SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 35EFM

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FEILONG QI

Petitioner,

- v -

DERMOT SHEA,

Respondent.

INDEX NO. 150615/2021

MOTION DATE 03/26/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. CAROL R. EDMEAD:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

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

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Feilong Qi (motion sequence number 001) is denied and the petition is dismissed; and it is further

ORDERED that counsel for respondent New York City Police Department shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

In this Article 78 proceeding, petitioner Feilong Qi (Qi) seeks a judgment to overturn an order of the Firearms Licensing Department of the respondent New York City Police Department (NYPDLD) which denied his renewal application for a "Carry Business Handgun" (CBL) license (motion sequence number 001). For the following reasons, this petition is denied.

FACTS

On March 1, 2019, Qi submitted an application to renew the CBL license that the NYPDLD had previously issued to him. See verified answer, ¶ 91; exhibit A. The NYPDLD thereafter conducted a thorough investigation during which it reviewed the documentation that Qi had submitted, including a "letter of necessity." *Id.*, ¶¶ 92-93; exhibit B. On March 3, 2020, the NYPDLD issued a "Notice of Disapproval of Renewal Application" that informed Qi that his renewal application was denied for failure to demonstrate proper cause. *Id.*, ¶ 94; exhibit C. Qi filed an administrative appeal of that disapproval on March 3, 2020; however, on September 29, 2020 the director of the NYPDLD issued a "Notice of Disapproval after Appeal" that denied Qi's appeal and upheld the agency's disapproval of his CBL renewal application (the final determination). *Id.*, ¶¶ 97-98; exhibits D, E. The final determination provides as follows:

> "'No license shall be issued ...except... by the licensing officer, and then only after investigation . . .' Penal Law Section 400.00 (1). In order to be granted a Carry Business license, the applicant must establish 'proper cause,' which requires a showing of 'extraordinary personal danger' due to employment and/or due to recurrent threats to life or safety, and, also, a showing of a special need for self-protection that distinguishes the applicant from others in the community and/or in the same profession. 38 RCNY 5-03; Penal Law Section 400.00.
>
> "In Mr. Qi's letter of necessity, he stated that he needs a Carry Business handgun license for self-protection as he is a 'high profile' individual in the Chinese community, which makes him a potential target. Further, in your appeal, you stated that Mr. Qi had been upgraded from a Limited Carry to a Business Carry in connection with his business, World Shaolin Kungfu Association. As part of his profession, Mr. Qi conducts seminars, demonstrations and classes. You further noted that Mr. Qi's notoriety in the community places him in personal danger. You attached photographs of Mr. Qi with former U.S. Presidents as an example of his 'high profile' status.

> "Title 38, Section 5-03 of the Rules of the City of New York requires documentary proof that an applicant's business actually requires him to routinely engage [in] transactions that exposes [sic] him to extraordinary personal danger. During the investigation of Mr. Qi's application, the License Division conducted a business inspection of his business. Mr. Qi told the License Division that a section of his home is dedicated to his business of acupuncture and meditation. Mr. Qi further stated that he teaches martial arts at different locations. Mr. Qi never stated that he was in personal danger due to the nature of his business nor did he provide any evidence indicating same.
>
> "There is no documentation of any threats made to Mr. Qi due to the nature of his business and/or based on his status in the community. Fear of being a potential target is insufficient to establish 'proper cause' for the issuance of a Carry Business handgun license. Mr. Qi has failed to sufficiently demonstrate a special need of self-protection distinguishable from that of the general community or from persons engaged in the same profession. He has not shown any evidence of personal danger when travelling to teach martial arts or conduct seminars/classes. Nor has he shown any evidence of personal danger at home when he sees clients for acupuncture or meditation.
>
> "Additionally, being well known in any community does not, in and of itself, necessitate the need for a Carry Business handgun. As stated above, Mr. Qi has not been the subject of any threats based on his alleged status in the community. Further, your attachment of numerous photographs of Mr. Qi with politicians does not 'prove' his 'high profile' status.
>
> "As such, you have failed to establish proper cause under 38 RCNY §5-03 (b) and your appeal for the disapproval of Mr. Qi's Carry Business handgun license renewal application is denied. You may appeal this determination by commencing an Article 78 proceeding with [sic] four months of the date of this letter."

Id., exhibit E.

