

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CIVIL DIVISION – LAW

Dennis McKee

Vs.

Sheriff George David

No. 10630 of 2013

OPINION & ORDER

Tesla, J.

November 25, 2013

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HAROLD KEENE
PROthonARY
BEAVER COUNTY PA

The matter before the Court is a statutory appeal filed by Dennis McKee in response to the revocation of his license to carry a firearm concealed on his person issued by Beaver County Sheriff George David. For the reasons stated below, Sheriff David's decision to revoke Mr. McKee's license to carry a concealed firearm is reversed.

Facts and Procedural History

Dennis McKee, 66 years old, is an honorably discharged veteran, who served in the United States Marine Corps during the Vietnam War. N.T., 8/29/13, at 202. After leaving the Marine Corps, Mr. McKee served as a prison guard in a maximum security prison. Id. at 202. Mr. McKee left his employment as a prison guard after being stabbed in the throat by a prisoner. N.T., 5/21/13, at 27. Mr. McKee then worked for PennDOT as a truck driver before retiring. Id.

After leaving the Marine Corps, Mr. McKee still professes to live by the Marine Code, stating "we take an oath to protect our people and our country and our Constitution against all enemies, domestic and foreign." N.T., 8/29/13, at

221. Throughout his life, Mr. McKee has expressed strong feelings against criminals, who commit violent acts upon citizens. Id. at 200. He has made public statements that he has a firearm and would not be afraid to use it to protect himself or other citizens from violent criminals. Id. at 64-67. Mr. McKee, himself, has no prior criminal record and has never been charged with a criminal offense. Id. at 203.

For approximately 35 years, the Sheriff of Beaver County had issued a license to carry a firearm concealed on his person (hereinafter, "license") to Mr. McKee. Id. at 203. No action was taken by any of the previous Sheriffs to revoke the license of McKee during these 35 years. On July 19, 2012, Beaver County Sheriff George David renewed Mr. McKee's license to carry a firearm.

In October of 2012, Mr. McKee became a tenant of the Housing Authority of Beaver County when he leased an apartment at the Thomas G. Bishop Apartments located at 1023 Sixth Avenue in New Brighton, Pennsylvania. Id. at 102. While Mr. McKee resided there, Lori Musser served as the project manager for the Thomas G. Bishop Apartments and was responsible for addressing disputes between tenants. Id. at 102-04. In December of 2012, a tenant named Lucretia Bentley notified Ms. Musser of an argument between her and Mr. McKee. Id. at 103. Shortly thereafter, Ms. Musser spoke with Mr. McKee about the incident and informed him that it constituted a violation of his lease. Id. at 105-06. Ms. Musser did not take any steps requesting eviction of Mr. McKee because she did not consider this matter to be serious. During the following months, several other disputes over tenants' rights and responsibilities arose

between Mr. McKee and Ms. Musser that served to create a sense of acrimony between them. Id. at 108-18. In addition, Mr. McKee sent numerous written and e-mail communications to the Housing Authority of Beaver County regarding these incidents. Id. at 153. The Court notes that none of these communications contained any direct threats of violence toward Ms. Musser.

On January 31, 2013, Ms. Musser contacted the New Brighton Police Department concerning Mr. McKee. Ms. Musser complained that McKee had been saying to other tenants that he is filing a lawsuit against her and saying things like, "he has a gun and is not afraid to use it". Ms. Musser told the New Brighton Police that she just started the eviction process for McKee and wanted this documented. (See: Attachment 1, 1-30-2013, New Brighton Police report).

Officer Janectic per his report interviewed Mr. McKee. Initially, McKee told the officer that he was filing a grievance against Ms. Musser for yelling at him. McKee denied making the specific statement, "I have a gun and I'm not afraid to use it." Mr. McKee explained to the police officer that his intent was to use his firearm to protect citizens in case of an emergency or if a violent crime was occurring. Based on his investigation, Officer Janectic of the New Brighton Police Department did not file any criminal charges against Mr. McKee. However, Officer Janectic contacted the Beaver County Sheriff's office and requested revocation of Mr. McKee's license to carry a firearm.

On February 7, 2013, Sheriff David sent a letter to Mr. McKee notifying him of the revocation of his license to carry a concealed firearm. The notice stated, in part, as follows:

This correspondence is to advise you that your active License to Carry a firearm permit . . . issued 7/19/12 has been revoked due to the following reason(s):

*Good Cause / Incident Report
New Brighton PD*

You must return your permit to our office within five(5) days from the date of this notice, as required by law. Failure to do so will result in criminal charges being filed against you.

Notice of Revocation (handwritten portion in italics). Within five days of the February 7, 2013 notice, Mr. McKee turned his license in to the Sheriff's Office as directed. N.T., 5/21/13, at 93-94. On the same day that Mr. McKee handed in his license, he met with Sheriff David to discuss the reasons for the revocation. *Id.* During the informal meeting, Sheriff David explained to Mr. McKee that the permit was being revoked because the "New Brighton police requested for it to be pulled because of the incidents that were happening where he lived." *Id.* at 93. During this meeting, Dennis McKee requested a copy of the New Brighton Police Department report. The Sheriff denied his request and informed Mr. McKee that he could obtain a copy from the New Brighton Police Department. *Id.* The Court notes that the parties disagree about the level of detail Sheriff David provided Mr. McKee during the explanation for the revocation.

No appeal of Sheriff David's revocation was initially taken. On April 10, 2013, Mr. McKee filed a Motion to Compel-Request for Production of Documents with the Court. In his Motion, Mr. McKee alleged that the Sheriff revoked his license without notifying him of the specific reasons for the revocation. Citing Caba v. Weaknecht, 64 A.3d 39 (Pa. Cmwlth. 2013), Mr. McKee claimed that he had a right to know the reasons for the revocation and the identity of his accusers

as well as a right to cross-examine any witnesses against him. Mr. McKee contended that, without this information, he was unable to decide whether to appeal the revocation of his license to the Court of Common Pleas.

