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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF ROBESON	22 DOJ 02965

Joe Travis Locklear Petitioner, v. North Carolina Criminal Justice Education and Training Standards Commission Respondent.	**PROPOSAL FOR DECISION**

This contested case was heard by Administrative Law Judge Stacey Bice Bawtinhimer, ("the Tribunal") on December 15, 2022, in Fayetteville, North Carolina, following the request of Respondent North Carolina Criminal Justice Education and Training Standards Commission ("Respondent") for appointment of an Administrative Law Judge to hear the case of Petitioner Joe Travis Locklear ("Petitioner") pursuant to N.C.G.S. 150B-40(e).

APPEARANCES

For Petitioner: J. Michael McGuinness
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For Respondent: Erika N. Jones, Assistant Attorney General
Kristen Mallet, Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
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ADMITTED EXHIBITS

For Petitioner: Exhibits A and C.

For Respondent: Exhibits 1-17.

WITNESSES

For Petitioner: Joe Travis Locklear, Petitioner
Michael Seago, Captain St. Pauls Police Department

For Respondent: Judy Kelley, Investigator

ISSUE

Whether Respondent correctly found probable cause to suspend Petitioner's law enforcement officer certification for committing the Class B Misdemeanor offense of "Willful Failure to Discharge Duties," in violation of N.C. Gen. Stat. § 14-230, and/or for lacking the good moral character necessary to hold a law enforcement officer certification in North Carolina?

BURDEN OF PROOF

1. This contested case is conducted pursuant to Article 3A of the Administrative Procedure Act, N.C. Gen. Stat. Chapter 150B. There is no statutory allocation of the burden of proof in a contested case heard under Article 3A.

2. In the absence of constitutional or statutory direction, the burden of proof is allocated on considerations of "policy, fairness and common sense." *Peace v. Employment Sec. Comm'n of N. Carolina*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998). Applying *Peace*, which requires allocation of the burden based on "policy, fairness and common sense," Respondent bears the burden of proof in cases where it seeks to remove a previously granted certification on lack of good moral character grounds. *Nathan Alexander Caudill v. NC Sheriffs Education and Training Standards Commission*, 2022 WL 473555, 21 DOJ 01689.

3. Petitioner was not "convicted" of the crime at issue. In a situation where Respondent alleges that a citizen not convicted of a crime nonetheless "committed" it, the burden of proof is properly on Respondent to show, by (at least) a preponderance of the evidence, that the person committed all elements of the criminal offense at issue. *Christopher Garris v. NC Criminal Justice Education And Training Standards Commission*, 2019 WL 2183214, 18 DOJ 04480.

4. While North Carolina appellate courts in the N.C. Gen. Stat. 150B, Article 3 context have at times required petitioners to prove a negative, no North Carolina court has approved of the State, in whatever form, first deciding that a citizen committed a crime and then requiring that citizen to prove that he or she did not. *Christopher Lee Jackson v. NC Criminal Justice Education and Training Standards Commission*, 2021 WL 2779127, 20 DOJ 04578.

5. The same is true of Respondent's allegation that Petitioner lacks good moral character to hold a North Carolina law enforcement officer certification. Petitioner holds such a certification; to obtain it, he had to demonstrate good moral character. Respondent now contends Petitioner lacks it. While in some cases conviction of a criminal offense of moral turpitude is *prima facie* evidence of lack of good moral character, *see Kevin C. Corpening v. North Carolina Alarm Systems Licensing Board*, 2008 WL 5999764, 08 DOJ 2560, Petitioner was convicted of nothing.

Again applying *Peace*, the burden of proof is properly on Respondent to show that Petitioner's previous good moral character is now absent.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the Stipulation of Facts, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Tribunal makes the following Findings of Fact.

In making these Findings, the Tribunal weighed all the evidence and assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including without limitation the demeanor of each witness, any interests, bias, or prejudice of the witness, his or her opportunity see, hear, know or remember the facts or occurrences, about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS AND STIPULATIONS OF FACT

Parties and Witnesses

1. Petitioner Joe Travis Locklear ("Petitioner") is a citizen and resident of Robeson County, North Carolina and currently hold a certification as a law enforcement officer issued by Respondent North Carolina Criminal Justice Education and Training Standards Commission ("Respondent"). Petitioner was a credible witness.

2. Respondent has the duty and authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9, to certify justice (law enforcement) officers and revoke, suspend, or deny such certifications under appropriate circumstances.

3. Captain Michael Seago ("Captain Seago") is employed with the St. Pauls Police Department. T. 17. He has served that agency for 20 years. *Id*. He has 29 years of total law enforcement experience including work with the Robeson County Sheriff's Office, the Maxton Police Department, and the Red Springs Police Department. *Id.* Captain Seago was a credible witness.

4. Judy Kelley ("Ms. Kelley") works for Respondent as an investigator and conducted Respondent's investigation in this contested case. Ms. Kelley was a credible witness.

