COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss

Brookline District Court
Civil Action No. 0609 CV 0211

Morton L. Bardfield,
Petitioner

v.

Daniel C. O'Leary, as he is Chief of Police for the Town of Brookline, Massachusetts,
Defendant

Petitioner's Memorandum in Support Of His Opposition to Defendant's Motion for Summary Judgement and Cross-Motion for Summary Judgment Per Mass. Rule of Civil Procedure 56(a)

Now comes Petitioner Morton L. Bardfield and files this Memorandum in Support of his Opposition to Defendant's Motion for Summary Judgment and Cross-Motion for Summary Judgment. Petitioner hereby incorporates his Statement of Material Facts, Exhibits and the Copies of Applicable Law, included herewith.

I. PETITIONER'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

A. Defendant's Requirement is Based on Obsolete Law.

Defendant's argument supporting his requirement of a "Range Test" relies heavily upon just one case; MacNutt v. Police Commissioner of Boston; 30 Mass. App. Ct. 632 (1991). He cites it directly five times in his Statement of Reasons, with further references to it. However, the *MacNutt* court's decision upholding the "broad discretion" granted to the licensing authority was "implicit in a statute which lacks guidelines" and upheld a range test. [1] As that court further noted,"The suggestion by this court that a statutory statement of the guidelines and restrictions might be helpful has not yet stimulated

[1] MacNutt v. Police Commissioner of Boston, 30 Mass.App.Ct. 632, 636 (1991).

legislative action."[2] The "legislative action" the court sought has been provided: Chapter 180 of the Acts of 1998.

Chapter 180 was a wholesale revision of Massachusetts firearms licensing law. It rendered the basis for the court's decision in *MacNutt* a nullity by the creation of statutory safety requirements, filling the void upon which *MacNutt* was decided.

The new Chapter 140, § 131P created mandatory safety certification and the creation of instructors to train and test applicants and issue the appropriate certificates. There is no requirement of a mandatory "Range Test" anywhere in that statute. Moreover, the legislature specifically *excluded* those already licensed, such as Petitioner Bardfield, from its requirements and did so by clearly stating that those already licensed "shall" be exempt from the requirement.[3] It did not create mandatory "range tests" nor did it authorize licensing authorities to impose one.

The legislative mandate of M.G.L.c. 140, § 131P was further implemented by regulations; 515 CMR 3. 00 *et sequentia*. The statutory objective of a standard safety course requirement for firearms license applicants was set forth in CMR 3. 05. It also contains no reference whatsoever to a mandatory "Range Test" for such applicants; neither is there any language suggesting a local licensing authority has the discretion to impose one.

The *MacNutt* decision Defendant O'Leary (hereafter, "O'Leary") bases his imposition of a "Range Test" was premised upon what the court called the "lack of guidelines" in the then-existing statute. That court upheld a range test requirement because there was nothing in the licensing statute at that time forbidding one. However, that court again sought a "statutory statement of the guidelines and restrictions" regarding testing requirements.

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[2] *Id.* at fn. 6.

[3] See M.G.L.c. 140, § 131P (a) and 515 CMR 3.05 (1)(a) and (b). The former says then-existing licensees "shall be exempt" from its provisions; the latter says then-existing licensees

The enactment of Chapter 180, creating M.G.L.c. 140, § 131P and its implementation via 515 CMR 3.05 is clear legislative action pre-empting local authorities from imposing "range tests" upon applicants generally and renewal applicants particularly. It thus renders the *MacNutt* decision a nullity as regards licensing authorities having any authority or discretion in that regard.

Much of the Massachusetts case law O'Leary cites is pre-Chapter 180 case law, including all the cases cited on Page 4 of his "Statement of Reasons." Each must be analyzed under that major revision of the firearms laws, as such cases may no longer be applicable.

To the extent *MacNutt* has any applicability to this present action, it is that court's striking the unauthorized "range fee" Appellant MacNutt was compelled to pay. As with O'Leary's imposition of a "range test," that fee was not created by regulation or ordinance. The *MacNutt* court struck down the range fee accordingly. [4] It logically follows that O'Leary's "Range Test" being devoid of any such valid enactment, fails under the same analysis.

