

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
09 DOJ 03751

PROPOSAL FOR DECISION

APPEARANCES

For Respondent: Catherine F. Jordan
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

STATUTES AND RULES AT ISSUE

12 NCAC 9A .0103(5) and (23)(b)
12 NCAC 9A .0204(b)(3)(A)
12 NCAC 9A .0205(b)(1)
NC.G.S. §14-127
N.C.G.S. § 14-134.3(a)
N.C.G.S. § 17C-10(c)

FINDINGS OF FACTS

Having weighed all the evidence, and assessed the credibility of the witnesses by judging each witness' credibility, demeanor, interests, bias, or prejudice, by considering each witness' opportunity to see, hear, know or remember the facts or occurrences about which the witness testified, and by judging whether the testimony of each witness is reasonable, and whether such testimony is consistent with all other believable evidence in the case, 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 proper notice of hearing required pursuant to N.C.G.A. §150B-38, and Petitioner received notice of the proposed suspension of his certification as a law enforcement officer mailed by Respondent on May 7, 2009.

2. The North Carolina Criminal Justice 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 9A, to certify law enforcement officers, including denying, revoking or suspending such certification.

3. Rule 12 NCAC 09A .0204(b)(3)(A) provides that the Respondent Commission may suspend, revoke, or 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.

4. Rule 12 NCAC 09A .0205(b)(1) provides that when the Respondent Commission 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 this rule 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. "Injury to Real Property" in violation of N.C.G.S. § 14-127 and "Domestic Criminal Trespass" in violation of N.C.G.S. § 14-134.3(a), each constitutes a "Class B Misdemeanor" as defined in 12 NCAC 09A .0103(23)(b) and neither are listed in paragraph (2) of this rule.

5. On August 15, 1997, Winterville Police Department submitted a Form F-5A Report of Appointment to Respondent on behalf of Petitioner for appointment as a law enforcement officer. (Resp. Exh. 1) On August 22, 1997, Petitioner received his probationary certification as a law enforcement officer with Respondent. (Resp. Exh. 2) On August 19, 1998, Petitioner received his general certification as a law enforcement officer with Respondent. (Resp. Exh. 3)

6. Petitioner was first employed as an officer with Winterville Police Department, after applying for certification with Respondent. Petitioner separated from the Winterville Police Department on April 30, 2009.

7. On October 28, 2002, Petitioner applied on a Form F-5A for appointment as a police officer with the Pinetops Police Department. On December 12, 2002, Respondent issued

Petitioner a general certification as a law enforcement officer with Respondent for Pinetops Police Department. (Resp. Exh. 5)

8. N.C.G.S. § 17C-10(c) empowers the Respondent Commission to fix other qualifications for employment of criminal justice officers.

9. Richard Squires is an investigator for Respondent Commission, and identified that Respondent received all documents identified as Respondent's Exhibits 1 – 7 in support of the above Findings of Facts.

10. On March 17, 2009, a warrant for arrest was issued to Petitioner for the criminal offenses of domestic criminal trespass and injury to real property. (Resp. Exh. 8) Such warrant stated that on March 17, 2009, Petitioner

unlawfully and willfully did, at 1866 Centry Dr., Greenville, N.C., enter the premises after being forbidden to do so and remain in the premises after being ordered to leave by Jacqueline Lymon, the lawful occupant, the premises then being occupied by: the present spouse of the defendant, who was living separate and apart from the defendant at the time of the entry and refusal to leave." The warrant for arrest also alleged that on March 17, 2009, Petitioner "unlawfully and willfully did wantonly damage, injure and destroy real property, rear door, the property of the Tommy and Jacqueline Lymon.

(Resp. Exh. 8) The warrant further alleged that the parties were living separate and apart at the time of entry and refusal to leave. Petitioner was also charged with injury to personal property for damaging the rear door of the property of Tommy and Jacquelyn Lymon. (Resp. Exh. 8)

11. On March 24, 2009, Pinetops Police Department Captain Cappelletti notified Respondent of Petitioner's two criminal charges of domestic criminal trespass and injury to real property. (Resp. Exh. 11) Captain Cappelletti stated that the Pinetops Police Department had not taken action in the incident beyond recovering their service weapon.

