

STATE OF MICHIGAN
COURT OF APPEALS

KENT A. MCNEIL,

Petitioner-Appellant,

v

ANTRIM COUNTY GUN BOARD a/k/a
ANTRIM COUNTY CONCEALED WEAPONS
LICENSING BOARD,

Respondent-Appellee.

UNPUBLISHED
May 23, 2013

No. 311229
Antrim Circuit Court
LC No. 2012-008721-CZ

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Respondent Antrim County Gun Board (the “board”) rejected petitioner Kent McNeil’s request to restore his right to possess and use a firearm. McNeil’s right to bear arms had been suspended following his 1988 plea-based convictions for kidnapping and extortion. In a well-reasoned opinion, the Antrim circuit court affirmed the board’s decision because McNeil had failed to present the board with clear and convincing evidence that he was “not likely to act in a manner dangerous to the safety of others.” We affirm.

I. BACKGROUND

In 1985, McNeil’s employer paid him \$2,000 to “convince” a debtor to repay a loan. McNeil, joined by two accomplices, laid in wait, accosted the victim, bound and gagged him, and transported him to a rural area. McNeil and his cohorts beat the victim, one of them using the butt of a shotgun. While McNeil awaited trial in jail, he engaged in a violent altercation with a fellow inmate, causing severe injuries. McNeil pleaded guilty to kidnapping and extortion in exchange for the dismissal of armed robbery and assault with intent to commit great bodily harm charges. After serving a lengthy prison term and completing post-release requirements, McNeil was discharged from parole in 1999.

Pursuant to MCL 750.224f, as McNeil had committed a “specified felony,” his right to possess or use a firearm was suspended until specifically restored. MCL 28.424 provides for the restoration of such rights as follows:

- (1) A person who is prohibited from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm under [MCL

750.224f(2)] may apply to the concealed weapons licensing board in the county in which he or she resides for restoration of those rights.

* * *

(3) The concealed weapons licensing board shall, by written order of the board, restore the rights of a person to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm if the board determines, by clear and convincing evidence, that all of the following circumstances exist:

(a) The person properly submitted an application for restoration of those rights as provided under this section.

(b) The expiration of 5 years after all of the following circumstances:

(i) The person has paid all fines imposed for the violation resulting in the prohibition.

(ii) The person has served all terms of imprisonment imposed for the violation resulting in the prohibition.

(iii) The person has successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition.

(c) The person's record and reputation are such that the person is not likely to act in a manner dangerous to the safety of other persons.

In 2007, McNeil first petitioned for restoration of his firearm rights, but was denied. In 2012, McNeil repeteritioned the board. McNeil presented evidence regarding his employment and education since his release from prison. The board also took into consideration a 2006 incident in which McNeil had illegally used a firearm (and injured his eye in the process). The board noted that McNeil had made several local officials feel unsafe because he threatened them with citizen's arrest and researched the level of force he would be entitled to use. The board also considered the nature of the crime that led to the revocation of his firearm rights in the first instance. One member of the three-person board moved for denial of McNeil's petition because "he has been convicted of two felonies, two significant felonies. And I think giving his firearm rights back to him would be a violation of not only federal law but the public trust that we have to serve." This motion passed unanimously.

McNeil then "petition[ed] the circuit court for review of that decision" as permitted by MCL 28.424(4). McNeil sought a de novo review of the board's decision, asserted that the burden fell on the board to support its decision by clear and convincing evidence, and challenged the overall fairness of the board proceedings. The circuit court concluded that its role was that of an appellate tribunal reviewing an administrative agency's decision. Its review was therefore limited to the record to consider whether the board's factual findings were supported by "substantial, competent, and material evidence." The court further noted that the burden was on McNeil as the petitioner to prove his case to the board by clear and convincing evidence. The court approved the board's consideration of McNeil's prior record in making its determination

but noted that this evidence should be used in a balanced manner. The court ruled that the board acted as required in light of the evidence before it and affirmed the denial of McNeil’s petition accordingly.

II. STANDARD OF REVIEW

McNeil first challenges the circuit court’s limitation of its review to the “substantial, competent, and material evidence” standard based on its determination that it was sitting as an appellate tribunal. We agree with the circuit court’s reasoning in this regard:

As this Court reads [MCL 28.424(4)], this petition for review is an appellate action. It is not a new action. The word review used in its most common sense, in statutory language, typically refers to an appeal. The looking over of something that has been done by another.

Now, the question of whether or not that appeal is on a record or de novo, I think is also fairly easily answered. In those cases where the Legislature has determined that the review should be de novo or in limited aspects de novo . . . the Legislature has been fairly careful to do so. . . .

* * *

This Court finds that this is an appeal. It’s an appeal from a municipal county Gun Board, an administrative body. And that it should be treated as an appeal on the record

* * *

[W]hen the Court looks at an appeal on a record from an administrative body, the typical standard . . . is whether or not there was substantial, competent, and material evidence to support the factual findings. But nevertheless, questions of law are always reviewed de novo, to determine whether they’re actually been properly interpreted or whether there was some odd constitutional behavior, that existed.

