

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

SHAWN GOWDER,)	
)	
Plaintiff,)	
)	No. 11 C 1304
v.)	
)	Judge Der-Yeghiayan
CITY OF CHICAGO, a municipal corporation,)	
the CITY OF CHICAGO DEPARTMENT OF)	
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.)	

**DEFENDANTS LOCAL RULE 56.1(B)(3) RESPONSE
TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS
AND LOCAL RULE 56.1(B)(3)(C) STATEMENT OF ADDITIONAL FACTS
REQUIRING THE DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendants, by and through their attorney, Stephen R. Patton, hereby submit their Local Rule 56.1(b)(3) Response to Plaintiff's Statement of Undisputed, Material Facts and their Local Rule 56.1(b)(3)(c) Statement of Additional Undisputed Material Facts Requiring the Denial of Plaintiff's Motion for Summary Judgment as follows.

1. Plaintiff Shawn Gowder is a resident of the City of Chicago. Plaintiff's Amended Complaint [Doc. # 13] at ¶ 2.

Response: Undisputed.

2. Defendant City of Chicago is a political subdivision of the State of Illinois. Defendant City of Chicago Department of Administrative Hearings, Municipal Hearings Division is the administrative agency in which the hearing giving rise to this action occurred. Defendant City of Chicago Department of Police is an agency of the City of Chicago that denied plaintiff's application for a CFP, which denial was reviewed and affirmed by the Department of Administrative

Hearings, as described more fully herein. Defendant Scott V. Bruner is the former Director of the City of Chicago Department of Administrative Hearings. Defendant Jody P. Weis is the former Superintendent of Police for the City of Chicago Department of Police. Defendants' Answer [Doc. # 17] at ¶ 3.

Response: Undisputed.

3. On July 2, 2010, the City Council of Chicago amended the Municipal Code of Chicago as it pertains to firearms. The amended ordinance, codified as Municipal Code of Chicago ("MCC") Chapter 8-20, is attached to plaintiff's amended complaint as Exhibit A. Plaintiffs Amended Complaint [Doc. # 13] at ¶ 6; Defendants' Answer [Doc. # 17] at ¶ 6.

Response: Undisputed.

4. Pursuant to MCC § 8-20-110(a), it is unlawful for any person to carry or possess a firearm in Chicago without a Chicago Firearm Permit ("CFP"). MCC § 8-20-110(b) provides that no CFP application shall be approved unless the applicant, inter alia, "has not been convicted by a court in any jurisdiction of ... an unlawful use of a weapon that is a firearm." MCC § 8-20-110(b)(3)(iii). Amended Complaint [Doc. # 13] at ¶ 7; Defendants' Answer [Doc. # 17] at p 7.

Response: Undisputed, except that MCC § 8-20-110(d) allows certain categories of persons to carry or possess firearms in Chicago without a CFP.

5. MCC 8-20-010 contains the Definitions applicable to Chapter 8-20 of the ordinance. Neither § 8-20-010 nor any other provision of MCC Chapter 8-20 defines the term "use." Amended Complaint [Doc. # 13] at ¶ 8; Defendants' Answer [Doc. # 17] at ¶ 8.

Response: Undisputed.

6. On November 1, 2010, plaintiff filed an application for a CFP with the City of Chicago Department of Police. Plaintiff's application included a current copy of his Illinois Firearm Owner's Identification Card ("FOID Card"). Amended Complaint [Doc. # 13] at ¶ 11; Defendants' Answer [Doc. # 17] at ¶ 11.

Response: Undisputed.

7. Plaintiff has one misdemeanor conviction, entered in 1995, for carrying/possessing a firearm on a public street in violation of 720 ILCS 5/24-1(a)(10). Amended Complaint [Doc. # 13] at ¶ 12; Defendants' Answer [Doc. # 17] at ¶ 12; Joint Memorandum Regarding Plaintiff's Conviction Status [Doc. # 34] at 2-3.

Response: Undisputed.

8. On November 10, 2010, the City of Chicago Department of Police denied plaintiff's application for a CFP on the sole ground that "You have been convicted by a court in any jurisdiction of an unlawful use of a weapon that is a firearm. See Municipal Code of Chicago 8-20-110(b)(3)(iii)." A copy of CPD's denial letter to plaintiff is attached to the amended complaint as Exhibit C. Amended Complaint [Doc. # 13] at ¶ 13; Defendants' Answer [Doc. # 17] at ¶ 13.

