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Gun Permit Appeals

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There are two types of gun permits in North Carolina: concealed handgun permits[1] and pistol purchase permits.[2] By law, a citizen must hold one or the other in order to purchase a handgun or to receive one as a gift.[3] A concealed handgun permit further allows the permit holder to carry a handgun concealed on or about his or her person notwithstanding the state's general ban on concealed weapons.[4]

A citizen seeking either type of permit must apply to the sheriff. If the sheriff rejects the citizen's application—or if the sheriff initially issues a permit but later revokes it or declines to renew it—the citizen may appeal to the courts. This bulletin addresses how courts should handle such appeals. It is not intended to assist sheriffs in handling permit applications in the first instance.[5]

Concealed Handgun Permits

North Carolina law requires that a sheriff issue a concealed handgun permit to an eligible applicant.[6] A permit holder may carry a concealed handgun anywhere in the state other than the areas excepted by statute, such as schools, law enforcement facilities, state and federal offices, and posted private property.[7]

The criteria that a sheriff must use when considering an application for a concealed handgun permit are set forth in Section 14-415.12 of the North Carolina General Statutes (hereinafter G.S.). Many of them are objective and mechanical. For example, there will normally be little dispute concerning whether the applicant is 21 years of age or older, whether the applicant has

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1. *See generally* N.C. Gen Stat. (hereinafter G.S.) §§ 14-415.10 through 14-415.27.
2. *See generally* G.S. 14-402 through 14-405.
3. G.S. 14-402(a).
4. G.S. 14-269.
5. Sheriffs may wish to seek guidance from their agency attorney, if any; from their county attorney; or from the North Carolina Sheriffs' Association.
6. G.S. 14-415.11(b).
7. G.S. 14-415.11. The scope of a permit is even broader for certain classes of permit holders, including many court officials. G.S. 14-415.27.

successfully completed an approved training course, and whether the applicant has been discharged from the military under conditions other than honorable.

Other criteria may be less susceptible to conclusive documentary proof. For example, whether the applicant has a "physical or mental infirmity that prevents the safe handling of a handgun,"[8] or whether the applicant is "an unlawful user of, or addicted to marijuana, alcohol, or . . . any other controlled substance,"[9] are points on which disagreement may arise.

When a sheriff denies an applicant a concealed handgun permit, the sheriff must, "within 45 days, notify the applicant in writing, stating the grounds for denial."[10] If the applicant is dissatisfied with the sheriff's decision, the applicant "may appeal the denial . . . by petitioning a district court judge of the district in which the application was filed."[11]

Even if a sheriff initially issues a permit, the sheriff may later revoke or decline to renew[12] the permit for a variety of reasons, including fraud by the permittee in obtaining the permit, misuse of the permit by the permittee, or the permittee being charged with or convicted of certain crimes.[13] As discussed further below, revocation and nonrenewal of a permit also may result in appeals to district court.

Appeal from Denial of a Permit

There is no statutory time limit on an applicant's right to appeal a sheriff's denial of a permit. In practice, most appeals follow closely on the heels of a denial, but an applicant occasionally appeals a denial that took place years earlier.

Procedurally, an applicant may initiate an appeal by filing a petition with the clerk. After collecting the filing fee, currently $150, the clerk should establish a civil district court (CVD) case file.[14] In some districts, the chief district court judge handles all appeals of this kind. Nothing in the statute so requires, however, and it would be permissible to assign the cases to another district court judge or judges.[15]

The relevant statute provides little detail about how the appeal should proceed, stating only that it shall be "upon the facts, the law, and the reasonableness of the sheriff's refusal."[16] However, any procedure likely must satisfy the demands of due process. Because North Carolina is a "shall issue" state, eligible applicants probably have a liberty or property interest in the issuance of a concealed carry permit.[17]

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8. G.S. 14-415.12(a)(3).
9. G.S. 14-415.12(b)(5).
10. G.S. 14-415.15(c).
11. G.S. 14-415.15(c).
12. Concealed handgun permits are valid for five years, G.S. 14-415.11(b), and may be renewed pursuant to G.S. 14-415.16.
13. G.S. 14-415.18.
14. See N.C. Admin. Office of the Courts, Rules of Recordkeeping 3.1, Comment B.34.
15. The practice of some chief district court judges handling all appeals from denials of concealed carry permits may have arisen in part because chief district court judges were at one time required to handle all appeals from denials of *pistol purchase* permits. As discussed further in the section of this bulletin concerning pistol purchase permit appeals, such appeals now go to superior court as a result of S.L. 2015-195 § 10.(d).
16. G.S. 14-415.15(c).
17. In "may issue" states, where government officials have considerable discretion regarding whether to issue a permit, applicants may have no legally cognizable interest in issuance. *See, e.g.,* Erdelyi v. O'Brien, 680 F.2d 61 (9th Cir. 1982) (finding that a California permit applicant lacked a legally protected property