On April 25, 2013, the Court issued a rule upon Sheriff David to show cause why the February 7, 2013 revocation notice was in compliance with 18 Pa. C.S.A. § 6109 and Caba as well as why Mr. McKee's request for information concerning the revocation should not be granted. The Court also scheduled a hearing on Mr. McKee's Motion to Compel on May 21, 2013. On May 9, 2013, Sheriff David filed an Answer to Mr. McKee's Motion and New Matter. The Answer did not include a copy of the New Brighton Police incident report, but it did indicate that the report would be provided at the time of the May 21, 2013 hearing. In the New Matter, Sheriff David alleged that the Court did not have jurisdiction to hear Mr. McKee's request because he had not filed an appeal.

During the May 21, 2013 hearing, Mr. McKee argued that he could not appeal the license revocation because he was not provided the specific reasons for the revocation. N.T., 5/21/13, at 112-13. He further indicated that the revocation notice, which stated that the reason for the revocation was "Good Cause / Incident Report New Brighton PD", was insufficiently specific to comply with the requirements of 18 Pa.C.S.A. § 6109. Id. at 137-38. At the hearing, Sheriff David provided Mr. McKee with a copy of the New Brighton Police Department incident report. Id. at 71. Following the hearing, the Court expressed its concern that the February 7, 2013 revocation notice did not provide the specific reasons for the revocation, as required by Caba and § 6109. Id. at

138. After some discussion, Sheriff David agreed to re-issue within ten days a revocation notice outlining the specific reasons for the revocation of Mr. McKee's license. *Id.* at 140. The parties also agreed that Mr. McKee would have 30 days following the re-issuance of the revocation notice to file any appeal of the Sheriff's decision. *Id.* As a result, on May 21, 2013, the Court issued an Order granting Mr. McKee's Motion to Compel.

On May 31, 2013, Sheriff David issued a second letter of revocation in which he notified Mr. McKee that his license was being revoked per 18 Pa.C.S.A. § 6109(e)(1)(i) because he was allegedly an individual whose character and reputation is such that he would likely act in a manner dangerous to the public safety. Attached to the second revocation notice are 51 reports and documents in alleged support of Sheriff David's decision.

On June 19, 2013, Mr. McKee filed a Notice of Appeal of the Court's May 21, 2013 Order. Mr. McKee subsequently filed an addendum to his Notice of Appeal in which he clarified that he was appealing Sheriff David's decision to revoke his concealed carry license. In this addendum, Mr. McKee attached the original revocation notice issued on February 7, 2013. Based on the procedural posture, the Court interpreted this as Mr. McKee taking a statutory appeal of Sheriff David's revocation notices dated February 7, 2013 and May 31, 2013.

On August 29, 2013, the Court held a *de novo* hearing to consider whether the decision to revoke Mr. McKee's license to carry a firearm concealed on his person was proper. Sheriff David had the burden of production and persuasion during the hearing to establish that the revocation of Mr. McKee's

license was required because Mr. McKee was a person whose character and reputation is such that he would likely act in a manner that was dangerous to the public safety, per 18 Pa. C.S.A. § 6109(e)(1)(i). During the hearing, Sheriff David and four additional witnesses testified on behalf of the Sheriff's Office, and Mr. McKee called two witnesses and testified on his own behalf. Following the hearing, the Court took this matter under advisement and now issues this Opinion outlining the reasons for its decision.

Analysis

Issue: Is there substantial evidence to support the Sheriff's decision to revoke Mr. McKee's license because his character and reputation is such that he would likely act in a manner dangerous to the public?

Answer: Based on the evidence received at the *de novo* hearing, the Court concludes that there is not substantial evidence to support the revocation of Mr. McKee's license under 18 Pa. C.S.A. § 6109(e)(1)(i).

In District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783 (2008), the United States Supreme Court struck down a District of Columbia law that banned the possession of handguns and further required anyone lawfully possessing a firearm to render the weapon inoperable by either disassembling it or binding it with a trigger lock.

The Supreme Court held that both provisions violated the 2nd Amendment. In Heller, the Supreme Court held that, "the inherent right to self-defense has been central to the Second Amendment right." Heller, 554 U.S. at 628. In rendering the opinion of the Court, Justice Scalia found, after conducting an extensive historical analysis, that the Second Amendment conferred an individual

right to keep and bear arms for purposes of self-defense. In Heller, Justice

Scalia stated:

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two of them—Pennsylvania and Vermont—clearly adopted individual rights unconnected to militia service. Pennsylvania's Declaration of Rights of 1776 said: "That the people have a right to bear arms *for the defence of themselves, and the state....*"

Heller at 600-01 (italics in original). In McDonald v. City of Chicago, ____ U.S. ____, 130 S. Ct. 3020 (2010), the Supreme Court stated that, "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamentals rights necessary to our system of ordered liberty." Id. at 3042 (emphasis added).

In this case, Mr. McKee has filed an appeal of the notice of revocation of his license to the Court of Common Pleas per 18 Pa. C.S.A. §6109(i). The first questions that must be addressed are what role does the Court have in making factual determinations concerning the basis for the revocation and what is Court's standard of review on appeal.

The section governing judicial review states, in part, as follows:

The action of the chief of police, sheriff, county treasurer or other officer under this subchapter shall be subject to judicial review in the manner and within the time provided by 2 Pa. C.S. Ch. 7 Subch. B (relating to judicial review of local agency action). 18 Pa.C.S.A. § 6114.

The section governing disposition of appeals provides:

(a) **Incomplete record.**--In the event a full and complete record of the proceedings before the local agency was not made, the

court may hear the appeal de novo, or may remand the proceedings to the agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.

- (b) **Complete record.**--In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa. C.S. § 706 (relating to disposition of appeals).

2 Pa.C.S.A. § 754.

In Caba, the sheriff revoked Caba's license pursuant to 18 Pa.C.S.A. § 6109(e)(1)(i) because he believed that Caba would likely act in a manner dangerous to public safety. On appeal, the Commonwealth Court of Pennsylvania, citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), and recognizing that Article I, Sections 1 and 11 of the Pennsylvania Constitution expressly attach due process protections to a citizen's interest in his or her reputation, held "that the Sheriff's revocation of Caba's license in this case implicated a liberty interest worthy of procedural due process protections." Caba, 64 A.3d at 60 (underlining added). "[D]ue process ... accord[s] an opportunity to refute the charge before' the Sheriff." Id. (citing Regents, 408 U.S. at 573, 92 S.Ct. 2701) (emphasis added).

