

untitled

Opinion 17-166

December 7, 2017

Digest: A judge who serves as a firearm licensing officer must not initiate licensing revocation/suspension proceedings pursuant to Penal Law § 400.00, nor conduct one without a prosecuting agency.

Rules: NY Const art VI, § 20(b)(4); Judiciary Law §§ 16; 471; Penal Law §§ 265.00(3); 265.00(10); 400.00(10)(b); 400.00(15); 22 NYCRR 100.2; 100.2(A); 100.3(B)(1); 100.3(B)(6); 100.4(G); 100.6(B)(2); Opinions 16-09; 15-197(A); 13-33; 10-142; 10-113; 00-95; 88-147.

Opinion:

The inquiring judges ask if a judge who is a firearm licensing officer (*see* Penal Law § 265.00[10])¹ may undertake the following actions when he/she is aware of grounds for a revocation proceeding but the prosecutorial agencies have declined to initiate such a proceeding:

- (a) Initiate licensing revocation proceedings by providing notice to the pistol permit holder of the apparent grounds for revocation and an opportunity to be heard; and
- (b) thereafter conduct the pistol permit revocation/suspension proceeding without the prosecuting agency's participation and then issue findings and a determination.

The judges explain that, under the Secure Ammunition and Firearms Enforcement Act of 2013 (the "SAFE Act"), a pistol permit holder who obtained a permit prior to January 15, 2013, must re-certify before January 31, 2018. Failure to do so "shall act as a revocation of such license" (Penal Law § 400.00[10][b]). A pistol permit holder's failure to obtain the required recertification may qualify as a Class A misdemeanor (*see* Penal Law § 400.00[15]). Section 400.00(10)(b) does not facially appear to require a licensing officer to notify licensees or initiate revocation proceedings for failure to re-certify. Rather, "the *state police* shall send a notice to all license holders who have not recertified" at least "one year prior to" the recertification deadline (Penal Law § 400.00[10][b] [emphasis added]). Also, "[i]f the New York state police discover as a result of the recertification process that a licensee failed to provide a change of address, *the New York state police* shall not require the licensing officer to

revoke such license” (*id.*).

The judges further advise revocation and suspension procedures vary in this state. In some areas, district or county attorneys file a court proceeding with notice and an opportunity to be heard. In others, prosecutorial agencies decline to participate in license revocation proceedings, thereby shifting the duty to the licensing officer, who outside New York City and Long Island is generally “ a judge or justice of a court of record having [an] office in the county of issuance” (*see* Penal Law §265.00[10]). If the licensing officer is aware a license holder may be subject to revocation proceedings, he/she may face pressure to act.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act in a manner that promotes public confidence in the judiciary’s integrity and impartiality (*see* 22 NYCRR 100.2[A]). Among other restrictions, a judge must avoid improper *ex parte* communications (*see* 22 NYCRR 100.3[B][6]) and must “not be swayed by ... public clamor or fear of criticism” (22 NYCRR 100.3[B][1]). Moreover, full-time judges must not engage in the practice of law (*see* 22 NYCRR 100.4[G]; NY Const art VI, § 20[b][4]), and a part-time judge may not practice law “in the court on which the judge serves” (22 NYCRR 100.6[B][2]) or act as an attorney in any matter “originating” in that court (Judiciary Law §§ 16; 471).

We have advised judges to “maintain their independence from prosecutors and not participate or assist in ‘what is essentially the work of the prosecutor’s office’” (Opinions 16-09; 13-33; 10-113; 00-95). Indeed, “a judge must decline to act as the prosecutor’s intermediary” (Opinion 15-197[A]).

Applying these principles, a judge who is a licensing officer must not initiate license revocation proceedings by providing notice to the pistol permit holder of the alleged grounds for revocation. For example, it would readily create the impression that (1) the judge is engaging in *ex parte* communications with the affected party, (2) the judge is prosecution-oriented, (3) the judge’s impartiality is compromised, and/or (4) the judge has pre-determined the license holder’s guilt. Moreover, if a judge were to conduct a pistol permit revocation or suspension proceeding without a prosecuting agency, the judge would necessarily be perceived as a surrogate prosecutor practicing law. The positions of initiator, prosecutor and trier of facts are ethically incompatible (*see e.g.* Opinion 88-147 [town justice may not assist the town clerk in obtaining compliance with dog licensing ordinances by communicating with suspected offenders and informing them of possible violations of law]).

Ultimately, the decision to either prosecute or refrain from prosecuting pistol permit holders pursuant to Penal Law § 400.00 is a policy decision for the prosecuting agencies, not judges (*cf.* Opinion 10-142 [“The propriety of a prosecutor’s exercise of discretion in deciding whether and how to prosecute offenses raises legal issues beyond the Committee’s jurisdiction.”]).

Thus, we conclude a judge who is a firearm licensing officer must not initiate license revocation/suspension proceedings nor conduct such a proceeding without a prosecuting agency.

¹The statute uses the term “firearm,” which includes (but is not limited to) “any pistol or revolver” (Penal Law § 265.00[3]). While it might be more technically correct to refer to a “firearm permit,” we use here the more familiar term “pistol permit,” as seen in the inquiry.