

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DOJ 13152

PROPOSAL FOR DECISION

APPEARANCES

ISSUE

STIPULATED FINDINGS OF FACT

Prior to this contested case hearing being called, the Undersigned advised both counsel to the Respondent and Petitioner's counsel that he recognized the Petitioner as he entered the courtroom. The undersigned Judge was not aware that he knew the Petitioner until such time as he saw Petitioner's face. Thereafter, the Undersigned fully advised the parties and their counsel that the undersigned Judge has known Petitioner in a strictly professional capacity for many years. The undersigned knew Petitioner while Petitioner was assigned to the High Point Jail as a detention officer. The undersigned would interact with the Petitioner in a professional capacity during the period the undersigned Judge was practicing law as an assistant public defender and an assistant district attorney. The Judge agreed to hear this contested case after determining that he was capable of rendering a decision based solely on the facts and evidence presented.

Having been fully advised of the foregoing, Assistant Attorney General Matthew L. Boyatt and the Respondent consented to this Court hearing this contested case. The Respondent's position is that the undersigned is fully capable of rendering a sound and just decision following the presentment of evidence. The Respondent does not perceive any conflict with the undersigned hearing this matter and is comfortable with this Judge doing so. Further, both the Petitioner and his counsel, William Hill, concurred with the Respondent and agreed that this Judge should hear Petitioner's contested case. The Petitioner and Respondent each stipulate the undersigned Administrative Law Judge is capable of hearing this contested case and rendering a sound and just decision based on the law and evidence presented at trial.

In addition to the foregoing, prior to the contested case hearing, the parties stipulated to the following additional written findings of fact:

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received, by certified mail, the proposed Denial of Justice Officer's Certification letter mailed by Respondent Sheriffs' Commission on September 9, 2011.

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter referred to as "The Sheriffs' Commission") 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. 12 NCAC 10B.0301(6) (c) states:

Every Justice Officer employed or certified in North Carolina shall have produced a negative result on a drug screen administered according to the following specifications:

(C) The drugs whose use shall be tested for shall include at least cannabis, cocaine, phencyclidine (PCP), opiates and amphetamines or their metabolites.

4. Further, 12 NCAC 10B.0204(b) (5) provides that the Commission shall revoke a law enforcement officer's certification when the Commission finds that a certified officer has produced a positive result on any drug screen specified in 12 NCAC 10B.0301, unless the positive result is due to a medically indicated cause.

5. Petitioner was appointed, and subsequently certified, as a Law Enforcement Officer through the Guilford County Sheriff's Office on June 1, 1995. Petitioner has served as a detention officer with the Guilford County Sheriff's Office since obtaining employment with that agency in 1994.

6. On or about July 11, 2011, the Petitioner was selected by the Random Ware Drug Testing Program for a random drug screening. Petitioner was originally scheduled for random drug screening for July 15, 2011. However, on or about July 13, 2011, Petitioner was provided with a US Health Works Treatment Authorization form to submit to a random drug screen by

submitting a urine sample at Petitioner's request. The random drug screen is a Department of Transportation (DOT) 5 panel urine drug screen that tests for cannabis, cocaine, phencyclidine, and amphetamines and their derivatives.

7. On July 13, 2011, Petitioner submitted a urine sample which tested positive for the controlled substance amphetamine. Petitioner's urine sample tested negative for all other controlled substances, including but not limited to marijuana and cocaine.

8. Petitioner's urine sample was tested by US Health Works Medical Group (hereinafter "US Health Works"), a laboratory certified by the United States Department of Health and Human Services to conduct federal workplace drug testing. US Health Works reported Petitioner's urine sample to be positive for the presence of amphetamine. Amphetamine is a psychostimulant drug that produces increased wakefulness and focus in association with decreased fatigue and appetite. The drug is also used recreationally and as a performance enhancer. Amphetamine is also known as "speed" by recreational users of the drug. Brand name medications contain amphetamine, such as the prescription drug Adderall.

