

**Matter of Wilson v N.Y.C. Police Dept. License Div.**

2012 NY Slip Op 32191(U)

July 25, 2012

Supreme Court, New York County

Docket Number: 401475/10

Judge: Lucy Billings

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

PRESENT: Billingis  
Justice

PART 46

Wilson, Nancy

INDEX NO.

401475/10

MOTION DATE

MOTION SEQ. NO.

03

MOTION CAL. NO.

- v -  
(Police) NYC Dept. of Licenses

The following papers, numbered 1 to 2 were read on this motion to/for Vacate order

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits

2

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:

*The court grants petitioner's motion to vacate the court's order dated 1/10/11 and grants the petition to the extent set forth, denies any other relief sought by the motion or petition, and dismisses this proceeding, pursuant to the accompanying decision. C.P.L.R. §§ 5015(a)(2), 7803(3) and (4), 7806.*

**FILED**

AUG 20 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/25/12

Lucy Billingis

LUCY BILLINGIS

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

In the Matter of the Application of  
NANCY WILSON,

Index No. 401475/2010

Petitioner

- against -

DECISION AND ORDER

N.Y.C. POLICE DEPT. LICENSE DIVISION,

Respondent

**FILED**

**AUG 20 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

APPEARANCES:

For Petitioner

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For Respondent

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LUCY BILLINGS, J.S.C.:

I. THE BASES FOR POST-JUDGMENT RELIEF

Petitioner moves to vacate the prior order dated January 10, 2011, denying her petition to reverse respondent's denial of a handgun license because she failed to disclose an arrest for a charges that eventually were dismissed: information the license application specifically requests. She bases her motion on C.P.L.R. § 5015(a)(3), because respondent failed to disclose to the court that the circumstances of the dismissal triggered New York Criminal Procedure Law (C.P.L.) § 160.60, under which the arrest and prosecution are considered a nullity. See Travelers Ins. Co. v. Rogers, 84 A.D.3d 469 (1st Dep't 2011); Zagranichnay

v. Zagranichnay, 68 A.D.3d 1103, 1104 (2d Dep't 2009); Thakur v. Thakur, 49 A.D.3d 861, 862 (2d Dep't 2008).

Petitioner alternatively may invoke C.P.L.R. § 5015(a)(2), based on her Certificate of Disposition of the dismissed charges, which she did not present previously. American Comm. for Weizmann Inst. of Science v. Dunn, 10 N.Y.3d 82, 95-96 (2008); Atienza v. MBBCO II, LLC, 75 A.D.3d 424 (1st Dep't 2010); Ramos v. City of New York, 61 A.D.3d 51, 54 (1st Dep't 2009). See C.P.L.R. § 2221(e)(2); Sirico v. F.G.G. Prods., Inc., 71 A.D.3d 429, 433-34 (1st Dep't 2010). Respondent conceded that the charges were dismissed, so petitioner, who previously was unrepresented, did not realize that the Certificate of Disposition would include any other relevant information. See C.P.L.R. § 2221(e)(3); Atienza v. MBBCO II, LLC, 75 A.D.3d at 425; Sirico v. F.G.G. Prods., Inc., 71 A.D.3d at 433-34.

The Certificate of Disposition reveals, however, that the charges were dismissed upon the Bronx County District Attorney's motion, to which C.P.L. § 160.60 applies. Since respondent, in denying petitioner the license, knew of petitioner's arrest and the charges against her, petitioner contends that respondent surely knew the circumstances of the dismissal, triggering § 160.60's nullification provision, yet failed to reveal this fact and thus its legal ramifications to the court.

Whether or not respondent's nondisclosure amounts to misrepresentation or other misconduct sufficient to vacate the dismissal of this proceeding, C.P.L. R. § 5015(a)(3); see

Travelers Ins. Co. v. Rogers, 84 A.D.3d 469; Vogelgesang v. Vogelgesang, 71 A.D.3d 1131, 1132 (2d Dep't 2010); Sieger v. Sieger, 51 A.D.3d 1004, 1006 (2d Dep't 2008); Thakur v. Thakur, 49 A.D.3d at 862, petitioner's offer of this more specific evidence in any event bears on the court's prior determination, C.P.L.R. §§ 2221(e)(2), 5015(a)(2); Atienza v. MBBCO II, LLC, 75 A.D.3d at 425; Sirico v. F.G.G. Prods., Inc., 71 A.D.3d at 433, 435; Ramos v. City of New York, 61 A.D.3d at 54, and, albeit delayed, has neither exceeded any definitive time constraint, nor hampered respondent's defense of the proceeding. C.P.L.R. §§ 2221(e), 5015(a)(2); Sirico v. F.G.G. Prods., Inc., 71 A.D.3d at 433; Ramos v. City of New York, 61 A.D.3d at 54-55. Respondent has been provided ample opportunity to respond to petitioner's motion and the Certificate of Disposition presented. As respondent concedes, this evidence is more than a "mere allegation" or "specious claim," American Comm. for Weizmann Inst. of Science v. Dunn, 10 N.Y.3d at 96; it is uncontroverted. In light of the Certificate of Disposition and the consequent application of C.P.L.R. § 160.60, petitioner maintains that respondent's denial of the handgun license was based on an error of law and unsupported by any evidence that petitioner had failed to make a required disclosure. C.P.L.R. § 7803(3) and (4).