Due process is a flexible concept.[18] Although the appellate courts have sometimes stated that due process requires a "hearing,"[19] they have also stated that "the exact nature and mechanism of the required [hearing] will vary based upon the unique circumstances surrounding the controversy."[20]

In practice, many judges start the appeal process by requesting information in writing from the sheriff about the reason for the denial and giving the applicant an opportunity to submit information in writing that undercuts the sheriff's justification. In some districts, the clerk keeps all concealed handgun permit appeal files confidential, perhaps based on the provision in G.S. 14-415.17 that "the list of permit holders and the information collected by the sheriff to process an application for a permit are confidential and are not a public record under G.S. 132-1."[21] However, it is not clear that G.S. 14-415.17 covers appeal files, for three reasons. First, the statute appears to address information in the custody of the sheriff and may not reach the same information in the custody of the courts. Second, appeal files concern people who were denied permits, not "permit holders." Third, while such files may include "information collected

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interest and stating, "[w]hether the statute creates a property interest in concealed weapons licenses depends largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [issuing authority] to deny licenses to applicants who claim to meet the minimum eligibility requirements"); King v. Wyoming Div. of Criminal Investigation, 89 P.3d 341 (Wyo. 2004) (holding that an applicant had no protected property interest in obtaining a concealed weapon permit; while Wyo. Stat. Ann. § 6-8-104 includes the phrase "shall issue," the court emphasized that the statute gives officials considerable discretion to deny a permit if law enforcement officers provide reasonable grounds to believe that the applicant "has been or is reasonably likely to be a danger to himself or others, or to the community at large"); Mosby v. Devine, 851 A.2d 1031 (R.I. 2004) ("[B]ecause the statute under consideration vests the Attorney General with discretion to refuse a license even if a person makes 'a proper showing of need,' we are of the opinion that it has no impact on any constitutionally protected liberty interest."); Nichols v. Cnty. of Santa Clara, 223 Cal. App. 3d 1236 (Cal. Ct. App. 2d Dist. 1990) ("In light of [California's concealed carry] statute's delegation of such broad discretion to the sheriff, it is well-established that an applicant for a license to carry a concealed firearm has no legitimate claim of entitlement to it under state law, and therefore has no 'property' interest to be protected by the due process clause of the United States Constitution."). In shall-issue states, by contrast, courts generally have ruled that eligible applicants do have a property right in the issuance of a permit. *See, e.g.,* Caba v. Weaknecht, 64 A.3d 39 (Pa. Comm. Ct. 2013) (reviewing case law and concluding that a permit holder "was entitled to procedural due process protections when the Sheriff revoked his license").

18. Mathews v. Eldridge, 424 U.S. 319 (1976) (so noting, and stating that "identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

19. *See, e.g., In re* Gupton, 238 N.C. 303 (1953) ("The law of the land clause embodied in Article I, Section 17, of the North Carolina Constitution guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree," including the right to "be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it.").

20. Peace v. Emp't Sec. Comm'n of North Carolina, 349 N.C. 315 (1998).

21. It is not clear whether the statute contemplates the information collected by the sheriff remaining confidential once an appeal has been filed. And the statute does not provide for the confidentiality of any information submitted to the court by an appellant. Therefore, a case-by-case sealing determination may be better than a blanket policy of confidentiality.

by the sheriff to process an application," they may also include other information, such as information submitted by the appellant and never considered by the sheriff. The additional information may be sensitive (such as medical or mental health records) or not (such as affidavits vouching for the good character of the applicant). One possible approach would be to have a local rule or standing order that provides for the automatic sealing of information collected by the sheriff in connection with the initial application but allows the decision as to whether to seal any other submissions to be made on a case-by-case basis through motions to seal.[22] Other procedures are possible, and judges and clerks may wish to discuss how to handle filings in permit appeals consistent with clerks' obligations to follow the Rules of Recordkeeping promulgated by the Administrative Office of the Courts.[23]

