

Mudrick v City of New York

2020 NY Slip Op 32598(U)

August 10, 2020

Supreme Court, New York County

Docket Number: 155756/2019

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

JASON MUDRICK,

Plaintiff,

- v -

THE CITY OF NEW YORK, JAMES O'NEILL, THE NEW
YORK CITY POLICE DEPARTMENT

Defendant.

-----X

INDEX NO. 155756/2019
MOTION DATE 1/13/2020
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 26, 27, 28, 29, 30, 31

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED that the petition for relief, pursuant to CPLR Article 78, of petitioner Jason Mudrick (Motion Seq. 001) is denied and the petition is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for Respondents serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for petitioner.

CASE DISPOSED

In this Article 78 proceeding, Petitioner Jason Mudrick seeks an order reversing the decision of the New York City Police Department License Division (the “License Division”) denying Petitioner a Special Carry Business License for a pistol permit.

BACKGROUND

Petitioner is a resident of New York County, State of New York, and the sole owner of an investment fund, Mudrick Capital Management, LP. Petitioner sought to obtain a New York City Pistol License by filing an application in 2015, which was denied and then administratively appealed. In support of his application, Petitioner submitted a “threat assessment” prepared by the security firm Kroll. The assessment detailed the exposure and risks associated with Petitioner’s occupation and personal wealth, and noted:

“Kroll finds the threat environment around Mr. Mudrick to be significant and one predisposed to nefarious/adversarial actions presenting with little or no notice...Kroll recommends Jason Mudrick and Mudrick Capital engage in various executive protection practices for the personal protection of Mr. Mudrick...” (page 4)

(NYSCEF doc No. 7, at 2-4).

On February 14, 2019, the License Division issued its Notice of Disapproval After Appeal (the “Final Determination”), which is the subject of this Article 78 proceeding (NYSCEF doc No. 4). The Final Determination found that Petitioner was not entitled to a permit as he did not demonstrate “special cause” as required by New York Penal Law pursuant to Chapter 5 of Title 38 of the Rules of the City of New York (“RCNY”). The decision noted that Petitioner’s job managing a hedge fund was not “inherently dangerous work,” and the management of a large sum of capital in and of itself does not place Petitioner in “extraordinary personal danger” (*id.*). The License Division also dismissed Petitioner’s contentions that he was entitled to Special Carry Business License because of disgruntled investors and former employees, and general

negative sentiment towards Wall Street, noting that such contentions were “dubious and highly speculative” (*id.*)

Petitioner argues that he satisfied the requirements demonstrating need for a permit under New York Penal Law. Petitioner contends that RCNY Section 5-03 is unconstitutionally vague and the License Division’s application of the statute in rendering the Final Determination violated his due process rights.

Petitioner asks that the case be remanded to the License Division with orders to approve Petitioners’ application.¹

DISCUSSION

Applicable Statutory Law

Pursuant to Penal Law § 400 and Administrative Code § 10-131, the License Division has promulgated regulations governing the issuance, revocation, and suspension of handgun licenses, which are codified in Title 38 RCNY § 5 (“38 RCNY § 5”). That regulation provides for six types of handgun licenses. Relevant to this case, § 5-01(e)(1) provides for a "Special Carry Business License," which is defined as “a special license, permitting the carrying of a concealed handgun on the person while the licensee is in New York City”. An applicant for a Special Carry Business License must demonstrate "proper cause" pursuant to Penal Law § 400.00(2)(f).

Additionally, Title 38 RCNY § 5-03 states, in relevant part:

“In addition to the requirements in 38 RCNY § 5-02, an applicant seeking a carry or special handgun license shall be required to show "proper cause" pursuant to §

¹ The Court notes that this request for relief is improper as Petitioner essentially seeks mandamus relief for a decision that is discretionary and not ministerial. Mandamus is available only where there is a clear and absolute right to the relief sought, and the body or officer whose duty it is to enforce such right has refused to perform such duty (*Brusco v Braun*, 84 N.Y.2d 674, 679). Mandamus is not available where, as here, a litigant seeks to compel administrative officials to render a determination in a particular manner when said officials have been given broad statutory authority and discretion (*id.* at 678). Thus, the scope of this decision with respect to the relief sought under Article 78 will be limited to whether this matter must be generally remanded for further fact finding.

