

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

PRESENT: PAULA J. OMANSKY

PART 47

*Justice*

Tim Deilly

EX NO.

117385/02

MOTION DATE

117385/02 11/5/02

- v -

MOTION SCO NO.

001

MOTION CAL. NO.

29

Raymond Kelly

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

**SCANNED**

Answering Affidavits — Exhibits \_\_\_\_\_

MAR 04 2003

Replying Affidavits \_\_\_\_\_

Cross-Motion: ☐ Yes ☐ No

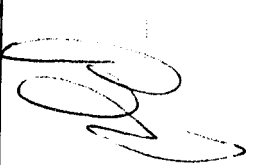
Upon the foregoing papers, it is ordered that this motion

*Motion dismissed & remanded with  
costs to be paid by defendant*

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE \_\_\_\_\_

Dated \_\_\_\_\_

2/21/03



Check one:

☒ FINAL DISPOSITION

**PAULA J. OMANSKY**

☐ NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 47**

-----X  
In the Matter of the Application of  
TIM DE LILLY

Index No. 117385/02

Petitioner,

**ORDER AND JUDGMENT**

For a Judgment under Article 78  
of the Civil Practice Law & Rules,

- against-

RAYMOND KELLY, as Commissioner of the  
Police Department of the City of New York

Respondent.

.....X  
**PAULA J. OMANSKY, J.:**

Petitioner instituted this Article 78 proceeding challenging respondent Police Commissioner's action in eliminating the category of "Target" firearm license ,converting all then existing Target licenses to "Premises Residence" Licenses with endorsement permitting the licensee to transport firearms .unloaded, in locked boxes, to shooting ranges, and refusing to reinstate at petitioner's request his "Target" firearm license. Respondent cross-moves to dismiss the petition.

In New York City, the Police Commissioner is the firearm licensing officer (see, Penal Law §265.00(10), and issues licenses pursuant to Administrative Code § 10-131. Prior to June 18,2001, the rules provided for the issuance of a "target" license (38 RCNY §5-01[b]):

(B)Target License. This is a handgun license which permits the transporting of an unloaded handgun in a locked container to and from an authorized range.

(1) Target license applicants shall provide evidence of intention to use licensed handguns for regular recreational target shooting purposes,...

(6) A licensee may transport his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations...

Petitioner held a Target License dated January 6, 2000, which was due to expire on March 19, 2002. On June 18, 2001, the Police Department notified the holders of Target Licenses that, beginning June 30, 2001, and in keeping with the new firearm licensing rules that would go into effect on that date, Target Licenses would be converted into Premises Residence Licenses ("Premises Licenses"), and upon expiration of their Target Licenses, they were entitled to renew their licenses as Premises Licenses. The holders of Target Licenses were further advised that, as Premises Licensees, they would be permitted to use their licensed firearms to protect their residences and to transport such firearms to and from an authorized small arms ranges/shooting clubs for target shooting practice.

On March 12, 2002, petitioner submitted an application to renew a Premises License as instructed by respondent's June 18 notice. After reviewing the petitioner's application, the License Division issued a Premises License to petitioner (the record is not clear as to this date).

On July 8, 2002, the petitioner wrote to the License Division stating that he "was not given a choice as to whether [he] wanted a Premises license, " that he interpreted Penal Law Article 400 as prohibiting the removal of his firearms from his residence for target practice or hunting, and that the Police Department "clearly has no authority to make these changes." Petitioner also requested that the respondent reinstate his Target License and advise him of his administrative remedies. Petitioner's request for the reinstatement of his Target License was denied, and petitioner was

advised that there were no administrative remedies available because the Target License ceased to exist as of June 30, 2001. Thereafter, by Notice of Petition and Petition dated August 1, 2002, petitioner instituted this Article 78 proceeding.

### DISCUSSION

The City Respondent argues that the proceeding is untimely because the four-month period in which to challenge the action of a body or officer (CPLR § 217) began to run on June 30, 2001, when respondent notified petitioner of the new firearm licensing rules. However, the change was done by administrative conversion when respondent eliminated the category of Target License, and notified all holders of such licenses that the licenses could be renewed as "premises licenses". At the time, petitioner's Target License had not expired and was not due for renewal until March 19, 2002. Further, Penal Law § 400.00(10) provides that any license not revoked 'shall be in full force and effect for thirty days beyond the stated expiration date on such license.' Therefore, petitioner's license remained in effect until April 18, 2002, thirty days after March 19, 2002, the stated expiration date on the license. Arguably, then, April 19, 2002 was the first date that respondent's administrative action became final and binding on petitioner.

