

Matter of Friedman v Kelly

2009 NY Slip Op 33326(U)

October 16, 2009

Sup Ct, New York County

Docket Number: 110367/07

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

In the matter of the Application of
Friedman

Plaintiff,

- v -

Kelly,

Defendant.

INDEX NO.: 110367107

MOTION DATE: 3-5-09

MOTION SEQ. NO.: 003

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this ^{petition} motion ~~to~~/for Article 78 relief

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this ~~motion~~ ^{petition} is decided
in accordance with the Memorandum Decision Order Judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Dated: October 16, 2009



J.S.C.

Check one: [X] FINAL DISPOSITION [] NON-FINAL DISPOSITION

Do Not Post [X]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

In the Matter of the Application of
JASON FRIEDMAN,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law
and Rules Granting Petitioner a Pistol License,

-against-

Index No. 110367/07

RAYMOND KELLY, as the Statutorily Designated,
Handgun Licensing Officer and As the Police
Commissioner of the City of New York,
and His Successors in Office,

UNFILED JUDGMENT
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1415).

Respondent
-----X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner seeks an order directing respondent to issue to petitioner a restricted handgun license permitting possession of a gun at a specific business or residence (the License) (*see* 38 RCNY § 5-01 [a]). Petitioner further seeks an order permitting him to amend the Verified Petition and to enlarge the record to include a letter from Thomas Prasso (Prasso), the Director of the License Division of the Police Department of the City of New York (the License Division), dated June 24, 2008. Petitioner avers that this letter was provided to him in response to this Court's prior order and judgment in this matter dated April 17, 2008 (Prior Order).¹ Petitioner also seeks reversal of respondent's determination to deny petitioner a home premises possession license on the grounds that denying him such a license violates the Second Amendment of the Constitution. Familiarity with the Prior Order is assumed, and the

¹Petitioner's application to restore the case to the calendar was previously granted by order of this court dated December 22, 2008.

facts will be repeated here only as necessary.

Previously, petitioner commenced this proceeding after respondent denied petitioner's appeal of respondent's determination denying petitioner's application for the License.

Respondent denied petitioner's appeal, by notice dated March 28, 2007, due to:

- Your arrest history for Aggravated Harassment and Harassment.
- You were the subject of an Order of Protection in 2005.
- You were psychologically disqualified from employment by the Department of Correction in 2004."

(Prior Order, at 4 [citation and internal quotation marks omitted]). This court granted petitioner's CPLR Article 78 application to the extent of remanding this matter to the respondent to expand the record concerning the investigation and reasoning underlying the determination for reconsideration. The matter was remanded as the record did not indicate respondent's reasoning as to why petitioner's single misdemeanor arrest, which was dismissed, and related order of protection impacted on petitioner's qualifications. Respondent's reasoning was significant in light of petitioner's claim that the arrest and order of protection against him were in retaliation for a complaint he made for which he received an order of protection, and were the product of a family dispute. Nor did the record indicate that the respondent examined the underlying basis for the Department of Correction's (DOC) determination that petitioner was not psychologically qualified to be a corrections officer.

After remand, Prasso sent petitioner's counsel the June 24, 2008 letter (Prasso Letter). Petitioner's unopposed application to enlarge the record to include the Prasso Letter and to amend his verified petition is granted. The Prasso Letter states that petitioner's application was denied based on instability in his personal life, including treatment in the year before his

application with the psychotropic medication Seroquel in therapy related to an abusive relationship and the loss of his mother. The letter further states that in December 2004, petitioner was arrested on charges of harassment and aggravated harassment, and that charges were not immediately dismissed but rather an order of protection was issued effective for six months. Finally, the letter indicates that DOC's disqualification of petitioner due to psychological reasons was troubling since DOC officers are authorized to carry guns.

Decisions made by administrative agencies are subject to judicial review under Article 78 of the CPLR. The court may inquire as to "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803; *see Matter of Partnership 92 LP v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). An agency's determination concerning a pistol license generally will be upheld where there exists in the record a rational basis for it (*Matter of Fastag v Kerik*, 295 AD2d 114 [1st Dept 2002]). It is well settled that "a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted]" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 [1974]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*id.* at 231).

Contrary to petitioner's argument that Director Prasso's letter was a rubber stamping of the License Division's prior decision, and that nothing in it responds to the Prior Order's directive to expand on the underlying reasons for denying the License, the court concludes that

respondent has expanded on the reasoning underlying its determination. Specifically, the Prasso Letter reveals that petitioner's application was in part denied because of respondent's findings concerning petitioner's mental health treatment, including psychotropic medication in the years immediately prior to petitioner's submission of an application for the License. Respondent also stated that notwithstanding petitioner's claim that the arrest and order of protection were in retaliation for a complaint he made against the complainant, that concerns remained since the court issued an order of protection effective for six months. Finally, the letter states that the DOC's rejection was relevant as corrections officers are authorized to carry guns.

While the court may not have arrived at the same conclusion as Prasso, the record shows that respondent has expanded the record. The record reflects that petitioner has sought assistance when confronted with personal difficulties and petitioner's motivation to resolve his personal issues is apparent. However, from the record as a whole, including the temporal proximity of petitioner's application for the license and his treatment with psychotropic medications and the issuance of an order of protection against him, it cannot be said that respondent's denial of petitioner's application for a handgun license was arbitrary, capricious or irrational.

Petitioner's argument that the denial of the license violates the Second Amendment of the Constitution based on United States Supreme Court's decision in *District of Columbia v Heller* (554 US at ___, 128 S Ct 2783 [2008]), is also unavailing. In *Heller*, while the Supreme Court struck down a local government ordinance totally banning hand gun possession, the Court also stated that an individual's right to keep and bear arms for self-defense within the home "is not absolute and may be limited by reasonable governmental restrictions" (*People v Perkins*, 62 AD3d 1160, 1161 [3d Dept], *lv. denied*, 13 NY3d 748 [2009]). Indeed, the Court identified

several presumptively lawful regulatory measures, including prohibition of the possession of firearms by those with mental illness, and noted that it named but a few examples of permissible regulations, and not an exhaustive list (128 S Ct at 2816-2817, 2817 n 26). In addition, recently, in *Maloney v Cuomo* (554 F3d 56 [2d Cir 2009]), the Second Circuit discussed *Heller* stating that it did not invalidate the longstanding principle that the “Second Amendment applies only to limitations the federal government seeks to impose on this right” (*id.* at 58).

New York’s handgun licensing scheme is not a complete ban on handguns. In addition, petitioner points to nothing in *Heller* that would change the result in this matter. *Heller* does not address the Article 78 standard, and petitioner does not challenge any specific *gun licensing* statute or regulation. Accordingly, respondent’s determination is not arbitrary or capricious, or affected by an error of law, and petitioner is not entitled to an order directing respondent to issue a handgun license to him.

CONCLUSION

In view of the above, it is

ORDERED that petitioner’s application to amend the verified petition and enlarge the record is granted; and it is further

ORDERED and ADJUDGED that petition is denied and the proceeding is dismissed.

Dated: October 16, 2009

ENTER:

UNFILED JUDGMENT
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 and notice of entry cannot be served based hereon. J.T.C.
 obtain entry, counsel or authorized representative must
 appear in person at the Judgment Clerk’s Desk (Room
 141B).