District of Columbia
Court of Appeals

No. 20-AA-427

ALLEN WHITAKER,

Petitioner,

v. **2019-034**

DISTRICT OF COLMBIA
CONCEALED PISTOL
LICENSING REVIEW BOARD,

Respondent.

BEFORE: Glickman and Easterly, Associate Judges, and Ruiz, Senior Judge.

ORDER

(Filed Mar. 9, 2022)

On consideration of respondent's motion to dismiss this appeal as moot, the opposition and reply thereto, and the record on appeal, it is

ORDERED that respondent's motion to dismiss this appeal as moot is granted. *See Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006) ("Although not bound strictly by the 'case or controversy' requirements of Article III of the U.S. Constitution, this court does not normally decide moot cases.") (quoting *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004)). Petitioner seeks review of respondent's decision denying his administrative

appeal and summarily affirming the revocation of his concealed pistol license ("CPL") by the Chief of the Metropolitan Police Department. However, it is undisputed that the Chief reversed the revocation and approved petitioner's CPL during the pendency of this appeal; therefore, the court can provide petitioner no effective relief. *See Crawford v. First Washington Ins. Co.*, 121 A.3d 37, 39 (D.C. 2015) ("[I]t is well-settled that, while an appeal is pending, an event that renders relief impossible or unnecessary also renders that appeal moot") (quoting *Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 905 (D.C. 2006)); *Thorn*, 912 A.2d at 1195 ("In deciding whether a case is moot, we determine whether this [c]ourt can fashion effective relief.") (citation omitted).

The remaining issues petitioner raises in his appeal related to the Chiefs possible revocation of his CPL in the future do not constitute "live" controversies for purposes of this appeal. *See Cropp*, 841 A.2d at 330 (rejecting argument that the court should issue an advisory opinion to "forestall [ ] hypothetical future clashes between" the parties). Petitioner's remaining claims of error are particular to his case, dependent on an event several years in the future that may not occur, and are unlikely to evade review in the event they do recur. Hence, we decline to permit this otherwise moot appeal to proceed under the exception for matters "capable of repetition, yet evading review." *See McClain v. United States*, 601 A.2d 80, 82 (D.C. 1992) (explaining that, with respect to this court's prudential rather than jurisdictional adherence to federal mootness doctrine

and its recognized exceptions, "[t]he issue . . . is not one of authority but of when – under what circumstances – the court should exercise its 'careful discretion . . . to reach the merits of a seemingly moot controversy") (quoting *Atchison v. District of Columbia*, 585 A.2d 150, 153 (D.C. 1991)).

PER CURIAM

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cml

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONCEALED PISTOL LICENSING
REVIEW BOARD

Case Number: 2019-034

* * *

FINAL DECISION DENYING APPEAL OF ALLAN WHITAKER

On May 14, 2020, the appeal of Mr. Allan Whitaker ("appellant") came before a Panel of the Concealed Pistol Licensing Review Board ("Panel") to review the revocation by the Chief of the Metropolitan Police Department ("Chief") of appellant's application for a concealed pistol license ("CPL"), based upon the "suitability" standards promulgated pursuant to D.C. Official Code § 7-2509.11(1)(C). The Panel consisted of Ms. Alicia Washington, Presiding Member, along with Dr. Chad Tillbrook and Dr. Edwin Powell.

The Panel met to review the materials submitted by appellant at the time of his appeal; the materials submitted by the Chief in support of the revocation of appellant's application; and, the filings submitted by both parties in response to the Panel's Notice of Summary Disposition, which included Summary Disposition Responses Nos. 1-4.[1]

[1] The Panel on December 12, 2019, voted to set the case for summary disposition, and the Notices of Summary Disposition ("Notices") were issued shortly thereafter. As indicated in the Notices, and as is the Board's practice, accepted filings are specified as appellant's response and the Chief's reply to the Notice (here,

During the prior meetings on December 12, 2019, and February 13, 2020, the Panel found the following facts were not in dispute

1. **On September 24, 2019, the Chief issued a Notice of Revocation stating that appellant's application had been revoked for failure to "Meet the standards of suitability required to obtain a concealed carry license." The Notice of Revocation stated in relevant part as follows:**

> "The Firearms Registration Control Act of 1975, (D.C. Official § 7-2501 *et seq.*), and Chapter 23 (Guns and other Weapons) of Title 24 (Public Space and Safety) of the District of Columbia Municipal Regulations (DCMR), establish the qualifications and procedures for the issuance and revocation of a license to carry a concealed pistol. Based on these criteria, your concealed carry license has been revoked based on the following criteria found in 24 DCMR §2341.1(2). which states:
>
> - DC Municipal Regulation 2341.5 The Chief may revoke a concealed carry license on a finding that the licensee: (1) No longer satisfies one or more of the concealed carry license qualifications set

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Summary Disposition Responses 1 & 2). After receiving both filings, on February 13, 2020, the Panel met on this case to issue a ruling and voted to sustain the Chief's decision. Prior to issuing a final decision, however, the Panel on February 20, 2020, received appellant's response to the Chief's Reply ("Summary Disposition Response No. 3), and on March 25, 2020, the Panel received the Chief's reply ("Summary Disposition Response No. 4).

forth in the Act or any regulation authorized by the Act.[2]

- DCMR 2332.1(h) A person is eligible for Issuance of a license to carry a concealed pistol only if the person is suitable to be so licensed.
- DCMR 2335.1(d) A person is suitable to obtain a concealed carry license if he or she: has not exhibited a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another.
- On April 29, 2019, you were involved in an incident in PG County, Maryland at the BP Gas Station located at the intersection of Walker Mill Road and Addison Road. During the incident you were observed by a PG County Officer arguing with another individual. The officer stopped to investigate and found that you were carrying your registered firearm (Glock 19 serial #BGUF380) wrapped In a t-shirt with a loaded magazine containing 8 rounds of ammunition in the trunk

[2] The Chief mistakenly cites to section 2341.5, which addresses suspensions. Clearly, the Chief intends to cite to section 2341.1(1), the language of which he correctly recites as the basis for the revocation in this case. The Chief also mistakenly cites to section 2341.1(2) when he intends and subsequently does cite to section 2341.1.(1). As such, appellant is on proper notice of the legal basis for the revocation. Still, the Panel respectfully requests that the Chief correct this miscite in his revocation notices.

of your vehicle. The vehicle was also found to contain marijuana (12.9 grams) inside the vehicle. No arrest was made, however a report was generated by the PG Officer and your firearm and marijuana were recovered and placed into the custody of PG County Police.

- As a result of this incident no charges were filed. However, the Firearms Registration Branch reviews violations and criminal cases involving concealed pistol licensees. In addition you applied to register a new firearm. The review found that the most recent incident and it was combined with your past criminal history which found several drug and weapons incidents; Possession of Marijuana/Firearm stored improperly in trunk 4/29/19 (Report-no charges-MD), Possession of Marijuana 7/6/15 (Reported as suspect in MD), Assault, Other Weapon 3/5/15 (Report as Suspect-MD), Control of a Dangerous Substance, Possession of Marijuana (MD-Nolle Pros), Manufacture/Distribute/Possess/PWID 5/21/12 (Nolle Pros-MD), Possession of CDS Misdemeanor 5/21/12 (Guilty/Stricken-MD), Possession of Marijuana 9/23/11 (Nolle Pros-DC), Carrying a Concealed Weapon-Knife 12/3/07 (Dismissed-OH), Sound Amplifying Device 12/3/07 (Convicted-OH)
- As a result of these findings it is it has been determined that your concealed carry pistol license be *revoked* based on

> DC Code § 7-2341.5(1) and DCMR 2332.1(h) in that you no longer satisfies the suitability requirements as found under DCMR 2335.1(d) due to exhibiting a propensity to violence or instability that may reasonable render the person's possession of a concealed pistol a danger to the person or another[.]"

