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SECTION REVIEW



MASSACHUSETTS
LAWYERS JOURNAL
JUNE 2014

MASSACHUSETTS BAR ASSOCIATION

PUBLIC LAW

Suitability challenged

The judicial creation of suitability standards for firearms licensing

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In Massachusetts, to “carry” a firearm, an individual must possess a license to carry or a firearms identification card (FID card), which is issued by the appropriate licensing authority (e.g., a chief of police or their designee), unless the individual is exempt.¹ In order to obtain and hold a Class A or B license, an individual cannot be automatically disqualified under M.G.L. c. 140, § 131 and must be a “suitable person.”²

The Second Amendment to the United States Constitution provides that “[a] well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” In recent years, the United States Supreme Court has defined limits to government regulation of firearms vis-à-vis the Second Amendment.³

In *Heller*, the United States Supreme Court recognized that “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” was protected by the Second Amendment.⁴ Accordingly, a complete ban on handguns inside the home and a trigger-lock requirement, which prevented immediate self-defense, violated the Second Amendment. Still, *Heller* recognized that the Second Amendment was “not unlimited” and “presumptively lawful regulatory measures” were permissible.⁵

Subsequently, in *McDonald*, a plurality of the United States Supreme Court held that the Second Amendment applied to the States, through the Due Process Clause of the Fourteenth Amendment.⁶ *McDonald* recognized that “the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty,” and included the “right to possess a handgun in the home for the purposes of self-defense.”⁷ While the *McDonald* plurality recognized that the Second Amendment right could be reasonably regulated, it concluded that local laws that effectively prohibited handgun possession by nearly all private citizens violated the Second and Fourteenth Amendments.

Recent judicial recognition of the applicability of the Second Amendment creates the potential for increased scrutiny of the “suitable person” standard. Significantly, in *Firearms Records Bureau v. Simkin*, 466 Mass. 168 (2013), the Supreme Judicial Court held that an individual’s conduct, even if ostensibly unusual, did not constitute a proper basis for revoking a license to carry firearms on the basis of the “suitable person” standard. The holding of *Simkin*, particularly in light of recent Second Amendment precedent, creates the possibility of judicial limitations on the otherwise broad discretion of licensing authorities over licenses to carry firearms.

Overview of procedures for licenses to carry firearms

Class A and Class B licenses to carry firearms allow individuals to acquire, possess and carry non-large capacity firearms, and rifles and shotguns (including large capacity rifles and shotguns).⁸ However, unlike a Class B license, a Class A license also



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allows an individual to hold “large capacity firearms” and to possess or carry concealed firearms in public.⁹

In order for an individual to receive and hold a Class A or Class B license, the individual must: (1) be a “suitable person,” (2) have a “proper purpose” and (3) not be statutorily disqualified.¹⁰ Currently, there is no statutory or regulatory definition of a “suitable person” — the parameters of the standard have been judicially created.

The “suitable person” standard is consistent with the judicial recognition that firearms control legislation serves the objective of restricting “access to deadly weapons by irresponsible persons.”¹¹ Accordingly, the “suitable person” standard is considered on a case-by-case basis by the licensing authority. For example, in *Gemme v. Smith*, No. WOCV201100977D, 30 Mass. L. Rptr. 439, 2012 WL 6616936 (Mass. Super. Nov. 13, 2012), a revocation of a license to carry firearms was upheld because of the license holder’s involvement in a domestic altercation and his lack of cooperation when the police responded to the incident.

In determining that an individual is not a “suitable person,” the licensing authority has “broad discretion” and “considerable latitude.”¹² However, the licensing authority must issue his or her decision in writing, along with the supporting reason(s).¹³

The decision of the licensing authority is subject to judicial review in state District Court.¹⁴ To overturn the denial, suspension or revocation of a license to carry firearms, a plaintiff must demonstrate that “no reasonable ground” existed for the decision by the licensing authority and that the decision was “arbitrary, capricious, or an abuse of discretion.”¹⁵ Further appeal is to the Superior Court via a petition for certiorari under M.G.L. c. 249, § 4.

