2015 IL App (1st) 151519-U

THIRD DIVISION
July 13, 2016

No. 1-15-1519

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EUGENE JOHNSON, Plaintiff-Appellant, v. ILLINOIS CONCEALED CARRY LICENSING REVIEW BOARD; THE ILLINOIS STATE POLICE; and HIRAM GRAU, as Director of the Illinois State Police, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 14 CH 6131 The Honorable Kathleen G. Kennedy, Judge Presiding

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly held that the Illinois Concealed Carry Licensing Review Board's decision to deny plaintiff a concealed carry license was neither against the manifest weight of the evidence nor clearly erroneous, and the proceedings comported with due process. We therefore affirm circuit court's judgment.

¶ 2 Plaintiff, Eugene Johnson, appeals from the circuit court's order affirming the Illinois Concealed Carry Licensing Review Board's (Board) decision denying him a license under the Firearm Concealed Carry Act (Act) (430 ILCS 66/1 *et seq*. (West 2014)). Johnson contends the

Board's decision was against the manifest weight of the evidence and clearly erroneous because it was based on inadmissible hearsay and a criminal charge that was dismissed by the State. He further contends he was denied his right to due process of the law. We affirm the judgment of circuit court affirming the Board's decision.

¶ 3 BACKGROUND

¶ 4 *Johnson's License Application and Law Enforcement Objections*

¶ 5 On January 27, 2014, Johnson applied to the Illinois Department of State Police (State Police) for a concealed carry license. See 430 ILCS 66/10 (West 2014)). The State Police conducted the requisite background check, and both the Cook County Sheriff's Office and Chicago Police Department objected, noting there was a "reasonable suspicion" that Johnson was a danger to himself or others or a threat to public safety based on a domestic battery incident in October 2009. See 430 ILCS 66/15(a) (West 2014). The Chicago police attached to the objection the domestic battery arrest and incident reports and Johnson's criminal history report.

¶ 6 In the narrative portion of the October 2009 incident report, Officer Shane Mikicic stated that he and his partner were dispatched at about 1:45a.m. to a bowling alley after an employee reported a domestic battery. Officers arrived but Johnson was not on the scene. The victim, S.C., reported that she and Johnson had a dating relationship. They had been drinking and arguing at the bar when Johnson "shoved her by placing his hand on her face." She smacked his head in self-defense. He then grabbed S.C. by the throat and pushed her outside, where he struck her in the mouth, causing her head to hit the building and mouth to bleed. Officer Mikicic observed S.C.'s lower lip was bloody and swollen. S.C. went to the police station, where she signed a complaint against Johnson and they took photos of her injuries. Johnson later appeared at the police station and relayed his own account of the incident. Johnson said that while at the

bar, S.C. hit him in the head from behind, as she was presumably jealous about his attentions to another woman. After she slapped him a second time, he pushed her out of the building. Outside, S.C. continued to hit Johnson, so he "stuck out his arm and blocked her, knocking her hand into her mouth, causing her to bleed from her lip." He admitted he had been drinking but claimed S.C. was intoxicated.

¶ 7 The attached documents showed that the State ultimately *nolle prossed* the domestic battery charge against Johnson, which was his only reported criminal history.

¶ 8 *The Board's Decision*

¶ 9 On September 24, 2014, the State police informed Johnson by letter about the law enforcement objections[1] and specifically that the reports reflected he had battered his girlfriend. The State Police provided him with the opportunity to respond. Johnson timely replied by letter. He noted that his domestic battery case had been *nolle prossed* and he was otherwise a "hard working, law abiding citizen, tax paying, registered voter, just trying to protect my family, and myself [from] the mean and dangerous people in the world we live in." See *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 101 (2004) (*nolle prossed* means the prosecuting attorney declared he was unwilling to prosecute the case). Johnson asserted he met the qualifications under the Act and should be granted the license.

¶ 10 On November 12, 2014, the Board issued its final order in which it determined by a preponderance of the evidence that Johnson was a danger to himself, to others, or posed a threat to public safety. The Board sustained the law enforcement agency's objection and directed the State Police to deny Johnson's application for a concealed-carry license.

¶ 11 *Complaint for Administrative Review*

[1] In March 2014, the State Police first rejected Johnson's license. Johnson appealed and the matter was remanded to permit him the opportunity to respond to the law enforcement objections, which formed the basis for denying him the license.

¶ 12 On December 10, 2014, Johnson, through his attorney, filed a first-amended complaint for administrative review, arguing the Board's decision was contrary to the law. In support, Johnson argued the denial of his license could not be based upon a dismissed charge and mere arrest. He argued the evidence was inadmissible hearsay. He also argued his due process rights were violated when he was not afforded an evidentiary hearing.

