinary personal danger, documented by proof of recurrent threats to life or safety requiring authorization to carry a handgun.”

(Examples of proof to be considered by the License Division include Police Department records demonstrating “that the life and well being of an individual is endangered”.)

Section 5-05 of the regulations prescribes the requirements for handgun license applications. In addition to completing an application form, applicants for handgun licenses, other than a Premises Residence License, must submit a "letter of necessity", a signed, notarized typewritten letter explaining the need for the license and containing information, including "[a] detailed description of the applicant's employment and an explanation of why the employment requires the carrying of a concealed handgun" (38 RCNY § 5-05 [b] [8] [i] and [ii] [A]).

The regulations do not prescribe a category of handgun licenses for retired police officers and peace officers. In a memorandum dated September 25, 2002, the License Division clarified the guidelines for the issuance of handgun licenses to active and retired police officers and peace officers (Sadok Aff., Ex. D). As has been discussed above, active Police Officers, defined in CPL § 1.20, do not require a license to carry a weapon. The same rule applies to active Peace Officers, defined in CPL § 2.10, "except those granted Peace Officer status with restriction that they not be authorized 'to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law'" (*id.*). The latter category of Peace Officers includes officers and members of the Sanitation Police, like petitioner (*see* CPL § 2.10 [59]). The License Division memorandum further provides, "Peace Officers in this category must be licensed by the License Division in order to lawfully possess a handgun. The appropriate license in this situation is a Carry Guard/Security license" (*id.*). Such a license will only be issued if the peace officer/applicant meets all of the applicable legal requirements. The License Division memorandum further states that "applicants who, in addition to any peace officer status, can show the existence of extraordinary circumstances and proper cause, may be granted a Carry Business license notwithstanding the above guidelines" (*id.*).

The License Division memorandum then discusses guidelines for issuing handgun licenses to retired law enforcement officers. Retired Police Officers (CPL § 1.20), retired Federal Law Enforcement Officers (CPL § 2.15) and retired Peace Officers without handgun restrictions (CPL § 2.10) "may qualify for the appropriate retired law enforcement license" (Sadok Aff., Ex. D). The

memorandum provides, however, “Peace Officers who possess a Carry Guard License (which include Sanitation Police Officers) will not qualify for a retired law enforcement handgun license upon leaving their employment. However, an application for a Residence Premises Handgun License will be accepted from these individuals” (*id.*) (parenthetical supplied). The License Division’s September 2002 memorandum, thus, clearly states that retired Sanitation Police Officers, unlike retired Police Officers, do not automatically qualify for a retired law enforcement handgun license. Instead, they must apply for a handgun license, fulfill the requirements of Penal Law § 400.00 and the applicable regulations and will generally be granted a restricted Residence Premises handgun license, instead of the unrestricted Carry Business license sought by petitioner¹.

2. Legal Analysis

It is well settled that the issuance of a handgun license is a privilege, rather than a right (*see Matter of Papaioannou v Kelly*, __ AD2d ___, 788 NYS 2d 378 [1st Dept 2005]; *Matter of Kaplan v Bratton*, 249 AD2d 199, 201 [1st Dept 1998]; *Matter of Fondacaro v Kelly*, 234 AD2d 173, 177 [1st Dept 1996], *lv denied* 89 NY2d 812 [1997]; *Sewell v City of New York*, 182 AD2d 469, 472 [1st Dept 1992], *lv denied* 80 NY2d 846 [1992]). The respondent Police Commissioner has broad discretion to determine whether to issue a handgun license, in accordance with the provisions of Penal Law § 400.00, Administrative Code of the City of NY § 10-131 (a) and the applicable regulations (*see Sewell v City of New York*, 182 AD2d at 472; *see also Matter of Papaioannou v Kelly*, 788 NYS 2d at 378; *Matter of Fondacaro v Kelly*, 234 AD2d at 177; *Sewell v City of New York*, 182 AD2d at 472). Judicial review is limited to whether the respondent’s administrative determination to deny petitioner’s application for a carry handgun license is arbitrary and capricious

¹ Petitioner was granted a Carry Guard/Security handgun license during most of his tenure with the Sanitation Police (Answer, at ¶¶ 20-21 and Ex. B). According to the records of the License Division, however, petitioner was granted a Carry Business handgun license during the last several years of his tenure, from on or about August 12, 2000 until on or about April 2, 2003, after his retirement (Answer, at ¶ 22, n 1, and Ex. C). In accordance with the guidelines set forth in the License Division’s September 2002 memorandum, however, petitioner was in a category of peace officers who were not automatically eligible for retired law enforcement handgun licenses. Instead, the License Division, pursuant to the guidelines in the memorandum, offered petitioner a Residence Premises handgun license, which he declined (Answer, at ¶ 33, and Ex. M).

