

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SHAWN GOWDER,)	
)	
Plaintiff,)	
)	
v.)	
)	No. 11-cv-1304
CITY OF CHICAGO, a municipal corporation,)	
the CITY OF CHICAGO DEPARTMENT OF)	Judge Der-Yeghiayan
ADMINISTRATIVE HEARINGS, MUNICIPAL)	
HEARINGS DIVISION, SCOTT V. BRUNER,)	
Director of the City of Chicago Department of)	
Administrative Hearings, the CITY OF CHICAGO)	
DEPARTMENT OF POLICE, and JODY P. WEIS,)	
Superintendent of the City of Chicago Department)	
of Police,)	
)	
Defendants.)	

INITIAL STATUS REPORT

The parties, by their respective undersigned counsel, submit the following Initial Status Report pursuant to the Court's standing order:

1. Nature of claims and counterclaims

Plaintiff has asserted a claim for administrative review of the denial of his application for a Chicago Firearm Permit (CFP) by the City of Chicago Department of Police, and the decision of the City of Chicago Department of Administrative Hearings affirming that denial, pursuant to the Illinois Administrative Review Law, 735 ILCS 5/3-101 *et seq.* Plaintiff has also asserted claims under 42 U.S.C. Sec. 1983 and the Second and Fourteenth Amendments to the U.S. Constitution; and under Article I, Section 22 of the Illinois Constitution.

Plaintiff claims that the denial of his CFP application under Section 8-20-110(b)(3)(iii) of the Municipal Code of Chicago (MCC) was based upon an erroneous interpretation of that

ordinance to bar issuance of a CFP for a misdemeanor conviction for carrying/possessing a firearm in a public place; that the denial of plaintiff's CFP application pursuant to this erroneous interpretation of the ordinance violates his fundamental right to keep and bear arms under the Second and Fourteenth Amendments to the U.S. Constitution, and under Article I, Section 22 of the Illinois Constitution; and that MCC Section 8-20-110(b)(3)(iii) is unconstitutional on its face and as applied to plaintiff's CFP application. The defendants have asserted no counterclaims.

2. Relief sought by plaintiff

Plaintiff's complaint contains three counts: (1) administrative review pursuant to the Illinois Administrative Review Law, by which plaintiff seeks reversal of the denial of his CFP application and an order requiring defendants to issue a CFP to plaintiff; (2) declaratory and injunctive relief pursuant to U.S. Const. Amendments II and XIV and 42 U.S.C. Sec. 1983, by which plaintiff seeks a declaration that MCC Sec. 8-20-110, on its face and as applied through the denial of plaintiff's CFP application, violates plaintiff's fundamental right to keep and bear arms; and an injunction requiring defendants to issue a CFP to plaintiff; and (3) declaratory and injunctive relief pursuant to Illinois Constitution Article I, Sec. 22, by which plaintiff seeks a declaration that MCC Sec. 8-20-110, on its face and as applied through the denial of plaintiff's CFP application, violates plaintiff's fundamental right to keep and bear arms; and an injunction requiring defendants to issue a CFP to plaintiff. Plaintiff also seeks reasonable attorney's fees and costs incurred in bringing this action.

3. Names of parties not served

None.

4. Principal legal issues

(a) Whether MCC Sec. 8-20-110(b)(3)(iii), which provides that no application for a

CFP shall be approved unless the applicant “has not been convicted by a court in any jurisdiction of an unlawful use of a weapon that is a firearm,” applies to a conviction for “carrying or possessing a firearm” rather than the “unlawful use of a weapon.”

(b) Whether MCC Sec. 8-20-110(b)(3)(iii) violates the fundamental right to keep and bear arms under the U.S. and Illinois Constitutions on its face.

(c) Whether MCC Sec. 8-20-110(b)(3)(iii) as applied to plaintiff violates plaintiff’s fundamental right to keep and bear arms under the U.S. and Illinois Constitutions, where plaintiff’s CFP application was denied based upon plaintiff’s 1995 misdemeanor conviction for carrying/possessing a firearm on a public street in violation of 720 ILCS 5/24-1(a)(10).

(d) Whether the denial of plaintiff’s CFP application by the Chicago Department of Police, and the affirmance of that denial by the City of Chicago Department of Administrative Hearings, violated plaintiff’s fundamental right to keep and bear arms under the U.S. and Illinois Constitutions, for the reasons set forth in (a), (b) and (c) above.

5. Principal factual issues

Plaintiff’s position: Based upon defendants’ answer to the complaint, plaintiff does not believe there are any disputed factual issues.

Defendants’ Position: At this juncture, Defendants do not know what fact issues may be in dispute because facts relevant to Plaintiff’s constitutional claims in Count II and III have not yet been developed. Defendants must be allowed an opportunity to develop a factual record with respect to Plaintiff’s constitutional claims asserted in Counts II and III.

6. List of pending motions and brief summary of bases for motions

There are no pending motions before the Court.

7. Description of discovery requested and exchanged

The parties have not requested or exchanged any discovery at this time.

8. Type of discovery needed

Plaintiff's position: Plaintiff's constitutional claims turn solely on the construction and application of MCC 8-20-110(b)(3)(iii) by defendants to the undisputed facts presented in the DOAH. It is undisputed that plaintiff's CFP application was denied based solely upon his 1995 misdemeanor conviction for carrying/possessing a firearm on a public street in violation of 720 ILCS 5/24-1(a)(10). This fact was undisputed in the DOAH proceeding, and defendants did not seek or rely upon any other facts or information from or regarding plaintiff as a basis for denying plaintiff's CFP application. Defendants must therefore justify their construction and application of the ordinance to plaintiff based upon the information they possessed at the time plaintiff's CFP application was denied, and they should not be permitted to conduct discovery in an attempt to locate other facts to attempt to retroactively support their denial of plaintiff's CFP application. Therefore, discovery is not necessary or appropriate in this case.