¶ 13 *The Circuit Court's Judgment*

¶ 14 Following supplemental briefing on the term "*nolle prosequi*," the circuit court affirmed the Board's decision. The court found the Board's decision was "neither against the manifest weight of the evidence nor clearly erroneous." Even with the hearsay objection aside, the court concluded that Johnson's "submission of a violent incident in which he participated, after he had been drinking is sufficient to support the finding that Mr. Johnson is a danger to himself, a danger to others, or poses a threat to public safety." The court also concluded the Board's proceedings comported with due process, noting Johnson was not charged with a criminal offense in the administrative proceeding. He had been notified of the properly submitted law enforcement objections, and he had an opportunity to respond with additional evidence. After the circuit court affirmed Board's decision, Johnson appealed to this court.

¶ 15 ANALYSIS

¶ 16 On appeal, Johnson first contends the Board's decision was against the manifest weight of the evidence and clearly erroneous, and therefore the circuit court erred in affirming it. The Act subjects all final decisions of the Board to judicial review under the provisions of the Administrative Review law. 430 ILCS 66/87(b) (West 2014); see also 735 ILCS 5/3-101 *et seq*. (West 2014). In such an instance, this court's role is to review the administrative decision rather than that of the circuit court. See *Wortham v. City of Chicago Department of Administrative*

Hearings, 2015 IL App (1st) 131735, ¶ 13. An administrative agency's findings and conclusions on questions of fact are deemed *prima facie* true and correct, and consequently, this court should not reweigh the evidence or substitute its judgment for that of the agency. *Cinkus v. Village of Stickney Municipal Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008)*; Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 715 (2007). Rather, we are limited to ascertaining whether the agency's findings of fact are against the manifest weight of the evidence, which occurs only if the opposite conclusion is clearly evident. *Cinkus*, 228 Ill. 2d at 210. Where an agency's ruling involves a mixed question of law and fact, the ruling will not be disturbed unless it's clearly erroneous. *Id*. at 211. Under this standard, we afford some deference to the agency's experience and expertise. *Wortham*, 2015 IL App (1st) 131735, ¶ 13. We must accept the agency's finding unless, after reviewing the record, we are left with the definite and firm conviction that the agency made a mistake. *AFM Messenger Service. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001).

¶ 17 Johnson challenges the Board's determination that he was ineligible for a license based on his criminal history. Under the Act, the State Police is responsible for issuing a concealed-carry license when the applicant is 21 years old, has no convictions, and meets other criteria. 430 ILCS 66/10(a),(f); 430 ILCS 66/25 (West 2014). On receiving an application, the State Police must conduct a background check, which includes a search of "all available state and local criminal history record information files," among other records. 430 ILCS 66/35 (West 2014). Where, as here, a law enforcement agency submits an objection to the applicant's proposed license, and the Board determines by a preponderance of the evidence "that the applicant poses a danger to himself or herself or others, or is a threat to public safety, then the Board shall affirm the objection of the law enforcement agency or the Department [State Police]." 430 ILCS

66/15(a); 430 ILCS 66/20(g) (West 2014); *In re Terry H.*, 2011 IL App (2d) 090909, ¶ 14. In such a case, the applicant is ineligible for a license. 430 ILCS 66/20(g) (West 2014).

¶ 18 Johnson specifically contests the conclusion that he was a danger to himself, or others, or posed a threat to public safety. Johnson argues the Board improperly based this decision on his criminal history reports because the charge of domestic battery was ultimately *nolle prossed*. He argues that absent these reports, which he claims consisted of only inadmissible hearsay, the Board had no evidence upon which to base its decision and he is therefore entitled to a concealed-carry license.

¶ 19 The Board first responds that Johnson made no hearsay objection to the police report being admitted in the administrative proceeding and as a result he waived the matter. *Board of Education, Joliet Township High School District No. 204 v. Board of Education, Lincoln Way Community High School District No. 210,* 231 Ill. 2d 184, 205 (2008) (issues not raised before the administrative agency are forfeited); *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 279 (1998) (administrative review is confined to the proof offered before the agency). We agree.