In Caba, the Sheriff argued that he had unfettered discretion in the issuance and revocation of a license to carry a firearm and that the licensee did not have a property interest for which he is entitled to procedural due process protection. Caba, 64 A.3d at 60. In response to the sheriff's contention, the Commonwealth Court pointed out that the legislature had amended the language of 18 Pa. C.S.A. § 6109. Id. at 61-63. Prior to 1998, Section 6109 (a) provided that the Sheriff may issue a License to Carry a Firearm. Id. at 61. In 1988, the legislators changed the language to provide that a license shall be issued to the licensee unless the licensing authority determines that there is good cause to deny the license. Id. The Commonwealth Court further indicated that the current statutory provisions limit the unfettered discretion of the sheriff to revoke a license for any reason. Id. at 63. The Commonwealth Court stated:

In June 1998, the General Assembly again amended the Act, specifically Section 6109(i) regarding revocation. The 1998 Amendments added the following emphasized language to the current version of Section 6109(i) of the Act:

- (i) Revocation.-A license to carry firearms may be revoked by the issuing authority for good cause. *A license to carry firearms shall be revoked by the issuing authority for any reason stated in subsection (e) (1) which occurs during the term of the permit.* Notice of revocation shall be in writing and shall state the specific reason for revocation. Notice shall be sent by certified mail, and, at that time, a copy shall be forwarded to the commissioner. An individual whose license is revoked shall surrender the license to the issuing authority within five days of receipt of the notice. An individual whose license is revoked may appeal to the court of common pleas for the judicial district in which the individual resides.

Id. at 62 (italics in original) (citing 18 Pa.C.S. § 6109(i)). The Commonwealth Court went on to conclude that:

Under the Act, the Sheriff must have "good cause" before he can revoke a license. 18 Pa. C.S. § 6109(i). In other words, he cannot revoke a license as a matter of administrative whim. He must revoke a license if the licensee becomes ineligible, for the reasons set forth in Section 6109(e)(1) of the Act, during the term of the license. *Id.* He also must provide the "**specific reason**" to the licensee for his revocation decision. *Id.* And, the licensee may appeal the Sheriff's decision to the Court of Common Pleas. *Id.* When a regulatory scheme provides for a review of an adverse governmental decision, this "sheds light on the legislature's intention in conferring a property right on those" with the appeal right.

Caba, 64 A.3d at 63 (emphasis added).

In Caba, the licensee argued that the sheriff's failure to conduct a pre- or post-deprivation hearing violated his due process rights. *Id.* at 64. The Commonwealth Court rejected this argument, stating:

His argument would be valid were it not for the fact of the hearing de novo before the Trial Court. In the de novo proceeding, the Court appropriately placed the burden of proof and ultimate burden of persuasion on the sheriff to justify his revocation decision . . . The Trial Court considered only the evidence placed before it on the record and **made weight and credibility determinations**. *Id.* at pg. 60.

The Commonwealth Court concluded that:

On appeal, Caba is entitled to challenge the Sheriff's factual findings. In the context of administrative law, courts review fact finding by the local agency to determine whether substantial evidence and record supports the finding, not for an abuse of discretion. See 2 Pa. C.S.A. § 754(b). As we explained in Tsokas, "[w]hen *the evidence* supports the conclusion that an individual licensed to carry a firearm does not possess the requisite character and reputation to do so, this Court must uphold the decision of a police chief or other proper official to revoke the license."

Id. at 63 (quoting Tsokas v. Board of Licenses and Inspections Review, 777 A.2d 1197, 1202 (Pa. Cmwlth. 2001) (emphasis added)).

In Beaver County, no pre- or post-administrative hearings are held before Sheriff David concerning the revocation of licenses to carry a firearm under 18 Pa. C.S.A. § 6109, and no full and complete record of any proceedings are made prior to revocation of a person's license to carry firearm. The only documentation provided to the licensee is a certified registered mail letter from the Sheriff revoking his license.

This proceeding was initiated when Sheriff David issued a letter of revocation on February 7, 2013 which indicated that Mr. McKee's license was revoked due to "Good Cause / Incident Report New Brighton PD." The February 7, 2013 notice did not: (a) cite any particular section under Section 6109(e)(i) authorizing revocation of his license; (b) allege that Mr. McKee had a reputation that he was likely to act in a manner dangerous to the public safety; (c) provide any details concerning the incident report or the date of the New Brighton Police Department report constituting the basis for the revocation of his license; or (d) provide any notification to the licensee of his right to appeal or the period of time to appeal the decision revoking his license to the Court of Common Pleas.

At the May 21, 2013 hearing, Mr. McKee testified that he asked the Sheriff for a copy of the New Brighton Police Department report that was the basis for the revocation of his license but was told by the Sheriff that he could obtain a copy from the New Brighton Police Department. N.T., 5/21/13, at 33. When Mr. McKee asked the Police Department for a copy of this report, he was informed that he could obtain one for a \$15.00 charge. Id.

After reviewing the February 7, 2013 notice, the Court believed that it did not provide the specific reason for the revocation as required under section 6109(i) and Caba. The Court directed the Sheriff to provide a notice of revocation providing the specific reasons for the revocation. On May 31, 2013, the Sheriff issued a second notice of revocation to Mr. McKee. No further administrative hearing was held by the Sheriff.

The proceeding for revocation of license in Tsokas was very different. In Tsokas, a hearing was held before a Board of Licenses and Inspections Review that determined based on the record that Tsoka's license should be revoked. Tsokas, 777 A.2d at 1198. The Court upheld the revocation based on a transcribed record made before the Board and before the Court. Id. at 1198-99.

