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

SHAWN GOWDER, Plaintiff, v. 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.	)	No. 11-cv-1304 Judge Der-Yeghiayan

PLAINTIFF'S RULE 26(c) MOTION FOR PROTECTIVE ORDER BARRING OR STAYING DISCOVERY, OR ALTERNATIVELY, BARRING PLAINTIFF'S DEPOSITION

NOW COMES plaintiff Shawn Gowder, by and through his attorney Stephen A. Kolodziej of the law firm of Brenner, Ford, Monroe & Scott, Ltd., and moves the Court pursuant to FRCP 26(c) to enter a protective order barring discovery in this cause, or alternatively, staying discovery pending disposition of plaintiff's motion for judgment on the pleadings, or alternatively, barring defendants from taking plaintiff's deposition. In support of this motion, plaintiff states as follows:

1. By this action, plaintiff seeks judicial review under the Illinois Administrative Review Law, 735 ILCS 5/3-101 *et seq.*, of the decision of the City of Chicago Department of Administrative Hearings ("DOAH") affirming the denial of plaintiff's application for a Chicago Firearm Permit ("CFP"), which is required to possess a firearm, even in the home. As set forth

in plaintiff's motion for judgment on the pleadings filed simultaneously herewith, the pleadings establish that it is undisputed that plaintiff's CFP application was denied on the sole ground that plaintiff has a 1995 misdemeanor conviction for carrying/possessing a firearm in public, in violation of 720 ILCS 5/24-1(a)(10). It is further undisputed that the CFP application was denied pursuant to Municipal Code of Chicago ("MCC") § 8-20-110(b)(3)(iii), which provides that an applicant for a CFP must not have been "convicted by a court in any jurisdiction of . . . an unlawful use of a weapon that is a firearm." It is further undisputed that Chicago's firearm ordinance, MCC Chapter 8-20, does not define the terms "use" or "unlawful use of a weapon."

2. As set forth in the motion for judgment on the pleadings, it is further undisputed that the DOAH affirmed the denial of plaintiff's CFP application based upon its interpretation of the term "use" in MCC § 8-20-110(b)(3)(iii) to include the mere carrying or possessing of a firearm, as opposed to actively employing, operating, or discharging a firearm. It is plaintiff's contention that DOAH erred by interpreting the ordinance in this manner, because its interpretation is contrary to ordinary linguistic usage and raises a substantial constitutional question, in violation of Illinois precedent on statutory construction. It is plaintiff's further contention that even if the DOAH's interpretation of the ordinance was not legally erroneous, its denial of plaintiff's CFP application based solely upon a misdemeanor conviction for carrying/possessing a firearm violates the 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. Plaintiff has therefore included two counts for declaratory and injunctive relief in his complaint, pursuant to 42 U.S.C. § 1983 and the Illinois Constitution.

3. Both of plaintiff's declaratory/injunctive relief counts arise out of, and are premised solely upon, the issue of whether MCC § 8-20-110(b)(3)(iii), as construed by the

DOAH, constitutes an impermissible categorical ban infringing the right to keep and bear arms. Neither claim includes additional factual allegations other than the undisputed facts underlying plaintiff's administrative review claims. Thus, both of plaintiff's federal and state claims involve a pure question of law, and do not involve any questions of fact. In addition, both claims will be mooted if the Court grants plaintiff's pending motion for judgment on the pleadings with respect to the administrative review claim, and finds the DOAH's interpretation of the ordinance is erroneous, and that the ordinance does not preclude the issuance of a CFP to a person convicted only of the misdemeanor offense of carrying or possessing a firearm in public.

4. In determining whether the DOAH's interpretation of MCC § 8-20-110(b)(3)(iii) was erroneous pursuant to plaintiff's administrative review claim (count I of the complaint), the defendants are bound by the administrative record from the DOAH proceeding. The Illinois Administrative Review Law provides that "No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court." 735 ILCS 5/3-110; *Lyon v. Dept. of Children & Family Services*, 807 N.E.2d 423,430 (Ill. 2004). "The construction of a statute is a question of law," *People v. Davison*, 233 Ill.2d 30, 40, 329 Ill. Dec. 347, 906 N.E.2d 545 (2009), and no additional evidence will shed light on whether the term "use" in the ordinance includes mere carrying or possession. Accordingly, discovery is not appropriate with respect to plaintiff's administrative review claim, as the parties are precluded from presenting any additional facts or evidence outside the administrative record that might be obtained in discovery.

