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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF RANDOLPH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 DOJ 05194

Taylor Eugene Graves Petitioner, v. NC Criminal Justice Education and Training Standards Commission Respondent.	**PROPOSAL FOR DECISION**

THIS MATTER CAME ON FOR HEARING on the merits on 28 June 2022 before The Honorable Jonathan Dills, Administrative Law Judge from request of Respondent per NCGS §150B-40(e) for Article 3A proceeding.

APEARANCES

Petitioner: Taylor Eugene Graves, *pro se*
4184 NC Highway 134
Asheboro, North Carolina 27205

Respondent: Erika N. Jones
Attorney for Respondent
North Carolina Department of Justice
Special Prosecutions and Law Enforcement Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

QUESTION: Is law enforcement certification properly denied?

ANSWER: Certification is properly denied but sanction, suspension, or probation is inapplicable.

RULES AT ISSUE

12 NCAC 09A .0103(24)(b)

12 NCAC .0204(b)(2)

12 NCAC 09A .0204(b)(3)(A)

12 NCAC 09A .0205(b)(1)

12 NCAC 09A .0205(c)(2)

12 NCAC 09B .0101(3)(h)

NCGS §17C-10

BASED UPON careful consideration of the entire record; having weighed all the evidence and assessing the credibility of each witness by considering appropriate factors for judging credibility, including demeanor, interests, biases, and prejudices; the opportunity to see, hear, know, and remember; reasonableness; and consistency with all other believable evidence; the undersigned makes the following:

FINDINGS OF FACT

1. Both parties are properly before this Tribunal in that jurisdiction applies; venue is appropriate; Petitioner received notice of agency action and timely appealed; both parties received appropriate notice of hearing; and no party has otherwise objected.

2. The Commission has the authority granted under the North Carolina General Statutes and the North Carolina Administrative Code to certify law enforcement officers and to revoke, suspend, or *deny* such certification under appropriate circumstances.

3. Petitioner was previously employed by the Albemarle Police Department ("APD"). He requested attenuate certification. Two APD officers attended the resultant Probable Cause Hearing.

4. Following that hearing, Petitioner had some interaction with leadership at APD and felt encouraged to resign. Regardless, Petitioner voluntarily separated prior to hearing.

5. As indicated in correspondence dated 23 September 2021 to Petitioner, the Probable Cause Committee ("PCC") found probable cause to believe Petitioner committed the following:

    a. Assault on a Female as defined by NCGS §14-33(c)(2); and
    b. Battery on Unborn Child as defined in NCGS §14-23.6.

6. These offenses were treated as Class B misdemeanors for matters of certification.

7. Respondent further found cause re moral turpitude pursuant to NCGS §17C-10.

8. Petitioner appealed and a hearing on the merits occurred 28 June 2022. Only Petitioner and an investigator with the Commission testified.

9. Both sides introduced documents. Respondent presented documentation with allegations of domestic violence, which allegations amount to accusation by Petitioner's spouse.

10. Petitioner, as the only direct witness, largely explained away most accusation save one incident. He admitted to a postpartum altercation with his wife which resulted in facial injury to her. The Tribunal found that explanation less than credible.

11. Nevertheless, it is evident that Petitioner has had a tumultuous home life, fraught with potential for further issue and distraction. Petitioner himself indicates nothing more than a fragile *status quo* is currently maintained. He testified he remains trapped/stuck.

12. There were times in the hearing that one could believe Petitioner had net positives to offer a career in law enforcement, and at other times, the opposite. Petitioner testified as to his continuing maturation. There is probably something to that point.

13. Petitioner successfully called into question Respondent's primary evidence, which beyond eliciting Petitioner's testimony, was hearsay.

14. It appeared that significantly more testimony and evidence was presented to the PCC than to this Tribunal.

15. Respondent counsel stated she had subpoenaed Petitioner's wife. Petitioner suggested the wife's willingness to participate. The wife was not present or called.