Notice of Revocation, dated September 24, 2019 (emphasis in original).

2. On September 17, 2019, Lt. Colin Hall issued a Memorandum on behalf of the Chief in support of the revocation, which included the following:

> " . . . Mr. Allan Whitaker was issued a concealed carry pistol license by the Metropolitan Police Department and has one firearm registered. On April 29, 2019, Mr. Whitaker was stopped by Prince George's County Police after he was observed at a BP Gas Station involved in a verbal dispute with another subject. Mr. Whitaker was standing in the parking lot of the gas station which is located at Walker Mill Road and Addison Road in Prince George's County Maryland.
>
> As the PG County Officer approached Mr. Whitaker he walked toward his vehicle. The officer reported that he could smell marijuana emanating from the front compartment of the vehicle. He also observed that Mr. Whitaker was wearing a holster with no firearm inserted. Mr. Whitaker told the officer that he was traveling from a firing range and he was

an SPO and he had the firearm in the trunk of his vehicle, he also identified himself as a DC Concealed Carry Pistol licensee. The time of this incident was 1211 am, and Mr. Whitaker opened the trunk of his vehicle, the officer observed the firearm was wrapped in a shirt with a loaded magazine containing 8 rounds of ammunition. The officer also found 12.9 grams of marijuana within the inside of the vehicle and recovered Mr. Whitaker's firearm (Glock 19 serial #BGUF380) which is registered with the Metropolitan Police Department.

No charges were placed against Mr. Whitaker as the result of this incident and his firearm is still in the control of the PG County Police. Mr. Whitaker applied with the Metropolitan Police Department to register an additional Glock 19 handgun September 1, 2019. While conducting the background investigation required to determine eligibility to register a firearm it was found that Mr. Whitaker had extensive criminal history, and when combined with his recent incident it was determined he was no longer eligible to be licensed to carry a pistol in the District of Columbia or register a firearm, based on a propensity to violence and a violent history within 5 years of his registration application.

Mr. Whitaker's criminal history includes carrying a concealed weapon, possession with intent to distribute drugs, possession of controlled substance, possession of marijuana, and assault. These charges are as follows:

- April 29, 2019-Possession of Marijuana/ Firearm in trunk-Linx Report
- July 6, 2015-Possession of Marijuana-MD-Linx report suspect
- March 5, 2015-Assault Other Weapon-MD-Linx report suspect
- January 15, 2015-Possession of Marijuana-Linx report of arrest
- September 11, 2014-CDS: Possession of Marijuana-MD-Nolle Pros.
- May 21, 2012-Manufacture/Distribute/ Possess/PWID-MD-Nolle Pros.
- May 21, 2012-Possession of CDS Misdemeanor-MD-Guilty (stricken)
- September 23, 2011-Possession of Marijuana-DC-Nolle
- December 3, 2007-Carrying a Concealed Weapon (Knife)-OH-Dismissed
- December 3, 2007-Sound Amplifying Device-OH-Convicted . . .

. . . **Justification for Revocation**

- D.C. Municipal Regulation 2341.5 The Chief may revoke a concealed carry license on a finding that the licensee: (1) No longer satisfies one or more of the concealed carry license qualifications set forth in the Act or any regulation authorized by the Act
- DCMR 2332.1(h) A person is eligible for issuance of a license to carry a concealed pistol only if the person is suitable to be so licensed.

- DCMR 2335.1(d) A person is suitable to obtain a concealed carry license if he or she: has not exhibited a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another.

Summary/Recommendation

Mr. Whitaker was involved in an incident in Prince George's County which resulted in marijuana and his registered handgun being seized from his possession by PG County Police. Mr. Whitaker then applied to register an additional handgun with the Metropolitan Police Department during which a background investigation uncovered an extensive history of criminal actions that would cause a reasonable person to believe that he is not a suitable person to be licensed to carry a concealed carry pistol. As a result of these findings it is the recommendation of the writer that Mr. Whitaker's concealed carry pistol license be ***revoked*** based on DC Code § 7-2341.5(1) and DCMR 2332.1(h) in that Mr. Whitaker no longer satisfies the suitability requirements as found under DCMR 2335.1(d) due to exhibiting a propensity to violence or instability that may [cause a] reasonable [person to] render the person's possession of a concealed pistol a danger to the person or another.

In addition Mr. Whitaker's application to register a firearm shall be denied based on DC

> Code § 7-2502.03 a history of violence in the five years prior to the Application."

Chief's Memorandum, dated September 17, 2019 (emphasis in original).

3. On October 17, 2019, the Panel received from appellant's authorized attorney appellant's incomplete request for appeal, which stated that the Notice "is based on an incorrect factual basis and is legally deficient." The Notice also stated in relevant part as follows:

> "On April 29, 2019, Mr. Whitaker visited the gun range, Maryland Small Arms Range, located at 9801 Fallard Ct, Upper Marlboro, MD 20772. He was accompanied by his girlfriend, Jazz, and his adult male cousin. When he finished, he placed his pistol in a lockbox in the trunk of his car. He did not remove his holster from his hip. He left the gun range and drove to pick up his minor daughter at her mother's house and then go home.
>
> After he picked up his daughter, she said that she needed water. Mr. Whitaker stopped at a BP gas station, which is close to his daughter's mother's house, to purchase some water for her. After pulling up to the entrance of the gas station store, he observed a group of men engaging in an altercation. One man was yelling at a group of multiple individuals. Hoping to avoid the altercation, he parked away from the entrance of the gas station store. His girlfriend and his daughter stayed in the car, while he and his cousin went inside to purchase water.

As Mr. Whitaker was walking to the entrance, he observed a Prince George County officer pulling up to the gas station lot and then driving around. The officer could observe Mr. Whitaker and his cousin entering the gas station store. After buying the water, they left the gas station store and walked back to Mr. Whitaker's car. Before they could enter the car and while both Mr. Whitaker and his cousin were standing next to the car, the officer pulled in front of Mr. Whitaker's car. The police car was blocking Mr. Whitaker's car from pulling out. The officer exited the car and immediately pointed his gun at Mr. Whitaker and his cousin. He yelled for them to put their hands up and to not reach into the car or he would shoot.

While still pointing his firearm at Mr. Whitaker, the officer approached. He then patted down Mr. Whitaker, while instructing Mr. Whitaker's cousin to maintain his hands on the vehicle. The officer noticed that Mr. Whitaker was wearing his holster while patting him down. After discovering the holster, the officer handcuffed both men. The officer then called for additional police officers. When the additional officers arrived, they asked Mr. Whitaker's girlfriend and his daughter to leave the car.