Stipulated Findings of Fact

5. This case is unique in that the majority of the facts are uncontested and have been stipulated. The Parties stipulated to and filed the following Findings of Fact, as found by Michael C. Byrne, Administrative Law Judge ("ALJ Byrne"), in 21 OSP 01175, *Joe T. Locklear v. North Carolina Department of Public Safety*. These stipulated facts are adopted in this Proposal for Decision:

6. Petitioner, prior to his termination, was a Master Trooper with the North Carolina Highway Patrol ("Highway Patrol").

7. Sergeant Philip Collins ("Sgt. Collins") is a Sergeant with the Highway Patrol. He has served in the Highway Patrol since 1997. Sgt. Collins is a "district first line supervisor" managing eight to ten troopers in a district. He has known Petitioner for more than ten years. At the time of the incidents giving rise to this case, Sgt. Collins was Petitioner's direct supervisor.

8. Lieutenant Brett Snotherly ("Lt. Snotherly") has worked for the Highway Patrol since 2000. As of August 2020, Lt. Snotherly was assigned to the Internal Affairs Unit.

9. Lt. Col. Jeff Gordon ("Col. Gordon") is the recently retired Deputy Commander of the Highway Patrol. He was employed by the Highway Patrol for 28 years. He oversaw the Internal Affairs section. Lt. Col. Gordon recommended Petitioner's dismissal. Lt. Col. Gordon was present at Petitioner's pre-disciplinary conference.

10. Petitioner was born in 1974 and was 48 years old at the time of [21 OSP 01175] hearing. Petitioner grew up in Robeson County, North Carolina and is a lifelong resident. At the time of the incidents giving rise to this contested case, Petitioner worked in the Robeson County area.

11. Petitioner began employment as a State Trooper on May 31, 2006. Petitioner served with the Highway Patrol for over thirteen years until his termination on October 30, 2020. Petitioner was promoted to Master Trooper. Petitioner also served in the Motor Carrier Division. Petitioner enjoyed his service as a Trooper.

12. Prior to the incidents in this case, the Highway Patrol had never charged Petitioner with any untruthfulness.

13. Prior to the incidents in this case, Petitioner never received any disciplinary action from the Highway Patrol.

14. Petitioner received annual performance reviews. Per Sgt. Collins, Petitioner had earned a good personnel record and he (Collins) had found that to be true as Petitioner's supervisor.

15. On or about August 20, 2020, at approximately 2:30 p.m., Petitioner was on routine patrol traveling east on NC 72. Petitioner noticed a tan vehicle. The driver of the tan vehicle was not wearing a seat belt, and the passenger appeared to be drinking a Bud Lite [sic] beer.

16. Petitioner activated his blue lights and pulled alongside of the tan vehicle. After stopping the vehicle, Petitioner noticed that the driver[, Mr. Callahan,] had put on his seat belt.

17. Petitioner did not exit his patrol vehicle or otherwise conduct a formal traffic stop. Petitioner visually determined that the passenger who appeared to be drinking a Bud Lite [sic] was in fact drinking a Red Bull, which is non-alcoholic energy drink.

18. Per Sgt. Collins, the proper procedure for a traffic stop is:

> A trooper would activate the blue lights for – after observing a traffic violation. The trooper would activate his blue lights, siren if needed. The vehicle usually would pull to the right shoulder of the road. The trooper would stop behind him, exit his patrol vehicle, walk up to the suspect vehicle, identify himself, state a reason that he stopped them, ask for driver's license, registration, things of that nature.

19. Per Sgt. Collins, a trooper would not properly conduct a stop without exiting his patrol vehicle. However, there was nothing inappropriate in Petitioner giving a verbal warning to the driver about the seat belt violation. Further, Sgt. Collins confirmed that State Troopers may exercise discretion and give verbal or written warnings in lieu of a formal citation.

20. Although Petitioner had observed the driver without a seat belt, Petitioner did not issue a citation to the driver. "I was not going to take any enforcement action because they were in compliance in my opinion." Both the driver and the passenger were polite and cooperative.

21. On or about August 20, 2020, after allowing Callahan to drive away, Petitioner turned the vehicle around and traveled westbound on Melinda Road. Petitioner noticed a small camouflage bag in the ditch line. Petitioner stopped his car and did a cursory examination of the bag. Petitioner smelled an odor of marijuana coming from the bag.

22. Petitioner opened the camouflage bag and saw marijuana. He did not thoroughly investigate the contents of the bag at the time, an action he now regrets. Petitioner believed that the bag was associated with the vehicle he had recently stopped. Petitioner determined that the proper action was to take the bag, search for the vehicle, and make inquiries. Petitioner never saw the bag in the possession of either the driver or the passenger of the vehicle he had stopped.

23. Petitioner placed the camouflage bag into his patrol vehicle and attempted to find the vehicle he had previously stopped. Failing to do so, Petitioner returned to the scene where he had found the bag in the hopes that the persons would return to retrieve the bag. They did not. By this time, Petitioner was close to the end of his shift.

24. Petitioner decided to leave the scene. Instead of retaining the bag, searching it, and bringing it back to be logged as evidence, Petitioner threw the camouflage bag with the marijuana into the woods. Petitioner acknowledges that submitting the bag to the Patrol station to be logged as evidence would have been the correct course of action. He did not remove anything from the bag.

25. Petitioner explained his actions with the bag to the Tribunal as, "My mindset was I didn't have anyone to charge. I assumed it was Mr. Callahan's, but I wasn't for sure it was." Petitioner continued: "Was I wrong? Yes sir. Should I have put it in safekeeping and take it back to the office? Yes sir; I should have."

