

Klein v City of New York
2021 NY Slip Op 31803(U)
May 28, 2021
Supreme Court, New York County
Docket Number: 150339/2021
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART IAS MOTION 33EFM

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<p>MARTIN KLEIN,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">- v -</p> <p>THE CITY OF NEW YORK, MICHAEL BARETTO, HUGH BOGLE, JONATHAN DAVID, JAMES O'NEILL, DERMOT SHEA, POLICE USPENSKY</p> <p style="text-align: center;">Respondents.</p>	<p>INDEX NO. <u>150339/2021</u></p> <p>MOTION DATE <u>01/12/2021</u></p> <p>MOTION SEQ. NO. <u>001</u></p> <p style="text-align: center;">DECISION + ORDER AND JUDGMENT ON MOTION</p>
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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38
 were read on this petition for ARTICLE 78 (BODY OR OFFICER).

In this Article 78 proceeding, petitioner seeks an order (1) annulling and rescinding the final determination of respondent New York City Police Department (“NYPD”) dated September 25, 2020, denying petitioner’s renewal application for his Carry Business pistol license (“Carry license”), (2) extending the duration of petitioner’s license, (3) ordering the immediate return of the license, and (4) awarding petitioner costs, fees, and disbursements in connection with this proceeding. Respondents oppose the petition.

Background

Petitioner, who is a practicing attorney, was first issued a license to carry a handgun in 1987 (NYSCEF #’s 1, ¶ 1; NYSCEF # 13, ¶ 2). Petitioner has never been arrested or convicted of a crime and held the Carry license for more than 30 years without incident (NYSCEF # 1, ¶ 2; NYSCEF # 13, ¶ 3). On September 9, 2019, the NYPD License Division notified petitioner that his Carry license was due to expire and instructed him to submit documentation in support of his renewal application (NYSCEF #25). Petitioner submitted his renewal application on October 4, 2019 which included various documentation and a Letter of Necessity (NYSCEF #’s 25, 26).

In the Letter of Necessity, petitioner states, *inter alia*, that he “continues to be prominent attorney” and was an Administrative Law Judge (“ALJ”) of the City of New York in the Environmental Control Board.” He further states that for four years he was the president of his synagogue (now honorary president) and that as result of this position he “has been the target of numerous threats... [and that] [his] daughter was the target of a kidnapping threat requiring us to maintain security for her” (NYSCEF # 26).

In November and December 2019, the NYPD made additional requests for supporting documentation, including petitioner’s 2018 tax returns, and sought further information as to the asserted plot to kidnap petitioner’s daughter, and an explanation why petitioner never contacted the police (NYSCEF # 27). Petitioner’s response included his 2018 tax returns, showing \$8,678 in gross receipts for 2018, and as to the kidnapping, petitioner indicated that it occurred in Palm Beach, Florida but failed to explain the lack of any police record (NYSCEF # 28). Petitioner also stated that a bullet was once fired into his car and that it was “reported to the US Attorney’s Office who dealt with it” (*id*). In an email dated November 22, 2019, the NYPD requested information as to when the alleged kidnapping plot occurred and when and where the shooting occurred (NYSCEF # 29). Petitioner responded that the kidnapping plot took place during Thanksgiving weekend more than ten years earlier, and that the shooting incident occurred “most likely” a year before the kidnapping (*id*).

On November 25, 2019, the NYPD inquired as to the dates that petitioner was an ALJ and the president of his synagogue, and when he discovered the bullet hole in his car, and an explanation as to why there were no police records as to the bullet hole (NYSCEF # 30). In response, petitioner stated that he was president of his synagogue from 1995-1999 and honorary president from 2000-2018; that he “believed” he was appointed an ALJ in 2014, and that the bullet hole was discovered and reported by the US Attorney’s Office which handled the shooting incident (*id*).

On December 26, 2019, the NYPD served a final notice on petitioner, stating that he had failed to establish proper cause to have his license renewed and that he needed to submit an updated Letter of Necessity (NYSCEF # 31). In response, petitioner submitted a six-page letter, stating, *inter alia*, that his legal career put him in a position of prominence and that he notified police of the alleged kidnapping plot and had to hire private security (NYSCEF # 32). No new details were provided about the alleged shooting and the letter did not include any accompanying documentation (*id*).

By letter dated March 3, 2020, the NYPD License Division notified petitioner that his renewal application for a Carry license had been disapproved because he failed to show “proper cause,” including by providing documentation that he carries large sums of money or is subject to “extraordinary personal danger” (NYSCEF #

33). Specifically, the letter stated that petitioner provided no documentation from any police agencies asserted to have been involved with the alleged kidnapping plot, or any specific details as to the date, time, or exact location where the incident occurred (*id.*). Petitioner appealed the March 3, 2020 decision.