The Prince George's County Police proceeded to search the car without Mr. Whitaker's consent. Mr. Whitaker had told them that his firearm was in the car after being asked about the holster. Mr. Whitaker advised the officers

that he had documentation of his right to possess the firearm, but they refused to remove it from his wallet to verify that. After the officers had searched the car and could not locate the firearm, an officer asked Mr. Whitaker where his gun was. Mr. Whitaker replied that it was in a lockbox in the trunk. The police again searched but could not find the firearm.

After the officers' second search failed to locate the firearm, an officer asked Mr. Whitaker to retrieve it.

The lockbox had been displaced during the search, but Mr. Whitaker readily found it in the trunk, covered by a sheet. Mr. Whitaker retrieved his gun from the lockbox and handed it to the police. The gun was not then or ever wrapped in a t-shirt.

The officers also searched Mr. Whitaker's girlfriend and his cousin while they were searching the car. His girlfriend, Jazz, had a small amount of marijuana in her purse, an amount which is legal in both D.C. and in M.D. Mr. Whitaker did not know she had the marijuana. Mr. Whitaker and his family were detained for a total of 3 hours before they were finally let go. Although he had been handcuffed and detained for 3 hours, Mr. Whitaker was not arrested. Indeed, there were no arrests and no charges were ever filed. The police, however, did seize his gun.

Analysis

These facts do not warrant the revocation of Mr. Whitaker's license to carry. The Notice alleges that Mr. Whitaker is no longer qualified because he has exhibited a propensity for violence or instability that may reasonably render his possession of a concealed pistol a danger to the person or another. The Notice bases this allegation on Mr. Whitaker's past criminal history and the incident that occurred on April 29, 2019.

First, Mr. Whitaker's past criminal history was known to and evaluated by the licensing authority prior to receiving his existing license. There is no justification for revoking his license now, when this prior criminal history did not disqualify him from receiving a license when he first applied. Mr. Whitaker was granted his license regardless of his past criminal history, and this same history cannot now be a basis for revoking his license.

Mr. Whitaker is a long-time resident of the District of Columbia and employee of the city government. He has two degrees and is a single parent raising a teenaged daughter. He presents absolutely no risk or profile warranting the revocation of his carry license.

Second, the events of April 29, 2019, do not warrant revocation because they do not demonstrate any instability or propensity for violence on Mr. Whitaker's part. He acted as a law-abiding citizen from start to finish. He was not involved in the altercation at the gas

station and, in fact, tried to avoid it. There was no probable cause (or articulable suspicion) for the Prince George's County Police to confront him. He was simply a large black man, with dreadlocks, who was minding his own business. He was merely an observer of an altercation in which others were involved.

To the extent that the Prince George's County Police report paints a different version of events, it is inaccurate and unreliable. The report itself is hearsay. The police had a motive to slant their version of events to justify a 3-hour detention of Mr. Whitaker that did not result in any charge against him. By contrast, Mr. Whitaker has submitted a verified statement, under the penalty of perjury, concerning the facts involved in the incident of April 29, 2019. His recounting of the situation has far more weight than an unsubstantiated and biased police report.

The police report inaccurately recounts the incident. Mr. Whitaker was not involved in the confrontation, contrary to the report saying he was observed arguing. Mr. Whitaker had no relation to, and no interaction with the individuals causing a disturbance. In addition, his firearm was properly stored in a lockbox until the officer asked him to retrieve and hand it to him. Mr. Whitaker was not carrying the firearm, and the firearm would have stayed in the lockbox if not for the officer's request. Furthermore, the marijuana was found inside Mr. Whitaker's girlfriend's purse, not in the vehicle. Mr. Whitaker had no involvement with or

control over the marijuana. Thus, there was no criminal conduct on Mr. Whitaker's part, which is confirmed by the absence of charges.

What did happen is that the Prince George's County Police violated Mr. Whitaker's Fourth Amendment rights in multiple ways, and finding no legitimate grounds for any criminal charge, they prepared a policy report that distorts and misrepresents the incident in an effort to hide their misconduct. The report clearly is biased and cannot reasonably be relied upon as a basis for any factual finding affecting Mr. Whitaker's rights.

In summary, the April 29, 2019 incident involved no violence whatsoever on Mr. Whitaker's part and therefore absolutely does not demonstrate a "propensity for violence." Nor does it demonstrate any "instability" on his part. Mr. Whitaker has no history of mental instability or illness and the facts of April 29, 2019 certainly do not demonstrate any mental instability.

Finally, the regulation used to revoke Mr. Whitaker's license to carry is unconstitutionally vague. "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *See Giaccio v. Pennsylvania*, 382 U.S 399, 402-403 (1966). The

> regulation fails to set out what behavior or type of behavior constitutes "a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another" and therefore fails to inform the public what behavior should be avoided.
>
> To close, Mr. Whitaker's license to carry should not be revoked because there is no factual basis for doing so and because the regulation is legally deficient. Revoking his carry license serves only to compound the injustice inflicted upon Mr. Whitaker on April 29, 2019."
>
> Appellant's appeal letter, dated October 11, 2019.

4. **On November 6, 2019, the Panel received appellant's completed appeal, by letter dated October 31, 2019, to include the above-cited Notice of Revocation. On November 13, 2019, the Panel issued to appellant and to the Chief Notices of Receipt of Appeal.**

5. **On December 12, 2019, the Panel concluded an initial hearing and voted to issue a Notice of Summary Disposition ("Notice). On January 2, 2020, the Panel issued to the Chief and to appellant the Notice, along with the Chief's file supporting the revocation.**

6. **On January 16, 2020, the Panel received from appellant via mail and email, appellant's Response to the Notice, which stated in**

relevant part as follows ("Appellant's Response" or "Summary Disposition Response No. 1"):

> " . . . Pursuant to 1 DCMR § 1210.2(b), Mr. Whitaker, through undersigned counsel, submits the following written argument about why his license to carry a concealed pistol should not be revoked and an evidentiary hearing is required.
>
> **A. The revocation is not supported by reliable, probative, and substantial evidence**
>
> The stated basis for the revocation is that Mr. Whitaker "exhibit[s] a propensity to violence or instability" because of his involvement in an April 29, 2019, incident in Prince George's County, Maryland, combined with his prior criminal history between 2007 – 2015.
>
> Mr. Whitaker's past criminal history was known to and evaluated by the MPD before it granted him his existing license that it now proposes to revoke. (See Memorandum Concealed Carry Pistol License Application Batch Approvals with Criminal History from Lieutenant Colin Hall at page 3.) The MPD concluded that this past history did not preclude Mr. Whitaker from receiving a license. Thus, this past history cannot now, by itself, constitute a basis for revoking his license. *See Borger Management, Inc. v. Sindram*, 886 A.2d 52, 59 (D.C. 2005) (res judicata applies to agency rulings); *Brentwood Liquors, Inc. v. D.C. Alcoholic Bev. Control Bd.*, 661 A.2d 652,

656-57 (D.C. 1995) (agency cannot make inconsistent decisions on the same set of facts). Accordingly, the validity of the revocation depends on the April 29, 2019 incident.

