

TOWN OF PLYMOUTH VS. ROBERT J. POWER & ANOTHER[1]

Docket:	18-P-1362
Dates:	July 12, 2019 - May 29, 2020
Present:	Henry, Sacks, & Ditkoff, JJ.
County:	Plymouth
Keywords:	Firearms. Constitutional Law, Right to bear arms. Practice, Civil, Judicial review of license to carry firearms, Action in nature of certiorari, Judgment on the pleadings. District Court, Jurisdiction.

Civil action commenced in the Superior Court Department on June 20, 2017.

The case was heard by Cornelius J. Moriarty, II, J., on motions for judgment on the pleadings.

Timothy A. Ciaffoni for Robert J. Power.

Nicole J. Costanzo (Brian W. Riley also present) for the plaintiff.

HENRY, J. Until paragraph (1 1/2) was added to G. L. c. 140, § 129B, effective January 1, 2015, a licensing authority could only approve an application for a firearm identification (FID) card or deny it on the basis that an applicant was a "prohibited person" under the statute.[2] Paragraph (1 1/2), which is at issue in this case, addresses the possibility that a licensing authority might conclude that someone who is not a prohibited person is "unsuitable" to possess an FID card. In that event, paragraph (1 1/2) does not empower the licensing authority to deny the FID card. Rather, it provides that "the licensing authority may file a petition" "in the [D]istrict [C]ourt of jurisdiction" "to request that an applicant be denied the issuance or renewal of [an FID] card." The statute reserves to the District Court the decision whether the licensing authority has met its burden of proving by a preponderance of the evidence that the applicant is unsuitable. G. L. c. 140, § 129B (1 1/2).

On the issue of timing, paragraph (1 1/2) does not expressly set a deadline for the licensing authority to petition the District Court for a determination of unsuitability. Section 129B (3), in contrast, sets a forty-day deadline for the licensing authority to approve an application for an FID card or deny it on the grounds that an applicant is a prohibited person. Here, over one hundred days after Robert J. Power filed his FID card application, the licensing authority petitioned the District Court for a determination that he is an unsuitable person. Power argues that paragraph (3)'s forty-day deadline can be imposed on paragraph (1 1/2). Even if he were correct, an issue we need not and do not decide, we reject Power's contention that if the licensing authority does not petition the District Court pursuant to paragraph (1 1/2) within forty days of the application, the consequence is that the FID card constructively issues.

Background. On October 4, 2016, Power submitted an FID card application to the Plymouth Police Department (department), the local licensing authority.[3] Over one hundred days later, pursuant to G. L. c. 140, § 129B (1 1/2) (a), the department filed a petition in the District Court asking it "to determine that [Power] is an unsuitable person to possess" an FID card.[4] Although Power has an extensive criminal history dating back to 1973, the department did not and does not take the position that he is a prohibited person under § 129B (1).

At a hearing on April 19, 2017, a District Court judge allowed Power's motion for a directed verdict and ordered the department to grant Power an FID card. The judge reasoned that § 129B (3) requires the licensing authority to make a decision on the application within forty days and it was undisputed that it did not. In the interest of judicial economy, the judge added that if his decision to allow the directed verdict was later determined to be incorrect, his conclusion on the merits of the suitability issue was that "the [d]epartment was not arbitrary and capricious," in light of Power's criminal record.

The town of Plymouth (town) then filed a complaint for judicial review in the Superior Court pursuant to G. L. c. 249, § 4. In deciding the cross motions for judgment on the pleadings, the Superior Court judge assumed the forty-day deadline applied to a paragraph (1 1/2) petition but found that the remedy was not constructive approval of the FID card because that remedy is appropriate only when "a legislative enactment" clearly so specifies. He expressed concern that it could take a licensing authority longer than forty days to reach a conclusion on

suitability.[5] He then ruled that the District Court judge was correct in concluding that the department's reasons for finding Power unsuitable were not arbitrary and capricious, and allowed the town's motion for judgment on the pleadings. Judgment entered affirming the department's "decision . . . denying" Power's FID card application. This appeal followed.

Discussion. 1. Standard of review. Because this action was brought in the Superior Court in the nature of certiorari, pursuant to G. L. c. 249, § 4, we review "to correct substantial errors of law apparent on the record adversely affecting material rights." *Commissioners of Civ. Serv. v. Municipal Court of Boston*, 369 Mass. 84, 90 (1975), quoting *Sullivan v. Committee on Rules of the House of Representatives*, 331 Mass. 135, 139 (1954). In a certiorari action, we review the District Court record "without giving the view of the Superior Court judge any special weight." *Doe v. Superintendent of Sch. of Stoughton*, 437 Mass. 1, 5 (2002).