Response: Undisputed.

9. On November 22, 2010, plaintiff filed a written request for a hearing to contest the denial of his CFP application with the City of Chicago Department of Administrative Hearings (DOAH"), pursuant to MCC § 8-20-200. That request is attached to the amended complaint as Exhibit D. Amended Complaint [Doc. # 13] at ¶ 14; Defendants' Answer [Doc. # 17] at ¶ 14.

Response: Undisputed.

10. Pursuant to plaintiff's request, the DOAH held a hearing on the denial of plaintiff's CFP application on December 8, 2010. At that hearing, plaintiff submitted, through counsel, a written brief and oral argument, in which plaintiff argued that because the term "use" is not defined in MCC Chapter 8-20, that term must be given its plain and ordinary meaning in linguistic usage of operating, discharging or actively employing a firearm, rather than merely carrying or possessing a firearm. Therefore, plaintiff's prior conviction for carrying/possessing a firearm while on a public street did not constitute a conviction for the unlawful "use" of a weapon within the meaning of MCC § 8-20-110(b)(3)(iii), and the DOAH must so construe the ordinance in order to avoid raising a substantial constitutional question. Plaintiff further argued that a prior misdemeanor conviction, as opposed to a felony conviction, cannot form the basis for denial of the fundamental constitutional right to keep and bear arms. Thus, the denial of plaintiff's CFP application, based solely upon a prior misdemeanor conviction for carrying/possessing a weapon in a public street and the erroneous interpretation of the ordinance by the DOAH, would violate plaintiff's fundamental right to keep and bear arms under the Second and Fourteenth Amendments to the U.S. Constitution and Article I § 22 of the Illinois Constitution. Amended Complaint [Doc. # 13] at ¶ 16; Defendants' Answer [Doc. # 17] at ¶ 16; Certified Record of Proceedings before the City of Chicago Department of Administrative Hearings [Doc. # 18-1] at pp. 71-78.

Response: Undisputed to the extent that Plaintiff made these arguments at the December 8, 2010 DOAH hearing appealing his denial of a CFP, but disputed as to the merits of those legal arguments.

11. At the administrative hearing, the City of Chicago introduced as its group Exhibit 6 the Illinois State Police records of plaintiff's criminal background check, which included a Certified

Statement of Conviction/Disposition from the Circuit Court of Cook County, Illinois. Certified Record of Proceedings before the City of Chicago Department of Administrative Hearings [Doc. # 18-1] at pp. 31-34, 67. The Certified Statement shows a misdemeanor conviction entered on a charge of “Carry/Posses [sic] Firearm in P” pursuant to 720 ILCS 5/24-1(A)(10)l. *Id.* at pp. 31, 67.

Response: Undisputed.

12. The DOAH issued a decision on December 8, 2010, which was served upon plaintiff on December 22, 2010. The DOAH affirmed the denial of plaintiff’s CFP application on the grounds that the Illinois Criminal Code, 720 ILCS 5/24-1(a)(1), defines “unlawful use of a weapon” as including the offense of carrying or possessing a handgun on or about the person upon any public street or lands within the corporate limits of a city. Therefore, the DOAH concluded that “the plain and ordinary meaning and usage given to ‘unlawful use of a weapon’ in this jurisdiction is to ‘carry or possess a firearm’ as provided in 720 ILCS 5/24-1(a)(10).” The DOAH further concluded that “There is no distinction between the meanings of ‘use of a weapon’ and ‘carry and possess a firearm[.]’ as used in MCC 8-20-110.” Therefore, the DOAH ruled that “the basis for the denial of the application has not been rebutted by the Applicant,” and affirmed the CPD’s denial of plaintiff’s CFP application. Amended Complaint [Doc. # 13] at ¶¶ 17-18; Defendants’ Answer [Doc. # 17] at ¶¶ 17-18.

Response: Undisputed.

