

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

M. PETER KUCK, individually	:	
and on behalf of others similarly situated,	:	
	:	
Plaintiffs,	:	CASE NO.: 3:07-cv-1390-VLB
	:	
v.	:	
	:	
JOHN A. DANAHER, III, COMMISSIONER,	:	
CONNECTICUT DEPARTMENT OF PUBLIC	:	
SAFETY, in his official and individual capacities,	:	
ALBERT J. MASEK, JR., COMMANDING	:	
OFFICER, CONNECTICUT DEPARTMENT OF	:	
PUBLIC SAFETY, in his official and individual	:	
capacities,	:	
	:	
Defendants.	:	JANUARY 22, 2008

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO
MOTION TO DISMISS**

The Plaintiff, M. Peter Kuck, by and through undersigned counsel, hereby responds to the Motion to Dismiss filed by Defendants on November 30, 2007. (doc. # 13.)

I. SUMMARY OF MEMORANDUM

The Defendants have moved, pursuant to Rule 12(b)(1), (6) of the Federal Rules of Civil Procedure to dismiss the Complaint filed by Plaintiff on September 17, 2007. (doc. # 1.) Plaintiff has filed a Notice of Amended Complaint, or, Alternately, a Request for Leave of Court to File Amended Complaint and Motion to Supplement Complaint based upon evidence contained in emails and documents gathered since September 17, 2007, relevant to Plaintiff’s claims. Plaintiff has filed a Motion for Joinder of Parties based upon information gathered since

September 17, 2007, which support Plaintiff's claims against the individuals sought to be joined.¹

Defendants' Motion to Dismiss argues four general points:

- First, Defendants argue that the backlog of appeals is “not traceable to Defendants” and any responsibility for the backlog “rests solidly with the Board.” (Defs.’ Mem. at 9.)
- Second, Defendants argue that even if the backlog of appeals could be attributable to the Defendants, the delay is attributable to a compelling state interest in safety.
- Third, Defendants argue that they lawfully demanded that Plaintiff produce a birth certificate or United States passport as a condition for renewing his state permit.
- Fourth, Defendants argue that the Complaint does not allege retaliation for speech or conduct protected by the First Amendment to the United States Constitution.

In response, Plaintiff asserts that the Complaint contains sufficient factual allegations to support his claim that the unlawful conduct of the Defendants created the backlog of appeals. The backlog was not a result of any conduct by the Defendants in furtherance of a compelling state interest. There is no statutory or other authority that allows the Defendants to demand a birth certificate as a condition for renewing a state permit. Finally, the Complaint sufficiently alleges retaliation against the Plaintiff for speech regarding a matter of public interest.

¹ Plaintiff's counsel filed a complaint by James F. Goldberg on December 27, 2007, in docket number 3:07-CV-1911-VLB (“Goldberg action”). The Goldberg action alleges claims regarding the revocation of Goldberg's state permit following his arrest and the denial of a meaningful opportunity for hearing to challenge the revocation. The complaint in the Goldberg action names the same Defendants as are named in the instant action and includes factual allegations based on information obtained since September 17, 2007, from emails and other discoverable documents relevant to the claims in the instant action and the Goldberg action. The complaint in the Goldberg action names seven (7) defendants including the two (2) named in the Kuck action. The proposed Amended Complaint attached to Plaintiff's Notice of Amended Complaint names Governor M. Jodi Rell and the same seven (7) defendants as are named in the Goldberg action.

II. LEGAL STANDARD

“In deciding a motion to dismiss, the court takes the allegations of the Complaint as true, and construes them in a manner favorable to the pleader.” George Campbell Painting Corp. v. Chao, 2006 WL 197375, *1 (D.Conn.) (citations omitted). “The court must draw all reasonable inferences in the plaintiff’s favor.” Id (citations omitted).

“A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.” Id (citations omitted). “A plaintiff generally has the burden of proving by a preponderance of the evidence that jurisdiction exists.” Id.