The Benson v. City of Chicago case cited below by defendants does not involve an administrative review of the denial of a CFP application under MCC 8-20-110(b)(3)(iii), and whether and to what extent discovery is appropriate in that case is not relevant to whether discovery is appropriate in this case.

Defendants' position: Defendants disagree with Plaintiff's initial statement that his constitutional claims turn solely on the construction and application of MCC 8-20-110(b)(3)(iii) by defendants to the undisputed facts presented in the DOAH, because Plaintiff has made a more broad, facial challenge to that provision. Moreover, while Defendants agree that no discovery is permitted with respect to Plaintiff's claim for administrative review in Count I, Defendants strongly disagree that discovery is not appropriate or necessary with respect to Plaintiff's

constitutional claims asserted in Counts II and III. Plaintiff has alleged that MCC 8-20-110(b)(3)(iii) violates the Second Amendment under the U.S. Constitution and the Illinois Constitution, Article I, Section 22, both facially and as-applied. The Administrative Law Judge had no authority to hear or decide these constitutional issues and, therefore, no factual record was developed with regard to these constitutional issues during the administrative hearing. The only issue before the Administrative Law Judge was the statutory construction of the word “use” as included in MCC 8-20-110(b)(3)(iii), and whether, based on that construction, plaintiff’s permit was properly denied. It would defy logic to require Defendants to fully develop and make part of the record all of the facts it might rely on to defend against constitutional challenges when the constitutional issues were not even allowed to be part of the case before DOAH.

While Defendants are bound by the administrative record with respect to Count I, Defendants are not bound by the record with respect to Plaintiff’s section 1983 claim simply because Plaintiff chose to include that claim together with his claim for administrative review, rather than filing it as a separate federal action. In civil rights actions challenging the constitutionality of an ordinance, both facially and as-applied, Defendants must be given an opportunity to develop a factual record and submit expert testimony. Indeed, in another case currently pending in this district before Judge Chang challenging the facial constitutionality of five other provisions of Chicago’s firearms ordinance, Benson v. City of Chicago, 10-cv-4184, the parties have been engaged in extensive fact discovery for over six months and have not yet begun expert discovery. To disallow Defendants an opportunity to create the necessary record to defend against Plaintiff’s constitutional challenges here would be a violation of Defendants’ due process rights.

At this time, at a minimum, Defendants anticipate taking Plaintiff’s deposition,

conducting any discovery which may reasonably flow from that deposition and the events surrounding Plaintiff's arrest in 1995, and expert and other discovery to support the constitutionality of MCC 8-20-110(b)(3)(iii).

9. Proposed dates for Rule 26(a)(1) disclosures, fact discovery completion, expert discovery completion, filing of dispositive motions, filing of a final pretrial order

Plaintiff's position: No discovery should proceed in this case, as it presents only a question of the construction and application of MCC 8-20-110(b)(3)(iii) to undisputed facts.

Plaintiff suggests that judicial economy would be best served, and motion practice on this issue will be best avoided, by the Court determining whether and to what extent discovery will be permitted in this case as an initial matter before any discovery deadlines are set. Plaintiff requests that the Court allow the parties to file briefs on this issue within 21 days, and that a further status hearing be set after the Court has ruled on the issue, in order to set discovery deadlines if necessary.

Defendants' position: Defendants propose that the parties exchange Rule 26(a)(1) disclosures within 30 days; complete fact discovery 60 days after Rule 26(a)(1) disclosures; and complete expert discovery 90 days after the close of fact discovery.

Defendants propose that dispositive motions regarding the administrative review claim in Count I be filed within 60 days of the submission of this report. Defendants further propose that dispositive motions regarding Plaintiff's constitutional claims should be filed within 30 days after the close of expert discovery, consistent with the federal rules. Defendants propose that a final pretrial order be submitted sometime thereafter at the Court's discretion and scheduling.

Defendants do not believe that briefing is necessary on the issue of whether any discovery should be permitted in this case because Defendants are entitled, as a matter of course, to conduct discovery in section 1983 cases. With regard to the issue of the extent of allowable

discovery, Defendants believe that those issues cannot be answered in the abstract but must be determined in response to specific discovery requests by analyzing the relevancy and burdensomeness of such specific requests. Accordingly, Defendants believe that the appropriate vehicle for the Court to determine the scope of discovery is through usual discovery motion practice.

10. Estimation of when the case will be ready for trial

Plaintiff's position: Because this case turns solely on an issue of statutory construction and application to undisputed facts, no actual trial is necessary and the case may be decided on dispositive motions. In addition to dispositive motions, the Court may if necessary hold a hearing in this matter consisting solely of submission of written briefs and oral arguments from the parties, and this could be done within 30 days after dispositive motions are ruled upon.

Defendants' position: At this time, Defendants disagree that a trial is not necessary. Defendants propose that, after development of the record and the filing of dispositive motions, the Court rule on such dispositive motions and then set a trial date accordingly should one be necessary.

11. Probable length of trial

Plaintiff's position: One day.

Defendants' position: Two days.

12. Whether a request has been made for a jury trial

No request for a jury trial has been made.

13. Whether there have been settlement discussions and if so the outcome of those

There have been no settlement discussions.

14. Whether the parties consent to proceed before a Magistrate Judge

The parties do not consent to proceed before a Magistrate Judge.

Respectfully submitted,

s/Stephen A. Kolodziej

s/Rebecca Alfert Hirsch

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CERTIFICATE OF SERVICE

I, Stephen A. Kolodziej, an attorney, hereby certify that on April 8, 2011, service of the foregoing document is being made in accordance with the General Order on Electronic Case Filing to the following:

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