Applying Caba, the Court concludes that procedural due process requires that a *de novo* hearing must be held to determine whether Mr. McKee was an individual whose character and reputation was such that he would be likely to act in a manner that is dangerous to public safety. At this hearing, the Sheriff would have the burden of proof and persuasion to justify the revocation of his license. The requirement of a *de novo* hearing by necessity requires the Court to evaluate and weigh the evidence at the *de novo* hearing to determine what evidence the Court believes was credible. After making findings of fact, the Court is required to determine whether there is substantial evidence to support the Sheriff's decision to revoke the license. If the evidence supports the Sheriff's conclusion that an individual licensed to carry a firearm does not possess the requisite

character or reputation to do so, the Court is required to uphold the decision of the Sheriff.

At the *de novo* hearing, Lori Musser, Project Manager of the Housing Authority of Beaver County, testified that she first had contact in October 2012 with Mr. McKee, when he became a tenant at the Thomas G. Bishop Apartments. N.T., 8/29/13, at 102. In December 2012, Ms. Musser received a complaint from another tenant, Lucretia Bentley, concerning Mr. McKee. Id. at 103. Ms. Musser told the Court that Ms. Bentley made a report to the New Brighton Police Department that she was afraid of Mr. McKee. Id. at 104. Review of the New Brighton Police Department report of December 10, 2012 by Officer Eric Bock indicated that Lucretia Bentley complained that Mr. McKee always says rude things to her when she comes and goes. Ms. Bentley did not allege Mr. McKee made any threats to her. No charges were filed by the New Brighton Police Department. Ms. Musser told the Court that she did not consider this matter serious enough to take formal steps for a formal hearing requesting eviction of Mr. McKee by the Housing Authority. Id. at 105.

Ms. Musser explained the next problem that she experienced with Mr. McKee as a tenant involved a carpet left behind in an apartment vacated by Mr. Bilbo. Id. at 108. When she was inspecting the apartment vacated by Mr. Bilbo, Ms. Musser told the Court that Mr. McKee indicated to her that the carpet was his. Id. This controversy centered around Mr. McKee alleging that he had made arrangements with Mr. Bilbo to have the carpet and Ms. Musser's insistence that he could not have the carpet unless Mr. Bilbo verified that fact to her. Id. at 109.

Ms. Musser alleged that Mr. McKee was angry with her, accusing her of stealing and stating that the Housing Authority could not take these things. Id. Ms. Musser told that Court that Mr. McKee placed a note under her door defining stealing, alleging that he would report her to HUD and that she could get fired. Id. The controversy of the rug ended when Mr. Bilbo called Ms. Musser and gave her authorization to give the carpet to Mr. McKee. Id.

However, the tension between Ms. Musser and Mr. McKee continued. Ms. Musser testified that she was afraid of Mr. McKee because his statements were always in a threatening tone. Id. at 110. Ms. Musser explained that, "I just felt that it was a definite threatening, like he was, he was taking the approach that he was threatening my position as manager, he was going to get me fired. Although I was not worried about that, it was offensive. I didn't care for the type of threatening tone." Id. at 111. Ms. Musser also testified that she felt violated, because Mr. McKee suggested alternative remedies to chemo therapy to her after he learned that she had cancer. Id. at 112. Ms. Musser objected to Mr. McKee talking to her ex-husband, who shared difficult details of her divorce. Id. at 114. Ms. Musser was particularly disturbed by Mr. McKee's action of conducting a back ground check on her that **incorrectly showed Ms. Musser had been arrested 49 times.** Id. at 113. Ms. Musser considered Mr. McKee's actions of showing these **incorrect** reports and pictures of her home to other tenants as threatening to her. Id.

During direct examination, Ms. Musser testified that Mr. McKee had stated, "I have a gun and am not afraid to use it." Id. at 106. When questioned

about Mr. McKee's purpose for saying that, Ms. Musser explained that Mr. McKee stated he would use his firearm to protect others in the building or to protect a person that was being raped. Id.

During the period of his tenancy, Ms. Musser made complaints to the New Brighton Police Department concerning Mr. McKee making inquiries into her personal life. Id. at 114-15. New Brighton Police Department never filed any criminal charges against Mr. McKee based on these complaints.

On January 13, 2013, Ms. Musser made a complaint to the New Brighton Police Department (See attachment 1). In this incident report, Ms. Musser alleged that Mr. McKee had told other tenants that he was filing a lawsuit against her and saying things like he has a gun and is not afraid to use it. In this incident report, Ms. Musser alleged that she and other tenants are fearful of him. During this communication, Ms. Musser advised the New Brighton Police Department that the Housing Authority had initiated eviction proceedings against Mr. McKee and wanted to have her complaint documented. Per this complaint, Officer Janetic interviewed Mr. McKee. During this interview, Mr. McKee told Officer Janetic that he was filing a grievance with the Housing Authority against Ms. Musser for yelling at him. Mr. McKee explained to Officer Janetic that he was not making a threat when he said he has a gun and is not afraid to use it but meant that he would use his gun to protect another person. No criminal charges were filed based on the allegations of Ms. Musser.

No evidence was presented at the Revocation Hearing that would establish that Mr. McKee made any direct threats to harm Ms. Musser or made

any direct statements to Ms. Musser that he would use a firearm to hurt her or any innocent person. This is clearly seen by the testimony of Ms. Musser during cross examination. During cross, Ms. Musser admitted:

Q: Oh, you're saying I came to you and threatened you personally?

A: Your, your--yes you have. You have made, where they're not threats to my live, you have made threats of my job, you have made a threatening—your actions are definitely threatening to me, yes.... You do not have the right to say you're going to get me fired for something that I have not done. No, you do not. That's a threat.

Id. at 130-31. Based on Ms. Musser's own testimony, the Court concludes that Mr. McKee has not made any direct threats of violence to Ms. Musser. The controversy between Ms. Musser and Mr. McKee concerns a landlord-tenant dispute in which the Housing Authority of Beaver County is requesting Mr. McKee's eviction. Mr. McKee's statement that he is going to file a grievance against Ms. Musser or that he is going to make a complaint to HUD causing her to be potentially fired does not establish that Mr. McKee has a character or reputation that makes it likely that he will act in a manner dangerous to public safety, nor does Ms. Musser's speculations that because Mr. McKee has stated in the past that he has a gun and is not afraid to use it to protect others from violent crime establish that Mr. McKee would use this firearm to hurt her or any other innocent tenant.