26. Between 7:30 p.m. and 7:45 p.m. on August 20, 2020, Callahan called in a citizen complaint related to Petitioner's stop of Callahan's vehicle.

27. Sgt. Collins contacted Callahan by telephone about Callahan's citizen complaint. Callahan informed Sgt. Collins that Callahan had thrown his bag from his vehicle when Callahan noticed Petitioner's patrol vehicle. It is important to note that according to Sgt. Collins' interview, Callahan at the time of his complaint specifically told Sgt. Collins that his bag contained marijuana, money, and jewelry.

28. Callahan also told Sgt. Collins that after the traffic stop, Callahan observed Petitioner activate his blue lights and pull to the side of the road where Callahan had thrown his bag. Callahan eventually returned to the location where Callahan had thrown out his bag but found that the bag was no longer there. Callahan did not testify.

29. Sgt. Collins sent a text message to the troopers who had been on duty that day to see who had stopped Callahan's vehicle. Petitioner truthfully responded that he was the trooper who stopped Callahan's vehicle.

30. Sgt. Collins asked Petitioner what happened, and Petitioner described the traffic stop. Petitioner said nothing about Callahan's bag.

31. Sgt. Collins asked Petitioner, "Anything else happen?" Petitioner said "No, sir." Sgt. Collins asked again "Nothing unusual, other than that, Joe?" Petitioner said "No, nothing."

32. When Sgt. Collins informed Petitioner that Callahan had alleged Petitioner had stolen his bag, Petitioner was, "scared, got scared, panic, because I'm thinking, I know I didn't steal a bag."

33. Petitioner told Sgt. Collins that he (Petitioner) had not picked up the bag. Petitioner also told Sgt. Collins "I didn't even get out of the car." Petitioner's claim that he had not taken the bag was untruthful. Petitioner at the hearing stated that he had "panicked" and become "scared" over the (false) allegation that he had stolen property from a citizen. Petitioner now wishes that he had been immediately forthcoming as opposed to being untruthful regarding his actions involving the bag.

34. After the telephone conversation with Sgt. Collins, at approximately 10:00 p.m., Petitioner went to the home of a resident who lived near the scene of the traffic stop. Petitioner asked the resident to allow Petitioner to review his security camera footage, but the resident told Petitioner that his cameras do not record and store video footage.

35. The following day, August 21, 2020, at approximately 6:00 a.m., at Sgt. Collins' direction, Petitioner met Sgt. Collins at the scene of the traffic stop.

36. Petitioner found the bag where he had thrown it the day before but implied to Sgt. Collins that this was the first time that he had seen the bag. This representation was untruthful; Petitioner had seen the bag, and handled the bag, on the previous day.

37. Sgt. Collins instructed Petitioner to prepare a statement about the incident.

38. Upon further inspection, Callahan's bag contained an amount of marijuana sufficient to constitute a felony if a person was convicted of its possession. The bag also included drug paraphernalia (a grinder and digital scales). The bag also contained some quantity of cash, as well as some family heirloom jewelry.

39. As Sgt. Collins was logging the bag and contents into evidence, he received a call from Major William A. Hook, Director of Professional Standards for the Highway Patrol ("Major Hook"). Major Hook ordered Sgt. Collins to bring Petitioner to Raleigh for interview by Internal Affairs.

40. During their travel to Raleigh, Sgt. Collins advised Petitioner to tell the truth about the bag incident to Internal Affairs.

41. In Petitioner's first interview with Internal Affairs, Petitioner admitted being untruthful to Sgt. Collins as described above. There is no evidence that Petitioner did anything to hinder or interfere with the Internal Affairs investigation. At no time was Petitioner charged with any untruthfulness regarding his Internal Affairs interview or the written "Member Statement" he submitted in that process.

42. Petitioner admits he "made several mistakes" involving this incident. One mistake was discarding the bag containing marijuana. Another was being untruthful with Sgt. Collins. Petitioner admits his actions were wrong, and "[i]f I had to go over with it, I would do things totally different."

43. Petitioner regrets his actions. "There's not a day that don't go by that I don't think about different outcomes if I had done things different." Petitioner admits that truthfulness is a "very important" matter for law enforcement officers.

44. Lt. Snotherly was the lead officer in the Internal Affairs investigation of Petitioner.

45. In the Internal Affairs investigation, Lt. Snotherly and First Sergeant Thomas Van Dyke ("Sgt. Van Dyke") interviewed Petitioner, Sgt. Collins, Callahan, and a Mr. Parnell, who owned the home with the video cameras that Petitioner visited in the course of the incidents of August 20-21.

46. During his interview with Lt. Snotherly, Callahan admitted he threw his bag containing marijuana out the window when he realized he had been seen by Petitioner to be not wearing a seat belt.

47. During his interview, Lt. Snotherly asked Callahan whether he believed Petitioner had seen him throw the bag out the window of his vehicle. Callahan replied, "No, sir."

48. During his interview with Lt. Snotherly, Callahan admitted that "the large amount of marijuana" found in the bag was, in fact, his. "It was some grass, a couple of ounces, my gold, my stimulus check money, umm, bag of chips, a charger cord and I'm not sure for what else."