Some judges decide the appeals in chambers based on the written submissions, while other judges calendar these cases for in-court hearings. Based on the author's communication with a number of district court judges, it seems that most judges do not routinely conduct evidentiary hearings, though some may allow evidence to be presented in some instances. A cautious middle ground might be to decide whether to calendar a case for an in-court hearing—and if so, whether to allow the presentation of evidence—after reviewing the written materials. Some cases may be dependent "upon the facts" and may present disputed issues that would be difficult to resolve fairly without a hearing, such as cases that involve multiple witness statements. Cases from other states are divided regarding what kind of hearing is required.[24]

Judges who choose to hold a hearing often invite an employee of the sheriff to be present to explain the basis for the denial. At hearings that are more formal, more adversarial, and more

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22. Courts in North Carolina have the inherent authority to order court files sealed, *see* Virmani v. Presbyterian Health Services Corp., 350 N.C. 449 (1999), though they may do so only when necessary to "preserve higher values," and even then, any sealing order must be narrowly tailored and supported by findings of fact, *In re* Investigation into Death of Cooper, 200 N.C. App. 180 (2009).

23. *See generally* G.S. 7A-109(a).

24. *Compare In re* Dubov, 981 A.2d 87 (N.J. Super. App. Div. 2009) (police chief denied handgun purchase permit, apparently because the applicant's references were not supportive; the applicant appealed to superior court, which held a hearing; "[h]owever, the court did not hear testimony . . . by the appellant, the Chief of Police, police officers who investigated and forwarded reports to the Chief, or other witnesses who furnished information that influenced the denial. Instead, the court considered the appeal based solely on documentary evidence, including letters from two of appellant's references and the report of his psychiatrist. The court also considered factual representations set forth in the County Prosecutor's brief regarding [a reference's] negative comments about appellant's fitness to own a gun"; six months later, the judge affirmed the denial, relying in part on a letter the judge had received after the hearing by someone who knew the applicant and did not think he should have a gun; this "did not conform with the requirements of procedural due process" as set forth in *Weston v. New Jersey*, 286 A.2d 43 (1972); "the informality of a chief of police's initial consideration of an application for a gun permit requires an evidentiary hearing when an applicant appeals a denial"; therefore, the matter was remanded for an evidentiary hearing, albeit a somewhat informal one at which the rules of evidence do not apply), *with* Dlugosz v. Scarano, 681 N.Y.S.2d 120 (N.Y. Supr. Ct. App. Div. 1998) (a county judge revoked a man's pistol permit based on his "general course of conduct," including being charged with several crimes; the judge "denied petitioner's . . . request for a formal hearing, but agreed to review any . . . materials petitioner chose to submit," and the man submitted a letter explaining his various arrests; on subsequent appeal, the reviewing court stated: "We reject petitioner's contention that respondent erred in not conducting an evidentiary hearing before rendering a determination. It is well settled that a formal hearing is not required prior to the revocation of a pistol permit as long as the licensee is given notice of the charges and has an adequate opportunity to submit proof in response.").

evidentiary, this procedure may raise questions about the unauthorized practice of law. It may be better for an attorney to represent the sheriff at such hearings.

The statute does not expressly provide a standard of review, such as abuse of discretion or plain error. The closest it comes is its reference to "the reasonableness of the sheriff's refusal." If reversing the sheriff's denial requires a finding that the sheriff acted unreasonably, the statute may call for some deference to the sheriff's decision.

According to the statute, the decision by the district court judge "shall be final." Thus, there is no clear path for a further appeal. A motion for relief from judgment or an extraordinary writ of some kind could potentially provide a vehicle for further review in some cases.

Appeal from Revocation of a Permit

Under G.S. 14-415.18, there are two types of revocations of concealed handgun permits: discretionary and mandatory. As with appeals from permit denials, there is no statutory time limit on appeals from permit revocations.