¶ 20 Here, the Board notified Johnson that the law enforcement agency's objections appeared sustainable based on the domestic battery arrest and the arrest report showing that Johnson shoved his girlfriend in the face during an argument, grabbed her by the throat, and dragged her outside, striking her in the mouth and causing her head to hit the wall. In his written response, Johnson did not oppose the submission of this report or that deny the incident occurred for that matter, but simply insisted that he was qualified to conceal and carry a gun. Because Johnson did not file his hearsay objection before the agency, he has waived the matter. See *Jackson v.*

Board of Review of Department of Labor, 105 Ill. 2d 501, 508 (1985) (hearsay evidence admitted without objection is given its natural probative effect).

¶ 21 Even waiver aside, his argument lacks merit where the Act makes clear that law enforcement agencies can file objections consisting of criminal history and arrest reports. The Act requires that law enforcement agencies "must include any information relevant to the objection," (see 430 ILCS 66/15(a) (West 2014)), and the Board is specifically directed to consider the materials received from law enforcement agencies. 430 ILCS 66/20(e) (West 2014). Johnson counters that the Illinois Rules of Evidence prohibit relying on hearsay statements like that of the officer discussing S.C.'s account of the battery. See Ill. R. Evid. 802 (generally prohibiting hearsay) (eff. Jan. 1, 2011); see also Ill. R. Evid. 803(8) (allowing "matters observed pursuant to duty imposed by law as to which matters there was a duty to report," but excluding matters observed by police) (eff. April 26, 2012). However, Rule 802 provides that hearsay is not admissible "except by statute as provided in Rule 101," and also cites other exceptions. See Ill. R. Evid. 802 (eff. Jan. 1, 2011). As stated, the statutory scheme under which we are operating appears to permit such an exception because it requires the State Police and then the Board to consider an applicant's criminal history, including arrests, when reviewing his license application for a gun. See 430 ILCS 66/15(a); 430 ILCS 20(e); 430 ILCS 66/35(2) (West 2014); see *e.g.*, 430 ILCS 66/15(b) (West 2014) (noting State Police *shall* object to application of person with three or more arrests for gang-related offenses or with five or more arrests for any reason); *Cinkus*, 228 Ill. 2d at 216-17 (the primary rule of statutory construction is to ascertain and give effect to the legislature's intent, the best evidence of which is the statute's language itself, read in its plain and ordinary language). It arguably even permits reliance on police reports containing hearsay statements. *Cf. Miles v. Housing Authority of Cook County*, 2015 IL

App (1st) 141292, ¶ 37 (Housing Authority of Cook County rules prohibited hearsay as sole basis for hearing officer decision). Based on the foregoing, Johnson's argument fails.

¶ 22 Apart from any hearsay concerns, we agree with the circuit court that there was sufficient evidence to sustain the Board's decision based on Johnson's own admissions regarding the incident. The incident report and criminal history record revealed that Johnson was at least involved in a violent altercation with S.C. while drinking, and the altercation caused injury to S.C. Johnson admitted that he forcibly pushed S.C. out of the building, and had an altercation with SC while drinking. Johnson essentially admits in his appellate brief that his statement can be considered. In addition, the Board cited S.C.'s more detailed account of the incident as the basis for denying Johnson his gun license. Johnson was given the opportunity to respond to the evidence against him, and rather than denying the incident occurred as described by S.C., Johnson simply noted the domestic battery charges had been *nolle prossed* and asserted he was a law-abiding citizen entitled to a gun. *Cf. Landers v. Chicago Housing Authority*, 404 Ill. App. 3d 568, 576 (2010) (agency improperly rejected public housing applicant based on criminal history, where applicant testified he did not commit any of the acts for which he was arrested, the charges were dismissed, and his testimony was unrebutted). Based on this evidence, we cannot say the Board's determination that Johnson was a danger to himself or others or posed a threat to public safety was against the manifest weight of the evidence, or clearly erroneous. The opposite conclusion is not clearly evident, nor are we left with a firm conviction that a mistake was made. See *Cinkus*, 228 Ill. 2d at 210; *AFM Messenger Service,*, 198 Ill. 2d at 395.

¶ 23 In reaching this conclusion, we reject Johnson's argument that he was charged with "criminal conduct" that had to be proven by clear and convincing evidence. Here, there was no criminal conduct charged and, regardless, Johnson's argument hangs on a case, *Shallow v. Police*