At the revocation hearing, the Sheriff did not present any witnesses that established Mr. McKee made direct threats of violence about Ms. Musser to them. Ms. Musser's allegations that she heard from tenants that Mr. McKee threatened to harm her with a firearm is directly contradicted by the testimony

presented at the hearing. During direct examination, Peggy Buterbaugh, a tenant at the Thomas Bishop Apartments, testified concerning her contact with Mr. McKee at the housing complex. Id. at 134. Ms. Buterbaugh testified that Mr. McKee had stated to her at different times, the phrase, "I have a gun. I am not really afraid to use it." Id. at 137. During cross examination, Ms. Buterbaugh explained that Mr. McKee made these statements to her when they were discussing newspaper articles describing child abuse or other persons being assaulted. Id. at 146. Ms. Buterbaugh clarified to the Court that Mr. McKee only made these statements in the past, when they were talking about fellow citizens being harmed by criminals. Id. at 147. Ms. Buterbaugh acknowledged that Mr. McKee did not make any threats to her and did not believe that Mr. McKee meant he would use his firearm as an initial aggressor in a criminal act. Id. at 142, 146, 148. When the Court asked Ms. Buterbaugh, "Did [Mr. McKee] ever make any kind of statement that the only people he's threatened to kill are those who cause him problems and refer to Lorrie Musser during that conversation", **Ms. Buterbaugh responded to the Court, "No, I never heard that."** Id. at 145.

This testimony illustrates a great concern of the Court that the revocation of the license of Mr. McKee is based solely on hearsay statements that are incorrect or based on mere speculation. On May 31, 2013, Sheriff David issued his second revocation letter to Mr. McKee alleging that Mr. McKee was an individual whose character and reputation was such that he would likely act in a manner dangerous to the public safety. The eighteenth report attached to the Sheriff's second letter of revocation is an email of Ms. Musser to Brian Yaworsky

forwarded to George Verlihay, Esquire and Carl DeChellis. (See: Attachment 18). This email sent by Ms. Musser constitutes hearsay within hearsay within hearsay. In her email, Ms. Musser stated: "Another tenant Peggy Booterbaugh [SIC] said she talked with Dennis on a few occasions. She said that Dennis is obsessed with the upcoming court case, bragging he is going to sue me, Housing Authority, Sheriff, and her and P. & C. Part. He assured her the only people he is threatening to kill are those who cause him problems, then said that was me." Ms. Musser's email that Peggy Buterbaugh told her that Mr. McKee had indicated to her that the only people he threatened to kill are those who he had problems with, then said it was me, is totally contrary to Ms. Buterbaugh's testimony in Court. When Ms. Buterbaugh told the Court that she never heard Mr. McKee say this, the Court observed her demeanor. Ms. Buterbaugh's answered no without any hesitation and seemed surprised at the allegations. The Court finds that the information provided in the email of May 15, 2013 is based on incorrect information and not credible to the Court.

The testimony of Mike Masilon further illustrates this problem. Attached to the Sheriff's second revocation letter is the May 16, 2013 Police Report of Officer Kelch of a complaint made by Ms. Musser. (See: Attachment 5). In this report, Ms. Musser alleged that an unnamed tenant reported to her that Dennis McKee is making threats about killing midgets and a particular woman, Lori. Based on this hearsay allegation, Ms. Musser wanted the New Brighton Police Department to document her complaint. The New Brighton Police Department did not file any criminal charges against Mr. McKee based upon these allegations.

During the revocation hearing, the Sheriff presented the testimony of tenant Mike Masilon. N.T., 8/29/13, at 164. During direct examination, the solicitor for the Sheriff asked Mr. Masilon if Mr. McKee has some issue with "midgets". Id. at 167. In response, Mr. Masilon testified that Mr. McKee told him that his first wife was a midget and that she fell through a hole of an outhouse and died. Id. Mr. Masilon, nor any other witnesses presented by the Sheriff, testified that Mr. McKee made any threats to kill midgets, to kill Ms. Musser, or to kill any other tenants at the Thomas G. Bishop Apartments. Mr. Masilon merely stated that Mr. McKee did not care for Ms. Musser because she allegedly did not do her job at the Housing Authority. Id. at 166. No known witnesses were presented at the revocation hearing to substantiate the hearsay allegations of Ms. Musser alleging that Mr. McKee had threatened to kill midgets or her.

The Court notes that Mr. Masilon did testify that Mr. McKee told him during a casual conversation when Mr. McKee moved into the Thomas Bishop Apartments that he allegedly killed someone in the past. Id. at 165. During cross examination, Mr. Masilon testified that he believed that Mr. McKee referred to killing the boyfriend of his ex-wife. Id. at 171. Mr. Masilon told the Court that he didn't take Mr. McKee seriously at the time and was not alarmed by the alleged statement. Id. at 172. At the revocation hearing, Mr. McKee denied making this statement and only stated that he had killed the enemy in Vietnam. Id. at 169.

After review of the testimony and observation of the demeanor of the witnesses, the Court finds that Mr. McKee did not make any statement to Mr. Masilon that he killed a person in the past other than as a soldier during Vietnam.

