

OFFICE OF THE CITY ADMINISTRATOR

CONCEALED PISTOL LICENSE REVIEW BOARD

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The City Administrator, pursuant to the authority provided by section 908(d) of the Firearms Regulations Control Act of 1975 (Act), effective June 16, 2015 (D.C. Law 20-279; D.C. Official Code § 7-2509.08(d)), and Mayor’s Order 2015-036, dated January 9, 2015, hereby gives notice of the adoption of an emergency rulemaking that amends Sections 1210 (Summary Disposition) and 1218 (Burden of Proof) of Chapter 12 (Concealed Pistol Licensing Review Board) of Title 1 (Mayor and Executive Agencies) of the District of Columbia Municipal Regulations (DCMR).

The emergency rulemaking amends 1 DCMR § 1218, which establishes the burdens of production and persuasion in appeals of adverse actions related to concealed pistol licenses (CPLs) issued by the Chief of the Metropolitan Police Department (Chief), by confirming: the appellant bears the burdens of production and persuasion; the Board will apply a “preponderance of the evidence” standard to resolve disputed facts; and the Board will otherwise defer to the Chief’s exercise of discretion. The rulemaking also amends 1 DCMR § 1210 to make conforming changes to reflect these standards.

The emergency rulemaking makes two substantive amendments to Section 1218.

First, it changes the standard of proof on disputed material facts from “substantial evidence” to “preponderance of the evidence.” District law requires the Board to issue regulations that place both the burden of production of evidence and burden of persuasion on the appellant. *See* D.C. Official Code § 7-2509.08(d).

“Preponderance of the evidence” means the degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact “more probably true than untrue.” D.C. Std. Civ. Jury Instr. No. 2-3. This is the standard typically applied to resolve factual disputes in judicial and administrative proceedings. *See, e.g., id.* (applying standard at civil trials); 1 DCMR § 2932.2 (applying standard to resolve factual disputes in rental housing cases before the D.C. Office of Administrative Hearings); 6B DCMR 628.1 (applying standard to resolve factual disputes in proceedings before the D.C. Office of Employee Appeals); 27 DCMR § 120.1 (applying standard to resolve factual disputes at proceedings before the Contract Appeals Board); 14 DCMR § 8905.1 (applying standard to resolve factual disputes at proceedings addressing D.C. Housing Authority determinations); 29 DCMR § 5909.7 (applying standard to resolve factual disputes at proceedings before the Child and Family Services Agency).

“Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). This is the standard typically applied in appellate review of a factfinder’s decision. *See, e.g., id.* (applying standard to review of hearing examiner’s determination on disability); *Neighbors for Responsive Gov’t, LLC v. District of Columbia Bd. of Zoning Adjustment*, 195 A.3d 35, 47 (D.C. 2018) (applying standard to review of zoning determination).

Under D.C. Official Code § 7-2509.08(f), a person aggrieved by the Chief’s decision may file an appeal in accordance with the Administrative Procedure Act (D.C. Official Code § 2-501 *et seq.*) (APA). Under D.C. Official Code § 7-2509.08(d), the Board is the factfinder in such appeals when there are material facts in dispute. Because the APA controls in these proceedings, and consistent with the above-cited jury instructions at civil trials and with other District administrative proceedings, the most appropriate standard to apply to disputed facts in Board adjudications is the “preponderance of the evidence” standard. Thus, appellants in such cases must prove by a preponderance of the evidence that the Chief failed to demonstrate unsuitability, among other things.

Second, the emergency rulemaking clarifies that, once any material factual disputes are resolved, the Board defers to the Chief’s discretion in determining whether those facts warrant the adverse action.

District law provides that the Chief “may... issue a license to such person to carry a pistol concealed upon his or her person... if it *appears* that the applicant... is a suitable person to be so licensed,” D.C. Official Code § 22–4506(a) (emphasis added), and that “[t]he Chief may... revoke a license upon a finding that the licensee no longer meets” the applicable requirements, D.C. Official Code § 7-2509.05; *see also* 24 DCMR § 22341.1 (establishing criteria for license revocation). Additionally, District law requires the applicant to “demonstrate *to the satisfaction of the Chief* that he or she” has complied with enumerated criteria, including “any procedures the Chief may establish by rule.” *See* D.C. Official Code § 7-2509.02(a)(6) (emphasis added). District law directs that the Chief’s rules must “establish criteria for determining when an applicant has... [d]emonstrated [his CPL] suitability.” D.C. Official Code § 7-2509.11(1)(C). The Chief, in turn, has set forth by regulation five enumerated “suitability” criteria, including that the applicant “has not exhibited a propensity for violence or instability that may reasonably render the person’s possession of a concealed pistol a danger to the person or another.” 24 DCMR § 2335.1(d); *see also* 24 DCMR § 2337.2(h) (requiring applicant to submit “[a]ny information reasonably required by the Chief... to complete an application investigation”).