O'Leary states; "The Legislature was aware of the MacNutt case when it added Section 131P and had no intention of overruling it..." [5] The legislature was indeed "aware of the MacNutt case;" however, there was no need of "overruling it." The *MacNutt* case was decided as it was because of a "lack of guidelines," as that court expressly stated [6] and O'Leary admits.[7] Section 131P provided those guidelines; it did so quite explicitly and specifically exempting those already licensed from such testing. Thus, it did not overrule *MacNutt*, nor was it meant to. Section 131P and its implementing regulations, 515 CMR 3.00 *et sequentia*, provided precisely the guidelines the *MacNutt* court sought. There is no

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"shall not be required to complete the statutorily required" course.

[4] *MacNutt*, *supra* at the end of page 637.

[5] See Defendant's "Statement of Reasons" at p. 14.

[6] MacNutt v. Police Commissioner of Boston; 30 Mass.App.Ct. 632, 637 (1991); also fn. 6.

[7] See Defendant's "Statement of Reasons" at Page 4, Section 2.

provision in either the statute or its regulations for local authorities to supplement or supplant those specific and standard requirements with mere local policies. O'Leary's Motion for Summary Judgment should be denied accordingly.

B. Defendant Claims a Non-existent Authority for His Policy.

O'Leary claims that his imposition of a "Range Test" "....may be a local enactment that is subject to analysis under the Home Rule Amendment and G.L.c. 43B, § 13."[8] He further equates his personal policy with a "by-law" by citing case law; Pearson v. Plymouth, to that effect.[9] An individual chief's fiat is not an "enactment." The creation of a statutory, standard testing program, the terms of which expressly exempt current licensees from it, clearly bars local chiefs from imposing their own testing requirements. It further provides the clear "legislative intent to preclude local action" which O'Leary admits is the standard for review.[10]

O'Leary's claim of "by-law" authority is particularly disingenuous as:

1. There is no such home rule amendment for this alleged power cited;

2. There is no such "enactment" of this alleged power cited; and

3. O'Leary's "Statement of Material Facts" expressly states that "Chief O'Leary requires each applicant" to take the "range test;" not a local ordinance duly enacted under the Home Rule statute. [11]

The "enactment" asserted as the basis for O'Leary's "Range Test" policy does not exist and the case law he claims supports it is obsolete. His Motion for Summary Judgment

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[8] See Defendant's "Statement of Reasons" at p. 17, § d.

[9] *Id.* at Page 18, second paragraph.

[10] See Defendant's "Statement of Reasons" at Page 18, ¶ 3, quoting Pearson v. Plymouth; 44 Mass. App.Ct. 741, 743 (1998).

[11] Defendant's "Statement of Material Facts" ¶ 2.

should be denied accordingly.

C. Defendant Misstates the Applicable Statutes and Regulations.

Again citing *MacNutt*, O'Leary declares that; "Under Section 131, Chief O'Leary May Require an LTC Renewal Applicant to Take a Range Test..."[12] There is no such reference to a "Range Test", still less any requirement of one, anywhere in M.G.L.c. 140, § 131. Neither is there any suggestion that a licensing official's discretion is as broad and unchecked in that regard as O'Leary would have this court believe.

[12] See Defendant's "Statement of Reasons" at ¶ 4, caption 2.

O'Leary expressly cites the *MacNutt* court's observation that the then-grant of authority regarding testing was "without guidelines." [13] As has been demonstrated by the above section of this memorandum, that void was completely filled by the enactment of Chapter 180 of the Acts of 1998, creating M.G.L.c. 140, § 131P and 515 CMR 3.05. O'Leary still relies upon that obsolete case, while ignoring subsequent, explicit statutes and regulations.

