

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

_____)	
WILLIAM AKINS,)	
)	
Plaintiff,)	
vs.)	
UNITED STATES OF AMERICA,)	Civil Action No. 8:08-cv-988-T-26TGW
)	
Defendant.)	
)	
_____)	

REPLY IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Plaintiff’s Response in Opposition to Defendant’s Motion fails to show that the decision by the Bureau of Alcohol, Tobacco, and Firearms (“ATF”) to classify the Akins Accelerator as a “machinegun” is arbitrary and capricious, unlawful, or violative of his constitutional rights. Accordingly, the Court should grant Defendant’s Motion to Dismiss or in the Alternative for Summary Judgment. This brief reply will help clarify a few points raised in Plaintiff’s Response and the accompanying “Statement of Disputed Facts,” and thus aid the Court’s decision. See Plaintiff’s Response, dkt. no. 25 (“Response”); Statement of Disputed Facts, Ex. A to Response (“Statement”).

I. Plaintiff’s Statement of Disputed Facts Demonstrates That the Only Material Disputes Between the Parties are Legal, Not Factual.

This case is a challenge to final agency action, namely, ATF’s interpretation of 26 U.S.C. § 5845 and its application to the Akins Accelerator. As such, as Defendant has consistently

argued, the Court should decide it based on the administrative record, without any need to consider extrinsic facts or to permit discovery. See Defendant's Motion at 9, n.3, dkt. no. 19 ("Defendant's Motion"); Case Management Report at 1, dkt. no. 17 (July 25, 2008). Because the facts set forth in Plaintiff's "Statement of Disputed Facts" are not material to the Court's narrow review of the agency's action, the Court may resolve this matter on the basis of the existing record.¹ See Defendant's Motion at 8; Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242, 1246-47 (11th Cir. 1996) (appropriate to grant summary judgment based on the administrative record).

Indeed, Plaintiff's Statement of Disputed Facts itself confirms that Plaintiff's challenge is to ATF's interpretation. For instance, Plaintiff does not dispute that the purpose of the Akins Accelerator is to make it possible for the shooter to act once and cause the rifle to fire repeatedly until its ammunition is exhausted or until the shooter takes an action to remove his finger from the device. See Statement at ¶¶ 3-8. Notwithstanding Plaintiff's claim that Defendant has ignored the meaning of the word "automatically," Response at 13, Plaintiff acknowledges that the Akins Accelerator "bounces" the rifle back and forth, repeatedly causing the weapon to discharge by "push[ing] it into the finger." Id. at ¶¶ 6-7. Plaintiff's description makes clear that the Akins Accelerator causes a weapon to fire repeatedly, without further action by the shooter,

¹ Importantly, Plaintiff erroneously claims that the redactions and omissions in the administrative record are "unexplained" or "without explanation." Plaintiff has been furnished with a privilege log explaining the reasons for these redactions, which are entirely appropriate where statutory requirements or legal privileges limit the agency's obligation to disclose certain information. See, e.g., Tafas v. Dudas, 530 F.Supp.2d 786, 794 (E.D.Va. 2008) ("A complete administrative record, however, does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege.").

which is the factual basis for ATF's decision. See Defendant's Motion at 9, 12-13, 15. Thus, the dispute between the parties is not over the facts set forth in ¶¶ 3-8 of Plaintiff's statement, but over whether ATF has reasonably interpreted the meaning of a "single function of the trigger" to include these facts.²

The subsequent facts set forth by Plaintiff agree with those stated in the pleadings and the administrative record. The Complaint noted the reliance by both Mr. Akins and his customers on ATF's original position on the meaning of "single function of the trigger." See Compl., Ex. J, at 6; compare Statement at ¶¶ 9, 13. Plaintiff's description of the communications with ATF similarly confirms the account set forth in the Complaint. See id. at ¶¶ 9-12, 15-18. Likewise, the parties agree that the sample Akins Accelerator provided in 2003 "was made for an SKS-type semiautomatic rifle," on the contents of the memo by Richard Vasquez contained in the administrative record, and that, pursuant to ATF's decisions, the spring must be removed from Akins Accelerators. See id. at ¶ 11, n.8, ¶ 20, ¶ 19. Thus, Plaintiff's Statement of Disputed Facts presents no obstacle to resolution of this case on the basis of the pleadings and the administrative record.

