

M E M O R A N D U M

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

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PAUL RUBENFELD,

Petitioner,

-against-

RAYMOND KELLY, as Police Commissioner
of the City of New York and THOMAS M.
PRASSO, as Director of the License
Division of the Police Department
of the City of New York,

Respondents.

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INDEX NO. 42/2003 001
MOTION DATE: MAY 20, 2003
MOTION CAL. NO. 7
DATED: SEPTEMBER 2, 2003

HON. DAVID GOLDSTEIN

In this Article 78 proceeding, petitioner Paul Rubenfeld seeks a judgment annulling the determination of respondents Raymond Kelly, Police Commissioner of the City of New York and Thomas M. Prasso, Director of the License Division of the Police Department of the City of New York, dated September 23, 2002, which, after a hearing, revoked petitioner's carry pistol permit.

In 1959, Paul Rubenfeld, now age 73, was issued a carry pistol permit by the New York City Police Department License Division. Rubenfeld who is the sole proprietor of a towing company, Hillside Service, which is located in Queens County, has had the license for over 40 years.

It is alleged that, on May 16, 2001, threats were made against the family of Police Officer Gregg Thompson, who was then

assigned to the Queens South Task Force, which resulted in an investigation by NYPD's Threat Assessment Unit. Officer Thompson reported an incident that occurred while he was waiting to testify at a Department of Consumer Affairs ("DCA") hearing. The officer, who had issued a violation to a tow truck operator, recalled that, just prior to testifying at the hearing, he was approached by Paul Rubinfeld, who intimated that he knew many people in the Police Department, asked if he could call the officer "Gregg" and, stated that he knew his home address and unlisted telephone number. According to Thompson, at the time, Rubinfeld was holding a piece of paper with the former's address and telephone number and, when questioned, said that he knew a lot of people in the borough and could get that kind of information at any time.

On May 22, 2001, the Threat Assessment Unit notified the License Division of its investigation. Thereafter, a Firearms Surrender Notice was issued, which was served upon Rubinfeld by Detective Robert Mattera, Sergeants Orlando and Carberry, and Police Officer Guglielmo. At the time, Rubinfeld was interviewed by Sergeant Orlando, whereupon he surrendered his firearms. Detective Mattera, in a written investigation report, stated: "Mr. Rubinfeld stated that he was involved in an Administrative Hearing resulting from an LD6 his tow company received from an Officer assigned to the Queens South Task Force. Mr. Rubinfeld could not remember the name or shield number of the

Officer involved, but did remember speaking to him. He stated that he may have tried to engage the Officer in polite conversation by telling the Officer, 'I know where you live. You live near my Lawyer in Farmingdale.' Sergeant Orlando inquired as to how Mr. Rubenfeld knew where the Officer lived. Mr. Rubenfeld said that he didn't remember. Mr. Rubenfeld further stated that even if he could remember, he is not sure if he would tell us. Sergeant Orlando left his business card with Mr. Rubenfeld and instructed him to call us when he is willing to cooperate with the investigation."

On May 28, 2001, the License Division notified petitioner that his carry license had been suspended. The letter advised as to the license revocation process and that Officer Murch was the investigator assigned to the case. On June 7, 2001, petitioner telephoned Murch to inquire about the suspension of his license. Petitioner recorded the conversation, professing to have no knowledge of the circumstances surrounding the suspension. Subsequently, on June 8, 2001, Rubenfeld telephoned Sergeant Schillaci and, again recorded the conversation, in which he again denied any knowledge why his license had been suspended. He also telephoned and spoke to Sergeant Orlando regarding the suspension.

During the course of the investigation of the threats against Officer Thompson's family, it was determined that there was no

proof that Rubenfeld had any connection with the threats. Following the investigation, the License Division, in a letter dated January 22, 2002, informed petitioner that his license had been revoked. On January 31, 2002, petitioner requested a hearing as to the revocation. He was provided with a copy of the License Division's file, although information regarding the threats made to Officer Thompson's family was redacted.

A hearing was held on March 25, 2002, at which petitioner and Officers Thompson and Murch appeared. Thompson testified that petitioner had confronted him with his home address and telephone number, in an apparent attempt to influence his testimony before the DCA. Thompson was positive that it was Rubenfeld who spoke to him prior to the DCA hearing. According to Officer Murch, in the telephone conversation she had with petitioner as to the suspension of his license, although Rubenfeld conceded he spoke to Officer Thompson after the DCA hearing, he denied confronting him with his first name, address and telephone number. Rubenfeld also denied any knowledge of the charges against him and reported his long relationship with the Police Department and his involvement in civic and community affairs.

