

RETURN DATE: SEPTEMBER 21, 2010 : SUPERIOR COURT
:
JEFFREY C. MATHENA : JUDICIAL DISTRICT OF NEW BRITAIN
: AT NEW BRITAIN
V. :
:
BOARD OF FIREARMS PERMIT :
EXAMINERS : AUGUST 30, 2010

APPEAL FROM FINAL DECISION OF ADMINISTRATIVE AGENCY

I. NATURE OF APPEAL

1. This is an appeal by the aggrieved party, Jeffrey C. Mathena (hereinafter, “Appellant” or “Mathena”), from the July 16, 2010, final decision of the Board of Firearms Permit Examiners (“Board”) voting to uphold the decision of James M. Thomas, Commissioner, Department of Public Safety (DPS), revoking Mathena’s state permit to carry a pistol or revolver (“state permit”) issued pursuant to Connecticut General Statutes (“General Statutes”), § 29-28(b), for lack of suitability.

II. INTERESTED PARTIES

Appellant Jeffrey C. Mathena

2. Mathena is an adult male Connecticut resident who meets the standard for mandatory issuance, upon application to the Commissioner of the Department of Public Safety, of an eligibility certificate for a pistol or revolver. Conn. Gen. Stat. § 29-36f.

3. Mathena is eligible under federal law “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g).

4. Mathena held a valid state permit on February 1, 2009, issued and renewed by the DPS over the course of the twenty (20) year preceding period pursuant to General Statutes §§ 29-28(b), 29-30(c).

The Department of Public Safety

5. The DPS Special Licensing and Firearms Unit (SLFU) sent notice by United States mail to Mathena dated February 4, 2009, of the immediate revocation of his state permit “as a result of your [Mathena’s] involvement in an incident investigated by: Farmington Police Department, Case Number: 0900001905, Date: 02/01/2009.”

6. The DPS is a state agency within the executive branch of government comprised of three (3) principal divisions: (a) the Division of State Police, (b) the Division of Fire, Emergency and Building Services, and (c) the Division of Scientific Services.

7. The Division of State Police (DSP) has two distinct operational offices: (a) Office of Field Operations and (b) Office of Administrative Services.

8. The Office of Administrative Services includes SLFU located at the DSP headquarters in Middletown, Connecticut.

9. The SLFU is responsible for the issuance, revocation, and renewal of state permits.

The Board of Firearms Permit Examiners

10. Mathena filed a timely appeal of the February 4, 2009, revocation to the Board requesting from the Board an order restoring to him his state permit.

11. The Board hears appeals by any person aggrieved by any refusal to issue or renew a permit or certificate under the provisions of General Statutes §§ 29-28(b), 29-36f, or by any limitation or revocation of a permit or certificate issued under any of said sections, or by a refusal or failure of any issuing authority to furnish an application as provided in General Statutes § 29-28(b). Conn. Gen. Stat. § 29-32b(b).

12. After hearing on July 8, 2010, a majority of the Board voted to uphold the DPS SLFU February 4, 2009, revocation.

13. The Board issued written notice of its final decision to Mathena on July 16, 2010.

14. The instant appeal from the final decision of the Board is filed pursuant to General Statutes §§ 4-183(j)(1,2,3,5,6), 29-32b(f).

15. Mathena exhausted his administrative remedies prior to filing this appeal.

III. THE BOARD'S ACTIONS PREJUDICED APPELLANT'S SUBSTANTIAL RIGHT TO KEEP AND BEAR ARMS

A. The Board's Refusal to Order Reinstatement of the State Permit Based on a Lack of "Suitability" Violates the Second Amendment to the United States Constitution

16. Mathena has never been arrested.

17. Mathena has no criminal convictions.

18. Mathena has no criminal convictions that would render him ineligible under General Statutes § 29-28(b) for issuance of a temporary state permit or a state permit.

19. The DPS, upon receipt of Mathena's application for an eligibility certificate, would be mandated by state statute to issue Mathena an eligibility certificate for a pistol or revolver.

Conn. Gen. Stat. § 29-36f.