The revocation relies upon a version of the events of April 29, 2019 which is derived entirely from a report prepared by the PG County Police. But this report does not constitute reliable, probative, and substantial evidence. To the contrary, the report is inadmissible and unreliable. Police reports are inadmissible as substantive evidence of the facts recorded in the report, especially if they were prepared (at least in part) in anticipation of litigation. *See Evans-Reid v. District of Columbia*, 930 A.2d 930, 944 & n. 21 (D.C. 2007). Not only is the PG Police report unsworn, but the officers involved had an obvious motive to distort and misrepresent what happened in order to justify their own improper actions.

As explained in Mr. Whitaker's verified response to the Notice of Revocation, the PG County police handcuffed Mr. Whitaker and detained him and his family for a total of three hours on April 29, 2019, only to ultimately release them without filing any charge. Further, the police seized Mr. Whitaker's lawfully registered handgun and a small, legal amount of marijuana that belonged to Mr. Whitaker's girlfriend without any legal justification for doing so.

In addition, none of the "facts" set forth in the Notice of Revocation provide a basis for concluding that Mr. Whitaker exhibits A propensity to violence or instability. The MPD previously decided that Mr. Whitaker's past criminal history does not demonstrate a propensity for violence or instability. Neither does the April 29, 2019 incident demonstrate such a propensity. Mr. Whitaker was not a participant in the argument that occurred that day.

The April 29, 2019 incident did not involve any violence or threatened violence or unstable conduct by Mr. Whitaker.

Furthermore, even had Mr. Whitaker been involved in the incident, one incident does not demonstrate a "propensity" to engage in certain behavior. Propensity, by definition, requires reoccurring events showing a tendency to act in a certain way. *See Chambers v. Simon Property Group, L.P.*, 2013 WL 1947422, at *4 n. 22 (D. Kan. 2013) ("'Propensity' is defined as '[a]n innate inclination' or 'tendency.' *The American Heritage Dictionary of the English Language* 1412 (5th ed. 2011). The single incident of alleged violence described in the Complaint is insufficient to show that the guard has an innate inclination towards violence.").

A decision that is not supported by substantial evidence is arbitrary and capricious. In *Newsweek Magazine v. District of Columbia Com. on Human Rights*, the Court held "that the Commission's findings of fact in this case

were incomplete and more importantly that they were not supported by substantial evidence. Consequently, we must hold that the Commission's ruling in this regard was arbitrary and capricious, an abuse of discretion, and not in accordance with the law." 376 A.2d 777, 786 (D.C. 1977). To be valid, the decision in this case, including "[f]indings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence." D.C. Code § 2-509 (2001). This evidentiary support is complete lacking here. To the contrary, the only reliable, probative and substantial evidence available to the Chief shows that Mr. Whitaker engaged in no misconduct and was wrongfully detained by the P.G. County police.

Accordingly, the Board could – and should - conclude that no evidentiary hearing is required if it intends to overturn the revocation. However, if the Board does not determine to overturn the revocation, it must conduct a hearing as there are material, disputed facts as explained in the next section.

B. There are material facts in dispute that require an evidentiary hearing

The Notice of Revocation relies on the following "facts" that are disputed, material, and can only be resolved through an evidentiary hearing:

1. The Notice asserts that Mr. Whitaker was observed by a PG County officer arguing with another individual (See Notice of

Revocation page 1.) Mr. Whitaker denies that he was involved in any argument during the incident. (See Response to Notice of Revocation page 2.) He was merely a bystander to an argument involving other parties. *Id.* He did not participate in any argument or disturbance. *Id.*

2. The Notice asserts that Mr. Whitaker was carrying his firearm "wrapped in a t-shirt" in the trunk of his vehicle. (See Notice page 1.) This is not correct. (See Response page 2-3.) The firearm was properly stored in a lockbox in the trunk of Mr. Whitaker's vehicle. *Id.* It was handed over to the P.G. County police without any coverings at all by Mr. Whitaker after he retrieved it from its lock box. *Id.*

3. The Notice asserts that Mr. Whitaker's vehicle was found to contain marijuana and asserts that "your firearm and marijuana were recovered and placed into the custody of PG County Police." (See Notice at page 1-2.) The marijuana was found inside Mr. Whitaker's girlfriend's purse, not in the vehicle. (See Response at page 3.) Mr. Whitaker had no involvement with or control over the marijuana.

Without resolving these disputed facts, this case is not properly decided against Mr. Whitaker on a summary disposition. These disputed facts go directly to whether Mr. Whitaker was involved in the alleged dispute,

whether he was properly conveying his weapon, and whether he was in possession of marijuana – all issues on which the Chief has relied in making the decision in this case. Mr. Whitaker is therefore entitled to and requests a hearing in this case in the event the Board is not prepared to overturn the Chief's decision without a hearing.

C. The revocation denies Mr. Whitaker due process because it is based on an unconstitutionally vague regulation

Furthermore, administrative actions than do not comport with constitutional requirements are subject to reversal by the courts under the D.C. Administrative Procedure Act. See D.C. Code § 2-510 (2001).

"Unduly vague regulations and statutes are constitutionally inadequate for two reasons. First, they deprive the individual of notice as to what conduct will be considered proscribed or required, or otherwise relevant to the agency's decision. Second, vague standards encourage arbitrary and possibly discriminatory decisions." *Woods v. D.C. Nurses' Examining Bd.*, 436 A.2d 369, 373-74 (D.C. 1981). The regulation in this case fails to set out what conduct evidences 'a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger" and therefore fails to inform the public what behavior must be avoided. *See e.g.*, *Bynum v. U.S. Capitol Police Bd.*, 93 F.Supp.2d

> 50, 58 (D.D.C. 2000) (regulation forbidding conduct that "has the intent, effect or propensity to attract a crowd of onlookers" is unconstitutionally vague).
>
> In summary, there is no reliable, probative, and substantial evidence which supports the revocation of Mr. Whitaker's license to carry. Further, the revocation deprives him of due process because it is based on an unconstitutionally vague regulation.
>
> Therefore, we respectfully request a hearing in this matter to resolve the disputed issues of material fact. However, if the Board is inclined to find in Mr. Whitaker's favor, we would withdraw our request for a hearing and accept a summary disposition overturning the Chief's decision . . .
>
> Appellant's Response, dated January 16, 2020 ("Summary Disposition Response No. 1").

7. On February 8, 2020, the Panel received the Chief's Reply to Appellant's Response ("Chief's Reply" or "Summary Disposition No.2"). On February 10, 2020, the Panel forwarded the Chief's Reply to appellant via email at the same email indicated above. The Chief's Reply stated in relevant part as follows:

> "The Chief of the Metropolitan Police Department (MPD), by and through his designee, and pursuant to D.C. Mun. Regs. tit. 1, § 1210.2, submits this response to the Concealed Pistol Licensing Review Board (CPLRB) Panel's

Notice of Summary Disposition, issued January 2, 2020, in the appeal of Mr. Allan Whitaker.

Factual Background

On August 8, 2018, Mr. Whitaker applied to MPD for a concealed pistol license (CPL). On August 23, 2018, Mr. Whitaker purchased and registered a Glock 19 Gen 5 handgun for home protection. On November 27, 2018, the Chief issued Mr. Whitaker a CPL.

