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EMAIL TO: All Sheriffs
FROM: Eddie Caldwell
Executive Vice President and General Counsel
North Carolina Sheriffs' Association
SENT: March 27, 2020
SUBJECT: Does a Sheriff Have the Authority to Suspend Processing and
Issuance of Pistol Purchase Permits and Concealed Handgun
Permits Because of a Declared State of Emergency?

Questions have arisen about whether or not current State law allows a sheriff to cease processing and issuing pistol purchase permits, concealed handgun permits, or both because of a declared state of emergency, such as the coronavirus pandemic.

For the reasons stated below, we can find no legal authority authorizing a sheriff to stop processing and issuing the following permits because of a declared state of emergency, because the processing and issuance of these permits are mandated by statute:

- (1) Pistol purchase permits.
- (2) New concealed handgun permits.
- (3) Renewal concealed handgun permits.

Note: In various statutes cited below, emphasis (bold/underline) has been added as appropriate to assist the reader.

A. Pistol Purchase Permits

Article 52A of Chapter 14 of our General Statutes governs the pistol purchase permitting process. North Carolina sheriffs are required to issue these permits to qualified applicants within their respective jurisdictions. **Article 52A does not grant to the sheriff the authority to suspend processing or issuing pistol purchase permits because of a declared state of emergency.**

G.S. § 14-403 provides: "The sheriffs of any and all counties of this State **shall issue** to any person, firm, or corporation in any county a permit to purchase or receive any weapon mentioned in this Article [i.e. pistol] from any person, firm, or corporation offering to sell or dispose of the weapon."



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G.S. § 14-404 further provides: “Upon application, and such application must be provided by the sheriff electronically, the sheriff **shall issue** the permit to a resident of that county” when the sheriff has completed the criminal background check and has made a determination that the applicant does not have a disqualifying criminal conviction, is of good moral character and is obtaining the permit for protection, target shooting, collection or hunting.

As part of the mandatory criminal background check, G.S. § 14-404(a)(1) requires that the “sheriff **shall** determine the criminal and background history of any applicant by accessing computerized criminal history records as maintained by the State Bureau of Investigation and the Federal Bureau of Investigation, by conducting a national criminal history records check, by conducting a check through the National Instant Criminal Background Check System (NICS), and by conducting a criminal history check through the Administrative Office of the Courts.”

Pursuant to G.S. § 14-404(e): “There shall be no limit as to the number or frequency of permit applications....” G.S. § 14-404(f) also requires that: “Each applicant for a license or permit shall be informed by the sheriff **within 14 days of the date of the application** whether the license or permit will be granted or denied and, if granted, the license or permit **shall be immediately issued** to the applicant.”

There is nothing in Article 52A that gives the sheriff the discretion to stop processing applications for pistol purchase permits or to otherwise delay issuance of the permit to a qualified applicant beyond the statutorily mandated 14-day deadline that is in G.S. § 14-404(f). Furthermore, we can find no legal authority elsewhere in the General Statutes or in case law that authorizes the sheriff to not follow the mandatory provisions in Article 52A because of a declared state of emergency.

B. Concealed Handgun Permits

Article 54B of Chapter 14 governs the concealed handgun permitting process. G.S. § 14-415.14(a) provides: “The sheriff shall make permit applications readily available at the office of the sheriff or at other public offices in the sheriff’s jurisdiction.” In addition, G.S. § 14-415.12(a) provides: “The sheriff **shall issue** a permit to an applicant if the applicant qualifies....”

G.S. § 14-415.15(a) states the sheriff “**shall either issue or deny the permit**” within “**45 days after receipt**” of both the items required of the applicant (such as the fee, application, safety course certificate, signed release and fingerprints) and the mental health records of the applicant. As part of the permitting process, G.S. § 14-415.13 requires the applicant to submit a full set of fingerprints to the sheriff and the fingerprinting must be “administered by the sheriff.”

Article 54B does not grant to the sheriff the authority to suspend the processing or issuance of concealed handgun permits because of a declared state of emergency. There is nothing in Article 54B that gives the sheriff the discretion to stop processing or issuing concealed handgun permits. We can find no legal authority elsewhere in the General Statutes or in case law that authorizes the sheriff to not follow the mandatory provisions in Article 54B because of a declared state of emergency.

C. Concealed Handgun Permit Renewals

Concealed handgun permit renewals are governed by G.S. § 14-415.16. All that is required for a renewal is: (1) submission of a renewal form; (2) submission of an affidavit stating the applicant remains qualified; and (3) payment of fees.

