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OLR BACKGROUNDER: PENDING GUN PERMIT CASES

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SUMMARY

This report summarizes two federal cases challenging the state's firearm permit revocation process on constitutional grounds. Both cases were appealed and remanded to the District Court.

The report also summarizes four state cases, three involve the issue of suitability to get a gun permit and one dealing with the issue of carrying guns openly. Two of the cases are pending in New Britain Superior Court and two are on appeal.

KUCK V. DANAHER (600 F. 3D 159 (2010)).

The plaintiff, M. Peter Kuck, appealed a U. S. District Court judgment to the 2nd Circuit Court of Appeals. The complaint alleged that the gun permit renewal process was unnecessarily prolonged by the Department of Public Safety (DPS) and the Board of Firearms Permit Examiners (BFPE). Kuck alleged three constitutional claims: (1) violation of procedural due process, (2) violation of substantive due process, and (3) retaliation for exercising 1st Amendment rights.

DPS denied Kuck's application to renew his gun permit because he refused to provide a U. S. passport, birth certificate, or voter registration as part of his application. Kuck contended that he had submitted proof of citizenship when he first applied in 1982 and had not been asked for proof in other renewal applications. Kuck appealed to the BFPE for a hearing on whether refusing to submit a passport or birth certificate was proper cause for denying his application. The BFPE scheduled the hearing for 18 months later, during which time he could not carry a firearm.

Procedural Due Process

Kuck's main contention was that the 18-month wait for a hearing violated due process because it was excessive and unwarranted given the liberty interest at stake.

DPS and the BFPE conceded that Kuck possessed a liberty interest to carry a firearm. But they contended that the long wait for a hearing did not violate due process because it was a result of a substantial caseload and the state has an interest in ensuring that firearms are carried only by those who are fit to do so.

In arriving at its decision, the court looked at the (1) private interest at stake; (2) risk of erroneous deprivation of that interest through the procedures used and the probable value of alternative procedures; and (3) government's interest, including the possible burdens of alternative procedures.

Private Interest. The court decided that Kuck's stake in the gun permit, though not directly tied to his livelihood, was substantial. It stated that though the state may regulate firearms, it still must afford due process protections, including a meaningful opportunity to be heard after a permit denial or revocation. The court concluded that the private interest was significant though not overwhelming or absolute.

Erroneous Deprivation. In analyzing the risk of erroneous deprivation, the court looked at Kuck's allegation that DPS frequently denies permits for frivolous reasons, subjecting qualified applicants to a lengthy appeals process only to grant the permit just before the hearing. Kuck offered data to suggest that the number of appeals "resolved" without a hearing greatly exceeded the ones the BFPE heard. He further alleged that it regularly takes an appellant 14 to 20 months to receive an appeal hearing.

The court decided that Kuck's claims plausibly described a state practice of delaying appeals only to resolve them at the last minute after the applicant waited for more than a year. It also appeared to affect a significant number of applicants.

Governmental Interest. According to the court, Connecticut has a strong and compelling interest in ensuring that firearms are not issued to unfit persons, but, for due process reasons, the state must justify its long wait for appeals. The court was not convinced that the long wait for hearing appeals was simply a function of the BFPE's caseload and backlog.

The court concluded that Kuck has a viable procedural due process claim for the District Court to decide on remand.

Substantive Due Process

Kuck also asserted a substantive due process claim based on DPS practices. He claimed that DPS imposes arbitrary requirements contrary to state law, which, combined with a lengthy appeals process, denied him substantive due process. The Appeals Court agreed with the District Court's dismissal because asking Kuck to produce proof of citizenship or legal residency for a permit renewal is hardly outrageous or shocking.

1st Amendment

Kuck's final claim was that his 1st Amendment rights were violated because a DPS officer threatened and harassed him because of his outspoken criticism of the agency and the BFPE. The court, agreed with the District Court's decision to dismiss this claim because Kuck had not adequately alleged that his speech caused any adverse action by DPS.

The Appeals Court remanded the case back to the District Court to decide Kuck's procedural due process claim.

GOLDBERG V. DANAHER (599 F. 3D 181 (2010)).

The plaintiff, James Goldberg, is appealing the District Court's decision to dismiss his complaint challenging the revocation of his gun permit.

After the BFPE delayed the hearing for 22 months, Goldberg brought suit alleging violations of substantive and procedural due process under the 14th Amendment as well as 1st Amendment retaliation and unlawful seizure of property.

The defendants, including the public safety commissioner, moved to dismiss the claim on a number of grounds, including failure to state a claim. In response, Goldberg submitted a "bare-bones" opposition that raised two points.

The District Court ruled that because Goldberg's filing failed to address any of their legal defenses on the merits, he had waived opposition to their motion to dismiss.