49. Lt. Snotherly knew that Callahan's bag contained approximately 207 grams of marijuana, and also knew that possession of more than 42 and ½ grams of marijuana "is considered a felony."

50. Callahan claimed in his interview that he was subsequently close enough to Petitioner's car to see Petitioner stop in the vicinity of where Petitioner picked up Callahan's bag. He did not see Petitioner pick up the bag.

51. Following the investigation, $997 in cash, jewelry, and other items in Callahan's bag were returned to him. The marijuana and paraphernalia were destroyed. Callahan was never arrested or prosecuted.

52. The Internal Affairs investigation resulted in a "personnel charge sheet" alleging that Petitioner violated Highway Patrol policies involving "neglect of duty," "truthfulness," and "unbecoming conduct."

Additional Material Facts

53. Captain Seago has known Petitioner throughout Petitioner's 13-year service with the Highway Patrol. Petitioner has assisted Captain Seago with law enforcement duties in St. Pauls. Captain Seago has knowledge of Petitioner and of Petitioner's character. T p 18. However, Captain Seago has not worked with the Highway Patrol and thus did not work with Petitioner on a regular basis.

54. Captain Seago has a positive opinion of Petitioner's character as a person and as a law enforcement officer, though he agrees Petitioner's actions in misleading a supervisor and disposing of the bag of drugs were "upsetting to me, but still I have to say that we all make mistakes. And I don't - I don't like the mistake that he did, and he did do a mistake." T p 31. Captain Seago would welcome Petitioner back into the Robeson County law enforcement community. *Id.*

55. Petitioner admitted as exhibits statements from other law enforcement officers; including Interim Chief of Police for the Town of Pembroke and the Director of the BLET for Robeson Community College; attorneys who had worked directly with Petitioner; and private individuals expressing confidence in Petitioner's honesty, integrity, and professionalism. Pet'r Ex A-5, pp 34-51. These officers did not testify and were not subject to cross-examination. Respondent objected to the hearsay and irrelevant contents of these letters. These statements were considered by the Probable Cause Committee and ALJ Byrne in rendering his decision in 21 OSP 01175. These hearsay statements, as collaborative evidence only, were given appropriate weight under N.C. Gen. Stat. § 150B-41.

56. Investigator Kelley has worked for Respondent for eight years as an investigator. Her duties are "To look into alleged violations of the Administrative Code or the Commission's rules as it relates to certifications." T p 53. Investigator Kelley does not determine whether or not a rule violation has occurred. T p 54.

57. Investigator Kelley, after review by her supervisory chain, submitted documentation about Petitioner's case to Respondent's Probable Cause Committee, which considered the matter and issued the Notice of Probable Cause ("Notice of Probable Cause") giving rise to this contested case.

58. Prior to Petitioner's dismissal from the Highway Patrol, the Highway Patrol issued a "charge sheet" listing the conduct for which the Highway Patrol intended to take disciplinary action. Resp't Ex. 8.

59. The Highway Patrol "charge sheet" does not cite an alleged violation by Petitioner of N.C. Gen. Stat. § 14-230, "Willful Failure to Discharge Duties." The Highway Patrol charge sheet alleged that Petitioner violated the Highway Patrol's "Neglect of Duty" policy.

60. The Highway Patrol "charge sheet" does not allege that Petitioner lacked the good moral character to hold a law enforcement officer certification in North Carolina.

61. Respondent issued the "Notice of Probable Cause" to Petitioner on June 2, 2022, proposing to suspend Petitioner's law enforcement certification. Resp't Ex. 2. The Notice of Probable Cause states, in relevant part, that probable cause existed to suspend Petitioner's law enforcement certification for five (5) years in that Petitioner committed the Class B Misdemeanor offense of "Willful Failure to Discharge Duties," in violation of N.C. Gen. Stat. § 14-230, based on listed allegations:

A. Petitioner did "not exit your patrol vehicle during a traffic stop to conduct a thorough investigation of the driver and passenger."
B. Petitioner did "not secure the camouflage gym bag found in the ditch line on the shoulder of the road that you suspected as being tossed from that vehicle prior to the traffic stop."
C. Petitioner did "not log the camouflage gym bag into evidence after viewing the contents of the bag and seeing marijuana later determined to be approximately 207 grams in addition to $997.00 USD and jewelry among the contents of the bag."
D. Petitioner "Intentionally place[d] the found camouflage bag with its contents into the woods."

Resp't Ex. 2, p. 2.

62. The Notice of Probable Cause does not allege or describe any claimed injury to the public as a result of Petitioner's alleged neglect of duty.

63. No witness testified that any of the above-referenced acts of alleged "Willful Failure to Discharge Duties" caused injury to the public.