Board of Chicago, 95 Ill. App. 3d 901, 908 (1981), which has effectively been overruled. See *Board of Education of the City of Chicago v. State Board of Education*, 113 Ill. 2d 173, 194 (1986) (holding that in tenured-teacher dismissal proceedings where conduct that might also constitute a crime is charged, due process does not require a clear and convincing standard of proof and preponderance of the evidence standard is sufficient); *Clark v. Board of Fire & Police Commissioners of Village of Bradley*, 245 Ill. App. 3d 385, 390-92 (1993) (preponderance of the evidence standard sufficient in proceeding terminating police officer for allegedly criminal conduct). The Act provides for a preponderance of the evidence standard, meaning that the Board need only find it's more probably true than not "that the applicant poses a danger to himself or herself or others, or is a threat to public safety." See 430 ILCS 66/20(g) (West 2014); *Maplewood Care, Inc. v. Arnold*, 2013 IL App (1st) 120602, ¶ 38. Several courts have held this standard satisfactory under the Act. See *Berron v. Concealed Carry Licensing Review Board*, No. 15-2404, *et. al* (7th Cir., June 17, 2016), affirming *Moustakas v. Margolis*, No. 14 C 9294, 7 (N.D. Ill., January 5, 2016) (holding same). Johnson additionally did not raise this issue before the agency and has not adequately developed an argument on the issue before this court, thus resulting in double waiver. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (arguments must be supported with citation to legal authority); *Arvia v. Madigan*, 209 Ill. 2d 520, 528 (2004).

¶ 24 We also reject Johnson's claim that "the dismissal of a criminal charge *** would tend to show that the charges were unfounded and that *** Johnson was innocent." The criminal cases Johnson cites do not support his argument and are inapposite since the present case is a civil administrative proceeding. The burden of proving a prior criminal case was dismissed for reasons consistent with the innocence of the accused should be on the accused. See *Swick v. Liautaud*, 169 Ill. 2d 504, 513 (1996) (in a criminal context, a *nolle prosequi* is not a final

disposition but reverts the matter to the same condition as before the prosecution); see also *Ferguson*, 213 Ill. 2d at 102 (reaffirming *Swick*); *People v. DeBlieck*, 181 Ill. App. 3d 600, 603 (1989) (a *nolle prosequi* entered before jeopardy attaches does not operate as an acquittal). Here, Johnson did not submit any explanation as to why the charge was dismissed, and therefore waived the matter.

¶ 25 Finally, Johnson contends he was denied due process of law because the Board did not hold an evidentiary hearing. He argues since he was charged with criminal conduct in a civil proceeding, a hearing is required. We reject Johnson's contention for two reasons. First, we observe that due process is a flexible concept which "requires only such procedural protections as fundamental principles of justice and the particular situation demand." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 92 (1992); *Hayashi v. Illinois Department of Financial and Professional Regulation*, 2014 IL 116023, ¶ 40. Due process in an administrative proceeding does not require a proceeding in the nature of a judicial proceeding. *Abrahamson*, 153 Ill. 2d at 92. Rather, due process, at its core, simply requires notice and an opportunity to be heard. *Chamberlain v. Civil Service Commission of Village of Gurnee*, 2014 IL App (2d) 121251, ¶ 46. Under the administrative rules interpreting the Act, the Board was not required to hold an evidentiary hearing since hearings "shall be limited to circumstances that cannot be resolved to the Board's satisfaction through written communication with the parties." 20 Ill. Admin. Code § 2900 140(c); see also 430 ILCS 66/20(e) (West 2014) (the Board *may* request testimony from law enforcement, the Department, or the applicant). The Board notified Johnson via letter of the law enforcement objections to his license application, and he had the opportunity to respond.

¶ 26 Second, in responding to the law enforcement objection, Johnson did not request a hearing or otherwise challenge the administrative scheme that permits denying an application without an evidentiary hearing. The failure to raise an issue before an administrative body, even a question of constitutional due process rights, waives the issue for review. *Cinkus*, 228 Ill. 2d at 212-13; *S.W. v. Department of Children and Family Services*, 276 Ill. App. 3d 672, 679 (1995). In fact, Johnson consented to the administrative procedure of written communications. See *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000) (a party may not complain of error to which he consented). We finally observe that Johnson has not cited or developed an argument regarding the familiar factors in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which courts typically assess when analyzing a due process claim. Given Johnson's waiver of the matter before the administrative agency and his failure to fully develop his due process argument on appeal, we need not address those factors. See Ill. S. Ct. R. 341(h)(7) (eff. eff. Jan. 1, 2016) (points not argued are waived and shall not be raised in the reply brief); *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007) (an issue not clearly defined and sufficiently presented fails to satisfy the requirements of Rule 341(h)(7) and is, therefore, waived). Based on the foregoing, Johnson's due process argument fails.

¶ 27 CONCLUSION

¶ 28 We affirm the judgment of the circuit court affirming the Board's decision to deny Johnson a concealed-carry gun license.

¶ 29 Affirmed.