

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DOJ 11632

DECISION

APPEARANCES

ISSUES

Whether Petitioner's justice officer certification should be revoked for failing to possess good moral

character?

Whether Petitioner failed to notify Respondent, in writing, within five working days, of criminal offenses with which he was charged?

STATUTES AND RULES AT ISSUE

N.C.G.S. § 14-54(b)
N.C.G.S. § 14-159.13
12 N.C.A.C. 10B .0103(10)(a)&(b)
12 N.C.A.C. 10B .0204(b)(2)
12 N.C.A.C. 10B .0204(d)(1)&(5)
12 N.C.A.C. 10B .0205(2)
12 N.C.A.C. 10B .0301(a)(7)&(8)

FINDINGS OF FACT

1. Both parties are properly before the Office of Administrative Hearings, in that jurisdiction and venue are proper, and both parties received notice of hearing.

2. The North Carolina Sheriffs' Education and Training Standards Commission (Respondent) has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.

3. On August 9, 1990, Petitioner was issued a General Basic Law Enforcement Certificate by Respondent.

4. Since that time, Petitioner has obtained numerous and extensive training and certifications pertaining to his employment in law enforcement. He performed duties very well.

5. Petitioner has been convicted of two separate charges violating N.C.G.S. § 14-107(d)(1), "Simple Worthless Check" in New Hanover County on July 16, 1999, and January 19, 2000. Both charges are classified as Class A misdemeanors.

6. In July 2004, Petitioner began working for the Pender County Sheriff's Office as a detention officer. He had a good working relationship with his fellow officers.

7. At around the same time, Petitioner applied for certification as a detention officer with Respondent. Petitioner received detention officer certification on September 30, 2005.

8. As part of his appointment to the Pender County Sheriff's Office, Petitioner read and signed a "Report of Appointment Form," also known as an "F-4" form. The F-4 form notifies appointees of their continuing obligation to notify the Sheriffs' Commission of all criminal offenses for which the appointee is arrested, charged, pleads to, or is found not guilty of.

9. Petitioner testified at the February 27, 2012, hearing that he was aware of the continuing obligation to notify Respondent of any newly charged criminal offenses. He further testified that he failed to notify Respondent of both his arrest and the subsequent criminal offenses he was charged with on July 24, 2010, and that he "knew it would be an issue."

10. As part of his appointment to the Pender County Sheriff's Office, a personal history was given in conjunction with a routine background investigation. The report, also known as an "F-3" form, showed the existence of the two worthless check misdemeanor offenses on Petitioner's criminal record, and that Respondent was aware of the offenses.

11. In November 2009, Petitioner and Ashley Byrd began a relationship. During the relationship, Petitioner helped Byrd out around the house, and spent time with Byrd's five-year-old daughter, as well as Byrd's mother. Petitioner's daughter occasionally baby-sat for Byrd and Byrd also allowed Petitioner access to her home when she wasn't there.

12. During their relationship, Byrd and Petitioner had access to keys for each others' residences. Byrd also showed Petitioner how to gain access to her residence without a key for occasions when she was not at home, via a malfunctioning side-door. Petitioner entered Byrd's residence when she was not at home four or five times during the course of their relationship.

13. Sometime during the week preceding July 24, 2010, Byrd ended the romantic relationship with Petitioner. She wanted to move on, while Petitioner hated to give her up.

14. Shortly after the relationship was terminated, but prior to his arrest, Petitioner went to Byrd's residence. Despite being told to leave several times, Petitioner remained inside Byrd's residence. She told Petitioner that he was not to return to her residence.

15. On or around July 24, 2010, very late at night, Petitioner returned to Byrd's residence. Byrd was not at home when Petitioner arrived.

16. Without her permission, Petitioner entered Byrd's residence. Petitioner did not use a key, but instead gained entry through the malfunctioning side-door.

17. While Petitioner was still at Byrd's home, her mother arrived and inquired as to Byrd's whereabouts. A phone call to Byrd by her mother revealed that she was at a party nearby.

18. Byrd told her mother to tell Petitioner to leave her residence. Steve Throneburg, a friend of Byrd, now her husband, called the sheriff's office to report that Petitioner had entered the residence without authorization.

19. Pender County Sheriff's deputies Gregory Cromartie and Jeffrey Hooks responded to the call. When they arrived, Petitioner was outside. After speaking to Byrd on the phone, and to her mother, the deputies placed Petitioner under arrest.

20. Cromartie believed that he had probable cause to arrest Petitioner because Byrd's mother had witnessed Petitioner inside the residence, and Byrd had advised Cromartie that Petitioner was not authorized to enter.

21. Petitioner was taken before a Magistrate, and probable cause was found to charge him with violations of N.C.G.S. § 14-54(b), "Breaking or Entering," and N.C.G.S. § 14-159.13, "Second Degree Trespass."

22. At no time did Petitioner tell Deputies Cromartie or Hooks about any key to Byrd's residence he had in his possession, nor did he allege that he had permission to enter the residence.