Qi then commenced this Article 78 proceeding to challenge the NYPDLD's final determination on July 18, 2021. *See* verified petition. Respondents filed an answer with affirmative defenses on March 12, 2021. *See* verified answer. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

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 (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 arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." See *Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, where there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232. Further, it is 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, 252 (1st Dept 1994); citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). In the specific context of Article 78 proceedings to challenge handgun licensing denials, the Appellate Division, First Department, explains 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) (internal citations omitted). The "extraordinary power delegated by statute" that the First Department refers to is set forth in Penal Law § 400.00 et seq., the pertinent portion of which provides as follows:

> "A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to . . . (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof;"

Penal Law § 400.00 (2) (f) (emphasis added). Settled appellate case law specifically recognizes that an NYPD "'[pistol] licensing officer has broad discretion in determining whether proper cause exists for the issuance of a carry concealed license.'" *Matter of Goldstein v Schwartz*, 185

AD3d 929, 930 (2d Dept 2020), quoting *Matter of McCarthy v Sini*, 172 AD3d 1069, 1070 (2d Dept 2019). Of particular relevance to Qi's application is the regulation set forth in 38 RCNY § 5-03 (formerly 38 RCNY § 5-08) which provides as follows:

> "In addition to the requirements in § 5-02, an applicant seeking a carry or special handgun license shall be required to show 'proper cause' pursuant to § 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 will 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.
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> Example: Employment in a position in which the applicant routinely engages in transactions involving substantial amounts of cash, jewelry or other valuables or negotiable items. In these instances, the applicant shall furnish documentary proof that her/his employment actually requires that s/he be authorized to carry a handgun, and that s/he routinely engages in such transactions.
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> (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.
>
> Example: Instances in which Police Department records demonstrate that the life and well-being of an individual is endangered, and that s/he should, therefore, be authorized to carry a handgun. The factors listed above are not all inclusive, and the License Division will consider any proof, including New York City Police Department records, which document the need for a handgun license. It should be noted, however, that the mere fact that an applicant has been the victim of a crime or resides in or is employed in a 'high crime area,' does not establish 'proper cause' for the issuance of a carry or special handgun license."

38 RCNY § 5-03.

Here, the director of the NYPDLD found that there was no "proper cause" to renew Qi's BCL license because: 1) Qi did not provide any evidence indicating that he was in personal danger due to the nature of his business; and 2) Qi did not provide any documentation of any threats made against him due to the nature of his business and/or based on his status in the community. *See* verified answer, exhibit E. Both of these factual findings has been confirmed to provide a basis for determining that no "proper cause" exists. *See e.g., Matter of Kaplan v Bratton*, 249 AD2d 199 (1st Dept 1998) (Urologist's general allegations about her work hours

and location were insufficient to show an extraordinary threat to her safety)[1] *Matter of Baldea v City of New York License Division of NYPD*, _ AD3d_, 2021 NY Slip Op 03366, *1 (1st Dept 2021), citing *Matter of Martinek v Kerik*, 294 AD2d 221-222 (1st Dept 2002) ("petitioner's application did not establish 'proper cause' within the meaning of Penal Law § 400.00, in the absence of documentation substantiating threats to petitioner personally").[2] Further, the director cited to documentary evidence in the record (and/or absence thereof) to support both of his factual findings; specifically: 1) the NYPDLD's interview of Qi; 2) the NYPDLD's inspection of Qi's business; and 3) the NYPDLD's search of NYPD records for documentation of threats against Qi. *See* verified answer, exhibit E. As a result, the court concludes that the director's findings had a "rational basis" in the administrative record, and, therefore, so did his determination to uphold the NYPD's denial of Qi's BCL renewal application. Nevertheless, Qi's amended petition asserts a number of arguments (which he denominates as "points") that the NYPDLD's final determination was an arbitrary and capricious ruling. The court finds none of them compelling.

The amended petition contains two "points" of legal argument," while counsel's supporting affirmation sets forth an additional four, loosely related, "points." Rules of proper practice require counsel to present all legal arguments together in a memorandum of law.

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[1] *See also, Matter of Sumowicz v Kelly*, 14 AD3d 407 (1st Dept 2005) (no "proper cause" because petitioner failed to demonstrate that her position as the owner/director of a funeral home established that she was in greater danger than others engaged in a similar occupation); *Matter of Ferrara v Safir*, 282 AD2d 383 (1st Dept 2001) (no "proper cause" because petitioner failed to show that his position as the chief executive officer of a body-guard business for movie stars places him in extraordinary personal danger, or engendered another special need for self-protection distinguishable from that of the general community).