“A motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6), tests only the adequacy of the complaint.” Id (citations omitted). “A Rule 12(b)(6) motion can be granted only if ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” Id (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). This principle is applied with particular strictness when the plaintiff complains of a civil rights violation. “An action, especially under the Civil Rights Act, should not be dismissed at the pleadings stage unless it appears to a certainty that plaintiffs are entitled to no relief under any state of the facts, which could be proved in support of their claims.” Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2d Cir. 1970) (citations omitted).

III. ARGUMENTS OF LAW

A. The Complaint Sufficiently Alleges that the Backlog of Appeals Arises from the Defendants’ Conduct²

² The Complaint alleges:

24. In May, 2007, the estimated wait time for hearing before the Board was seventeen (17) months.

25. The DPS caused the backlog of cases by not reviewing, processing and preparing the appeal cases in a reasonable and timely manner for the Board’s review.

26. The DPS caused the backlog in cases by increasing the number of appeals through its denial of pistol permit renewals based upon arbitrary and illegal requirements for renewal.

...

Plaintiff's Complaint alleges that the Defendants, acting under color of state law, abused the statutory authority of their positions with the Connecticut State Department of Public Safety ("Department") to intentionally delay review by the Connecticut State Board of Firearms Permit

59. The DPS delay in submitting its case statements and positions to the Board prevents the Board from timely review and resolution by the Board of meritless, legally insufficient, and evidentiary deficient cases.

60. The SFLU, knowing that it denies a percentage of initial and renewal applications for pistol permits and revokes pistol permits, without evidence or basis in law, withholds its case statements and positions from the Board until just prior to the scheduled hearing and then settles cases on the day of hearing because the DPS knows that the cases are without evidence or basis in law.

61. By the time the DPS settles cases on the day of hearing before the Board, the aggrieved person has been denied the pistol permit without evidence or basis in law for a fourteen (14) to twenty (20) month time period. The proposed Amended Complaint alleges, in further detail:

27. Commissioner Danaher and his designated agents, including, but not limited to, Captain Masek, Detective Mattson, Detective Karanda, and Sergeant Bastura, have maintained an unlawful practice and procedure of returning revoked state permits to their holders prior to hearing before the Board.

28. Commissioner Danaher or any of his designated agents, including, but not limited to, Captain Masek, Detective Mattson, Detective Karanda, and Sergeant Bastura, have no lawful authority to return a revoked state permit to its holder until the Board orders, after hearing, the restoration of the state permit.

29. The Board, in deciding whether to order the restoration of a state permit, inquires into and determines the facts, *de novo*, and unless the Board finds that revocation would be for just and proper cause, the Board orders the state permit restored to its holder in accordance with General Statutes § 29-32b(b).

30. Commissioner Danaher and his designated agents, including, but not limited to, Captain Masek, Detective Mattson, Detective Karanda, and Sergeant Bastura, by engaging in the unlawful practice and procedure of returning revoked state permits to their owners prior to a hearing before the Board, have circumvented the exclusive authority of the Board to determine whether the facts support a finding that revocation was for just and proper cause.

31. Commissioner Danaher and his designated agents, including, but not limited to, Captain Masek, Detective Mattson, Detective Karanda, and Sergeant Bastura, by engaging in the unlawful practice and procedure of returning revoked state permits to their owners prior to a hearing before the Board, have concealed and secreted revocations from the civilian scrutiny and review of the Board.

32. Commissioner Danaher and his designated agents, including, but not limited to, Captain Masek, Detective Mattson, Detective Karanda, and Sergeant Bastura, by engaging in the unlawful practice and procedure of returning revoked state permits to their owners prior to a hearing before the Board, have condoned and promoted the revocation of state permits revocations having no basis in fact and without any just and proper cause.

33. Commissioner Danaher and his designated agents, including, but not limited to, Captain Masek, Detective Mattson, Detective Karanda, and Sergeant Bastura, by engaging in the unlawful practice and procedure of returning revoked state permits to their owners prior to hearing before the Board, have used discretion not granted them under state law and opened the state permit revocation process to partiality, inconsistency, appearance of impropriety, and problems associated with the lack of oversight attendant to the unauthorized and unregulated discretion practiced by the SFLU in determining whether revoked state permits should be returned to their holders prior to the civilian scrutiny of the Board.