5. Discovery is also not appropriate in this case with respect to plaintiff's constitutional claims, because those claims are based solely upon the undisputed facts presented to the DOAH and the question of law raised by those undisputed facts. In a § 1983 claim, the

Court may properly deny discovery where the material facts are not in dispute and discovery would not lead to any triable issue. *Reynolds v. Jamison*, 488 F.3d 756, 762 (7th Cir. 2007). In this case, as demonstrated by the defendants' answer to the complaint, there are no material facts in dispute. The City of Chicago Department of Police and the DOAH denied plaintiff's application for a CFP based solely upon the undisputed fact that plaintiff has a misdemeanor conviction for carrying or possessing a firearm in a public place. The only question raised by plaintiff's § 1983 claim is whether it is constitutionally permissible for defendants to deny plaintiff the right to keep and bear arms based upon a misdemeanor conviction for carrying or possessing a firearm in public. No additional facts developed in discovery will be material to this question of law or will lead to any triable issue, because defendants do not dispute the reason why they denied plaintiff's CFP application or the interpretation of the ordinance by the DOAH. Defendants should not be permitted to conduct a "fishing expedition" to develop additional facts not presented to the DOAH, in an improper attempt to invent new reasons to justify their denial of plaintiff's CFP application after the fact.

6. The categorical approach taken by the U.S. Supreme Court on Second Amendment rights renders further evidence irrelevant. The denial of the CFP bars plaintiff from possession of any firearm. *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008), held that a handgun ban, "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, . . . would fail constitutional muster." 554 U.S. at 628-29. While "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," *id*. at 626, that obviously does not apply to misdemeanants. Being "not otherwise disqualified" for a handgun license meant that a person "is not a felon and is not insane," *id*. at 631, and "[a]ssuming that Heller is not disqualified from

the exercise of Second Amendment rights, the District must permit him to register his handgun . . . ." *Id*. at 635. The undisputed record here warrants the same disposition, and no further evidence would be relevant.

7. Nor is further evidence about the role of firearms in society relevant. *Heller* rejected Justice Breyer's proposed "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id*. at 634.[1] *Heller* explained: "The very enumeration of the right takes out of the hands of government -- even the Third Branch of Government -- the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Id*. For his interest balancing, Justice Breyer would have considered legislative findings in a committee report, studies in medical journals and crime reports, and other sources that allegedly supported the handgun ban with facts. *Id*. at 694-704 (Breyer, J., dissenting). The *Heller* majority did not find such sources worthy of mention.[2]

8. Defendants have not pointed to any disputed facts or information reasonably calculated to lead to the discovery of admissible evidence, and therefore discovery in this case would serve no purpose but to harass and embarrass the plaintiff, and cause him undue burden and expense.

9. At the initial status hearing on April 14, 2011, the undersigned counsel advised the Court that plaintiff believes discovery would be inappropriate in this case. The Court at that time declined counsel's oral request to preclude discovery, but did not preclude plaintiff from

[1] The "interest-balancing inquiry" would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem . . . ." *Id*.

[2] *McDonald* barely mentioned Chicago's legislative finding about guns and violence and accorded it no discussion. 130 S.Ct. at 3026.

bringing a motion for an appropriate protective order should plaintiff believe it necessary. For the reasons stated above, the Court should bar discovery in this cause, or at a minimum, stay discovery pending disposition of plaintiff's motion for judgment on the pleadings. *See Reynolds*, 488 F.3d at 762.

10. Defendants have served plaintiff with a notice for his deposition, to be taken on June 28, 2011. Prior to issuing this notice, defendants' counsel inquired of plaintiff's counsel whether plaintiff maintains that discovery is not appropriate in this case. The undersigned counsel advised that this is plaintiff's position; however, pursuant to FRCP 26(c) and LR 37.2, plaintiff's counsel requested that defendants' counsel advise of the specific issues or topics on which defendants wished to depose plaintiff, so that plaintiff's counsel could determine whether the parties could agree to the deposition proceeding without seeking court intervention, and if not, whether and to what extent plaintiff would move for a protective order. Defendants' counsel refused this request. A copy of the email correspondence between plaintiff's counsel and defendant's counsel is attached hereto as group Exhibit 1.

11. Should the Court deny plaintiff's request to bar discovery entirely, plaintiff requests in the alternative that the Court bar defendants from taking the deposition of plaintiff. As stated above, the issue in this case is whether the denial of plaintiff's CFP application based upon the plaintiff's undisputed misdemeanor conviction for carrying/possessing a firearm in public constitutes an impermissible infringement of the right to keep and bear arms under the U.S. and Illinois Constitutions. No information obtained from the plaintiff can have any bearing on this legal question. In view of the defendants' refusal to identify the topics on which they wish to question the plaintiff or the information they seek to obtain, there is no basis for the Court to conclude that plaintiff's deposition would yield admissible evidence or information

reasonably calculated to lead to the discovery of admissible evidence, as required by FRCP 26(b)(1).