The testimony of Carl DeChellis, Executive Director of the Housing Authority of Beaver County, also shows that one of the primary difficulty between Mr. McKee and the Housing Authority was based on numerous emails that Mr. McKee had sent to him regarding HUD regulations, grievance procedures, and complaints about management. The Housing Authority sent to the Sheriff 24 emails that Mr. McKee sent to Carl DeChellis. Each of these emails were attached to the Sheriff's second letter of revocation that were alleged to establish that Mr. McKee had a character and reputation that would make him likely to act in a manner dangerous to the public safety. See attachment 16, 19, 20 – 42. In none of these emails does Mr. McKee make any threats to commit any violent acts towards Ms. Musser, the Housing Authority, Mr. DeChellis or any tenant of the Thomas Bishop Apartments. During his testimony, Mr. DeChellis stated:

I am just tired of answering his constant rants. I finally blocked him off of my e-mail. So, his e-mails go to the Housing Authority's website, not to me directly.... I told him, "Quit doing that. You don't have to protect people. That's why we have police, and please refrain from bothering our manager," which he continued to do by continuing to do these things and continued to send e-mails saying **we were violating his rights, veterans rights, civil rights, left rights, right rights. I was tired of hearing it.**

N.T., 8/29/13, at 152-53 (emphasis added). When the Court asked Mr. DeChellis, did any of Mr. McKee's communication make any kind of threats of violence to any tenants, Mr. DeChellis's answer was, "They were so numerous, Your Honor, I do not remember if there were anything in there about, referencing other residents. Id. at 159.

After review of the 24 emails by Mr. McKee to Carl DeChellis, the Court finds that, in eight of the emails, Mr. McKee was complaining about the

procedures of the Housing Authority at Thomas Bishop Apartments and / or requesting hearings on his allegations. See attachment 8, 20 & 25 – 29. In eight emails, Mr. McKee made alleged complaints against Ms. Musser as manager of the Housing Authority project. See attachment 20, 22, 30, 31, 33, 34, 36, 39. In three of these emails, Mr. McKee disputes the allegations that he has a gun and he is dangerous. See attachment; 22, 23, 33. In nine of Mr. McKee's emails, he made demeaning allegations against the Sheriff and expressed dissatisfaction with the revocation of his license.

Under the First Amendment, Mr. McKee had a right to communicate with public officials through email. First Amendment rights are not left rights or right rights as referred to by Mr. DeChellis, but a fundamental right that is the basis of our free society. Each of us, including public officials, must understand the people have a right to voice their opinions and have an opportunity to be heard. This Court's opinion does not address the merits of the underlying allegations made by Mr. McKee in his emails or approve of the demeaning language he used. However, the Court concludes that these emails do not establish that Mr. McKee is likely to act in a manner dangerous to public safety.

Prior to the *de novo* hearing, McKee filed a Motion to Strike, a Motion to Compel and several requests for additional discovery. On August 15, 2013, the Court held a pre-trial conference to make rulings on the Pre-trial Motions and additional requests for discovery filed by McKee. In his Motion to Strike, McKee alleged that 18 Pa. C.S.A. Section 6109 provides that a license may be revoked by the issuing authority for any reason stated in 6109(e)(i) which occurs during

the term of the permit. McKee objected to the Sheriff specifying in his second letter of revocation that he relied on documents concerning McKee's divorce 17 years ago as one of the basis for his revocation of his license in 2013. After reviewing the Motion, the Court considered this motion as a Motion in Limine. At the pre-trial conference, the Court stated that it was difficult to determine whether this evidence was relevant or admissible without hearing the context that the Sheriff was attempting to admit this alleged evidence. The Court denied McKee's motion to preclude pre-trial admission of this evidence. However, the Court held that defendant could object to the admission of this evidence at the time of the hearing, so the Court could determine whether the proposed evidence was relevant in the context of the evidence presented at the hearing. N.T., 8/15/13, at 8-9, 21-22.

At the start of the *de novo* hearing, the Court reiterated that 18 Pa. C.S.A. Section 6109 provided that the reasons for the revocation must occur during the period of the license. N.T., 8/29/13, at 4. The Court informed the parties that any objection to the proposed evidence that allegedly arose prior to the date of the reissued license on July 19, 2012 could be raised at the time of its proposed admission. Id.

The first witness that testified at the revocation hearing was Sheriff David. During the hearing, Sheriff David rendered an opinion that Mr. McKee is a dangerous man that should not have a weapon or a license to carry a firearm concealed on his person. Id. at 51.

The primary reason that the Sheriff revoked Mr. McKee's license to carry a firearm is that Officer Janectic of the New Brighton Police Department requested revocation of Mr. McKee's license based on Ms. Musser's report of January 31, 2013 and May 16, 2013. After review of Ms. Musser's testimony at the revocation hearing, the Court has concluded that Mr. McKee has not made any threats of violence to Ms. Musser. The testimony of Ms. Buterbaugh and Mr. Masilon further illustrate that the two reports of Ms. Musser are based on inaccurate hearsay statements made to Ms. Musser from unknown persons. No investigation was conducted by the Sheriff's office concerning the New Brighton Police Department reports. The Court concludes that, in light of the in-court testimony of Ms. Musser, the New Brighton Police Department reports of January 31, 2013 and May 16, 2013 do not constitute substantial evidence that Mr. McKee is an individual whose character and reputation is such that he would be likely to act in a manner dangerous to the public safety.

In support of his decision to revoke, Sheriff David recounted to the Court a conversation that he had with Mr. McKee after issuing the initial revocation letter of February 7, 2013. Id. at 16, 49-51. Sheriff David testified that, in this conversation, Mr. McKee had indicated to him that if a criminal goes into the New Brighton school, he would arrive before the police and use deadly force if necessary. Id. at 49. The Sheriff told Mr. McKee that he could not bring a weapon onto school property, but should wait for the police to arrive at the scene. Id. at 49-50. At the hearing, Mr. McKee explained to the Court that he had stated that he has a firearm and is prepared to use it against criminals that are killing or

committing violent acts against citizens. Id. at 221. McKee stated, "If somebody is in shooting up our school and killing our kids and our teachers, to me that's a criminal, and I'm going to take him out if I can. . . .Well the criteria is very intense. They have to be killing people." Id. at 212.

The tragic loss of children in school shootings has stirred strong emotions in all of our citizens. All have grieved for the loss of these children and for their families. Many citizens have expressed strong thoughts and desires to protect our children from attack by criminals in our schools. The use of deadly force in any circumstance is a matter of utmost seriousness. It is prudent to rely on members of law enforcements during these emergencies.