On September 1, 2019, Mr. Whitaker applied to register another Glock 19 handgun with MPD. MPD conducted the mandatory background check into Mr. Whitaker's eligibility including the standard search of criminal record databases. Among other incidents in Mr. Whitaker's criminal history record, MPD uncovered a new incident reported by the Prince George's County Police Department (PCJCPD). According to the police reports, on April 29, 2019, shortly after midnight, a member of PGCPD observed Mr. Whitaker arguing with an unidentified male in front of a BP gas station. As the officer approached Mr. Whitaker, he smelled marijuana emanating from Mr. Whitaker's vehicle. He also observed an empty gun holster on Mr. Whitaker's right hip. The officer reported finding Mr. Whitaker's Glock 19 handgun wrapped in a t-shirt in the trunk of his car. The officer also found a total of 12.9 grams of marijuana inside the vehicle.

On September 24, 2019, the Chief issued a Notice of Revocation to Mr. Whitaker. The notice

informed Mr. Whitaker that his CPL was being revoked based on the Chief's determination that Mr. Whitaker was not suitable to carry a concealed firearm because he exhibited a propensity for violence or instability. See D.C. Mun. Regs. tit. 24, § 2335.1(d). The notice identified a number of incidents from Mr. Whitaker's criminal history record involving violent or illegal conduct with weapons and drugs. On October 11, 2019, Mr. Whitaker, represented by counsel, submitted his appeal.

Response

Mr. Whitaker's appeal should be dismissed because the Chief's revocation decision was supported by substantial evidence of Mr. Whitaker's propensity for violence or instability. D.C. Mun. Regs. tit. 24, § 2335.1(d); *see also* D.C. Code§ 7-2509.11(1)(C); D.C. Mun. Regs. tit. 24, § 2332.1(h). The Supreme Court has defined substantial evidence as being "more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389,401 (1971) (citations omitted). The Chief is entitled to rely on police reports or other criminal history records containing hearsay in determining whether a person is suitable to carry a concealed firearm. *Cf. id.*

In this case, the Chief determined that Mr. Whitaker exhibited a propensity for violence or instability based on the following incidents from Mr. Whitaker's criminal history records:

- On April 29, 2019, the PGCPD seized 12.9 grams of marijuana from the passenger compartment of Mr. Whitaker's vehicle and his registered firearm, which was found loaded and wrapped in a t-shirt in his trunk.
- On July 6, 2015, the PGCPD reported that Mr. Whitaker was a suspect for possession of marijuana and possession of narcotics implements.
- On March 5, 2015, the PGCPD reported that Mr. Whitaker was the suspect of an assault.
- On January 15, 2015, Mr. Whitaker was arrested by PGCPD for possession of marijuana.
- On April 4, 2014, Mr. Whitaker was arrested by PGCPD for possession of controlled dangerous substances (CDS) and possession of marijuana. On September 11, 2014, his charges were *nolle* prossed.
- On May 21, 2012, Mr. Whitaker was arrested by PGCPD for possession of CDS with intent to distribute. On September 19, 2012, his felony charge for manufacturing/distribution/possession with intent to distribute was *nolle* prossed, and he was convicted of a misdemeanor possession of CDS offense.

- On August 23, 2011, Mr. Whitaker was arrested by the U.S. Park Police for possession of marijuana. On September 23, 2011, the charge was *nolle* prossed.
- On December 3, 2007, Mr. Whitaker was arrested by the Akron Police Department in Ohio for carrying a concealed weapon, a noise offense, and a sound amplifying offense. On February 9, 2010, Mr. Whitaker was convicted and fined for the sound amplifying device charge and the concealed weapon and noise charges were dismissed.

In addition to discovering new information about Mr. Whitaker's April 2019 conduct, the revocation decision was the result of a deliberate and principled change in the Chief's position on what it means to have "exhibited a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another," under D.C. Mun. Regs. tit. 24, § 2335.1(d).

The Chief revised his interpretation of the regulation as the result of an incident involving another CPL holder that occurred after Mr. Whitaker's CPL had been issued. On August 20, 2019, shortly before 2:00 p.m., another CPL holder engaged in a shooting in the 500 block of H

Street NE. The CPL holder and two of his acquaintances had been sitting on the corner of 5th and H Street NE and were approached by two other men, one of whom displayed a handgun. The CPL holder thought the two men were about to rob him and opened fire on them using his registered handgun. One of his rounds struck one of the men in the arm, and his stray bullets broke windows in four storefronts nearby. Ten shell casings were recovered on the scene. The shooter was not criminally charged as a result of this incident and was deemed to have acted in self-defense. The two men who approached him were arrested for Assault with the Intent Rob.

Following this incident, the Chief summarily suspended the shooter's CPL. The Chief also examined the information initially presented in the shooter's application for firearms registration and concealed pistol licensing. The Chief determined that a change in the interpretation of the "propensity for violence or instability" regulation was justified. The Chief's decision was based on an analysis of the circumstances of the H Street shooting/CPL holder and the intent of improving the risk assessment aspect of the suitability determination process.

Mr. Whitaker was initially issued a CPL based on the Chief's prior interpretation of the "propensity for violence or

instability" regulation. The Chief's prior interpretation placed more weight on the passage of time since a person's criminal history accrued as a mitigating factor. Likewise, the Chief's prior interpretation took a narrower view on the rate and persistence of violent or illegal incidents in a person's criminal history justifying a denial decision under D.C. Mun. Regs. tit. 24, § 2335.1(d). Under the Chief's new interpretation of the regulation, conduct that is violent or criminal demonstrating low self-control, regardless of whether it results in a criminal conviction, may be grounds for denial, revocation, or suspension of a CPL on the basis of unsuitability.

Mr. Whitaker mistakenly contends that since the Chief approved his CPL in November 2018, he could not reach a different conclusion on the same facts in September 2019. However, as long as the Chief's decision is based on substantial evidence, it should not be disturbed. This is true whether his decision revokes or limits an earlier issuance of a CPL or announces a determination on a new application. Furthermore, the Chief has the power to reconsider any decision he makes unless there is some statute ca- regulation affirmatively forbidding such action.

Cf. Tiger Wyk Ltd. V. D.C. Alcoholic Bev. Control Bd., 825 A.2d 303, 308 (D.C. 2003). However, as the record indicates,

> the Chief's decision in this case is not based on the same set of facts. It involved a new incident where an officer seized Mr. Whitaker's licensed firearm after reportedly locating it in the trunk of his vehicle wrapped in a t-shirt, and seized 12.9 grams of marijuana.
>
> Mr. Whitaker has the burden of "persuading the Board that the Chief's final action should be reversed or modified based on substantial evidence. "D.C. Mun. Regs. tit.1, § 1218.1. Given the record evidence supporting the Chief's decision, and because Mr. Whitaker has not met this burden, his appeal should be dismissed."

Chief's Reply, dated February 6, 2020 emailed and served on appellant on February 10, 2020) ("Summary Disposition Response No. 2").