9. The minimum confirmatory threshold value for amphetamine is 250 nanograms. Petitioner's urine sample produced a confirmatory threshold value of 1,519 nanograms, which is a positive result for the presence of amphetamine. Petitioner's urine sample was reported positive for amphetamine on or about July 25, 2011.

10. The drug screen conducted on Petitioner's urine sample was administered in accordance with the procedures authorized and mandated by the United States Department of Health and Human Services for federal workplace drug testing programs. These procedures require that an initial screen test of Petitioner's urine be conducted using the immunoassay method and that a confirmation test be conducted using the gas chromatography/mass spectrometry (GC/MS) method. As indicated above, the positive result revealed a level of 1,519 nanograms, which is above the threshold established for an initial screen and a confirmation test was conducted in accordance with the standards established by the United States Department of Health and Human Services.

11. The purpose of the initial screen and confirmation tests are to conduct a quantitative analysis of the amount of controlled substance in an individual's urine. The amount tested is measured in nanograms per milliliter (ng/mL) of the substance in the urine. The testing process is conducted such that there is a screen cutoff level and a confirmation cutoff level for the test. If either the initial screen or the confirmation tests report a level of the substance below the cutoff amount, the sample will be reported as negative. The current cutoff adopted by the United States Department of Health and Human Services is 500 ng/mL for amphetamine as a screen cutoff and 250 ng/mL for the confirmation cutoff level. The purpose of this cutoff limit is to prevent any possibility of a small trace amount of the illicit drug from being reported as positive if it is detected in the person's system. Petitioner's sample tested at 1,519 ng/mL.

12. There was no flaw in the chain of custody for Petitioner's urine sample. Petitioner was offered a reanalysis of his urine sample, and was advised that he had until July 28, 2011 to make such a request. The Petitioner declined to have the urine sample retested, as the Petitioner

voluntarily and immediately admitted to taking his daughter's Adderall without a valid prescription.

13. Subsequent to Petitioner testing positive for amphetamine on his drug screen, Petitioner was interviewed by Captain J.L. Bruce of the Guilford County Sheriff's Office Professional Standards Office regarding Petitioner's positive urinalysis test result for amphetamine. After acknowledging his Employee Advice of Rights, Petitioner admitted to the use of the prescription drug Adderall, which contains amphetamine, in the form of pills. Petitioner admitted to having obtained this prescription medication from his daughter who was prescribed the medication. At the time of his use, Petitioner did not have a physician prescription for the substance. Petitioner advised in his September 25, 2011 Request for Administrative Hearing that he was suffering from extreme stress related to his mother's diagnosis of Stage 3 lung cancer, and separation, divorce and custody matters with his ex-wife. Petitioner attempted to resolve his attention deficit disorder and memory lapses/loss by use of this medication.

14. Regarding the investigation conducted by the Guilford County Sheriff's Office, Petitioner was forthright in admitting his conduct, that it was wrong, and that he used poor judgment in taking medication that had been prescribed for his daughter. At no time during the investigation did the Petitioner attempt to conceal his use of this prescription drug that was prescribed to his daughter. Petitioner was forthright in admitting to the amount of Adderall he took without a valid prescription. Petitioner estimated that between January 2011 and July 12, 2011, he took approximately 30 of his daughter's prescription Adderall. However, Petitioner could not state the amount definitively, as he did not keep track of the exact amount he was taking. Petitioner's stated amount is a good faith estimate of the amount of Adderall he consumed without a prescription.

15. The investigation by the Guilford County Sheriff's Office regarding Petitioner's unlawful use of Adderall concluded that the Petitioner violated the Sheriff's drug testing policy, Rule 6.2, which provides that no employee will ingest any controlled substance unless prescribed by a licensed physician for the employee's use. Further, it was determined that the Petitioner violated Rule 10.2.2, which states that all Guilford County Sheriff's Office employees shall obey the laws of the United States and of the State of North Carolina. Petitioner violated this policy when he took a prescription medication without first obtaining a prescription from a licensed physician, in violation of this State's laws.