2. Statutory framework. We begin with an overview of the statutory framework. General Laws c. 140, § 129B, regulates the issuance of FID cards. Paragraph (1) sets forth who is a statutorily prohibited person. The licensing authority "must deny an application for a firearms identification card . . . if the applicant is subject to any of several statutory disqualifications" set forth in paragraph (1). *Andrade v. Somerville*, 92 Mass. App. Ct. 425, 427 (2017). Paragraph (2) imposes a timeline for initial action on the application. Paragraph (3), among other things, sets a deadline of forty days for a licensing authority to "either approve the application and issue the license or deny the application and notify the applicant of the reason for such denial in writing." Paragraph (4) addresses revocations and suspensions. Paragraph (5) permits an applicant to petition for court review "within either [ninety] days after receipt of such denial, revocation or suspension or within [ninety] days after the expiration of the time limit in which the licensing authority is required to respond to the applicant." Several other provisions address large capacity firearms and feeding devices, the form of the card, fees, and other issues. G. L. c. 140, § 129B (6)-(15).

Until § 129B was amended, effective January 1, 2015, by An Act Relative to the Reduction of Gun Violence (act), St. 2014, c. 284, § 30, a person who did not suffer from a statutory disqualifier was entitled to an FID card as a matter of right. The act added paragraph (1 1/2) to § 129B, in recognition of the fact that some

applicants who are not statutorily "prohibited person[s]" might otherwise be "unsuitable" to possess an FID card. Paragraph (1 1/2) creates a process by which a licensing authority may seek a judicial determination that an applicant is unsuitable by petitioning "the [D]istrict [C]ourt of jurisdiction" to deny an FID card application based on those grounds. G. L. c. 140, § 129B (1 1/2). The petition must include a written statement of the reasons supporting an unsuitability finding. See G. L. c. 140, § 129B (1 1/2) (a). Upon filing of the petition, the licensing authority must also provide the applicant with written notice describing the evidence contained in the petition. *Id.*

Paragraph (1 1/2) does not permit the licensing authority itself to deny an application for an FID card based on suitability. That role is reserved for the District Court. Nor does paragraph (1 1/2) include a deadline within which the licensing authority must file the petition seeking a judicial determination that the applicant is unsuitable to hold an FID card.

Power argues that paragraph (3) of § 129B sets a forty-day deadline for the licensing authority to approve or deny an FID card application and, because the licensing authority here did not petition in that time, the FID card must issue forthwith. Paragraph (3) provides, in pertinent part:

"The licensing authority may not prescribe any other condition for the issuance of [an FID] card and shall, within 40 days from the date of application, either approve the application and issue the license or deny the application and notify the applicant of the reason for such denial in writing."

By its terms, paragraph (3) requires one of two decisions by the licensing authority: "approve" or "deny." Paragraph (1 1/2), in contrast, does not empower the licensing authority to deny the application.

The town accepts that the forty-day limit to approve or deny the application in paragraph (3) also applies to paragraph (1 1/2) notwithstanding that paragraph (3) by its own terms applies only to approvals and denials. The town argues, however, that the forty-day deadline is directory rather than mandatory. See *Monico's Case*, 350 Mass. 183, 185-186 (1966) (holding that a statute that relates only to the time of performance of an agency's duty is to be considered as directory only and not mandatory); *Kerr v. Palmieri*, 325 Mass. 554, 558 (1950) (same); *Cheney v. Coughlin*,

201 Mass. 204, 211 (1909) (same). The town conceded at argument, however, that it would be unreasonable to wait a year to act.

Given the importance of the rights guaranteed by the Second Amendment to the United States Constitution, licensing authorities must act promptly on FID card applications. We need not decide whether the forty-day deadline in paragraph (3) applies to petitions filed pursuant to paragraph (1 1/2) to resolve this case, however. Even if the forty-day deadline applies, the question is whether, as Power argues, a licensing authority's failure to petition the District Court within forty days constitutes constructive approval of the FID card application. Here, § 129B is clearer. It does not.

Nothing in § 129B (1 1/2) states a consequence of the licensing authority failing to petition the District Court within forty days or any other timeline. This is in marked contrast with other language in paragraph (1 1/2). Paragraph

(1 1/2) (d) contains a deadline within which the District Court must act on an unsuitability petition and an express consequence in the event the court fails to do so. If the "court has not entered a judgment that an applicant is unsuitable under this clause within [ninety] days . . . the court shall enter a judgment that the applicant is suitable for the purposes of this paragraph." G. L. c. 140, § 129B (1 1/2) (d). "[W]here the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present." *Commonwealth v. Galvin*, 388 Mass. 326, 330 (1983), quoting *Beeler v. Downey*, 387 Mass. 609, 616 (1982). See *Commonwealth v. McLeod*, 437 Mass. 286, 294 (2002) (declining to "add words to a statute that the Legislature did not put there, either by inadvertent omission or by design"). Accordingly, we do not agree with Power that if the licensing authority fails to timely file a petition to determine unsuitability, the application is constructively approved.

This construction is consistent with "[t]he goal of firearms control legislation," which "is to limit access to deadly weapons by irresponsible persons." *Firearms Records Bur. v. Simkin*, 466 Mass. 168, 176 (2013), quoting *Ruggiero v. Police Comm'r of Boston*, 18 Mass. App. Ct. 256, 258 (1984). Judicial review provides a mechanism to protect an applicant's Second Amendment rights if a licensing authority fails to act in a timely manner.