12. On April 29, 2009, Petitioner's two criminal charges came on at the Pitt County District Court, the Honorable H. Paul McCoy, presiding. (Resp. Exh. 8) Petitioner had retained an attorney, and pled not guilty to both charges. After a trial in which Ms. Jacqueline Lymon and the arresting deputy sheriff testified, Judge McCoy found Petitioner guilty beyond a reasonable doubt on both criminal charges. Petitioner received a prayer for judgment continued upon payment of costs for both criminal convictions.

13. On May 4, 2009, Winterville Police Department Chief Billy Wilkes sent a notification to Respondent of Petitioner's two criminal charges and their adjudication of a prayer for judgment. (Resp. Exhs 9-10) Chief Wilkes stated that Petitioner resigned his position effective immediately on April 30, 2009.

14. By letter dated May 7, 2009, Respondent's Wayne Woodard notified Petitioner that he was proposing a suspension of Petitioner's law enforcement certification based on Petitioner's two criminal convictions of the Class B misdemeanors of domestic criminal trespass

and injury to real property, and gave Petitioner notice of his right to request an administrative hearing. (Resp. Exh. 13)

15. On May 22, 2009, Captain Cappelletti notified Respondent that the trial court entered a guilty verdict against Petitioner for his two criminal charges of domestic trespass and injury to real property. (Resp. Exh. 12) Petitioner was in receipt of the Commission's Notification of Probable Cause and that he was requesting a hearing, and that on May 22nd, Petitioner had taken a "fit for duty" psychological evaluation and, pending a passing result, would be allowed to return to work.

16. On May 27, 2009, Respondent received Petitioner's request for an administrative hearing, appealing Respondent's proposal to suspend Petitioner's law enforcement certification. On cross-examination, Mr. Squires explained that the Notice letter to Petitioner was an administrative action, and that the "investigation" into the conviction goes no further than the record of the conviction itself. In addition, Respondent Commission's Probable Cause Subcommittee neither investigated nor heard this matter.

17. Petitioner is currently an officer with the Pinetops Police Department. At the time of the incident on March 17, 2009, he was an officer with both Winterville and Pinetops Police Departments.

18. Pursuant to *Krueger v. North Carolina Criminal Justice Education & Training Standards Commission*, 198 N.C. App. 569, 680 S.E.2d 216 (2009), facts leading up to Petitioner's criminal charges and conviction was allowed into evidence. Since Respondent's administrative rules allow for a sanction less than the five (5) years set forth in 12 NCAC 09A .0205(b)(1), evidence must be placed on the record to provide Respondent Board with a complete record, including any mitigating evidence presented by Petitioner; thus, allowing Respondent full consideration of a possible lesser sanction.

19. At hearing, Petitioner explained that he and his wife, Jacquelyn Lymon, dated for three years, and married in June, 1992. In 1999, they purchased the marital home, located at 1866 Century Drive, Greenville, North Carolina, and lived at that address for approximately ten (10) years. About four (4) years before March 17, 2009, they began having marital problems. Petitioner was working two (2) jobs at Winterville Police Department and Pinetops Police Department, and his wife was working shifts at two (2) jobs as a nurse. He oftentimes worked the 3:00 p.m. to 3:00 a.m. shift and also filled in at the Pinetops Police Department, because they were short-handed. He and his wife worked opposing shifts each weekend and saw each other rarely. They had children in the home.

20. On occasion, Petitioner would leave the house for a few days after he and his wife had a verbal altercation, and would stay with friends until things calmed down at home, and he and his wife could talk through the matter. Before March, 2009, Petitioner left the marital home approximately three (3) times for short durations. Petitioner never had the intention of permanently leaving the marital home, but only wanted things to cool off.