16. Following the internal investigation, the Guilford County Sheriff's Office convened disciplinary proceedings at which it was determined by the Sheriff that Petitioner would receive the following disciplinary action:

- i. Reduction in rank from Lieutenant to Detention Services Officer;
- ii. Suspension without pay for 14 working days;
- iii. Departmental Reprimand; and

- iv. One (1) year of disciplinary probation with a signed agreement that the employee submits to unannounced drug tests during the probationary period.

17. Following the positive drug screen, Petitioner promptly went to his personal physician who examined Petitioner and gave him a prescription for Amphetamine-Dextroamphetamine (Adderall). The significance of this is that Petitioner, by and through his personal physicians, demonstrated a medical necessity for the prescription drug Adderall.

18. Petitioner has had several follow up appointments with his physicians, who have since diagnosed Petitioner with depression and anxiety. Petitioner is now taking the prescription medication Cymbalta with positive results.

19. Petitioner has had no sustained departmental violations or disciplinary action until this incident. Petitioner previously had passed employment drug screenings. In addition, the evidence is that Petitioner did this job competently and professionally during his many years working with the Guilford County Sheriff's Office.

20. The Guilford County Sheriff's Office could have terminated Petitioner's employment after it learned of his positive drug screen. Instead, it placed him on administrative duty and severely reprimanded and penalized Petitioner as set out above in Paragraph 16. The Guilford County Sheriff's Office desires to retain Petitioner as a sworn officer based upon his work history and service to the agency.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Administrative Law Judge made the following adjudicated findings of fact. In making these adjudicated FINDINGS OF FACT, the Administrative Law Judge weighed all the evidence and assessed the credibility of witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to 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.

Adjudicated Findings of Fact

1. In 2011, Petitioner's mother was diagnosed with cancer. Petitioner was required to care for his mother, in addition to caring for his family and maintaining full time employment with the Guilford County Sheriff's Office. At the same time, Petitioner was also going through a divorce and custody battle. Based on Petitioner's testimony and demeanor at trial, it is clear that Petitioner was under a tremendous amount of stress in 2011. Petitioner was having an especially difficult time coping with his mother's stage 3 lung cancer diagnosis, and with his mother's suffering resulting from cancer treatment.

2. The daily stress Petitioner was experiencing in 2011, as a result of an ongoing custody dispute and caring for a family member stricken with cancer, interfered with Petitioner's work. Petitioner often found it difficult to concentrate at work and Petitioner also experienced a degree of memory loss. As a result, Petitioner made the grave mistake of taking prescription Adderall that had been prescribed to his daughter for attention deficit disorder. Although the Petitioner knew this was wrong, Petitioner continued to take the Adderall because the medication had a positive impact on Petitioner's symptoms and Petitioner was able to work more effectively while taking the Adderall.

3. To the Petitioner's credit, he does not deny his wrongdoing and acknowledges it was unlawful to take his daughter's prescription medication. It is clear from Petitioner's testimony and demeanor at trial that Petitioner is genuinely remorseful for his actions. The Petitioner continues to suffer embarrassment and humiliation because, as the Petitioner testified, he has been a poor role model and has failed his daughters by placing himself in this situation. It is clear to the Undersigned that Petitioner genuinely feels a great sense of guilt due to his actions. Further, the Undersigned does not believe Petitioner is at risk of engaging in similar behavior in the future, as this event has had a profound impact on Petitioner's personal life and on his career as a detention officer.

4. Major Deborah Montgomery has worked with Petitioner for 18 years. Major Montgomery is a member of the Command Staff at the Guilford County Sheriff's Office and she is responsible for supervising approximately 250 sworn law enforcement officers. This Judge has personal knowledge of Major Montgomery's service to Guilford County and to the State of North Carolina by way of the undersigned's personal interaction with Major Montgomery in a professional capacity over the last 25 years. The undersigned Judge has observed and interacted with Major Montgomery while the undersigned served as an assistant public defender, an assistant district attorney, and subsequently an administrative law judge. The Undersigned gives a tremendous amount of deference to Major Montgomery's testimony and opinions due to her extensive training and experience and her unwavering integrity and credibility.