or an abuse of discretion (*see Matter of Papaioouannou v Kelly*, 788 NYS 2d at 379; *Matter of Fondacaro v Kelly*, 234 AD2d at 177; *Sewell v City of New York*, 182 AD2d at 473). In applying this standard, the function of the courts is to ascertain whether there is a rational basis for the agency's action (*see Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 [1974]). The Court of Appeals explained, "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ.*, 34 NY2d at 231). Nevertheless, as the Appellate Division stated in *Matter of Kaplan v Bratton* (249 AD2d at 201), "[t]he agency's determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result [citation omitted]."

Respondent's reason for denying petitioner's application for an unrestricted carry business handgun license is that he failed to show "proper cause", as required by Penal Law § 400.00 (2) (f) and 38 RCNY § 5-03. The applicant, in this case petitioner, has the burden to demonstrate "proper cause" for the issuance of an unrestricted carry handgun license, which the Appellate Division has interpreted to mean "'a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession'" (*Matter of Kaplan v Bratton*, 249 AD2d at 201, quoting *Matter of Klenosky v New York City Police Dept.*, 75 AD2d 793 [1st Dept 1980], *aff'd* 53 NY2d 685 [1981]).

Petitioner's application does not meet this standard. His original application did not contain a signed, notarized "letter of necessity" explaining his need to carry a concealed handgun, as required by 38 RCNY § 5-05 (b) (8) (i) and (ii) (A). Petitioner's letter of July 15, 2003, submitted to provide advance support for his appeal, indicates that his need for an unrestricted carry handgun license to protect himself and his family is based on his prior employment with the Sanitation Police, during which he made thousands of vehicle impoundments and numerous arrests for illegal dumping. Petitioner's letter vaguely states that "on occasion", he has seen unidentified "defendants" involved in these prior impoundments and arrests, but fails to even assert that his safety was ever threatened on these occasions (Answer, Ex. J). Petitioner's explanation does not

meet the standard for “proper cause” for an unrestricted carry handgun license, as has failed to demonstrate that he is exposed to “extraordinary personal danger”, either by virtue of his current employment or business, or as the result of documented threats to his life or safety (*see* 38 RCNY § 5-03 [a] and [b]; *see also Matter of Sumowicz v Kelly*, ___ AD2d ___, 787 NYS 2d 654 [1st Dept 2005] [owner/ director of a funeral home failed to demonstrate need for a carry pistol permit, by establishing she was in greater danger than others engaged in a similar occupation, or that she had to carry large sums of cash in connection with her business]; *Matter of Martinek v Kerik*, 294 AD2d 221 [1st Dept 2002], *aff'd* 98 NY2d 613 [2002] [bank president failed to show “proper cause” for a carry pistol permit, as the result of traveling to and from high crime areas and transporting large sums of cash between branches, as he failed to provide documentation substantiating the amount of cash he carried or of particular threats or other “extraordinary danger” to his personal safety]; *Matter of Ferrara v Safir*, 282 AD2d 383 [1st Dept 2001] [chief executive officer of celebrity body-guard service failed to show “extraordinary personal danger” or “other special need for self-protection distinguishable from that of the general community”]; *Matter of Kaplan v Bratton*, 249 AD2d at 201 [physician’s general allegations that she needed to protect herself when traveling in high crime areas late at night to see patients did not establish an extraordinary threat to her safety required to obtain a carry pistol license]).

Notwithstanding his failure to demonstrate “proper cause” for an unrestricted carry handgun license, based upon extraordinary danger to his personal safety, petitioner asserts that he is entitled to such a license by virtue of respondent’s purported practice of granting carry handgun licenses to other retired Sanitation Police Officers, whose circumstances are allegedly factually similar. According the Verified Petition, “Petitioner has no different need for the license than numerous other Retired Sanitation Police Officers who hold such licenses” (Verified Pet., at ¶ 9). Petitioner further asserts that respondent customarily has issued carry handgun licenses to both former police officers and former Sanitation Police Officers, who have retired in good standing, “as administrative perks for service in law enforcement” (Levine Reply Aff., at ¶ 4, n 1). The alleged “need” basis for

issuing such licenses is that retired law enforcement officers may come in contact with individuals whom they have previously summonsed or arrested (*id.*). Petitioner further asserts that other Retired Sanitation Police Officers have received carry business handgun licenses based solely upon: (1) their retired law enforcement status; and (2) submission to the License Division of ‘good guy’ letters from their superiors describing their duties while employed with the Sanitation Police and their exemplary service, similar to the letters submitted in support of petitioner’s original application and his appeal (*Levine Reply Aff.*, at ¶ 20).