Discretionary Revocations

Discretionary revocations—and discretionary nonrenewals—are addressed in subsection (a) of G.S. 14-415.18. The law provides that a sheriff "may revoke" a permit "subsequent to a hearing" for any of the following reasons:

1. Fraud or intentional and material misrepresentation in the obtaining of a permit.
2. Misuse of a permit, including lending or giving a permit or a duplicate permit to another person, materially altering a permit, or using a permit with the intent to unlawfully cause harm to a person or property . . .
3. The doing of an act or the existence of a condition which would have been grounds for the denial of the permit by the sheriff.
4. The violation of any of the terms of [the concealed carry statutes].[25]

Appeals from discretionary revocations and nonrenewals are governed by a provision that is worded identically to the provision concerning appeals from permit denials: the appeal begins "by petitioning a district court judge," and the appeal "shall be upon the facts, the law, and the reasonableness of the sheriff's refusal."[26]

The discussion above regarding the procedures for handling appeals from permit denials is generally applicable to appeals from discretionary revocations. However, appeals from discretionary revocations may require even more careful consideration than appeals from permit denials, as a citizen who has been issued a permit may have an even stronger liberty or property interest in the permit than an applicant who has been denied.[27]

25. G.S. 14-415.18(a).

26. G.S. 14-415.18(a). Unlike the statute concerning appeals from permit denials, this statute does not contain language concerning the finality of the district court's disposition.

27. *Cf.* Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980) (stating, in a different context, that when assessing a litigant's claim to a constitutionally protected interest, "[c]onsiderable weight is given to whether the alleged liberty interest is in the nature of 'a bird in the hand' rather than one in the bush").

Mandatory Revocations

Mandatory revocations are addressed in G.S. 14-415.18(a1). A sheriff "shall revoke" a permit when the permittee "is adjudicated guilty of or receives a prayer for judgment continued for a crime which would have disqualified the permittee from initially receiving the permit."[28]

Again, appeal is by petition to a district court judge. In this situation, however, the determination on appeal is limited to whether the permittee was adjudicated guilty of or received a prayer for judgment continued for a disqualifying offense. This seems to be a mechanical determination on which an in-court hearing will rarely be helpful. The statute provides that "[r]evocation of the permit is not stayed pending appeal."[29]

The statutory provisions regarding appeals from revocations—whether discretionary or mandatory—do not include any statement that the court's decision shall be final. Presumably, therefore, an appeal to the court of appeals would lie.[30]

Pistol Purchase Permits

North Carolina law makes it unlawful to sell or transfer, or to purchase or receive, a handgun unless the recipient has a North Carolina concealed handgun permit or a North Carolina pistol purchase permit.[31] An applicant seeking a pistol purchase permit may obtain one from the sheriff[32] if the applicant meets the criteria set forth in G.S. 14-404. As with concealed handgun permits, many of the criteria for pistol purchase permits are mechanical, while a few invite a greater exercise of judgment. For example, a sheriff may deny a permit to an applicant who lacks "good moral character,"[33] who wants to own a weapon for an improper purpose,[34] or who is "an unlawful user of or is addicted to marijuana" or other drugs.[35]

If the sheriff denies the application, the sheriff must provide the applicant "a written statement of the reason(s) for the denial" within seven days.[36] The statute then provides:

> An appeal from the refusal shall lie by way of petition to the superior court in the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal, and shall be final.[37]

If the sheriff issues a permit, but a later "event or condition" arises that would have caused the application to be denied had it been present at the time of the application, the sheriff "shall revoke" the permit.[38] In such a case, the statute provides simply that "[a] permittee may appeal

28. G.S. 14-415.18(a1).
29. G.S. 14-415.18(a1).
30. G.S. 7A-27(b) provides that "appeal lies of right directly to the Court of Appeals" from "any final judgment of a district court in a civil action."
31. G.S. 14-402(a).
32. G.S. 14-403.
33. G.S. 14-404(a)(2).
34. G.S. 14-404(a)(3).
35. G.S. 14-404(c)(3).
36. G.S. 14-404(b).
37. *Id.*
38. G.S. 14-404(h).

the revocation of a permit . . . by petitioning a district court judge of the district in which the permittee resides."[39]

Appeal from Denial of a Permit

As with the types of appeals considered above, there is no statutory time limit on the filing of an appeal of a denial of a pistol purchase permit.

Appeals from permit denials formerly went to "the chief judge of the district court," but in 2015, the General Assembly shifted responsibility for such appeals to the superior court.[40] The effective date provision in the law provides that it "becomes effective December 1, 2015, and applies to permits issued on or after that date."[41] Denials are not specifically mentioned in the effective date provision, leaving some uncertainty about which court should hear a case in which a sheriff denied a permit before December 1, 2015, but the applicant filed an appeal after that date.[42] Because there is no time limit on appeals, courts may continue to receive appeals from pre-December 1, 2015, permit denials for years to come.