[2] *See also Matter of Fondacaro v Kelly*, 234 AD2d 173 (1st Dept 1996) (no "proper cause" because petitioner who alleged "general fear for his safety" but did not present any instances of threats, attacks or extraordinary danger).

The first "point" in Qi's verified petition asserts that "the denial of [his BCL] license is unwarranted, since [his] need (or 'proper cause') for this license was thoroughly investigated by [the NYPDLD] during the original pistol license . . . issuing process, and in connection with [his] prior renewal." *See* verified petition, ¶¶ 16-40. Qi particularly notes that "[t]he same 'proper cause' review was undertaken in 2012, 2014, 2015 and 2016," and complains that "[the NYPDLD] acts as though it was rendering a decision on an initial application," but argues that "the only way that this agency can justify this denial is by claiming that all of the prior agency actions in regards to the decision on Petitioner's 'proper cause' were flawed." *Id*., ¶¶ 18, 20, 32. Qi's argument misconceives the governing law.

First, Penal Law § 400.00 (2) (f) places the burden of proof on Qi to demonstrate "proper cause." *See e.g.*, *Matter of Kaplan v Bratton*, 249 AD2d at 201. Qi's assertion that the NYPDLD "must justify its denial" is an improper attempt to shift that burden back to the NYPDLD, and the court rejects it.

Second, in *Matter of O'Brien v Keegan* (87 NY2d 436 [1996]), the Court of Appeals interpreted Penal Law § 400.00 to grant the NYPDLD "extraordinary power" over all phases of the handgun license application process, under which an applicant's "[e]ligibility for a license in the first instance *or for renewal* is contingent upon an investigation by the licensing officer," which must "must yield [a finding of] *'proper cause' to the licensing officer's satisfaction*," and that "the licensing officer is *statutorily invested with the power to sua sponte revoke or cancel a license*." 87 NY2d at 439 (emphasis added); *see also Matter of Minervini v Kelly*, 22 AD3d 238, 239 (1st Dept 2005), citing *Matter of Papaioannou v Kelly*, 14 AD3d 459 (1st Dept 2005). Subsequent First Department decisions that cite *Matter of O'Brien v Keegan* have upheld NYPDLD denials of license renewal applications that were based on the agency's re-review of

information submitted in connection with earlier license applications. *See e.g., Matter of Baldea v City of New York License Division of NYPD*, _ AD3d_, 2021 NY Slip Op 03366, *1; *Matter of Girandola v Shea*, 193 AD3d 543 (1st Dept 2021); *Matter of Tolliver v Kelly*, 41 AD3d 156 (1st Dept 2007); *Matter of Romanoff v Kelly*, 23 AD3d 212 (1st Dept 2005). As a result, Qi's objection that the NYPDLD "acts as though it was rendering a decision on an initial application" is irrelevant, and the court rejects it.

Finally, to the extent that Qi's argument that the NYPDLD "must justify its denial" of his renewal application implies that the agency failed to do so, Qi is mistaken. As the court observed above, the final determination plainly spelled out both grounds why the NYPDLD director found that there was no "proper cause" to support Qi's BCL renewal application. *See* verified answer, exhibit E. Therefore, the court rejects Qi's argument as unfounded. Accordingly, the court rejects Qi's first point of argument in its entirety.

Qi's second point of argument asserts that "instead of providing a reason why [the NYPDLD] has modified its position when it issued, upgraded and renewed petitioner's license, the respondent arrogantly makes a 180 degree turn on petitioner's 'proper cause' leaving behind any semblance of continuity of determinations, and violating this critical tenet of administrative agency action." *See* verified petition, ¶¶ 41-80. The first portion of this argument repeats the false claim that the NYPDLD did not "provide a reason" for its recent finding of "no proper cause." Because the agency clearly did so, the court again rejects this claim. *See* verified answer, exhibit E.

The remainder of Qi's second point focuses on the principle of administrative law enunciated by the Court of Appeals in *Matter of Lantry v State of New York* (6 NY3d 49 [2005]), and examined by the First Department in *Matter of 20 Fifth Ave., LLC v New York State Div. of*