20. At the July 8, 2010, hearing before the Board, the DPS representative conveyed the DPS Commissioner's position: "The Commissioner's position is that he [Mathena]'s not suitable to carry a gun. He doesn't possess the character or the maturity to be trusted to carry a gun in public if he's been drinking and consuming alcohol in excess of the legal limit. And out in public carrying a firearm on his person. It's a risk to the public safety."

21. Following the July 8, 2010, hearing, the Board deliberated.

22. The Board member presiding as the Chairman at Mathena's hearing voted to uphold the DPS revocation finding that Mathena was not suitable.

23. Three other members of the Board concurred with the Chairman that Mathena was not suitable.

24. The fifth member of the Board hearing Mathena's appeal voted in favor of restoring Mathena's state permit.

25. General Statutes § 29-28(b) lists ten factors reviewed by state and local agencies for determination of a person's eligibility to obtain or hold a temporary or state permit to carry pistols or revolvers.

26. The statute also requires "suitability." Conn. Gen. Stat. § 29-28(b).

27. A person may be denied a state permit even if he or she meets all ten of the eligibility factors but is not deemed suitable.

28. A person is disqualified from holding a state permit if he or she is suitable but does not meet one or more of the eligibility factors.

29. Only a suitable person who meets all ten eligibility factors may hold a state permit.

30. Mathena's fundamental constitutional right to keep and bear arms in self-defense is contingent upon holding a state permit that requires he be found "suitable" by the DPS and, on appeal, by the Board.

31. In determining suitability, the DPS and the Board exercise discretion absent any parameters set forth under state law.

32. The “right to keep and bear arms” is “among those fundamental rights necessary to our system of ordered liberty.” McDonald v. City of Chicago, Illinois, ___ U.S. ___, 130 S.Ct. 3020, 3042 (2010).

33. A fundamental right, such as the right to keep and bear arms, is “enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” McDonald, 130 S.Ct. at 3111.

34. While ““longstanding regulatory measures”” such as ““prohibitions on the possession of firearms by felons and the mentally ill,” ““laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms”” are not imperiled by incorporation, limitations on the legislative freedom and policy choices of the States and restrictions on ““experimentation and local variations”” are necessary consequences of the ““enshrinement of constitutional rights.”” Id. at 3050, 3047 (quoting District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783, 2816-17, 171 L.Ed.2d 637 (2008)).

35. The Board’s final decision was conditioned upon its determination that Mathena is not suitable to hold a state permit.

36. The vague principle of suitability in General Statutes §§ 29-28(b), which has no statutory definition and is subject to a myriad of interpretations among reasonable individuals, is the

essence of the freedoms exercised by the state legislature and the policy choices of the DPS and the Board now subject to limitations necessitated by an individual's fundamental right to keep and bear arms.

37. The Board's application of a suitability standard in its consideration of Mathena's appeal violated his fundamental constitutional right under the Second Amendment to keep and bear arms and constitutes prejudice to Mathena's substantial rights. Conn. Gen. Stat. § 4-183(j)(1).

38. The Board's enforcement of a statute which violates the United States Constitution is a *de facto* exercise of excess statutory authority. Conn. Gen. Stat. § 4-183(j)(2).

39. The impossibility of determining whether a Board decision founded on a determination of suitability is clearly erroneous, arbitrary, capricious, an abuse of discretion, or clearly unwarranted derives from the absence of any agreement on the definition of suitability.

40. Therefore every decision of the Board which rests upon a determination of suitability, whether in favor of or against the individual appellant is clearly erroneous, arbitrary, capricious, an abuse of discretion, or clearly unwarranted, except that when the decision denies the appellant his or her state permit based on suitability, the decision violates the Second Amendment. Conn. Gen. Stat. § 4-183(j)(5-6).

B. The Board's Reliance Upon Statutorily Erased Information in its Final Decision Constitutes an Unlawful Procedure

41. A police officer employed by the Farmington Police Department testified at the July 8, 2010, hearing as a witness for the DPS.

42. At the commencement of the hearing, Mathena objected to the use of documents, records, and testimony subject to erasure under General Statutes § 54-142a.

