

STATE OF NORTH CAROLINA
COUNTY OF HARNETT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 DOJ 03174

<p>Kevin Moore Petitioner,</p> <p>v.</p> <p>North Carolina Sheriffs Education and Training Standards Commission Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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This case came on for hearing on January 10, 2023 before Administrative Law Judge Melissa Owens Lassiter in Fayetteville, North Carolina after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

For Petitioner: Kevin Moore
Dunn, North Carolina

For Respondent: Jason Paul Caccamo
Attorney for Respondent
N.C. Department of Justice
Raleigh, North Carolina

ISSUE

Whether Petitioner's certification should be revoked for failure to notify the Commission of his arrest for DUI on November 1, 2014?

RULES AT ISSUE

Rule 12 NCAC 10B.0204(b)(2)
Rule 12 NCAC 10B.0301(a)(8)

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent: 1 - 8

WITNESSES

Petitioner Kevin Moore
Former Wake County Sheriff Donnie Harrison

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of witnesses presented at hearing, stipulations by the parties, documents admitted into evidence, having weighed all the evidence and assessed the credibility of the witnesses by the appropriate factors for judging credibility, including but not limited to the demeanor of each witness; any interest, bias or prejudice each witness may have; the opportunity for each witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of each witness is reasonable; whether such testimony is consistent with all other believable evidence in the case, and upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable rules and laws, the undersigned finds as follows:

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received Notice of Hearing, and Petitioner received by certified mail, the Notification of Probable Cause to Revoke Petitioner's justice officer certification, dated July 28, 2022, issued by Respondent North Carolina Sheriffs' Education and Training Standards Commission (hereinafter "The Commission").

2. Respondent, North Carolina Sheriffs' Education and Training Standards Commission, has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09G, to certify correctional officers and to revoke, suspend, or deny such certification.

3. On February 22, 2006, Respondent awarded certification to Petitioner through the Wake County Sherriff's Office.

4. Petitioner has held a law enforcement certification for 17 years with no issues.

5. On May 10, 2022, Petitioner was certified as a law enforcement officer with Criminal Justice Training and Standards Commission through the Dunn Police Department. As part of his application for that certification, Petitioner completed and filed a personal history statement indicating that he was arrested for Driving Under the Influence (DUI) on November 1, 2014, while he was still certified through the Wake County Sheriff's Office.

6. After Respondent Commission received Petitioner's personal history statement, the Commission determined it had no record that Petitioner had notified the Commission of this arrest as he was obligated to do.

7. Petitioner readily admits that he was arrested for DUI on November 1, 2014. The DUI charge was dismissed on November 6, 2015.

8. Petitioner also admits that he did not notify the Commission of this charge. Petitioner was unaware that he had to report his criminal charge to the Commission and would have, had he known of his obligation.

9. However, Petitioner immediately notified his chain of command at Wake County Sheriff's Office of the DUI charge including making a personal phone call to the then Wake County Sheriff Donnie Harrison. The Sheriff's Department's Internal Affairs investigated the DUI charge and took administrative actions against Petitioner by removing Petitioner from duty for one year until the DUI charge was dismissed on November 6, 2015. The Wake County Sheriff's Office also required Petitioner turn in his car and gun issued by the Sheriff's Office.

10. Petitioner thought that his notice to the Wake County Sheriff's Office handled all the reporting and notification requirements to the Commission. He would have notified the Commission about the DUI charge had he known about the notification requirement.

11. The Commission mailed Petitioner Notice of the Probable Cause Committee's hearing to consider Petitioner's matter at issue. However, since Petitioner had moved residences in the last five years, he did not receive that Notice and therefore, did not attend the Probable Cause Committee hearing. Had he received notice, Petitioner would have had every intention to attend.

12. At hearing, Sheriff Donnie Harrison confirmed that Petitioner called him after being charged with the DUI. Petitioner did not hide that he had been charged with a DUI. Sheriff Harrison admits that he did not personally notify the Commission about Petitioner's DUI charge in November of 2014, but also indicates that his administrative department might have informed the Commission about Petitioner's DUI charge.

13. Sheriff Harrison fully supports Petitioner's continued law enforcement career and would rehire Petitioner if Harrison was Sheriff.

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge as the Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Article 3A, N.C.G.S. § 150B-40(e). The parties received proper notice of the hearing in this matter.

2. To the extent that the findings of Facts contain Conclusions of Law, or that the 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, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

Burden of Proof

3. When an agency requests designation of an Administrative Law Judge to hear a case pursuant to N.C.G.S. § 150B-40(e), the Administrative Law Judge sits and presides over the 3A hearing in the place of the agency and makes a “proposal for decision” back to the agency. N.C. Gen. Stat. § 150B-40. In such a case, “[t]he provisions of [Article 3A], rather than the provisions of Article 3, shall govern a contested case....” N.C. Gen. Stat. § 150B-40(e). N.C. Gen. Stat. § 150B-38(h) provides “Every agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.” The “Article” referred to is “Article 3A.”

