STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Revocation of the Fishing, Trapping and Hunting Licenses Held

- by -

CARMINE G. ZOCCOLILLO,

Respondent.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE

DEC Case No. OHMS-64039

Appearance of Counsel:

-- J. Lee Snead, for respondent Carmine G. Zoccolillo

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Mark D. Sanza of counsel), for staff of the Department of Environmental Conservation

Respondent Carmine G. Zoccolillo requests an administrative adjudicatory hearing pursuant to State Administrative Procedure Act ("SAPA") articles 3 and 4, and part 622 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") ("Part 622") to challenge sport license revocation orders issued by staff of the Department of Environmental Conservation ("Department"). For the reasons that follow, respondent's request for an adjudicatory hearing is denied, and the proceeding is dismissed.

PROCEEDINGS

September 2008 Sport License Revocation

On September 12, 2008, Col. Walter Heinrich, License Revocation Officer in the Department's Division of Law Enforcement, issued a license revocation order revoking all the fishing, trapping and hunting licenses ("sport licenses") held by respondent Carmine G. Zoccolillo until January 1, 2010 (see License Revocation Order [9-12-08], Respondent's Reply, Exh 1 ["September 2008 revocation order"]). The revocation was based upon respondent's conviction for two violations of the Fish and Wildlife Law. Specifically, the order was based upon respondent's (1) conviction on November 6, 2006, for a violation of ECL 11-0901 (shining a spotlight for deer within 500 feet of a

dwelling), and (2) conviction on December 13, 2004, for a violation of ECL 11-0931 (spotlighting deer while in possession of a bow).

Hearing Request

By letter dated October 3, 2008, addressed to the Chief Administrative Law Judge ("ALJ") and the Division of Law Enforcement, respondent requested a hearing to challenge the September 2008 revocation order pursuant to SAPA articles 3 and 4, and either 6 NYCRR part 175 or Part 622. By letter dated October 15, 2008, Department staff objected to respondent's hearing request on the ground that the revocation order constituted a final agency action, that no appeal lies to the Department's Office of Hearing and Mediation Services ("OHMS") from such an order, and that Part 622 did not confer jurisdiction upon OHMS.

The October 15, 2008, letter also noted that respondent's sport licenses were previously revoked from August 13, 2003, to January 1, 2008, based upon four prior ECL violations: (1) ECL 11-0705 (failure to exhibit hunting license upon request); (2) ECL 11-0901 (hunting deer over pre-established bait pile); (3) ECL 11-0931(2) (use of spotlight on lands inhabited by deer while in possession of a bow); and (4) ECL 11-2113 (trespassing on posted land). Staff also noted that "[w]hile not germane to the determination in the instant matter," respondent was also convicted on October 26, 2005, of violating an out-of-state hunting statute, Wisconsin Stat. § 29.347(2) (failure to attach ear tag to deer carcass) (Sanza Letter [10-15-08], at 2 n1).

Department staff further asserted that the two convictions that served as the basis for the September 2008 revocation order were respondent's (1) conviction on July 6, 2005, in Town Court, Town of Southampton, Suffolk County for a violation of ECL 11-0931(2) (use of spotlight on lands inhabited by deer while in possession of a bow), and (2) conviction on November 6, 2006, in Town Court, Town of Southampton, Suffolk County, for a violation of ECL 11-0901(4)(e)(1) (shining a spotlight for deer within 500 feet of a dwelling).[1] Staff

[1] Department staff's October 15, 2008, letter makes no mention of the December 13, 2004, conviction expressly stated in the September 2008 revocation order as a basis for the order, nor does it explain the discrepancy between the October 15, 2008, letter and the September 2008 revocation order concerning the two

concluded that as a result of respondent's two convictions within five years, which occurred when respondent's hunting privileges in New York were still revoked by the 2003 determination, pursuant to ECL 11-0719(1)(a) and (b), the Department again revoked respondent's sport license privileges in the September 2008 revocation order.