Under the State and Federal Constitution, a core part of an individual's right to bear arms is an individual's right to self defense. Article 1 Section 21 of the Pennsylvania Constitution states, "The right of citizens to bear arms in defense of themselves and the state shall not be questioned." In McDonald v. City of Chicago, Illinois, ___ US ___, 130 S. Ct. 3020 (2010), the United States Supreme Court stated, "Individual self defense is the central component of the 2nd amendment." McDonald, 130 S.Ct. at 3023. Our legislature has defined when the use of deadly force is justified. 18 Pa. C.S.A. Section 505(b)(2) use of force in self-protection, states, "[t]he use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat[.]" 18 Pa.C.S.A. § 505(b)(2).¹ 18 Pa. C.S.A. Section

¹ The legislature has reinforced a lawful citizen's right to self-defense by the passage of the Castle Doctrine effective August 29, 2011.

506, use of force for the protection of other persons, provides, "[t]he use of force upon or toward the person of another is justifiable to protect a third person when: (1) the actor would be justified under Section 505(relating to the use of force in self protection) in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect[.]" 18

Pa.C.S.A. § 506(a)(1).

After review of the testimony of Mr. McKee, the Court concludes that his statements are a reiteration of the law of self-defense as defined by 18 Pa.C.S.A. Section 506 and Article 1, Section 21 of the Pennsylvania Constitution. The Court concludes that these statements of McKee do not constitute substantial evidence that McKee has a character and reputation that he would be likely to act in a manner that is dangerous to the public.

During much of his testimony, the Sheriff explained that he had considered the 51 reports/documents attached to his second letter of revocation in making his decision to revoke Mr. McKee's license. After review of these reports, the Court has concluded that these reports do not constitute substantial evidence to establish that McKee has a character and reputation that he is likely to act in a manner dangerous to public safety. Seven reports and documents relied upon the Sheriff were outside of the time period of McKee's license or so distant in the past that the Court deemed that they were not admissible under 18 Pa. C.S.A. Section 6109 or relevant in making a determination of the character and reputation of McKee. (See: Appendix – Attachments 2; 3; 43-47.)

Sheriff David testified that he relied on New Brighton Police Department reports and supplemental reports of May 19, 2010 submitted by Officer Steven Ivan. In these reports, Officer Ivan documented that a Yolanda Tomeo had reported to the New Brighton Police Department that she was being harassed by McKee because he left two letters on her sister's porch, which advised her sister that Ms. Tomeo was on drugs and that a child molestor was watching her children. After reading these letters, Officer Ivan determined that they were not sent to Ms. Tomeo and concluded his investigation. Officer Ivan's report does not elude to Mr. McKee making any direct or indirect threats of violence to Ms. Tomeo. Based on the officer's investigation, he closed the case. Again, the Court does not find that these reports constitute substantial evidence that McKee is likely to act in a manner that is dangerous to the public.

Also included in Sheriff David's pre-trial statement were numerous e-mail communications between Mr. McKee and members of the Sheriff's office or other law enforcement officials. N.T., 8/29/13, at 14-19, 50, 93, 94. Sheriff David testified that he considered these communications in making his decision to revoke Mr. McKee's license. Id. at 14-19. A review of these communications reveals that they are devoid of any threats to commit crimes of violence. Rather, the communications illustrate, for the most part, Mr. McKee's dissatisfaction with Sheriff David's revocation decision. Sheriff David himself essentially admitted that the e-mails did not contain such violent threats. When asked by the Court whether the communications included any threats to commit acts of violence, Sheriff David testified that what he found objectionable about the

communications was that they demonstrated Mr. McKee's abnormal behavior and his desire to "open carry" his firearm. Id. at 93-94. While Sheriff David may find these statements obnoxious, they provide little indication from the Court's perspective that Mr. McKee is a danger to public safety.

The Court notes that, in addition to his objections to the revocation, Mr. McKee's e-mail communications contain various insulting and inflammatory statements directed at Sheriff David and the Beaver County Sheriff's Office. It is disappointing when any public official is the target of such rude and offensive attacks. The Beaver County Sheriff's Office and its deputies have provided excellent security to the Court, which, in turn, enables the Court to perform its duties. Hence, this opinion should not be interpreted as condoning the statements made by McKee in these email communications.²

Prior to issuing a license to carry a firearm, the Sheriff is required to conduct a criminal background and mental health check of the applicant. 18 Pa.C.S.A. § 6109(d). For 35 years, Mr. McKee passed the criminal background and mental health check conducted by the Beaver County Sheriff. Prior to reissuing a license to carry a firearm, Sheriff David was required to conduct a background check following the procedure in section 6111 to verify that Mr. McKee did not have any criminal record and mental health history that would preclude him from having a license.

² The Sheriff also testified that he relied on the 24 e-mails that Mr. McKee sent to Carl DeChellis of the Housing Authority. The Court has previously discussed those e-mails and concluded that none of the e-mails contained any threats of violence. In these e-mails, Mr. McKee was exercising his First Amendment right to communicate grievances to the Housing Authority.

The background check conducted by Sheriff David did not reveal that Mr. McKee had ever been committed to any mental institution or have any mental health history that would preclude him from having a license. After conducting a background check, Sheriff David reissued Mr. McKee's license to carry a firearm on July 19, 2012.

At the revocation hearing, Sheriff David indicated that he considered e-mail communications referencing Mr. McKee's mental condition. Id. at 39, 81. Sheriff David expressed concern that in e-mails of November 8, 2008, Mr. McKee had indicated that he had diagnosed himself with a borderline personality disorder. In these e-mails, Mr. McKee indicated he managed his needs for aggression by fighting for people in the legal system. In his second e-mail of December 9, 2008, Mr. McKee stated that people with this disorder have a choice to do good things or criminal acts and "It boils down not to diagnosis but to the character of the person and what we choose to do." (See: attachment 50). The Court does note that McKee did make inappropriate comments about peeing on attorneys and derogatory comments concerning the justice system in these e-mails. The undersigned does not approve of these statements. However, Mr. McKee did not make any threat of violence in these e-mails.