4. Respondent’s 12 NCAC 10B .0105, titled “Administrative Hearing Procedures,” provides:

Administrative hearings in contested cases conducted by the Commission or an Administrative Law Judge (as authorized in G.S. 150B-40(e)) shall be governed by:

(1) procedures set out in Article 3A of G.S. 150B.

12 NCAC 09A .0207(a).

5. 12 NCAC 10B .0105(b) states that the “rules establishing procedures for contested case. . . contained in Title 26, Chapter 3 of the North Carolina Administrative Code are hereby incorporated by reference.” However, many of the rules contained within Title 26, Chapter 3 of the NCAC are not consistent with Article 3A but are in line with Article 3 hearings. To the degree that the rules are inconsistent with N.C. Gen. Stat. § 150B Article 3A, those rules shall not apply to hearings conducted under Article 3A. The dictates of the statute, N.C. Gen. Stat. §150B, are paramount and shall control.

6. Historically, in Article 3A hearings, a license or certification is considered “property or rights” and thus entitle the applicant or holder to a contested case hearing pursuant to Article 3A. When a license or certification is at issue, whoever is trying to take that license or certificate away has the burden of proof.

7. In *Peace v. Employment Sec. Comm’n of N. Carolina*, the North Carolina State Supreme Court recognized that neither the North Carolina Constitution nor the North Carolina General Assembly had specifically addressed the proper allocation of the burden of proof in “just cause” termination cases. The Court in *Peace* stated:

In the absence of state constitutional or statutory direction, the appropriate burden of proof must be “judicially allocated on considerations of policy,

fairness and common sense.” 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 37 (4th ed.1993). Two general rules guide the allocation of the burden of proof outside the criminal context: (1) the burden rests on the party who asserts the affirmative, in substance rather than form; and (2) the burden rests on the party with peculiar knowledge of the facts and circumstances. *Id.*

Peace v. Employment Sec. Comm'n of N. Carolina, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998). (Since *Peace*, the legislature has allocated the burden of proof in just cause termination, demotion, or suspension cases to the employer State agency. N.C. Gen. Stat. § 126-34.02(d))

8. N.C. Gen. Stat. § 150B-40 also provides that the “hearings shall be conducted in a fair and impartial manner” and that the presiding officer, including the ALJ, may “regulate the course of the hearings.” That statutory provision allows the presiding officer to dictate who has the burden of proof.

9. Applying the statutory law along with “considerations of policy, fairness and common sense,” and the statutory authority to regulate the course of hearing, the Undersigned determines that Respondent should bear the burden of proof in an Article 3A action where Respondent proposes to take some action against a license/certificate holder or application based upon its investigation into that individual.

Failure to Notify the Commission Within Five Days

10. Per 12 NCAC 10B .0301(a)(8), Petitioner had an obligation to, “...within five business days, notify the [Commission’s] Standards Division and the appointing department head in writing of all criminal offenses with which the officer is charged.”

11. When Petitioner signed his application for certification with the Commission on February 22, 2006, he was notified that he had an obligation to notify the Commission withing five business days of being charged with all criminal offenses pursuant to 12 NCAC 10B .0301(a)(8).

12. By failing to notify the Commission’s Standards Division that he had been charged with a DUI, Petitioner failed to meet or maintain the employment certifications standards required.

13. Per 12 NCAC 10B.0204(b)(2), the Commission has the authority to revoke Petitioner’s certification because of his violation.

14. The Commission’s action against the Petitioner’s certification was not arbitrary or capricious and was in accordance with the evidence and law in this matter.

15. Nonetheless, there are significant mitigating factors present in this case which support the Commission imposing a lesser sanction against Petitioner’s certification. Those factors including Petitioner’s 17 years of service, no record of other

violations, not receiving the Notice of the Probable Cause Committee's hearing, full support of his former sheriff, Sheriff Donnie Harrison, and Petitioner's willingness to accept consequences of his actions and remorse for failing to notify the Commission of his DUI charge.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby proposes the Commission **REVOKE** Petitioner's law enforcement certification for a period of 6 months but **SUSPEND** that revocation for a probationary period of six months on the conditions that Petitioner shall not violate any federal law, any law of the State of North Carolina, any rules of the Criminal Justice Training and Standards Commission.

NOTICE OF APPEAL

The North Carolina Sheriffs' Education and Training Standards Commission will make the Final Decision in this case. That agency 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).

SO ORDERED, this the 24th day of February, 2023.



Melissa Owens Lassiter
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.

Kevin Moore
3900 US Highway 301 N
Dunn NC 28334
Petitioner

Jason P Caccamo
North Carolina Department of Justice
jcaccamo@ncdoj.gov
Attorney For Respondent

This the 24th day of February, 2023.



Daniel Chunko
Law Clerk
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850