Accordingly, petitioner renewed by applying for a Premises License as instructed by respondent's June 30, 2001 conversion. On July 8, 2002 petitioner protested that he was not given a choice and requested that he be issued a Target License. Petitioner was not 'aggrieved' until his request was denied and not when the City administratively eliminated Target Licenses (see, New

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<sup>1</sup>We note, as well, the dilemma facing petitioner. It was futile to apply for a renewal of a Target License when that category of license was eliminated by administrative action. Had petitioner applied for a renewal of his Target License, he invited the stigma of being denied a license, with all the weight such a denial carries in re-applying for a license.

York State Association of Counties v. Axelrod, 78 N.Y. 2d 158, 165 [1991]). Accordingly, the special proceeding instituted on or about August 1, 2002 was timely.

Turning to the merits, petitioner argues that the respondent's issuance of a Premises License with an endorsement to transport it, unloaded, to sporting locations violates Penal Law §400.00(2)(a). That section authorizes the issuance of a Premises License to any person to "have and possess (a firearm) in his dwelling by a householder." Petitioner argues that the respondent is without authority to expand the scope of that license by an off-premises endorsement.

Insofar as petitioner claims that the State Penal Law §400.00 pre-empts the field and prohibits the City from enacting firearm licensing rules, he had no complaint when respondent issued him a Target License, although no such category exists in Penal Law §400.00. In any event, Penal Law §400.00 is not a comprehensive and detailed regulatory scheme but, to the contrary, looks to local governments to issue rules and regulations compatible with its mandate. Penal Law §265.00(10) defines a "licensing officer" to mean "in the City of New York, the police commissioner of that city..." (see also, Admin. Code § 10-1310), and respondent is authorized to issue firearm licensing rules on behalf of the City of New York (see, C.D.M. Products, Inc. v. City of New York, 76 Misc. 2d 369, 373 (Sup. Ct., N.Y. Co., 1973)). There is no indication that the State intended to pre-empt the field when it enacted Penal Law §400.00 (see, DJL Restaurant Corp. v. City of New York, 96 N.Y.2d 91, 95 [2001]; Vatore v. Comm'r of Consumer Affairs of the City of New York, 83 N.Y. 2d 645, 649 [1994]). "Clearly, the State has not, either directly or indirectly, regulated all aspects of gun possession and use as to time, place and circumstance" (Citizens for a Safer Community v. City of Rochester, 164, Misc. 2d 822, 833-834 (Sup. Ct, Monroe Co. 1994)).

Penal Law § 400.00(2)(f) authorizes the issuance of a license to “have and carry concealed. without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof”. This provision on its face does not contemplate any restrictions on the issuance of a “carry” license, as it is called. Nonetheless, the Court of Appeals held that the licensing officer had authority to restrict the scope of the carry license to hunting and target shooting in view of the licensee’s inability, on his application to amend the license, to demonstrate need for an unrestricted license to carry several concealed firearms (see, O’Brien v. Keegan, 87 N.Y. 2d 436, [1996]); see also - O’Connor v. Scarpino, 83 N.Y. 2d 919 [1994]). The O’Brien and O’Connor cases stand for the proposition that the licensing officer is not without discretion to impose conditions on the issuance of a license just because the statute does not expressly empower him or her to do so. Where, as in this case, the license holder held a Target License specifically for sporting purposes, and when that license was administratively converted into a Premises License, the respondent had the discretion to authorize a limited off-premises use, namely, the transporting of such gun or guns, unloaded, in a locked box to sporting locations. Indeed, respondent suggests that the Target License was itself a qualification of the carry license.

It is hard to see how petitioner is aggrieved. He has the same rights he had under the Target License. He fears that, when transporting his guns, unloaded, to a sporting location, he will be arrested outside the City of New York. He might have had the same fear when he was the holder of a Target License, a category not expressly authorized by Penal Law § 400.00. In any event, his fears are wholly speculative.

Respondent’s elimination of the Target License category, the conversion of such licenses to Premises Licenses, and the issuance of a Premises License to petitioner with an endorsement

permitting the transportation of his guns, unloaded, in a locked box to sporting locations was neither arbitrary nor capricious. and promotes both the regulatory and public safety aims of Penal Law § 400.00 (see, O'Brien v. Keegan, supra. 87 N.Y.2d, at 439).

Respondent's cross-motion to dismiss the petitioner is granted, and the petition is dismissed.

Accordingly, it is

ORDERED that the respondent's motion to dismiss is granted and it is further

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

This constitutes the order and judgment of the court.

DATED: February 24, 2003

ENTER:

  
\_\_\_\_\_  
PAULA J. OMANSKY  
J.S.C.