8. As indicated above, the Panel met on this case on February 13, 2020, and voted to sustain the Chief's decision. Prior to issuance of the ruling, however, on or about February 20, 2020, the Panel received appellant's response to the Chief's Reply ("Summary Disposition Response No. 3"), which stated in part as follows:

> **"A. MPD cannot rely on a *post hoc* rationalization of its decision**
>
> The MPD, in its response, attempts to smuggle into the record an additional rationale for its decision. It contends, for the first time, that the revocation decision was based not only on

new information regarding the April 29, 2019 incident in Prince George's County, but also on a revised, more expansive interpretation of the "propensity for violence or instability" regulation that gives more adverse weight to Mr. Whitaker's past record. The law is clear, however, that review of the decision to revoke Mr. Whitaker's license must be based on the actual rationale of the MPD, and not a post hoc rationalization that the agency offers to defend its action. *See Walsh v. District of Columbia Bd. of Appeals and Review*, 826 A.2d 375, 379 (D.C. 2003). Here, neither the Notice of Revocation sent to Mr. Whitaker on September 24, 2019, nor the internal memo supporting that action, dated September 17, 2019, says anything about applying a new interpretation of the "propensity for violence or instability" regulation to Mr. Whitaker's past record, which MPD had previously reviewed in the course of issuing a license to him. Neither has MPD issued any public statement or ruling stating that it has changed its interpretation of the regulation. It appears MPD revised "interpretation" has arisen merely for purposes of Mr. Whitaker's case. This is exactly the kind of *post hoc* rationalization that the courts forbid.

B. MPD cannot revoke Mr. Whitaker's license based on conduct it previously approved

Furthermore, contrary to MPD's contention, it lacks authority to now revoke Mr. Whitaker's license based on the same criminal history

that it reviewed and approved in 2018 when it granted him a license. *See Borger Management, Inc. v. Sindram*, 886 A.2d 52, 59 (D.C. 2005) (res judicata applies to agency rulings); *Taylor v. England*, 213 A.2d 821, 822-23 (D.C. 1965) (court assumes res judicata applies to license); *Brentwood Liquors, Inc. v. D.C. Alcoholic Bev. Control Bd.*, 661 A.2d 652, 656-57 (D.C. 1995) (agency cannot make inconsistent decisions on the same set of facts).

The MPD argues that the Chief has the power to reconsider any decision he makes unless there is some statute or regulation affirmatively forbidding such action, citing *Tiger Wyk Ltd. V.D.C. Alcoholic Bev. Control Bd.* 825 A.2d 303, 308 (D.C. 2003). But *Tiger Wyk* merely stated the "obvious" proposition. that an agency presumptively has authority to reconsider a decision. It upheld a board's ability to change position where a motion for reconsideration was made promptly after the board's original decision. *Tiger Wyk* does not hold or suggest that an agency has the authority to revisit and reverse final decisions made months or years earlier.

MPD's revocation decision in this case must stand or fall on the April 29, 2019 incident in Prince George's County. For the reasons previously discussed, the police report of that incident is inadmissible and unreliable. Moreover, the incident involved no violence or threatened violence and no unstable conduct by Mr. Whitaker. None of the "facts" set forth in the Notice of Revocation provide a basis for

concluding that Mr. Whitaker exhibits a propensity to violence or instability. Revoking Mr. Whitaker's license serves only to compound the injustice inflicted upon him by the P.G. County police on April 29, 2019."

Appellant's Summary Disposition Response No. 3, dated February 20, 2020.

9. On March 24, 2020, the Chief served the Panel, appellant's attorney, and appellant with the Chief's response to appellant's recent filing ("Summary Disposition Response No. 4"):

"The Chief of the Metropolitan Police Department (MPD), by and through his designee, and pursuant to D.C. Mun. Regs. tit. 1, § 1210.2, submits this response to Mr. Allan Whitaker's sur-reply to the Concealed Pistol Licensing Review Board (CPLRB) Panel's Notice of Summary Disposition.[1] In this appeal, Mr. Whitaker challenges the revocation of his concealed pistol license (CPL) based on the Chief's revised interpretation of the "propensity for violence or instability" suitability regulation, D.C. Mun. Regs. tit. 24, § 2335.1(d). As explained in MPD's response to the Notice of Summary Disposition, and for the reasons stated herein, the Chief's revocation decision should be upheld.

The arguments in Mr. Whitaker's sur-reply regarding the Chief's new interpretation of D.C. Mun. Regs. tit. 24, § 2335.1(d) are unavailing. It is an "important principle . . . that while an agency may change over time the

interpretation it gives to a controlling statutory term, an agency changing its course is obligated to supply a reasoned analysis for the change." *Brentwood Liquors, Inc. v. D.C. Alcohol Beverage Control Bd.*, 661 A.2d 652, 656 (D.C. 995) (internal quotation marks and citations omitted); *see Greater Bos. Television Corp. v. Fed Commc'ns Comm'n*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"), *cert. denied*, 403 U.S. 923 (1971). To those ends, MPD's response to the Notice of Summary Disposition supplied a reasoned analysis for the change in the Chief's interpretation of what it means to have exhibited a propensity for violence or instability, for purposes of D.C. Mun. Regs. tit. 24, § 2335.1(d). Not only has the detailed, reasoned analysis been provided in this case, but MPD provided it in other CPLRB appeals involving revocation decisions under D.C. Mun. Regs. tit. 24, § 2335.1(d)./2 Accordingly, this was not a "*post hoc* rationalization . . . offer[ed] to defend [the Chief's] action" in Mr. Whitaker's case, as his sur-reply avers, but the Chief's "actual rationale" which compelled Mr. Whitaker's CPL revocation.

Furthermore, and contrary to Mr. Whitaker's claim, MPD's reasoned analysis was timely advanced. For this reason, Mr. Whitaker's reliance on *Walsh v. District of Columbia Bd. of Appeals and Review*, 826 A.2d 375 (D.C. 2003), is misplaced. In *Walsh*, the agency's change of

course was not explained in the underlying administrative proceedings. There, a D.C. Department of Consumer and Regulatory Affairs (DCRA) Administrative Law Judge (ALJ) imposed fines on a landlord for violating zoning regulations and housing business licensing requirements. The landlord unsuccessfully appealed to the D.C. Board of Appeals and Review (BAR), then appealed the BAR's decision to the D.C. Court of Appeals. At that juncture, for the first time, DCRA argued a new interpretation of a controlling statutory term. The D.C. Court of Appeals remanded the new interpretation to the BAR for consideration to ensure that it was DCRA's position, and not just the position advanced by agency counsel, and to permit evaluation by "the administrative board with special expertise in this area of the law . . . " *Id.* at 379-80. Here, MPD timely supplied the CPL RB with a reasoned analysis for the Chief's new interpretation of the suitability regulation./3

The remainder of Mr. Whitaker's sur-reply merely rehashes arguments from parties' responses. First, there are no restrictions on the Chief's authority under D.C. Code § 7-2509.05(a)(1) to review and revoke Mr. Whitaker's license, whether or not the decision is based on the same set of criminal history records available during the initial licensing determination. Mr. Whitaker mistakenly contends that *res judicata* applies to the Chief's decisions. To be sure, *res judicata* does not apply because the Chief does not "act in a judicial capacity, resolving disputed issues

of fact . . . which the parties have an adequate opportunity to litigate." *Borger Mgmt. v. Sindram*, 886 A.2d 52, 59 (D.C. 2005) (landlord-tenant administrative proceeding before a DCRA ALJ) ("The threshold question is whether the earlier proceeding was the essential equivalent of a judicial proceeding." (internal quotation marks and citation omitted))/.4 As such, Mr. Whitaker's *res judicata* argument, and likewise, his claim that the revocation decision "must stand or fall" on the April 29, 2019 incident, is meritless.