64. Additionally, the Notice of Probable Cause states that probable cause existed to suspend Petitioner's law enforcement certification indefinitely for lack of good moral character, based on listed allegations:

A. Petitioner was "untruthful with your immediate supervisor when you informed him that you did not pick up the bag on August 20, 2020."
B. Petitioner was "untruthful with your immediate supervisor on August 21, 2020 when you failed to inform him that you had exited your patrol vehicle and picked up the bag on August 20, 2020, that you had placed the bag in your patrol vehicle and had observed the marijuana in the bag, and that you had thrown the bag into the woods the previous day on August 20, 2020 thus leading your immediate supervisor to believe you found the bag for the first time on August 21, 2020."
C. Petitioner "drove your personal vehicle to a resident on the night of August 20, 2020 in an attempt to view the resident's camera recordings of outside the home in order to see what had been captured on surveillance."
D. Petitioner "intentionally placed the bag with its contents into the woods."

Resp't Ex. 2, p. 4.

65. ALJ Byrne's Final Agency Decision in 21 OSP 01175 found that Respondent met its burden of proof to show that Petitioner violated the Highway Patrol's policy on "Neglect of Duty."

66. ALJ Byrne did not find, nor did the Highway Patrol in that case allege, that Petitioner committed or had been convicted of the criminal offense of "Willful Failure to Discharge Duties," in violation of N.C. Gen. Stat. § 14-230. *See generally*, *Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol*, 221 N.C. App. 376, 726 S.E.2d 920 (2012).

67. Petitioner has never been convicted of, or pleaded guilty to, the criminal offense of "Willful Failure to Discharge Duties" in violation of N.C. Gen. Stat. § 14-230.

68. ALJ Byrne's Final Agency Decision in 21 OSP 01175 only found that Respondent met its burden of proof to show that Petitioner was untruthful with Sgt. Collins in the manner stipulated to by the Parties above.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this contested case pursuant to N.C. Gen. Stat. § 150B, Article 3A, following a request from Respondent under N.C. Gen. Stat. § 150B-40(e) for an Administrative Law Judge to hear this contested case. In such cases the Tribunal sits in place of the agency and has the authority of the presiding officer in a contested case under Article 3A. The Tribunal makes a proposal for decision, which contains findings of fact and conclusions of law. Respondent makes the final agency decision. N.C. Gen. Stat. § 150B-42.

2. All Parties are properly before the Office of Administrative Hearings and there is no question as to joinder or misjoinder. There was no objection from either Party to the Tribunal hearing this contested case.

3. This case involves a proposal to revoke an occupational license or certification. It thus affects the substantive rights of Petitioner, and he is entitled to both notice and opportunity to be heard. *Scroggs v. N. Carolina Criminal Justice Educ. & Training Standards Comm'n,* 101 N.C. App. 699, 701, 400 S.E.2d 742, 744 (1991). Notice was duly provided to all Parties by the Office of Administrative Hearings.

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

5. A court, or in this case an administrative Tribunal, need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the resolution of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd,* 335 N.C. 234, 436 S.E.2d 588 (1993).

6. Respondent has authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify law enforcement officers, including denying, revoking or suspending such certification under appropriate circumstances.

7. Respondent may suspend, revoke, or deny the certification of a criminal justice officer when Respondent 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. 12 NCAC 09A .0204(b)(3)(A).

8. When Respondent suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five (5) years; however, the Commission may either reduce or suspend the period of sanction under paragraph (b) of 12 NCAC 09A .0205 or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of the proposed sanction is the commission or conviction of a criminal offense other than those listed in paragraph (2) of this rule. 12 NCAC 09A .0205(b)(1).

9. Further, it is a requirement for holding law enforcement certification in North Carolina that the person doing so:

> be of good moral character as defined in: : *In re Willis*, 288 N.C. 1, 215 S.E. 2d 771 *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); *[I]n 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.
>
> 12 N.C. Admin. Code 9B.0101(12).

"Willful Failure to Discharge Duties" (N.C. Gen. Stat. § 14-230)

10. The Administrative Code defines "conviction" and "commission" of a crime, for purposes of a petitioner's activities, separately. *Becker v. N. Carolina Crim. Just. Educ. & Training Standards Comm'n*, 238 N.C. App. 362, 768 S.E.2d 200, 2014 WL 7472958 (2014) (unpublished). The Court of Appeals has held, at least in one case, that Respondent "may revoke a correctional officer's certification if it finds that the officer committed a misdemeanor, regardless whether he was criminally convicted of that charge." *Becker*, 2014 WL 7472958 at *4 (citing *Mullins v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 125 N.C. App. 339, 348, 481 S.E.2d 297, 302 (1997)).

11. "Convicted" or "Conviction" means the entry of "(a) a plea of guilty; (b) a verdict or finding of guilt by a jury, judge, magistrate, or other adjudicating body, tribunal, or official, either civilian or military; or (c) a plea of no contest, nolo contendere, or the equivalent." 12 NCAC 9A.0103(6).

12. Petitioner was never "convicted" of "Willful Failure to Discharge Duties" in violation of N.C. Gen. Stat. § 14-230.

13. "Commission of an offense" means "a finding by the North Carolina Criminal Justice Education and Training Standards Commission or equivalent regulating body from another state that a person performed the acts **necessary to satisfy the elements** of a specified criminal offense." 12 NCAC 9A.0103(5) (emphasis supplied).