O'Leary would have this court find that the reference to § 131P, which proscribes any testing requirements for current licensees, somehow empowers him to impose "range tests" because it refers to meeting the "requirements" in the LTC statute, M.G.L.c. 140, § 131.[14]

The requirements set forth in § 131 are for an applicant's eligibility; age, citizenship, etc., and duly completing and submitting the state's firearms license application form, F 25/26. There are no requirements for testing in § 131, as the *MacNutt* court noted, which finding by that court O'Leary himself expressly quoted.[15] Ergo, there was not and still is not any authority in §131 for the "Range Test" O'Leary imposes by invoking that section.

O'Leary further asserts that "[t]he regulations fail to set forth standards for determining an applicant's ability to actually handle a firearm safely and competently."[16] That claim is demonstrably false.

The controlling regulation, 515 CMR 3.05, specifically identifies those courses which have been reviewed and accepted by the designated authority, the Colonel of the State Police. They are each set forth, by name, in §§ 3 (a) - (d) and 4 (a) - (d). Each has met the criteria the legislature specified in M.G.L.c. 140, § 31P(b). There is a further provision for

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[13] *Id.* at p. 4, first line of Section 2.

[14] *Id.* at Page 5, first paragraph of Section B(1).

[15] *Id.* at Page 4, first line of Section 2.

[16] *Id.* at Page 7, first full paragraph.

adding courses submitted to and approved by the Colonel.[17] Those requirements and procedures clearly constitute "standards for determining an applicant's ability to actually handle a firearm safely and competently."

Where the legislature has determined what the safety training and testing is required, and duly enacted regulations specifically set forth and detail same, claims that "[t]he regulations fail to set forth standards for determining an applicant's ability to actually handle a firearm safely and competently" are specious. O'Leary's Motion for Summary Judgment should be denied accordingly.

D. Defendant's Claims of "Broad Discretion" and "Considerable Latitude are Overstated.

O'Leary asserts; "[t]he Legislature has granted police chiefs 'broad discretion' and 'considerable latitude' in determining whether or not to issue a license to carry a firearm."[18] As to the actual issuance of such a license, O'Leary is correct; he has that discretion in issuing such licenses. However, that discretion to issue is limited to authorized investigations of that applicant a review of that application. O'Leary's essential argument is that the "broad discretion" under § 131 authorizes that determination of suitability to include whatever he deems relevant, including matters in which his actions are proscribed by law. O'Leary's theory of his power under the licensing law is, therefore, incorrect.

Massachusetts law imposes significant bounds on the "considerable latitude" O'Leary claims under § 131:

1. The license application form itself is statutorily specified.[19]

2. The application must be processed and prints sent to the State Police within seven days of filing.[20]

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[17] See 515 CMR 3.05 (5).

[18] See Defendant's "Statement of Reasons" at Page 4, ¶ 1; see also Page 16, ¶ 2.

[19] See M.G.L.c. 140, §§ 129B(7) and 131(g).

3. A chief cannot deny a Firearms Identification Card (FID) to an applicant not statutorily barred, nor impose any conditions upon that license.[21]

4. A chief cannot require membership in a gun club or range.[22]
5. A chief can only require references, not "Letters of Recommendation" from an LTC applicant; nor require references from an FID applicant.[23]

6. Denial of a license must be for cause:

"While the police are allowed discretion, they can not make a decision that is arbitrary, capricious or an abuse of discretion. **The law requires reasonable justification for the denial of an applicant's license."** [24]

Notwithstanding those express limitations on his "broad discretion," O'Leary demands all applicants, whether a "License to Carry/Firearms Identification Card Applicant" to provide:

1. "Two letters of reference," with further restrictions on O'Leary deems acceptable to submit same;

2. "Proof of current membership to a gun club;"

3. "Three months worth of cash bank deposit slips," (underscore in original) and a

4. "Hunting License;"

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[20] *Id* at §§ 129B(3) and 131(e).

[21] See M.G.L.c. 129B(3).

[22] See Victor v. Barkhouse; Quincy Docket No. 98 CV 0640 (1998).

[23] See fn. 19; see also F 25/26, attached as "Valid Application Form," **Exhibit 3**, Page 3.