Simkin and its potential for narrowing discretion

Simkin may reflect a retreat from the broad discretion conferred upon a licensing authority, as the plaintiff’s license to carry firearms in that case was improperly revoked on the basis of the “suitable person” standard. In *Simkin*, Jay E. Simkin, the plaintiff, a nonresident and federally licensed firearms dealer, held an unrestricted license to carry firearms in Massachusetts. In his license application, Simkin represented that he traveled in Massachusetts for business reasons, with firearms, ammunition and cash, and that he needed to conceal firearms for self-defense purposes.

Simkin’s license to carry was revoked as a result of his visit to a medical appointment and subsequent events. Simkin informed staff at the medical office that he was armed,

as he brought with him firearms, ammunition, and knives. The employees at the medical office were “alarmed” and “concerned for their safety.”¹⁶ During a subsequent investigation, the local police learned that Simkin provided the medical office with a pseudonym and an address in Maryland to cover up his identity, even though he actually resided in New Hampshire, and he paid in cash, which seemed unusual.

Simkin’s license to carry firearms was revoked because: (1) he was “heavily armed” at the medical office, (2) “fear and alarm” resulted from his visit to the medical office and (3) he provided a pseudonym to the medical office, paid \$1,500 in cash for medical services and did not provide other information about his identity. The Massachusetts Firearms Records Bureau essentially used a totality of the circumstances approach to determining that Simkin was not a “suitable person.”

While recognizing that the phrase “suitable person” was undefined, the Supreme Judicial Court acknowledged that a person may not satisfy this licensing requirement under certain circumstances, including acts that do not violate the statutory disqualifiers for holding a license to carry firearms and non-criminal conduct. However, the “suitable person” standard was not unlimited, and the Supreme Judicial Court held that Simkin’s conduct did not render him unsuitable to hold a license to carry firearms.

The Supreme Judicial Court characterized Simkin’s conduct as “innocuous,” even if “arguably unusual,” and based on the circumstances no “reasonable ground” prohibited him from being a “suitable person” for the license to carry firearms.¹⁷ The Supreme Judicial Court placed particular emphasis on the absence of any state regulations concerning suitability, leaving applicants and license holders without any guidance on how to be a “suitable person.” For example, there were no regulations prohibiting the use of a pseudonym in connection with carrying concealed firearms, which was the precise conduct Simkin engaged in when he visited the medical office. Without some regulatory parameters or other official guidance, the Supreme Judicial Court cautioned that licensing decisions could be more exposed to challenges as arbitrary and capricious.

On the facts, the conduct involved did not render Simkin “unsuitable.” The Supreme Judicial Court declined to credit the observations and reactions of the medical office staff, essentially faulting the medical office staff, rather than Simkin, for being “alarmed” upon learning about his concealed weapons, and it instead recognized that Simkin did not violate the terms of his unrestricted license to carry firearms “for all lawful purposes.”¹⁸ Moreover, Simkin was upfront with the medical office staff about his concealed weapons, cooperated with the law enforcement authorities and did not attempt to participate in a crime or carry out a fraud.

Simkin serves as a warning that, especially in combination with evolving Second Amendment jurisprudence, the discretion of licensing authorities may ultimately have limits, particularly in the absence of a statutory or regulatory definition of what constitutes a “suitable person.” Because suitability

is not confined to solely criminal conduct or the six categories of statutory disqualifiers, it instead remains susceptible to individualized interpretation on a case-specific basis. By that same token, *Simkin* creates an increased risk for individual licensing decisions to be challenged as arbitrary, capricious, or an abuse of discretion.

Simkin underscores the need for licensing authorities to more fully evaluate and consider the grounds for each individual licensing decision. The focus may need to be based on objectivity, rather than subjectivity, invoking consideration of whether an underlying incident renders an individual an improper person to hold a license to carry firearms, and including evaluation of the scope of the license itself and its use restrictions.

‘Suitability’ remains intact

Simkin did not invalidate the “suitable person” standard. To the contrary, Massachusetts courts considering the “suitable person” standard in the aftermath of *Heller* and *McDonald* have recognized that this standard passes constitutional muster.