14. In determining whether a person "committed" a crime, Respondent does not "attempt to interpret North Carolina's criminal code," but instead must "use pre-established elements of behavior which together constitute an offensive act. The Commission relies on the elements of each offense, as specified by the Legislature and the courts." *Mullins*, 125 N.C. App. at 347, 481 S.E.2d at 302. Therefore, in this case, each element of "Willful Failure to Discharge Duties" in violation of N.C. Gen. Stat. § 14-230 must be established. *See State v. Eastman*, 113 N.C. App. 347, 351, 438 S.E.2d 460, 462 (1994) (stating "The State failed to show any instance where the defendant [a state employee at the Governor Morehead School] could exercise sovereign power at any time in the course of his employment.").

15. N.C. Gen. Stat. § 14–230 states in pertinent part:

> (a) If 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.

16. "The essential elements of the crime [14-230] are that 1) the defendant is an official of a state institution, rather than a state employee, and that 2) he willfully omitted, neglected or refused to discharge the duties of his office." *Eastman*, 113 N.C. App. at 350, 438 S.E.2d at 462. A police officer is an "official" for purposes of the criminal offense. *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965). A North Carolina State Trooper, who is also "charged with the duty to enforce" State law, would also be an "official" for purposes of N.C. Gen. Stat. § 14-230, assuming the trooper's duties, as here, included such obligations. *Hord*, 264 N.C. at 155, 141 S.E.2d at 245.

17. More than 90 years ago, North Carolina's Supreme Court established that the elements of the criminal offense of "Willful Failure to Discharge Duties" include "first, a willful neglect in the discharge of official duty, and, second most significant to this case, **injury to the public**." *State v. Anderson*, 196 N.C. 771, 147 S.E. 305, 306 (1929). *See State v. Birdsong*, 325 N.C. 418, 422, 384 S.E.2d 5, 7 (1989), fn 1 (emphasis added).

18. There is no evidence that any conduct by Petitioner, that Respondent claims violated N.C. Gen. Stat. § 14-230, caused injury to the public. Significantly for due process purposed, Respondent's Notice of Probable Cause also fails to make that allegation.

19. Thus, in addition to an essential element of the crime being wholly unproven; Respondent failed to give Petitioner notice of the elements of the crime he allegedly committed. "Petitioner has the due process and statutory right to notice of the acts for which his certification is being challenged." *Enrico Miguel Orevillo Sabangan v. NC Criminal Justice Education and Training Standards Commission*, 2022 WL 888027, 21 DOJ 03253 (citing *Matter of Chastain*, 2022-NCCOA-54, ¶ 32, 281 N.C. App. 520, 529, 869 S.E.2d 738, 745). "It is fundamental that both unfairness and the appearance of unfairness should be avoided." *American Cyanamid Company v. F.T.C.*, 363 F.2d 757, 767 (6th Cir. 1966); *Crump v. Bd. of Educ. of Hickory Admin. Sch. Unit*, 326 N.C. 603, 624, 392 S.E.2d 579, 590 (1990); N.C. Const. art. I, Sec. 19.

20. The Highway Patrol never alleged that Petitioner violated N.C. Gen. Stat. § 14-230. The Highway Patrol alleged that Petitioner violated the Patrol's *policy* on "Neglect of Duty," which was: "*Members shall not be inattentive to their duty nor neglect their duties. Members shall not engage in any activities or personal business which would cause them to neglect or be inattentive to duty or which would impair their ability to perform such duty.*" *Amended Final Decision*, 21 OSP 01175, *Conclusion of Law* 33. By plain reading, the Highway Patrol's policy in 21 OSP 01175 differs from the elements of N.C. Gen. Stat. § 14-230.

21. It differs because a "policy" is a "nonbinding interpretative statement" by the Highway Patrol that "merely defines, or explains the meaning of a statue or rule" that is "used purely to assist a person to comply with the law . . .." N.C. Gen Stat. § 150B-2(7a). Policies, while helpful in interpreting rules, are not "rules" and are not binding on this Tribunal. N.C. Gen Stat. § 150B-2(8a); N.C. Gen. Stat. § 150B-18. While a policy violation may be grounds for termination

of a career employee's employment based on a policy manual, N.C Gen Stat. § 150B-2(8a)(a), it is not a rule or statutory basis for "Injury to the public" as defined by N.C. Gen. Stat. § 14-230.

22. The legal term "Injury to the public" is a long-recognized element of the criminal offense of "Willful Failure to Discharge Duties" in violation of N.C. Gen. Stat. § 14-230. There was no evidence offered in this case showing any injury to the public by Petitioner. Thus the evidence failed to "satisfy the elements of a specified criminal offense." 12 N.C.A.C. 09A .0103 (5).

23. Petitioner thus did not "commit" the crime of "Willful Failure to Discharge Duties" in violation of N.C. Gen. Stat. § 14-230.

Lack of Good Moral Character

24. The issue here is whether Petitioner's admitted acts of untruthfulness with his supervisor about the bag of marijuana and throwing the bag into the woods show that Petitioner lacks the requisite good moral character required of a law enforcement officer in North Carolina.

25. Whether this specific conduct was or was not of good character requires no analysis: Petitioner admits these actions were wrong, and that he regrets them "every day." T p 40. Good moral character:

> [I]s something more than an absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should, or does. Such character expresses itself, not in negatives nor in following the line of least resistance, **but quite often in the will to do the unpleasant thing if it is right, and the resolve not to do the pleasant thing if it is wrong**.
>
> *In re Farmer*, 191 N.C. 235, 131 S.E. 661, 663 (1926) (emphasis supplied).