Additionally, G.S. § 14-415.16(d) provides that no fingerprints are required for a concealed handgun permit renewal application if the applicant's fingerprints have previously been placed into the Automated Fingerprint Identification System (AFIS).

We believe the analysis for concealed handgun permit renewals is the same as described above in Section B for new concealed handgun permits.

We can find no legal authority elsewhere in the General Statutes or in case law that authorizes the sheriff to not follow the mandatory provisions regarding the renewal of a concealed handgun permit because of a declared state of emergency.

D. Governor Cooper's Executive Orders and County State of Emergency

It has been suggested that various local emergency orders and Governor Cooper's Executive Orders No. 117 and No. 120 may authorize the sheriff to stop processing and issuing pistol purchase permits, concealed handgun permits, or both. Specifically, some of these local emergency orders and the Governor's Executive Orders recommend that local government officials "take appropriate precautions to maintain the health of the general public and their employees who are required to perform their official duties in a manner that brings them in contact with the general public by putting in place appropriate public health measures, such as social distancing, use of reasonable personal protective equipment, and offering reasonable accommodations to employees who provide services to the public with consideration for their health."

Of critical importance, there is no State law that allows a local emergency order to supersede the statutory requirements contained in Chapter 14 of our General Statutes.

Furthermore, while the powers of the Governor, including issuance of Executive Orders, during a declared state of emergency are broad, they do not include the authority to supersede the statutory requirements contained in Chapter 14 of our General Statutes. This is best summarized by Norma Houston, Lecturer in Public Law and Government, at the UNC-CH School of Government, who has advised:

The Governor's emergency powers under Chapter 166A, while broad, do not include the blanket authority to override a state statute. The Governor, with concurrence of the Council of State, is authorized to waive "a provision of any regulation or ordinance." (G.S. § 166A-19.30(b)(4)). A statute is not a "regulation" or "ordinance." Thus, by Executive Order, the Governor cannot suspend or waive a provision of statute unless such authority is specifically granted as to a specific statute (there is one specific grant of such authority under G.S. § 166A-19.30(a)(5) regarding Articles 1, 4, and 7 of Chapter 113A of the General Statutes for certain enumerated purposes), or the statute in question itself grants authority for flexibility for modification without legislative action. **No such authority is granted for any provisions of Chapter 14.** (Emphasis added.)

While local emergency orders and the Governor's Executive Orders encourage social distancing and other protective health measures, they do not and cannot legally direct law enforcement officials to cease providing services that are required by our General Statutes. In fact, Section 2 of Executive Order 120 itself directs local governments to continue to perform functions required by State and federal law:

Section 2. Mandatory Local Government Operations

- a. Consistent with my authority under N.C. Gen. Stat. §§ 166A-19.30(c)(I) and (c)(2), and to the extent that local government functions are required under state and federal law, I hereby direct the appropriate local government agencies and officials to continue to exercise their responsibilities, including but not limited to local county Department of Social Services ("DSS") offices, Health Departments, Registers of Deeds, and other local government functions that are required to protect lives and property.
- b. Notwithstanding Section (a) of this Section, local government must take appropriate precautions to maintain the health of the general public and their employees who are required to perform their official duties in a manner that brings them in contact with the general public by putting in place appropriate public health measures, such as social distancing, use of reasonable personal protective equipment, and offering reasonable accommodations to employees who provide services to the public with consideration for their health. (Emphasis added.)

Note: Some counties have enacted [and the Governor may eventually enact] a “stay at home” provision in their emergency order that prohibits persons from movement or travel about public places including streets, roadways, etc. and that requires persons to remain in their household or residential living unit, except for purposes of certain specified “essential activities,” such as grocery or pharmacy shopping, medical appointments, etc. These provisions may restrict persons from coming to the sheriff’s office to apply for either a pistol purchase permit, a concealed handgun permit, or both, unless that is ultimately determined to be an “essential activity.” Of course, for pistol purchase permits and renewal of concealed handgun permits, the application paperwork can be submitted to the sheriff’s office via U.S. Mail, and the permit can be returned to the applicant via U.S. Mail. For sheriff’s offices with the capability, those applications could also be submitted electronically on-line.

