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.	:	**SEPTEMBER 29, 2008**

PLAINTIFF'S REPLY BRIEF RE: MOTION FOR RECONSIDERATION

Plaintiff M. Peter Kuck, by and through his undersigned counsel, hereby submits a Reply Brief with regard to his Motion for Reconsideration of the Court's Memorandum of Decision Denying Plaintiff's Motions to Amend and for Joinder and Granting Defendant's Motion to Dismiss ("Decision and Order") dated July 25, 2008. (doc. # 33.)

I. REQUEST FOR RECONSIDERATION - SUMMARY

In moving for reconsideration, Plaintiff cites and relies upon the authority of Local Civil Rule 7(c)(1) which provides, in relevant part:

> **Motions for reconsideration … shall be accompanied by a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court overlooked in the initial decision or order.**

(Pl.'s Mot. for Reconsideration at 1 n. 1) (doc. # 35) (Pl.'s Mem. of Law in Supp. of Mot. for Reconsideration at 1 n. 1) (doc. # 36); see also Schwartz v. Liberty Mut. Ins. Co., 539 F.3d 135, 153 (2d Cir. 2008) ("[D]istrict courts may alter or amend judgment 'to correct a clear error of law or prevent manifest injustice.'") (citing Munafo v. Metro. Transp. Auth., 381 F.3d 99, 105 (2d Cir. 2004) (quoting Collison v. Int'l Chem. Workers Union, Local 217, 34 F.3d 233, 236 (4th Cir. 1994)).

The memorandum accompanying Plaintiff's motion sets forth, as required by Local Civil Rule 7(c)(1), the matters or controlling decisions which Plaintiff asserts were overlooked in the Decision and Order.[1] (doc. # 36.) The overlooked matters and controlling decisions specified in Plaintiff's memorandum are: (1) the Court's clear error in relying upon allegations of fact not contained in the record[2] and the erroneous inferences drawn as a result; (2) the Court's clear error in disregarding allegations of fact contained in the record and the reasonable inferences in Plaintiff's favor that would have resulted had the allegations of fact not been disregarded; (3) the Court's application of the wrong legal principle and imposition of the burden on Plaintiff in finding that the Court could not "conclude that a nineteen-month wait for a hearing is so inadequate as to make the review

---

[1] In support of his Motion for Reconsideration, based in part on the Court's incorrect application of a standard for a motion to dismiss, the Plaintiff includes the standard for the motion to dismiss. Cf: Defs.' Mem. at 3 n. 1 ("In his motion for reconsideration, plaintiff improper relies upon the standard of review for a motion to dismiss, and fails to present the applicable standards for a motion for reconsideration."). Plaintiff does not state that the standard for deciding a motion to dismiss is the standard for reconsideration. The standard for reconsideration is, among other things, clear error and, in moving for reconsideration based on clear error in applying the incorrect standard to a motion to dismiss, the standard for deciding a motion to dismiss is incorporated by Plaintiff into the consideration.

[2] The "record" is the Complaint and the proposed Amended Complaint.

by the firearms board 'meaningless and nonexistent.'"[3] (Decision and Order at 6); and (4) the import of the decision in District of Columbia v. Heller, 128 S.Ct. 2783 (2008) on the Plaintiff's due process claims.

II. ARGUMENTS IN REPLY

A. The Court's Standard for Consideration of Defendants' Motion to Dismiss is Clear Error

"A district court 'abuses' or 'exceeds' the discretion accorded to it when ... its decision rests on an error of law (such as application of the wrong legal principle)...."). Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007); see also Wynder v. McMahon, 360 F.3d 73, 76 (2d Cir. 2004) ("And, of course, a district court abuses its discretion when its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or ... its decision - though not necessarily the product of a legal error or a clearly erroneous factual finding - cannot be located within the range of permissible decisions.") (internal citation omitted); Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104, 115 (2d Cir. 2008) (citing Zervos v. Verizon New York, Inc., 252 F.3d 163, 169-71 & n. 5 (2d Cir. 2001)) ("explaining that '[a] district court "abuses" or "exceeds" the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding or (2) its decision-though not necessarily the product of a legal error or a clearly erroneous factual finding-cannot be located within the range of permissible decisions'").