26. Given Petitioner's subsequent candor with the Highway Patrol's Internal Affairs process, this case features elements of both.

27. Truthful conduct is a requirement of law enforcement officers. ALJ Donald W. Overby observed, as cited approvingly by the Court of Appeals:

> The world in which we live has become more tolerant and accepting of untruthfulness and outright lies. While it may be acceptable in some corners, it is not acceptable for everyone. With some occupations, there is a higher expectation for honesty and integrity, *e.g.,* the judiciary and law enforcement officers. Those with power and authority have a greater responsibility.
>
> *Wetherington v. NC Dep't of Pub. Safety*, 270 N.C. App. 161, 193, 840 S.E.2d 812, 834 (2020).

28. But *Wetherington*, which involved a State Trooper lying about a lost hat, holds that not *all* acts of untruthfulness justify a law enforcement officer's dismissal. ALJ Byrne, relying in part on the *Wetherington* holdings, reached precisely that conclusion with respect to Petitioner's conduct that there was no just cause for Petitioner's termination from the Highway Patrol.

29. Here, the sanction sought by Respondent goes well beyond loss of specific employment. It entails barring Petitioner, perhaps forever, from working in law enforcement in North Carolina. "Loss of a professional license is more than a monetary loss; it is a loss of a person's livelihood and loss of a reputation." *Johnson v. Bd. of Governors of Registered Dentists of State of Okl.*, 1996 OK 41, 913 P.2d 1339, 1345 (1996).

30. Moreover, "[t]he right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare." *Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957). "The right to conduct a lawful business or to earn a livelihood is regarded as fundamental." *McCormick v. Proctor*, 217 N.C. 23, 6 S.E.2d 870, 876 (1940). Further, there "is a well recognized gap between the regulation of a business or occupation and restrictions preventing persons from engaging in them to which courts must pay careful attention." *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 863 (1940).

31. In citing these holdings, the Tribunal does not question Respondent's authority to suspend or revoke, under appropriate facts, a law enforcement certification. The Tribunal emphasizes a principle so imperative that it appears at Article 1, Section 1 of the Constitution of North Carolina: "We hold it to be self-evident that all persons are created equal; that they **are endowed by their Creator with certain inalienable rights**; that among these are life, **liberty, the enjoyment of the fruits of their own labor**, and the pursuit of happiness." N.C. Const. art. I, § 1 (emphasis supplied). The Constitution commands that the Tribunal recall these issues: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 3.

32. Respondent's rule on good moral character requires that a person holding a law enforcement certification:

> (12) be of good moral character as defined in: *In re Willis*, 288 N.C. 1, 215 S.E. 2d 771 *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); *[I]n 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.
>
> 12 N.C. Admin. Code 09B .0101(12).

33. The Tribunal discusses these cases, and their application to Petitioner's matter, in turn all of which are distinguishable from the specific facts in this case.

A. *In re Willis* involves an applicant to practice law. It said of good moral character: "The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However, the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer." 288 N.C. at 10, 215 S.E.2d at 776. Good moral character is defined as "honesty, fairness, and respect for the rights of others and for the laws of the state and nation." *Id.* at 10, 215 S.E.2d at 776-77.

The *In re Willis* applicant made repeated deceptive statements regarding his criminal record and his dismissal from the military and had unsatisfied court judgments against him. *Id.* at 9, 215 S.E.2d at 775. These "misrepresentations and evasive or misleading responses" [were] "inconsistent with the truthfulness and candor required of a practicing attorney." *Id.* at 18, 215 S.E.2d at 781. *In re Willis* thus features a general history of disreputable conduct in various contexts. Petitioner's history is one of creditable service and conduct marred by isolated acts of untruthfulness and inattention to his job responsibilities.

B. *State v. Benbow* addresses the moral character of a criminal defendant for purposes of sentencing. Most notably, it states: "Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." 309 N.C. at 538, 308 S.E.2d at 653. This case features precisely that situation as it was one isolated incident.

C. *In re Legg* involves an applicant to the North Carolina bar who omitted substantial information in his application and showed a "pattern of carelessness, neglect, and inattention to detail" while engaged in law practice elsewhere. The Board of Law Examiners found Legg "morally unfit to practice law in the State of North Carolina because of his failure to settle all accounts left owing from his law practice, his willful conversion of funds owed to a private investigator . . . and his neglect to return legal papers to a client after a written request for such papers." 325 N.C. at 658, 386 S.E.2d at 179.

The Supreme Court stated, "The findings taken singly may not be sufficient to disqualify the applicant from the practice of law in North Carolina. *See In re Rogers*, 297 N.C. 48, 58, 253 S.E.2d 912, 918 (1979) ('Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents'). However, when the findings are viewed in the aggregate, **they reveal a systemic pattern of carelessness, neglect, inattention to detail and lack of candor that permeates the applicant's character** and could seriously undermine public confidence and the integrity of the courts." *Legg*, 325 N.C. at 673-674, 386 S.E.2d at 183 (emphasis supplied). This "systemic pattern" of misconduct is substantially different from Petitioner's actions.