The Department asserted that the License Revocation Officer's authority to revoke sport licenses without a hearing derived from a Commissioner's Delegation of Authority 05-11 (Division of Law Enforcement Employees To Conduct Hearings, Aug. 24, 2005, Respondent's Reply, Exh 7 ["DOA 05-11"]). In a reply dated October 28, 2008, respondent argued that although DOA 05-11 delegated to various employees in the Division of Law Enforcement the authority to act as hearing officers for hearings held under subdivision 2 of ECL 11-0719, among other sections,[2] it did not delegate to the Department's License Revocation Officer the authority to revoke licenses pursuant to subdivision 1 of ECL 11-0719, the statutory authority cited by staff as the basis for the September 2008 revocation. Accordingly, respondent argued that the License Revocation Officer acted in excess of his authority when he revoked respondent's sport license pursuant to subdivision 1 of ECL 11-0719.[3]

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convictions relied upon for the order. In light of my ruling below, it is not necessary to resolve the discrepency.

[2] Subdivision 2 of ECL 11-0719 authorizes the Department to revoke the hunting or trapping licenses of persons who kill, injure, or endanger the safety of another by the discharge of a firearm or longbow.

[3] During an email exchange between Department staff and respondent, Department staff requested that, pursuant to CPLR 4511, the ALJ take judicial notice of (1) respondent's prior license revocation from August 13, 2003 until January 1, 2008; (2) respondent's July 6, 2005 conviction; and (3) respondent's November 6, 2006 conviction (see Sanza Email [11-10-08]). Department staff also asked that, pursuant to CPLR 4511, judicial notice be taken (4) of ECL 11-0719(1)(a) and (b); (5) that ECL 11-0719(1)(a) does not require a hearing prior to license revocation; and (6) that as a result of respondent's two convictions in 2006 for offenses listed in ECL 11-0719(1)(b), the Department revoked respondent's sport license for the period from September 11, 2008 until January 1, 2010.

Department staff's request must be denied. To the extent

Delegation of Authority 08-08 and December 2008 Sport License Revocation

After argument was joined on respondent's hearing request, Department staff issued Commissioner's Delegation of Authority 08-08 (Division of Law Enforcement Employees To Revoke Licenses and Conduct Hearing ["DOA 08-08"]). DOA 08-08, which was executed by the Commissioner on November 25, 2008, supercedes DOA 05-11. In DOA 08-08, the Commissioner delegates to the Director and Assistant Director of the Division of Law Enforcement "the authority to act on my behalf for the purpose of any license revocation or hearing arising out of the application of any of the provisions of ECL Sections 11-0719," among other statutes and regulations. In addition, DOA 08-08 delegates to certain other Division of Law Enforcement employees the authority to act as hearing officers in proceedings arising under any provision of ECL 11-0719, among other statutes and regulations.

Thereafter, by letter dated December 16, 2008, the Director of the Division of Law Enforcement issued to respondent a second license revocation order dated December 15, 2008 ("December 2008 revocation order"). In his letter, the Director indicated that acting pursuant to DOA 08-08, he had rescinded the September 2008 revocation order, reviewed respondent's sporting license privileges in New York, and again revoked respondent's sporting license privileges until January 1, 2010. The Director's letter again cited the July 6, 2005, and November 6, 2006, convictions as the basis for the revocation. The December 2008 revocation order indicated that the revocation period was from September 12, 2008 to January 1, 2010.[4]

Department staff requests that I take judicial notice pursuant to CLPR 4511(a) of ECL 11-0719(1)(a) and (b), the request is denied as unnecessary. CPLR 4511(a) provides that judicial notice of the statutes of the State of New York shall be taken without request. The remaining matters staff requests judicial notice of are factual assertions that are not subject to judicial notice as matters of law under CPLR 4511. Accordingly, the remainder of staff request must be denied on this ground.