[24] Hakioglu v. Reilly, Middlesex No. 023702 (Jul. 29, 2003), citing Godfrey v. Chief of Police of Wellesley, 35 Mass. App. Ct. 42, 45-46 (1993) (**bold** added).

all as specifically required in his "Letter to Applicants.[25] O'Leary's requirements contravene the licensing statutes he purports to operate under, as well as established case law.[26]

Further, as already argued at length in the previous sections of this memorandum, a chief has no authority to require any test or certification of a firearms license holder who was duly licensed on the effective date of M.G.L.c. 140, § 131P or became so licensed thereafter; neither can a chief impose any additional requirements, such as the "Range Test" at bar.

Defendant O'Leary's argument that he holds "broad discretion" and "considerable latitude" as justification of his imposition of a "Range Test" is contradicted by controlling law. His Motion for Summary Judgment should be denied accordingly.

E. Defendant O'Leary's "Range Test" Cannot Achieve Its Ostensible Purpose.

Defendant O'Leary asserts that he has "...the authority to require a Range Test that ascertains Mr. Bardfield's present ability to safely and competently handle a firearm."[27] The issue of Defendant's alleged authority to impose that requirement has been addressed. Petitioner Bardfield now challenges the validity and efficacy of the Defendant's "Range Test."

O'Leary demands that all applicants, including those renewing existing licenses,

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[25] See Letter to Applicants, attached as **Exhibit 2**; also, Cullinane Affidavit "Exhibit C".

[26] See footnotes 19 through 23, *supra*.

[27] See Defendant's "Statement of Reasons" at Page 5, first full paragraph.

"demonstrate the safe handling and familiarity with a .38 cal. 4-inch barrel revolver."[28] The court is hereby requested to note that revolvers have been virtually abandoned in favor of semi-automatics by most law enforcement agencies, including the Brookline police, the FBI, BATFE the Massachusetts State Police and the Air Marshals. Two of the reasons for that switch, which began in the 1980's are the more ergonomic grips and easier trigger pull of the semi-autos, especially for the smaller-statured officers. These advantages also favor women, the elderly and those with arthritis, carpal tunnel syndrome and similar disabilities.

O'Leary provides no rational basis for his insistence upon using a full-sized and largely obsolete firearm which, as noted, many shooters find uncomfortable, unfamiliar and difficult to shoot. Moreover, many applicants for an LTC need a gun compact enough to be carried concealed for their protection, as would be expected by such an applicant. This was a stated basis in Petitioner Bardfield's application.[29] A full-size revolver is antithetical to that end.

Additionally, Defendant's demand that applicants use a large, heavy revolver with a stiff (typically 10-14 pounds, double-action) trigger pull may well explain the alleged failures O'Leary cites as justification for his practice.[30] As the current pistol technique is to shoot with both hands, O'Leary's requirement that applicants perform the test while shooting "with one handhold" is not only pointless; it makes the test deliberately more difficult.[31]

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[28] See "Instructions for Applicants," attached as **Exhibit 1**; O'Leary and Cullinane Affidavits as "Exhibit A" to each.

[29] See Addendum, attached as **Exhibit 4**.

[30] See O'Leary Affidavit at ¶ 15, Cullinane Affidavit at ¶ 22 and Defendant's "Statement of Material Facts" at ¶ 24.

The court may wish to note that the *MacNutt* decision, upon which O'Leary so heavily relies, expressly referred to the testing requirements of other states, including those of Rhode Island.[32] That state wisely applies a test which allows the applicant to select for him or herself the size, caliber and type of gun, i.e., revolver or semi-auto, with which to qualify.[33]

The applicant is thus tested on the firearm he or she actually intends to carry and which, if so required, would actually use. By comparison, O'Leary's test is not just in derogation of the controlling law, but both inadequate and inappropriate for its stated purpose.

Defendant O'Leary argues that his imposition of a range test requiring all applicants to fire a full-size revolver single-handed is a valid means to determine whether an applicant, regardless of their age, size, strength, dexterity or experience with revolvers, can "demonstrate his [or her] present ability to safely and competently handle a loaded firearm..."[34] O'Leary provides no documentation for his claim, and current police practices and the evidence presented herein contradict it. His Motion for Summary Judgment should be denied accordingly.