400.00(2)(f) of the New York State Penal Law. "Proper cause" is determined by a review of all relevant information bearing on the claimed need of the applicant for the license. The following are examples of factors which shall be considered in such a review.

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

Before turning to the merits of Petitioner's Article 78 application, the Court addresses as a preliminary matter Petitioner's contentions that 38 RCNY § 5 is unconstitutionally vague and the License Division's application of the statute violated his due process rights.

Whether 38 RCNY § 5 of the RCNY is Unconstitutionally Vague

Petitioner appears to argue in his moving papers that 38 RCNY § 5 is unconstitutionally vague and void on its face. Petitioner alleges that statute is "rife with undefined and vague standards in every paragraph. They are either purposefully or negligently created so as to trap an applicant. Objective: make it impossible for any law-abiding citizen to qualify for a handgun license" (NYSCEF doc No. 9 at 5). In support of this argument, Petitioner cites to Court of Appeals caselaw noting that statutes may be struck down on grounds of vagueness (see *People v Stuart*, 100 NY2d 412 [2003]). Petitioner concludes that the "proper cause" standard of 38 RCNY § 5-03 is unconstitutionally vague as it contains no bright line standards and is thus a "standardless requirement which does not provide the applicant with 'reasonable notice' of that which the license applicant must initially meet" (NYSCEF doc No. 31, ¶ 22, citing *Papachristou v City of Jacksonville*, 405 US 156, 162 [1972]).

In opposition, the License Division counters that Petitioner has not demonstrated why 38 RCNY § 5 is impermissibly vague. The License Division notes that "a statute, or a regulation, is 'unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable

opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement" (*Ulster Home Care Inc v Valco*, 96 NY2d 505, 509 [2001], quoting *People v Foley*, 94 NY2d 688,681 [2000]). A law is unconstitutionally vague if it fails to provide a person of ordinary intelligence fair notice of what is prohibited. (See *United States v. Rybiki*, 354 F3d 124, 132 [2d Cir. 2003])². It is well-settled that a regulation will only be found to be impermissibly vague if it is too vague to provide clear guidance to reasonable persons. The Constitution "requires only a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms." (*Foss v City of Rochester*, 65 NY2d 247, 253 [1985]).

Here, the Court finds that Petitioner has not met the "heavy burden" required in sustaining a facial challenge to a statute or regulation (see *Sanitation and Recycling Industry Inc. v. City of New York*, 1997 U.S. App. LEXIS 3600, Docket No. 96-7788, at * 12 [2d Cir. Feb. 28, 1997], quoting *New York State Club Ass'n v City of New York*, 487 U.S. 1, 11 [1988]). Petitioner is correct in noting that statutes and regulations may be overturned for vagueness, but Petitioner does not cite to any caselaw or legal reasoning for why 38 RCNY § 5 is vague on its face. The fact that the regulation does not contain bright line standards and is subject to the reasonable interpretation of License Division officers does not support Petitioner's argument, as "the Constitution does not require 'meticulous specificity' and does not require a law to be drafted with such specificity that it leaves no room for interpretation" (*People v Lang*, 36 NY2d 366, 370 [1915]).

² The federal and state constitutional standards for adjudicating vagueness claims are indistinguishable. (See *People v. Smith*, 44 NY2d 613 [1978]).

Whether Petitioner's Due Process Rights Were Violated

Petitioner also counters that his due process rights were violated, and he was denied equal protection under the law as the vagueness of the “proper cause” requirement allowed the License Division to arbitrarily abuse its powers and deny him a permit. Petitioner cites to no legal authority for this argument other than the general proposition that a statute violates due process when it leaves an administrative body with arbitrary standards that are unclear to applicants (*164th Bronx Parking v City of New York*, 20 Misc3d 796 [NY Sup Ct 2008]). Petitioner also offers no fact-based support for the argument that he was denied equal protection, other than an unsubstantiated allegation that retired New York City police officers do not have to demonstrate extraordinary need for a permit, a separate set of standards Petitioner claims is separate set of standards is “patently unfair, and discriminatory” (NYSCEF doc No. 31, ¶¶ 22-23).

As the License Division notes, Courts have stressed that a lack of precision in a statute is not in and of itself offensive to the requirements of due process (*Roth v United States*, 354 US 476, 491-92 [1951]). To successfully challenge a statute, the petitioner must show more than that the statute “requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, ‘men of common intelligence must necessarily guess at its meaning’” (*Coates v Cincinnati*, 402 US 611, 614 [1971], citing *Connally v General Construction Co.*, 269 US 385, 391 [1926]).