The Appeals Court reversed the District Court's decision to grant the motion to dismiss because it felt an automatic dismissal is not appropriate when the pleadings establish a viable claim.

The Appeals Court returned the case to the District Court to decide Goldberg's claims.

MATHENA V. BFPE (DOCKET NO. HHB-CV10-6006642-S).

The plaintiff, Jeffrey C. Mathena, is appealing the BFPE's June 16, 2010 decision to uphold DPS' decision to revoke his gun permit on suitability grounds.

The revocation stemmed from an incident in which Mathena was carrying a gun while intoxicated. DPS determined Mathena didn't possess the character or maturity to be trusted to carry a gun in public if he had consumed alcohol in excess of the legal limit.

By law, the permit issuing authority may deny a gun permit on several grounds, including "suitability." But the law does not define "suitability." In his appeal, Mathena claimed that in determining suitability, DPS and the BFPE exercised discretion without any parameters set under state law. Because "suitability" is not statutorily defined, it is subject to different individual interpretations. As such, the enforcement of the statute violates the U. S. Constitution as a *de facto* exercise of excess statutory authority.

The case is pending in New Britain Superior Court.

SAVISKE V. BFPE (DOCKET NO. [CV-10-6006014-S](#)).

The plaintiff, Robert J. Saviske, is appealing the BFPE's May 25, 2010 decision to uphold DPS' decision to revoke his gun permit, after he was involuntarily committed to a mental institution for approximately two weeks.

The case stemmed from an incident in which the Rocky Hill police took Saviske into custody under the provisions of [CGS § 17a-503](#) because they believed his mental state needed to be examined by a medical doctor. The police took his gun permit and forwarded it to DPS, which revoked it.

In Saviske's appeal, he claimed that there was no probable cause for the Rocky Hill police to take him into custody. Further, he stated that at the BFPE hearing, he provided two letters from mental health professionals that said he was suitable to possess and carry firearms, while DPS provided no documentation or evidence to support any inference that he was ineligible or unsuitable under [CGS § 29-28](#).

The case is pending in New Britain Superior Court.

DPS V. BFPE (2010 CONN. SUPER LEXIS 1750 (2010)).

The DPS commissioner is appealing the BFPE's decision to reverse the revocation of Griffess McWhorter's gun permit.

McWhorter received the permit in 2003. On August 12, 2007, Windsor police arrested him for operating a vehicle under the influence, carrying a firearm while under the influence, and illegally possessing a weapon in a motor vehicle. McWhorter had the gun in his pocket but did not use or display it.

On September 24, 2007, the commissioner revoked McWhorter's permit and he appealed to the BFPE. While the appeal was pending, McWhorter completed the pretrial alcohol program and the court dismissed the charges against him.

The BFPE found that McWhorter did not display, brandish, or use the firearm while intoxicated. It also noted that McWhorter was responding to a family emergency in the middle of the night and did not realize that the gun was in his pocket until he was already driving to assist his son. The BFPE also indicated that McWhorter responded appropriately to the officer's commands, was cooperative, and before this incident, was a law abiding citizen. The BFPE characterized McWhorter's behavior as a single, isolated incident and McWhorter as a suitable person to possess a gun permit.

DPS contended that McWhorter carried a firearm while intoxicated, which violated [CGS § 53-206d\(a\)](#). This law prohibits anyone, while under the influence of alcohol, from carrying a firearm "which is loaded and from which a shot may be discharged." The court concluded that the commissioner had not established that McWhorter's use of the firearm violated this law, because DPS presented no evidence that the gun could be fired. It said the gun could have been in a state of disrepair or could

have jammed upon firing, but ultimately it would be speculative to conclude the gun was operable.

DPS argued that the BFPE's decision was arbitrary and capricious because it departed from a long line of its own precedents. The court noted that the Connecticut appellate courts have not adopted a rule requiring agencies to follow their own decisions.

The final question the court answered was whether the suitability conclusion was a reasonable one. The court determined that the BFPE could have reasonably found that the incident was an isolated one and that McWhorter was a suitable person to regain a firearm permit.

The case is on appeal.

PERUTA V. DPS (2009 CONN. SUPER LEXIS 1041 (2009)).

The plaintiff, Edward Peruta, sought a ruling (declaratory judgment) in Superior Court on whether Connecticut prohibits someone who has a gun permit from carrying a handgun openly.

The court dismissed the case, stating that when state agencies are defendants, plaintiffs must submit requests for declaratory rulings to the agencies before the court may address the issue. Failing to comply is grounds for dismissal based on subject matter jurisdiction. In this instance, Peruta submitted his request to the BFPE, but did not send it to DPS.

The case is on appeal.

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