As noted by the circuit court, nothing in MCL 28.424(4) suggests that the court may review de novo a gun board’s decision not to restore a felon’s firearm rights. Compare MCL 28.425d(1) (requiring a circuit court to hold a “hearing de novo” on a challenge to a concealed weapon licensing board’s rejection of a petition for a concealed weapon permit). Moreover, the state constitution provides that a court must review an administrative agency’s quasi-judicial decision affecting private rights or licenses to determine if the decision is “supported by competent, material and substantial evidence on the whole record.” Const 1963, art 6, § 28. And a local concealed weapons licensing board is an administrative agency that makes quasi-judicial decisions affecting private rights or licenses. See *Carr v Midland Co Concealed Weapons Licensing Bd*, 259 Mich App 428, 432; 674 NW2d 709 (2003); *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 214; 707 NW2d 353 (2005).

III. BURDEN OF PROOF

McNeil complains that the board had the burden to support its decision based on clear and convincing evidence and the board and the circuit court erroneously determined that the burden of proof and persuasion was on him. We again agree with the circuit court's well-reasoned opinion. In this regard the circuit court ruled:

In such a proceeding, the burden of proof, by necessity, is on the petitioner. This is [sic] isn't unusual, nor is it a hardship. When one seeks relief from the Zoning Board of Appeals, when one seeks relief from the Secretary of State with regard to [a] driver's license action.

When one seeks relief from the Michigan Employment Security Commission, it is the petitioner who comes in subject to varying standards of review, to present his or her evidence. . . .

* * *

The burden of proof is on the petitioner. The standard to show satisfaction of the statutory requirements is by clear and convincing evidence. And so the burden of going forth with the evidence, what lawyers would typically refer to as the production burden, is with petitioner. And the petitioner ultimately carries the burden of persuasion to satisfy the Gun Board by clear and convincing evidence.

Again, nothing in the statute suggests that the board bears the burden of proof or persuasion. MCL 28.424(3) simply states that the decision whether to restore a felon's firearm rights must be supported "by clear and convincing evidence." It is axiomatic that the party filing a petition has the burden to establish his right to the relief requested. See, e.g., *Kampf v Kampf*, 237 Mich App 377, 385-386; 603 NW2d 295 (1999) (holding that "the burden of proof naturally falls on the petitioner" seeking a personal protection order even though not specifically assigned in the relevant statute); see also *Kimball v Myers*, 21 Mich 276, 280 (1870) (COOLEY, J.) (reasoning that in a civil action, "[t]he burden of proof is, of course, on the complainant").

IV. DUE PROCESS

McNeil contends that the board members had personal biases against him such that the restoration proceeding was unfair and he was denied due process of law. Specifically, McNeil argued that board member and assistant prosecuting attorney James L. Rossiter was on the board in 2007, when McNeil's first petition was denied. In 2007, McNeil took out a federal court ex parte temporary restraining order against the board, including Rossiter. Rossiter also had signed a search warrant for McNeil's residence sometime after the 2007 hearing. Similarly, McNeil contended that board member and Antrim County Sheriff Dan Bean was too involved in a pattern of harassment against McNeil to be neutral.

Generally, due process requires the right to a hearing before an unbiased and impartial decision-maker. *Hughes v Almena Twp*, 284 Mich App 50, 70; 771 NW2d 453(2009). If the circumstances reflect an unconstitutionally intolerable probability of bias on the part of the decision-maker, petitioner need not show actual bias. *Id.* McNeil's concern that Bean and

Rossiter harbor actual bias is not without arguable merit. Bean and Rossiter have both interacted with McNeil under unpleasant circumstances that could potentially implicate their abilities to serve as impartial decisionmakers. However, based on the record before us, we discern no evidence of actual bias against McNeil. Although Bean and Rossiter were the targets of a temporary restraining order issued at McNeil's request, the circumstances did not involve personal abuse or criticism likely to engender bias. See *Cain v Dep't of Corrections*, 451 Mich 470, 500-501; 548 NW2d 210 (1996). We also reject McNeil's reliance on *Crampton v Michigan Dept of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), in support of his bias claim. In *Crampton*, the Supreme Court identified circumstances which may create an intolerable risk of bias, including where the decision-maker (1) has a pecuniary interest in the outcome, (2) has been the target of personal abuse or criticism from the party before him, (3) is enmeshed in other matters involving petitioner, or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder, or initial decision-maker. *Id.* The Supreme Court held that a board to which an individual can appeal the revocation of his or her driver's license "membered by full-time law enforcement officials [is] not [a] fair and impartial tribunal[] to adjudge a law enforcement dispute between a citizen and a police officer." *Id.* at 350.