F. Defendant O'Leary's Argument Would Have an Unconscionable Result.

Defendant O'Leary would have the court authorize his imposition of a "Range Test" that contravenes the controlling statute, as well as his imposition of other requirements unauthorized or precluded by controlling law, as inherent in his "broad discretion" and

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[31] See Defendant's "Instructions for Applicants, attached as **Exhibit 1**.

[32] MacNutt v. Police Commissioner of Boston; 30 Mass.App.Ct. 632, at fn. 5 (1991).

[33] See Rhode Island Statute 11-47-15, attached as **Exhibit 5A**, together with the Qualification portion of the Rhode Island Pistol Permit Application, attached as **Exhibit 5B**.

[34] See Defendant's "Statement of Reasons" at Page 8, top paragraph.

"considerable latitude" to grant a firearms license. As argued above, particularly in subsection D, O'Leary's powers are more far circumscribed than he acknowledges.

Under his theory of "exercise of discretion under Section 131," O'Leary can demand anything which, however remotely, be argued helps ascertain "suitability". O'Leary's scope of review would thus include any ostensible investigation of an applicant's "...clumsiness, ineptitude, physical or mental incapacity or poor judgment in handling firearms..."[35]

O'Leary is expressly asking this court to permit his imposition of a "Range Test" in derogation of statutory preemption of that field. He is implicitly asking this court to also permit not merely those requirements he already imposes, including those already in violation of law, but also any other such other incursions into applicants' rights, such as:

> 1. Demanding medical or psychiatric records to determine "physical or mental incapacity," vitiating patient confidentiality and chilling the seeking of treatment;
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> 2. Demanding that applicants allow unannounced and warrantless searches of their homes, ostensibly to ensure compliance with firearms storage laws, contravening the applicants' Fourth, Fifth and Fourteenth Amendment rights;
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> 3. Demanding blood, hair and/or semen samples of applicants to "clear them quickly" in the event of any crime the Brookline police investigated; or
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> 4. Demanding applicants maintain a liability policy or bond indemnifying O'Leary, the Town of Brookline or some other third party as a condition of licensing, thus further dissuading citizens from applying.

Defendant O'Leary's argument consists of his claim of "broad discretion" and "considerable latitude" to impose any conditions he chooses regarding a determination of

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[35] See Defendant's "Statement of Reasons" at Page 9, top paragraph.

"suitability." Approving that argument compels this court to slalom down the proverbial "slippery slope" of excessive authority and thus condone further abuses of power. As Petitioner Bardfield has shown herein, O'Leary's argument is both untenable and undesirable. Defendant's Motion for Summary Judgment should be denied accordingly.

II. PETITIONER BARDFIELD'S CROSS - MOTION FOR SUMMARY JUDGMENT.

A. Petitioner's Cross - Motion is Consistent With The Controlling Law.

Petitioner Bardfield moves this court to grant his Cross-Motion for Summary Judgment on the grounds that his refusal to take a "Range Test" is consistent with the controlling law. That law is part of the wholesale revision of firearms law known as Chapter 180 of the Acts of 1998; the pertinent part is M.G.L.c. 140, § 131P and its implementation by 515 CMR 3.00 *et sequentia*. That statute and regulation each specify what safety certification an applicant for an LTC must provide. Copies of each are included herewith.

The implementation of M.G.L.c. 140, § 131P responded to the *MacNutt* court's request for "guidelines" and filled the void in the licensing standards upon which that case was decided.[36] It did so with specific criteria and conditions, such as statutorily creating a state-wide standard and specifically exempting those who were then licensed or subsequently became so.[37] This is consistent with other Massachusetts licenses. Massachusetts drivers licenses are not required to take road tests with each renewal;

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[36] MacNutt v. Police Commissioner of Boston, 30 Mass.App.Ct. 632, 636 ; see also fn. 6 (1991).

