

In re Revocation of Pistol **License** of Beach
N.Y.Sup.,2007.

Supreme Court, New York County, New York.
In the Matter of the REVOCATION OF the PISTOL
LICENSE OF David BEACH, Petitioner, For a
Judgment under Article 78 of the Civil Practice Law
and Rules Directing, Respondent to Grant a
Restoration of Petitioner's Pistol **License**
v.

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, Respondent.

No. 113372/06.

May 18, 2007.

[John S. Chambers](#), Esq., New York, NY, for
petitioner.

[Michael A. Cardozo](#), Corporation Counsel (Desiree A.
Wise, Esq., Assistant Corporation Counsel), New
York, NY, for respondent.

[JANE S. SOLOMON](#), J.

*1 Petitioner David Beach petitions this court for a
judgment pursuant to CPLR Article 78 compelling
and directing Respondent Raymond Kelly, as the
statutorily designated Handgun Licensing Officer and
as the New York City Police Commissioner, and his
successors to (1) grant Petitioner a continuation of his
pistol permit on the grounds that Respondent ignored,
and/or misinterpreted the 1986 federal law known as
the **Firearm** Owners' Protection Act; and (2) grant
Petitioner a continuation of his pistol permit based
upon the grounds that the revocation of this permit by
Respondent is "shocking to one's sense of fairness."
For the reasons described herein, the Petition is
granted.

Background

Petitioner is a naturalized U.S. citizen and a resident of
New York City, who works as an unarmed security
doorman at a lower Manhattan restaurant. In or about
March 2001 he applied to Respondent's **License**
Division for a Premises Resident pistol **license**. This is
a restricted **license**, issued for a specific residence
location. *See* 38 Rules of the City of New York §
5-01(a). It differs from other types of **licenses**, which
permit a licensee to carry a loaded handgun, either

during specified times for certain business reasons or
without restrictions. *See id.*

A Premises Resident pistol **license** does, however,
permit the licensee to transport an unloaded handgun
that is secured unloaded in a locked container directly
to and from authorized small arms ranges/shooting
clubs. *Id.* Ammunition needs to be carried separately.
Id. Transportation to and from areas designated by the
New York State Fish and Wildlife Law is also
permitted if the licensee has a separate hunting
authorization. *See* 38 RCNY §§ 5-23(a)(1)-(4). Other
than these specific exceptions, the handgun must be
safeguarded at the specific address indicated on the
license. Petitioner's **license** clearly reads "RESTRIC-
TED-NOT FOR CARRY."

By a letter dated September 10, 2001, the **License**
Division approved Petitioner's Premises Residence
license. It renewed his application the subsequent two
years. On or about July 25, 2003, Petitioner's pistol
was stolen from his vehicle. Petitioner reported the
incident to the **License** Division, and following an
investigation into the matter, Petitioner's **license** was
continued.

On or about January 9, 2004, Petitioner went to have
his pistol inspected by the **License** Division. It was
discovered that Petitioner carried his ammunition in
the same box as his newly purchased pistol and that he
had an expired purchase order in violation of 38
RCNY §§ 5-24(5) and (6). As a result of an
investigation, Petitioner's **license** was suspended until
June 9, 2004.

When Petitioner attempted to renew his **license** in
August 2004, the **License** Division became aware that
he transported a handgun by plane to Las Vegas,
Nevada, in 2003 to attend security related seminars,
conventions and training sessions. Petitioner also held
the equivalent of a full carry pistol **license** in Nevada,
and he states that he required **licenses** from both States
in order to check his handgun with the airline. Prior to
his trip, Petitioner contacted the **License** Division
regarding taking his pistol to Nevada, but testified that
he never receive a clear answer. He states that he
checked his handgun in a locked container, unloaded
and without ammunition.

*2 Following an investigation, the **License** Division

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revoked Petitioner's **license** by letter dated December 1, 2004. Upon Petitioner's request, the **License** Division scheduled a hearing for January 11, 2006.^{[FN1](#)} Hearing Officer Arlynn Lowell ("H.O.Lowell") presided over the hearing, and Petitioner and Investigator Patsy Brewster both testified. On January 13, 2006, H.O. Lowell notified Petitioner it misinterpreted [18 U.S.C. § 926](#) during the January 11, 2006 hearing, and that a second hearing would be required. Commonly known as the **Firearm** Owners' Protection Act, [18 U.S.C. § 926A](#) provides:

^{[FN1](#)}. The **License** Division originally scheduled a hearing for May 10, 2005, but rescheduled it following Petitioner's request.

Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a **firearm** shall be entitled to transport a **firearm** for any lawful purpose from any place where he may lawfully *possess and carry* such **firearm** to any other place where he may lawfully *possess and carry such firearm* if, during such transportation the **firearm** is unloaded, and neither the **firearm** nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the **firearm** or ammunition shall be contained in a locked container other than the glove compartment or console. (*emphasis added*).