## II. THE RESULT DICTATED BY C.P.L. § 160.60

Criminal Procedure Law § 160.60 provides that upon termination of the criminal action against petitioner in her favor:

- (1) Her arrest and prosecution were considered a nullity.
- (2) She was restored to her status before the arrest and prosecution.
- (3) Neither the arrest nor the prosecution would operate to disqualify her from any occupation.
- (4) She was not required to divulge information regarding her arrest or prosecution, except where a statute specifically requires.

New York Penal Law (P.L.) § 400.00 confers on respondent the authority to issue handgun licenses. Section 400.00(1) requires that:

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.

P.L. § 400.00(1) (emphasis added). The application for a handgun license that petitioner completed specifically asks: "HAVE YOU EVER . . . (23) Been arrested . . . ? . . . . (False statements are grounds for disapproval)." V. Answer Ex. A § B, at 2. The application's instructions require that:

If you were ever arrested . . . you must answer Yes to question-23 and submit a certificate of disposition . . . . Also, you must submit a detailed, notarized statement describing the circumstances surrounding each arrest. YOU MUST DO THIS EVEN IF: the case was dismissed, the record sealed or the case nullified by operation of law.

V. Answer Ex. B § 7(A).

Thus the only statutory requirement governing the information to be disclosed in a handgun license application is that "all statements in a proper application for a license are

true." P.L. § 400.00(1). The requirement to divulge information regarding an arrest or prosecution "EVEN IF: the case was dismissed, the record sealed or the case nullified by operation of law" is only in respondent's handgun license application instructions. As the court's prior determination recognized, petitioner's violation of this requirement, to divulge her arrest, and her false answer "NO" to the application question "HAVE YOU EVER . . . Been arrested . . . ?" in violation of P.L. § 400.00(1), not the arrest itself, formed the basis for denying her the handgun license. V. Answer Ex. A § B, at 2.

Inaccuracies in the information provided in the handgun license application by an applicant, in violation of P.L. § 400.00(1), constitute a valid basis to deny the application. Tartaglia v. Kelly, 215 A.D.2d 166, 167 (1st Dep't 1995). See DeMeo v. Bratton, 237 A.D.2d 111, 112 (1st Dep't 1997). This rule applies equally when the inaccuracy is a statement that the applicant has never been arrested. Conciatori v. Brown, 201 A.D.2d 323 (1st Dep't 1994); Papineau v. Martusewicz, 35 A.D.3d 12114 (4th Dep't 2006); Hanna v. Police Dept. of County of Nassau, 205 A.D.2d 689 (2d Dep't 1994). See Fortuniewicz v. Cohen, 54 A.D.3d 952 (2d Dep't 2008).

Because C.P.L. § 160.60 applies to the dismissal of the charges for which petitioner was arrested, however, her answer was true when she did not divulge her arrest, because it was a nullity, and she was restored to her status before the arrest, as if it never occurred. People v. Patterson, 78 N.Y.2d 711, 715



(1991). Even though she attributed her nondisclosure to an unknowing or inadvertent oversight, which, as the court previously recognized, P.L. § 400.00(1) does not forgive, she was entitled under C.P.L. § 160.60 to deny her arrest. People v. Patterson, 78 N.Y.2d at 715; Taylor v. Loquercio, 106 A.D.2d 391, 392 (2d Dep't 1984). Penal Law § 400.00(1) did not require petitioner to divulge information regarding her arrest; the statute only required that her statements in her license application be true. Pursuant to C.P.L. § 160.60, they were.

While the license application may have required her to disclose any arrest, C.P.L. § 160.60 relieved her from any such non-statutory requirement. Respondent may not create a duty to disclose a fact that never occurred. Pursuant to C.P.L. § 160.60, no arrest ever occurred.

### III. VACATUR OF THE COURT'S ORDER AND REVERSAL OF RESPONDENT'S DETERMINATION

Because petitioner's nondisclosure of her arrest formed the sole basis for respondent's denial of a handgun license to petitioner, and under the law her arrest never occurred, respondent's denial of the license was based on an error of law and unsupported by any evidence that petitioner had failed to make a required disclosure. C.P.L.R. § 7803(3) and (4). Because respondent's denial was "without regard to the facts" and "without sound basis," it must be reversed. Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). See Goodwin v. Perales, 88 N.Y.2d 383, 392 (1996); Soho Alliance v. New York State Liq. Auth., 32 A.D.3d 363 (1st Dep't 2006). Therefore the court



grants petitioner's motion to vacate the court's order dated January 10, 2011, C.P.L.R. § 5015(a)(2), and grants the petition to the extent of remanding the proceeding to respondent for a new determination of her handgun license application without consideration of an arrest June 9, 2000, and without consideration of any nondisclosure of such an arrest.