It has also been suggested that the sheriff can stop processing pistol purchase permits, concealed handgun permits, or both, because the sheriff utilizes the clerk of court to conduct the necessary criminal history searches of applicants and the clerk of court cannot or will not perform this service. G.S. § 14-404(f) requires a sheriff to either issue or deny the pistol purchase permit “**within 14 days of the date of application**” and there are no exceptions in the law to this deadline. Regarding concealed handgun permits, G.S. § 14-415.15(a) states the sheriff “**shall either issue or deny the permit**” within “**45 days after receipt**” of the required items and there are no exceptions in the law to this deadline. The sheriff could choose to conduct the criminal history searches independently through alternate electronic databases such as the Criminal Justice Law Enforcement Automated Data Services (CJLEADS) instead of through a clerk of court.

Furthermore, it has been suggested that the sheriff has the authority to simply postpone accepting applications for pistol purchase permits, concealed handgun permits, or both, presumably to avoid processing and issuing the permits during a declared state of emergency. There is no State law that allows the sheriff to refuse to accept applications for pistol purchase and concealed handgun permits or to otherwise delay receipt of applications in order to artificially extend the statutorily mandated 14 day deadline.

Again, G.S. § 14-404(e) states: “There **shall be no limit** as to the number **or frequency of permit applications** . . .” and G.S. § 14-404(f) requires that: “Each applicant for a license or permit **shall be** informed by the sheriff **within 14 days of the date of the application** whether the license or permit will be granted or denied and, if granted, the license or permit **shall be immediately issued** to the applicant.” Additionally, with respect to concealed handgun permit applications, G.S. § 14-415.13 states: “A person shall apply to the sheriff of the county in which the person resides to obtain a concealed handgun permit.” G.S. § 14-415.14 further states: “The sheriff **shall** make permit applications **readily available** at the office of the sheriff **or at other public offices** in the sheriff’s jurisdiction.”

We can find no legal authority elsewhere in the General Statutes or in case law that authorizes the sheriff to not follow the mandatory provisions regarding processing and issuance of pistol purchase permits, concealed handgun permits, or both, merely by refusing to accept applications because of a declared state of emergency.

Finally, some have suggested that the sheriff has the authority to prohibit persons from entering the sheriff’s office to be fingerprinted so long as it is pursuant to a continuity of operations plan that is in place to deal with the COVID-19 pandemic. There is no State law that allows the sheriff to stop processing and issuing concealed handgun permits based upon an internal continuity of operations plan or any other policy or plan adopted by the sheriff. Furthermore, the General Statutes contemplate that these gun permit processing activities can occur at a sheriff’s office or at any other location. G.S. § 14-415.14(a) authorizes the sheriff to “make permit applications readily available at the office of the sheriff or at other public offices in the sheriff’s jurisdiction.”

E. Constitutional Considerations

If a sheriff ceases to process pistol purchase permits, concealed handgun permits, or both during a declared state of emergency, it is possible that a deprivation of rights claim under Title 42, Section 1983 of the United States Code could be brought for infringement of an individual’s constitutional right to possess firearms. Sheriffs should be aware that prior to 2012, during a declared state of emergency, several General Statutes allowed restrictions and prohibitions to be imposed on the “possession, transportation, sale, purchase, storage and use of dangerous weapons and substances, and gasoline.” “Dangerous weapons,” under these former statutes, included firearms such as handguns, rifles, and shotguns.

Those General Statutes, as they applied to firearms, were held unconstitutional in the federal court case in the Eastern District of North Carolina of *Bateman v. Perdue*, 881 F.Supp.2d 709 (2012). As a result, the North Carolina General Assembly amended those General Statutes effective October 1, 2012 (recodified as G.S. § 166A-19.31) to address this issue.

G.S. § 166A-19.31(b)(4) provides that ordinances enacted by counties or cities during a state of emergency may include prohibitions and restrictions: “Upon the possession, transportation, sale, purchase, storage, and use of gasoline, and dangerous weapons and substances, **except that this subdivision does not authorize prohibitions or restrictions on lawfully possessed firearms or ammunition.**” (emphasis added.)

By discontinuing the processing and issuing of pistol purchase permits, concealed handgun permits, or both, even during a declared state of emergency, a sheriff could be exposed to civil liability for infringing on constitutionally protected rights.

F. Statutes Governing Removal from Office, etc. and the Sheriff's Bond

G.S. § 128-16 provides that the sheriff "shall be removed from office by the judge of the superior court, resident in or holding the courts of the district where said officer is resident upon charges made in writing, and hearing thereunder, for the following causes:

- (1) For willful or habitual neglect or refusal to perform the duties of his office.
- (2) For willful misconduct or maladministration in office."