12. Pursuant to FRCP 26(c) and LR 37.2, the undersigned counsel for plaintiff hereby certifies that on June 16, 2011, he conferred with defendant's counsel, Rebecca Hirsch, by telephone in a good faith attempt to resolve the parties' dispute over whether and to what extent discovery would serve any purpose in the case and the appropriate parameters of any discovery, including plaintiff's deposition. Counsel were unable after conferring to resolve their dispute.

WHEREFORE, plaintiff Shawn Gowder respectfully prays that the Court enter a protective order either (1) barring all discovery in this case; (2) staying all discovery until after the Court's disposition of plaintiff's motion for judgment on the pleadings; or (3) barring defendants from taking the deposition of plaintiff; and (4) granting such other and further relief as may be equitable and appropriate pursuant to FRCP 26(c)(1).

Respectfully submitted,

s/ Stephen A. Kolodziej

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Attorney for Plaintiff Shawn Gowder

EXHIBIT 1

From: Hirsch, Rebecca [rebecca.hirsch@cityofchicago.org]
Sent: Monday, May 23, 2011 10:15 AM
To: Kolodziej, Stephen
Cc: Forti, Michael; Nereim, Mardell; Worseck, Andrew; Aguiar, William
Subject: RE: Gowder

Steve,

After consideration of your request, we cannot agree to providing you with topics ahead of time about which we would question Plaintiff during his deposition. Although we are bound by the evidentiary record regarding Claim I, we are entitled under the federal rules to question Mr. Gowder about anything relevant -- or that might lead to relevant information-- to our defense of Counts II and III. While you may have objections, he would still be required to answer under Fed. R. Civ. P. 33 (with the exception of privileged information), and it would be unheard of to put us to the task of identifying specific topics or questions beforehand, especially since we do not know where the deposition might lead.

If you intend to move for a protective order to quash the deposition in its entirety because you continue to assert that no discovery should be allowed (a position we believe has already been denied by Judge Der-Yeghiayan), that's a different matter. But otherwise, we will proceed with the deposition as noticed for the last week of June, and remain open to finding a more mutually agreeable time/date.

Thanks,

Rebecca

From: Kolodziej, Stephen [skolodziej@brennerlawfirm.com]
Sent: Friday, May 13, 2011 10:48 AM
To: Hirsch, Rebecca
Subject: RE: Gowder

Rebecca,

Thank you for your email. It does remain my position that discovery is not appropriate in this case. However, in view of Judge Der-Yeghiayan's order and our obligations under Rule 26(c), I'd like to request that you please advise me of the specific issues or topics on which you wish to examine Mr. Gowder at a deposition, so that I can determine whether and to what extent I will move for a protective order with respect to the deposition. Once I receive this information, we can confer about whether we can agree to proceed with the deposition without me first seeking a protective order, and if so, what dates are available to everyone.

That being said, I start a two week trial June 1, and I will be on vacation the week of June 20-24, so I'll be unavailable until the last week of June.

Thank you,

Steve

Stephen A. Kolodziej
Brenner, Ford, Monroe & Scott, Ltd.
33 North Dearborn Street
Suite 300
Chicago, Illinois 60602
312-781-1970

From: Hirsch, Rebecca [mailto:rebecca.hirsch@cityofchicago.org]
Sent: Thursday, May 12, 2011 4:22 PM
To: Kolodziej, Stephen
Cc: Forti, Michael; Nereim, Mardell; Aguiar, William; Worseck, Andrew
Subject: Gowder

Steve,

Attached please find a courtesy copy of Defendants' Rule 26(a)(1) Disclosures -- I have placed the original in the mail to you.

We intend to serve Plaintiff with a Notice of Deposition shortly, and would be happy to discuss available dates with you. Although Judge Der-Yeghiayan said he was going to allow discovery and set a schedule for such in his order, it appears based on statements in your initial disclosures that you still intend to argue that no discovery should be permitted at all. Please let me know if that is the case, and if so, I can simply pick a date for Plaintiff's deposition in June, and you can file whatever motion you deem appropriate after receiving the notice.

Thanks,

Rebecca

Rebecca Hirsch
Assistant Corporation Counsel
City of Chicago Department of Law
30 North LaSalle Suite 1230
Chicago, IL 60602
(312) 742-0260

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Kolodziej, Stephen

From: Hirsch, Rebecca [rebecca.hirsch@cityofchicago.org]
Sent: Friday, May 13, 2011 11:15 AM
To: Kolodziej, Stephen
Subject: RE: Gowder

Thanks, Steve. I'll get back to you about your request soon, but in any event I will go ahead and notice the deposition for the last week of June -- given the discovery cutoff of July 15, I'd like to have it officially on file, and then we can always change the date later.

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Rebecca

Rebecca Hirsch

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