[37] See M.G.L.c. 140, § 131P at ¶ (a) and 515 CMR 3.05 at ¶ (1) Applicability.

rather, a new license may be obtained on-line. Similarly, notaries, pharmacists, physicians and attorneys hold their respective licenses without taking exams again for each renewal.

That these laws pre-empt local imposition of "Range Tests, altered the basis on which *MacNutt* was based and rendered that case a nullity has already been acknowledged by a recognized Massachusetts firearms law authority. In an e-mail exchange with Defendant O'Leary's then-firearms officer, Sgt. Michael Raskin, discussing Brookline's "Range Test," Chief Ron Glidden wrote:

> Just so you know, these type of requirements [**local "range test" requirements**] are exactly what the legislature was complaining about even in 1998, and why they had hoped that a standardized (state approved) safety course would take the place of these individual PD requirements. **Most PD's that still have such a requirement think they can do so under a 1991 appeals court case of (attorney) Karen MacNutt v. Police Commission of Boston which held that a firing test could be required. However, most legal folks now feel that said case was superseded by the 1998 statutory change requiring a specified safety course.** The fact that firing tests are not challenged in court today have more to do with people not wanting to cause a problem for themselves in applying for an LTC than they do with the fact that MacNutt v. Boston PD is still valid.
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> **The bottom line is that the state set a standard for us to follow** and the legislators (at least at the time) were pretty adamant about not wanting more requirements in addition to that standard. Do what you need to do (especially since it's often not the choice of the licensing officer), but **I would not recommend that PD's go farther than require the statutorily mandated approved safety course for a first LTC or FID**.[38]

O'Leary objects to the inclusion of his subordinate's debate with Chief Glidden on the grounds, among others, that it is inappropriate because "[a]s a practical matter, the foundation for Chief Glidden's views as to how local police chiefs should exercise their broad discretion is skewed" due to the "population density" differences between Brookline

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[38] See "Glidden - Raskin Discussion" attached as **Exhibit 6** (**bold** added).

and Glidden's town, Lee.[39]

O'Leary significantly fails to acknowledge Chief Glidden's ample qualifications, with which O'Leary should be well aware. Chief Ron Glidden is:

1. Chairman of the Mass. Chiefs of Police Association (MCOPA) Firearms Committee;

2. Chairman of the Gun Control Advisory Board, Executive Office of Public Safety; and

3. Author of the standard reference book on Massachusetts firearms law; *Law Enforcement Guide to Firearms Law*, now in its 11th Edition.

That text is a training manual published by the Municipal Police Institute, Inc. in cooperation with the Mass. Chiefs of Police Association, Inc. As Defendant O'Leary is an MCOPA member, he should know who and what Chief Glidden is. As the exchange was between Glidden and O'Leary's licensing officer and initiated by that officer to discuss O'Leary's "Range Test" requirements, O'Leary is further deemed to know of that exchange.

Petitioner Bardfield duly submitted a complete, statutorily-specified application for the renewal of his existing LTC. O'Leary admits he denied that renewal because Bardfield refused to take a "Range Test." O'Leary knew or certainly should have known his "Range Test" requirement was in derogation of the controlling statute and regulation, by the express terms of each and the professional interpretation of same. Therefore, it is Bardfield who has complied with the controlling law, while O'Leary has acted in derogation of it. Bardfield's Cross-Motion for Summary Judgment should be granted accordingly.

B. Petitioner Is Exempt By Law From Any Certification Requirements.

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[39] See Defendant's "Statement of Reasons" at Page 11, fn. 3.

Bardfield was denied the renewal of his then-existing LTC merely because he declined to take a "Range Test" Defendant O'Leary requires in contravention of the controlling law; M.G.L.c. 140, § 131P and 515 CMR 3.05. Both the statute and regulation specify what safety certification an applicant for an LTC must provide. Neither requires a "Range Test" and each expressly exempts those licensed prior to June 1, 1998 and those certified thereafter from taking the certification courses upon renewal.

Bardfield has held an LTC since the 1970's and was so licensed at the time specified in §131P.[40] He therefore falls under both the "grandfather" exemption and the current licensee exemption of the controlling statute. There is no legal basis for the imposition of any "Range Test" upon him or any so situated.