21. Before leaving home for the fourth time, Petitioner and Jacquelyn had a verbal altercation, and Jacquelyn assaulted him. He told her that he was going to call the Sheriff's

Department. She later came into the kitchen, asked him if he had called the Sheriff's Office, and he said, "No." She told him that if he did, she would tell his Chief that he pointed his gun at her. Petitioner decided that he needed to leave to allow her to cool down, and left the house. Even when Petitioner had left the home to stay with friends, he would, on occasion, spend the night in the marital home, if he was working a late-night shift so as not to have to drive either to or from Pinetops or Winterville.

22. A week later, Petitioner and his wife decided to separate, and Petitioner began looking for an apartment.

23. Petitioner found an apartment to rent. On Thursday, March 12, 2009, the landlord of the apartment called Petitioner, and said the apartment would be ready the following week. On Friday, March 13, 2009, Petitioner stayed at the marital home as he worked at Winterville Police Department on Friday night, Saturday and Sunday. On Saturday (March 14), Sunday and Monday nights, Petitioner stayed elsewhere.

24. On Tuesday morning, March 17, 2009, Petitioner called Jacquelyn. She told Petitioner that he could pick up his personal possessions. When Petitioner arrived at home, Jacquelyn told Petitioner that he could not have his personal possessions. He walked around to the side of the house, went to the back door, and kicked it in. He knew that his wife had called the Sheriff's Office. He waited for the Deputy to arrive, because he did not think he had done anything wrong; it was his house. He was repairing the back door when the Sheriff's Deputy arrived.

25. Petitioner did not leave the scene, because it was his house. There was no assaultive behavior on that day, just a verbal exchange.

26. Petitioner called and advised Lieutenant Eric Stallings, Petitioner's supervisor at Winterville Police Department, what had occurred and that his wife had called the Sheriff's Office. Lt. Stallings came to Petitioner's home.

27. The Deputy Sheriff charged Petitioner with domestic criminal trespass and injury to real property. Petitioner retained an attorney, and pled not guilty. The Judge did not ask him any questions at the trial. The arresting Deputy Sheriff testified and Jacquelyn Lymon testified. The District Court judge found Petitioner guilty of the criminal charges of domestic criminal trespass, and injury to real property. Petitioner received a Prayer for Judgment Continued (PJC.)

28. Petitioner does not recall his attorney telling him the ramifications of the PJC (i.e. that it constitutes a conviction), and he understood that it would not affect his law enforcement certification. He later learned from Chief Wilkes and Lieutenant Stallings that it would affect his law enforcement certification.

29. Chief Wilkes conducted an internal affairs investigation, and suspended Petitioner from the Winterville Police Department.

30. Petitioner explained that all of the door locks on his home had a separate key, so he and Jacquelyn decided to have them all keyed alike. He paid the locksmith to have the doors

re-keyed. On Saturday, March 14, 2009, the locksmith re-keyed all the locks, so Petitioner did not have a key when he went to the marital home on Tuesday, March 17, 2009.

31. Since the incident in question, Petitioner and Jacquelyn have divorced. She is still living in the former marital home, and they currently have a good relationship.

32. Petitioner has never had an allegation of unlawful use of force in his law enforcement career, and has never been charged with an act of violence. In fact, he has never been charged with any crime. He is an eight-year veteran of the U.S. Army.

33. Petitioner considers law enforcement to be his career. He acknowledged that he would have handled things differently if he had to do it all over again.

34. Jacquelyn Lymon, Petitioner's ex-wife, testified at the contested case hearing. She explained that they were married on June 22, 1996. They began purchasing the house in 1999, and she still lives there following their divorce. She has been a nurse for 11 years, and has two (2) children from a previous relationship. Petitioner and she did not have any children together. Their marital problems began in 2006, when both were working two (2) jobs and shifts. At the time of the incident in question, she was working at the Walter B. Jones Center and Port Human Services, both of which are detoxification centers. She was working eight and ten-hour shifts, including weekends.