34. While the Department has the authority to revoke a state permit pursuant to General Statutes § 29-32(b), it does not have the authority that the Board possesses to restore a revoked state permit pursuant to General Statutes § 29-32b(b).

35. The SFLU's practice of revoking state permits and then returning them to their holders without review by the Board of the facts underlying the revocation has resulted in a pattern and practice of allowing law enforcement agencies and the Department to revoke state permits without concern for the law or the intent of the duly elected legislature.

Examiners (“Board”) of appeals from the Department’s decisions to revoke and deny issuance or renewal of state permits to carry a pistol or revolver. (Compl. ¶ 4.)

The Complaint alleges that the Department, knowing that it denies a percentage of initial and renewal applications for pistol permits and revokes pistol permits, without evidence or basis in law, withholds its case statements and positions from the Board until just prior to the scheduled hearing and then settles cases on the day of hearing because the DPS knows that the cases are without evidence or basis in law.³ (Compl. ¶ 60) The Defendants state that the Board is not responsible for the delay because the Department is a party to the appeals. However, this is similar to arguing that a judge is responsible for a backlog of cases when the prosecution refuses to plea bargain or dismiss cases that have no merit until the day of trial. At least a judge is able to dismiss cases to negate this (hypothetical) conduct on the part of a prosecutor. The Complaint alleges however that the information about the cases was kept from the Board and appellants had no means of bringing their appeals to the Board without action by the Defendants. In most cases the Board never learned about the merit of the cases because the cases were settled at or near the time of hearing.

In the Amended Complaint, Plaintiff alleges that the Board Chairperson and the Board’s Executive Head corroborated with the Defendants when they refused to listen to the Plaintiff’s concerns about the backlog and refused to recognize the Plaintiff’s authority as Secretary to investigate and remedy the backlog.

³ The proposed Amended Complaint contains statistical evidence of this claim: “In previous fiscal years, the number of new appeals, the number of appeals resolved, and the number of appeals resolved at hearings before the Board included for:

- a. FY 2005-06: 281 New Appeals; 281 Appeals Resolved; 72 Appeals presented to Board.
- b. FY 2004-05: 295 New Appeals; 265 Appeals Resolved; 76 Appeals presented to Board.
- c. FY 2003-04: 300 New Appeals; 166 Appeals Resolved; 52 Appeals presented to Board.
- d. FY 2002-03: 299 New Appeals; 150 Appeals Resolved; 43 Appeals presented to Board.
- e. FY 2001-02: 313 New Appeals; 109 Appeals Resolved; 39 Appeals presented to Board.”

(Am. Compl. ¶ 197.)

B. The Complaint Sufficiently Alleges that the Back Log of Appeals is Not in Furtherance of a Compelling Governmental Interest

In alleging that the Defendants are responsible for the backlog, the Plaintiff alleges unlawful conduct in excess of the Defendants' statutory authority. The alleged reasons for the backlog violate the law. The Defendants' unlawful conduct cannot be justified by a compelling state interest. For these same reasons and because the law was clearly established, Defendants are not entitled to qualified immunity.⁴

C. The Complaint Sufficiently Alleges that the Department's Demand that Plaintiff Produce a Birth Certificate or Passport for Renewal of his State Permit was Contrary to State Law⁵

⁴ The proposed Amended Complaint alleges:

174. Despite the Internal Memorandum's characterization of the practice as potential illegal activity, an attorney working from within the Department, Sergeant Christopher Arciero, was ordered to draft and distribute a memorandum to the municipal police agency chiefs encouraging their agencies to confiscate state permits and forward them to the Department in a timely manner.

175. In Sergeant Arciero's memorandum to the municipal police agency chiefs, the Department encouraged the municipal police agencies to take lawfully held state permits and thereby commit the criminal offense of larceny.