Defendant O'Leary admits that the only reason for his refusal to renew Bardfield's LTC was "Mr. Bardfield's refusal to take the Range Test and submit a Range Qualification score as part of the application process." [41] Thus, O'Leary's only reason for denying Bardfield's renewal is the refusal to take a "Range Test" which O'Leary, by law, cannot impose and from which Bardfield, by law would be expressly exempted. Petitioner Bardfield's Cross-Motion for Summary Judgment should be granted accordingly.

C. Petitioner Bardfield Is A Suitable Person To Hold A Firearms License.

1. Bardfield has demonstrated his suitability.

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[40] See Bardfield Affidavit at ¶ 5; see also Defendant's Statement of Material Facts at ¶10.

[41] See Defendant's "Statement of Material Facts" at Page 4, ¶ 17.

Bardfield has held a Massachusetts License To Carry Firearms for over thirty years.[42] His last renewal was approved by O'Leary, who has alleged no change in Bardfield's qualifications or the applicable law as the basis for denying Bardfield's renewal; only his refusal to take O'Leary's "Range Test."

Bardfield, a retired U.S. Army colonel, retired deputy sheriff and current Consular Warden, has extensive small arms training and assists certain Federal agencies in the Caribbean.[43] Consistent with his Caribbean duties, he is also licensed by the Dutch authorities in Sint Maarten, Netherland Antilles.[44] O'Leary has never challenged Bardfield's qualifications or credentials, basing his denial entirely upon Bardfield's refusal to take O'Leary's "Range Test"[45]

Petitioner Bardfield has a well-documented history of responsible firearms ownership, as indicated by his being licensed in two countries and never being denied by Brookline until he refused to take O'Leary's unauthorized "Range Test." He has demonstrated both need and suitability, neither of which O'Leary challenges, except as to that refusal. Petitioner Bardfield's Cross-Motion for Summary Judgment should be granted accordingly.

2. O'Leary has acknowledged Bardfield's suitability.

After O'Leary refused renewal of Barfield's LTC because he justly refused to take

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[42] See Bardfield Affidavit at ¶ 5; see also Defendant's Statement of Material Facts at ¶10.

[43] *Id.* at ¶¶ 3 and 4.

[44] *Id* at ¶ 6.

O'Leary's "Range Test," Bardfield applied for a Firearms Identification Card (FID).[46] O'Leary granted that firearms license,[47] although that fact appears nowhere in his Motion for Summary Judgment.

Rather, O'Leary alleges that Bardfield somehow "waived his right to challenge" the "Range Test" by taking it in 2002.[48] O'Leary's bald assertion that an act four years prior prevents Bardfield from challenging a present infringement of rights is not explained in that paragraph, nor supported anywhere else in O'Leary's pleadings. Given that failure, together with the fact that Bardfield signed nothing so nominated or construable as having "waived his right to challenge" the "Range Test," O'Leary's assertion of waiver is devoid of credibility.

It is O'Leary, if anyone, who has "waived his right to challenge" in this action. Having granted Bardfield a Firearms Identification Card, it is O'Leary who should be deemed to have waived any challenge of, or now be deemed estopped from challenging, Bardfield's suitability. Petitioner Bardfield's Cross-Motion for Summary Judgment should be granted accordingly.

CONCLUSION

As documented in detail in this memorandum, Petitioner Bardfield is eminently suitable to have the LTC he has held since the 1970's renewed. His qualifications are not

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[45] See Defendant's "Statement of Material Facts" at Page 4, ¶ 17.

[46] See Bardfield Affidavit at ¶ 14.

[47] *Id.*

challenged; it is only his refusal to obey an edict contrary to controlling law that makes him, in the eyes of the official who issued that fiat, "unsuitable." It is Defendant O'Leary whose actions flout the statutory testing program, exceed the parameters of firearms licensing application law and thereby trespass upon individual rights. It is those actions which warrant redressing, for which reason Petitioner Bardfield has brought this action.