Hous. & Community Renewal (109 AD3d 159 [1st Dept 2013]), which holds that "an administrative agency's determination is arbitrary and capricious when it neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts." 109 AD3d at 163 (internal citations and quotation marks omitted). In seeking to invoke that rule in this case, Qi asserts that "in the past the [NYPDLD] has attempted this kind of action, but the courts would not have it . . . prior agency action must be respected, and not ignored," and that "petitioner's most recent application repeats the reasons that have been set forth in ALL of the previous applications" (emphasis in original). *See* verified petition, ¶¶ 54-70, 71-80. The petition specifically refers to three unpublished 1999 decisions by this court (*Matter of Geik* [Sup Ct, NY County, Index No. 109525/99], *Matter of Sgarlato* [Sup Ct, NY County, Index No. 003179/99] and *Matter of Levine v NYPD* [Sup Ct, NY County, Index No. 222166/99]) which reversed NYPDLD denials of handgun license renewal applications on the ground that it was arbitrary and capricious for the agency to deny a renewal application that was substantially identical to the preceding application. *Id*.; exhibit 10. Qi then argues that the instant final determination must also be reversed as arbitrary and capricious because "[his] most recent application repeats the reasons that had been set forth in all of the previous applications." *Id*.; ¶ 79. The NYPDLD does not discuss the 1999 cases, but it refers to three more recent unpublished decisions by this court (*Mario Leo v City of New York* [Sup Ct, NY County, Index No. 162287/19], *Genarelli v N.Y.P.D. License Division* [Sup Ct, NY County, Index No. 101241/18] and *Posner v O'Neill* [Sup Ct, NY County, Index No.l0l195/18]) that upheld NYPDLD denials of handgun license renewal applications based on findings of "no proper cause." *See* respondent's mem of law at 15-18; appendix. The NYPDLD then argues that "[s]imply because a license was issued in the past does not remove [a] petitioner's obligation to establish proper

cause," or that it is "ipso facto required to renew [a handgun license] . . . if 'proper cause' was not established, even if based on the same facts." *Id*. The court finds that the NYPDLD's interpretation of its review authority under Penal Law § 400.00 is correct.

In a 2003 decision in *Matter of Papaioannou v Kelly* (2003 NY Slip Op 30131(U) [Sup Ct, NY County]), this court (Stone, J.) vacated the NYPDLD's denial of the petitioner's handgun license renewal application, in part, because of "[p]etitioner's unblemished record in the twelve years he had a license without incident." *Id*. However, in 2005, the First Department, citing *Matter of O'Brien v Keegan*, reversed Justice Stone's decision and reinstated the NYPDLD's renewal license denial because it found that the "extraordinary power" delegated to the NYPDLD by Penal Law § 400.00 necessarily includes the discretion to make a different determination on a handgun license renewal application than the agency made on the initial license application. *Matter of Papaioannou v Kelly*, 14 AD3d 459 (1st Dept 2005). The First Department's acknowledgement of the NYPDLD's broad procedural discretion necessarily supersedes the 1999 trial court decisions that overturned the NYPDLD rulings that did not adhere to prior agency precedent. As a result, the court finds that Qi's reliance on that older precedent is unavailing, and rejects so much of his second point of argument as is based on that reliance.

The final issue raised in Qi's second point of argument is his assertion that "there can be little question that this agency action should be deemed to be even more than an abuse of discretion, it is the underpinning of a conscious program to eliminate concealed handgun licenses within this jurisdiction." *See* verified petition, ¶ 80. The court finds that this assertion is a classic "straw man" argument. First, Qi assumes the existence of a non-proven fact (here, an unsubstantiated NYPDLD policy of eliminating BCL licenses), and then posits an

unsubstantiated explanation for it (i.e., that the NYPDLD abandoned its policy in 1999 because it knew that it was illegal, but now seeks to resurrect it). However, Qi offers no proof to support his assertion. For its part, the NYPDLD acknowledges that a 2016 corruption investigation disclosed that certain of its personnel were granting handgun renewal license applications without conducting "proper cause" investigations, and avers that its new management officials now ensure that these reviews are performed on all renewal applications. *See* respondent's mem of law at 15-16. In view of this acknowledgement, the court dismisses Qi's assertion as speculative.

In conclusion, the court rejects both "points of argument" that Qi raised in his verified petition. This does not end the court's inquiry, however.