IV. LIMITATIONS UPON REMAND

Respondent's Notice of Disapproval dated June 11, 2009, referring to petitioner's arrest June 9, 2000, informed petitioner that respondent denied her handgun license application because:

YOU NEGLECTED TO REVEAL THIS ARREST ON YOUR NOTARIZED PISTOL LICENSE APPLICATION. THIS ARREST ALSO WAS NOT MENTIONED AT YOUR PERSONAL INTERVIEW WITH YOUR INVESTIGATOR . . . , THE FALSE STATEMENTS REGARDING THIS INCIDENT IS GROUNDS FOR DISAPPROVAL.

V. Pet. Ex. A. This notice makes no reference to any grounds other than petitioner's failure to disclose her arrest, so as to apprise her that respondent premised its denial on an additional ground. 38 R.C.N.Y. § 5-07(e) and (f). See Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d 470, 472 (1st Dep't 2009); Benson v. Board of Educ. of Washingtonville Cent. School Dist., 183 A.D.2d 996, 997 (3d Dep't 1992). Even if this notice were susceptible of another interpretation, reasonable notice of the grounds for adverse action must not relegate the applicant to guesswork. Block v. Ambach, 73 N.Y.2d 323, 333 (1989); Wolfe v. Kelly, 79 A.D.3d 406, 410-11 (1st Dep't 2010); Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d

at 473. Nor does the record disclose that respondent considered any other basis for denying petitioner the license. E.g., New York State Ch., Inc., Associated Gen. Contrs. of Am. v. New York State Thruway Auth., 88 N.Y.2d 56, 75 (1996). See Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d at 471, 475; Benson v. Board of Educ. of Washingtonville Cent. School Dist., 183 A.D.2d at 997.

Since respondent presented no other ground for the denial, respondent may not now, upon remand, invoke any additional or different ground for denial. 38 R.C.N.Y. § 5-07(e) and (f); Pantelidis v. New York City Bd. of Stds. & Appeals, 43 A.D.3d 314, 316-17 (1st Dep't 2007). See Earl v. Turner, 303 A.D.2d 282 (1st Dep't 2003). Due process requires that petitioner "be given notice of the charges and evidence" against her and "an opportunity to appear to rebut the charges," Strom v. Erie County Pistol Permit Dept., 6 A.D.3d 1110, 1111 (4th Dep't 2004); to prepare adequately to defend the agency's charged grounds for its action; and "to submit proof in response." Pacicca v. Allesandro, 19 A.D.3d 500, 501 (2d Dep't 2005). See Wolfe v. Kelly, 79 A.D.3d at 410; Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d at 472-73; Gordon v. LaCava, 203 A.D.2d 290, 291 (2d Dep't 1994); Benson v. Board of Educ. of Washingtonville Cent. School Dist., 183 A.D.2d at 997. In the particular context of an administrative appeal:

the charges need to be "reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him . . . and to allow for the preparation of an adequate defense"

. . . .  
Wolfe v. Kelly, 79 A.D.3d at 410 (quoting Block v. Ambach, 73 N.Y.2d at 333).

Petitioner was entitled to notice of and an opportunity to prepare fully to address all the bases relied on for the agency's action in her prior administrative appeal, as well as through this judicial review. 38 R.C.N.Y. § 5-07(e) and (f); Block v. Ambach, 73 N.Y.2d at 333; Wolfe v. Kelly, 79 A.D.3d at 410; Pantelidis v. New York City Bd. of Stds. & Appeals, 43 A.D.3d at 316-17; Benson v. Board of Educ. of Washingtonville Cent. School Dist., 183 A.D.2d at 997. Even if the evidence were to show another basis for denying her a license, if that basis was not cited, it may not furnish a reason for denying her a license. Pantelidis v. New York City Bd. of Stds. & Appeals, 43 A.D.3d at 316-17. See Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d at 472; Rice v. Hilton Cent. School Dist. Bd. of Educ., 245 A.D.2d 1104, 1106 (4th Dep't 1997).

V. CONCLUSION

Consequently, upon the remand of the proceeding to respondent for a new determination of petitioner's application, respondent only may consider new circumstances that have arisen since its final determination July 27, 2009, as grounds to deny her application. Respondent still may not consider, however, any subsequent arrest or prosecution or nondisclosure of an arrest or prosecution to which C.P.L. § 160.60 or any comparable provision of the Criminal Procedure Law applies. E.g., C.P.L. § 170.55(8).

This decision constitutes this court's order and judgment granting petitioner's motion to vacate the court's order dated January 10, 2011, and granting the petition to the extent set forth; denying any other relief sought by the petition or petitioner's motion; and dismissing this proceeding. C.P.L.R. §§ 5015(a)(2), 7803(3) and (4), 7806.

DATED: July 25, 2012

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS  
J.S.C.**

**FILED**

**AUG 20 2012**

NEW YORK  
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