13. Plaintiff timely filed an action for administrative review of the DOAH’s decision in the Circuit Court of Cook County, Illinois within 35 days of the date the decision was served upon the plaintiff, pursuant to section 103 of the Illinois Administrative Review Law, 735 ILCS 5/3-103. Amended Complaint [Doc. # 13] at ¶ 19; Defendants’ Answer [Doc. # 17] at ¶ 19. Plaintiff’s complaint included a cause of action against the defendants under the Second and Fourteenth Amendments to the U.S. Constitution pursuant to 42 U.S.C. § 1983. Defendants’ Notice of Removal [Doc. # 1] at ¶ 2.

Response: Undisputed.

14. Defendants removed this action to this Court on Feb. 24, 2011. Defendants’ Notice of Removal [Doc. # 1].

Response: Undisputed.

15. Following removal, Defendants served upon plaintiff their Rule 26(a)(1) Disclosures, a copy of which is attached hereto as Exhibit A. With respect to the purported governmental interests served by MCC § 8-20-110 and the manner in which the ordinance serves such purported interests, that disclosure states only: “Individuals with knowledge of the governmental purposes served by MCC § 8-20-110. Investigation continues.” Defendants have never disclosed the names of any specific individuals having such knowledge, nor have defendants ever disclosed any experts

pursuant to FRCP 26(a)(2). Declaration of Stephen A. Kolodziej, attached hereto as Exhibit B.

Response: Undisputed to the extent that the City did not formally supplement its Rule 26(a)(1) Disclosures to specifically identify witnesses with knowledge of the purposes served by MCC § 8-20-110, or retain and disclose any experts it intends to use at trial. Disputed to the extent that the City produced documents to Plaintiff that identified the names of individuals who testified to the City Council regarding the purposes served by the Ordinance, as well as included the substance of such testimony.

Local Rule 56.1(b)(3)(C) Statement of Additional Facts

Defendants hereby asserts the following additional, undisputed material facts that require the denial of Plaintiffs' Motion for Summary Judgment:

1. The stated purpose of Chicago's Responsible Gun Ownership Ordinance is "protecting the public from the potentially deadly consequences of gun violence." Exhibit 1 (Responsible Gun Ownership Ordinance, July 2, 2010 Journal of the Proceedings of the City Council, at 96237). In 2009, Chicago had the second-highest murder and non-negligent manslaughter rate (16.1 per 100,000 residents) of the 10 U.S. cities with the largest population. Exhibit 2 (Uniform Crime Reporting Statistics – 10 cities). That rate was nearly double that of Los Angeles (8.1) and nearly triple that of New York City (5.6), the two cities with a higher population than Chicago. *Id.*

2. Dr. Jens Ludwig, the McCormick Foundation Professor of Social Service Administration, Law, and Public Policy at the University of Chicago, testified that the total annual social cost of Chicago gun violence is estimated to be about \$2.5 billion, or \$2,500 per household, and estimated to depress total property values by around \$30 billion and property tax revenues by

\$30 million per year. Exhibit 3 (June 29, 2010 Ludwig Written Testimony for Chicago City Council Committee on Police and Fire at C0398-401); Exhibit 4 (J. Ludwig & P.J. Cook, *The Benefits of Reducing Gun Violence: Evidence from Contingent-Valuation Survey Data*, 22 Journal of Risk and Uncertainty 207-26 (2001)).

3. Dr. Daniel Webster, Co-Director of the Center for Gun Policy and Research at Johns Hopkins University, testified to the Chicago City Council that one the most effective policies for preventing gun violence “is proscribing the most high-risk people from possessing firearms.” Exhibit 5 (June 29, 2010 Webster Testimony to Chicago City Council at C0243-47; C0407-09). Dr. Webster concluded that convicted misdemeanants fall into this “high risk” category because they are more likely to commit violent crimes in the future. *Id.* One of the studies Dr. Webster relied upon to support this conclusion is Garen J. Wintemute, *et al.*, *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 J. Am. Med. Ass’n. 2083, 2086 (Dec. 1998) (“Wintemute Study”), attached as Exhibit 6.