35. Mrs. Lymon was present during Petitioner's testimony. She explained that when Petitioner left the home after a verbal altercation, he would leave for no more than four (4) days at a time. She also recalls that he was there on Friday night and Saturday morning before the incident on Tuesday, March 17th, but did not return to the house until that Tuesday morning. He called first, and she knew he was coming. She agreed with Petitioner's testimony as to the events of that day. She said that she changed her mind about letting him have his personal possessions, because "reality [was] setting in."

36. She confirmed that they had agreed to have all the doors keyed alike and that Petitioner paid for it.

37. Mrs. Lymon did not think that Petitioner had left the marital home, and thought he would be coming back, until Tuesday morning when he came to pick up his personal possessions. She still thought they could work it out, even if he rented an apartment and their daughter could live in it.

38. Throughout their marriage, Petitioner had never threatened her or harmed her in anyway. She was never scared of Petitioner. Mrs. Lymon admitted that she had hit Petitioner in the past, and that she had also damaged his car on one (1) occasion. She attributed their marital problems to the stress of them both working two (2) jobs, including night shifts, and not seeing each other.

39. She never told Petitioner that he could not come by the house; he was always free to stay there. She stated, "It was his home."

40. She admitted that she had called the Sheriff's Office, and was present when the Deputy arrived. She called the Sheriff's Office because she thought it might keep Petitioner from leaving, the Deputy might counsel them, and Petitioner might change his mind. Now, she regrets calling the Sheriff's Office.

41. She did not think Petitioner had committed a crime in what he did, and he immediately went to the work shed to get tools to repair the door.

42. She always supported Petitioner as a law enforcement officer, and continues to do so. She never saw or heard anything that made her think Petitioner has a temper. She opined that Petitioner is a "good person," and that he "took a lot off me." She has no doubts about Petitioner serving as a law enforcement officer in the future.

43. On cross-examination, Mrs. Lymon indicated that it was not hard for Petitioner to break the back door in. It did not have a deadbolt; it just had a lock on the knob. She was not scared of Petitioner on the day in question.

44. At hearing, Lieutenant Eric Stallings was present during the testimony of the Petitioner, Tommy Keith Lymon, and his wife, Jacquelyn Lymon. At the time of the incident in question, Lieutenant Stallings was employed by the Winterville Police Department. He received a call from either Petitioner or the Sheriff's Office notifying him that a Deputy had been dispatched to the scene.

45. Lieutenant Stallings was Petitioner's supervisor at the Winterville Police Department, and they had worked together for ten (10) years. The Winterville Police Department has 21 officers. At the time of the incident, Lieutenant Stallings was Petitioner's supervisor. Upon his arrival at the scene, Sergeant Keith Godley of the Pitt County Sheriff's Office was either present or arrived shortly thereafter. Lieutenant Stallings did not know Sergeant Godley in that he was new to the Sheriff's Office's Domestic Violence Unit. Petitioner briefed Lieutenant Stallings on what had occurred.

46. Lieutenant Stallings noted that while he was present, and while they were waiting on the Deputy, Jacquelyn Lymon put some of Petitioner's personal possessions into his car for him. At the scene, Lieutenant Stallings tried to explain to Sergeant Godley that no crime had occurred. He explained to him that just because Petitioner had rented an apartment, he had not moved into it, nor had he relinquished the marital residence. Lieutenant Stallings also tried to explain to Sergeant Godley that there could not be an injury to personal property for the same reason; it was still Petitioner's property, and he had not moved out into the apartment or relinquished the marital house to his spouse.

47. Lieutenant Stallings remained at the scene and accompanied Petitioner to the Magistrate's Office and his first appearance. He brought Petitioner back home, then reported the incident to Chief Wilkes of the Winterville Police Department.

48. The Winterville Police Department initiated an internal affairs investigation, however it suspended the investigation when Petitioner resigned from the Department.