After the conclusion of the hearing, the hearing officer re-opened the hearing to take the testimony of Sergeant Orlando. On June 12, 2002, at the continuation of the hearing, Sergeant Orlando produced a report, dated May 22, 2001, as to the

surrender of the firearms, a copy of which had been provided to petitioner and counsel. According to Orlando, a few days after the initial interview and removal of Rubenfeld's firearms, the latter telephoned and stated that he had known Officer Thompson from prior occasions and in the area. Rubenfeld admitted to having obtained the officer's telephone number and address and that he knew where he lived. Orlando again asked petitioner where he got this information, but petitioner refused to tell him.

On September 9, 2002, the hearing officer issued a determination setting forth her findings of fact and conclusions of law, in addition to her recommendation that the January 22, 2002 determination be upheld and Rubenfeld's carry pistol permit be revoked. The hearing officer made the following conclusions:

"1. The issuance of a pistol license is not a right but a privilege subject to reasonable regulation. The Police Commissioner has broad discretion to decide whether to issue a license (**Sewell v City of New York**, 182 AD2d 469, 472 [1st Dept 1992]).

2. The licensee's permit was properly suspended pending investigation of the allegations against the licensee (38 RCNY § 5-30[e]).

3. The protection of the welfare and safety of the general public is a factor of great weight in the issuance of a pistol permit (**Harris v Codd**, *supra*; **Lacono v Police Dept. of the City of New York**, 204 AD2d 25, 226, lv denied 85 NY2d 848).

4. An applicant for a pistol license must be of 'good moral character' and no good cause must exist to deny the applicant a license (P.L. § 400.00[1]).

5. I find the testimony of P.O. Gregg Thompson and former Sergeant Frank Orlando to be credible. Although it is unclear whether the DCA incident occurred just prior to the hearing or just afterward, it is clear that it happened as Thompson related it. There is no reason for Thompson to have fabricated such a story, and he was very positive about the identity of the individual who confronted him with his personal information, that it was Paul Rubinfeld. I believe Orlando's testimony that Rubinfeld admitted to him that he had obtained the police officer's home address and telephone number, and that Orlando informed Rubinfeld that it was Thompson who had made the complaint against him.

6. I find Rubinfeld's testimony not credible. He has variously described inconsistent versions of his conversation with Thompson at DCA: to Murch, to Orlando, and in his testimony herein given on two separate dates. The only consistency was his evasiveness about exactly what he said to Thompson. In his testimony herein on 6-12-02, Rubinfeld said he did not know until the hearing who had made the complaint against him. In his earlier testimony on 3-25-02 he said he had learned this in January 2002. It appears that when he telephoned Murch and Schillaci on 6-7-02 asking what the allegation against him was, he had already learned this from Orlando. In testimony, he related that Orlando told him he would not get his pistol permit back unless he could prove that he did not know Thompson. Finally, I do not believe the licensee's claim that he did not record his telephone call to Orlando, just as he had done with his telephone calls to Murch and Schillaci.

7. In summary, I find that the licensee did obtain Thompson's personal information-first name, home address, and unlisted telephone number-and did confront Thompson with this information either prior to or immediately after a DCA hearing in an attempt to intimidate the officer by showing that he had important sources within the Police Department. Although it is unclear from the record before me exactly how he obtained the officer's personal information, the only possible interpretation for this action is to intimidate the officer. I also find that the licensee's testimony about this incident was false and misleading. Although the licensee has possessed a pistol permit for 40 years without incident, his conduct in both instances demonstrates that he lacks the requisite good moral character to possess firearms.

8. I find unpersuasive counsel's arguments that Thompson confused Rubenfeld with another tow truck owner, or that even if the incident did occur as alleged, this single incident was insufficient grounds to revoke Rubenfeld's pistol permit given the licensee's lengthy and clean record. While the DCA incident may be considered an aberration in an otherwise spotless record, the licensee has compounded his error in judgment by lying about the incident. It is precisely because of Rubenfeld's false testimony about this incident that my recommendation is for revocation rather than for a suspension of his permit.

9. The Police Commissioner is authorized to revoke or suspend a pistol permit for good cause (P.L. § 400.00[1 1]; Harris v Codd, 394 NYS2d 210, 57 AD2d 788 [1st Dept 1977], affd 408 NYS2d 501, 44 NY2d 978). For all the reasons noted above, I find that the licensee's pistol permit was revoked for sufficient good cause."

On September 23, 2002, Thomas Prasso, Director of the License Division, issued his determination, concurring with the hearing officer's conclusions and recommended decision.