5. Major Montgomery testified that Petitioner has been honest about his poor judgment since he tested positive for Amphetamine in July of 2011. Petitioner has never tried to conceal his unlawful behavior and has never tried to make excuses for his poor judgment. Major Montgomery testified that Petitioner has been a good detention officer and has been an asset to the Guilford County Sheriff's Office throughout his career. Major Montgomery also stated Petitioner remains motivated and committed to the Guilford County Sheriff's Office, despite Petitioner being stripped of rank and suffering a pay cut as a result of his unlawful behavior. Further, Major Montgomery testified that Petitioner remains committed to his career as a detention officer. Most recently, Petitioner has contributed significantly to the preparation of the new Guilford County Jail.

6. Major Montgomery testified that Petitioner has humbled himself and has learned from this experience. Major Montgomery does not question Petitioner's integrity, and continues to hold Petitioner in high regard not only due to his long standing service with the Guilford County Sheriff's Office, but also due to the manner in which Petitioner has handled this negative event in his career.

7. Major Montgomery testified that Petitioner has been working with the Sheriff's Office in an administrative capacity since his certification was summarily suspended approximately 1 year ago. Major Montgomery would like to see Petitioner continue to work at the Guilford County Sheriff's Office and believes Petitioner will continue to be an asset to the Sheriff's Office once Petitioner's certification is restored.

8. Captain Chuck Williamson and Captain Kenny Watkins also testified on behalf of the Petitioner. Both deputies corroborate the testimony of Major Montgomery, in that Petitioner is considered to be a good detention officer. According to the testimony of Captains Williamson and Watkins, Petitioner is honest, hardworking, reliable, and is well respected among his peers. Further, both Williamson and Watkins consider Petitioner to be an asset to the Guilford County Sheriff's Office. Like Major Montgomery, Williamson and Watkins would like to see Petitioner continue to work at the Guilford County Sheriff's Office and believe Petitioner will continue to be an asset to the Sheriff's Office.

9. It is acknowledged that whenever, in this document, reference is made to the Undersigned, the undersigned Judge or the Court reference is being made to the undersigned administrative law judge with the Office of Administrative hearings.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings.
2. 12 N.C.A.C. 10B.0301(6)(c) requires every justice officer employed in North Carolina to produce negative drug screen results. Drugs whose use shall be tested for include Opiates and Amphetamines or their metabolites.
3. 12 N.C.A.C. 10B.0204(b)(5) provides that the Sheriffs' Education and Training Standards Commission may revoke or suspend certification when the Commission finds that the certified officer has produced a positive drug screen.
4. Under 12 N.C.A.C. 10B.0205(2)(g), when Respondent revokes the certification of a justice officer for a positive drug screen result, the period of sanction shall be not less than five years; however, Respondent may either reduce or suspend the period of sanction under this Rule or substitute a period of probation in lieu of revocation of certification following an administrative hearing, where extenuating circumstances brought out at the administrative hearing warrant such a reduction.
5. Petitioner did test positive for Amphetamine as a result of his taking Adderall without a valid prescription. Petitioner's certification is therefore subject to suspension or revocation based on a positive drug screen for a prohibited substance. However, based on the extenuating circumstances brought out at the administrative hearing, in addition to Petitioner's demonstrating the medical necessity for Amphetamine-Dextroamphetamine (Adderall) and Cymbalta, this Court finds that Petitioner's certification should be suspended for 1 year and that this suspension itself should be suspended for 1 year on the condition that Petitioner not violate any of the Commission's Rules.

DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned recommends Respondent suspend Petitioner's justice officer's certification for a period of one year, and that this suspension be suspended for one year provided Petitioner remains in compliance with all Rules of the Commission.

NOTICE AND ORDER

The North Carolina Sheriffs' Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, 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 pursuant to N.C. Gen. Stat. § 150B-40(e).

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b).

SO ORDERED this 27th day of August, 2012.

J. Randall May
Administrative Law Judge