49. Lieutenant Stallings has known Petitioner since 2001. He knows him both as a law enforcement officer and personally. He considers him to be a person of “outstanding character.” He had never witnessed anything that would call into question Petitioner’s fitness to serve as a law enforcement officer. He has never witnessed any act of violence or aggression by Petitioner and has never seen him be rude or untold to anyone, professionally or personally. Lieutenant Stallings has “seen him [Peticioner] take a lot of crap” and remain calm.

50. In Stallings’ opinion, there is nothing about the incident in question that should keep him from serving as a law enforcement officer in the future. Although what Petitioner did “may not be right, it was not criminal.” He believes that Petitioner was charged only because he was a law enforcement officer.

51. On cross-examination, Lieutenant Stallings acknowledged that he separated from the Winterville Police Department in 2009, as he resigned over the stress of the loss of a fellow officer and friend who was killed in the line of duty. He merely lost interest in being a law enforcement officer.

52. Lieutenant Stallings has never been charged with anything other than a worthless check and speeding except that his wife charged him with communicating threats after he caught her with her boyfriend; the charge was dismissed.

53. Corey Dixon, Sr. has been a detective with the Roanoke Rapids Police Department since December, 2006, and is formerly with the Winterville Police Department. He has known Petitioner since late 2003. Petitioner was his supervisor at the Winterville Police Department.

54. Detective Dixon was familiar with the March 17, 2009, incident, first through media reports and then through Petitioner. He first learned about it on television, called a friend in Winterville, and then attempted to reach Petitioner. It took him a couple of days to contact him, but once he did, Petitioner explained what had occurred.

55. He considers himself to be a personal friend of Petitioner and was familiar with his domestic situation in 2009 and before. He had witnessed arguments between Petitioner and his wife. He was present during the testimony of Petitioner and Mrs. Lymon and their testimony was consistent with his observations. He was aware of Petitioner leaving the marital residence on a number of occasions for “cooling down time” and could recall at least two or three times that he did so.

56. He has never known any incidence of violence and never known Petitioner to threaten anyone with harm. Detective Dixon has no concern over Petitioner ever harming anyone and considers Petitioner to be a “good guy.” Professionally, he has always known Petitioner to take the extra step. In his opinion, law enforcement needs more people with Petitioner’s abilities. He is a good problem solver without having to arrest people. He considers him to be a good officer and believes he needs to remain a law enforcement officer.

57. On cross-examination, Detective Dixon that nothing about his knowledge of the criminal charges that would change his opinion. In his experience, law enforcement officers are always held to a higher standard. An officer will be arrested when a non-law enforcement

officer would have been released. He agreed with Lieutenant Stallings' assessment that Petitioner was only charged with these two (2) criminal offenses because he was a law enforcement officer. Detective Dixon would not have charged under similar circumstances.

58. Captain James A. Cappelletti was in charge of daily operations for the Pinetops Police Department. He has been employed by the Pinetops Police Department for five (5) years, and before that, was employed by the Tarboro Police Department for three (3) years. Prior to his employment in Tarboro, he was a reserve officer with the Edgecombe County Sheriff's Office for two (2) years. He met Petitioner when he came to the Pinetops Police, and has supervised Petitioner over the last four (4) years. On March 17, 2009, he was Petitioner's supervisor.

59. On the day of the incident, Lieutenant Stallings from the Winterville Police Department called Captain Cappelletti at Petitioner's request. They were both at the Magistrate's Office. Captain Cappelletti could not leave the town limits because he was the only officer on duty. Upon learning the nature of the charges, he asked Lieutenant Stallings to retrieve Petitioner's duty weapon and badge and hold them for the Pinetops Police Department. This request was made in accordance with the personnel handbook for the Pinetops Police Department, which requires an officer to surrender his or her duty weapon and law enforcement identification whenever they are charged with a criminal offense.