[4] As was the case with September 2008 revocation order, the face of the December 2008 revocation order relied upon a December 13, 2004, conviction as a basis for the revocation, and made no mention of a July 6, 2005, conviction. Again, the discrepancy between the Director's letter and the revocation order is unexplained, but need not be resolved.

In his final submissions in this proceeding, respondent requests that the December 2008 revocation order be addressed as part of his original demand for a hearing or, in the alternative, that he be granted a hearing to challenge the second order.

Discussion

Respondent's Request for a Hearing Pursuant to Part 622

The question presented is whether, pursuant to subdivision 1 of ECL 11-0719, respondent is entitled to an adjudicatory hearing conducted consistent with SAPA articles 3 and 4 prior to revocation of his sport license. Although I conclude that OHMS has jurisdiction to determine whether Part 622 applies to respondent's sport license revocation, for the reasons that follow, I conclude that no SAPA hearing is required for revocations pursuant to subdivision 1. Thus, procedures before OHMS under Part 622 are not available to challenge the revocation orders in this matter.

As a threshold matter, Department staff asserts that as a result of the DOAs referenced above, OHMS is "divested" of jurisdiction to entertain respondent's hearing request. In essence, staff challenges OHMS's subject matter jurisdiction over hunting license revocation proceedings.

OHMS's subject matter jurisdiction to conduct SAPA-complaint adjudicatory hearings on hunting license revocations rests on grounds that are separate and independent from the DOAs involved here. SAPA was enacted in 1975 to establish uniform procedures and legal safeguards for administrative rulemaking and adjudications (see SAPA § 100). With respect to adjudicatory proceedings, among the requirements established by article 3 of SAPA are reasonable notice of hearing, the opportunity to present evidence before an impartial hearing officer, the right to cross-examination, and restrictions on ex parte communications with the decision maker. Article 4 of SAPA extends article 3's requirements to licensing proceedings where an adjudicatory hearing is required (see SAPA § 401[1]).

Requirements for the fair and impartial conduct of administrative adjudicatory proceedings are further refined by Executive Order No. 131 (see 9 NYCRR 4.131).[5] Executive Order

[5] Executive Order No. 131 was originally issued by Governor Cuomo on December 26, 1994. The order was continued by Governors Pataki and Spitzer and, most recently, by Governor Paterson (see

No. 131 imposes a stricter ex parte communication rule on ALJs or other hearing officers than the rule contained in SAPA, and limits agency influences over the ALJs' decision making process (see id. ¶ II). Executive Order No. 131 also required agencies to develop and implement administrative adjudication plans to ensure that ALJs do not report on the merits of adjudicatory proceedings to any agency official other than the head of the agency, a supervisor of hearing officers, or the general counsel (see id. ¶ III.B.2.a). Executive Order No. 131 further requires that an agency's hearings office be separate, both structurally and physically, from program staff (see id. ¶III.B.2 & 4).

Pursuant to regulation, separate delegation of authority, and the Department's adjudication plan, OHMS is the Division within the Department authorized to conduct adjudicatory proceedings consistent with the requirements of SAPA and Executive Order No. 131 (see 6 NYCRR 622.2[l]; Commissioner's Delegation of Authority 08-02, July 2, 2008 [Chief Administrative Law Judge and Administrative Law Judges]; Final Adjudication Plan, April 26, 1990, at 2). OHMS is an independent office within the Department that conducts adjudicatory hearings on both permit applications and enforcement proceedings. OHMS is separate both physically and organizationally from the remaining Divisions of the Department, including the Office of the General Counsel and the Division of Law Enforcement, and separately reports to the Commissioner through an Assistant Commissioner.