By its enactment of M.G.L.c. 140, § 131P and its further implementation under 515 CMR 3.00 *et sequentia*, with its express creation of a state-wide testing standard and exemptions for those already licensed, the Legislature clearly pre-empted the type of arbitrary, town-by-town "Range Tests" such as that O'Leary demands of all applicants. Having made its purpose clear, there is no basis in law for O'Leary's personal interpretation of that statute:

> When interpreting a statute, we attempt to give effect to the intent of the Legislature as ascertained from the ordinary use of the language employed, the reasons for the enactment, and the main object to be accomplished. Commonwealth v. Valiton, 432 Mass. 647, 650 (2000). **The language of the statute itself is our primary source of insight into legislative purpose**. Foss v. Commonwealth, 437 Mass. 584, 586 (2002). For assistance with interpretation, **we may utilize other statutes relating to the same matter as the statute being construed**, Commonwealth v. Smith, 431 Mass. 417, 420 (2000), and we may examine the general statutory framework in which the statute in question is located. See Commonwealth v. Brown, 431 Mass. 772, 776-777 (2000).[49]

As the *McDowell* court stated, *supra*, what the Legislature intended is determined from what it said.

Similar citations of law regarding the statute itself being the best source of legislative

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[48] See Defendant's "Statement of Reasons" at Page 3, ¶ 1, line (5).

intent and purpose are found in O'Leary's own pleadings.[50] As O'Leary also noted, "The Legislature was aware of the MacNutt case when it added Section 131P and had no intention of overruling it..."[51] However, the Legislature was not "overruling" *MacNutt*; it was responding to that court's request for guidelines as to testing requirements.[52] The Legislature did so clearly and specifically; detailing course criteria, which existing courses were acceptable, what the instructor criteria were, identifying who were required to take those courses, and those who - like Bardfield - were expressly exempt from those requirements. The result was a safety certification program pre-empting local standards.

It is, therefore, Petitioner Bardfield who is eligible under the controlling law and Defendant O'Leary who has acted in derogation of it. This is consistent with the rest of his licensing procedures, which impose numerous requirements unauthorized under, and even in violation of, the licensing laws he purports to enforce.

Even taken at its best interpretation, O'Leary's "Range Test" fails to achieve its stated objective of determining an applicant's ability to safely handle a firearm. He requires applicants to shoot a heavy revolver, a firearm design law enforcement abandoned, *en masse*, decades ago. He further requires that it be fired single-handed, regardless of an applicant's age, size, strength or what the applicant actually intends to carry. The test is invalid because it has no relevance to what an applicant will actually use once licensed.

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[49] Commonwealth v. McDowell, 62 Mass. App. Ct. 15, 20 (2004) (**bold** added)

[50] See Defendant's "Statement of Reasons" at Page 13, § b.

[51] *Id.* at Page 14.

[52] MacNutt v. Police Commissioner of Boston, 30 Mass.App.Ct. 632, 636;

That the "Range Test" is not a valid criterion may be deduced by O'Leary's utter failure to document any agency other than the Boston Police Department using it, which department itself went to semi-auto sidearms for its officers years ago. The policy of Rhode Island, which the MacNutt court noted with approval,[53] further disproves the validity of O'Leary's test.[54]

Petitioner Bardfield has documented these defects in Defendant O'Leary's "Range Test" in detail as to law and logic. Those flaws are fatal to his arguments rationalizing his imposition of requirements, including his "Range Test," in excess of his statutory authority. Petitioner Bardfield is entitled to have his Cross-Motion for Summary Judgment granted accordingly.

Respectfully submitted by
Petitioner Morton L. Bardfield
through his counsel,

April 27, 2007

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see also fn. 6 (1991).

[53] MacNutt v. Police Commissioner of Boston; 30 Mass.App.Ct. 632, (1991) at fn. 5.

[54] See Rhode Island Statute 11-47-15, attached as **Exhibit 5A**, together with the Qualification portion of the Rhode Island Pistol Permit Application, attached as **Exhibit 5B**.