The information regarding Mr. McKee's self-diagnosis would have probably been available when Sheriff David conducted the requisite mental health check and renewed his license. Since the information did not prevent the renewal of the license, the Court concludes that it is not sufficient to revoke Mr. McKee's license. This is especially true because Mr. McKee only diagnosed

himself several years ago with borderline personality disorder. N.T., 8/29/13, at 204. Since that time, Mr. McKee determined that he does not suffer from the disorder, and the Veteran's Administration agreed. Id. at 215-16. Mr. McKee testified that he underwent several tests, and it was determined that he does not suffer from borderline personality disorder or any other personality disorder. Id. at 204-05. As a result, the Court concludes that the e-mail communications referencing Mr. McKee's alleged mental condition do not constitute substantial evidence that Mr. McKee is a danger to public safety.

Lastly, during the revocation hearing, the Sheriff and witnesses referred to several offensive statements made by McKee. Id. at p.167, 172, 174, 176, 180. See also: Exhibit C. The Court does not condone those statements and has zero tolerance for these kinds of statements. Although these statements are totally not acceptable, they do not constitute substantial evidence that McKee is likely to act in a manner dangerous to the public safety.

A person's character and reputation in the community is established based on an individual's actions and how he has lived his life. Mr. McKee served as a Marine in Vietnam and received an honorable discharge. After returning home, McKee lived a productive life as a maximum security prison guard and as a truck driver for PennDOT. McKee, 66 years old, has no prior record and has possessed a license to carry a firearm for 35 years.

The basis for the revocation of McKee's license to carry a firearm centers on the controversy between Ms. Musser, Mr. McKee, and the Housing Authority of Beaver County concerning landlord tenant issues. Many of the statements

made during Ms. Musser's testimony were contradicted by the testimony of Mr. McKee. Throughout these proceedings, Mr. McKee testified that his statements were meant to convey his intention to use his gun in defense of others. At the outset of his testimony, Mr. McKee "apologize[d] to everyone in the courtroom who believes that I posed a threat to someone because I don't feel that way." N.T., 8/29/13, at 199. He further stated that he is "deeply sorry if Ms. Musser is afraid of" him. Id. at 200. On cross-examination, he maintained that he "never made the statement to Miss Musser or anyone else other than, 'I have a firearm, and I'm prepared to use it against criminals.'" Id. at 220. At the conclusion of his testimony, he again apologized to anyone he may have scared and stated that he has "no intention of hurting [Ms. Musser] or anyone else." Id. at 222. After considering Mr. McKee's testimony and his demeanor during the hearing, the Court finds Mr. McKee and his testimony credible. Based on the testimony presented at the hearing and the documents submitted into evidence, the Court concludes that any conflict between Mr. McKee and Ms. Musser was a result of his pursuit of grievances against the Housing Authority and not any alleged threats of violence.

Both the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania have "held that although the right to bear arms is a constitutional right, *it is not unlimited*, and restrictions are a proper exercise of police power if they are intended to protect society." Caba, 64 A.3d at 50 (citing Lehman v. Pa. State Police, 576 Pa. 365, 377-78, 839 A.2d 265, 273 (2003)) (emphasis in Caba). The Supreme Court of the United States has similarly stated:

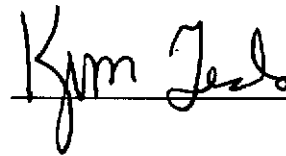
Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose....[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-27, 128 S.Ct. at 2816-17. Consistent with this statement by the Supreme Court, the fact that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller "does not imperil every law regulating firearms." McDonald, 130 S.Ct. at 3047, 3050. This reasoning applies to Section 6109. In finding Section 6109 constitutional, the Commonwealth Court stated, "the Supreme Court's decisions recognize that concealed carry laws, such as the scheme set forth in the Act, are presumptively valid even under a heightened standard of constitutional scrutiny." Caba, 64 A.3d at 52 (citing Heller, 554 U.S. at 628-29 & n. 27, 128 S.Ct. 2783); see also Commonwealth v. McKown, --- A.3d ---, 2013 WL 5729802 (Pa. Super. 2013).

As indicated above, the Commonwealth Court in Caba held "that the revocation of a person's license to carry a firearm implicated a liberty interest worthy of procedural due process protections." Caba, 64 A.3d at 60. After review of the record, the Court does not believe that our forefathers meant that an individual's right to bear arms under the 2nd amendment or Article 1 Section 21 require that a citizen is unable to express his or her views or is gagged, in order to be licensed to carry a firearm under 18 Pa. C.S.A. Section 6109. Nor

should a lawful citizen, who has no prior record, and had been issued to a license to carry a firearm for 35 years, have his license to carry a firearm be revoked based on hearsay statements that have not been substantiated by investigation of the Sheriff's Office or the evidence introduced at the De novo hearing. The Court finds that the Sheriff's conclusion that McKee has a reputation and character that it is likely that he will act in a manner dangerous to the public is based solely on incorrect information, hearsay and speculation. The Court sustains the appeal of the revocation of his license filed by Dennis McKee and enters the attached Order.

BY THE COURT,

A handwritten signature in black ink, appearing to read "Kim Tesla", is written over a horizontal line.

KIM TESLA
JUDGE

2013 NOV 25 P 2:35

BY THE COURT

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CIVIL DIVISION – LAW

Dennis McKee

Vs.

Sheriff George David

No. 10630 of 2013

ORDER

AND NOW, this 25th day of NOV, 2013,

upon consideration of Dennis McKee's appeal from Sheriff George David's revocation of Mr. McKee's license to carry a firearm concealed, and after a hearing thereon, it is hereby ORDERED and DIRECTED that:

- (1) Mr. McKee's appeal is SUSTAINED;
- (2) This matter is REMANDED to the Sheriff with instructions to reinstate Mr. McKee's license to carry a firearm concealed;
- (3) The costs associated with the reinstatement of the license are waived.

BY THE COURT,


Kim Tesla, J.

KIM TESLA
JUDGE

NOV 25 P 2:34

BY THE COURT

FILED OR ISSUED

2013 NOV 25 PM 2:44

NANCY WERME
PROTHONOTARY
BEAVER COUNTY, PA