Thereafter, petitioner commenced the within proceeding for a judgment vacating the determination, dated September 23, 2002, which had revoked his pistol carry license, and for an order directing respondents to renew the license for a period of three years. He alleges that the License Division's determination was arbitrary, capricious and an abuse of discretion. He contends that Officer Thompson had mistakenly confused Rubenfeld's tow truck operation with another business; he denies any threatening remarks to Thompson or any other police officer; and claims that the hearing officer erroneously chose to believe Thompson's

testimony rather than his own account. It is also asserted that the redaction of a portion of the police file prevented petitioner from the fair hearing to which he was entitled. He states that, (1) he has always been a strong supporter of the Police Department (2) is a member of the 105th Police Precinct Community Counsel, (3) has raised funds for the Department's bicycle program, (4) received Police Department commendations for his community involvement and, (5) is involved in other business and civic groups. He contends that the hearing officer did not accord appropriate "importance" or consideration to these factors in reaching the determination.

In opposition, respondents assert that the determination to revoke petitioner's pistol license was neither arbitrary nor capricious, nor was it an abuse of discretion and that the decision has a reasonable basis in the record and is in accordance with the applicable law.

It is well settled that the only issue for the court's consideration is whether the License Division's determination to revoke petitioner's pistol license was arbitrary and capricious or an abuse of discretion (*Matter of Pell v Board of Educ.*, 34 NY2d 222; *Sewell v City of New York*, 182 AD2d 469; *Matter of Lipton v Ward*, 116 AD2d 474). The judicial function is limited to ascertaining whether there is a rational basis for the agency's determination (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269). A rational basis for revoking a pistol

license exists when the evidence adduced is adequate to support the Commissioner's action (*Matter of Beninson v Police Dept.*, 176 AD2d 183; see also, *300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176). In reviewing the administrative ruling, the court must defer to the fact-finder's assessment of the evidence and the credibility of witnesses (*Matter of Berenhaus v Ward*, 70 NY2d 436; *Matter of Interliners Lounge Social Club v Department of Consumer Affairs*, 176 AD2d 169). It is axiomatic that the "court may not weigh the evidence, choose between conflicting proof, substitute its assessment of the evidence or interfere with the Administrative Law Judge's province to pass on the credibility of witnesses" (*Matter of Deitch v Dole*, 159 AD2d 311).

The possession of a handgun license is a privilege rather than a right (*Matter of Caruso v Ward*, 160 AD2d 540, lv denied 76 NY2d 706). The New York City Police Commissioner has broad discretion to grant licenses in accordance with the provisions of Penal Law § 400.00 and Administrative Code of the City of New York § 10-131(a)(1). Moreover, "[a] license may be revoked and cancelled at any time in the City of New York ... by the licensing officer" (Penal Law § 400.00 [11]).

In the within proceeding, the Court finds that the determination to revoke petitioner's license was supported by substantial evidence that he lacked the necessary moral character

required of a pistol licensee (see, Penal Law § 400.00[1][b]). Plainly, the hearing officer was entitled to credit the testimony of Officer Thompson and Sergeant Orlando and to discredit that by Mr. Rubenfeld. To the extent petitioner asserts that there are errors in the transcript of certain tape recordings, it is noted that the hearing officer was able to listen to the tape recordings at the hearing, as well as to review and compare the transcripts. The proof adduced established that petitioner had obtained Officer Thompson's unlisted home address and telephone number, and that he confronted Officer Thompson with this information, either immediately prior to or after the DCA hearing, in an apparent attempt to intimidate the officer by demonstrating that Rubenfeld had important sources within the Police Department. During the course of both the investigation and the hearing, petitioner was evasive as to how he had procured Thompson's personal information. He consistently sought to impress the investigating officers and the hearing officer, with his record of civic involvement and his connections within the Police Department, which in no way affords him any favorable treatment or special consideration.

Nor is the fact that petitioner is a businessman and may handle large sums of cash a sufficient basis for the issuance of a carry pistol permit. Plainly, petitioner has failed to distinguish himself from countless other merchants in the community, albeit the instant matter concerns revocation of a license, not issuance of a

new permit. As has been recognized, the "solution is not to grant permits to all who seek them and thus to make the community an armed camp." (Tabankin v. Codd, NYLJ Sept. 13, 1974, p. 2, col. 3 [Fein, J.] aff'd. 48 AD 2d 771, app. disp. 40 NY 2d 893).

Finally, petitioner's assertion that he was denied certain discovery during the administrative hearing is without merit. Although he did not make a timely request for the License Division's records, petitioner was provided with a copy of the file relating to the suspension of the license. Contrary to the objection, the file was properly redacted as to the investigation into threats made against Officer Thompson's family (see, 38 RCNY § 15-25). Petitioner was provided with the report by Sergeant Orlando and he never made any discovery requests relating to the information contained in the report.

Upon the foregoing, petitioner's application to vacate respondents' determination of September 23, 2002, is denied in all respects and the petition is dismissed.

Settle judgment.

J.S.C.