As was previously noted, Qi's counsel presented an additional four "points of argument" in the affirmation that accompanied the petition, and the court must consider these as well. *See* verified petition, Randazzo affirmation, ¶¶ 3-59. Counsel's first "point" asserts that "[QI's BCL] license was issued and renewed following intensive and thorough investigation by experienced investigators assigned to the [NYPDLD] under the guidance of even more experienced supervisors, with the top uniformed officer in the pistol license division, the commanding officer, having to conduct a final review and determination." *Id.*, ¶¶ 3-25. He more particularly contends that "unlike the licensee in *Matter of O'Brien v Keegan*, where there was no 'proper cause,' or similar investigation, and yet Mr. O'Brien sought an unrestricted handgun license admitting he wanted it because [he] claimed 'it just makes me feel better.'" *Id.*, ¶ 3. In this point of argument, counsel attempts to factually distinguish *Matter of O'Brien v Keegan*, and thereby assert that its holding should not apply in this case. However, there is no reason to make any such factual distinctions. As previously observed, *O'Brien* held that Penal Law § 400.00 granted

the NYPDLD "extraordinary power" to review handgun license applications, under which an applicant's "[e]ligibility for a license in the first instance or for renewal is contingent upon an investigation by the licensing officer," which must "must yield [a finding of] 'proper cause' to the licensing officer's satisfaction," and that "the licensing officer is statutorily invested with the power to sua sponte revoke or cancel a license." 87 NY2d at 439. The Court of Appeal did not limit the *O'Brien* holding to the facts of the case, but instead recognized that the NYPDLD's authority under Penal Law § 400.00 is very broad with respect to all handgun applications - both initial and renewal submissions. Despite this acknowledgment of the NYPDLD's broad grant of statutory authority, counsel avers that "[t]here is nothing rational about this decision made by this agency against this law-abiding licensee." *See* verified petition, Randazzo affirmation, ¶ 25. Counsel is incorrect for two reasons. First, he misinterprets the *O'Brien* holding, which did not impose any restrictions on the NYPDLD's discretion to undertake "proper cause" review of handgun license renewal applications. Second, counsel's argument also ignores the fact that the September 29, 2020 final determination *did* include two specific findings of "no proper cause" to support Qi's renewal application. *See* verified answer, exhibit E. Thus, the court rejects counsel's contention that the instant final determination was procedurally improper and/or not rationally based.

The court further notes that *Matter of O'Brien v Keegan* also held that "a licensing officer's power to determine the existence of 'proper cause' for the issuance of a license necessarily and inherently includes the power to restrict the use of a license," and that "[w]ithout such a power to condition, the licensing officer's authority to allow possession of a handgun only for proper cause would be rendered meaningless and the obvious regulatory purpose of the statute would be frustrated." 87 NY2d at 439-440, quoting *Matter of O'Connor v Scarpino*, 83

NY2d 919, 921 (1994). This court finds that counsel's position that the NYPDLD should be bound by its prior findings regarding Qi's "proper cause" would also "frustrate the regulatory purpose of " Penal Law § 400.00 by unnecessarily restricting the NYPDLD's licensing authority. Such a practice would, in effect, recognize licensure by estoppel, which New York jurisprudence does not permit. *See e.g.*, *Parkview Associates v City of New York*, 71 NY2d 274, 282 (1988). Therefore, the court rejects so much of counsel's first point of argument as is based on *Matter of O'Brien v Keegan*.

Counsel's next point of argument asserts that "another distinction between *O'Brien* and the present case . . . is that petitioner's license is indeed restricted, even though technically not so under state law, the [NYPDLD] only issues concealed carry licenses connected to business endeavors . . . thus the license at issue herein is termed a 'carry business' handgun license, and not an unrestricted concealed carry license, as was the case with licensee O'Brien." *See* verified petition, Randazzo affirmation, ¶¶ 26-40. This argument is another attempt to distinguish *Matter of O'Brien v Keegan* from the facts of this case. However, it is unavailing. Although counsel focuses on different types of handgun "carry licenses," Penal Law § 400.00 (2) provides that all types of "carry licenses" are subject to the statute, and the *O'Brien* holding provides that the NYPDLD has "extraordinary power" over the review process applicable to all types of handgun licenses. 87 NY2d at 439. Therefore, counsel's second point of argument asserts "a distinction without a difference," and the court rejects it as irrelevant.

Counsel's next point of argument asserts that "[the NYPDLD], a1though admittedly vested with discretion in the area of handgun licensing in NYC, does not possess limitless power, and it certainly cannot neglect or ignore the actions taken by this very agency in 2012, 2014, 2015 and 2016 in connection with [Qi's] business carry licensure." *See* verified petition,

Randazzo affirmation, ¶¶ 41-51. This argument is a rehash of Qi's assertion that the NYPDLD is somehow bound to grant his BCL renewal license application simply because it granted his prior applications based on supporting documentation it previously reviewed and accepted. As previously discussed, however, the agency is not so bound. Therefore, the court rejects counsel's third point of argument for the reasons discussed earlier in this decision.