Petitioner argues that he is entitled to a carry business handgun license on the same basis as other retired Sanitation Police Officers who allegedly received such licenses under similar factual circumstances, based upon a line of Court of Appeals decisions (*see Matter of Lafayette Stor. & Moving Corp. [Harnett]*, 77 NY2d 823 [1991]; *Matter of Claim of Martin [Roberts]*, 70 NY2d 679 [1987]; *Matter of Charles A. Field Delivery Serv., Inc. [Roberts]*, 66 NY2d 516 [1985]). In *Matter of Charles A. Field Delivery Serv.*, the Court of Appeals concluded that the Unemployment Insurance Appeal Board (UI Appeal Board) had failed to adequately explain why its decision, determining that drivers for a delivery service were independent contractors, rather than employees, was inconsistent with two earlier decisions based upon essentially similar facts, both of which had been confirmed by the Appellate Division and the Court of Appeals. The Court of Appeals ruled, “... absent an explanation by the agency, an administrative agency decision which, on essentially the same facts as underlaid a prior agency determination, reaches a conclusion contrary to the prior determination is arbitrary and capricious” (66 NY2d at 518). The Court stated that it was not rigidly applying the doctrine of *stare decisis* and administrative agencies, like courts, are free “to correct a prior erroneous interpretation of the law ... [citations omitted] ... by modifying or overruling a past decision” (*id.* at 518-519). The Court explained the result it reached, as follows, “...when an agency determines to alter its prior stated course it must set forth its reasons for doing so. Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its

prior decision [citations omitted]” (*id.* at 520). The Court of Appeals remanded the matter to the Board for further proceedings in accordance with its opinion, presumably to explain why it reached a result different from the two prior decisions. The decisions in *Matter of Lafayette Stor. & Moving Corp.* (77 NY2d 823, *supra*) and *Matter of Claim of Martin* (70 NY2d 679, *supra*), both of which follow the principles of *Matter of Charles A Field Delivery Serv.*, likewise, involved the review of determinations of the UI Appeal Board classifying persons as employees or independent contractors.

There are significant distinctions, however, between *Matter of Charles A. Field Delivery Serv.*, the decisions following it, and the determination of the respondent Commissioner and the NYPD License Division as to whether to approve an application for handgun license. Notably, *Matter of Charles A. Field Delivery Serv.* involved the judicial review of a written determination by an administrative agency, the UI Appeal Board, based upon an adjudicatory hearing on the record (66 NY2d at 518). Indeed, the Court of Appeals noted that the decisions of the UI Appeal Board, as well as decisions in adjudicatory proceedings by other administrative agencies subject to the State Administrative Procedure Act, are reported and indexed for public review, in a manner analogous to court decisions (*id.* at 519-520 and n 3). Accordingly, the determinations of such agencies in adjudicatory proceedings are akin to the legal precedents of judicial decisions. By contrast, the License Division and the respondent Commissioner subject each applicant for a handgun license to a review and investigation process to determine whether he or she meets the applicable criteria for the license sought. Nevertheless, there is no right to a formal adjudicatory hearing on the record, nor are the decisions of the License Division and the Commissioner reported and indexed. Accordingly, the determinations of the respondent Commissioner to grant or deny a handgun license differ significantly from the quasi-judicial proceedings involved in *Matter of Charles A. Field Delivery Serv.* (66 NY2d 516, *supra*) and similar decisions (*see Matter of Ins. Premium Fin. Assoc. of New York State v New York State Dept. of Ins.*, 88 NY2d 337, 345 [1996]; *Matter of Knight v Amelkin*, 68 NY2d 975, 977 [1986]).

Petitioner has cited no reported decisions applying the principles of *Matter of Charles A. Field Deliver Serv.* to determinations by the respondent Commissioner denying applications for handgun licenses. Petitioner relies upon two unreported decisions from this Court involving an application for a carry business handgun license by another retired Sanitation Police Officer (*see Matter of Lauria v Kelly*, Sup Ct. NY County, May 21, 2004, Soto, J, Index No. 101572/04 [Sadok Aff., Ex. A]; *Matter of Lauria v Kelly*, Aug. 6, 2004).