² To the extent Defendant does not agree with Plaintiff's statement of these facts, or has no information about certain facts, those facts are not material to the question of whether ATF acted reasonably. For example, ATF has never attempted the procedure described in ¶¶ 3-4, but has no reason to say that Plaintiff's statement is wrong. Nor is it relevant that Defendant does not agree that is "has deemed [the spring] to be a machine gun," an erroneous inference that Plaintiff apparently arrives at from ATF's requirement that Akins Accelerators be rendered inoperative by removing those springs. See ¶ 5, n.4; ¶ 19. Similarly, while ATF cannot confirm Plaintiff's statements about the market's "response to the product," there is no indication that this fact has any bearing on the issues in this case. Id. at ¶ 14.

II. Because ATF Ruling 2006-2 Provides an Interpretive Rule, Notice and Comment is Not Required by the APA.

The Complaint describes Plaintiff's due process claim only as Defendant's alleged failure to provide him with "a hearing." Citing 5 U.S.C. § 553(b), Plaintiff now asserts that "Defendant was required to provide a notice of proposed rule making via publication in the Federal Register" before issuing ATF Ruling 2006-2. Response at 6. Plaintiff misunderstands the scope of the APA's notice-and-comment requirement. Because Ruling 2006-2 is an interpretative rule, not a substantive rule, the requirements of § 553(b) do not apply.

"The APA's notice and comment requirements apply to substantive rules established through agency rulemaking, but do not apply to interpretive rules." Hi-Tech Pharms., Inc. v. Crawford, 505 F. Supp. 2d 1341, 1351 (N.D. Ga. 2007) (citing 5 U.S.C. 553(b)). "Substantive rules are those that implement statutes and have the force and effect of law." Id. In contrast, "[i]nterpretive rules are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" Id. (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979)). Ruling 2006-2 spells out how ATF is interpreting the definition of machinegun contained in 26 U.S.C. § 5845(b) in the context of a device like the Akins Accelerator, and is therefore an interpretive rule to which the APA's notice and comment requirements do not apply.

Under similar circumstances in York v. Secretary of Treasury, the 10th Circuit recognized that an ATF ruling on whether to classify a device as a machinegun is an "administrative interpretation of an existing statute," based on its discussion of how to define the terms in the statute. 774 F.2d 417, 419-20 (10th Cir. 1985). Noting that the ruling contained "elements of both adjudication and rulemaking," the Court concluded that to the extent the ruling was a

rulemaking, it was “merely an interpretative rule not subject to either notice and comment procedure under 5 U.S.C. § 553 or the formalities of an agency hearing under 5 U.S.C. §§ 556-557.” Id. at 420.

As Defendant noted in its opening brief, the York Court did state that “due process would require a hearing . . . after the issuance of the [classification] order,” because the agency’s classification decision also acts as an adjudication. Defendant’s Motion at 21, n. 11 (“MTD”); York, 774 F.2d at 420.³ However, that Court found that such a hearing would only be necessary “if [Plaintiff] contends the agency made a mistake of fact.” Id. As in York, Mr. Akins’s claim is subject to resolution as a matter of law, not as a matter of fact: he is disputing the agency’s legal interpretation of what constitutes a “trigger function.” Notwithstanding his bare assertion that “Defendant’s decision was factually wrong,” see Response at 8, Plaintiff is not entitled to a hearing as a matter of due process because he has not identified any “mistake of fact” in ATF’s understanding of the operation of the Akins Accelerator that such a hearing could rectify. The limited nature of his challenge is underscored by the relief he seeks: not a hearing, but a reversal of the agency’s classification of the Akins Accelerator altogether. See Complaint at 9.

CONCLUSION

For the reasons set forth herein and in Defendant’s Motion, ATF acted reasonably in protecting the public from rapid-firing rifles by classifying Plaintiff’s invention as a machinegun. Accordingly, the Court should dismiss Plaintiff’s claims and grant judgment in favor of Defendant.

³ Significantly, just as Defendant has proposed in this case, the York Court reached this conclusion after applying the standards set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), to conclude that due process did not require a pre-deprivation hearing.

Dated: September 18, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2008, I caused a copy of the foregoing MOTION to be served electronically, upon:

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