[3] **The necessary finding in granting a motion to dismiss would be that, considering all factual allegations of the Complaint and reasonable inferences drawn in Plaintiff's favor, the nineteen-month wait for a hearing was adequate. (Pl.'s Mem. at 10-14.)**

Rule 12(b)(6) of the Federal Rules of Federal Evidence and its interpretive case law require a court to accept the facts alleged in the complaint as true. Spool v. World Child Intern. Adoption Agency, 520 F.3d 178, 180 (2d Cir. 2008). In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court "'construe[s] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor.'" Goldstein v. Pataki, 516 F.3d 50, 56 (2d Cir. 2008) (bracketed language not in original) (quoting Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)).

In his motion and memorandum, Plaintiff submits that the Court, in considering the Defendants' Motion to Dismiss, relied upon statements that were not derived and could not be reasonably inferred from the factual allegations of the Complaint and proposed Amended Complaint.

In his motion and memorandum, Plaintiff submits that the Court, in considering the Defendants' Motion to Dismiss, disregarded the allegations of fact included in the Complaint and proposed Amended Complaint and the reasonable inferences in Plaintiff's favor that would have resulted had the allegations of fact not been disregarded.

If an individual files a cause of action and (1) a court cites to factual allegations not in the record as cause for dismissal or (2) disregards factual allegations found in the Complaint and reasonable inferences from those allegations that state a claim, then a manifest injustice has occurred. See McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007) ("In general,

our review is limited to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference.") (citation omitted).

B. The Court's Findings Not Derived or Reasonably Inferred From Factual Allegations Are Clear Error

In his memorandum, Plaintiff lists eight (8) statements contained in the Decision and Order not alleged in the Complaint and proposed Amended Complaint and not reasonably inferred from the record, but upon which the Court relies in the findings and conclusions of its Decision and Order.[4]

---

[4] The referenced statements are:

1. Decision And Order Finding No. 1 Not Alleged By Plaintiff
"When Kuck applied for renewal in 2007, the public safety department's licensing unit requested that he provide his birth certificate, United States passport, or voter registration card because pistol permits cannot be issued to illegal aliens pursuant to Conn. Gen. Stat. § 29-36f(b)(9)." (Decision and Order at 2) (doc. # 33.)

2. Decision And Order Finding No. 2 Not Alleged By Plaintiff
"He [Plaintiff] declined to provide any of the requested documents in 2007, asserting that the request was unconstitutional." (Decision and Order at 2-3) (doc. # 33.)

3. Decision And Order Finding No. 3 Not Alleged By Plaintiff
"Consequently, in April 2007, the licensing unit declined to renew Kuck's permit." (Decision and Order at 3) (doc. # 33.)

4. Decision And Order Finding No. 4 Not Alleged By Plaintiff
"Because parties commonly endure significant delays in securing administrative and judicial review, the Court cannot conclude that a nineteen-month wait for a hearing is so inadequate as to make the availability of review by the firearms board 'meaningless and nonexistent.'" (Decision and Order at 5-6) (quoting Gyadu v. Workers' Compensation Com'n, 129 F.3d 113, 1997 WL 716128 at * 2) (doc. # 33.)

5. Decision And Order Finding No. 5 Not Alleged By Plaintiff
"Kuck has not alleged any facts that rise to the high level needed to maintain a substantive due process claim. The government action, namely, the licensing unit's denial of Kuck's renewal permit application, on the basis of Kuck's refusal to provide documentation of his citizenship, was not egregious, outrageous, or shocking to the contemporary conscience." (Decision and Order at 6) (doc # 33.)

6. Decision and Order Finding No. 6
"He [Plaintiff] acknowledges that his application was denied for failure to provide documentation of his citizenship, a reason entirely distinct and unrelated to his exercise of free speech." (Decision and Order at 7) (doc. # 33.)