176. In Sergeant Arciero's memorandum to the municipal police agency chiefs, the Department provided notice that the Department would accept possession of the stolen state permits once forwarded to the Department by the municipal police agencies.

177. In resigning his position as an inspector with the Department, the author of the Internal Memorandum stated that he thought it his responsibility to bring "any potential illegal activity" to the attention of his supervisors.

178. The author of the Internal Memorandum informed his supervisor that the Department's refusal to follow the law was the cause of his resignation.

179. Commissioner Danaher, Captain Masek, Detective Mattson, Detective Karanda, and Sergeant Bastura continue to maintain the unlawful practice and procedure of receiving from municipal police agencies unlawfully taken and withheld valid state permits

⁵ The Complaint alleges:

28. Plaintiff spoke with Sergeant Ronald Bastura ("Sgt. Bastura"), the Executive Officer of the SFLU, about the basis for demanding the submission of a birth certificate or United States passport as a condition for renewing a pistol permit.

29. Sgt. Bastura told Plaintiff that since September 11, 2001, it was SFLU policy to demand a United States passport or birth certificate as a condition for renewing a pistol permit.

30. Sgt. Bastura knew on March 19, 2007, when he informed Plaintiff of the SFLU policy conditioning the renewal of a pistol permit upon the submission of a United States passport or birth certificate that the policy violated the law.

31. In June, 2005, the Board, upon receipt of a letter from YCGG questioning the SFLU's lawful basis for demanding United States passports as a condition for renewal of a pistol permit, requested that DPS clarify the basis for the SFLU policy.

32. The YCGG informed the Board in its June, 2005, letter that the demand for United States passports was an arbitrary and possibly illegal change in pistol permit renewal requirements.

33. The SFLU informed the Board in 2005 that the SFLU had requested United States passports since September 11, 2001, but that no one would be denied renewal if a United States passport was not produced.

34. On April 17, 2007, Plaintiff requested information from Capt. Masek about the SFLU's denial of Plaintiff's pistol permit renewal.

Plaintiff's Complaint alleges that he was told by Sergeant Ronald Bastura ("Sergeant Bastura"), a member of the Department's Special Licensing and Firearms Unit (SFLU), that the Department's demand for a passport or birth certificate was policy that arose after September 11, 2001. (Compl. ¶ 29.) In alleging that Captain Masek was aware that the demand for a passport or birth certificate was unlawful, the Compliant references an inquiry in 2005 from the Board to the SFLU requesting information about the SFLU's demand. (Compl. ¶ 33.) In 2005, the SFLU stated that no one would be denied renewal if a passport was not produced. (Compl. 33.) In April, 2007, Plaintiff asked Captain Masek for information about the requirement. (Compl. ¶ 36.) Captain Masek did not reference any law or regulation but stated that "we require the submission of a birth certificate, United States passport, or voter registration d." (Compl. ¶ 36.)

35. Capt. Masek responded to Plaintiff that the DPS sent Plaintiff a renewal form and instructions pursuant to General Statutes § 29-30(f) and that Plaintiff had failed to provide the documentation required for renewal.

36. Capt. Masek instructed Plaintiff by letter dated April 26, 2007: "Enclosed please find another copy of the instruction sheet, which states the documentation that DPS will accept for establishing one's United States citizenship or legal residency. For establishing citizenship, we require the submission of a birth certificate, United States passport or voter registration card."

37. The DPS, acting through its Legal Affairs Section, and Capt. Masek, has failed to provide Plaintiff any basis in law for the DPS demand that Plaintiff provide a birth certificate, United States passport, or voter registration card as a condition for renewal of a pistol permit pursuant to General Statutes § 29-30.

The proposed Amended Complaint alleges, in further detail:

180. hen Plaintiff applied for his first state permit in 1982, the process required that he submit a birth certificate as proof of United States citizenship.

181. The Department did not require that Plaintiff provide a birth certificate, United States passport, or voter registration card with any of his five (5) year state permit renewal applications until the renewal application submitted on or about March 19, 2007.