Finally, the revocation decision was supported by reliable, probative, and substantial evidence, including the LInX report from the Prince George's County Police Department describing the April 29, 2019 incident. "[H]earsay evidence is admissible in administrative proceedings unless it is irrelevant, immaterial, or unduly repetitious." *James v. D.C. Dep't of Employment Servs.*, 632 A.2d 395, 398 (D.C. 1993) (internal quotation marks and citation omitted). Mr. Whitaker's uncorroborated assertions do not weigh against the Chief's use of police records, which are both reliable and probative of Mr. Whitaker's unsuitability for a CPL.

For these reasons, Mr. Whitaker's appeal should be denied.

1/ The Panel issued a Notice of Summary Disposition on January 2, 2020. Mr. Whitaker and MPD submitted responses, on January 16, 2020, and February 7, 2020, respectively,

completing the briefing on summary disposition. *See* D.C. Mun. Regs. tit. 1, § 1210. On February 20, 2020, Mr. Whitaker submitted a sur-reply. The Panel accepted Mr. Whitaker's sur-reply to ensure a complete record and invited MPD to submit a response thereto.

2/ As fully explained in MPD's February 7, 2020 response, under the Chief's new interpretation of D.C. Mun. Regs. tit. 24, § 2335.1(d), conduct that is violent or criminal demonstrating low self-control, regardless of whether it results in a criminal conviction, may be grounds for denial, revocation, or suspension of a CPL on the basis of unsuitability. In Mr. Whitaker's case, the Chief found him to be unsuitable based on his record of drug offenses, suspected assault, and two concealed weapons offenses.

3/ Contrary to Mr. Whitaker's claim, MPD provided him proper written notice including the reason for revocation, citing the appropriate regulation, and a statement that the revocation would take effect unless appealed within 15 days to the CPLRB. *See* D.C. Mun. Regs. tit. 24, § 2341.3.

4/ Mr. Whitaker's *res judicata* argument misconstrues *Taylor v. England*, 213 A.2d 821, 822-23 (D.C. 1965), by stating in an explanatory parenthetical: "[the) court assumes res judicata applies to license." To the contrary, the D.C. Court of Appeals explicitly refrained from deciding whether *res judicata* applied in

Taylor and concluded "there would be no room for its application here." *Id.*"

Chief's Summary Disposition Response No. 4, dated March 20, 2020.

10. On May 14, 2020, the Panel met and voted to sustain the Chief's revocation.

During the meeting the Panel made the following conclusions based upon the above facts.

1. The record reviewed by the Panel contained no disputes as to material facts. Appellant does not dispute the fact of his criminal history records. Rather, appellant claims that the Chief does not have the authority to 'change his mind,' and to revoke a CPL based on the same criminal history records known to him at the time an application was approved. Thus, appellant claims that the revocation must stand or fall upon the 2019 incident that purportedly triggered the revocation.

As an initial matter, the Panel finds that appellant is mistaken that the 2019 incident alone triggered the revocation. Indeed, appellant applied to register a *new* firearm, which triggered a review of appellant's criminal history and that review alone would have been a basis to deny. *See* Chief's Notice of Revocation. Even absent appellant's new application, however, for the reasons explained below, the Panel finds that appellant's position regarding the Chief's revocation authority is in error.

Regarding the Chief's authority to revoke CPLs, based upon the same information known to him at the time of approval, the Panel sought the opinion

of Counsel to the Board.[3] After considering the advice of Counsel to the Board, the Panel concluded that MPD is authorized to revoke a concealed pistol license using new interpretation of the suitability standard in 24 DCMR § 2335.1(d), provided it articulates a reasoned analysis and justification for the new interpretation. Furthermore, MPD's license decisions are not barred by the doctrine of *res judicata* and have no preclusive effect which would prohibit the agency from making a different determination than it has previously. *Res judicata* only applies to administrative decisions when a quasi-judicial proceeding has taken place, unlike in these instances of revocation, when only an administrative process has occurred, without the benefit of witness testimony or the exchange of evidence. As an agency charged with guarding the public's safety, MPD's view of what is in the public's interest may change with or without a change in circumstance. However, given that many licensees subject to revocation previously relied upon MPD's decision to grant their licenses and the new interpretation has resulted in MPD taking a contradictory position on these same licenses, MPD should provide a more complete and thorough explanation for its deviation from the previous interpretation than it currently provides. MPD should also offer a detailed explanation as to why a licensee's criminal history demonstrates a propensity for violence or instability and show that it

[3] The Legal Counsel Division of the Office of the Attorney General for the District of Columbia serves as Counsel to the Board.

sufficiently analyzed the criminal history while weighing any mitigating factors.

Consistent with the Panel's analysis of the law and the materials submitted, the Chief in this case provided a "complete and thorough explanation" of his interpretation of the case, and further, "offered a detailed explanation" as to why Mr. Whitaker's criminal history records demonstrate propensity for violence or instability. *See* Chief's Memorandum, dated September 17, 2019, and Chief's Summary Disposition Responses Nos. 2 & 4. For example, in Response No. 2, the Chief stated that, "[u]nder the Chief's new interpretation of the regulation, conduct that is violent or criminal demonstrating low self-control, regardless of whether it results in a criminal conviction, may be grounds for denial, revocation, or suspension of a CPL on the basis of unsuitability." The Chief's Response No. 2, as well as his other filings, detailed appellant's numerous drug offenses, suspected assault, and concealed weapons offense – all of which indicate low self-control and indicia for violence or instability – to include the following:

- April 29, 2019-Possession of Marijuana/ Firearm in trunk-Linx report
- July 6, 2015-Possession of Marijuana-MD-Linx report of suspect
- March 5, 2015-Assault Other Weapon-MD-Linx report of suspect
- January 15, 2015-Possession of Marijuana-Linx report of arrest

- April 4, 2014-CDS: Possession of Marijuana-MD-Nolle Pros.
- May 21, 2012-Manufacture/Distribute/ Possession with intent to distribute-MD-Convicted of misdemeanor possession of CDS offense
- August 23, 2011-Possession of Marijuana-DC-Nolle
- December 3, 2007-Carrying a Concealed Weapon (Knife), noise offense, and a sound amplifying offense-OH-Convicted of sound amplifying device charge

The Panel finds that, as a matter of law, appellant's undisputed criminal history records may be a factor in revoking appellant's CPL. *See* 24 DCMR § 2335.1(d) (stating that a person is not suitable for a CPL if he has exhibited "a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another);" *see also* D.C. Official Code § 7-2509.11(1)(C); 1 DCMR § 2332.1(h). The law provides the Chief with discretion to determine what events may constitute a propensity for violence or instability, which may include appellant's criminal history records not resulting in convictions. In addition, the law does not require that the Chief find that appellant has a history of violent behavior.[4] To the contrary, the

[4] In fact, a finding of a history of violent behavior within the past five years automatically would have disqualified appellant from a CPL. *See* C.C. Official Code §§ 7-2502.03(a)(6A), 7-2509.02(a)(2).