Indeed, the United States Court of Appeals for the First Circuit upheld the constitutionality of the “suitable person” standard in *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012), both on a facial basis and as applied to the revocation of the *Hightower* plaintiff’s license to carry firearms. *Hightower* specifically held that the “suitable person” standard was not subjective, nor did it bestow overbroad discretion on the licensing authority.

Hightower involved circumstances where false information on the license application, rather than to a third party, constituted a reasonable basis for holding that an applicant or license holder is unsuitable. The First Circuit acknowledged that the revocation was not a general determination in *Hightower*, and instead related to the grounds for which the firearms license was sought.

Moreover, in *Ferrill v. Chief of Police of Sandwich*, 83 Mass. App. Ct. 1114 (Feb. 19, 2013), a Rule 1:28 decision, the Massachusetts Appeals Court, in *dicta*, rejected the plaintiff’s challenge to the constitutionality of the “suitable person” standard. In *Ferrill*, the Massachusetts Appeals Court upheld the denial of a firearms license to a plaintiff with a criminal record, who failed to disclose prior court appearances, was associated with a known felon and who provided a pseudonym during a police investigation. *Ferrill* demonstrates the continued validity of criminal conduct as a consideration for suitability.

Similarly, in *Michaud v. Chief of Police of Kingston*, 85 Mass. App. Ct. 1111 (Apr. 3, 2014), also a Rule 1:28 decision, the Massachusetts Appeals Court rejected the plaintiff’s argument that the revocation of his firearms license contravened the limits on reasonable regulation under the Second Amendment and its focus on self-defense in the home. The license revocation in *Michaud* was upheld because the plaintiff overreacted to employees of a repossession company who approached his property, by discharging his firearm in their

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proximity and instilling fear in them. The repossession company employees had not attempted to enter the license holder's residence, nor did they threaten the license holder or his family with bodily harm, notwithstanding the license holder's reaction.

Significantly, in *Michaud*, the Massachusetts Appeals Court recognized that neither self-defense nor any other justification existed for the plaintiff's conduct. *Michaud* suggests that the Second Amendment considerations for

protecting the "hearth and home" — a "core right" — may be appropriate for the "suitable person" analysis and whether an incident renders an individual unsuitable. Thus, in examining whether any incident is relevant to the suitability analysis, a licensing authority, and a reviewing court, may consider that incident in light of the protections of the Second Amendment.

Second Amendment jurisprudence will likely contribute to defining the limits on licensing deci-

sions under the "suitable person" standard, such as the relevance of activities outside the home. The consequence is a potential for judicial reassessment of the suitability standard, on a case-by-case basis, and a more focused and involved analysis on the conduct used to determine whether an individual is unsuitable.

1. See M.G.L. c. 140, §§ 121, 129B, 131; M.G.L. c. 269, § 10.
2. See M.G.L. c. 140, § 131(d), (f).
3. See *District of Columbia v. Heller*, 554 U.S.

570 (2008); *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) (plurality opinion).

4. See *Heller*, 554 U.S. at 635.
5. See *id.* at 596 & n.26.
6. See *McDonald*, 130 S. Ct. at 3042, 3050 (plurality).
7. See *id.* at 3042.
8. See M.G.L. c. 140, § 131(a), (b).
9. See *id.*, § 131(a).
10. See *id.*, § 131(d), (f).
11. *Ruggiero v. Police Comm'r of Boston*, 18 Mass. App. Ct. 256, 258 (1984).
12. *Ruggiero*, 18 Mass. App. Ct. at 259.
13. See M.G.L. c. 140, § 131(f).
14. See M.G.L. c. 140, § 131(f); *Chief of Police of Shelburne v. Moyer*, 16 Mass. App. Ct. 543, 544 (1983).
15. See *Howard v. Chief of Police of Wakefield*, 59 Mass. App. Ct. 901, 902 (2003); *Godfrey v. Chief of Police of Wellesley*, 35 Mass. App. Ct. 46-47 (1993).
16. See 466 Mass. at 170.
17. See *id.* at 182.
18. See *id.*
19. See *Wesson v. Town of Salisbury*, C.A. No. 13-10469-RGS, 2014 WL 1509562, at *4 (D. Mass. Apr. 18, 2014) (recognizing, on an as applied basis, the plaintiffs' "Second Amendment right to possess firearms in the home for self-defense").