182. The Department does not require the submission of a birth certificate, United States passport, or voter registration card with every state permit renewal application.

183. In the February, 2006, session of the state General Assembly, language in Raised Bill No. 307 that would have imposed a requirement that a birth certificate, naturalization certificate or valid United States passport be required for citizens of the United States making application for a temporary state permit under General Statutes §§ 29-28 was rejected.

184. In a May 14, 2007, letter to Commissioner Danaher, Adams told Commissioner Danaher that General Statutes § 29-30 did not require the presentation of any one particular type of identification.

185. In his May, 14, 2007, letter to Commissioner Danaher, Adams asked Commissioner Danaher to reference a federal law or regulation that would require a particular type of identification as a condition for the renewal of a state permit.

186. Commissioner Danaher never responded to Adams' requests in the May 14, 2007, letter.

187. Sergeant Bastura knew on March 19, 2007, when he informed Plaintiff of the SFLU policy conditioning the renewal of a state permit upon the submission of a United States passport or birth certificate that the policy violated the law.

The Department's Legal Affairs Section did not provide Plaintiff any statutory reference to such a requirement.

In their Memorandum, Defendants state that the Department may demand a birth certificate, United States passport, or voter registration card in issuing a state permit because "the gun licensing statutes all expressly require that an applicant be a 'bona fide' resident, and not an illegal alien." (Mem. at 4) (citing General Statutes §§ 29-28(f), 29-28(b)(9), 29-36f(b)(9).) The Memorandum states that "[a]s part of the renewal process and as required by law, plaintiff was asked to provide proof of U.S. citizenship or legal residency." (Defs.' Mem. at 5.) The law does not require that the applicant provide any proof. In the February, 2006, session of the state General Assembly, language in Raised Bill No. 307 that would have imposed a requirement that a birth certificate, naturalization certificate or valid United States passport be required for citizens of the United States making application for a temporary state permit under General Statutes §§ 29-28 was rejected.

D. The Plaintiff Suffered Retaliation for in Speaking As A Citizen About A Matter of Public Concern

In its Memorandum, Defendants state that "plaintiff concedes that his speech was 'in his capacity as a Board member.'" (Defs.' Mem. at 15) (citing Compl. ¶¶ 70-71.) However, paragraphs 70 and 71 of the Complaint do not make any such concession and read in their entirety, state:

24. Plaintiff, in his capacity as a Board member, makes inquiry into and determines the facts, *de novo*, of matters brought before the Board by aggrieved persons.
25. Plaintiff, in his capacity as a Board member, votes to order pistol permits or certificates to be issued, renewed, or restored, or limitations removed or modified, unless he finds that such refusal, limitation or revocation, was for just and proper

cause.

(Compl. ¶¶ 70, 71.) Plaintiff is not a state employee and is not employed by the Board. The Complaint alleges that Sergeant Bastura, a member of the SLFU, told Plaintiff on or about March 19, 2007, when Plaintiff sought renewal of his pistol permit, that Plaintiff had a problem with the SFLU. (Compl. ¶ 73.) Plaintiff was not allowed to renew his state permit based on a demand that he produce a birth certificate or United States passport. The Amended Complaint supplements the Complaint in alleging that Plaintiff was replaced as Secretary of the Board less than one month after filing his Complaint in the instant action.

IV. CONCLUSION

The factual allegations in Plaintiff's Complaint are sufficient to support his claims and merit further discovery. The proposed Amended Complaint attached to Plaintiff's Notice of Amended Complaint, or, Alternately, a Request for Leave of Court to File Amended Complaint and Motion to Supplement Complaint provides additional factual allegations to support Plaintiff's claims against the Defendants in the above-captioned matter and those individuals which Plaintiff seeks to join as defendants in the instant action.

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion to Dismiss.

PLAINTIFFS

M. PETER KUCK, individually
and on behalf of others similarly situated

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY THAT on January 22, 2008, a copy of the foregoing Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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