STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

DONALD K. McCLURE,

Plaintiff,

-v-

File No. 98-17300-AA
HON. PHILIP E. RODGERS, JR.

GRAND TRAVERSE COUNTY CONCEALED WEAPON LICENSING BOARD, an administrative agency of Grand Traverse County,

Defendant.
_____/

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Attorney for Defendant

DECISION AND ORDER

On June 5, 1998 Plaintiff McClure served Defendant gun board with a second set of interrogatories and requests for production of documents. Questions 1, 2 and 3 of the interrogatories ask the Defendant to specifically state the reasons Defendant considers "good reason" to issue a general permit to carry a concealed pistol under MCL §28.426(1).

Defendant submitted answers to the interrogatories on June 17, 1998, but refused to "speculate" on all of the reasons the Defendant might consider "good reason" to issue a permit.

Plaintiff filed a Motion to Compel Answers to Interrogatories. Pursuant to the Court's Pre-Hearing Order, the parties filed briefs on the matter and it was set for hearing on July 20, 1998. Counsel for the Defendant failed to appear at the hearing. The Court granted Plaintiff's motion. Defendant subsequently filed a Motion for Reconsideration. Plaintiff filed a Brief in Opposition.

In considering the Motion for Reconsideration, the Court has reviewed the documents described above and the Court file.

MCR 2.119(F)(3) states:

> Generally, and **without restricting the discretion of the court**, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from the correction of the error. (Emphasis added.)

The phrase "without restricting the discretion of the court" has been interpreted to mean that the rule is "in no way mandatory." *Smith v Sinai Hospital*, 152 Mich App 716, 723; 394 NW2d 82, 85 (1986). "The 'palpable error' requirement of MCR 2.119(F)(3) merely provides guidance to the trial court in deciding reconsideration motions and does not operate to restrict the trial court's discretion in determining whether a grant of reconsideration is appropriate in a particular case." *Fetz Engineering Co v Ecco Systems Inc*, 188 Mich App 362, 373; 471 NW2d 85, 90 (1991). "The court rule does not prevent a court's exercise of discretion on when to give a party a 'second chance' on a motion it has previously denied." *Michigan Bank-Midwest v D.J. Reynaert Inc*, 165 Mich App 630, 646; 419 NW2d 439, 445 (1988).

In Plaintiff's brief in support of his motion to compel, he simply states that he asked three questions and only got one partial answer, the questions are legitimate and the court rules require Defendant to answer. He does not cite any authority.

In Defendant's brief in opposition to Plaintiff's motion to compel, Defendant argues that the three interrogatories in question "clearly ask not for facts, but hypothetical examples of what may convince the board to issue a permit." He cites as authority *Great Lakes Steel Division of National Steel Corp v Michigan Public Services Comm*, 130 Mich App 470, 490; 344 NW2d 321 (1983), in which the Court upheld the trial court's denial of a motion to compel answers to interrogatories which "impermissibly invaded the agency's thought process." He also cites *Goetz v SEC*, 23 Fd 452, 489 (CA DC, 1994) in which the Court held: "The inner workings of administrative decision making processes are almost never subject to discovery."

In *Great Lakes Steel, supra,* industrial customers of a gas company appealed a decision of the Public Service Commission adopting a rate structure which allocated to industrial customers a portion of winter heating costs which otherwise would be borne by residential customers. The circuit court refused to permit pretrial discovery of items which allegedly formed the basis of the majority's rate order. The plaintiffs in *Great Lakes Steel* alleged that "one member of the Michigan Public Service Commission had prejudged the residential winter heating rate issue" and one of the interrogatories asked for the defendant "to identify with particularity . . . any document, note, memorandum, letter or similar writing, however characterized, **which was in any way relied upon or referred to by either member of the majority** of the Defendant Commission in connection with its findings, conclusions and or statements . . ." (Emphasis added.) The Court of Appeals upheld the trial court's ruling refusing to permit the discovery because the interrogatories "delve into the [defendant's] mental process. The Court held that the language, "in any way relied upon or referred to by either member of the majority," in the interrogatories touches upon the mental process by which a conclusion is reached and is therefore nondiscoverable, citing *United States v Morgan*, 313 US 409, 621 Sct 999, 85 Led 1429 (1941). In *Morgan* the United States Supreme Court established the "thought process rule." Discovery seeking information which is a part of the decision-making process is an impermissible intrusion into the thought process. *Great Lakes Steel, supra,* at 490; 344 NW2d 330.

The Court of Appeals goes on to reject plaintiff's claim that the "case falls within one of the well-recognized exceptions to the *Morgan* thought process rule: (1) where the decision makers have demonstrated bad faith or improper behavior . . ., or (2) where the administration record is inadequate to explain the action taken." *Id.* at 491; 344 NW2d 330. Plaintiff in the instant case has not argued, nor does this Court believe, that the interrogatories fall within either of the exceptions to the *Morgan* thought process rule. In order to fall within the first exception, a "most powerful preliminary showing" of bad faith must be made. *Id.* at 491; 344 NW2d 330. Even though the plaintiff's brief in *Great Lakes Steel, supra,* contained many references to alleged prejudgment on the part of one commissioner, the only allegation of misconduct at the time the interrogatories were submitted is a single statement in paragraph 27 of plaintiff's second amended complaint that MPSC members had

prejudged the adoption of the residential winter heating rate. The Court did not find this "single, conclusory statement a 'powerful' showing as required." *Id.* at 491; 344 NW2d 330-331.

In paragraph 27 of the Verified Complaint in the instant case, Plaintiff alleges that the gun board's denial of his application for a permit was "arbitrary, unreasonable, an abuse of discretionary power and an improper exercise of judgment." Under *Great Lakes Steel, supra,* this does not constitute a "powerful preliminary showing of bad faith."

Whether the second exception to the thought process rule applies depends upon how "inadequate" a record must be. After a review of the case law, the Court in *Great Lakes Steel,* held that the second exception only applies where there is virtually no record or explanation for the decision reached. *Id.* At 492, 344 NW2d 331. The minutes of the August 19, 1998 meeting of the gun board are adequate for the discovery issue raised here.

In addition, there is a significant difference between the *Morgan* and *Great Lakes Steel* cases and the instant case. In the former, the interrogatories were aimed at discovering the mental processes, the reasoning, and the deliberations that determined the particular decision being complained of in those cases. In the instant case, the Plaintiff is attempting to discover what could, in a hypothetical situation, influence the mental process of the Defendant gun board; not specifically in denying him a permit but in every conceivable situation. Plaintiff's interrogatories call for pure speculation on the part of the members of the Defendant gun board.

Defendant's counsel also noted that in answers to Plaintiff's first set of interrogatories, Defendant did answer questions regarding the same subject matter. In addition, Plaintiff has received "full minutes for all concealed weapon licensing board meetings for the years 1996 through 1998," which contain two years of gun board decisions.

For these reasons, the Court grants Defendant's Motion For Reconsideration, dispenses with the need for oral argument, and denies Plaintiff's Motion to Compel Answers to Interrogatories.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 9/30/98