7. Decision and Order Finding No. 7
"In order to renew a permit, the licensing unit requires documentation of citizenship pursuant to Conn. Gen. Stat. § 29-36f(b)(9)."[4] (Decision and Order at 7) (doc. # 33.)

8. Decision and Order Finding No. 8
"Therefore, the licensing unit would have denied Kuck's application regardless of any statements he made that allegedly displeased the defendants." (Decision and Order at 7) (doc. # 33.)

C. The Court's Disregard of Heller's Applicability to Plaintiff's Due Process Claims is Clear Error

The Court finds, in its Decision and Order, that "[b]ecause parties commonly endure significant delays in securing administrative and judicial review, the Court cannot conclude that a nineteen-month wait for a hearing is so inadequate as to make the availability of review by the firearms board 'meaningless and nonexistent.'" (Decision and Order at 5-6) (quoting Gyadu v. Workers' Compensation Com'n, 129 F.3d 113, 1997 WL 716128 at * 2) (doc. # 33.)

The Defendants argue that "[a]s a practical matter, whether the Second Amendment applies in the instant matter is completely irrelevant because plaintiff has an individual state constitutional right to keep and bear arms."[5] (Defs.' Mem. at 6) (doc. # 41.) The Second Amendment is not irrelevant if it affords broader protections for the right to bear arms in self defense.[6] Our state case law does not set forth the due process required when the state seeks to deprive a citizen of his or her right to bear arms under Article 1, § 15, of our state constitution. The holding in Rabbitt v. Leonard, 36 Conn.Supp. 108 (1979), a decision cited in the Court's Decision and Order and by Defendants, does not provide a guideline for the due process required but attaches a lesser constitutional interest in the right to bear arms then the United States Supreme Court in its recent Heller decision.

---

[5] In many cases, rights afforded under our state constitution may overlap or be identical to rights guaranteed under the United States Constitution but no principle in law states that this renders the United States Constitution irrelevant. Otherwise, citizens of Connecticut would not rely upon the Fourth Amendment, the Fifth Amendment, or numerous other federal amendments that guarantee similar or identical rights guaranteed under our state constitution.

[6] "No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." Heller, 128 S.Ct. at 2806.

In Rabbitt v. Leonard, 36 Conn.Supp. 108, the plaintiff claimed that the revocation of his state permit without prior notice and opportunity to be heard violated his right to due process. The plaintiff never sought an appeal from revocation within the required ninety (90) days, so it is impossible to know what hearing date the plaintiff would have been given and whether the state trial court would have found that the timeliness of the hearing met minimum due process requirements. Regardless, the court framed the issue as: "Does the statutory scheme for permit revocation satisfy the due process requirements of the fourteenth amendment?" Id at 111.

In deciding the issue, the Rabbitt court assessed and applied the first of the three factors in Mathews v. Eldridge, 424 U.S. 319 (1976):

> **The plaintiff's private interest here is the continued possession of his pistol permit and his ability to carry his pistol on his body. Unless the plaintiff has shown that he needs the weapon in connection with his livelihood or that it is absolutely necessary for his self-defense, this interest, although important, is not substantial.**

and the second Mathews v. Eldridge factor:

> **The second factor the risk of erroneous deprivation and the probable value, if any, of safeguards requires an assessment of the relative reliability of the procedures used and the substitute procedures sought.**

and the third Mathews v. Eldridge factor:

> **The government's interest, including the function involved and the fiscal and administrative burdens that the plaintiff's suggested procedures would produce, is the final factor to be weighed. The governmental interest here is to protect the safety of the general public from individuals whose conduct has shown**

> **them to be lacking the essential character or temperament necessary to be entrusted with a weapon.**

Rabbitt v. Leonard, 36 Conn.Supp. at 115-116.