23. Days before his arrest, Petitioner approached Deputy Cromartie in the county jail parking lot. Petitioner told Cromartie that he had been in an argument with his girlfriend and asked if any police calls had been dispatched to her residence.

24. Byrd filed a statement on July 24, 2010, in which she claimed that Petitioner had broken into her locked residence without her permission. Nothing was harmed or stolen.

25. On August 3, 2010, Byrd requested that her statement be retracted because she had been drinking the night of the incident. Byrd also testified that she did not want Petitioner arrested for entering her residence. She only wanted him to leave. She further testified that Petitioner did not take or damage any property and that she did not want him to lose his job.

26. Both the Second Degree Trespass and Breaking or Entering charges were voluntarily dismissed on August 12, 2010, pursuant to Byrd's request.

27. The Pender County Sheriff's Office terminated Petitioner's employment on July 27, 2010, and notified Respondent of the separation from employment; thus, Petitioner did not.

28. Pursuant to established procedures, Respondent began an investigation of Petitioner and the events surrounding the arrest on July 24, 2010. The investigation involved interviews of Petitioner and witnesses, and gathering of all related documents. Once completed, a Probable Cause Memorandum was sent to the Probable Cause Committee to determine appropriate action.

29. The Probable Cause Committee reviewed the materials obtained during the investigation. It considered the applicable rules and determined that enough evidence existed to find that Petitioner had committed the offenses for which he was arrested on July 24, 2010.

30. The Probable Cause Committee recommended that Petitioner's certification be

revoked for a period of five years for committing the misdemeanor offense of breaking and entering; revoked for an indefinite period for a combination of four or more Class A and Class B misdemeanor offenses; revoked for an indefinite period for failure to maintain good moral character; and revoked for a period of five years for failing to timely notify Respondent of the arrest and charges stemming from the July 24, 2010 incident.

31. On June 20, 2011, Respondent sent a Notification of Probable Cause to Revoke Justice Officer Certification. The Notification detailed probable cause for revocation for four principal reasons:

- Pursuant to 12 N.C.A.C. 10B .0204(d)(1), commission of a crime classified as a Class B misdemeanor, as defined under 12 N.C.A.C. 10B .0103(10)(b). Specifically, it is alleged that on July 24, 2010, Petitioner committed the Class B misdemeanor offense of “Breaking or Entering” in violation of N.C.G.S. § 14-54(b).
- Pursuant to 12 N.C.A.C. 10B .0204(d)(5), commission of any combination of four or more crimes classified as either Class A or Class B misdemeanor, as defined under 12 N.C.A.C. 10B .0103(10)(a) and (b), respectively. Specifically, it is alleged that on July 24, 2010, Petitioner committed the Class A misdemeanor offense of “Second Degree Trespass” in violation of N.C.G.S. § 14-159.13. When combined with the alleged July 24, 2010 Class B misdemeanor violation and the two Class A misdemeanor convictions for Simple Worthless Check in New Hanover County in 1999 and 2000, Petitioner is alleged to have committed at least four qualifying crimes.
- Pursuant to 12 N.C.A.C. 10B .0301(a)(8), lack of good moral character, as evidenced by the alleged commission of Breaking or Entering and Second Degree Trespass on July 24, 2010. Evidence of lack of good moral character is considered a minimum employment standard, and, as such, authorizes revocation or suspension of officer certification under 12 N.C.A.C. 10B .0204(b)(2).
- Pursuant to 12 N.C.A.C. 10B .0301(a)(7), failure to notify the Standards Division and the appointing department head in writing of all criminal offenses with which the officer is charged. Failure to notify the Standards Division is considered a minimum employment standard, and, as such, authorizes revocation or suspension of officer certification under 12 N.C.A.C. 10B .0204(b)(2).

29. Several friends and colleagues attested to Petitioner’s good character. Petitioner has a good reputation in the community, is a family-man, good father, active church member, Mason, Shriner, respectful, honest and trustworthy, works hard, fair-minded, dedicated, and friendly.

CONCLUSIONS OF LAW

1. Both parties are properly before the undersigned Administrative Law Judge, in that jurisdiction and venue are proper, both parties received proper notice of hearing required pursuant to N.C. Gen. Stat. § 150B-38.

2. Respondent has the authority granted under Chapter 17E of the North Carolina General Statutes, and Title 12 of the North Carolina Administrative Code, Chapter 10, Subchapter 10B, to certify detention officers, and to deny, revoke or suspend such certification.

3. N.C.G.S. § 14-54(b) provides that “[a]ny person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor.” As distinguished from N.C.G.S. § 14-54(a), which adds an element of intent, and is a felony offense, § 14-54(b) merely requires a “wrongful” breaking and entering. The wrongfulness element rests upon a showing that the entry was “without the consent of the owner.” *State v. Boone*, 297 N.C. 652, 655, 256 S.E.2d 683, 685 (1979). When entry to the building is permitted, either expressly or impliedly, the requisite element of wrongfulness does not exist. *Id.*, at 659, 256 S.E.2d at 685.