Following the second hearing in March 2006, H.O. Lowell recommended that Petitioner's pistol **license** remain revoked. On May 17, 2006, the **License** Division agreed, informing Petitioner by letter of the same. On September 19, 2006, Petitioner commenced this Article 78 Proceeding. He asserts that the reasoning underlying the final agency action was arbitrary and capricious, and in violation of [18 U.S.C. § 926A](#).

Discussion

[CPLR § 7804\(g\)](#) requires this Court to transfer to the Appellate Division any Article 78 case where there is an issue raised of substantial evidence, as specified in [CPLR § 7803\(4\)](#). See *Al Turi Landfill v. N.Y. State Dep't of Env'tl. Conservation*, 98 N.Y.2d 758 (2002). It is well settled that possessing a handgun **license** in New York is a privilege rather than a right (*Sewell v. City of New York*, 182 A.D.2d 469 [1st Dep't 1992]),

and it is therefore unnecessary to furnish a quasi-judicial or formal adversarial hearing before revoking a pistol **license** (*Burke v. Colabella*, 113 A.D.2d 794 [2nd Dep't 1985]).

"Accordingly, no question of substantial evidence is properly raised in a proceeding to review the revocation of a pistol **license**, and it is not appropriate to transfer the matter to the Appellate Division." *Shapiro v. New York City Police Dep't*, 157 Misc.2d 28 (Sup.Ct. New York County, 1993). Moreover, in the case at bar there is no substantial evidence question as there is no disagreement on the facts. The only issue is whether H.O. Lowell's interpretation of the **Firearm** Owners' Protection Act is correct. Thus, this Court rejects Respondent's argument that this case should be transferred to the Appellate Division for a substantial evidence analysis.

*3 Respondent argues that Petitioner's Premises Resident **license** did not authorize him to "carry" a handgun in New York, and thus the federal statute does not apply. It states that he used poor judgment in carrying his pistol to Nevada because he never received a definitive answer from it as to whether or not he was permitted to do so. Respondent contends that this error in judgment, combined with his two previous incidents, was a rational reason to deny his **license**.

As opposed to some other States, New York requires a specific carry **license** for both the open and concealed carrying of **firearms**. See *Bach v. Pataki*, 408 F.3d 75 (2d Cir.2005). On the other hand, New York law permits holders of a Premises Resident pistol **license** to transport a handgun in a locked container to and from small arms ranges/shooting clubs and specified hunting locations. 38 RCNY §§ 5-23(a)(1)-(4). Thus, although named a "premise" **license**, it allows for transportation of handguns under some circumstances.

The question is the definition of the word "carry" under the **Firearm** Owners' Protection Act. [18 U.S.C. § 921](#) unfortunately does not provide a definition. In *Muscarello v. United States*, 524 U.S. 125 (1998), the Supreme Court held that although the word "transport" is a broader category that includes the word "carry", the word "carry" should not be construed so narrowly as to undercut the statute's basic objective. "[I]n the words of its sponsor, [[§ 926A](#)] confers upon all law-abiding citizens a right to transport their **firearms** in a safe manner in interstate commerce." ' *City of Camden v. Beretta U.S.A. Corp.*, 81 F.Supp.2d 541 (D.N.J. 2000), quoting 131 Cong. Rec. S9101-05

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(July 9, 1985) (statement of Sen. Hatch).

[18 U.S.C. § 927](#) explicitly states that the **Firearm Owners' Protection Act** is intended to coexist with State laws affecting **firearms** “ unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.” Based on the Supreme Court's direction and the intent of the Act's sponsor, this Court holds that the definition of “ carry” under the **Firearm Owners' Protection Act** includes the transportation of handguns permitted for Premises **License** holders in New York.

Administrative agencies enjoy broad discretionary power when determining matters they are empowered to decide. This Court cannot substitute its own judgment, even if it might have reached a different conclusion on the evidence. See [Mid-State Mgt. Corp. v. New York City Conciliation and Appeals Bd.](#), 112 A.D.2d 72 (1st Dep't 1983), *aff'd* 66 N.Y.2d 1032 (1985).

However, it is also settled law that while a New York handgun **license** is a privilege and may be revoked at any time, the **License** Division must act rationally, and free from arbitrariness and capriciousness. See [Sheriff v. Codd](#), 83 Misc.2d 625 (Special Term, Sup.Ct. New York County, 1975). Since this Court has concluded that the **License** Division misinterpreted the definition of “ carry” under **Firearm Owners' Protection Act**, the Petition is granted in its entirety. Accordingly, it hereby is

*4 ADJUDGED that the Petition is granted; and it further is

ORDERED that Respondent's determination to revoke Premises Resident pistol **license** is annulled and Respondent is directed to restore Petitioner's **license** pursuant to [Penal Law Section 400.00](#).

This constitutes the decision and judgment of this court.

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