

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.

SUPERIOR COURT

JAMES W. ARCHER

)

)

VS.

)

PC/2002-5593

WILLIAM A. MacGARRY

)

HEARD BEFORE JUSTICE STEPHEN FORTUNATO, JR.
NOVEMBER 26, 2002

APPEARANCES:

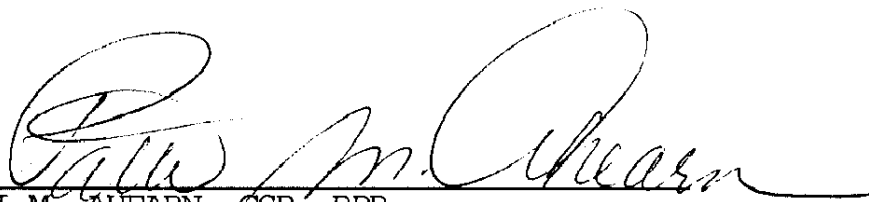
DAVID STRACHMAN, ESQ., FOR THE PLAINTIFF

CHRIS O'CONNOR, ESQ., ON BEHALF OF THE DEFENDANT

PATTI M. AHEARN, RPR
COURT REPORTER

C E R T I F I C A T I O N

I, PATTI M. AHEARN hereby certify that the following pages, 1 thru 23, inclusive, is a true and accurate transcript , according to my stenographic notes.



Patti M. Ahearn
PATTI M. AHEARN, CSR, RPR
COURT REPORTER

1 catch-all ordinance in our Home Charter that we referred
2 to which suggests that authority in the absence of
3 exclusive authority rests with the Town Council, and I
4 know that my brother vehemently opposes that position.

5 THE COURT: Yes. And the legislature has defined
6 licensing authority as meaning -- or as being possibly
7 several different categories of people. One of whom is
8 the Chief of Police or Superintendent of Police of other
9 cities and towns having a regular organized police
10 force. While it is clear, and I don't think anybody is
11 going to contradict the fact that Smithfield, indeed,
12 has a regular organized police force chief, the
13 Defendant, William A. MacGarry, is, indeed, the Chief of
14 that police force, and a licensing authority can also be
15 a Board of Police Commissioners of a city or town where
16 that Board has been instituted. There is no such Board
17 in the Town of Smithfield; is there, Mr. O'Connor?

18 MR. O'CONNOR: No, there is not.

19 THE COURT: Well, I think, then, the plaintiffs
20 have named the appropriate defendant here, and that
21 means we must now proceed to the question as to whether
22 or not he can take the position that he clearly has
23 based upon the communication he had with Mr. Archer;
24 namely, that his policy and practice over the years has
25 been -- and I'm referring to his February 22nd, 2002,

1 letter that he sent on his official stationery to
2 Mr. Archer, which he said, among other things, quoting
3 from the letter, "Although by law I, as the Chief of
4 Police, have the authority to issue such permits, it has
5 been my policy not to do so, and I've never issued any
6 such permits." And, now, the question is whether he can
7 take that position lawfully. Meaning, can he not do
8 something that the statute says, and it uses the word
9 shall, meaning the -- in so many words, "The police
10 chief shall issue these permits if there is an
11 application and if the applicant meets the criteria." I
12 want to emphasize for everybody that what I'm being
13 asked to do, as I understand it, is simply start the
14 application process at the level of Police Chief in
15 Smithfield. I'm not in any way intruding upon the
16 domain of discretion. I'm not being asked to intrude
17 upon the domain of discretion that the chief has
18 regarding whether Mr. Archer is a so-called suitable
19 person or meets any other criteria that are set forward
20 in the legislation for the issuance of a permit for a
21 concealed weapon. But that being the framework in which
22 we operate, I would be happy to hear some arguments.
23 They need not be extensive in light of your thorough
24 briefs, but if you want to highlight any of your points,
25 you may.

1 I was especially intrigued by Mr. O'Connor's
2 argument that somehow there is another adequate remedy
3 of law; namely, the avenue of going to the Attorney
4 General. Let me suggest that that is not an adequate
5 remedy of law. That is a separate avenue for
6 application, but I take the equitable doctrine of
7 adequacy of remedy of law to mean whether or not the
8 courts can do something for the plaintiff in this
9 controversy other than issue a mandamus, assuming the
10 criteria for that are met, directing the police chief to
11 do what the statute says he's supposed to do as one of
12 his functions as a chief of police.

13 MR. O'CONNOR: I suppose that puts the burden on me
14 to probably persuade you otherwise, and I'll be brief
15 because there is not much more than I think I can add
16 other than what is in my brief, and I don't want to be
17 redundant, but I didn't want to necessarily give up that
18 easily on the issue of the proper licensing authority,
19 and I understand that you not only have the authority to
20 determine what the law is in this case, but you're
21 sitting as the trier of fact in this regard as well.

22 We have taken the position that the Town Council is
23 the proper licensing authority, and we stick by that
24 determination and I respect the fact that you have a
25 different opinion as the trier of fact regarding that,

1 but I do believe that within the confines of that
2 statute that it does permit any other body authorized by
3 the city or town charter to act as the local licensing
4 department, so I would say that is the town.

5 Irrespective of what the Chief of Police's
6 interpretation of what the law may be, clearly there is
7 no dispute of what he said in his letter is that he
8 believes he is authorized by law to do it, but whether
9 his belief -- regardless of what his belief is, I would
10 say it is irrelevant because what is at issue here is
11 whether he is authorized, in fact, to do it by law, and
12 that's your determination.

13 I would simply state, your Honor, that this
14 plaintiff has had some eight months to make application
15 to the Attorney General's Office, and he has failed to
16 do that. It is the same application, although the
17 process may be different in terms of the criteria used
18 by the Attorney General's Office and the criteria used
19 at the local level, it is the same type of license. He
20 has chosen not to do that. Instead, he's chosen to seek
21 recourse from this Court. Clearly, if he made
22 application to the Attorney General's Office and was
23 denied, we would have no -- at the local level, we would
24 have no discretion but to at least accept and consider
25 his application, but he has had plenty of opportunity to

1 make application to the Attorney General, and for
2 whatever reason, he has elected not to.

3 Your Honor, I don't want to be redundant. I'll
4 rest on what we submitted in the brief, and I don't
5 believe that there is factually that much in dispute. I
6 thank you for your consideration.

7 THE COURT: All right. Counselor.

8 MR. STRACHMAN: Thank you, your Honor. I also
9 don't want to add much more than what was in my reply
10 brief which we filed with the Court on Friday. The
11 argument that I think intrigued your Honor, and as you
12 indicated as to the separate avenue, I think we've
13 dispelled in our reply brief by showing very clearly
14 that there are some significant distinctions between the
15 types of licenses issued by the Attorney General and the
16 license issued by the cities and towns.

17 And as to the facts, my brother and I have spent a
18 little time this morning trying to work out some
19 stipulations, and despite a very cooperative
20 relationship, there are few very minor factual issues.
21 If your Honor feels that it would be helpful, I would
22 like to have the chief testify for about five or ten
23 minutes on his past practice, the practice of the town,
24 and that is it, I don't really think there is much else.

25 THE COURT: All right. Go ahead.

1 MR. STRACHMAN: Thank you. Chief.

2 WILLIAM MacGARRY, called as a witness, first having been
3 duly sworn, testified as follows:

4 DIRECT EXAMINATION BY MR. STRACHMAN:

5 Q Chief MacGarry, how long have you been the Police Chief
6 for the Town of Smithfield?

7 A Approximately six-and-one-half years.

8 Q You were appointed in July of '96?

9 A June of '96.

10 Q And prior to that, did you serve -- where did you serve?

11 A I retired from the Rhode Island State Police after 25
12 years of service.

13 Q And, your next employment in law enforcement was with
14 the Town?

15 A Yes.

16 Q And, from the time when you were first appointed, as
17 part of your duties did you learn anything from your
18 predecessor of the practice in the town concerning the
19 issuance of gun licenses pursuant to local -- the state
20 statute by your town?

21 A No, not really.

22 Q Did you inquire of your predecessor?

23 A No, I did not.

24 Q And, from the time that you were appointed in 1996, did
25 you begin the process of accepting either applications

1 or requests for applications?

2 A We really didn't have a process.

3 Q There was no process?

4 A That's correct.

5 Q Okay. In 1996, 1997, 1998, did you from time to time
6 receive requests for applications?

7 A On rare occasions I received requests for applications,
8 yes.

9 Q And, did you ever issue applications?

10 A No, sir, I did not.

11 Q Is it fair to say, then, that during the entirety of
12 your term you have not issued an application?

13 A Yes, that is fair to say.

14 Q And, is it fair to say that you've taken a similar
15 position to the -- over time to the -- to your letter of
16 February of this year to the plaintiff?

17 A I'm not sure I understand that question.

18 Q In your letter of February of this year, you indicated
19 that it has been your policy, your practice, not to
20 issue licenses; is that right?

21 A Yes.

22 Q And, has that been your policy and practice from 1996
23 forward?

24 A I've never issued a license.

25 Q So, it has been your policy never to issue licenses?

1 A Yes.

2 THE COURT: Have you ever entertained an
3 application?

4 THE WITNESS: We have had a few inquiries over the
5 years as to how to get a license, and I've referred
6 those people to the Rhode Island Attorney General's
7 Office.

8 BY MR. STRACHMAN:

9 Q But when people have applied to you, like Mr. Archer,
10 and have said, "Chief, you have the authority pursuant
11 to this statute, will you entertain an application?" It
12 is fair to say that it has been your policy to respond?

13 A I'm not exercising that authority.

14 MR. O'CONNOR: Objection to the form of the
15 question, the characterization.

16 THE COURT: Well, he can answer and qualify it as
17 he sees fit. Go ahead.

18 A I've never issued a concealed weapons permit. I've had
19 a couple of inquiries over the last six-and-a-half
20 years, and my recollection is that I referred them to
21 the Attorney General's Department.

22 THE COURT: So, you don't issue permits, but you
23 also don't issue applications? You don't have an
24 application form at your department to apply to those
25 seeking a gun permit in your capacity as Chief of

1 Police?

2 THE WITNESS: That's correct.

3 THE COURT: Nor do you, in effect, say to a person,
4 "Well, just right write to me in your own format as to
5 your application"? In other words, you don't entertain
6 applications?

7 THE WITNESS: That is fair to say.

8 THE COURT: All right.

9 MR. STRACHMAN: Thank you.

10 Q And, do you serve for a period -- a term, a two-year
11 term, a three-year term?

12 A I serve at the pleasure of the town manager.

13 Q And, that has been continuous? In other words, not for
14 a period of -- you don't have a contract that has been
15 renewed or --

16 A Yes, I do have a contract.

17 Q And what term is that contract?

18 MR. O'CONNOR: I object. It is not relevant.

19 THE COURT: Overruled. You may answer.

20 A I currently have a four-year contract that expires, I
21 think, about three-and-a-half years.

22 Q So, it -- and your process, or your policy of not
23 entertaining or granting licenses for concealed weapons,
24 is that something that is public, that is not something
25 that is hidden? In other words, have you discussed that

1 with people in the Town Council? Have you discussed
2 that with other members, other employees of the Town?

3 MR. O'CONNOR: I object to the form of the
4 question.

5 THE COURT: Sustained as to form.

6 Q Have you discussed your policy concerning gun licenses
7 with other employees of the town?

8 A Yes, the Town Solicitor's Office.

9 Q And, that policy has been consistent for the
10 six-and-a-half years that you've served; is that
11 correct?

12 A We only received, I think, an inquiry as recently as
13 our first inquiry may be as recently as a couple of
14 years ago.

15 Q But your policy hasn't changed?

16 A Our policy hasn't changed in that we don't issue those
17 licenses.

18 Q Okay. And you weren't --

19 THE COURT: I think we've covered this. How much
20 longer are you going to be here, Counselor?

21 MR. STRACHMAN: Very briefly, Judge.

22 Q And you haven't been reprimanded by the Town Council or
23 informed by the Town Council that it is inappropriate
24 the way you're handling this; have you?

25 MR. O'CONNOR: Objection.

1 THE COURT: What does this have to do with
2 anything?

3 MR. STRACHMAN: It is significant for the practice.

4 THE COURT: He said what his practice is. We don't
5 know what his practice is.

6 MR. STRACHMAN: The chief is now saying the town
7 has the authority, and, yet, I've been acting this way
8 for six-and-a-half years. His contract is renewed --

9 THE COURT: He hasn't discussed it with anybody
10 other than the town solicitor, so why pursue this?

11 Q And, have you had occasion to accept renewal
12 applications? In other words, applications that came
13 for maybe the term of your predecessor that expires
14 during your term?

15 MR. O'CONNOR: I object. It is not relevant.

16 THE COURT: Overruled.

17 A Not that I'm apparently aware of.

18 Q And, does the Town -- does your department or the Town
19 have a Registry somewhere where the license holders are
20 identified?

21 A Not that I'm aware of.

22 MR. STRACHMAN: That's all, your Honor. Thank you.

23 THE COURT: Any questions, Mr. O'Connor?

24 MR. O'CONNOR: Just a couple.

25 CROSS-EXAMINATION BY MR. O'CONNOR:

1 Q Chief MacGarry, you indicated that you have had some
2 contact with the Town Solicitor. Which Town solicitor
3 are you referring to?

4 A Ed Alves who was the former Town Solicitor before
5 Warren Rosenbaum.

6 Q Mr. Alves was the former solicitor of the Town of
7 Smithfield; is that correct?

8 A Yes.

9 Q At some point in 1999 you made inquiry of Mr. Alves
10 concerning the authority -- concerning who has the
11 authority to issue a concealed weapon permit; is that
12 correct?

13 MR. STRACHMAN: Objection.

14 THE COURT: Overruled.

15 A Yes, that is correct.

16 Q And, did you receive a response?

17 A Yes, I received a written response.

18 Q And, what was the response?

19 MR. STRACHMAN: Objection.

20 THE COURT: Overruled.

21 A It my recollection that the letter that he sent to me
22 said that I don't have the authority to consider a
23 concealed weapon permit, that that authority rests in
24 the Smithfield Town Council.

25 MR. O'CONNOR: Thank you.

1 THE COURT: Go ahead.

2 REDIRECT EXAMINATION BY MR. STRACHMAN:

3 Q And, despite receiving that information from the Town
4 Council, you considered -- from 1999 forward, you
5 considered yourself as possessing that authority; is
6 that right?

7 A I'm not really sure right now whether I possess that
8 authority or that authority rests in the Town Council, I
9 really don't know.

10 Q But you had a communication with the Town's lawyer in
11 1999, you continued to describe your authority, at least
12 in public with people like Mr. Archer, as if you had
13 that authority, and that is exactly what you wrote in
14 February of 2002; is that right?

15 MR. O'CONNOR: I object to the form of the
16 question, the characterization.

17 THE COURT: Overruled. If the Chief understands
18 what he's being asked he can answer.

19 A Yes.

20 MR. O'CONNOR: No further questions.

21 THE COURT: All right. Chief, thank you. You may
22 step down.

23 THE COURT: In this matter the Plaintiff, a
24 resident of Smithfield, seeks to avail himself of
25 11-47-1 et sequitur, in particular 11-47-11, which

1 provides that if a person meets certain criteria, then
2 the licensing authority, quoting from the statute,
3 "...shall issue a license or permit to the person to
4 carry concealed upon his or her person a pistol or
5 revolver everywhere within this state for four years
6 from the date of issue." End of quote, and then it
7 continues on. The licensing authority is defined by our
8 legislature in 11-47-2, Part 5, and among the licensing
9 authorities is the Chief of Police of our cities and
10 towns, in this case the Town of Smithfield.

11 Now, it is possible to have a licensing authority
12 other than the Chief of Police in a given town or city,
13 but that must be brought about in a formal fashion by
14 the appropriate officials in the Town. That Part 5 that
15 I just referenced says that licensing authority can
16 mean, among other things, quote, "The Board of Police
17 Commissioners of a City or Town where that Board has
18 been instituted." End of quote. Mr. O'Connor candidly
19 states in answer to a question from the Court that there
20 is no such Board of Police Commissioners in the Town of
21 Smithfield, nor is there anything in the Charter or
22 Ordinances that suggest in any way that the Town Council
23 functions as the Board of Police Commissioners. In any
24 event, as the chief stated, he negotiates his contract
25 with, and, apparently, answers to the town manager.

1 There is no question, though, that William MacGarry is,
2 indeed, the Chief of Police in Smithfield, and given the
3 way that the Ordinances and Charter are structured in
4 that Town, he's the licensing authority.

5 Now, I'm very mindful that a Superior Court Judge
6 cannot take judicial notice of municipal ordinances. On
7 the other hand, nothing has been called to my attention
8 that would in any way contradict the candid
9 representations of Mr. O'Connor or, indeed, the
10 testimony, which, of course, I find to be credible, of
11 Chief MacGarry. So, the only evidence before the Court
12 in this matter leads me to the irresistible conclusion
13 that the Chief is the licensing authority in Smithfield.
14 That having been determined, the question now is does
15 the Chief have any discretion relative to entertaining
16 applications and processing the applications pursuant to
17 11-47-11.

18 There is, indeed, some discretion vested in the
19 licensing authority, and in this case, the chief. A
20 licensing authority must consider upon the receipt of an
21 application for a gun permit what the legislature says
22 the licensing authority must consider. Quoting from the
23 statute, "If it appears that the applicant has good
24 reason to fear an injury to his or her person or
25 property, or has any other appropriate reason for

1 carrying a pistol or revolver, and that he or she is a
2 suitable person to be licensed..." End of quote, then
3 the license shall issue. If the person is a suitable
4 person and meets the other criteria that I just quoted
5 from the statute, at that point there is no discretion
6 on the part of the licensing authority. According to
7 the legislature at that point the permit shall issue.
8 Not may, but shall. But, as I say, in the domain of
9 whether the person is a suitable person or has proved
10 that they are -- have a legitimate fear for their safety
11 or some other reason, and to this I think we would apply
12 the criteria that the licensing authority would have to
13 act in a reasonable fashion, we could not impute to the
14 legislature the intent to vest in licensing authorities
15 some power to act in an irrational or arbitrary fashion,
16 and we know in State Versus Storm, 112 RI, a Supreme
17 Court decision, that the Supreme Court, quite
18 understandably, concluded that appropriate licensing
19 authorities includes, among others, law enforcement
20 officials. Who better than they would know whether or
21 not the person has done what else they are required to
22 do as the statute suggests, such as go through a
23 training process and get duly certified and all the rest
24 of it. As the Supreme Court said, they are in a
25 particularly appropriate position to run the background

1 checks and check on the applicant and so on. But the
2 question remains, though the licensing authorities have
3 the discretion I just alluded to, do they have the
4 discretion to say, "I'm not going to exercise my
5 statutory power. I'm not going to entertain
6 applications. Moreover, no way, no how, am I ever going
7 to issue a permit pursuant to 11-27-11."

8 I do not believe that the police chiefs who happen
9 to serve as a licensing authority, such as Chief
10 MacGarry, I don't believe they have that power, any more
11 than they have the authority to say that I believe a
12 particular misdemeanor criminal statute is ridiculous
13 and stupid and it is a waste of our time to enforce it
14 and to walk away and to direct his subordinates to walk
15 away from a clear violation of that particular
16 misdemeanor statute or ordinance. It is not for the
17 chief to pick and choose what statutes will be enforced.

18 I realize there is a lot of discretion enjoyed by
19 police officers as to whether to arrest or not, whether
20 to tell the people to move on, you're blocking the
21 doorway, or to arrest them for blocking the doorway.
22 I'm speaking of a situation where the police says, "In
23 no circumstances, in no circumstances will I ever
24 enforce this ordinance. It is so stupid." Or, "This
25 statute, it is so stupid." I might say that same

1 criteria applies to judges. I'm sure that you will find
2 among the judges on the Superior Court opinions that
3 certain statutes are ridiculous and really have no place
4 -- they should not be tying up either the police
5 officers or the Courts. But if someone is arrested
6 under these, I'm certainly speaking in the large part
7 about misdemeanor statutes. If the arrest is made and
8 someone is brought before the Court, the Court has to
9 process the case, and that's the end of the discussion,
10 just as pretty much the end of the discussion regarding
11 whether or not the Chiefs of Police in the State must
12 entertain these applications that are presented to them.

13 It is true -- let me just say that our Supreme
14 Court has had occasion in other matters to define the
15 receipt by municipal officials of an application for a
16 particular permit, have defined those responsibilities
17 as being ministerial and non discretionary. Some of
18 these cases were cited by the Plaintiff in his brief,
19 Newman Versus Mayor of the City of Newport where the
20 Court said, the Supreme Court said, "The petitioners
21 have a clear right to compel the commissioner to perform
22 his ministerial duty in accordance with the law; namely,
23 to consider petitioner's application and to exercise his
24 discretion reasonably in the matter." In a similar
25 case, not exactly on point, but Corrente versus

1 Southworth, 448 A2d, 769, the Supreme Court said,
2 "Although the public officer may exercise a
3 discretionary function, that discretion may not be so
4 boundless and uncontrolled as to allow the official to
5 negate and nullify a statutorily established merit
6 system."

7 Here, we have a system for licensing of concealed
8 weapons. A person can apply, to be sure, to the
9 Attorney General, and it may well be that the Attorney
10 General has more discretion under the statute than does
11 the Chief of Police, but that aside, the legislature saw
12 fit to give to the citizens two prongs or two paths that
13 they may follow toward the objective of getting a gun
14 permit, and it is not for the Chief of Police anymore
15 than it will be for the Attorney General to foreclose
16 one of those paths by simply saying, "I'm not going to
17 participate in this regulatory scheme."

18 One consequence, of course -- and I realize as a
19 practical matter, Smithfield, according to the Chief, is
20 not being deluged with applications; but, nonetheless,
21 by the Chief taking this position, other than its it
22 prejudice to Mr. Archer, he also thereby burdens the
23 Attorney General with having to process Smithfield
24 permit applications.

25 In any event, while the objective of the Chief may

1 be very laudable -- I don't know, maybe the Chief's view
2 is that no one other than law enforcement officials
3 should have guns. I'm sure the Chief could find people
4 with that opinion in every state in the union, but at
5 this point in time people are permitted to have
6 concealed weapons, according to the legislature, and
7 they are afforded certain ways that they can go about
8 getting the licenses.

9 Mr. O'Connor argues strenuously that, look, there
10 is an adequate remedy here; namely, go to the attorney
11 general. But that's not the adequate remedy at law as
12 contemplated by our practice or by equity juris
13 prudencce. We speak of an adequate remedy of law as
14 being the so-called law side of the Court. I realize
15 that with the advent of the new Rules of Civil Procedure
16 -- when I say new, I'm speaking in terms of centuries.
17 They were new in the 1950's or 60's when they merged law
18 and equity. Prior to that time there was the so-called
19 law side of the Court and the equity side of the Court,
20 and if someone wanted to get equitable relief, such as
21 by a writ of mandamus, they had to demonstrate that
22 there was no adequate remedy at law, meaning no remedy
23 within the context of the common law in a court. It may
24 well be that, and, indeed, it is, many times people come
25 into this courtroom seeking some type of relief. This

1 Court, on their particular claim, may well have
2 concurrent jurisdiction with the Family Court. It may
3 well be that their claim also raises certain federal
4 claims or questions that could appropriately be brought
5 in the Federal Court, but if they are looking for
6 equitable relief here, and the case is not otherwise
7 removed to one of those other forums, then it is clear
8 that -- and if they show that there is no adequate
9 remedy of law, then they are entitled to adequate
10 equitable relief. And it is not an adequate remedy of
11 law to say, "Well, you could go to the Federal Court and
12 get your parade permit" or "You could go to the Family
13 Court and get your restraining order" for whatever
14 reason, but that is not what an adequate remedy or the
15 term adequate remedy at law contemplates. It means
16 whether within the context of the common law there is
17 some relief, adequate relief, I should say, and
18 emphasize available, and here there is none.

19 Here, the question is very narrow: Should the
20 Chief be compelled to do what he has no discretion to
21 refuse to do, and he has been refusing to process the
22 applications and, thereby, he doesn't even get to the
23 question of scrutinizing the merits of the person's
24 application because he takes the position that he won't
25 exercise any discretion and consider the application,

1 and when the person meets the criteria, the chief will
2 not issue a permit, but it is not for the chief or
3 someone in his position to decline to receive
4 applications and decline to process them in a reasonable
5 and fair way.

6 In no way at this point in time am I telling the
7 Chief what he must do with Mr. Archer's application. I
8 am mandating, and a Writ of Mandamus shall issue to the
9 Police Chief, William MacGarry, directing him to take an
10 application from Mr. Archer, and, then, process it and
11 conduct a review of the kind contemplated by the
12 legislature in 11-47-11.

13 As I believe I emphasized thus far, so there is no
14 mistake, the Police Chief has no discretion to decline
15 an application or decline to consider the application
16 once it has been filed with him. Nor does he have any
17 discretion to act in anything but a reasonable and fair
18 way regarding the application once it is on his desk.

19 Submit the Order, please.

20 (A D J O U R N E D)
21
22
23
24
25