The Rabbitt court did consider that "[a]n important factor in assessing the impact of official action on a private interest is the duration of any potentially wrongful deprivation of the property interest." Id at 114 (citing Mackey v. Montrym, 443 U.S. 1 (1979)). However, the court remained silent on an acceptable duration because "[h]ere, the plaintiff could have requested a hearing within ninety days of receipt of the notice of revocation, but he failed to do so."[7] Id.

In Rabbitt, the court found that "[u]nless the plaintiff has shown that he needs the weapon in connection with his livelihood or that it is absolutely necessary for his self-defense, this interest, although important, is not substantial." Rabbitt, 36 Conn.Supp. at 111. In Heller, the Supreme Court held that the Second Amendment of the United States Constitution guarantees "the individual right to possess and carry weapons in case of confrontation." Heller, 128 S.Ct. at 2797. The Heller court does not reference or otherwise consider the impact of a person's use of firearms in his or her profession on that person's right to bear arms. "The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" Id.[8] The difference between the import afforded the right to bear arms in defense by the Supreme Court and the import afforded the right to bear

---

[7] The Rabbitt court may have found, in all likelihood, that a nineteen (19) month delay failed to afford due process for the deprivation of a state constitutional right had that issue been before the trial court. Based upon the Rabbitt court's dicta that an important consideration is the duration of the wrongful deprivation, this is a reasonable inference to draw.

[8] "At the time of the founding, as now, to 'bear' meant to 'carry.'" Heller, 128 S.Ct. at 2793.

arms in defense by the Rabbitt court necessarily leads to a different outcome of opinion regarding the degree of due process afforded prior to the state's deprivation of that right. In the majority opinion of Heller, Justice Scalia writes:

> **We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. 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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.**

Heller, 128 S.Ct. at 2821. The Heller decision does not differentiate between a person who bears arms pursuant to his or her occupation and a person who bears arms according to his or her right to do so in self-defense any more so than the state considers a person's profession in determining the due process required prior to suspending or revoking a person's license. The Rabbitt court did not foresee that the Supreme Court would hold that the right to bear arms is an enumerated constitutional right. See Rabbitt, 36 Conn.Supp. at 110 ("The obvious purpose of the second amendment was to assure the continuation and the effectiveness of the state militia. It must therefore be interpreted and applied with that end in view."). The Rabbitt court did not foresee that the Supreme Court would write:

> **One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.**

Heller, 128 S.Ct. at 2807. A court, following the Heller decision, may no longer assume, upon mere assertion by the state, that the state's deprivation of a person's right to bear arms is consistent with and employed for public safety. The Heller court specifically rejects the "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.'" Heller, 128 S.Ct. at 2821.[9] The mere fact that a hearing is scheduled nineteen (19) months from revocation of a state pistol permit does not, by itself, or in the absence of facts supporting a direct relation between the delay and the furtherance of a lawful state interest, with no evidence of what exactly the state plans to do during that nineteen (19) months, warrant a finding that the delay furthers public safety. A reasonable inference, supported by the United States Supreme Court, is that such a delay may be intended to disarm the people. In its consideration of Defendants' Motion to Dismiss, the Court erred in failing to draw this reasonable inference from the factual allegations of the Complaint and proposed Amended Complaint.

III. CONCLUSION

For the foregoing reasons stated in Plaintiff's Memorandum of Law in Support of Motion for Reconsideration and in the instant Reply Brief, Plaintiff respectfully moves for reconsideration of the Decision and Order dismissing Plaintiff's Complaint and denying Plaintiff's motion to amend and for joinder.

---

[9] See also Heller, 128 S.Ct. at 2822 ("We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. … But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

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

BY: **/s/ Rachel M. Baird**
Rachel M. Baird (ct12131)
Law Office of Rachel M. Baird
100 Pearl St Fl 14
Hartford CT 06103-4500
Tel: (860) 249-7238
Fax: (860) 626-9992
Email: rbaird@rachelbairdlaw.com

CERTIFICATION OF SERVICE

I HEREBY CERTIFY THAT on September 29, 2008, a copy of the foregoing Plaintiff's Reply Brief 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