As noted in the adjudication plan, the Department's procedures for SAPA-compliant adjudicatory enforcement proceedings are found at Part 622 (see id. at 9-10). Part 622 provides the procedural framework for permit revocation hearings based upon alleged violations of the ECL or its regulations (6 NYCRR 622.1[a][6]). Part 622 is intended to apply to, among others proceedings, fishing and hunting license revocation proceedings (see Adjudication Plan, at 9, 15). Respondent is correct that if an adjudicatory hearing is required prior to license revocation, OHMS would be the appropriate Office within the Department to conduct the hearing, and Part 622 would provide the procedures to be followed. Contrary to Department staff's assertion, OHMS has subject matter jurisdiction over hunting license revocations proceedings and, thus, has jurisdiction to determine in the first instance whether Part 622 applies to a particular hearing request.

Whether an adjudicatory hearing under SAPA is required

Executive Order No. 9 [June 18, 2008]).

prior to a Departmental license revocation, however, depends upon whether a hearing on a record is required by law. Under SAPA § 102(3), SAPA applies to adjudicatory proceedings, which are defined as "any activity . . . in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing." For licenses, SAPA § 401(1) further provides that "[w]hen licensing is required by law to be preceded by notice and opportunity for hearing, the provisions of [SAPA article 3] concerning adjudicatory proceedings apply. For purposes of this act, statutes providing an opportunity for hearing shall be deemed to include statutes providing an opportunity to be heard." Thus, when the enabling statute authorizing the Department's licensing action requires a hearing on notice to the licensee, SAPA's provisions for adjudicatory proceedings apply (see Matter of Asman v Ambach, 64 NY2d 989, 990 [1985] [hearing required where recent amendments to statute provided that licensee may present evidence or sworn testimony, that a stenographic record of the hearing must be made, and the review committee's decision must be limited to the record]; see also Matter of Mary M. v Clark, 100 AD2d 41, 43 [3d Dept 1984] [hearing under SAPA not required where no statute or regulation required proceeding on the record]; Matter of Vector East Realty v Abrams, 89 AD2d 453, 456 [1st Dept 1982], appeal withdrawn 58 NY2d 973 [1983] [hearing under SAPA not required where statute contained no requirement of a record or a hearing]).

The enabling statute in this case, subdivision 1 of ECL 11-0719, authorizes the Department to revoke any hunting, fishing or trapping license, as defined in ECL 11-0701 or issued pursuant to any provision of the Fish and Wildlife Law, based upon the licensee's conviction for specified violations of the Fish and Wildlife Law (see ECL 11-0719[1][a] and [b]). Among the bases specified as grounds for license revocation are a licensee's conviction for any two violations of the Fish and Wildlife Law within a five-year period (see ECL 11-0719[1][b][3]).

Significantly, nothing in subdivision 1 of ECL 11-0719 requires that a licensee be given a hearing on notice prior to license revocation based upon prior convictions for violations of the Fish and Wildlife Law (see Heath v Diamond, 82 Misc 2d 217, 220 [Sup Ct, Schuyler County 1975]). This is in contrast to subdivision 2 of ECL 11-0719, which provides that Departmental actions revoking hunting or trapping licenses based upon certain discharges of a firearm or longbow may only be taken "after a hearing held by the department upon notice to the offender" (ECL 11-0719[2][b]; see also Heath, 82 Misc 2d at 220). This is also in contrast to other provisions of the ECL that authorize

revocation of Departmental permits only after notice to the permittee and an opportunity for hearing (see, e.g., ECL 70-0115 [revocation of permits governed by the Uniform Procedures Act (ECL article 70)]). Because the enabling statute for hunting license revocations based upon prior convictions does not require a hearing on notice to the licensee, a SAPA adjudicatory hearing is not required by statute (see Matter of Landesman v Board of Regents, 94 AD2d 827, 827 [3d Dept 1983]).