43. The Board issued no ruling on Mathena's objection but informed Mathena that the proceedings were very informal and the Board would take his objection to the use of the information as ongoing throughout the proceeding.

44. The DPS representative, the Farmington police officer, and the Board then addressed, relied upon, and questioned the witnesses about statutorily erased information.

45. The Board never asked the Farmington police officer to represent under oath that his testimony was based on information derived from information not subject to statutory erasure.

46. General Statutes § 54-142c provides: "The clerk of the court or any person charged with retention and control of erased records by the Chief Court Administrator or any criminal justice agency having information contained in such erased records shall not disclose to anyone the existence of such erased records or information pertaining to any charge erased under any provision of this part, except as otherwise provided in this chapter."

47. The Farmington Police Department and the DPS meet the statutory definition of a “criminal justice agency.” Conn. Gen. Stat. § 54-142i(b).

48. The substance, if not every word, testified to by the Farmington police officer at the July 8, 2010, pertained to information about an erased charge.

49. The Board’s denial of Mathena’s motion to hold the hearing in accordance with the statutory mandate of General Statutes § 54-142a et seq. in favor of a very informal approach to determining whether Mathena’s Second Amendment right to keep and bear arms would be denied, constitutes an unlawful procedure. Conn. Gen. Stat. § 4-183(j)(3).

50. The Board’s encouragement and condonation of the municipal police officer’s and the DPS representative’s intention to violate the law by disclosing erased information constitutes unlawful procedure. Conn. Gen. Stat. § 4-183(j)(3).

IV. CONCLUSION

51. But for the disclosure of the statutorily erased information by the Farmington police officer and the DPS representative at the hearing, the Board would not have found Mathena lacked suitability.

52. But for the Board’s application of an unconstitutional suitability standard in determining whether to order restoration of Mathena’s state permit, the Board would have been compelled to order such restoration.

WHEREFORE, pursuant to General Statutes §§ 4-183, 29-32b(f), Mathena hereby appeals from the Board's final decision of July 16, 2010, for the relief set forth in his Statement of Remedies.

APPELLANT
JEFFREY C. MATHENA

BY: /s/ Rachel M. Baird
Rachel M. Baird (Juris #407222)
Law Office of Rachel M. Baird
379 Prospect St
Torrington CT 06790-5238
Tel: (860) 626-9991
Fax: (860) 626-9992

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STATEMENT OF REMEDIES

The aggrieved party, Jeffrey C. Mathena (hereinafter, “Appellant”), appeals from the July 16, 2010, final decision of the Board of Firearms Permit Examiners (“Board”) pursuant to Connecticut General Statutes (“General Statutes”), §§ 4-183, 29-32b(f), and requests the following relief:

1. An order sustaining the appeal;
2. An order vacating the final decision of the Board of Firearms Permit Examiners (“Board”);
3. An order reversing the final decision of the Board and mandating that the Board restore the Appellant’s state permit to carry a pistol or revolver;
4. An order remanding the appeal to the Board and directing the Board to conduct further proceedings in accordance with the fundamental constitutional rights afforded under the Second Amendment to the United States Constitution;

5. An order remanding the appeal to the Board and directing the Board to conduct further proceedings in accordance with state law, including but not limited refraining from encouraging and condoning the violation of state laws by sworn law enforcement officers appearing before the Board, including but not limited to violating the statutory prohibition upon the disclosure of information pertaining to statutorily erased records; and
6. For such other and further relief as justice and equity require.

APPELLANT
JEFFREY C. MATHENA

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Rachel M. Baird (Juris #407222)
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379 Prospect St
Torrington CT 06790-5238
Tel: (860) 626-9991
Fax: (860) 626-9992

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RECOGNIZANCE

The undersigned hereby certifies that John Hudson, 379 Prospect Street, Torrington, Connecticut, is recognized in the sum of \$500.00 to prosecute the above-captioned civil action/administrative appeal.

Taken and acknowledged this 30th day of August, 2010, at Torrington, Connecticut.

/s/ Rachel M. Baird
Rachel M. Baird
Commissioner of the Superior Court