60. The Pinetops Police Department did not initially conduct an internal investigation, but upon Petitioner's resignation from the Winterville Police Department, opened an investigation. Captain Cappelletti, as the officer in charge of daily operations, conducted the internal affairs investigation. He became very frustrated with his inability to obtain cooperation from the Deputy that charged Petitioner, the Pitt County Sheriff's Office, the District Attorney's Office, and Mrs. Lymon as all refused to cooperate with him. He was able to interview Lieutenant Stallings, who was present on the scene. It was Lieutenant Stallings' opinion, which he testified to in court, that both the charge and the adjudication were not proper. Captain Cappelletti attempted to talk with the District Court Judge to ask him to make findings of facts in order to determine the reason for the finding of guilt, but the Judge refused to talk to him.

61. Petitioner told him that it was his understanding that a PJC would not cause a problem with his certification. The Chief and he notified Petitioner otherwise.

62. Since there was an inability to complete the internal investigation, Captain Cappelletti relied upon the only witness with knowledge of the incident, Lieutenant Eric Stallings), and therefore requested Petitioner undergo a psychological evaluation.

63. After successfully completing the psychological evaluation, Petitioner was returned to service on May 29, 2009, part-time, pending a hearing before the Criminal Justice Education & Training Standards Commission's Probable Cause Committee.

64. However, the Probable Cause Committee never heard this matter, as Mr. Woodard issue a Notice of Proposed Suspension of Petitioner's certification:

65. In Captain Cappelletti's opinion, the charges were not proper; he would not have charged under similar circumstances and related to the court a factual situation he was faced with similar to this one where he made the decision not to charge.

66. Captain Cappelletti has worked with Petitioner for five (5) years, part-time and full-time, and worked with him “intensely” for the past three (3) years. In his opinion, Petitioner is an “outstanding officer.” Captain Cappelletti has no doubts about Petitioner’s abilities if he were to continue as a law enforcement officer. He has never known Petitioner to be violent or engaged in any assaultive behavior. In fact, he described Petitioner as “actually, too peaceful.” (See Petitioner’s Exhibit 1, an open letter from Captain Cappelletti to Respondent)

67. Respondent did not present any rebuttal evidence to rebut the testimony of Petitioner, Mrs. Lymon, or the three (3) officers who testified as to the facts, their opinion of the charges, and Petitioner’s character and abilities as a law enforcement officer.

CONCLUSIONS OF LAW

1. Both parties are properly before this Administrative Law Judge. Jurisdiction and venue are proper and both parties received proper notice of the hearing.

2. Respondent North Carolina Criminal Justice Education and Training Standards Commission has certain authority under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapters 9A and 9B, to certify criminal justice officers and to suspend, revoke or deny certification under appropriate circumstances with proof of a rule violation.

3. 12 NCAC 09A .0205(b)(1) provides that when the Respondent Commission 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 this rule 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. “Injury to Real Property” in violation of N.C.G.S. § 14-127 and “Domestic Criminal Trespass” in violation of N.C.G.S. § 14-134.3(a), each constitutes a “Class B Misdemeanor” as defined in 12 NCAC 09A .0103(23)(b) and neither are listed in paragraph (2) of this rule.

4. Although Petitioner was convicted of two (2) Class B misdemeanors, the preponderance of the evidence demonstrates that Petitioner did not “commit” either of the crimes as a matter of law. Further, the mitigating evidence shows Petitioner is a dedicated professional law enforcement officer, a peaceful person, a person of good character and fit to continue to serve as a law enforcement officer in North Carolina.

5. Since Petitioner was convicted the two Class B misdemeanors, Respondent is authorized under 12 NCAC 9A.0204(b)(3)A to suspend Petitioner’s law enforcement certification. However, given preponderance of the evidence at hearing and the mitigating circumstances produced, the undersigned proposes Respondent not suspend Petitioner’s law enforcement certification.

PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent finds that while there has been a rule violation, there is no basis to revoke or suspend Petitioner's law enforcement certification. In light of the mitigating circumstances, Respondent should exercise its discretion, and not suspend Petitioner's law enforcement certification.

ORDER AND 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.

This the 30th day of July, 2012

Melissa Owens Lassiter
Administrative Law Judge