Concealing Due Process

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By Derek Andrew DeBrosse

As a firearms enthusiast and Second Amendment advocate, I naturally jump at the opportunity to represent clients with firearms issues. And while I expected some twists and turns in an otherwise straightforward practice area, I never imagined that firearms law could be one of the most nuanced aspects of my practice. The weapons control laws were poorly written from the start (a final "poison pill" effort to kill concealed carry), and because the General Assembly amends the laws almost every year, the statutes are full of pitfalls, ambiguities, and conflicts. Here are some of the problems that may arise in the course of a concealed handgun license revocation. Although these are relatively rare, a revocation comes with serious consequences to the licensee and serious responsibilities on the part of the county sheriff who revokes the license.

Is it an administrative proceeding?

State law is deceptively clear: a county sheriff shall revoke a concealed carry license if the licensee does anything on a laundry list of mostly criminal acts.[1] Based upon the experiences of my clients, some county sheriffs have considered this commandment the beginning and the end of the process for revoking a licensee's CHL. But as every lawyer learned in Constitutional Law, most licenses cannot be revoked without due process. Law enforcement officers are often experts in due process and equal protection in a criminal context, but are understandably less familiar with these Constitutional principles in a civil setting. Therefore, it is not unusual to discover a CHL revocation that almost certainly afforded the licensee something less than true procedural due process.

To ensure that licensees who face revocation proceedings are given the full dose of due process, the General Assembly enacted the Administrative Procedures Act, which regulates the process by which licenses are formally revoked, and the ways in which an aggrieved licensee may appeal the revocation.[2] The concealed carry law specifically states that a sheriff must consult and apply the APA whenever the sheriff *denies an application* for a concealed handgun license, but it is silent on the sheriff's obligations when seeking to *revoke* an otherwise valid license.[3]

Looking beyond the pages of the concealed carry statutes to the APA itself, though, the picture becomes more clear. The Act states that it applies to any "agency," and defines an agency as any entity that has authority to issue, suspend, or revoke a license.[4] Because a county sheriff has absolute authority to issue, suspend, and revoke a CHL, the sheriff is, for concealed carry license purposes, an "agency." Therefore, most sources agree that the APA does apply to revocations of concealed handgun licenses.

What Due Process is Required?

Based on reports from my clients, Ohio's eighty-eight sheriffs each provide a different "kind" of due process. Some sheriffs conduct full-blown administrative hearings, others have a quasi-hearing, where the licensee can respond in writing, and, unfortunately, a few are perfectly happy to summarily revoke a CHL as long as the licensee isn't aware of his right to demand additional process. I don't believe that this discrepancy is motivated by malice, but is instead the natural and foreseeable consequence of turning a peace officer into a judge – a role that is both foreign to a county sheriff and totally unprecedented elsewhere in the Revised Code.

Sheriffs are, first and foremost, peace officers. They are experts in due process of a different kind, including the protections of the Fourth, Fifth, and Eighth Amendments that the Fourteenth Amendment incorporates to the states. They are not always familiar with the requirements of the Revised Code outside of Chapter 29 and certain other criminal provisions. It is, therefore, not unexpected that a county sheriff may not fully understand his obligations under the APA. And since the APA is not even mentioned in the concealed carry revocation statute, even a diligent sheriff who thoroughly read the law might not know of his obligation to provide notice and a hearing.

So how should a sheriff properly revoke a CHL? Due process in the context of a license revocation requires a minimum of two things: notice of the proposed action and an opportunity for a fair hearing.[5] The concealed carry license revocation statute requires the sheriff to provide written notice to the licensee of the sheriff's intention to revoke the licensee's CHL.[6] That letter, combined with a fourteen day response window, probably satisfies the notice requirement of the due process clause.

As for the hearing, there is no judicial authority on what, specifically, is required. Because due process is a fundamental right, it is likely that a court would view anything less than a full-blown administrative hearing with suspicion. The best practice is for a county sheriff to convene a true evidentiary hearing. The sheriff should allow the licensee to attend in person and present testimony, evidence, and other legal arguments. A record, perhaps including a transcript of the proceedings, should be created and preserved for appeal.[7]

In exchange for the painstaking process of conducting such an extensive hearing, the sheriff gains the opportunity to exercise broad discretionary powers.[8] Perhaps more important, the standard of review in

appeals from agency orders is very much in the agency's favor. Legal issues are reviewed *de novo*, but factual issues are reviewed under a hybrid standard that emphasizes the agency's findings of fact.[9] A CHL revocation, if ordered after a full and fair hearing, is much more likely to be affirmed on appeal than one conducted under some lesser process.