The Board interprets these statutory provisions to vest in the Chief the discretion to apply undisputed facts, or facts resolved by the Board, to the statutory and regulatory standards for licensure, provided that it is rationally supportable and could have been arrived at reasonably. D.C. Official Code § 22-4506(a) is most reasonably read as authorizing the Chief to issue a CPL if it “appears” *to the Chief* that the applicant is a suitable person to be so licensed. This strongly indicates that, once factual disputes are resolved, the Board should defer to the Chief’s determination of whether those facts demonstrate suitability. This interpretation is bolstered by D.C. Official Code § 7-2509.02(a)(6), which requires applicants to demonstrate other qualifying criteria “to the satisfaction of the Chief.”

The Board has applied this standard in prior matters before it. For example, in the Chief’s discretionary suitability determinations, the Chief has reviewed criminal history records that may reflect conduct that is violent or criminal demonstrating low self-control, regardless of whether that conduct results in convictions, and the Board has accorded deference to the Chief where the

Chief properly details the appellant’s particular criminal history and its nexus to propensity for violence or instability.

The emergency rulemaking makes three substantive amendments to Section 1210 to conform with the amendments to Section 1218.

First, it eliminates the reference to the “substantial evidence” standard in the Board’s notice to appellants responding to a notice of summary disposition, instead requiring that the Board advise appellants to address why the Chief’s action was not rationally supportable and could not have been arrived at reasonably.

Second, it incorporates the deference due to the Chief’s determination of whether the undisputed facts justify the adverse action.

Third, it clarifies that the “substantial evidence” test applies only to “judicial review” of the Board’s decisions.

The emergency rulemaking was adopted on June 21, 2021, took effect immediately, and will remain in effect for one hundred twenty (120) days after the date of its adoption, (expiring October 19, 2021), unless earlier superseded by a subsequent emergency or final rulemaking.

The City Administrator also gives notice of his intent to take final rulemaking action to adopt the proposed rules in not less than thirty (30) days after the publication of this notice in the D.C. Register.

Chapter 12, CONCEALED PISTOL LICENSING REVIEW BOARD, of Title 1 DCMR, MAYOR AND EXECUTIVE AGENCIES, is amended as follows:

The first Subsection 1210.2 is amended to read as follows:

1210.2 If the Board determines that an appeal may be appropriate for summary disposition, the Board shall send a notice to the applicant that:

- (a) Contains the materials submitted to the Board by the Chief; and
- (b) Advises the appellant that he or she has ten (10) days from receipt of the notice to submit any written argument to the Board, and serve a copy on the Chief, concerning:
 - (1) The existence of any material fact in dispute that would require a contested case hearing, and why each such fact is material to the dispute; and/or
 - (2) If there are no material facts in dispute, why the Chief’s action is not rationally supportable and could not have been arrived at reasonably.

New subsections 1210.5 and 1210.6 are added to read as follows:

1210.5 [Reserved]

1210.6 The Board shall defer to the Chief’s exercise of discretion in applying the facts to the statutory and regulatory standards for licensure, provided that it is rationally supportable and could have been arrived at reasonably, and shall include an explanation in its decision as to why it has or has not upheld the Chief’s determination under that standard.

Section 1218, BURDEN OF PROOF, is amended to read as follows:

1218.1 An appellant challenging an adverse action shall have the burden of production of evidence and the burden of persuasion in any appeal before the Board.

1218.2 An appellant shall prove disputed material facts by a preponderance of the evidence. Preponderance of the evidence shall mean the degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a disputed fact more probably true than untrue.

1218.3 Once it has resolved disputed facts, the Board shall defer to the Chief’s exercise of discretion in applying those facts to the statutory and regulatory standards for licensure, provided that it is rationally supportable and could have been arrived at reasonably, and shall include an explanation in its decision as to why it has or has not upheld the Chief’s determination under that standard.

All persons desiring to comment on the subject of the proposed rulemaking should file comments in writing not later than thirty (30) days after the date of the publication of this notice in the D.C. Register. Comments should be sent to the CPLRB at cplrb@dc.gov with the subject header “CPLRB NPRM – Public Comments.” Copies of the proposed rules may be obtained from the Board at the same email address.