4. The Wintemute Study examined the criminal histories of 5923 individuals over 15 years who purchased handguns in California, dividing them into two groups: those who had at least one prior conviction for a misdemeanor offense at the time of purchase, and those who had no prior criminal record. Ex. 6 at 2083. It found that overall, handgun purchasers with at least one misdemeanor conviction had a 7.5 times higher risk for a later offense. *Id.* at 2086, Table 4. The study further found that even those who, like Plaintiff, had prior misdemeanor convictions for *nonviolent*, firearm related offenses were at a 6.4 times higher risk for later offenses in general; at a 4.4 times higher risk for violent offenses; and at a 7.7 times higher risk for a nonviolent firearms

offense. *Id.*, Table 5. “Our findings indicate that the characterization of high risk also applies to handgun purchasers with prior convictions for misdemeanor offenses, regardless of the nature of those offenses.” *Id.* at 2087.

5. A study conducted in 2010 examined the incidence of “prohibitory crimes” (crimes that disqualify individuals from gun possession under both federal and state law) committed by lawful owners of handguns with past misdemeanor convictions. Exhibit 7 (Mona A. Wright, et al., *Felonious or Violent Criminal Activity that Prohibits Gun Ownership Among Prior Purchasers of Handguns: Incidence and Risk Factors*, J. Trauma Injury, Infection, & Critical Care (2010) (“Wright Study”)). This study found that past misdemeanants were on average 5 times more likely to commit future prohibitory crimes. *Id.* at 3 and Table 2.

6. Numerous criminology studies have concluded that persons with an arrest history, even a single prior arrest, are as a group substantially more likely to engage in criminal behavior in the future than persons with no such history. Ex. 6 at 2083 and fns. 9-12.

7. Guns make violent events more lethal compared to crimes involving other weapons. Ex. 3 at 398; *see also* Exhibit 8 (Franklin Zimring: *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. Chic.L. Rev. 721 (1968)); Exhibit 9 (Zimring, *The Medium Is The Message: Firearm Caliber As A Determinant Of Death From Assault*, 1 Journal of Legal Studies 97 (1972)).

8. Gang members and professional criminals regularly engaged in crime intimidate and commit crimes merely by “brandishing the weapon.” Exhibit 10 (Philip J. Cook, et al., *Underground Gun Markets*, The Economic Journal (2007), 117 at F563). *See also* Exhibit 11 (June 29, 2010 Written Testimony of Chicago Police Department Deputy Superintendent Ernest Brown for Chicago City Council at C0392)) (“Intimidation by gangs in particular would increase if gang members could

lawfully carry arms in public.”).

9. Public carry increases the risk of accidental shootings and threats to law enforcement when responding to calls for assistance. Exhibit 12 (July 1, 2010 Legislative Findings of City Council Committee on Police and Fire at C0788).

10. On May 16, 2011, the City served a Notice of Deposition on Plaintiff for June 28, 2011. Exhibit 13 (Notice of Deposition).

11. On October 18, 2011, the Court denied the City’s request to take Plaintiff’s deposition. Exhibit 14 (October 18, 2011 Hearing Transcript, pp. 18, 23).

12. Plaintiff’s arrest record shows two other arrests in Illinois: one in 1993 for obstruction of service of process, and one in 2004 for assault. Exhibit 15 (Plaintiff’s Criminal History Data).

Respectfully submitted,

STEPHEN R. PATTON
Corporation Counsel
City of Chicago

By: /s/ Rebecca Alfert Hirsch
One of Its Attorneys

Andrew W. Worseck
William M. Aguiar
Rebecca A. Hirsch
City of Chicago, Department of Law
Commercial & Policy Litigation Division
30 North LaSalle Street, Suite 1230
Chicago, Illinois 60602
(312) 744-7129 / 744-4216 / 742-0260

CERTIFICATE OF SERVICE

The undersigned, an attorney of record for the Defendants, hereby certifies that on April 30, 2012, she served a copy of the foregoing **Defendants' Local Rule 56.1(b)(3) Response to Plaintiff's Statement of Undisputed Material Facts and Local Rule 56.1(b)(3)(c) Statement of Additional Facts Requiring the Denial of Plaintiff's Motion for Summary Judgment** on counsel of record listed below by electronic means pursuant to Electronic Case Filing (ECF):

Stephen Kolodziej
Ford & Britton, P.C.
33 N. Dearborn Street, Suite 300
Chicago, IL 60602

/s/ Rebecca Alfert Hirsch