D. *In re Rogers,* as noted, holds that "whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." 297 N.C. at 58, 253 S.E.2d at 918. *In re Rogers* also emphasized that "character . . . encompasses both a person's past behavior and the opinion of members of his community arising from it." *Id.* Here, it is not disputed that prior to the incidents at issue, Petitioner had a creditable, truthful career. The

only "opinion of members of [Petitioner's] community" introduced into evidence was favorable testimony from Captain Seago and multiple collaborative statements.

E. *In re Dillingham* features a bar aspirant whose application drew "a formal protest by prominent members of the Asheville bar." 188 N.C. at 162, 124 S.E. at 131. The protest revealed that the applicant committed "a series of acts … in the years 1919, 1920, and 1921, amounting in many instances to violations of the criminal law, including obtaining goods by false pretense, larceny, or conspiracy to commit it, forgery, extortion, and others; all of them involving moral turpitude and showing him now utterly unworthy of the honorable and important position to which he aspires." *Id.* This does not describe Petitioner.

F. *[I]n re Applicants for License* construes a 1905 statute on admission to the practice of law. Its observations on moral character are tangential.

G. *State v. Harris* involves a conviction for the then-existing crime of operating a dry cleaners without a license. The licensing requirement was held unconstitutional. "The Legislature may, through appropriate laws, protect the public against incapacity, fraud, and oppression where, from the nature of the business or occupation or the manner of its conduct, the natural consequence may be injurious to the public welfare." 216 N.C. at 746, 6 S.E.2d at 861. On the other hand, "[T]he right to earn a living must be regarded as inalienable. Conceding this, a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life by the erection of educational and moral standards of fitness is legal grotesquery." *Id.* at 746, 6 S.E.2d at 863.[1]

Harris emphasizes concerns about the application of laws that drive North Carolinians from a profession:

> There is nothing in government more dangerous to the liberty and rights of the individual than a too ready resort to the police power. . . . Resort to the police power to exclude persons from an ordinary calling, finding justification only by the existence of a vague public interest, often amounting to no more than a doubtful social convenience, is collectivistic in principle, destructive to the historic values of these guaranties, and contrary to the genius of the people who did all that was humanly possible to secure them in a written constitution. . . . No good can come to society from a policy which tends to drive its members from the ranks of the independently employed into the ranks of those industrially dependent, and the economic fallacy of such a policy is too obvious for comment.

Id. at 746, 6 S.E.2d at 865 (citation condensed for brevity).

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[1] *Harris* finds the latter case: "Looking at the dry cleaning and/or pressing business . . . exclusion of persons from its enjoyment as a means of livelihood must be attributed to some other purpose to be accomplished by the law, and is violative of constitutional guaranties." *Id.*

Thus, while *Harris* holds that some occupations – law enforcement among them – are subject to regulation and requirements of character, *Harris* also cautions that use of that authority to bar a person from his or her livelihood is not a task to be taken lightly. Also, it is not taken based on isolated conduct contrary to a commendable history as a law enforcement officer. "Because of . . . concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct." *Darryll Grey DeCotis v. North Carolina Criminal Justice Education and Training Standards Commission*, 2011 WL 7274519, 10 DOJ 07779. This is not one of those cases.

34. "Later court decisions," as referenced in the rule, hold consistently that isolated acts of conduct generally do not establish bad moral character, particularly with persons of demonstrated historical good character: *See Daniel June Campbell v. NC Criminal Justice Education and Training Standards Commission*, 2022 WL 2904160, 21 DOJ 03747; *Joshua Orion David v. NC Criminal Justice Education and Training Standards Commission*, 2018 WL 2387452, 17 DOJ 06743; *Robert Glenn Russell v. NC Criminal Justice Education and Training Standards Commission*, 2022 WL 888026, 21 DOJ 03252; *Heather Chatel Blair v. NC Sheriffs Education and Training Standards Commission*, 2021 WL 3615963, 20 DOJ 04027; *Scott McCoy v. NC Sheriffs Education and Training Standards Commission*, 2020 WL 11273133, 19 DOJ 06638.

35. There is no factual or legal basis to conclude that Petitioner lacks good moral character. The evidence demonstrates that Petitioner is a person of good moral character and a dedicated professional law enforcement officer in North Carolina for many years. Petitioner is morally fit to continue to serve as a law enforcement officer in North Carolina and has good moral character as required by law and rule.

36. This conclusion is not, and should not be considered as, approval of Petitioner's conduct in misleading a superior and throwing an illegal controlled substance into the woods. This conclusion, rather, is based on the overwhelming weight of authority that isolated acts of bad character do not generally establish bad character overall, especially in those persons with a substantial prior history of good conduct, truthfulness, and professionalism.

PROPOSAL FOR DECISION

The Tribunal respectfully proposes that the North Carolina Criminal Justice Education and Training Standards commission take no action against Petitioner's law enforcement certification.

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. N.C.G.S. 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.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C. Gen. Stat. § 150B-42(a).

IT IS SO PROPOSED.

This the 20th day of February, 2023.

Stacey Bice Bawtinhimer
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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This the 20th day of February, 2023.

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