By Notice of Disapproval after Appeal dated September 25, 2020, the Director of the License Division notified petitioner that his appeal was denied (“final determination”) (NYSCEF # 36). In his final determination, the Director stated that contrary to petitioner’s position, the numerous prior renewals of his Carry license do not mean he is entitled to renewal; that “proper cause” must be shown with each renewal application; and that “after 2016, there has been change in policy and the License Division was reviewing the renewal applications more carefully” (*id.*). The Director also wrote that being a “prominent attorney,” does not establish “proper cause,” and that petitioner’s income tax return shows only \$8,678 in gross receipts which demonstrates his practice of law is “sporadic.” In addition, the Director noted that petitioner was no longer an ALJ, or the president of his synagogue, and that any alleged plot to kidnap petitioner’s daughter occurred over ten years ago, and that unsubstantiated assertions that petitioner was in danger due to his “notoriety” were insufficient (*id.*). The Director also noted that petitioner failed to substantiate that a bullet was fired at his car or explain why the incident was not reported to the police.

Discussion

At issue in this proceeding is whether the respondents’ determination that petitioner failed to show “proper cause” for renewal of his Carry license was irrational, arbitrary or capricious and or beyond its discretion (*Matter of Pell v Board of Education*, 34 NY2d 222,230 (1974); *Matter of Lipton v Ward*, 116 AD2d 474 [1st Dept. 1986]; *see generally* CPLR 7803[3]).

Article 4 of the New York Penal Law, and New York City Administrative Code’s Section 10.131 grant the NYPD broad discretion to regulate the possession of firearms in New York City (*Sewell v City of New York*, 182 AD2d 469, 472 [1st Dept], *appeal denied* 80 NY2d 756 [1992]). The license at issue here, known as a Carry Business License, is “an unrestricted class of license which permits the carrying of a handgun concealed on the person” (38 RCNY § 5-01). In accordance with 38 RCNY §§ 5-02 and 5-03, an application for renewal of a Carry license must be denied if it is determined that applicant has not shown “proper cause” for renewal (*see* Penal Law § 400.00 [2][f]).

Under § 5-03(a), proper cause may be established by showing that the applicant is exposed to “extraordinary personal danger” due to employment and/or due to recurrent threats to life or safety, or that the applicant “routinely engages in transactions involving substantial amounts of cash [and] [i]n these instances, the

applicant shall furnish documentary evidence that the routinely engages in such transactions.” And, the First Department has upheld the denial of a Carry license in the absence of a showing of “an extraordinary threat to [petitioner’s] safety” (*Kaplan v Bratton*, 249 AD2d 199, 201 [1st Dept.1998]; Penal Law § 400.00). In this connection, courts have held that a petitioner’s “general fear for [a petitioner’s] safety” does not present a basis for finding the type of specific instances of “threats, attacks or extraordinary danger” required to show proper cause for renewal of a Carry license (*id.*, at 201-202 citing *Fondacaro v Kelly*, 234 AD2d 173, 177 [1st Dept 1996], *lv denied* 89 NY2d 812 [1997]).

Considering these requirements, it cannot be said that the respondents’ determination that petitioner failed to establish proper cause for renewal of his Carry license was irrational, arbitrary or an abuse of discretion. The alleged kidnapping plot regarding petitioner’s daughter took place over ten years before the application, and petitioner was unable to provide evidence of the bullet hole or a reason why it was not reported to the police. Additionally, petitioner was unable to prove that he presently carries a large quantity of cash, instruments, securities, or jewelry and, in fact, as noted in the final determination, the only documentation petitioner provided was a tax form declaring only \$8,678 in gross receipts for the tax year of 2018. Further, petitioner no longer holds positions of an ALJ or an officer of his synagogue and has not provided evidence that he is currently in danger, including based on these former positions.

As for petitioner’s argument that respondents’ determination is irrational because his prior renewal applications were approved, this argument is unavailing as it does not account for Penal Law § 400.00, which requires that the applicant establish proper cause each time renewal of a Carry license is sought. Furthermore, pursuant to 38 RCNY § 5-05(b)(8), Carry license applicants, “[r]egardless of whether a handgun license was previously issued by the New York City Police Department,” are required to submit a Letter of Necessity that provides a detailed description of the applicant’s employment and an explanation of why the employment requires the carrying of a concealed handgun. Thus, when there is no longer proper cause, the NYPD licensing officer has discretion to deny the renewal application in accordance with the licensing officer’s “extraordinary power” in handgun renewal matters (*Matter of O’Brien v. Keegan*, 87 NY2d 436, 439-440 [1996]).

Regarding petitioner’s argument that the proper cause requirement violates his Second Amendment rights, courts have consistently rejected this argument (*see Matter of Corbett v City of New York*, 160 AD3d 415, 416, [1st Dept 2018], *lv denied* 31 NY3d 913 [finding that “the proper cause element of New York’s handgun licensing scheme...passes intermediate constitutional scrutiny as it is substantially related to the state’s important interest in protecting public safety...[and] viewed as a whole, New York’s handgun licensing scheme does not impose any blanket or near


total ban on gun ownership or possession”] *see also Kachalsky v County of Westchester*, 701 F.3d 81, 96–97 [2d Cir. 2012], *cert denied* 569 U.S. 918 [2013]).

In sum, respondents’ determination denying petitioner’s application for renewal of his Carry license was not irrational, arbitrary or capricious and or beyond its discretion.

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition is denied and dismissed.

<u>5/28/21</u> DATE	 MARGARET A. CHAN, J.S.C.
CHECK ONE: <input checked="" type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED APPLICATION: <input type="checkbox"/> SETTLE ORDER CHECK IF APPROPRIATE: <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> DENIED <input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE