№ 08-7094

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re ROBERT L. ORD

PETITION FOR MANDAMUS RELIEF

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Certificate as to Parties, Rulings, and Related Cases.

PARTIES

There are no private corporate parties.

Robert Ord is a United States Citizen and resident of the Commonwealth of Virginia.

The District of Columbia is a municipal corporation capable of suing and being sued.

Amicus Curiae in the Appeal

The Second Amendment Foundation, Inc., ("SAF") has no parent corporations. No publicly traded company owns 10% or more of the corporation's stock. SAF, a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code, is a non-profit educational foundation incorporated in 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing throughout the United States.

The American Civil Liberties Union of the National Capital Area, Inc. ("ACLU-NCA") is a non-profit, non-stock corporation organized under the laws of the District of Columbia. The ACLU-NCA is an affiliate of the American Civil Liberties Union ("ACLU"), which is likewise a non-profit, non-stock corporation organized under the laws of the District of Columbia. No publicly held corporation

owns any stock in either organization. The ACLU is a membership organization with more than 500,000 members nationwide. Since its founding in 1920, the ACLU and its local affiliates have worked to protect and defend the civil liberties of all Americans.

RULINGS UNDER REVIEW

The Petitioner seeks relief from the May 10, 2010 Judgment of Judge John D. Bates denying the Petitioner a preliminary injunction.

RELATED CASES

This petition relates to *Ord v. District of Columbia*, 587 F.3d 1136 (D.C. Cir. 2009).

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II. Introduction

As provided by this Court's Rule 21, the Plaintiff in the underlying District Court case seeks an order instructing the District Court to abide by this Court's mandate in *Ord v. District of Columbia*, 587 F.3d 1136 (D.C. Cir. 2009). The District Court has completely embraced spurious legal arguments made by the Defendant on appeal, but properly disregarded by this Court in its December 4, 2009 decision. In doing so, the District Court has expressly invited the Defendant to inflict those very injuries the Plaintiff has sought injunctive relief therefrom since the initial filing in this case.

III. The relief sought

The Petitioner seeks a preliminary injunction prohibiting the District of Columbia from arresting or prosecuting him for alleged violation of District of Columbia weapons laws which a law enforcement officer would be otherwise exempt by operation of District of Columbia or Federal law.

IV. Issues presented

1. Is the Petitioner entitled to the immunities provided under the Law Enforcement Officers Safety Act of 2004, 18 U.S.C. § 926B?

2. Is the Petitioner entitled to the exemptions provided under D.C. Code §§ 7-2502.01 and 22-4505?

2. Where the Circuit Court has found the petitioner to be "effectively exiled" from the District of Columbia by threats of unwarranted prosecution, has the petitioner demonstrated irreparable injury necessary for a preliminary injunction?

V. Statement of facts

On September 4, 2008, Plaintiff Robert Ord made a timely Notice of Appeal to this Court of the District Court's August 29, 2008 Rule 12 (b)(6) dismissal of his case. *Ord v. District of Columbia*, 573 F. Supp. 2d 88 (D.D.C. 2008). In its Brief in Opposition, the District of Columbia vigorously argued against Ord's asserted status as a law enforcement agent of the Commonwealth of Virginia. Appellee's Opp'n Br. at 16-18.

After briefing and oral argument, this Court reversed the District Court's dismissal. Despite the Appellee's argument regarding Ord's status as a law enforcement officer or agent being an issue of law and such issue being potentially dispositive of Ord's entire cause of action, this Court remained deferential to Ord's order of appointment from the Virginia Circuit Court.

> In 2007, the Virginia Circuit Court of Orange County appointed appellant Robert Ord a Special Conservator of the Peace (SCOP). That order

> authorized Ord to carry firearms while acting in the course of his duties. It also designated him a "Qualified Law Enforcement Officer" with respect to certain provisions of Virginia and federal law, including the federal Law Enforcement Officers Safety Act of 2004. Known as LEOSA, that statute allows officers to carry concealed firearms notwithstanding contrary state law. See 18 U.S.C. § 926B.

Ord, 587 F.3d at 1138. This Court found Ord to be in imminent harm of injury as a direct result of the District of Columbia's intent to prosecute him for firearms offenses.

> Ord's injury stems from his inability to travel to D.C. and carry on his security business here while armed without fear of prosecution. That injury is imminent because the District of Columbia has made clear its specific intention to prosecute him.

Ord, 587 F.3d at 1143.

Upon remand, Ord sought leave to file a Supplemental Complaint and renewed his Motion for a Preliminary Injunction. The District Court permitted Ord to file his Supplemental Complaint but denied his renewed Motion for a Preliminary Injunction.

> …Ord briefly alleges that "[t]he arrest and prosecution of the Plaintiff for a weapons offense, however unlawful, would immediately jeopardize his appointment as a special conservator of the peace and would call into question his suitability for a government clearance for many years to come." Pl.'s Mot. at 10. In support, he offers that "[h]is status as a Special Conservator of the Peace is predicated upon his good conduct, demonstration of ethical character, and his lack of [a] criminal record." Id. (citing SCOP Appointment at 2)). But Ord has not demonstrated that this alleged harm is anything more than speculative. Although the appointment order indicates that one's status as a special conservator is predicated, in part, on one's "Good Moral and Ethical Character," SCOP Appointment at 2, Ord points to no evidence suggesting that being prosecuted for a weapons

> offense, but ultimately being found innocent, or succeeding in dismissing the charges through this challenge, would imperil one's appointment as a special conservator of the peace, or his suitability for a government clearance. See Nat'l Ass'n of Psychiatric Health Sys. v. Shalala, 120 F. Supp. 2d 33, 44 (D.D.C. 2000) (plaintiffs must offer "concrete, reliable evidence to support their contentions of irreparable harm"). Absent such evidence, the Court cannot conclude that this alleged harm is actual or imminent.

ECF Document # 27 at 5-6.

> …Ord contends that "his order of appointment specifically states that he is a 'Qualified Law Enforcement Officer' for the purposes of the Law Enforcement Officers Safety Act of 2004." Pl.'s Mot. at 7. Not so. Ord's appointment order states only that "the Appointee Shall be considered to meet the requirements of a 'Qualified Law Enforcement Officer' under 18 U.S.C. § 926B(c)(1)." SCOP Appointment at 4; see also id. at 3. Section 926B(c)(1), in turn, defines one additional requirement an employee of a government agency must meet in order to be a qualified law enforcement officer: he must be "authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and ha[ve] statutory powers of arrest." Therefore, Ord's appointment order confirms only that he has met this one additional requirement of section 926B(c)(1). See Va. Code § 19.2-18 ("Every conservator of the peace shall have authority to arrest without a warrant in such instances as are set out in §§ 19.2-19 and 19.2-81."). But neither the order nor section 926B(c)(1) say anything about Ord's status as an employee of a government agency. Because there is no evidence that Ord is an employee of a government agency, Ord has not established a likelihood that he is a "qualified law enforcement officer" within the meaning of LEOSA.
>
> Although Ord's argument that he is a law enforcement officer of Virginia or its subdivisions and therefore is immune from the District's firearm's laws stands on somewhat firmer ground, he has not shown a likelihood of success on the merits of this claim either. Under D.C. Code § 7-2502.01(b), the statute referenced in Ord's arrest warrant, the District's registration requirement for firearms does not apply to "any law enforcement officer or agent of the government of any state or subdivision thereof." Ord contends that he is covered by this exception because his appointment order deems him a law enforcement officer for purposes of "Article 4 (37.2-808 et seq.)

> of Chapter 8 of Title 37.2" of the Virginia code. SCOP Appointment at 3; see also Va. Code. § 19.2-13 ("The [appointment] order may also provide that the special conservator of the peace is a 'law-enforcement officer' for the purposes of Article 4 (§ 37.2-808 et seq.) of Chapter 8 of Title 37.2."). Section 37.2-808 and the subsequent code section, in turn, concern the emergency custody and involuntary temporary detention of individuals with mental illnesses…. The appointment order, then, appears to render Ord a law enforcement officer for the narrow purposes of section 37.2-808. And therefore it is plausible that Ord's limited appointed as a law enforcement officer for purposes of section 37.2-808 satisfies section 7-2502.01(b).
>
> Nevertheless, the parties do not discuss, and the Court has been unable to determine, whether a limited appointment as a law enforcement officer fulfills section 7-2502.01(b) – that is, whether the fact that Ord is a law enforcement officer only for the narrow emergency custody and involuntary detention of individuals with mental illnesses purpose of section 37.2-808 makes him a "law enforcement officer or agent of the government of any state or subdivision thereof" for purposes of District of Columbia law. Hence, at this stage of the litigation, the Court cannot conclude that Ord has demonstrated a substantial likelihood of success on the merits of this argument.

Id. 7-9 [footnote omitted].[1]

IV. Argument

In issuing what amounts to an open invitation for the District of Columbia to arrest and prosecute Robert Ord, the District Court has undermined and acted contrary to the mandate of this Court in *Ord*, 587 F.3d 1136. The District Court's adoption of the Defendant's spurious legal arguments, thoroughly refuted by Ord

[1] This is a complete departure from the District Court's prior deference to Ord's Order of Appointment. See *Ord*, 573 F. Supp. 2d at 90.

on appeal and not adopted by this Court, and the District Court's present contention that Ord's arrest and prosecution does not amount to irreparable harm make the District Court's denial of his preliminary injunction "clear and indisputable" error that will be "irremediable on ordinary appeal". *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000). The All Writs Act authorizes this Court to "issue all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The traditional use of the writ of mandamus in aid of appellate jurisdiction "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

> Not only must the error be clear; it must be irremediable by the regular appellate remedies. And ordinarily the inconvenience, lost time, and sunk costs of such further proceedings as could have been avoided by correcting the trial judge's error are not considered the kind of irremediable harm that will satisfy the stringent requirements for issuing a writ of mandamus. It could of course be argued that when the error is clear, of course the appellate court should correct it at once; the court will have to do it sooner or later--why not sooner? But the court may not have to do it later; the error may be mooted by the victory of the party against whom it was committed. And to determine whether an error is clear enough to warrant immediate correction can itself be a time-consuming endeavor. . . . If as we have seen the ordinary inconvenience of a new trial cannot justify the use of the writ, still, extraordinary inconveniences may do so.

Occidental Petroleum, 217 F.3d at 295, n.8 (quoting *Maloney v. Plunkett*, 854 F.2d 152, 154-55 (7th Cir. 1988)). See also *Wuterich v. Murtha*, 562 F.3d 375, 387

(D.C. Cir. 2009); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (citing *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 191 (1831) ("noting that Blackstone believed the writ of mandamus '"issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, whenever the same is delayed."'")).

> As the writ is one of "the most potent weapons in the judicial arsenal," [*Will v. United States*, 389 U.S. 90, 107 (1967)], three conditions must be satisfied before it may issue. *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403 (1976). First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," *ibid*.--a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process, [*Ex parte Fahey*, 332 U.S. 258, 260 (1947)]. Second, the petitioner must satisfy "'the burden of showing that [his] right to issuance of the writ is "clear and indisputable."'" *Kerr*, *supra*, at 403 (quoting [*Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953)]). Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Kerr*, *supra*, at 403 (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 112, n. 8 (1964)). These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrass[ing] the executive arm of the Government," *Ex parte Peru*, 318 U.S. 578, 588 (1943), or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations," *Will*, *supra*, at 95 citing *Maryland v Soper (No. 1)*, 270 U.S. 9 (1926).

Cheney v. United States Dist. Court, 542 U.S. 367, 380-381 (2004) [parallel citations omitted]. See *Hollingsworth v. Perry*, 130 S. Ct. 705, 710 (2010).

1. Ord's right to immediate injunctive relief is "clear and indisputable".

From April 24, 2008, the very same day that Ord was denied judicial review of his claimed exemption in the Superior Court, he has endeavored without delay to seek relief from the ongoing threat of his unwarranted arrest and prosecution. On that date, Ord had a judge in chambers hearing scheduled in Superior Court to quash a pending warrant issued by the Defendant's Attorney General. See J.A. 14. Within 24 hours of learning of the existence of the warrant, Ord's attorney had sought relief directly from the Attorney General, providing documentary evidence of Ord's status as a law enforcement agent of the Commonwealth of Virginia. Not only did the Attorney General not withdraw the patently defective warrant, its prosecutors outright lied to Ord's attorney, telling him that it would not go forward with the warrant, reasonably causing Ord's attorney to not seek relief from the courts at that time. Once Ord's attorney learned that not only had the Attorney General not withdrawn the warrant but the Defendant's Metropolitan Police Department was actively canvassing Ord's workplace *in Virginia* attempting to execute the warrant.[2]

[2] It is self-evident that execution of the warrant in Virginia by the local police would have further deprived Ord of any judicial review of the bases for the warrant until *after* he had been jailed and extradited back to the District of Columbia, thus drastically compounding Ord's injuries - even if he were later acquitted.

On April 24, 2008, the Attorney General's prosecutor approached Ord's attorney as he walked through the courthouse towards the judge in chambers office and announced the warrant was withdrawn, only minutes before the scheduled hearing. See J.A. 9. Once again deprived of judicial review, Ord's attorney immediately drafted and filed the initial Complaint in this case and applied for emergency injunctive relief that same day. J.A. 21. The District Court in short order denied Ord's temporary restraining order and dismissed his case outright on jurisdictional grounds. J.A. 33. On remand, the District Court somehow managed to chastise Ord for the lapse of time in his efforts to seek injunctive relief.

> Specifically, he states that he has "reasonably refrained from entering the District to pursue his licensed and lawful business interests because of the District of Columbia's demonstrated intent to prosecute him," and therefore "has lost over one hundred thousand dollars in income for his business." Id.; see also Pl.'s Reply in Supp. Of Renewed Mot. ("Pl.'s Reply") [Docket Entry 26], at 6. To support these allegations, Ord relies on his 2008 affidavit discussing the status of Falken Industries. See Pl.'s Reply at 6 (citing Ord Aff.). But such evidence -- now two years old -- cannot demonstrate that Ord currently faces irreparable harm absent an injunction.

ECF Docket # 27 at 5.

Thus, the District Court negates the validity of Ord's claims due to the delay in their hearing by two years, a delay solely caused by the now reversed dismissal of his case by the District Court in 2008. Ord relies upon his 2008 affidavits in part because really nothing has changed since then. His company abandoned its contracts in the District of Columbia in 2008 solely because of the Defendant's

unwarranted threat of prosecution. As this Court amply stated, Ord remains "effectively exiled" from the District of Columbia. *Ord*, 587 F.3d at 1146. The District of Columbia has never recanted its intention to prosecute Ord, the District Court's May 10, 2010 decision encourages it, and as Ord remains exiled, his contracts remain abandoned.[3]

a. Ord's categorical exemption from District of Columbia weapons laws is clear.

The District Court's sophistry in denying Ord his claimed exemption to District of Columbia weapons laws amounts to a negation of Ord's Order of Appointment made by the Orange County Circuit Court. J.A. 4.[4]

> …Ord contends that "his order of appointment specifically states that he is a 'Qualified Law Enforcement Officer' for the purposes of the Law Enforcement Officers Safety Act of 2004." Pl.'s Mot. at 7. Not so. Ord's

[3] While Ord's economist expert has now calculated the loss in sales to Ord's company caused by the Defendant's conduct to total $621,000.00 through the end of 2009 and such losses are obviously ongoing, Ord focuses herein rather upon the District Court's unsupported assertion that his unlawful arrest and prosecution by the Defendant (or Ord's abstention from otherwise lawful conduct because of it), *would not amount to irreparable harm*.

[4] Subsequent to the filing of this case, Ord has received an additional Special Conservator of the Peace appointment for the 20th Judicial Circuit from the Fauquier County Circuit Court giving him the identical conservator of the peace authority throughout three additional counties. *In re Robert Ord*, CL09-522 (Va. Cir. Ct., September 21, 2009). The Fauquier appointment contains the same LEOSA language as his Orange appointment. See *Ord*, 587 F.3d at 1138 (citing 18 U.S.C. § 926B).

> appointment order states only that "the Appointee Shall be considered to meet the requirements of a 'Qualified Law Enforcement Officer' under 18 U.S.C. § 926B(c)(1)." SCOP Appointment at 4; see also id. at 3. …But neither the order nor section 926B(c)(1) say anything about Ord's status as an employee of a government agency. Because there is no evidence that Ord is an employee of a government agency, Ord has not established a likelihood that he is a "qualified law enforcement officer" within the meaning of LEOSA.

ECF Document # 27 at 7-8.

At once, the District Court misstates LEOSA and misunderstands the nature of Ord's appointment as a law enforcement agent for the Commonwealth of Virginia. In doing so, the District Court undermines the express intent of the Virginia Circuit Court in making the appointment. Under Code of Virginia § 19.2-13 A, the authority to make such appointments are conferred solely upon the Circuit Court by the Virginia legislature as an exercise of its sovereignty. Such appointment process amounts to a docketed case, which may be contested by other parties and requires the taking of evidence or testimony in support. See *id.* (requiring "a showing by the applicant of a necessity for the security of property or the peace and presentation of evidence that the person or persons to be appointed as a special conservator of the peace possess a valid registration").

The second-guessing of the District Court regarding the Virginia Circuit Courts' intent in appointing Ord to office amounts to appellate review of the state appointment, authority which neither this Court nor the District Court have.

> "states are sovereign, save only as Congress may constitutionally subtract from their authority," municipalities are not themselves sovereign, nor do they receive "the federal deference of the States that create them" unless the anticompetitive activity in suit was undertaken by the municipality acting as the state's agent at the state's direction. But regulation by a state legislature of admission to the state's bar clearly would stand on an entirely different footing, as does that activity when conducted by a state court endowed with the "ultimate" authority to do so. In either case, the regulatory act brings to bear the sovereignty of the state, and immunity from federal antitrust liability attaches.

Feldman v. Gardner, 661 F.2d 1295, 1306 (D.C. Cir. 1981) [footnotes omitted] *reversed on other grounds*, 460 U.S. 462 (1983). See also *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.")

The District Court's present reading of LEOSA in the context of Ord's appointment is a construction which negates the very purpose of the Circuit Courts' insertion of the language in the appointment.

> (c) As used in this section, the term "qualified law enforcement officer" means an employee of a governmental agency who--
>
> (1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;

18 U.S.C. § 926B.

Ord cannot "be considered to meet the requirements of a 'Qualified Law Enforcement Officer' under 18 U.S.C. § 926B(c)(1)" unless he meets the predicate language of (c) itself. There can be no reading of Ord's Order of Appointment

which does not incorporate the language "employee of a governmental agency" by direct implication. If Ord is not an "employee of a governmental agency" then he cannot "be considered to meet the requirements of a 'Qualified Law Enforcement Officer' under 18 U.S.C. § 926B(c)(1)". It cannot be said that a Circuit Court intended to insert such non-operative language into its order.

The District Court spends entirely too much effort parsing the language of Code of Virginia § 9.1-101, in evident conflict with the intent of the Virginia Circuit Courts, and yet completely ignores the inherent "agency" nature of Ord's appointment. Ultimately, Ord is an employee of a governmental agency because he is *ex officio*, a government agent.

i. The status of a Conservator of the Peace as a law enforcement agent of the state is well settled by the state court of last resort for Virginia.

Ord's Orange County Order of Appointment sets forth that Ord "Shall have and be entitled to all the powers, functions, duties, responsibilities and authority of any other Conservator of the Peace…" J.A. 5. Nevertheless, the District Court describes Ord's appointment as "limited".

> Nevertheless, the parties do not discuss, and the Court has been unable to determine, whether a limited appointment as a law enforcement officer fulfills section 7-2502.01(b) – that is, whether the fact that Ord is a law enforcement officer only for the narrow emergency custody and involuntary detention of individuals with mental illnesses purpose of section 37.2-808

> makes him a "law enforcement officer or agent of the government of any state or subdivision thereof" for purposes of District of Columbia law.

ECF Docket # 27 at 9.

This conclusion at once conflicts with the District Court's own acknowledgment of Ord's statutory powers of arrest in the same opinion. *Id*. at 7 (citing Code of Virginia § 19.2-18 ("Every conservator of the peace shall have authority to arrest without a warrant in such instances as are set out in §§ 19.2-19 and 19.2-81.")). § 19.2-81 is the code section upon which *any* State Trooper, Sheriff or municipal Police Officer in Virginia derives their fundamental "law enforcement" authority, the ability to make a warrantless arrest beyond traditional common law limitations. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 343-345 (2001). To acknowledge Ord's statutory arrest authority and yet deny that as a Conservator of the Peace he is a "law enforcement officer" in nearly the same

breath demonstrates the District Court's fundamental (but hardly unique[5]) ignorance of the nature of Ord's office.

> At common law, the constable's office was twofold. As conservator of the peace, he possessed, *virtute officii*, a "great original and inherent authority with regard to arrests," 4 W. Blackstone, COMMENTARIES *292 [], and could "without any other warrant but from [himself] arrest felons, and those that [were] probably suspected of felonies," 2 M. Hale, PLEAS OF THE CROWN 85 (1736)…

Payton v. New York, 445 U.S. 573, 605 (1980) WHITE, J. dissenting.

[5] The District Court's "limited appointment" language echoes the incorrectly decided *Terrell v. Petrie*, 763 F. Supp. 1342, 1347 (E.D. Va. 1991) *aff'd* 952 F.2d 397. *Terrell* asserted, without authority in support, that "conservators of the peace have limited powers, and are not the equivalent of law enforcement officers" and incorrectly asserted that conservators of the peace cannot make an arrest on a warrant under Virginia law. *Id*. As described herein, Virginia conservators of the peace have *the same* arrest authority as any other police officer under Code of Virginia § 19.2-81 and that code section specifically addresses arrest warrants.

> Such officers may arrest, without a warrant or a capias, persons duly charged with a crime in another jurisdiction upon receipt of a photocopy of a warrant or a capias…, in which photocopy of a warrant…shall be given the name or a reasonably accurate description of such person wanted and the crime alleged.
>
> Such officers may arrest, without a warrant or a capias, for an alleged misdemeanor not committed in his presence when the officer receives a radio message from his department or other law-enforcement agency within the Commonwealth that a warrant or capias for such offense is on file.

CODE OF VIRGINIA § 19.2-81.

A Conservator of the Peace is defined as a public official authorized to conserve and maintain the public peace. BLACK'S LAW DICTIONARY, 6th ed. Under common law, Conservators of the Peace included judges[6], police, sheriffs, and constables[7]. Virginia Code specifically lists Virginia judges, magistrates, commissioners in chancery, Commonwealth Attorneys, various United States government agents and some other specific law enforcement officers and investigators as Conservators of the Peace. CODE OF VIRGINIA § 19.2-12.

> The king is mentioned as the first. Then come the chancellor, the treasurer, the high steward, the master of the rolls, the chief justice ant the justices of the King's-bench, all the judges in their several courts, sheriffs, coroners, constables; and some are said to be conservators by tenure, some by prescription, and others by commission.

Entick v. Carrington, 19 Howell's STATE TRIALS, 1029, 1061 (1765).

[6] "In England, by the common law, the Lord Chancellor and all the Judges of the Court of King's Bench, among other high officials, by virtue of their offices, are general conservators of the peace throughout the whole kingdom, and may commit all violators of the peace, or bind them in recognizances to keep it; but the other Judges are only so in their own Courts. 1 Black. COMM., 350." *In re Glenn*, 54 Md. 572, 597-598 (1880).

[7] "A constable and sheriff are conservators of the peace at the common law." *Commonwealth v. Gorman*, 288 Mass. 294, 296-297 (1934) (quoting *Sharrock v. Hannemer*, Cro. Eliz. 375, 376 (1595)). "A policeman is an officer whose duties have been, for local convenience, carved out of the old duties of constable, and the constables were always part of the general force at the disposal of the sheriff. There is no division of authority into those of the sheriff and the police. Each is a conservator of the peace possessing such power as the statutes authorize." *State ex rel. McKittrick v. Williams*, 346 Mo. 1003, 1014-1015 (1940).

Members of a police force of a locality in Virginia are "hereby invested with all the power and authority which formerly belonged to the office of constable at common law and are responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances." CODE OF VIRGINIA § 15.2-1704.

> Sheriffs are, *ex officio*, conservators of the peace within their respective counties, and it is their duty, as well as that of all constables, coroners, marshals and other peace officers, to prevent every breach of the peace, and to suppress every unlawful assembly, affray or riot which may happen in their presence

City of Chi. v. Morales, 527 U.S. 41, 108 (1999) THOMAS, J., dissenting (quoting J. Crocker, DUTIES OF SHERIFFS, CORONERS AND CONSTABLES § 48, 33 (2d ed. rev. 1871)). See 2002 VA. ATT'Y GEN. OP. 65 at 4 (quoting *Commonwealth ex rel. Davis v. Malbon*, 195 Va. 368, 371 (1953) (Sheriff "is also a conservator of the peace and charged with the enforcement of all criminal laws within his jurisdiction.")).

> As conservator of the peace in his county or bailiwick, he is the representative of the king, or sovereign power of the State for that purpose. He has the care of the county, and, though forbidden by *magna charta* to act as a justice of the peace in trial of criminal cases, he exercises all the authority of that office where the public peace was concerned. He may upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it; he may award process of the peace, and bind any one in recognizance to keep it. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody. For these purposes he may command the *posse*

> *comitatus* or power of the country; and this summons, every one over the age of fifteen years is bound to obey, under pain of fine and imprisonment.

South v. Md., 59 U.S. 396, 402 (1856).

For more than seventy years, the Virginia Supreme Court has consistently held that an officer in the employment of a private company remains an agent of the Commonwealth when in the performance of pubic duties.

> For many years, private employers have employed special officers pursuant to special officer statutes, see [Virginia] Code § 56-353; *Norfolk & W. Ry. Co. v. Haun*, 167 Va. 157, 160-62 (1936), or, as in this case, cooperative agreements between police departments and private employers, pursuant to Code § 15.2-1712. Not surprisingly then, this Court has considered a number of cases involving the liability of a private company for the tortious acts of an off-duty police officer occurring while the officer was in the employ of the private company. As the City contends, this Court has acknowledged that a person who is a police officer is not precluded from also acting in the capacity of an agent or employee of a private employer. *Clinchfield Coal Corp. v. Redd*, 123 Va. 420, 431 (1918). However, this Court has consistently held that, when considering tort liability, it is a factual question whether the officer was acting as an employee of the private employer or as a public officer enforcing a public duty when the wrongful conduct occurred. *Id.* at 431, 435; accord *Glenmar Cinestate, Inc. v. Farrell*, 223 Va. 728, 735 (1982); *Norfolk Union Bus Terminal, Inc. v. Sheldon*, 188 Va. 288, 294-95 (1948); *Haun*, 167 Va. at 160-61, 165, 167. We most recently reaffirmed this principle in *Godbolt v. Brawley*, 250 Va. 467, 472-73 (1995).

City of Alexandria v. J-W Enters., Inc., 2010 Va. LEXIS 50, 10-11 (Va. Apr. 15, 2010) [parallel citations omitted].

> "[T]he test is: in what capacity was the officer acting at the time he committed the acts for which the complaint is made? If he is engaged in the performance of a public duty such as the enforcement of the general laws, his employer incurs no vicarious liability for his acts, even though the employer directed him to perform the duty. On the other hand, if he was

> engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer, it becomes a jury question as to whether he was acting as a public officer or as an agent, servant, or employee."

J-W Enters., Inc. at 11-12 (quoting *Godbolt*, 250 Va. at 472-73).

The Fourth Circuit applied this Virginia Supreme Court caselaw specifically to a 42 U.S.C. § 1983 tort claim against a privately employed Special Conservator of the Peace appointed under Code of Virginia §19.2-13.

> Because Austin presented no evidence that Gatewood acted other than in her capacity as a public officer in effecting Austin's July 14, 1994 arrest and assisting with the prosecution, Paramount cannot be held vicariously liable with respect to Austin's claims for false arrest (July 14, 1994) and malicious prosecution. See *Glenmar*, 292 S.E.2d at 369 ("If [the officer was] engaged in the performance of a public duty such as the enforcement of the general laws, his employer incurs no vicarious liability for his acts. . . ."). We conclude, therefore, that Paramount was entitled to judgment as a matter of law on both claims.

Austin v. Paramount Parks, Inc., 195 F.3d 715, 731-732 (4th Cir. 1999).

Regardless of the employer, a Conservator of the Peace remains a representative of the sovereign in the performance of his law enforcement functions.

> The police officers of a city are not regarded as servants or agents of the municipality. They are conservators of the peace, and exercise many of the functions of sovereignty; they are appointed and paid by the municipality as a convenient mode of exercising the functions of government; they assist the city in the performance of its governmental duties, and not in the discharge of its proprietary obligations.

Hall v. Shreveport, 157 La. 589, 594 (1925).

That a Conservator of the Peace is employed by a municipality is of no consequence as the Conservator of the Peace acts on behalf of the state, not the county, city or town when taking police action. This holds true for many other government agents in the employ of non-state entities. For example, the Washington Metropolitan Area Transit Authority and the Metropolitan Washington Airports Authority both have uniformed police officers with state agent law enforcement authority despite not being necessarily a part of any state or local government. See *Commonwealth v. Deep Dalal*, 39 Va. Cir. 91 (1996); *Martin v. Washington Metropolitan Area Transit Authority*, 667 F.2d 435, 436 (4th Cir. 1981). Even this very Courthouse is guarded by employees of a private security company under contract with the United States Marshals Service Office of Court Security, who like Ord, are private employees clothed with governmental law enforcement agency authority.

ii. Virginia law recognizes the employer of a Special Conservator of the Peace as a governmental agency.

As the Special Conservator of the Peace is a government agent in the performance of police functions, it logically follows that the entity that employs the Conservator is a governmental agency, regardless of whether the entity is public or private. Through its employees, that entity performs inherently governmental functions and the exercise of the Commonwealth's sovereignty on

behalf of the Commonwealth's government. This is reflected in Virginia Code defining a private employer of Special Conservators of the Peace as a Virginia Criminal Justice Agency.

> "*Criminal justice agency*" means (i) a court or any other governmental agency or subunit thereof which as its principal function performs the administration of criminal justice and any other agency or subunit thereof which performs criminal justice activities, but only to the extent that it does so; (ii) for the purposes of Chapter 23 (§ 19.2-387 *et seq*.) of Title 19.2, any private corporation or agency which, within the context of its criminal justice activities employs officers appointed under § 15.2-1737, or special conservators of the peace or special policemen appointed under Chapter 2 (§ 19.2-12 *et seq*.) of Title 19.2, provided that (a) such private corporation or agency requires its officers, special conservators or special policemen to meet compulsory training standards established by the Criminal Justice Services Board and submits reports of compliance with the training standards and (b) the private corporation or agency complies with the provisions of Article 3 (§ 9.1-126 *et seq*.) of this chapter, but only to the extent that the private corporation or agency so designated as a criminal justice agency performs criminal justice activities; and (iii) the Office of the Attorney General, for all criminal justice activities otherwise permitted under subdivision (i) and for the purpose of performing duties required by the Civil Commitment of Sexually Violent Predators Act (§ 37.2-900 *et seq*.).

CODE OF VIRGINIA § 9.1-101.

The District Court's purported concern regarding Ord's employer's compliance with "provisions of Article 3 (§ 9.1-126 et seq.) of this chapter", ECF Docket # 27 at 7, n.4, is a red herring argument. As processing of arrests is conducted exclusively by the Sheriff's Office of the locality where the arrest occurred, for both private and public employees, see *Martin*, *supra*, all criminal history records are maintained, and therefore compliance with Article 3 conducted,

by the Sheriff's Office and the Virginia State Police as the NCIC Control Terminal Agency. See CODE OF VIRGINIA § 9.1-127. Any further compliance with the security and dissemination of records is a mandatory predicate to access of such records. See CODE OF VIRGINIA §§ 9.1-135 and 136 (civil remedies and criminal penalty for violations of the chapter). As the Circuit Court has expressed its intent that Ord "be considered to meet the requirements of a 'Qualified Law Enforcement Officer' under 18 U.S.C. § 926B(c)(1)" it necessarily follows that the Court recognizes that Ord is an employee of a governmental agency as described herein.[8]

iii. The *ex officio* powers of a Virginia Conservator of the Peace meet <u>all</u> requirements for exemption from District of Columbia weapons prohibitions.

The District Court seems to at once acknowledge, yet then inexplicably retreats from recognition of Ord's law enforcement powers as granting him exemption from District of Columbia weapons prohibitions. As discussed on appeal, the D.C. Superior Court occasioned to analyze the definition of "law enforcement officer" for the purpose of exemptions from District of Columbia

[8] Not unlike this Court's exercise of control and direction over its own Marshals, as an appointed officer of the Circuit Court, Ord could be further considered an "employee" of *the Circuit Court itself* as contemplated in *Seattle Opera v. NLRB*, 292 F.3d 757, 765 (D.C. Cir. 2002). See *e.g.* CODE OF VIRGINIA § 19.2-74 B (Ord's authority to issue summonses on behalf of the Commonwealth's courts in the same manner as a magistrate).

weapons laws in *United States v. Savoy*, D.C. Super. Ct. Crim. No. F-5748-98 (2001). THE DAILY WASHINGTON LAW REPORTER, Vol. 129, Num. 89, 877.[9]

> The District of Columbia Court of Appeals has consistently held that individuals whose job is primarily to protect property, rather than life, are not considered "police officers or other duly appointed law-enforcement officers" for the purposes of Section 22-3205. *McKenzie v. United States*, 158 A.2d 912, 914 (D.C. 1960), *Franklin v. United States*, 271 A.2d 784, 786 (D.C. 1970), *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979). Special police officers are not covered *Per Se* by Section 22-3205 because, by statute, they are appointed "for duty in connection with the property of" their employer. D.C. Code Ann. § 4-114 (1981).
>
> …the critical question was whether, by his employment, defendant's primary responsibility as a "police officer" was the protection of life and therefore a "policeman or other duly appointed law-enforcement officer" as defined by Section 22-3205.

Savoy at 878, discussing predecessor to D.C. CODE § 22-4505.

Virginia Special Conservators of the Peace are appointed "upon the showing of a necessity for the security of property *or the peace*". VA. CODE § 19.2-13 [emphasis added]. The *Savoy* Court went on to consider if an officer had law enforcement powers throughout a jurisdiction, or only upon the property of the employer.

> Postal Service police officers have police powers only on United States Postal Service property and have only the powers of a citizen in enforcing District of Columbia law. 40 U.S.C. § 318.
> …
> Unlike municipal police officers, PPOs do not have jurisdiction over all property, public or private, within the physical boundaries of their jurisdiction.

[9] The *Savoy* opinion is reproduced in the Appendix of this Petition.

Savoy at 880.

Ord's police powers in Virginia are derived from the same code section as a State Trooper or a Deputy Sheriff, Code of Virginia § 19.2-81 (applicable to Conservators of the Peace by operation of Code of Virginia § 19.2-18), and extend throughout the jurisdiction of Orange County, Virginia. J.A. 5.[10] As an agent of the State with statutory powers of arrest extending throughout his jurisdiction, Ord meets the *Savoy* definition of a "duty appointed law enforcement officer" for the purposes of District of Columbia law.

On appeal, the District of Columbia improperly attempted to interpret passages within the D.C. Code to construct limitations which do not exist within the law. Opp'n Br. 16. Ord pointed the *Savoy* analysis as specifically dispositive of this issue. Reply Br. at 20-21.

b. Ord has demonstrated an imminent threat of irreparable injury.

By far the most disconcerting element of the District Court's May 10, 2010 opinion was the proclamation that Ord's arrest and prosecution would not amount to irreparable harm.

> …Ord has not demonstrated that this alleged harm is anything more than speculative. Although the appointment order indicates that one's status as a

[10] And three additional counties with his 2009 appointment. See note 4, *supra*.

> special conservator is predicated, in part, on one's "Good Moral and Ethical Character," SCOP Appointment at 2, Ord points to no evidence suggesting that being prosecuted for a weapons offense, but ultimately being found innocent, or succeeding in dismissing the charges through this challenge, would imperil one's appointment as a special conservator of the peace, or his suitability for a government clearance. See Nat'l Ass'n of Psychiatric Health Sys. v. Shalala, 120 F. Supp. 2d 33, 44 (D.D.C. 2000) (plaintiffs must offer "concrete, reliable evidence to support their contentions of irreparable harm"). Absent such evidence, the Court cannot conclude that this alleged harm is actual or imminent.

ECF Docket # 27 at 6. The District Court cites no authority in support of this proposition, and the caselaw clearly dictates to the contrary. As recognized by this Court, "the arrest warrant effectively exiled [Ord] from the District of Columbia, thus restricting his ability to travel and causing him substantial injury." *Ord*, 587 F.3d at 1146. Ord's freedom to travel in the District of Columbia "is a constitutional liberty closely related to rights of free speech and association". *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964). See also *Id*. at 519-520, DOUGLAS, J. concurring.

> The word "travel" is not found in the text of the Constitution. Yet the "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence. *United States v. Guest*, 383 U.S. 745, 757 (1966). Indeed, as Justice Stewart reminded us in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the right is so important that it is "assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all." *Id*., at 643 (concurring opinion).

Saenz v. Roe, 526 U.S. 489, 498 (1999) [parallel citations omitted]. Ord's "exile" alone sufficiently demonstrates irreparable harm requiring emergency injunctive relief.

> We have already seen that where, as here, prosecutions are actually threatened, this challenge, if not clearly frivolous, will establish the threat of irreparable injury required by traditional doctrines of equity…As we observed in *Baggett v. Bullitt*, [377 U.S. 360, 378 (1964)], this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others.

Dombrowski v. Pfister, 380 U.S. 479, 490-491 (1965). See also *Elrod v. Burns*, 427 U.S. 347, 374 (1976).

> Cases such as *Dombrowski* [], and *Steffel v. Thompson*, 415 U.S. 452 (1974), both cited by plaintiffs, allow anticipatory relief against threatened state law enforcement; but these cases turned on that enforcement's deterrent threat to plaintiffs' constitutional, in particular First Amendment, rights. (In *Dombrowski*, moreover, enforcement was alleged to be in bad faith, "only to discourage appellants' civil rights activities." 380 U.S. at 490.)

Barwood, Inc. v. District of Columbia, 202 F.3d 290, 294 (D.C. Cir. 2000) [parallel citation omitted].

> These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

NAACP v. Button, 371 U.S. 415, 433 (1963).

> In this Court's view, there can be no injury more irreparable than being illegally arrested, with its attendant detention at D.C. Jail, risk of bodily harm while held there, receipt of an arrest record, presentment before the court to make bail, facing of charges and public humiliation, and risk of adverse employment consequences as a result of the time lost. This serious injury justifies entering an injunction. See [*Dombrowski*, 380 U.S. at 497] (holding that prosecution and threats of prosecution alleged sufficient irreparable harm to justify injunction); *Rubinstein v. Brownell*, 206 F.2d 449, 456 (D.C. Cir. 1953) (holding that illegal arrest would constitute irreparable loss of personal liberty).

Barwood, Inc. v. District of Columbia, 1999 U.S. Dist. LEXIS 21427 (D.D.C. 1999) [parallel citation omitted] *vacated on jurisdictional grounds* 202 F.3d 290 (D.C. Cir. 2000). Given Ord's security clearance and court appointments predicated entirely upon his lack of criminal history, the "adverse employment consequences" to Ord resulting from an arrest and pending prosecution would be profound and severe. See *e.g.* DOD Directive 5200.2-R (requiring individuals with access to classified information to report any criminal conduct).[11]

Ord need not make any further showing of irreparable harm.[12]

[11] http://www.js.pentagon.mil/whs/directives/corres/pdf/520002r.pdf (accessed May 22, 2010).

[12] With the inherently illegal conduct of the District of Columbia in its prosecution of Ord, the District Court's public policy argument hardly warrants acknowledgement, let alone rebuttal. See *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) (the government is not harmed when it is enjoined from enforcing an unconstitutional statute).

2. Ord has "no other adequate means to attain the relief".

Upon learning of its existence, Ord immediately sought review of the warrant by the Superior Court and the Defendant prevented it. Ord immediately sought injunctive relief from the District Court and the District Court dismissed his case. Ord timely sought appellate review from this Court and this Court reversed the District Court. On remand, Ord renewed his request for injunctive relief and the District Court denied it, adopting arguments properly disregarded by this Court on appeal. Ord now has no other option now to avoid prosecution other than this writ.

Given the District Court's reversal of *its own prior positions* regarding Ord's law enforcement status, only upon this Court's reversal of the District Court's dismissal, a writ of mandamus "is appropriate under the circumstances". Given that the District Court has acted in a vindictive manner in all but expressly inviting the District of Columbia to arrest and prosecute Ord for a crime he did not commit, mandamus is the only means of relief available to Ord.

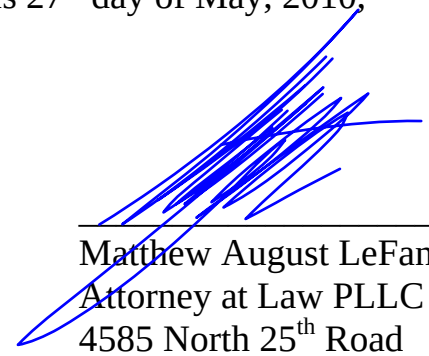
> This rendered an appeal from final judgment inadequate and counseled strongly for immediate mandamus relief to prevent the horses from irretrievably exiting the barn.

In re Cheney, 544 F.3d 311, 314 (D.C. Cir. 2008).

V. Conclusion

For these reasons, and for such other reasons as the Court finds to be good and sufficient cause, this Court should direct the District Court to enter Ord's preliminary injunction forthwith.

Respectfully submitted, this 27th day of May, 2010,



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18 U.S.C. § 926B. Carrying of concealed firearms by qualified law enforcement officers

(a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

(b) This section shall not be construed to supersede or limit the laws of any State that--
(1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or
(2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

(c) As used in this section, the term "qualified law enforcement officer" means an employee of a governmental agency who--
(1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;
(2) is authorized by the agency to carry a firearm;
(3) is not the subject of any disciplinary action by the agency;
(4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;
(5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
(6) is not prohibited by Federal law from receiving a firearm.

(d) The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer.

(e) As used in this section, the term "firearm" does not include--
(1) any machinegun (as defined in section 5845 of the National Firearms Act [26 USCS § 5845]);
(2) any firearm silencer (as defined in section 921 of this title [18 USCS § 921]); and
(3) any destructive device (as defined in section 921 of this title [18 USCS § 921]).

D.C. Code § 7-2502.01. Registration requirements [Formerly § 6-2311]

(a) Except as otherwise provided in this unit, no person or organization in the District of Columbia ("District") shall receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device, and no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm.
…
(b) Subsection (a) of this section shall not apply to:

(1) Any law enforcement officer or agent of the District or the United States, or any law

enforcement officer or agent of the government of any state or subdivision thereof, or any member of the armed forces of the United States, the National Guard or organized reserves, when such officer, agent, or member is authorized to possess such a firearm or device while on duty in the performance of official authorized functions;
…

D.C. Code § 22-4504. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty [Formerly § 22-3204]

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515…

D.C. Code § 22-4505. Exceptions to § 22-4504 [Formerly § 22-3205]

(a) The provisions of § 22-4504 shall not apply to marshals, sheriffs, prison or jail wardens, or their deputies, policemen or other duly appointed law enforcement officers, including special agents of the Office of Tax and Revenue, authorized in writing by the Deputy Chief Financial Officer for the Office of Tax and Revenue to carry a firearm while engaged in the performance of their official duties, and criminal investigators of the Office of the Inspector General, designated in writing by the Inspector General, while engaged in the performance of their official duties, or to members of the Army, Navy, Air Force, or Marine Corps of the United States or of the National Guard or Organized Reserves when on duty, or to the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States, provided such members are at or are going to or from their places of assembly or target practice, or to officers or employees of the United States duly authorized to carry a concealed pistol, or to any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business, or to any person while carrying a pistol, transported in accordance with § 22-4504.02, from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business or in moving goods from one place of abode or business to another.

Code of Virginia § 19.2-12. Who are conservators of the peace

Every judge and attorney for the Commonwealth throughout the Commonwealth and every magistrate within the geographical area for which he is appointed or elected, shall be a conservator of the peace. In addition, every commissioner in chancery, while sitting as such commissioner; any special agent or law-enforcement officer of the United States Department of Justice, National Marine Fisheries Service of the United States Department of Commerce, Department of Treasury, Department of Agriculture, Department of Defense, Department of State, Office of the Inspector General of the Department of Transportation, Department of Homeland Security, and Department of Interior; any inspector, law-enforcement official or

police personnel of the United States Postal Inspection Service; any United States marshal or deputy United States marshal whose duties involve the enforcement of the criminal laws of the United States; any officer of the Virginia Marine Police; any criminal investigator of the Department of Professional and Occupational Regulation, who meets the minimum law-enforcement training requirements established by the Department of Criminal Justice Services for in-service training; any criminal investigator of the United States Department of Labor; any special agent of the United States Naval Criminal Investigative Service, any special agent of the National Aeronautics and Space Administration, and any sworn municipal park ranger, who has completed all requirements under § 15.2-1706, shall be a conservator of the peace, while engaged in the performance of their official duties.

Code of Virginia § 19.2-13. Special conservators of the peace; authority; jurisdiction; registration; bond; liability of employers; penalty; report

A. Upon the application of any sheriff or chief of police of any county, city, town or any corporation authorized to do business in the Commonwealth or the owner, proprietor or authorized custodian of any place within the Commonwealth, a circuit court judge of any county or city shall appoint special conservators of the peace who shall serve as such for such length of time as the court may designate, but not exceeding four years under any one appointment, upon a showing by the applicant of a necessity for the security of property or the peace and presentation of evidence that the person or persons to be appointed as a special conservator of the peace possess a valid registration issued by the Department of Criminal Justice Services in accordance with the provisions of subsection B. However, a judge may deny the appointment for good cause, and shall state the specific reasons for the denial in writing in the order denying the appointment. The order of appointment may provide that a special conservator of the peace shall have all the powers, functions, duties, responsibilities and authority of any other conservator of the peace within such geographical limitations as the court may deem appropriate within the confines of the county, city or town that makes application or within the county, city or town where the corporate applicant is located, limited, except as provided in subsection E, to the judicial circuit wherein application has been made, whenever such special conservator of the peace is engaged in the performance of his duties as such. The order may also provide that the special conservator of the peace is a "law-enforcement officer" for the purposes of Article 4 (§ 37.2-808 et seq.) of Chapter 8 of Title 37.2. The order may also provide that the special conservator of the peace may use the title "police" on any badge or uniform worn in the performance of his duties as such. The order may also provide that a special conservator of the peace who has completed the minimum training standards established by the Department of Criminal Justice Services, has the authority to affect arrests, using up to the same amount of force as would be allowed to a law-enforcement officer employed by the Commonwealth or any of its political subdivisions when making a lawful arrest. The order also may (i) require the local sheriff or chief of police to conduct a background investigation which may include a review of the applicant's school records, employment records, or interviews with persons possessing general knowledge of the applicant's character and fitness for such appointment and (ii) limit the use of flashing lights and sirens on personal vehicles used by the conservator in the performance of his duties. Prior to granting an application for appointment, the circuit court shall ensure that the applicant has met the registration requirements established by the Criminal Justice Services Board.

B. Effective September 15, 2004, no person shall seek appointment as a special conservator of the peace from a circuit court judge without possessing a valid registration issued by the Department of Criminal Justice Services, except as provided in this section. Applicants for registration may submit an application on or after January 1, 2004. A temporary registration may be issued in accordance with regulations established by the Criminal Justice Services Board while awaiting the results of a state and national fingerprint search. However, no person shall be issued a temporary registration until he has (i) complied with, or been exempted from the compulsory minimum training standards as set forth in this section, (ii) submitted his fingerprints on a form provided by the Department to be used for the conduct of a national criminal records search and a Virginia criminal history records search, and (iii) met all other requirements of this article and Board regulations. No person with a criminal conviction for a misdemeanor involving (a) moral turpitude, (b) assault and battery, (c) damage to real or personal property, (d) controlled substances or imitation controlled substances as defined in Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2, (e) prohibited sexual behavior as described in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, (f) firearms, or (g) any felony, shall be registered as a special conservator of the peace. All appointments for special conservators of the peace shall become void on September 15, 2004, unless they have obtained a valid registration issued by the Department of Criminal Justice Services.

C. Each person registered as or seeking registration as a special conservator of the peace shall be covered by (i) a cash bond, or a surety bond executed by a surety company authorized to do business in the Commonwealth, in a reasonable amount to be fixed by the Board, not to be less than $ 10,000, conditioned upon the faithful and honest conduct of his business or employment; or (ii) evidence of a policy of liability insurance or self-insurance in an amount and with coverage as fixed by the Board. Any person who is aggrieved by the misconduct of any person registered as a special conservator of the peace and recovers a judgment against the registrant, which is unsatisfied in whole or in part, may bring an action in his own name against the bond or insurance policy of the registrant.

D. Individuals listed in § 19.2-12, individuals who have complied with or been exempted pursuant to subsection A of § 9.1-141, individuals employed as law-enforcement officers as defined in § 9.1-101 who have met the minimum qualifications set forth in § 15.2-1705 shall be exempt from the requirements in subsections A through C. Further, individuals appointed under subsection A and employed by a private corporation or entity that meets the requirements of subdivision (ii) of the definition of criminal justice agency in § 9.1-101, shall be exempt from the registration requirements of subsection A and from subsections B and C provided they have met the minimum qualifications set forth in § 15.2-1705. The Department of Criminal Justice Services shall, upon request by the circuit court, provide evidence to the circuit court of such employment prior to appointing an individual special conservator of the peace. The employing agency shall notify the circuit court within 30 days after the date such individual has left employment and all powers of the special conservator of the peace shall be void. Failure to provide such notification shall be punishable by a fine of $ 250 plus an additional $ 50 per day for each day such notice is not provided.

E. When the application is made, the circuit court shall specify in the order of appointment the

name of the sheriff or chief of police of the applicant county, city, town or the name of the corporation, business or other applicant and the geographic jurisdiction of the special conservator of the peace. Court appointments shall be limited to the judicial circuit wherein application has been made. In the case of a corporation or other business, the court appointment may also include, for good cause shown, any real property owned or leased by the corporation or business, including any subsidiaries, in other specifically named cities and counties, but shall provide that the powers of the special conservator of the peace do not extend beyond the boundaries of such real property. Effective July 1, 2004, the clerk of the appointing circuit court shall transmit a copy of the order of appointment that shall specify the following information: the person's complete name, address, date of birth, social security number, gender, race, height, weight, color of hair, color of eyes, firearm authority or limitation as set forth in subsection F, date of the order, and other information as may be required by the Department of State Police. The Department of State Police shall enter the person's name and other information into the Virginia Criminal Information Network established and maintained by the Department pursuant to Chapter 2 (§ 52-12 et seq.) of Title 52. The Department of State Police may charge a fee not to exceed $ 10 to cover its costs associated with processing these orders. Each special conservator of the peace so appointed on application shall present his credentials to the chief of police or sheriff or his designee of all jurisdictions where he has conservator powers. If his powers are limited to certain areas owned or leased by a corporation or business, he shall also provide notice of the exact physical addresses of those areas. Each special conservator shall provide a temporary registration letter issued by the Department of Criminal Justice Services prior to seeking an appointment by the circuit court. Once the applicant receives the appointment from the circuit court the applicant shall file the appointment order with the Department of Criminal Justice Services in order to receive his special conservator of the peace photo registration card.

If any such special conservator of the peace is the employee, agent or servant of another, his appointment as special conservator of the peace shall not relieve his employer, principal or master, from civil liability to another arising out of any wrongful action or conduct committed by such special conservator of the peace while within the scope of his employment.

Effective July 1, 2002, no person employed by a local school board as a school security officer, as defined in § 9.1-101, shall be eligible for appointment as a conservator for purposes of maintaining safety in a public school in the Commonwealth. All appointments of special conservators of the peace granted to school security officers as defined in § 9.1-101 prior to July 1, 2002 are void.

F. The court may limit or prohibit the carrying of weapons by any special conservator of the peace initially appointed on or after July 1, 1996, while the appointee is within the scope of his employment as such.

Code of Virginia § 19.2-18. Powers and duties generally

Every conservator of the peace shall have authority to arrest without a warrant in such instances as are set out in §§ 19.2-19 and 19.2-81. Upon making an arrest without a warrant, the

conservator of the peace shall proceed in accordance with the provisions of § 19.2-22 or § 19.2-82 as the case may be.

Code of Virginia § 19.2-74. Issuance and service of summons in place of warrant in misdemeanor case; issuance of summons by special policemen and conservators of the peace

A. 1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

2. Whenever any person is detained by or is in the custody of an arresting officer for a violation of any county, city, or town ordinance or of any provision of this Code, punishable as a Class 3 or Class 4 misdemeanor or any other misdemeanor for which he cannot receive a jail sentence, except as otherwise provided in Title 46.2, or to the offense of public drunkenness as defined in § 18.2-388, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving of such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

3. Any person so summoned shall not be held in custody after the issuance of such summons for the purpose of complying with the requirements of Chapter 23 (§ 19.2-387 et seq.) of this title. Reports to the Central Criminal Records Exchange concerning such persons shall be made after a disposition of guilt is entered as provided for in § 19.2-390.

Any person refusing to give such written promise to appear under the provisions of this section shall be taken immediately by the arresting or other police officer before a magistrate or other issuing authority having jurisdiction, who shall proceed according to provisions of § 19.2-82.

Any person who willfully violates his written promise to appear, given in accordance with this section, shall be treated in accordance with the provisions of § 19.2-128, regardless of the disposition of, and in addition to, the charge upon which he was originally arrested.

Any person charged with committing any violation of § 18.2-407 may be arrested and immediately brought before a magistrate who shall proceed as provided in § 19.2-82.

B. Special policemen of the counties as provided in § 15.2-1737, special policemen or conservators of the peace appointed under Chapter 2 (§ 19.2-12 et seq.) of this title and special policemen appointed by authority of a city's charter may issue summonses pursuant to this section, if such officers are in uniform, or displaying a badge of office. On application, the chief law-enforcement officer of the county or city shall supply each officer with a supply of summons forms, for which such officer shall account pursuant to regulation of such chief law-enforcement officer.

Code of Virginia § 19.2-81. Arrest without warrant authorized in certain cases

The following officers shall have the powers of arrest as provided in this section:

1. Members of the State Police force of the Commonwealth;

2. Sheriffs of the various counties and cities, and their deputies;

3. Members of any county police force or any duly constituted police force of any city or town of the Commonwealth;

4. The Commissioner, members and employees of the Marine Resources Commission granted the power of arrest pursuant to § 28.2-900;

5. Regular conservation police officers appointed pursuant to § 29.1-200;

6. United States Coast Guard and United States Coast Guard Reserve commissioned, warrant, and petty officers authorized under § 29.1-205 to make arrests;

7. The special policemen of the counties as provided by § 15.2-1737, provided such officers are in uniform, or displaying a badge of office;

8. Conservation officers appointed pursuant to § 10.1-115; and

9. Full-time sworn members of the enforcement division of the Department of Motor Vehicles appointed pursuant to § 46.2-217.

Such officers may arrest, without a warrant, any person who commits any crime in the presence of the officer and any person whom he has reasonable grounds or probable cause to

suspect of having committed a felony not in his presence.

Any such officer may arrest without a warrant any person whom the officer has probable cause to suspect of operating a watercraft or motor boat (i) while intoxicated in violation of subsection B of § 29.1-738 or (ii) in violation of an order issued pursuant to § 29.1-738.4, in his presence, and may thereafter transfer custody of the person suspected of the violation to another officer, who may obtain a warrant based upon statements made to him by the arresting officer.

Any such officer may, at the scene of any accident involving a motor vehicle, watercraft as defined in § 29.1-712 or motorboat, or at any hospital or medical facility to which any person involved in such accident has been transported, or in the apprehension of any person charged with the theft of any motor vehicle, on any of the highways or waters of the Commonwealth, upon reasonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a crime has been committed by any person then and there present, apprehend such person without a warrant of arrest. For purposes of this section, "the scene of any accident" shall include a reasonable location where a vehicle or person involved in an accident has been moved at the direction of a law-enforcement officer to facilitate the clearing of the highway or to ensure the safety of the motoring public. In addition, such officer may, within three hours of the occurrence of any such accident involving a motor vehicle, arrest without a warrant at any location any person whom the officer has probable cause to suspect of driving or operating such motor vehicle while intoxicated in violation of § 18.2-266, 18.2-266.1, 46.2-341.24, or a substantially similar ordinance of any county, city, or town in the Commonwealth.

Such officers may arrest, without a warrant or a capias, persons duly charged with a crime in another jurisdiction upon receipt of a photocopy of a warrant or a capias, telegram, computer printout, facsimile printout, a radio, telephone or teletype message, in which photocopy of a warrant, telegram, computer printout, facsimile printout, radio, telephone or teletype message shall be given the name or a reasonably accurate description of such person wanted and the crime alleged.

Such officers may arrest, without a warrant or a capias, for an alleged misdemeanor not committed in his presence when the officer receives a radio message from his department or other law-enforcement agency within the Commonwealth that a warrant or capias for such offense is on file.

Such officers may also arrest without a warrant for an alleged misdemeanor not committed in their presence involving (i) shoplifting in violation of § 18.2-96 or 18.2-103 or a similar local ordinance, (ii) carrying a weapon on school property in violation of § 18.2-308.1, (iii) assault and battery, (iv) brandishing a firearm in violation of § 18.2-282, or (v) destruction of property in violation of § 18.2-137, when such property is located on premises used for business or commercial purposes, or a similar local ordinance, when any such arrest is based on probable cause upon reasonable complaint of the person who observed the alleged offense. The arresting officer may issue a summons to any person arrested under this section for a misdemeanor violation involving shoplifting.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT L. ORD, **Plaintiff,** **v.** **DISTRICT OF COLUMBIA,** **Defendant.**	**Civil Action No. 08-704 (JDB)**

MEMORANDUM OPINION and ORDER

Robert Ord brings this action against the District of Columbia for violations of the Fourth and Fifth Amendments, and for malicious prosecution and intentional infliction of emotional distress under District law. Before the Court is Ord's renewed motion for a preliminary injunction, which seeks to restrain the District and its agents from arresting or prosecuting him for violations of the District of Columbia's firearms laws.[1] Upon consideration of Ord's motion, the parties' several memoranda, the applicable law, and the entire record herein, and for the reasons set forth below, the Court will deny Ord's motion for a preliminary injunction.

BACKGROUND

The Court, and the parties, have been here before. See Ord, 573 F. Supp. 2d at 90-91; see also Ord, 587 F.3d at 1138-40. Therefore, the Court only briefly recounts the facts underlying Ord's motion.

Ord is the sole owner of Falken Industries, a private security company. See Aff. of

[1] The Court previously dismissed Ord's complaint for lack of standing, and accordingly denied his first motion for a preliminary injunction. See Ord v. District of Columbia, 573 F. Supp. 2d 88, 96 (D.D.C. 2008). On appeal, the D.C. Circuit concluded that Ord had standing to bring his claims. See Ord v. District of Columbia, 587 F.3d 1136, 1138 (D.C. Cir. 2009).

Robert Ord ("Ord Aff.") [Docket Entry 9], ¶ 5. In 2007, he was appointed a special conservator of the peace by the Virginia Circuit Court of Orange County. Compl. ¶ 12. The appointment permits Ord "to carry firearms while acting within the course and scope of his employment and appointment as a special conservator of the peace, so long as a firearms certification is maintained." Compl., Ex. A (special conservator of the peace appointment ("SCOP Appointment")), 4. It also designates Ord as a "qualified law enforcement officer" pursuant to a provision of the Law Enforcement Officers Safety Act of 2004 ("LEOSA"), 18 U.S.C. § 926B. See id.

In 2008, the Washington D.C. Metropolitan Police Department ("MPD") issued a memorandum to MPD Reserve Corps Members, warning such members who also serve as special conservators of the peace that they have "no authority to carry a firearm in the District of Columbia" unless they are qualified law enforcement officers under LEOSA. Compl. ¶ 18 & Ex. B (MPD Memorandum), 1. Apparently based on this conclusion, the MPD issued an arrest warrant against Ord in April 2008, alleging that Ord had possessed unregistered firearms and ammunition in violation of D.C. Code § 7-2502.01. Compl. ¶ 19. The Office of the Attorney General subsequently abandoned the warrant, declaring a nolle prosequi. Compl. ¶¶ 28-29. Ord neither was arrested nor was taken into custody.

On the same day the District nullified the warrant, Ord commenced this action.[2] He also asked this Court to enjoin the District from enforcing its firearms statutes against him. Underlying this request was Ord's belief that, as a special conservator of the peace, he was

[2] He has since supplemented his complaint to add two new constitutional claims: a claim for deprivation of a property interest, and an additional claim for deprivation of a liberty interest. Supplemental Compl. ¶¶ 23-36.

immune from prosecution under the District's firearms laws. The Court denied his motion for a preliminary injunction when it dismissed his complaint for lack of standing. See Ord, 573 F. Supp. 2d at 95. Ord now renews that motion.

STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy, one that should be granted only when the moving party, by a clear showing, carries the burden of persuasion. See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); see also Munaf v. Geren, 128 S. Ct. 2207, 2219 (2008). To obtain a preliminary injunction, the moving party must demonstrate (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable harm without injunctive relief, (3) that an injunction would not substantially harm the defendants or other interested parties (balance of harms), and (4) that issuance of the injunction is in the public interest. See Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006); Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004).

A district court facing a motion for a preliminary injunction must "'balance the strengths of the requesting party's arguments in each of the four required areas.'" Chaplaincy of Full Gospel Churches, 454 F.3d at 297 (quoting CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995)). Despite this flexibility, "a party seeking a preliminary injunction must demonstrate . . . a likelihood of success on the merits." Munaf, 128 S. Ct. at 2219 (internal quotation marks omitted). Further, "[a] movant's failure to show any irreparable harm is . . . grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." Chaplaincy of Full Gospel Churches, 454 F.3d at 297; see also Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375 (2008) (a plaintiff must

"demonstrate that irreparable injury is likely in the absence of an injunction," and not a mere "possibility").

ANALYSIS

Because Ord's showing of irreparable harm is particularly weak, the other factors, even to the extent they weigh in favor of Ord, cannot justify the extraordinary remedy sought. Hence, the Court will begin its discussion with irreparable harm -- the decisive factor here.

I. Irreparable Harm

The irreparable harm requirement erects a very high bar for a movant. See Varicon Int'l v. Office of Pers. Mgmt., 934 F. Supp. 440, 447 (D.D.C. 1996). A plaintiff must show that he will suffer harm that is "more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff." Gulf Oil Corp. v. Dep't of Energy, 514 F. Supp. 1019, 1026 (D.D.C. 1981). "[T]he alleged injury must be certain, great, actual, and imminent." Hi-Tech Pharmacal Co., Inc. v. Food and Drug Admin., 587 F. Supp. 2d 1, 11 (D.D.C. 2008) (citing Wis. Gas Co. v. Fed. Energy Regulatory Comm'n, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). In this jurisdiction, harm that is "merely economic" in character is not sufficiently grave to meet this standard. See Wis. Gas, 758 F.2d at 674; Boivin v. US Airways, Inc., 297 F. Supp. 2d 110, 118 (D.D.C. 2003); Mylan Pharms., Inc. v. Shalala, 81 F. Supp. 2d 30, 42 (D.D.C. 2000). To successfully shoehorn potential economic loss into a showing of irreparable harm, then, a plaintiff must establish that the economic harm is so severe as to "cause extreme hardship to the business" or threaten its very existence. Gulf Oil, 514 F. Supp. at 1025; accord Wis. Gas, 758 F.2d at 674; Experience Works, Inc. v. Chao, 267 F. Supp. 2d 93, 96 (D.D.C. 2003); Sociedad

Anonima Vina Santa Rita v. Dep't of Treasury, 193 F. Supp. 2d 6, 14 (D.D.C. 2001).

Ord contends that, absent an injunction, he will suffer irreparable harm in two ways. First, he asserts that he will lose "revenue, business opportunities and goodwill for his company as a going concern absent declaratory and injunctive relief." Pl.'s Renewed Mot. for a Prelim. Inj. ("Pl.'s Mot.") [Docket Entry 24], at 11. Specifically, he states that he has "reasonably refrained from entering the District to pursue his licensed and lawful business interests because of the District of Columbia's demonstrated intent to prosecute him," and therefore "has lost over one hundred thousand dollars in income for his business." Id.; see also Pl.'s Reply in Supp. of Renewed Mot. ("Pl.'s Reply") [Docket Entry 26], at 6. To support these allegations, Ord relies on his 2008 affidavit discussing the status of Falken Industries. See Pl.'s Reply at 6 (citing Ord Aff.). But such evidence -- now two years old -- cannot demonstrate that Ord currently faces irreparable harm absent an injunction. He has not, for example, offered any evidence regarding the current status of Falken Industries -- even the new claims Ord asserts in his supplemental complaint rely on facts from 2008. Absent any current information, it is simply impossible to conclude that, based on alleged losses in revenue in 2008, Falken Industries (and hence Ord) faces an imminent and certain threat to its very existence in May 2010 .[3]

Second, Ord briefly alleges that "[t]he arrest and prosecution of the Plaintiff for a weapons offense, however unlawful, would immediately jeopardize his appointment as a special

[3] Even were the evidence in support of Ord's motion not stale, the Court is not persuaded that such evidence demonstrates irreparable harm. By casting irreparable harm in terms of economic harm, see Ord Aff. at ¶¶ 5, 11, 13, 32, Ord must demonstrate its severity. But alleging losses of $100,000 in the face of annual revenues of $2 million is insufficient, by itself, to show "extreme hardship to the business" or a threat to its very existence. Gulf Oil, 514 F. Supp. at 1025.

conservator of the peace and would call into question his suitability for a government clearance for many years to come." Pl.'s Mot. at 10. In support, he offers that "[h]is status as a Special Conservator of the Peace is predicated upon his good conduct, demonstration of ethical character, and his lack of [a] criminal record." Id. (citing SCOP Appointment at 2)). But Ord has not demonstrated that this alleged harm is anything more than speculative. Although the appointment order indicates that one's status as a special conservator is predicated, in part, on one's "Good Moral and Ethical Character," SCOP Appointment at 2, Ord points to no evidence suggesting that being prosecuted for a weapons offense, but ultimately being found innocent, or succeeding in dismissing the charges through this challenge, would imperilone's appointment as a special conservator of the peace, or his suitability for a government clearance. See Nat'l Ass'n of Psychiatric Health Sys. v. Shalala, 120 F. Supp. 2d 33, 44 (D.D.C. 2000) (plaintiffs must offer "concrete, reliable evidence to support their contentions of irreparable harm"). Absent such evidence, the Court cannot conclude that this alleged harm is actual or imminent.

II. Likelihood of Success on the Merits

Ord's failure to demonstrate irreparable harm is fatal to his motion for a preliminary injunction. But even if Ord could show some irreparable harm, he cannot demonstrate a sufficient likelihood of success on the merits. Animating Ord's claims is the assertion that his appointment as a special conservator of the peace renders him a "qualified law enforcement officer" for purposes of LEOSA, and a law enforcement officer of the state of Virginia or its subdivisions. In his view, the fact that he is a "law enforcement officer" immunizes him from the District of Columbia's firearms laws.

Under LEOSA, "[n]otwithstanding any other provision of the law of any State or any

political subdivision thereof, an individual who is a qualified law enforcement officer . . . may carry a concealed firearm." 18 U.S.C. § 926B(a). For purposes of the Act, "the term 'qualified law enforcement officer' means an employee of a government agency who" also satisfies several additional requirements. Id. § 926B(c); see also id. § 926B(c)(1)-(6) (listing additional requirements). But Ord does not explain how he is "an employee of a government agency." Indeed, Ord works for Falken Industries, a private security company. See Ord Aff. at ¶ 5.[4]

Nevertheless, Ord contends that "his order of appointment specifically states that he is a 'Qualified Law Enforcement Officer' for the purposes of the Law Enforcement Officers Safety Act of 2004." Pl.'s Mot. at 7. Not so. Ord's appointment order states only that "the Appointee Shall be considered to meet the requirements of a 'Qualified Law Enforcement Officer' under 18 U.S.C. § 926B(c)(1)." SCOP Appointment at 4; see also id. at 3. Section 926B(c)(1), in turn, defines one additional requirement an employee of a government agency must meet in order to be a qualified law enforcement officer: he must be "authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and ha[ve] statutory powers of arrest." Therefore, Ord's appointment order confirms only that he has met this one additional requirement of section 926B(c)(1). See Va. Code § 19.2-18 ("Every conservator of the peace shall have authority to arrest without a warrant in such instances as are set out in §§ 19.2-19 and 19.2-81."). But neither the order nor section

[4] In his earlier motion for a preliminary injunction, Ord argued that Falken Industries became a "criminal justice agency" because it employed a special conservator of the peace. See Pl.'s Opp'n to Def.'s Mot. to Dismiss [Docket Entry 10], at 21 (citing Va. Code § 9.1-101). But he offers nothing to suggest that "a criminal justice agency" is a "government agency" within the meaning of LEOSA. In any event, under Virginia law, a private corporation becomes a "criminal justice agency" when it aids the Central Criminal Records Exchange. See Va. Code § 9.1-101; id. § 19.2-387. Ord does not contend that Falken Industries does so.

926B(c)(1) say anything about Ord's status as an employee of a government agency. Because there is no evidence that Ord is an employee of a government agency, Ord has not established a likelihood that he is a "qualified law enforcement officer" within the meaning of LEOSA.

Although Ord's argument that he is a law enforcement officer of Virginia or its subdivisions and therefore is immune from the District's firearm's laws stands on somewhat firmer ground, he has not shown a likelihood of success on the merits of this claim either. Under D.C. Code § 7-2502.01(b), the statute referenced in Ord's arrest warrant, the District's registration requirement for firearms does not apply to "any law enforcement officer or agent of the government of any state or subdivision thereof." Ord contends that he is covered by this exception because his appointment order deems him a law enforcement officer for purposes of "Article 4 (37.2-808 et seq.) of Chapter 8 of Title 37.2" of the Virginia code. SCOP Appointment at 3; see also Va. Code. § 19.2-13 ("The [appointment] order may also provide that the special conservator of the peace is a 'law-enforcement officer' for the purposes of Article 4 (§ 37.2-808 et seq.) of Chapter 8 of Title 37.2."). Section 37.2-808 and the subsequent code section, in turn, concern the emergency custody and involuntary temporary detention of individuals with mental illnesses. See, e.g., Va. Code. § 37.2-808C ("The magistrate issuing an emergency custody order shall specify the primary law-enforcement agency and jurisdiction to execute the emergency custody order and provide transportation."); id. § 37.2-808G ("A law-enforcement officer who, based upon his observation or the reliable reports of others, has probable cause to believe that a person meets the criteria for emergency custody as stated in this section may take that person into custody and transport that person to an appropriate location to assess the need for hospitalization or treatment without prior authorization."). The appointment

order, then, appears to render Ord a law enforcement officer for the narrow purposes of section 37.2-808. And therefore it is plausible that Ord's limited appointed as a law enforcement officer for purposes of section 37.2-808 satisfies section 7-2502.01(b).[5]

Nevertheless, the parties do not discuss, and the Court has been unable to determine, whether a limited appointment as a law enforcement officer fulfills section 7-2502.01(b) -- that is, whether the fact that Ord is a law enforcement officer only for the narrow emergency custody and involuntary detention of individuals with mental illnesses purpose of section 37.2-808 makes him a "law enforcement officer or agent of the government of any state or subdivision thereof" for purposes of District of Columbia law. Hence, at this stage of the litigation, the Court cannot conclude that Ord has demonstrated a substantial likelihood of success on the merits of this argument.

III. Balance of Harms and the Public Interest

Ord contends that the District of Columbia will suffer no harm if an injunction issues because "[a]n injunction against inherently unlawful conduct cannot be said to injure the Defendant." Pl.'s Mot. at 11. But although Ord plausibly may fall within section 7-2502.01(b), he has not demonstrated that he will succeed on the merits of his claim. And "any time a State [or local government] is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury." New Motor Vehicle Bd. of Cal. v. Orrin W. Fox. Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit J.). Accordingly, the

[5] Ord's appointment as a special conservator of the peace also grants him "the authority to effect arrests, using up to the same amount of force as would be allowed to a law-enforcement officer employed by the Commonwealth or any of its political subdivisions when making a lawful arrest." SCOP Appointment at 3. This also plausibly supports the argument that Ord is a law enforcement officer under Virginia law.

balance of harms does not tip in favor of Ord.

Nor does the public interest support a preliminary injunction. Ord offers that both the District of Columbia, in D.C. Code § 7-2502.01(b), and Congress, in LEOSA, exempted law enforcement officers from their gun laws, and therefore "[i]t cannot be said that these exemptions have not been promulgated by both the D.C. Council and the United States Congress without being in the public's interest." Pl.'s Mot. at 12. But, as explained above, it is not clear that these exemptions apply to Ord. Hence, although of only modest relevance here, the Court finds that the public interest weighs against issuing an injunction.[6]

CONCLUSION

Ord has not established that he will suffer irreparable harm without an injunction; nor has he shown a likelihood of success on the merits of its claims. Because each is a prerequisite for the extraordinary relief Ord seeks, it is hereby

ORDERED that Ord's motion for a preliminary injunction is **DENIED**.

/s/
JOHN D. BATES
United States District Judge

Date: May 10, 2010

[6] Because the Court denies Ord's request for a preliminary injunction, it need not address the District's alternative argument that the Court cannot enjoin a future criminal proceeding. See Def.'s Opp'n to Pl.'s Renewed Mot. [Docket Entry 25], at 5-6 (discussing abstention under Younger v. Harris, 401 U.S. 37 (1971)).

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D.C. Superior Court

CRIMINAL LAW & PROCEDURE— POLICE

Postal Patrol Officer employed by U.S.Postal Service is not exempt from the law prohibiting carrying of concealed weapons (D.C.Code § 22-3204) because the job is primarily protecting property .

U.S. v SAVOY

D.C.Super.Ct.Crim No. F-5748-98 March 16,2001 Opinion per Natalia M. Ccombs Greene, J. *K.D. Clark for U.S. J.P. Byrd-Tillman for defendant.*

N.M.C. Greene, J.: This matter came before the Court on the Defendant's Oral Motion to Vacate Guilty Plea, Oral Motion for Reconsideration of Defendant's Motion to Dismiss and Oral Motion for Expungement of Records, made in open Court on October 27, 2000, the Defendant's Addendum to the Above Motions, filed on November 27, 2000, and the Government's Motion to Confirm that the Defendant is not Excepted from the District of Columbia's Gun Licensure Laws, filed on November 21, 2000.[1]

This case involves the strict firearms control laws in the District of Columbia and presents issues concerning the scope of the terms "police officer" and "law enforcement officer" as related to persons exempt from those laws. The Court examines these questions with respect to the facts presented in this case.

I.

The facts adduced during hearings on the motions and during the plea colloquy were essentially as follows. On August 8, 1998, defendant drove into the District of Columbia from Maryland for the purpose of driving a friend home. While doing so, defendant was involved in a minor motor vehicle crash in the 300 block of 37th Street in Southeast Washington. Following the crash, a verbal altercation ensued. During this verbal altercation, the driver of other vehicle[2] (hereinafter referred to as the "other driver") reached into his vehicle and opened the trunk of his car using a remote opening feature. Believing that the other driver might get a weapon from the trunk of his vehicle, defendant retrieved his United States Postal Service issued police badge and identification along with a Beretta semiautomatic pistol from his vehicle. Defendant ordered the other driver to step away from his vehicle. The other driver complied with defendant's commands, whereupon the defendant closed the trunk of the other driver's vehicle. Defendant then left the scene planning to contact the Metropolitan Police Department. In the meantime, the other driver flagged

Police — *Cont'd on page 878*

D.C. Court of Appeals

ATTORNEYS — DISCIPLINE

Attorney is suspended for 6 months nunc pro tunc followed by 2 years probation with conditions, Bar Counsel recommendation for requirement that attorney prove fitness is rejected under deferential standard.

IN RE JOSEPH A. LOPES

D.C.App.No. 97-BG-1927 April 12,2001 Opinion per Schwelb, J. (Farrell and Reid , JJ. concur) *M.E. Baurley for respondent. T.M. Tait, with J.E. Peters, for the Office of Bar Counsel. E.J. Branda, for the Board on Professional Responsibility.*

Schwelb, J: In a proposed simultaneous disposition of three District of Columbia disciplinary proceedings instituted by our Bar Counsel and one reciprocal discipline case that originated in Maryland, the Board on Professional Responsibility has recommended that Joseph A. Lopes be suspended from practice for six months, *nunc pro tunc* to July 29, 1998, and that his suspension be followed by a two-year period of probation, with conditions. Bar Counsel agrees that Lopes should be suspended for six months, but excepts to the recommended probation, arguing instead that as a condition of reinstatement following his suspension, Lopes should be required to demonstrate his fitness to practice law. Although Bar Counsel's position is not unreasonable, we apply our deferential standard of review and direct the imposition of discipline consistent with that recommended by the Board. ***.

LEGAL ANALYSIS

Bar Counsel takes issue with the Board's recommendation in two respects. First, according to Bar Counsel, "the Board erred in concluding that [Lopes] established *Kersey* [520 A2d 321 (1987)] style mitigation for any of his multiple instances of misconduct." Second, Bar Counsel challenges the recommended discipline; she asserts that Lopes should be required, at the conclusion of the six-month suspension

Discipline — *Cont'd on page 880*

"the primary duties of federal police officers are 'the preservation of peace; the prevention, detection, and investigation of crimes; the arrest or apprehension of violators; and the provision of assistance to citizens in emergency situations, including the protection of civil rights.'"

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Police

Continued from page 877

down a passing police car. After defendant returned to the scene, he was arrested and charged with carrying a pistol without a license.

II.

In his motions, defendant claimed that he was exempt from the law prohibiting the carrying of concealed weapons, D.C. Code Ann. § 22-3204 (1981) ("Section 22-3204"), because another statute, D.C. Code Ann. § 22-3205 (1981) ("Section 22-3205"), excepts "policemen or other duly appointed law-enforcement officers" from that provision.[3] At the time of the incident defendant was employed by the United States Postal Service as a "Postal Police Officer" and claimed that this job fell within the exemption outlined in Section 22-3205. The government contended that defendant, in his position, was actually equivalent to a special police officer and therefore did not fall within the exemption.

The Court agreed to hear arguments on the motions because the Court was concerned as to the legal validity of the defendant's guilty plea. Initially it was not clear that the defendant's position was that of a special police officer. One of the exhibits attached to defendant's sentencing memorandum was a letter from the Fraternal Order of Police National Labor Council No. 2 that indicated that defendant was a Postal Police Officer.[4] This Court therefore reviewed relevant case law to determine the scope of the terms at issue.

The District of Columbia Court of Appeals has consistently held that individuals whose job is primarily to protect property, rather than life, are not considered "police officers or other duly appointed law-enforcement officers" for the purposes of Section 22-3205. *McKenzie v. United States*, 158 A.2d 912, 914 (D.C. 1960), *Franklin v. United States*, 271 A.2d 784, 786 (D.C. 1970), *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979). Special police officers are not covered Per Se by Section 22-3205 because, by statute, they are appointed "for duty in connection with the property of" their employer. D.C. Code Ann. § 4-114 (1981).

If defendant was, in fact, a special police officer at the time of this incident, he would not fall within the exception found in Section 22-3205. *McKenzie v. United States*, 158 A.2d 912 (D.C. 1960). For purposes of Section 22-3204, the Court of Appeals has held that special police officers are law enforcement officers while on duty in the area of his or her assigned duty location or while travelling without deviation to and from the special police officer's place of employment immediately before or immediately after the period of actual duty.[5] *Franklin v. United States*, 271 A.2d 784, 785 (D.C. 1970), *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979). Only under those circumstances would a special police officer fall within the exemption found in Section 22-3205.

In his capacity as a Postal Service police officer, defendant is neither a special police officer as defined by District of Columbia law nor is he a member of a police department with statutory police powers in the District of Columbia. It therefore appeared, from arguments made and facts adduced at the hearing, that the critical question was whether, by his employment, defendant's primary responsibility as a "police officer" was the protection of life and therefore a "policeman or other duly appointed law-enforcement officer" as defined by Section 22-3205.

The defendant's job as a Postal Police Officer (hereinafter "PPO") is more akin to that of a special police officer than of a United States Park Police officer or Metropolitan Police Department officer. The Postal Service utilizes all of its PPOs for the protection of Postal Service property and the mails. The primary function of PPOs is not the preservation of life and the maintenance of law and order. Rather, PPOs control access to Postal Service facilities, escort the mails, and otherwise protect Postal Service property. Postal Service manuals refer to PPOs as a security force. Numerous Memoranda of Understanding between the PPO's labor union and the Postal Service explicitly state that no change in responsibility or authority took place from the time that the uniformed force was known as a security force to the force's present incarnation, the Postal Police.[6] The hierarchical structure of the Standard Position Description, *infra*, clearly indicates that the primary functions of a PPO involve physical security of property, loss prevention, and access control.

III.

In order to determine whether the defendant is exempt from Section 22-3204, the Court looked to the nature of the defendant's position. The job classification for the defendant's and other similar positions are set out in a United States Office of Personnel Management ("OPM") guide ("OPM Guide").[7] The defendant's OPM job classification is "GS-0083 Police Officer".

The OPM Guide provides that the primary duties of federal police officers are "the preservation of peace; the prevention, detection, and investigation of crimes; the arrest or apprehension of violators; and the provision of assistance to citizens in emergency situations, including the protection of civil rights."

Police — *Cont'd on page 879*

Recent Filings in DC Courts

D.C. SUPERIOR COURT
CIVIL DIVISION
NEW CASES
No., Parties, Action, Demand Amount & Plaintiff's Attorney

01-1101. D. Pindle v Aramark Corp.. Personan/al Tort: Negligence. Pro-se
01-1102. n/a
01-1103. Primus Automotive Financial Svcs. v L.A. Sinclair. Contract: Collection under $25,000.00. A.M. Hrehorovich
01-1104. Ford Motor Credit Co. v V.W. Strohman. Contract: Collection under $25,000.00. A.M. Hrehorovich
01-1105. n/a
01-1106. Primus Automotive Financial Svcs. v E.A. Gudger. Contract: Collection under $25,000.00. A.M. Hrehorovich
01-1107. n/a
01-1108. n/a
01-1109. A.A. Jefferson, et al. v J. Riddick, et al.. Personal Tort: Negligence, $500,000.00. Pro-se
01-1110. R.R. Jackson v District of Columbia. Personal Tort: Negligence, $500,000.00. Pro-se
01-1111. n/a
01-1112. n/a
01-1113. n/a
01-1114. n/a
01-1115. n/a
01-1116. M.P. Cheeks v MAIF. Contract: Breach of Contract. B.K. Cobbina
01-1117. Sullivan & Mitchell, PLLC, et al. v M. Tyree, et al.. Property Tort: Payment on a Forged Instrument. D.M. Schoenfeld
01-1118. n/a
01-1119. n/a
01-1120. M.A. Ramzan v Amalgamated Casualty Ins. Co., et al.. Contract: Breach of Contract. D.F. White
01-1121. n/a

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In an administrative decision, the OPM outlined four indicators to determine whether a job has a security-focused mission or a police-focused mission.[8] These indicators are: 1) the basic mission of the organization; 2) arrest authority; 3) training; and 4) patterns of work. As analyzed by the OPM, however, these factors are not dispositive of the issue as to whether the defendant was a policeman or other duly appointed law-enforcement officer under section 22-3205. *Middleton v. United States* 305 A.2d 259 (D.C. 1973). An examination of the factors outlined by the OPM Guide does, however, provide the Court with a useful algorithm for determining whether the defendant falls within the exemption as outlined in section 22-3205. Although the OPM finds that Postal Service police officers are police officers for purposes of job classification, for the reasons set out below, this Court finds that the defendant was not a policeman or other duly appointed law-enforcement officer under Section 22-3205 of D.C. Code.

The mission of the United States Postal Inspection Service's (hereinafter the "Inspection Service") uniformed arm is as follows:

> The purpose of the Security Force at any facility is security and protection. Security Force personnel should restrict their activities in all postal workroom areas to routine patrols, as specified in post instructions, and specific emergency requests by postal supervisors. All instances of Security Force personnel being in postal workroom areas, other than routine patrols called for by duty assignments and emergency situations, should be at the direction of the Security Supervisor.

U.S. Postal Service Postal Police Officer's Manual at 211 (1983). By contrast, the mission statement of the Metropolitan Police Department is "[t]o prevent crime and the fear of crime, as we work with others to build safe and healthy communities throughout the District of Columbia."

As detailed in an affidavit submitted in support of the government's opposition, the uniformed force of the Inspection Service was created in 1970 and at that time was referred to as the "Postal Security Force". The basic mission of the Postal Security Force "was to control access to postal facilities, provide protection of postal property and security for postal service-operated buildings." In 1971, that mission was expanded to include responsibility for "controlling access, maintaining order, preventing mail thefts, safeguarding customers and employees, and providing basic security for buildings operated by the Postal Service." In 1981, as a result of a collective bargaining agreement with the union representing the officers of the security force, the position title was changed from "Security Police Officer" to "Postal Police Officer". The parties agreed that this change did not augment or otherwise change the duties or authority for the members of this security force.[9]

In support of his argument that his position was that of a bona fide police officer, defendant relied upon the Standard Position Description for Postal Police Officers.[10] That portion of the description subsection entitled "Duties and Responsibilities" is reproduced below in its entirety because the language is instructive in divining the true nature of the defendant's employment.

> Performs a variety of duties related to the security of a postal installation, its buildings, employees, equipment, mail, and mail-in-transit, under the guidance and instruction of a security supervisor.
>
> Carries a firearm and exercises standard care required by the Inspection Service on firearms and use of reasonable force. Maintains assigned firearms in good conditions.
>
> Receives training in patrolling an assigned area on foot or by motor vehicle to maintain order and the general safeguarding of the facility, property, and employees. Prevents depredation, loss or damage of mail, by making observations in mail handling areas.
>
> Receives training in controlling access to buildings at an assigned post and enforces regulations requiring identification.
>
> As instructed, maintains a log of all incidents reported and a daily log of orders and basic information for the security force.
>
> As instructed, performs hourly checks: accounts for lost and found items, answers the telephone, and processes reports and inquiries.
>
> Responds to emergencies and other conditions, including burglaries and hold-ups, requiring immediate attention to maintain order and to prevent injury or theft to employees or property.
>
> Makes arrests and testifies in court on law violations within assigned authority.
>
> Performs other job related tasks in support of the primary duties.

The defendant specifically cited to numbers seven (7) and eight (8) to support his argument that his job is more analogous to that of a bona fide police officer. A fatal flaw in this argument, however, is that numbers one (1), three (3), four (4), five (5), and six (6) are most analogous to that of a special police officer whose primary

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Recent Filings in DC Courts *continued*

01-1122. R. Ageypong v J.N. Phillips. Personal Tort: Negligence, $100,000.00. B.F. Selig

01-1123. T.A. Kennerly, et al. v Douglas Dvlpt. Corp.. Contract: Collection over $25,000.00. B.M. Timian

01-1124. n/a

01-1125. Montague Plumbing & Heating Inc. v I.M. James, et al.. Contract: Interference, Personal Tort: Deceit, $500,000.00. P.A. Artis

01-1126. n/a

01-1127. n/a

01-1128. n/a

01-1129. Patuxent Flooring & Design, Inc. v United American, Inc., etal.. Contract: Collection under $25,000.00. D.B. Lamb

01-1130. District of Columbia, et al. v PSS & Assocs., inc.. Contract: Collection over $25,000.00. R. Herschthal

01-1131. First Select Corp. v M.L. Sweatt. Foreign Judgement. S.A. Kramer

01-1132. Bank of America v E.J. Rangel. Foreign Judgement. S.A. Kramer

01-1133. EMCC, Inc. v R. Emerson. Foreign Judgement. S.A. Kramer

01-1134. Discover Financial Svcs. v R.L. Williams. Foreign Judgement. S.A. Kramer

01-1135. MAIF v J.R.D. Cockrell, Jr.. Insurance/ Subrogation under $25,000.00. B. Rice

01-1136. n/a

01-1137. n/a

01-1138. F. Barnes v G. Bennett. Personal Tort: Automobile, $250,000.00. R.F. Silber

01-1139. n/a

01-1140. n/a

01-1141. B. Zeldis v Marriott Corp., et al.. Personal Tort: Personal Injury, $1 million. J. Strum

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mission is that of property protection. While both a special police officer and a Postal Police Officer may respond to emergencies, make arrests and testify in court, these are not their primary responsibilities.

An examination of the second prong of the OPM Guide's algorithm is also instructive. Federal police officers have the same police powers on federal property as do those officers given statutory police authority under District of Columbia law.[11] *See* 40 U.S.C. § 318 and D.C. Code. Ann. § 22-581 (1981). Postal Service police officers have police powers only on United States Postal Service property and have only the powers of a citizen in enforcing District of Columbia law. 40 U.S.C. § 318. Provisions do exist to extend statutory police powers found in D.C. Code Ann. § 23-581 (1981) to Postal Service Police Officers. D.C. Code Ann. § 4-192 (1981). The Postal Service can enter into a cooperative agreement with the Metropolitan Police Department coordinated through the United States Attorney for the District of Columbia to "assist the [Metropolitan Police] Department in carrying out crime prevention and law enforcement activities in the District of Columbia. *Id.* However, no such agreement between the Postal Service and the Metropolitan Police Department was in place at the time of defendant's arrest.[12]

A review of the third and fourth prongs of the OPM Guide's algorithm is instructive. United States Postal Service police officers receive approximately 10 weeks of training at the Federal Law Enforcement Training Center at Brunswick, Georgia. Special Police Officers, by contrast, receive approximately one (1) week of private training. Metropolitan Police Department officers receive 600 hours, or 15 weeks of training at the Maurice T. Turner, Jr. Institute of Police Science. From the record, it is impossible to determine the type of training received by Postal Police Officers. Specifically, the Court cannot determine whether the primary emphasis of the Postal Service training is on the protection of life or property. The OPM states that the pattern of work for security guards is oriented toward the protection of property while the work of police officers is oriented toward maintaining law and order. It is clear, however, from the record that the Postal Service employs Postal Police Officers for the primary purpose of securing Postal Service property and controlling access to said property.

Less important to this analysis is the physical jurisdiction of the PPOs. The physical jurisdiction of PPOs extends only to the physical boundaries of Postal Service property – property owned or controlled by the federal government. Unlike municipal police officers, PPOs do *not* have jurisdiction over all property, public or private, within the physical boundaries of their jurisdiction.

Because it cannot be shown that defendant's position as a PPO was akin to a policeman or other duly appointed law enforcement officer or that any agreement existed between the Metropolitan Police Department and the United States Postal Service pursuant to D.C. Code Section 4-192, the Court cannot conclude that defendant was exempt from the provisions of the District of Columbia's gun licensure laws. It may be said, however, that this conclusion presents some interesting questions given the state of the law and the apparent change in job title for this particular position. Although an interesting question, the Court must be guided by an honest analysis of the facts and the law.

Accordingly, it is this 16th day of March, 2001

ORDERED that Defendant's Motions are hereby DENIED. It is further

ORDERED that Government's Motion is hereby GRANTED. It is further

ORDERED that the Defendant's guilty plea, entered on October 3, 2000, stands.

SO ORDERED.

Endnotes

[1] Defendant, pursuant to a plea agreement with the government, pleaded guilty on October 3, 2000 to the charge of attempted carrying a pistol without a license, a lesser included offense to carrying a pistol without a license. The Court, prior to sentencing, invited the parties (after some discussion) to submit pleadings on the issue as to whether defendant might in fact be exempt from the District of Columbia gun licensure laws .

[2] The driver of the other vehicle was cited by Metropolitan Police Department officers for Following Another Vehicle Too Closely, in violation of 18 D.C.M.R. 2201.4.

[3] The defendant also claimed, in the alternative, that he was exempt from Section 3204 because he had intended to take the weapon to a pistol range for target practice before he was delayed and diverted into the District of Columbia. This defense is not discussed herein because: 1) the defendant's residence, where he apparently kept the weapon, and the firing range are located in Prince George's County, Maryland, and driving from the defendant's residence to the firing range would not normally necessitate passing through the District of Columbia; and 2) defendant did not advance this argument at the time of the hearing.

[4] The Fraternal Order of Police is a law-enforcement related labor union representing United States Postal Service police officers, among others; and is, according to the union, "the world's largest organization of sworn law enforcement officers".

[5] Special police officers in the District of Columbia are imputed to have a registration certificate for the

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Recent Filings in DC Courts *continued*

01-1142. In Re: Mahzad Essalat . Changing Name to Read: Mahzad Madeleine Essalat
01-1143. n/a
01-1144. US Bank Nat'l. Assn v C. James, et al.. Contract: Breach of Contract. H.N. Bierman
01-1145. n/a
01-1146. n/a
01-1147. US Bank Nat'l. Assn v E.A. Ferebee. Contract: Breach of Contract. H.N. Bierman
01-1148. B.L. Ripley v Washington Ctr., et al.. Personal Tort: Malpratice Medical, $10 million. B.H. Kim
01-1149. In Re: Jean Mikhail Meneses. Changing Name to Read: Michael Jean Menese
01-1150. Trinity College v A. Hill. Contract: Collection under $25,000.00. J.O. Curley

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employer-issued weapon and ammunition because their employers hold the registration certificate for the firearm and the ammunition. *See Timus v. United States*, 406 A.2d 1269, 1273 (D.C. 1979). Therefore, special police officers are not held liable for the crimes of possession of an unregistered firearm and possession of unregistered ammunition.

[6] Through collective bargaining, the Postal Service made changes to the uniformed service. On September 19, 1981, the Postal Service and the then Federation of Postal Security Police signed an agreement to change the name of the uniformed officers from "Security Police Officer" to "Postal Police Officer" and issue a new type of duty holster. On April 2, 1985, the two organizations signed an agreement issuing badges inscribed with the words "Postal Police Officer". On October 12, 1994, the Fraternal Order of Police and the Postal Service signed an agreement to change the graphics on their vehicles from "Security Force" to "Postal Police."

[7] Classification Programs Div., OPM, *Grade Evaluation Guide for Police and Security Guard Positions* (1988). Furthermore, previous administrative decisions are used to help classify positions.

[8] *See* 8 Digest of Significant Classification Decisions and Opinions 6 (U.S. Office of Personal Management 1986).

[9] Affidavit of Lawrence Katz at 3, *United States v. Savoy* (F-5748-98). *See also* Memorandum of Understanding (Sept. 19, 1981); Memorandum of Understanding between the United States Postal Service and Federation of Postal Police Officers (Apr. 2, 1985); Memorandum of Understanding between the United States Postal Service and Fraternal Order of Police National Labor Council, U.S.P.S. No. 2. (Oct. 12, 1994).

[10] Standard Position Description – Postal Police Officer (A), PPO-05 at 1 (Feb. 8, 1990).

[11] The government argues that postal service police officers are akin to special police officers "because of their limited authority to carry their service issued weapon." This argument is faulty. In *United States v. Pritchett*, the court noted that the District of Columbia Department of Corrections issued firearms to their officers only while on duty at the District of Columbia jail. 470 F.2d 455, 461 (D.C. Cir. 1972). In that case, the court found that District of Columbia corrections officers fall within the exemption outlined in § 22-3205. As Postal Service property, the Inspection Service's regulation of the use of their own firearms, badges, and identifications by employees does not impact upon District of Columbia weapons laws.

[12] Government's Motion to Confirm that the Defendant is not Excepted from the District of Columbia's Gun Licensure Laws at 25 (F-5478-98).

Discipline

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recommended by the Board, to demonstrate his fitness for the practice of law. In the alternative, if the court declines to require proof of rehabilitation, then Bar Counsel asks us to impose conditions of probation more exacting and more intrusive than those proposed by the Board.

A. The standard of review.

In conformity with the applicable rule of court, our review of the Board's findings and recommendations is deferential: ***.

D.C. App. R. XI, § 9 (g)(1). The quoted rule "endorses the Board's exercise of broad discretion in handing out discipline that is subject only to a general review for abuse in that discretion's exercise." *In re Goffe*, 641 A.2d 458, 464 n.7 (D.C. 1994) (per curiam) (quoting *In re Haupt*, 422 A.2d 768, 771 (D.C. 1980) (per curiam)). The Board's recommended discipline comes to the court with a strong presumption in favor of its imposition. *Goffe, supra*, 641 A.2d at 463 (citing *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc)). "Generally speaking, if the Board's recommended sanction falls within a wide range of acceptable outcomes, it will be adopted and imposed." *Goffe, supra*, 641 A.2d at 463-64. "We must therefore, at the very least, accord respectful consideration to the Board's views." *In re Marshall*, 762 A.2d 530, 536 (D.C. 2000).

B. Kersey mitigation.

***. The *Kersey* issues have been vigorously contested before the Hearing Committee and the Board, and they have been ably briefed in this court. Without reciting in detail all of the relevant testimony, we are satisfied, upon careful consideration of the record as a whole, that the Board's analysis and recommendation are reasonable and consistent with our precedents. Under these circumstances, we must defer to the findings of the Board.

We begin our consideration of this issue with the first element of Lopes' burden under *Kersey*. It is substantially undisputed that, at the relevant times, Lopes was suffering from depression, a disability that has been held to warrant *Kersey* mitigation. *See, e.g., In re Peek*, 565 A.2d 627, 631-32 (D.C. 1989). Bar Counsel and counsel for the Board have energetically debated whether Lopes' depression was comparable to the depression suffered by the respondents in *Peek* and in some of our other cases. In our view, however, there was clear and convincing evidence to support the Board's finding that

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing petition was served upon the following person via United States Postal Service First Class Mail postage prepaid, this 27th day of May, 2010.

Todd Kim
Solicitor General
Office of the Attorney General
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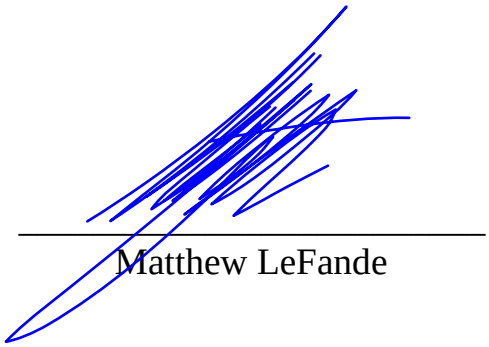

Matthew LeFande