An action to remove the sheriff "may be filed upon the relation of any five qualified electors of the county in which the person charged is an officer, upon the approval of the county attorney of such county, or the district attorney of the district, or by any such officer upon his own motion. It shall be the duty of the county attorney or district attorney to appear and prosecute this proceeding." G.S. § 128-17. While we could find no court cases on this point related to a sheriff, the actions of the sheriff could be viewed as failing to perform a duty mandated by our General Statutes.

G.S. § 14-230(a) provides that "[i]f any clerk of any court of record, **sheriff**, magistrate, school board member, county commissioner, county surveyor, coroner, treasurer, or official of any of the State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a Class 1 misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense." A successful prosecution under this statute must show injury to the public. See *State v. Anderson*, 196 N.C. 771 (1929). While we could find no court cases on this point related to a sheriff, the actions of the sheriff could be viewed as failing to perform a duty mandated by our General Statutes.

Finally, G.S. § 162-8 provides that a sheriff must furnish a bond. A claim could be filed against the sheriff's bond for the sheriff's failure to make "the due execution and return of process, the payment of fees and moneys collected, and the faithful execution of his office as sheriff."

Therefore, we recommend sheriffs consult with their own legal counsel or county attorney prior to making the decision to stop processing and issuing pistol purchase permits, concealed handgun permits, or both.

G. Fingerprinting for Other Purposes

Sheriffs have asked about other circumstances in which they are required to administer fingerprints. Fingerprinting in certain specified situations is mandatory and may not be suspended, even during a declared state of emergency. In addition to the mandatory fingerprinting for concealed handgun permit applications, we have identified the following mandatory fingerprinting:

- (1) Pursuant to G.S. § 15A-502, it "**shall be the duty** of the **arresting** law enforcement agency" to fingerprint individuals who have been charged with: (a) a felony, (b) domestic criminal trespass or other criminal offense involving domestic violence, (c) impaired driving misdemeanor offenses, or (d) possession of a controlled substance.

- (2) Pursuant to G.S. § 15A-502, it “**shall be the duty** of the **arresting** law enforcement agency” to fingerprint individuals who have been charged with the misdemeanor offense of assault, stalking, or communicating a threat if the person is under a domestic hold pursuant to G.S. § 15A-534.1.
- (3) In addition, pursuant to G.S. § 7B-2102, a law enforcement officer or agency “**shall fingerprint**” juveniles who have committed more serious offenses that do not qualify for diversion in juvenile court. This applies to juveniles 10 years of age or older who commit non-divertible offenses, who are in the physical custody of law enforcement or the Division of Adult Correction and Juvenile Justice, and where a complaint has been prepared for filing against the juvenile. [Note: This statute does not specify which law enforcement officer or agency must do the fingerprinting, but it appears to intend for the fingerprinting to be done by the officer or agency that takes the juvenile into custody.]
- (4) The sheriff **shall** fingerprint persons who are placed on the North Carolina Sex Offender Registry. Pursuant to G.S. § 14-208.7(b)(4), the sheriff is required to take the fingerprints of a sex offender “**at the time of registration.**” This requirement is mandatory.

There are no exceptions in the law to the fingerprinting requirements in paragraphs (1) through (4) above, and we can find no legal authority elsewhere in the General Statutes or in case law that authorizes the sheriff to not follow these mandatory fingerprinting requirements.

There are no other circumstances we are aware of at this time that require the sheriff to administer fingerprints. There are various discretionary scenarios where a sheriff may or may not choose to administer fingerprints. An example of this are the fingerprinting services offered by some sheriffs to the general public for occupational licensing or for employment purposes. These statutes do not require a sheriff’s office to conduct the fingerprinting service. For example, under G.S. § 58-33-48, applicants for an insurance producer’s license must provide fingerprints that are certified by an authorized law enforcement officer. Other examples include applications for licenses to practice in healthcare (e.g., G.S. § 143B-949); applications for an ABC permit (G.S. § 18B-902); and applications for public adjuster insurance licenses (G.S. § 58-33A-15).

Notably, none of these statutes mandate that any one specific law enforcement agency, such as a sheriff’s office, provide the fingerprinting service. **Therefore, a sheriff may decide to offer or suspend fingerprinting services for the general public in these discretionary scenarios.**

If you have any questions regarding these issues, do not hesitate to contact Matthew Boyatt, NCSA Deputy General Counsel, at mboyatt@ncsheriffs.net or at 919-459-6467.

Thanks....Eddie C.



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