Chief is required only to find that appellant is *not suitable* for a CPL based on his *propensity* for violence or instability. *See id*.[5]

The Panel acknowledges that appellant may not have been convicted of all or even any of the offenses. However, the standards in criminal cases and the instant civil proceedings are different. In a criminal case, the government is required to show that defendant was guilty of the offense beyond a reasonable doubt. In this administrative proceeding, however, the burden is on appellant to demonstrate that the Chief failed to establish by substantial evidence appellant's unsuitability. *See* 1 DCMR § 1218. In addressing the 'substantial evidence' standard in the context of similar administrative proceedings, the Supreme Court ruled that substantial evidence means "more than a mere scintilla . . . It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted).

Here, the Panel finds that appellant did not meet his burden to establish that there was not substantial evidence upon which the Chief could base

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[5] While suitability and propensity for violence or instability are undefined in District law, these types of findings are implicit in several states' CPL schemes where licensing authorities may deny CPL applicants where there is reason to believe applicants are unsuitable or dangerous. *See* https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/ (identifying 11 states and the District of Columbia which require applicants to be of good character or a suitable person, and 15 other states which authorize adverse actions based on reason to believe the person is dangerous).

the revocation, nor that the revocation was arbitrary or capricious. Rather, the Panel finds that the record reflects the undisputed fact that appellant's criminal history record includes numerous drug offenses, suspected assault, and a concealed weapons offense over a span of many years and in three jurisdictions. The Panel concludes that appellant's criminal history record, as well as the record in its totality, provide sufficient evidence to support the Chief's finding that appellant's propensity for violent and unstable behavior reasonably may render the possession of a CPL a danger to himself or others.

2. The Panel also concludes that, based upon the record before the Chief and the materials submitted to the Panel during this appeal, the Panel independently would have reached the same conclusion as the Chief.

3. As the Panel finds that there are no material facts in dispute, there is no basis to conduct an evidentiary hearing to resolve a fact in dispute in this appeal.

4. Finally, the Panel has no jurisdiction to rule on appellant's constitutional claims.

THEREFORE, by unanimous vote of the Panel members present, **IT IS ORDERED** that this appeal is **DENIED**.

Pursuant to 1 DCMR § 1221.6 the appellant is instructed that judicial review of this Order may be pursued as provided in section 908 of the Firearms Regulations Control Act of 1975, (D.C.

Official Code § 7-2509.08). So ordered this 1st day of June, 2020.

/s/ [Illegible]
Presiding Member

Cc: Betsy Cavendish, Mayor's Office of General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 2d day in June, 2020, a copy of the Final Decision was emailed to the Supervisor, Firearms Registration Unit, authorized by the Chief of Police to act as his designee in this capacity (pursuant to the Firearms Regulations Control Act of 1975, effective January 6, 2015 (D.C. Act 20-564), and 24 DCMR § 2399); and, emailed to appellant's attorney.

ADMINISTRATOR SIGNATURE: Michelle Vannsman

2332 LICENSES FOR CONCEALED PISTOLS

2332.1 A person is eligible for issuance of a license to carry a concealed pistol (concealed carry license or license) only if the person:

(a) Is twenty one (21) years of age;

(b) Meets all of the requirements for a person registering a firearm pursuant to the Firearms Control Regulations Act of 1975 (the Act), effective September 24, 1976 (D.C. Law 1-85; D.C. Official Code §§ 7-2501.01 *et seq.* (2012 Repl. & 2014 Supp.));

(c) Possesses a pistol registered pursuant to the Act;

(d) Does not currently suffer nor has suffered in the previous five (5) years from any mental illness or condition that creates substantial risk that he or she is a danger to himself or herself or others; provided, that if the person no longer suffers such mental illness or condition, and that person has provided satisfactory documentation required under § 2337.3, then the Chief may determine that this requirement has been met;

(e) Has completed a firearms training course, or combination of courses, conducted by an instructor (or instructors) certified by the Chief;

(f) Has a bona fide residence or place of business:

(1) Within the District of Columbia;

(2) Within the United States and a license to carry a pistol concealed upon his or her person issued by the lawful authorities of any State or subdivision of the United States; or

(3) Within the United States and meets all registration and licensing requirements pursuant to the Act;

(g) Has demonstrated to the Chief good reason to fear injury to his or her person or property or has any other proper reason for carrying a pistol; and

(h) Is a suitable person to be so licensed.

SOURCE: Final Rulemaking published at 62 DCR 9781 (July 17, 2015).

2335 SUITABILITY TO OBTAIN A CONCEALED CARRY LICENSE

2335.1 A person is suitable to obtain a concealed carry license if he or she:

(a) Meets all of the requirements for a person registering a firearm pursuant to the Act;

(b) Has completed a firearms training course, or combination of courses, conducted by

an instructor (or instructors) certified by the Chief;

(c) Is not presently an alcoholic, addict, or habitual user of a controlled dangerous substance, unless the habitual use of a controlled dangerous substance is under licensed medical direction;

(d) Has not exhibited a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another; and

(e) Does not currently suffer nor has suffered in the previous five (5) years from any mental disorder, illness or condition that creates a substantial risk that he or she is a danger to himself or herself or others, or if the Chief has determined that the person is suitable based upon documentation provided by the person pursuant to § 2337.3.

SOURCE: Final Rulemaking published at 62 DCR 9781 (July 17, 2015).

2341 REVOCATION, LIMITATION, AND SUMMARY SUSPENSION

2341.1 The Chief may revoke a concealed carry license on a finding that the licensee:

(1) No longer satisfies one or more of the concealed carry license qualifications set

forth in the Act or any regulation authorized by the Act; or

(2) Failed to comply with one or more requirements or duties imposed upon the licensee by the Act or any regulation authorized by the Act.

2341.2 A concealed carry license may be limited, after its issuance, as described in §2340.4, upon a finding by the Chief that such limitation is necessary to protect the health, safety, security, or welfare of the District and its residents.

2341.3 The Chief shall provide a written notice of revocation or limitation to a person whose license is revoked or limited. The written notice shall contain:

(a) The reasons the license was revoked or limited; and

(b) A statement that the revocation or limitation will take effect unless the licensee requests an appeal to the Concealed Pistol Licensing Review Board (Board) no later than fifteen (15) days after the receipt of the notice of revocation or limitation.

2341.4 Unless a licensee has requested an appeal pursuant to § 2341.6(b), a licensee whose concealed carry license is revoked shall return the license to the Firearms Registration Section within fifteen (15) days after receipt of the notice of revocation.

2341.5 The Chief may summarily suspend or limit, without a hearing, a concealed carry license, when the Chief has determined that the conduct of the licensee presents an imminent danger to the health and safety of a person or the public.

2341.6 At the time of the summary suspension or limitation of a concealed carry license, the Chief shall provide the licensee with written notice stating:

(a) The action that is being taken;

(b) The basis for the action; and

(c) The right of the licensee to request a hearing with the Board pursuant to § 2341.7.

2341.7 A licensee shall have the right to request a hearing by the Board within seventy-two (72) hours after service of notice of the summary suspension or limitation of the concealed carry license. The Board shall hold a hearing within seventy-two (72) hours after receipt of a timely request and shall issue a written decision within seventy-two (72) hours after the hearing.

2341.8 Upon receipt of a summary suspension notice issued pursuant to § 2341.6, the licensee shall immediately return his or her suspended license to the Chief.

2341.9 If the Board does not sustain a summary suspension, the suspended concealed carry license shall be returned to the licensee.

SOURCE: Final Rulemaking published at 62 DCR 9781 (July 17, 2015).