Unfortunately, some county sheriffs and the assistant prosecutors who advise them are unfamiliar with the APA. As a consequence, some CHL revocations are conducted without due process and can be set aside by the lawyer who is aware of the constitutional requirements of the Fourteenth Amendment and the provisions of Ohio's APA.

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1. R.C. 2923.128(B)(1).
2. R.C. 119.12 et seq..
3. R.C. 2923.125(D)(2)(b); 2923.128.
4. R.C. 119.01(A)(1).
5. *State ex rel. LTV Steel Co. v. Industrial Comm'n of Ohio* (10th Dist. 1995), 102 Ohio App.3d 100, 103-104, 656 N.E.2d 1016; *State ex rel. Finley v. Dusty Drilling Co.* (10th Dist. 1981), 2 Ohio App.3d 323, 325, 441 N.E.2d 1128.
6. 2923.128(B)(2).
7. *See* R.C. 119.09 (setting forth the process for administrative adjudication hearings).
8. *Finley v. Dusty Drilling Co.* (10th Dist. 1981), 2 Ohio App.3d 323, 325, 441 N.E.2d 1128.
9. *See Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570; *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio ST.2d 108.

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ABOUT THAT PROPOSITION . . .

By Jack D'Aurora, The Behal Law Group

U.S. District Judge Vaughn Walker's decision overturning California's Proposition 8, which prohibited same-sex marriage, has sparked angry comments.

Commentators, such as Cal Thomas, dismiss Walker as an "activist judge" and suggest he is immoral. But morality was not the issue at trial.

The issue was whether Prop 8 violated the due-process and equal-protection rights provided by the 14th Amendment. It's easy to blur the distinction between morality and constitutional safeguards because legal matters and morals are often consistent, but here they weren't.

Think about it. The Ten Commandments outlaw theft and murder, and so do the laws of every state in the Union. On the other hand, the commandments prohibit adultery, but there's no criminal sanction for sleeping with your neighbor's wife.

Because marriage long has been recognized as a fundamental constitutional right, for Prop 8 to be held constitutional, its proponents had to prove that its limitation on gay marriage serve a compelling government interest. To that end, the proponents attempted to prove that Prop 8 did four things: It maintained California's definition of marriage as excluding same-sex couples, affirmed the will of Californians to exclude same-sex couples from marriage, promoted stability between men and women and promoted "statistically optimal" child-rearing households.

Their position came down to an interest in encouraging sexual activity between people of the opposite sex in stable marriages because sexual activity may lead to children, and the state wants to encourage parents to raise children in stable households.

As to the plaintiffs who challenged Prop 8, the judge listened to gay witnesses who testified about why marriage was important to them. He also heard from several experts in psychology, economics, political science and history who testified about the benefits that marriage provides in areas such as insurance and employment benefits, taxes, inheritance, etc., and how these benefits have been denied to some simply because of their sexual orientation.

For California to have attempted to regulate marriage through Prop 8 was nothing new. Though solemnized by religious ceremony, marriage always has been a matter of civil law, which has evolved. Many states once carried laws, since held to be unconstitutional, that prohibited whites and non-whites from marrying. Other laws, known as coverture, once limited a woman's rights in marriage.

After two weeks of trial, Walker concluded that Prop 8 had no rational relationship to the state's interest in promoting stable marital relationships between opposite-sex couples and that allowing gay marriage did nothing to impair the relationships between opposite-sex couples.

The court found that domestic-partnership laws do not offer equality because they may not be recognized in other states and are not recognized by the federal government.

Perhaps most significantly, there was no evidence that permitting same-sex couples to marry would affect either the number of opposite-sex couples marrying and having children or the stability of opposite-sex marriages.

At a hearing conducted sometime prior to the trial, Walker asked the lawyer representing the Prop 8 proponents how same-sex marriage impairs the state's interest in marriage being for procreation. The attorney answered, "I don't know." Neither do I, and I doubt that anyone can offer a cogent explanation for how gay marriage interferes with stable marriages between opposite-sex couples and procreation.

Our society isn't founded on religious principles, though religious principles have helped shape our nation. The nation is founded on a Constitution that guarantees certain basic freedoms and equality to everyone. We should be troubled by the idea of denying any citizen, simply because of his sexuality, the benefits that the rest of us enjoy.

It took years before we acknowledged that race and other differences are irrelevant to equal treatment. We're now dealing with sexual orientation. The question is whether religious advocates can reconcile their personal beliefs with constitutional mandates and subdue their outrage.

Anyone who criticizes Walker hasn't read his decision in Perry vs. Schwarzenegger. It's a great primer on evidence, fact-finding and constitutional rights and, though 136 pages, an easy read. Give it a try: www.cand.uscourts.gov

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First published in The Columbus Dispatch, opinion page, August 28, 2010.