The discussion above regarding the procedures that should be used to determine appeals of concealed handgun permit denials is generally applicable to appeals of pistol purchase permit denials. The petition should be filed with the clerk. The clerk should collect the filing fee, currently $200, and open a civil case file—in this instance, a civil superior court (CVS) file for appeals based on denials after December 1, 2015.

As with appeals concerning concealed handgun permits, appeals concerning pistol purchase permits may involve the filing of medical records or other sensitive documents. Again, a court might address confidentiality concerns by sealing appropriate material.[43]

Appeals of this kind may be assigned to any superior court judge. Exactly how the appeal should be conducted is not clear. As discussed above, due process considerations suggest that, at a minimum, a judge should provide the applicant with an opportunity to submit documents pertinent to the issuance or denial of a permit.[44] A cautious judge may wish to allow an applicant an opportunity for a hearing in court, particularly if the appeal involves factual issues that

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39. G.S. 14-404(h)(4).

40. S.L. 2015-195 § 10.(d).

41. S.L. 2015-195 § 18.

42. One could argue that a permit denial is analogous to the issuance of a permit—because both are permit *determinations*—and so an appeal should go to superior court where the permit denial took place after December 1, 2015. Or one could argue that the reference to "permits issued" simply makes no sense as applied to permit denials, and that the simplest way to effect the legislature's intent is to have all appeals filed after December 1, 2015, go to superior court, regardless of the date of the denial.

43. *See generally supra* note 22 and accompanying text. G.S. 14-405(b) provides that certain "records maintained by the sheriff," including a list of pistol purchase permits issued, "are confidential and are not a public record under G.S. 132-1." The provision does not appear to reach records that are maintained by the clerk, though the privacy concerns behind the statute may be implicated in permit appeals. Under some circumstances, these concerns may provide a basis for a judge's decision to seal or otherwise limit public access to a permit appeal.

44. Because G.S. 14-403 and G.S. 14-404 provide that a sheriff "shall issue" a pistol purchase permit to a qualified applicant, citizens likely have a property interest in the issuance of such a permit. However, this interest may be slightly weaker than citizens' property interest in concealed handgun permits, because a sheriff may deny a pistol purchase permit based on the applicant's lack of "good moral character." G.S. 14-404(a)(2). This gives the sheriff more discretion over pistol purchase permits than over concealed carry permits.

would be difficult to determine on a paper record. As with concealed handgun permits, some judges allow a sheriff's employee to appear on the sheriff's behalf when considering appeals from permit denials.

The statute does not specify a standard of review, but as noted above, the reference to "the reasonableness of the sheriff's refusal" may call for some deference to the sheriff's determination.

As with concealed handgun permits, the statute provides that the superior court's decision "shall be final," and there is no clear path for a further appeal. A motion for relief from judgment or an extraordinary writ of some kind could potentially provide a vehicle for further review in some cases.

Appeal from Revocation of a Permit

Of all the types of gun permit appeals, the one that is least clearly defined by statute is the appeal from a sheriff's revocation of a pistol purchase permit. The statute does indicate that such appeals are initiated by petition to the district court.[45] Thus, the clerk should collect the $150 district court filing fee and open a civil district court case file.[46]

Beyond that, the statute offers no guidance about the grounds for appeal, the procedure for handling the matter, or the standard of review to be applied by the court. Like the other gun permit appeal statutes, it does not limit the time for appeal. Unlike the other gun permit appeal statutes, it lacks any reference to "the facts, the law, and the reasonableness of the sheriff's refusal." It also lacks any statement about the finality of the court's decision, therefore apparently leaving the door open to further appeals.

In the interest of simplicity and consistency, a judge may wish to handle these cases in a manner similar to how other gun permit appeals are handled. In deciding whether to calendar these appeals for a hearing in court, a judge should be aware that due process may require a more substantial opportunity to be heard when considering a revocation of a permit than when considering an initial denial.[47]

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45. It is not immediately obvious why the General Assembly moved responsibility for appeals of pistol purchase permit denials to the superior court but left responsibility for appeals of pistol purchase permit revocations with the district court. It may have been a legislative oversight. If so, it may be corrected in the future.

46. The Rules of Recordkeeping currently state that all purchase permit appeals should be to superior court. N.C. Admin. Office of the Courts, Rules of Recordkeeping 3.1, Comment B.34. As to appeals of permit revocations, this is at odds with the current text of the statute. As observed in the preceding footnote, it is possible that the current text of the statute will be amended.

47. *See supra* note 27 and accompanying text.

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