The remainder of the statutory scheme supports this construction. Paragraph (5) provides, in relevant part, that "[a]ny applicant . . . aggrieved by a denial . . . of a firearm identification card . . . may, within either [ninety] days after receipt of notice of such denial . . . or within [ninety] days after the expiration of the time limit in which the licensing authority is required to respond to the applicant, file a petition to obtain judicial review in the [D]istrict [C]ourt having jurisdiction in the city or town wherein the applicant filed for . . . such card." G. L. c. 140, § 129B (5). The District Court is empowered to direct that the card be issued "if the justice finds that such petitioner is not prohibited by law from possessing such card." *Id.*

The Superior Court judge correctly determined that the District Court judge erred in granting Power's FID card application based on the department's failure to adhere to the forty-day statutory deadline in paragraph (3).

3. Unsuitability determination. We next consider that the District Court judge found that if his decision on timeliness was reversed on appeal, he would find that the department's unsuitability determination was not arbitrary and capricious. The Superior Court judge granted the town's motion for judgment on the pleadings, affirming the department's "decision . . . denying" Power's FID card application.^[6] Both the District Court judge and the Superior Court judge applied the incorrect standard because § 129B (1 1/2) does not permit the licensing authority to deny an FID card application due to unsuitability. The question of unsuitability is reserved to the District Court upon petition by the licensing authority; the District Court is not merely reviewing the licensing authority's decision to determine if it was arbitrary and capricious.

Rather, the statute requires that the District Court's determination "shall be based on a preponderance of evidence that there exists: (i) reliable, articulable, and credible information that the applicant has exhibited or engaged in behavior to suggest the applicant could potentially create a risk to public safety; or (ii) existing factors that suggest that the applicant could potentially create a risk to public safety." G. L. c. 140, § 129B (1 1/2) (d).^[7] Thus, we reverse the Superior Court judgment and order this case remanded to the

District Court for the District Court to determine, by a preponderance of the evidence, whether Power is unsuitable in accordance with G. L. c. 140, § 129B (1 1/2).

4. Second Amendment. Power further argues that the denial of his FID card application infringes upon his Second Amendment right to keep and own firearms for self-defense.[8] The premise of this argument is incorrect because neither the town nor the department had the authority to deny Power's FID card application on suitability grounds; whether it should be denied on those grounds remains an open issue. We thus need not address this argument.

Conclusion. We reverse the judgment of the Superior Court and order the entry of a new judgment remanding this case to the District Court to determine whether Power is unsuitable under the statutory standard articulated in G. L. c. 140, § 129B (1 1/2) (d).

So ordered.

footnotes

[1] Plymouth District Court, which is a nominal party and has had no participation in this action.

[2] General Laws c. 140, § 129B (1), includes, as a "prohibited person" "persons convicted of felonies or adjudicated a youthful offender or delinquent child; persons convicted of violent crimes (as defined in G. L. c. 140, § 121) or misdemeanors punishable by imprisonment for more than two years; persons who have been committed to a hospital or an institution for mental illness, alcohol, or substance abuse; and persons under the age of fifteen." *Ramirez v. Commonwealth*, 479 Mass. 331, 341 (2018).

[3] "In Massachusetts, local police departments are responsible for the issuance of firearms licenses to individuals who reside or have a place of business within the jurisdiction." *Commonwealth v. Adams*, 482 Mass. 514, 531 (2019), citing G. L. c. 140, §§ 121, 129B (1).

[4] The department notified Power by a form letter that his application had been denied pursuant to G. L. c. 140, § 129B, and that the District Court had found him to

be an unsuitable person based on his criminal history. This notice was incorrect, as the department did not file its petition in the District Court until the next day. In any event, Power appeared and responded to the department's petition.

[5] Plymouth police Captain Bruce MacNamee testified about his review of Power's FID card application. He explained that Power's criminal history was more extensive than any he had seen in over eight years of reviewing applications. He also testified that Plymouth has "about 6,000 licensees."

[6] Both the town and the Superior Court judge identified the town, instead of the department, as the licensing authority that denied Power's application. However, the licensing authority, regardless of whether it was the town or the department, is not authorized to deny an FID card application on unsuitability grounds. Thus, this distinction does not impact our analysis.

[7] We note that the last sentence of § 129B (1 1/2) (d) refers to "clause (ii)" and "clause (iii)," but that there is no "clause (iii)" in that subsection. It appears that clause (ii) refers to subsection (b) and clause (iii) refers to subsection (c). In any event, our analysis is not affected by the discrepancy.

[8] Power also argues that the town "effectively narrowed" his rights under the Second Amendment by failing to petition the District Court within forty days of his application. However, assuming the forty-day deadline applies to Power, his remedy was to petition the District Court for relief pursuant to G. L. c. 140, § 129B (5). Thus, this argument is unavailing.