Due process may also require an administrative adjudicatory hearing prior to agency action, even when the enabling statute does not otherwise expressly require a hearing on notice (see Matter of Mary M., 100 AD2d at 43; Matter of Vector East Realty Corp., 89 AD2d at 456-457). Where the exercise of a statutory power adversely affects property rights, the requirement of notice and hearing may be implied, even where the statute is silent (see Hecht v Monaghan, 307 NY 461, 468 [1954]). The nature of the right to take wild game as granted by a sport hunting or fishing license is not a property right protected by due process (see Heath, 82 Misc 2d at 221-222). Rather, ownership of wild animals is vested in the State in its sovereign capacity, and it is the State that is obliged to preserve and protect wild game, birds and fish for the benefit of all the people of the State (see id.). The permission to hunt granted in a sport license is not the grant of property, but merely the grant of a privilege (see id.).

Respondent has not asserted any commercial or other economic interest implicated by his sport license revocation that would elevate the hunting privilege to a property right (see id.; Hecht v Monaghan, 307 NY at 467-468). Nor does the Department seek to impose a monetary penalty in this case (see ECL 71-4003 [authorizing the Department to impose civil penalties "following a hearing or opportunity to be heard"]). Moreover, I agree with the Heath court that any due process interests implicated by basing a license revocation on a licensee's prior convictions for violations of the ECL were addressed by the notice and opportunity to be heard afforded the licensee in the criminal court proceedings that led to the prior convictions (see Heath, 82 Misc 2d at 222). Thus, under the circumstances presented here, due process does not require a SAPA hearing prior to sport license revocations under subdivision 1 of ECL 11-0719.

The case law and administrative precedent relied upon by respondent for the proposition that a pre-revocation hearing is required do not compel the conclusion asserted. Matter of Ratowski v Van Benschoten (57 AD2d 1025 [3d Dept 1977]) concerned a hunting license revocation pursuant to subdivision 2 of ECL 11-

0719 that, as noted above, provides for a pre-revocation hearing. Matter of Cattarin v Commissioner of New York State Dept. of Envtl. Conservation (79 AD2d 885 [4th Dept 1980]) involved the discharge of a firearm resulting in the injury of another person and, thus, arguably also involved a revocation under subdivision 2 of ECL 11-0719. In Matter of Robinson v Department of Envtl. Conservation (72 AD2d 878 [3d Dept 1979]), petitioner's scientific collector's license, not his hunting and trapping license, was revoked after a hearing. Moreover, petitioner apparently relied upon the scientific collector's license for his living and, accordingly, due process concerns may have warranted the hearing.

Finally, respondent is correct that an adjudicatory hearing was conducted before an ALJ in Matter of Paul Przelski (Commissioner's Decision, March 28, 1986) to determine whether a three-year revocation of respondent's hunting license was excessive. In Przelski, respondent's hunting license was revoked pursuant to subdivision 1 of ECL 11-0719 based upon three violations of the ECL. It is not clear from the decision why a hearing was held. Nothing in the Commissioner's decision or the ALJ's underlying hearing report suggests that a hearing was required, however, and to the extent respondent was afforded a hearing in the exercise of the Department's discretion, an exercise of discretion in that case does not support a conclusion that a hearing is required in this case.

Accordingly, because no SAPA adjudicatory hearing is required prior to the revocation of a sport hunting license pursuant to subdivision 1 of ECL 11-0719, respondent's request for a hearing under Part 622 to challenge the Department's revocation orders is denied.

Because proceedings under Part 622 are not available, I have no occasion to rule upon the propriety of the Department's revocations, either procedurally or substantively. The Department's revocation orders constitute final agency determinations not subject to further administrative review. Accordingly, respondent's challenges to the revocation orders must be addressed in another forum.

Ruling

Respondent Carmine G. Zoccolillo's request for an adjudicatory hearing pursuant to Part 622 is denied, and the proceeding is dismissed. In light of the above, respondent's request for a declaration that any permits or licenses now held or to be held by respondent to be in full force or effect pending

a final determination of this matter is rendered academic.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: January 30, 2009
Albany, New York