In addition, even assuming for the sake of argument that *Matter of Charles A. Field Delivery Serv.* applies, petitioner has failed to establish that he was treated differently from other retired Sanitation Police Officers who applied for carry handgun licenses, under substantially similar factual circumstances. As has been discussed above, the License Division issued a memorandum in September 2002 clarifying its guidelines for issuing handgun licenses to active and retired law enforcement officers (Sadok Aff., Ex. D). The respondent Commissioner is free to clarify or even change the policies regarding the issuance of handgun licenses, in accordance with the applicable statutes and regulations (*see Matter of Caruso v Ward*, 143 Misc 2d 5 [Sup Ct., NY County 1989], *affd* 160 AD2d 540 [1st Dept 1990], *lv denied* 76 NY2d 705 [1990]). As the Court of Appeals stated, “The *Field* decision ... addressed actions of an administrative agency acting in a quasi-judicial capacity, not those which are quasi-legislative ... There is no similar rule applicable to quasi-legislative actions of an administrative agency adopting new rules” (*Matter of Ins. Premium Fin. Assoc. of New York State v New York State Dept. of Ins.*, 88 NY2d at 345). The License Division’s guidelines provide that retired Sanitation Police Officers are not eligible for retired law enforcement handgun licenses, but must qualify for a handgun license pursuant to the provisions of Penal Law § 400.00 and the applicable regulations, and are generally granted a restricted residence premises license. Petitioner’s application was disposed of in accordance with the License Division guidelines.

Nevertheless, petitioner asserts that respondent has not enforced the guidelines in the License Division September 2002 memorandum consistently and has, in fact, granted carry business

handgun licenses to some retired Sanitation Police Officers after that date. In *Matter of Lauria v Kelly*, the petitioner submitted to the Court several documents from the files of two other retired Sanitation Police Officers who applied for handgun licenses. Respondent has reproduced the documents submitted in *Matter of Lauria v Kelly* (Sadok Aff., Ex. B). The two Sanitation Police Officers in question applied for and received carry business handgun licenses upon their retirement in or about the Fall of 2000, prior to License Division memorandum clarifying its handgun license guidelines (*id.*). In support of their applications, they submitted “good guy” letters from their superiors describing their duties with the Sanitation Police and their exemplary service (*id.*). Their carry business handgun licenses were renewed in 2003 (*id.*). In view of petitioner’s failure to submit the entire license application and renewal files for each of the retired Sanitation Police Officers in question, it is not possible to determine whether their circumstances are, indeed, factually similar to those of petitioner.

Having failed to provide such documentation, it cannot be said that “[c]omparison of the facts ... makes evident, if not the impossibility of distinguishing this case [from the cases of other Sanitation Police Officer retiree pistol license applicants] at least the existence of sufficient factual similarity between those cases and this to require explanation [by the License Division] of why it reached a different result in this case” (*Matter of Charles A. Field Delivery Serv.*, 66 NY2d at 521 [parentheticals supplied]). Moreover, the fact that respondent has recently renewed carry business handgun licenses issued to two retired Sanitation Police Officers, by itself, is insufficient to establish that respondent is applying the guidelines regarding handgun licenses for such retired peace officers inconsistently (*see Matter of Kaplan v Bratton*, 249 AD2d 199, *supra* [Court not convinced by petitioner’s submission of examples of other allegedly similarly situated physicians who received pistol licenses]). Significantly, there is no evidence as to how respondent acted with respect to handgun license applications submitted by the Sanitation Police Officers who retired after September 2002.

In summary, the respondent Commissioner has provided a rational basis for denying

petitioner's application for the privilege of a carry business handgun license, based upon his failure to show "proper cause", in accordance with the requirements of the applicable statutory provisions and regulations. Respondent dealt with petitioner's application based upon the License Division guidelines for granting handgun licenses to retired Sanitation Police Officers. As has been stated above, the burden of demonstrating "proper cause" is on the applicant, in this case petitioner (*see Matter of Kaplan v Bratton*, 249 AD2d at 201). On the record before this Court, petitioner has not shown any basis to annul respondent's determination denying his application for a carry business handgun license.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that, within thirty days of entry, petitioner shall serve upon all parties a copy of this decision, order and judgment, together with notice of entry.

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

Dated: 4/15/05

HON. DORIS LING-COHAN

ENTER: [Signature]
Doris Ling-Cohan, JSC

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if Appropriate: DO NOT POST

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