CONCLUSIONS OF LAW

16. To the extent that the Findings of Fact contain Conclusions of Law, or Conclusions or Law are Findings of Fact, they should be so considered without regard to the given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946).

17. The Office of Administrative Hearings ("OAH") has jurisdiction over the parties and subject matter pursuant to the North Carolina General Statutes to include §150B-1, *et seq*. (APA). Venue is proper. All parties have been designated correctly, and there is no question as to misjoinder or nonjoinder. The parties received lawful notice of the hearing.

18. Axiomatic is "the important and potentially dispositive effect of the allocation of the burden of proof." *Peace v. Employment Sec. Comm'n of N. Carolina*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (*citing*, *Lavine v. Milne*, 424 U.S. 577, 585, 96 S.Ct. 1010, 1016 (1976)).

19. Very little was proven by anyone. This case turns on burden of proof.

Burden of Proof

20. Agencies in this circumstance routinely contend that the burden is wholly on Petitioner, often citing *Overcash v. N.C. Dep't. of Env't & Natural Resources*, 179 N.C. App 697, 635 S.E.2d 442 (2006). However, it has been repeatedly analyzed to be the converse. *See*, *e.g.s*, 20 DOJ 03914, 19 DOJ 02985, 18 DOJ 04480; *cf.*, *Homoly v. N. Carolina State Bd. of Dental Examiners*, 121 N.C. App. 695, 697, 468 S.E.2d 481, 483 (1996) ("the contested case provisions of Article 3 do not apply to Article 3A agencies"); *and* N.C.G.S. § 150B-40(e) ("The provisions of this Article [3A], rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge….").

21. Referencing the preceding citations, the undersigned previously concluded:

> Applying the prescription of *Peace*, *to wit*, "policy, fairness and common sense," the State bears the burden of proof in an action in which it investigates a certificate holder or **even an applicant**, and thereafter proposes to restrict certification. *Peace* at 328, 507 S.E.2d at 281.
>
> *See*, *Russell v. NC Crim. Jus. Ed. and Training Stand. Com.*, 2022 WL 888026 (N.C.O.A.H.), Conclusions paras 4-5 (emphasis added).

22. The use of the qualifying word 'even' before the qualified objective term 'an applicant' recognizes difference and along with the facts of this case, provoke further consideration.

23. Revocation or recertification denial is a different circumstance than a new applicant seeking a career in law enforcement, if in nothing more than the former has prior demonstrated suitability, and the latter has not. Even the word applicant insinuates the need for a showing. Caselaw supports this conclusion.

24. The applicant has a threshold burden to demonstrate suitability, while the burden is on the agency to prove specific instances of misconduct. *In Re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975); *In Re Rogers*, 297 N.C. 48, 58, 253 S.E.2d 912, 918 (1979); *In Re Elkins*, 308 N.C. 317, 302 S.E.2d 215 (1983); *Matter of Legg*, 325 N.C. 658, 673, 386 S.E.2d 174, 183 (1989); *See*, *also*, *In Re Golia-Paladin*, 344 N.C. 142, 148, 472 S.E.2d 878, 880 (1996) (burden on applicant to show meeting all requirements); *In Re Gordon*, 352 N.C. 349, 531 S.E.2d 795 (2000) ("The initial burden of showing good character rests with the applicant."); *and*, *In Re Braun*, 352 N.C. 327, 531 S.E.2d 213 (2000) (as long as decision is not arbitrary and capricious, what agency finds lacking candor and truth will stand).[1]

[1] The Tribunal notes that earlier cases in this line were more perfunctory. *E.g.*, *In Re Applicants for License*, 143 N.C. 1, 41, 55 S.E 635, 639-40 (1906) (compliance with formal prerequisites is sufficient). Other cases seemingly support that the applicant need only make an initial *prima facie* showing. *E.g.*, *Elkins* at 321, 302 S.E.2d at 217. However, given the import of these matters and the deference afforded the Commission in its serious and crucial mission, the undersigned concludes propriety and balance in requiring an applicant the initial burden of proving suitability by a preponderance of the evidence, as more recent caselaw supports. *Peace*, *supra/infra*.