Here, just as with his argument challenging 38 RCNY § 5 as unconstitutionally vague, Petitioner has only offered broad, threadbare assertions for why the License Division’s application of the statute violated his due process rights and denied him equal protection under the Law.

Therefore, the Court dismisses Petitioner's attempts to raise a facial challenge to 38 RCNY § 5 and turns to the merits of Petitioner's Article 78 application.

Petitioner's Article 78 Application

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious (see *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [Ct App 1974]; *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 [1st Dept 1996]). A determination is only deemed arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts" (See *Century Operating Corp. v Popolizio*, 60 NY2d 483 [Ct App 1983], citing *Matter of Pell*, 34 NY2d at 231). However, if there is a rational basis for the administrative determination, there can be no judicial interference (*id.* at 231-232). It is also well settled that "[t]he interpretations of [a] respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational" (*Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251 [1st Dept 1994], citing *Matters of Salvati v Eimicke*, 72 NY2d 784 [Ct App 1988]).

In the specific context of Article 78 proceedings to challenge handgun licensing denials, the First Department has explained that:

"It is well settled that the possession of a handgun license is a privilege, not a right, which is subject to the broad discretion of the New York City Police Commissioner, and respondent, by statute, has been delegated "extraordinary power" in these matters. Indeed, the only issue to be reviewed . . . is whether the administrative decision to revoke petitioner's pistol license was arbitrary and capricious or an abuse of discretion, and whether a rational basis exists for the agency's determination. A rational basis exists when the evidence adduced is sufficient to support the Commissioner's action."

(*Matter of Papaioannou v Kelly*, 14 AD3d 459, 460 [1st Dept 2005]).

The First Department has defined "proper cause" for the issuance of the Special Carry Business License as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." (*Matter of Klenosky v N.Y. City Police Dept.*, 75 AD2d 793 [1st Dep't 1980]), *aff'd* 53 NY2d 685 [1981]; *Kaplan v Bratton*, 249 AD2d 199, 201 (1st Dept. 1998)). Factors that may be considered for a showing of "proper cause" are "exposure of the applicant by reason of employment . . . to extraordinary personal danger," and "exposure of the applicant to extraordinary personal danger, documented by proof of recurrent threats to life or safety." In order to demonstrate that the applicant requires a Special Carry Business License under the aforementioned factors, a petitioner is required to provide "any proof . . . [which could include] New York City Police Department records" (38 RCNY § 5-03).

Petitioner argues that the "threat assessment" included in his application indicates that he requires a Special Carry Business License due to his field of work and personal wealth. However, Petitioner did not cite a single incident demonstrating his need for self-protection distinguishable from that of the general community or a person engaged in the same profession. As noted in the Final Determination, merely having significant assets or wealth does not establish "proper cause" (NYSCEF doc No. 19 at 12). Similarly, while Petitioner submitted media articles detailing his notoriety in the financial sector, the License Division reviewed the materials and found that Petitioner did not demonstrate that his "being 'well known in the financial sector' places him in extraordinary personal danger" (*id.* at 13). This reasoning is well supported by First Department caselaw (*See Martinek v Kerik*, 294 AD2d 221 [1st Dept 2002] [a bank president's application for a Special Carry Business License was denied because he did not substantiate a showing of "particular threats, attacks or other extraordinary danger" to personal safety], *see also Ferrara v Safir*, 282 AD2d 383 [1st Dept 2001] [the chief executive officer of a

celebrity bodyguard business did not demonstrate a “special need for self-protection” despite his field of work]).

Given that Petitioner failed to demonstrate how his field of work or his professional notoriety is related to any instances of threats, attacks, or extraordinary danger, the Court finds that the License Division’s determination denying Petitioner’s Special Carry Business License on the grounds that he did not demonstrate “proper cause” was rational and reasonable, and thus is not subject to judiciary interference.

CONCLUSION

Accordingly, it is hereby

ORDERED that the petition for relief, pursuant to CPLR Article 78, of petitioner Jason Mudrick (Motion Seq. 001) is denied and the petition is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for Respondents serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for petitioner.

8/10/2020

DATE



HON. CAROL R. EDM EAD
J.S.C.
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE