

STATE OF NORTH CAROLINA

COUNTY OF BURKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DOJ 13153

KO YANG,

Petitioner,

v.

N.C. SHERIFF'S EDUCATION
TRAINING STANDARDS COMMISSION,
Respondent.

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PROPOSAL FOR DECISION

This contested case came on for hearing before the Honorable Joe L. Webster, Administrative Law Judge, on March 28, 2012, at the Haywood County Courthouse in Waynesville, North Carolina.

APPEARANCES

Petitioner: Wes W. Barkley
Attorney at Law
Post Office Box 88
Newton, North Carolina 28658

Respondent: Matthew Boyette
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

WITNESSES

Petitioner: See Vue Yang
Gene Yang
Erica Yang

Respondent: Diane Konopka
Caleb Mace
Mike McLaughlin
Ko Yang

ISSUES

Whether Commission's Findings that Petitioner assaulted his wife in violation of NCGS 14-33©(2), which is defined in N.C.A.C. 12 NCAC 10B .0103 (10B) as a Class B, misdemeanor offense is supported by a preponderance of the evidence?

EXHIBITS ADMITTED INTO EVIDENCE

Respondents Exhibits 1-16

BASED UPON 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 Court makes the following **Findings of Fact**. In making these Findings of Fact, the Court has weighed all evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, 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.

FINDINGS OF FACT

1. On or about February 8, 2008, Petitioner and his wife, See Vue Yang, engaged in a heated argument in their home. The argument was observed, at least in part by their son, Gene Yang, and their daughter heard her parents arguing.
2. Petitioner testified at the hearing that as the argument got louder his wife grabbed a small container from the counter which contained stored medicine. Petitioner testified that he also grabbed the container and he and his wife both were pushing and pulling it when a vapor rub bottle jumped out of the container and hit his wife on the forehead.
3. See Vue Yang testified that she and her husband had a disagreement. She grabbed a medication container and each tugged the container and the pills were thrown out of the container. Ms. Yang testified she did not fully understand what the officer was asking her. Ms. Yang testified that her husband did not throw the container at her and it was just an accident and she didn't think her husband tried to assault her.
4. Petitioner's daughter, Erica Yang called the Sheriff's Department and Deputy Sheriff Caleb Smith arrived at the Petitioner's home. On February 8, 2008 Deputy Mace filed a Domestic Violence Incident/Incident Report in which he recorded that upon his arrival at the scene of the alleged assault, Petitioner's wife spontaneously told Deputy Mace that "we were arguing and he threw a bowl and hit me. He said he would kill me." The Report records Ms. Yang's condition as follows: "was crying, fearful, afraid and nervous and had bruises." In the same report, Deputy Mace recorded that Petitioner spontaneously stated "we just had an argument, nothing else. I did say I would kill her." Petitioner's condition upon the Deputy Sheriff Mace's arrival was as

follows: “angry, crying, and irrational.” (Resp. Ex. 4). After being arrested and placed in the police car, Petitioner admitted to threatening to kill his wife and throwing the bowl at her. He also said to the officers, “see what you did and stated wasn’t coming home.”

5. Petitioner had been drinking when officers arrived at the scene of the alleged assault. He vomited on himself after being placed in the car.

6. Petitioner was charged with assault on a female, but the charges were later dismissed at the request of Petitioner’s wife.

7. Petitioner’s son, Gene Young, age 15 at the time of the alleged assault, took the side of his father when the Deputies arrived to investigate the call. His testimony at the hearing was consistent with his father’s testimony regarding Petitioner and his mother tugging at the container containing medicines. Gene Young testified that his mother and father were arguing; that his mother pushed his father. He further testified both parents had their hands on the container and his father did not throw the container at his mother. He could not remember how they got hold of the container.

8. Erica Yang, the Petitioner’s daughter, had been on the telephone with a friend when she called law enforcement after hearing her parents arguing which did not stop. She heard yelling and got into the shower. She admits that she agreed with her mother’s statement to the Deputy Sheriff about what happened, but isn’t aware of there being previous fights between her father and mother. Erica Yang doesn’t agree that her father committed a crime.

9. The case file contains Letters of recommendations were submitted to the Commission by Petitioner, including one by the Sheriff of Catawba County, Coy Reid, which states in pertinent part, “Deputy Ko Yang has been employed with our agency for almost a year and he is doing a great job. He goes that extra step when dealing with the public and I have received numerous calls; from victims; on how considerate he is. He is very considerate and an asset to our office... I find him to be an honest man and I do not believe he would lie about the incident.”

10. Petitioner and his family are long time members of Catawba County and in particular, the Hmong community. Petitioner is considered to be a leader and expert in the Hmong culture relating to weddings, funeral ceremonies and meditation. (Letter by Khue Khang submitted to Commission on Petitioner’s behalf.)

11. Respondent Probable Cause Committee found that probable cause existed to deny Petitioner’s certification as a justice officer pursuant to Rule .0204(d)(2), Chapter 10B of Title 12 of the North Carolina Administrative Code. which provides that the Commission may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of a crime or unlawful act defined in 12 N.C.A.C. 10B .0103(10(b) as a Class B misdemeanor within the five-years prior to the date of appointment.

12. The denial period applicable to Petitioner expires February 2013 as the alleged assault took place February 8, 2008.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter.
2. The undersigned finds by a preponderance of the evidence that Petitioner's conduct on February 8, 2008 arising out of the argument with his wife constituted an "assault on a female" within the meaning of NCGS 14-33©(2). The undersigned also finds by a preponderance of the evidence that the Commission's finding of Probable Cause to deny Petitioner's certification was not erroneous and its decision to deny Petitioner's certification as a justice officer pursuant to Rule .0204(d)(2), Chapter 10B of Title 12 of the North Carolina Administrative Code was not erroneous or otherwise violative of NCGS 150B-23(a).
3. The Commission may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of a crime or unlawful act defined in 12 N.C.A.C. 10B .0103(10)(b) as a Class B misdemeanor within the five-years prior to the date of appointment.
4. Respondent's proposed denial of the Petitioner's certification as a justice officer detention is supported by substantial evidence.

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.

- 5.. The evidence at the administrative hearing and evidence of record proved extenuating circumstances exist to warrant Respondent imposing a lesser sanction, such as a suspended suspension, instead of active revocation or suspension of Petitioner's justice officer certification. 12 NCAC 10B .0205 (2)

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that Respondent suspend Petitioner's certification as a justice officer for a period of six (6) months for engaging in a misdemeanor, i.e. assault on a female. However, the undersigned further proposes that Respondent **suspend that suspension, and place Petitioner on probation** of six (6) months, in lieu of an active suspension, provided Petitioner not further violate Respondent's statutes and rules during that six (6) month period.

ORDER

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 North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and proposed findings of fact and to present oral and written arguments to the agency. G.S. 150B-40(e).

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 his attorney of record. G.S. 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the The North Carolina Sheriffs' Education and Training Standards Commission.

This the _____ day of June 2012.

Joe L. Webster
Administrative Law Judge