Counsel's final point of argument asserts that "[the NYPDLD], as an administrative agency, has not acted with continuity in its decision herein, and attempts to ignore the fact that it is settled law that an administrative agency must follow its own prior determinations, or provide a rational basis for a change in position." *See* verified petition, Randazzo affirmation, ¶¶ 52-59.

This argument is somewhat related to Qi's earlier argument that it is "arbitrary and capricious" for the NYPDLD issue "inconsistent" administrative determinations without providing a reason for doing so. The court rejected that argument because it found that the NYPDLD's final determination did include a rationally based finding of "no proper cause" to support Qi's renewal application. The court now also rejects counsel's argument on legal grounds. As was previously observed, Penal Law § 400.00 grants the NYPDLD "extraordinary power" to oversee all phases of the handgun licensing process. *See e.g., Matter of Papaioannou v Kelly,* 14 AD3d at 459. In a similar vein, New York courts recognize that "[l]ocal zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken was illegal, arbitrary, or an abuse of discretion." *Matter of Zapson v Zoning Bd. of Appeals of the City of Long Beach*, 193 AD3d 948, 948 (2d Dept 2021), quoting *Matter of Daneri v Zoning Bd. of Appeals of the Town of Southold*, 98 AD3d 508, 509 (2d Dept 2012). Appellate case law which has considered the breadth of that discretion holds that, when a zoning board issues a decision that denies a variance of a type that

it previously granted on a regular basis, the law does *not* consider this to be an "inconsistent agency determination" which is "arbitrary and capricious," because "[t]he zoning board may refuse to duplicate previous error; it may change its views as to what is for the best interests of the [neighborhood]; [or] it may give weight to slight differences which are not easily discernable" in an application. *See Matter of D'Souza v Board of Appeals of the Town of Hempstead*, 192 AD3d 1022, 1023 (2d Dept 2021), quoting *Matter of Monte Carlo 1, LLC v Weiss*, 142 AD3d 1173, 1176 (2d Dept 2016) and citing *Matter of Teixeira v DeChance*, 186 AD3d 1521 (2d Dept 2020). The court finds that that case law is helpful in understanding and interpreting the broad grant of discretion over handgun license applications that Penal Law § 400.00 accords to the NYPDLD. Because the statute authorizes the agency to perform a new review, and to reach a new determination, on a license renewal application than it did when it reviewed a prior application (supported by similar submissions), courts should not treat NYPDLD renewal determinations which differ from initial agency determinations as automatically "inconsistent" and therefor subject to reversal under the "arbitrary and capricious" standard. Indeed, the court does not find that the "inconsistent prior agency rulings" argument should be permitted in the context NYPDLD determinations (unless those determinations completely omit the reasons for an NYPDLD determination regarding proper cause). *Matter of O'Brien v Keegan*, 87 NY2d at 439-440; *see also Matter of Marino v Hubert*, 117 AD3d 829, 829-830 (2d Dept 2014); *Matter of Papaioannou v Kelly*, 14 AD3d at 460; *Matter of Trimis v New York City Police Dept.*, 300 AD2d 162, 163 (1st Dept 2002). Here, as the court has repeatedly noted, the NYPDLD director's September 29, 2020 final determination *does* set forth two reasons, supported by evidence in the administrative record, as to why there is no "proper cause" to grant Qi's handgun license renewal application. This determination was properly

performed pursuant to Penal Law § 400.00, which specifically authorizes the NYPDLD to re-review previously submitted material when considering a handgun license renewal application, and to make a different determination about what that material indicates. Counsel's "continuity" argument simply ignores the statute's grant of discretion to the NYPDLD to render renewal license determinations that reverse earlier license approvals. Such reversals may certainly appear to be "inconsistent," but that "inconsistency" does not make them "arbitrary and capricious" in every instance. Therefore, the court rejects counsel's final "point of argument" as inapposite in the context of Penal Law § 400.00 and the *O'Brien* holding.

In conclusion, the court rejects all of the "points of argument" that are set forth in Qi's petition and in his counsel's accompanying affirmation, and reiterates its initial finding that the NYPDLD has demonstrated a "rational basis" for its September 29, 2020 final determination. Consequently, the court also concludes that Qi's Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Feilong Qi (motion sequence number 001) is denied and the petition is dismissed; and it is further

ORDERED that counsel for respondent New York City Police Department shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

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6/14/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**