25. Similar to the matter *sub judice*, burden of proof was at issue in *Peace*, wherein our Supreme Court ultimately ruled in favor of the agency. *Peace*, *supra*. There the Court applied the Mathews-Eldridge Test "to determine the appropriate procedures required to comply with procedural due process protection in any given situation." *Id*. at 323, 507 S.E.2d at 278 (citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976)).

26. The Mathews-Eldridge Test uses three factors to determine procedural adequacy in administrative proceedings:

    "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." *Id*.

27. Regarding factor one, like *Peace*, the private interest affected here is (potential) employment. Agency denial of a law enforcement certification application was the impetus for this case, certification being prerequisite for such employment. *See*, Respondent's Prehearing Statement pp. 4-9. The "ability to obtain and retain employment is of utmost concern to individuals as they strive to provide support for themselves," but this interest is not absolute and must be considered in light of factor three. *Id.* at 323, 507 S.E.2d at 279.

28. Regarding factor two, the risk of erroneous deprivation of such interest is non-existent. There is no *deprivation* where Petitioner seeks that which he does not have, and never did.

29. Furthermore, the probable value of additional procedural safeguard would be irrelevant for Petitioner, since he is not losing anything, and like the employee in *Peace* "is free to and can readily seek alternate gainful employment, utilizing his or her skills and experience, within the available job market." *Id.* at 324, 507 S.E.2d at 279.

30. Regarding factor three, balancing of the interests, the government's is clearly prevalent. Duties of law enforcement require performance in extremely stressful, dangerous, and sensitive situations. It should suffice to say that the role of law enforcement implicates enormous potential for good or bad. Government has an interest of the highest order to ensure appropriate candidates for placement. On balance, such far outweighs any potential or even expected benefit of additional or substitute procedural safeguards.

31. In sum, there is no need to impose additional burdens here, when like other application processes, a candidate has an initial burden of convincing.

32. Additionally, our Supreme Court has advised that two principles guide allocation of burden outside the criminal context: (1) who asserts the affirmative, in substance rather than form; and (2) who has peculiar knowledge of the facts and circumstance at issue. *Id*. at 328, 507 S.E.2d at 281. As applicant, Petitioner asserts the affirmative, *to wit*, qualification, and must (given his first-person view) possess peculiar knowledge of the facts and

circumstances at issue. *Cf*., *In re Rogers*, 297 N.C. 48, 59, 253 S.E.2d 912, 919 (1979) (burden is on the agency largely due to the difficulties of proving a negative).

33. Finally, our Supreme Court offers further guidance. In absence of clear mandate, we decide with considerations of "policy, fairness and common sense" *Peace, supra.* at 328, 507 S.E.2d at 281.

34. In sum, under the Mathews-Eldridge Test or otherwise, the burden of proof is initially on a new applicant seeking law enforcement officer certification, to override determination by the PCC.

Standard of Evidence

35. Little dispute exists that the standard of evidence in administrative hearings, to include an Article 3A case, is a preponderance of the evidence. *Peace*, *supra* ("common sense"); *see also*, 26 NCAC 03.0125.

Regulations

36. 12 NCAC 09A .0204(b)(3)(A) states that:

> The Commission may suspend, revoke, or [just] deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer … has committed or been convicted of … a criminal offense or unlawful act defined in 12 NCAC 09A .0103 as a Class B misdemeanor….

37. 12 NCAC 09A .0103(24)(b) defines "Class B Misdemeanor" to include the allegations herein made, namely: Assault on a Female and Battery on Unborn Child.