This Court, however, determined in *Bay Co Concealed Weapons Licensing Bd v Gasta*, 96 Mich App 784, 790; 293 NW2d 707 (1980), that the *Crampton* rationale does not apply to decisions of local concealed weapons licensing boards:

The licensing board is comprised of one representative each from the County Prosecutor's Office, the State Police, and the County Sheriff's Department. By creating a Board composed of law enforcement officials . . . the Legislature has insured that an individual's perceived need to carry a concealed weapon will be evaluated in light of the experience and knowledge of community needs possessed by these local officials. The potential danger which a concealed weapon poses to the unsuspecting public justifies that licensing procedures be entrusted to a board comprised of law enforcement officials.

* * *

[T]he licensing board as composed reflects the Legislature's intent that power to issue and revoke such licenses is properly placed with those professionals most able to assess community needs and problems in this area. [*Id.* at 791-792.]

We find this analysis persuasive. All individuals who have lost firearm rights pursuant to MCL 750.224f(2) have a criminal history and therefore potentially have a prior relationship with the law enforcement and prosecutorial officials nominated to the local gun board. If the nominated officials could not impartially consider one individual's previous felony convictions when hearing a request for restoration of firearm rights, the board could not be impartial in relation to any petition. We find no inherent bias when the Legislature considered the proper composition of such board's and passed a well-considered enactment. Moreover, as there was record evidence to support the board's decision, we find no actually prejudicial personal bias.

IV. EVIDENTIARY SUPPORT

Finally McNeil argues that the board improperly based its decision solely on his two previous felony convictions. There is no contention that McNeil established the requirements of MCL 28.424(3)(a) and (b). McNeil challenges the board's determination only in relation to subsection (3)(c), which provides: "The person's record and reputation are such that the person is not likely to act in a manner dangerous to the safety of other persons."

The circuit court extensively discussed the evidence necessary to support a gun board's decision in relation to this element:

What the essence of the proceeding before the [board] was and what this appeal is about, is whether the person's record and reputation are such that the person is not likely to act in a manner dangerous to the safety of others.

The question, I think, which troubles Mr. McNeil the most, is the utilization of his prior criminal record. And the notion that somehow all felons are being prohibited from restoration of gun privileges. . . .

But consideration of record is something that is always appropriate. How the record is used, of course, is subject to – to a balancing test. But record in the context of restoring gun rights to someone with a felony conviction, clearly is a reference to the prior criminal record.

Reputation, which is joined conjunctively with record, is just that. It's the individual's current reputation in the community. And there are ways that, that can be established consistent with standard rules of evidence.

Let's talk about the record for a moment. Does the fact that a person has a felony record necessarily preclude them from the restoration of gun rights? Absolutely not. The whole statute is about the fact that people with a prior felony record can receive gun rights.

But clearly it is not inappropriate to make distinctions between individuals, this isn't you, Mr. McNeil, but it's a relatively recent case in Grand Traverse County, who stab their spouse to death, cutoff [sic] various body parts. That is a record that should cause someone more pause than an individual perhaps whose felony was breaking and entering an unoccupied structure. They went into one of the local markets and took returnable pop cans.

Idiot lawyers let them plead to a 10 year felony instead of some misdemeanor. They have a felony record. It's a felony. They should be allowed to seeking [sic] restoration of gun rights. And clearly a Gun Board is going to look at the 19 year old who stole the pop cans out of the market, differently than they're going to look at the serial killer

There is nothing then inappropriate – in fact, it's statutorily mandated that the record be considered and the reputation. Where you get into the balancing test

is, the Gun Board has to look at the record. What the nature of the record was. How long ago that behavior occurred. And then what's occurred in the ensuing years.

What is the current reputation of the individual in the community? Those are all things that – that are considered together and then reaching what should be a reasoned opinion about whether or not the individual is ready for the restoration of gun rights.

As aptly noted by the circuit court, the plain language of MCL 28.424(3)(c) requires the board to consider both McNeil's reputation *and his record*. As the statute governs the restoration of firearm rights to convicted felons, the "record" referred to is obviously a petitioner's criminal record. The board may not consider the petitioner's prior record alone; the board must also consider evidence regarding his reputation presented by the petitioner tending to establish that the petitioner "is not likely to act in a manner dangerous to the safety of other persons."

Although the board cited only McNeil's prior criminal record in the ultimate motion to deny his petition, the board actually considered other evidence related to McNeil's reputation. McNeil presented documentation that he had earned bachelors and masters degrees. When asked about his prior conviction, however, McNeil became argumentative and pretended not to remember the details of his offense. The board considered that McNeil illegally handled a gun in 2006, and shot himself in the face in the process. The board also made note that McNeil had threatened several local officials with citizen's arrest and investigated his right to use force during such an arrest. As the board considered evidence of both McNeil's reputation and record and substantial, competent, and material evidence supported the board's ruling, the circuit court properly upheld the decision.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Elizabeth L. Gleicher

/s/ Mark T. Boonstra