4. Testimony and evidence provided demonstrates that Petitioner knew that he no longer had consent to enter the residence of Ashley Byrd on July 24, 2010. The preponderance of the evidence indicates that Petitioner did commit the offense of Breaking and Entering, as defined by N.C.G.S. § 14-54(b). This offense is classified as a Class B misdemeanor by the State.

5. Pursuant to N.C.G.S. § 14-159.13 (a)(1) a person has committed second-degree trespass if “without authorization, he enters or remains on [the] premises of another...[a]fter he has been notified not to enter or remain there by the owner....”

6. Testimony and evidence provided demonstrates that despite having been notified not to enter the residence of Ashley Byrd, Petitioner did enter said premises on July 24, 2010. The preponderance of the evidence indicates that Petitioner did commit the offense of Second Degree Trespass, as defined by N.C.G.S. § 14-159.13.

7. 12 N.C.A.C. 10B .0301(a)(7) states:

(a) Every Justice Officer employed or certified in North Carolina shall:

...

(7) **within five working days notify the Standards Division and the appointing department head in writing of all criminal offenses with which the officer is charged...**and shall also give notification, in writing, to the Standards Division and the appointing department head following the adjudication of these criminal charges.... This shall include all criminal offenses except minor traffic offenses...[t]he initial notification required must specify the nature of the offense, the date of offense, and the arresting agency. The notifications of adjudication required must specify the nature of the offense, the court in which the case was handled and the date of disposition, and must include a certified copy of the final disposition from the Clerk of Court in the county of adjudication. The notifications of adjudication must be received by the Standards Division within 30 days of the date the case was disposed of in court. Officers required to notify the Standards Division under this

Subparagraph shall also make the same notification to their employing or appointing department head within 20 days of the date the case was disposed of in court. The department head, provided he has knowledge of the officer's charge(s),...shall also notify the Division within 30 days of the date the case or order was disposed of in court. Receipt by the Standards Division of timely notification of the initial offenses charged and of adjudication of those offenses, from either the officer or the department head, is sufficient notice for compliance with this Subparagraph[.]

(Emphasis added).

8. 12 N.C.A.C. 10B .0301(a)(8) requires that all Justice Officers be of good moral character. "[G]ood moral character...

...is seldom subject to proof by reference to one or two incidents...[and] is something more than the absence of bad character. It is the good name which the applicant has acquired...through association with his fellows...Character thus encompasses both a person's past behavior and the opinion of members of his community arising from it."

In re Rogers, 297 N.C. 48, 58, 253 S.E.2d 912, 918 (1976).

9. Respondent failed to establish, by a preponderance of evidence, Petitioner's lack of good moral character. Petitioner presented ample and credible evidence as to his good moral character, which was corroborated by Ashley Byrd's testimony.

10. 12 N.C.A.C.10B .0204(b)(2) states:

(b) The Commission shall revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer: . . .

(2) fails to meet or maintain any of the employment or certification standards required by 12 N.C.A.C. 10B .0300[.]

11. 12 N.C.A.C. 10B .0205(2)(e) states:

When the Commission suspends, revokes, or denies the certification of a justice officer, the period of sanction shall be: . . .

(2) not less than five years where the cause of sanction is: . . .

(e) failure to make either of the notifications as required by 12 N.C.A.C. 10B .0301(a)(7)[.]

12. Respondent's proposed revocation of the Petitioner's certification as a detention officer is supported by substantial evidence.

13. 12 N.C.A.C. 10B .0205 (2) also provides:

The Commission may either reduce or suspend the periods of sanction under this Item or substitute a period of probation in lieu of revocation, suspension, or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension.

14. The evidence at the administrative hearing proved extenuating circumstances exist to warrant Respondent imposing a lesser sanction, such as a suspended suspension or probationary period, instead of active revocation or suspension of Petitioner's detention officer certification.

DECISION

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby proposes that Respondent's decision to revoke Petitioner's justice officer certification was justified by substantial evidence in the record. Respondent has demonstrated by a preponderance of evidence that Petitioner did commit the offenses of "breaking and entering," in violation of N.C.G.S. § 14-54(b), and "second-degree trespass," in violation of N.C.G.S. § 14-159.13. However, the evidence presented also reflects mitigating circumstances, such as the retraction of the charges by the property owner, resulting in a failure to prosecute for the offenses, as well as her testimony reflecting her belief that Petitioner lacked a desire to do any harm. Additionally, substantial evidence was presented reflecting the good character of Petitioner among colleagues and in the community. The sum of the evidence presented warrants the imposition of a suspension of the imposed certification revocation for a probationary period of five (5) years, provided that the Petitioner continues to exhibit and maintain good moral character and behavior.

ORDER AND NOTICE

The North Carolina Sheriffs' Education and Training and Standards Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 19th day of June, 2012.

Fred G. Morrison Jr.
Senior Administrative Law Judge