38. 12 NCAC 9A. 0205(b) and (b)(1) provides that in these circumstances:

> When the Commission … denies the certification … the period of sanction shall be not less than five years; however, the Commission may reduce or suspend the period of sanction or substitute a period of probation in lieu of suspension of certification….

39. "The Commission may suspend, revoke, or deny the certification of a criminal justice officer" lacking appropriate character. 12 NCAC 09A .0204(b)(2).

40. 12 NCAC 09B .0101(3)(h) states that:

> Every criminal justice officer who is employed in or has received a conditional offer of employment for a certified position by an agency in North Carolina shall … be of good moral character pursuant to G.S. 17C-10 as evidenced by … not having engaged in any conduct that brings into question the truthfulness or credibility of the officer, or involves "moral turpitude." "Moral turpitude" is conduct that is contrary to justice, honesty, or morality, including conduct as defined in: *In re Willis*, 288 N.C. 1, 215 S.E.2d 771

(1975), *appeal dismissed* 423 U.S. 976 (1975); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989); *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); and later court decisions that cite these cases as authority.

41. 12 NCAC 09A .0205(c)(2), relative to lacking appropriate character, states that:

    [T]he period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist….

Final Considerations

42. It is important to note that the PCC's proposed denial of Petitioner's application only found "probable cause exists to believe" he committed offenses or lacked requisite character. It did not, nor could it determine criminal guilt or establish immutable fact. These determinations should not be interpreted as an unassailable black mark on Petitioner as he expressed concern in testimony that it might. Commission findings and the proposed denial herein represents attempt to ensure appropriate candidacy, and nothing more.

43. The state failed to prove specific instances of misconduct, though the circumstances here did not necessarily require it. However, the consequence of failing to prove such is that Petitioner is not subject to any period of sanction, suspension, or probation for reapplication.

44. The takeaway here is that an applicant for law enforcement certification may be denied when there is legitimate concern (measured minimally as probable cause) that he has engaged in significant criminal conduct and/or lacks requisite character, and if contested, the applicant at a threshold level must demonstrate suitability for the job. Only then is it incumbent for the state to prove specific instances of disqualifying conduct.

Conclusion(s)

45. There was sufficient evidence for the PCC to proceed, its decision and actions were not arbitrary or capricious, and its conduct was otherwise proper.

46. These administrative proceedings elicited similar, reasonable concerns.

47. Here, Petitioner applicant failed to present sufficient evidence to carry the initial burden of suitability by a preponderance of the evidence.

48. The surviving determinations of the PCC are sufficient to deny Petitioner certification.

49. The totality of the credible evidence presented demonstrates that Petitioner Graves is currently not a person yet suitable for law enforcement certification.

50. There is substantial evidence justifying the adoption of this Tribunal's proposal for decision. NCGS §150B-42. Titled in part "Final agency decision" and referencing NCGS §150B-40(e), dealing with OAH hearings and proposals for final decisions, the substantial evidence test is the standard of review the Commission should apply to this order. *Id*.

51. Pursuant to NCGS §150B-40(e), the Tribunal is to place itself in the role of the Commission, and after a just and lawful hearing; considerations of appropriate findings, applicable law, and extenuating circumstances; propose a just and final decision for due deliberation by the Commission. Mindful of these principles, the Tribunal submits the following:

PROPOSAL FOR DECISION

BASED ON the foregoing, it is proposed that Petitioner was appropriately denied his application for law enforcement certification, but that neither sanction, suspension, nor probation is applicable.

The decision of the PCC should be SUSTAINED in denial of certification only.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact, and to present oral and written arguments to the agency. NCGS §150B-40(e).

The agency that will make the final decision in this contested case is the North Carolina Criminal Justice Education and Training Standards Commission.

The Commission or its counsel will file a copy of its final decision, referencing this case number, with the Office of Administrative Hearings.

SO ORDERED.

This the 27th day of September, 2022.

The Honorable Jonathan S. Dills
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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Petitioner

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This the 27th day of September, 2022.

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