

STATE OF NORTH CAROLINA

COUNTY OF CRAVEN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DOJ 13158

John Jay O'Neal
Petitioner

vs.

North Carolina Criminal Justice Education and
Training Standards Commission
Respondent

PROPOSAL FOR DECISION

This case came on for hearing on May 21, 2012, before Administrative Law Judge Donald W. Overby in New Bern, North Carolina. This case was heard 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

Petitioner: John Jay O'Neal, Pro Se
105 Nunn Street
Havelock, North Carolina 28532

Respondent: Catherine F. Jordan
Assistant Attorney General
Law Enforcement Liaison Section
North Carolina Department of Justice
P.O. Box 629
Raleigh, N.C. 27602-0629

ISSUE

Did Respondent properly suspend Petitioner's law enforcement officer certification based upon Petitioner's criminal conviction of the Class B misdemeanor of Failure to Stop at the Scene of an Accident?

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 undersigned Administrative Law Judge makes the following

FINDINGS OF FACT.

In making the FINDINGS OF FACT, the undersigned Administrative Law Judge has weighed all the 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 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.

RULES

12 NCAC 09G .0504(b)(3)
12 NCAC 09G .0102(9)(vvv)
12 NCAC 09G .0102(2)
12 NCAC 09G .0505(b)(1)
N.C.G.S. § 20-166(c)

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 Petitioner received the notification of Proposed Suspension of Correctional Officer Certification through a letter mailed by Respondent on September 13, 2011. (Respondent's Exhibit 9)

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 9G, to certify correctional officers and to revoke, suspend, or deny such certification.

3. On December 7, 2001, Petitioner received his probationary certification as a correctional officer through Respondent. (Respondent's exhibit 1)

4. On October 29, 2002, Petitioner received his general certification as a correctional officer through Respondent. (Respondent's exhibit 2)

5. At 13:46 on January 6, 2009, Petitioner was cited with Armed Forces Traffic Tickets for failure to reduce speed causing a traffic accident, DWI, eluding military police, and careless and reckless driving. (Respondent's exhibit 3) Officer B. J. Brandehoff issued the tickets to Petitioner on the Cherry Point Military Base.

6. On January 14, 2009, Petitioner was issued a Traffic Hearing Notification stating that he was cited on January 6, 2009 for DWI, eluding military police, careless driving, and failure to reduce speed causing an accident. (Respondent's exhibit 4) Petitioner selected to attend a full hearing before the Traffic Court Hearing Officer on January 14, 2009.

7. On January 26, 2009, Petitioner's toxicology report was generated by the Department of Defense, Armed Forces Institute of Pathology, which stated that on January 6, 2009, "[z]olpidem was detected in the urine by gas chromatography and confirmed by gas chromatography/mass spectrometry. The blood contained 0.04mg/L of zolpidem as quantitated by gas chromatography/mass spectrometry." (Respondent's exhibit 5)

8. Petitioner had a prescription for Zolpidem (Ambien) which he had received approximately two weeks prior to this incident. There is no indication that he was not taking the prescribed medication in other than the proper prescribed amount. Petitioner testified that he had taken the medication and gone to sleep. He was aroused from sleep and needed to take something to his wife who worked on the post.

9. On January 28, 2009, Respondent received notice of Petitioner's pending criminal charges of failure to reduce speed causing a traffic accident, DWI, eluding military police, and careless driving. (Respondent's exhibit 3)

10. On August 20, 2009, Special Assistant U.S. Attorney Eric A. Catto submitted an offer of a plea agreement to Petitioner. (Respondent's exhibit 6) The offer stated that Petitioner will agree to plead guilty to impaired driving and failure to stop at the scene of an accident, and that, in exchange, the Government agrees to dismiss the charges of speeding to elude arrest and reckless driving. The Government further agreed to recommend the sentence of \$350.00 fine, 1 year probation, 24 hours of community service, completion of a substance abuse assessment and completion of all recommended education or treatment, and a special assessment fee of \$10.00.

11. On September 2, 2009, Petitioner accepted the plea agreement and signed the plea agreement. (Respondent's exhibit 6)

12. On September 3, 2009, Petitioner's formal charge of plea was entered in the United States District Court, Eastern District of North Carolina. (Respondent's exhibit 7) The document stated that Petitioner agreed to accept the plea offer from the United States to the effect that in exchange for his plea of guilty as to impaired driving and failure to stop at the scene of an accident, the Government agreed to dismiss speeding to elude arrest and reckless driving. The Government further agreed to recommend the sentence of a \$350.00 fine, 1 year probation, 24 hours of community service, completion of a substance abuse assessment and completion of all recommended education or treatment, and a special assessment fee of \$10.00.

13. On October 21, 2009, Petitioner pled guilty to DWI Level 5 and failure to stop at the scene of an accident in the United States District Court, Eastern District of North Carolina, the Honorable Louise W. Flanagan, Chief U.S. District Court Judge, presiding. (Respondent's exhibit 8) The trial court ordered that Petitioner perform 24 hours of community service, surrender his North Carolina driver's license, obtain a substance abuse assessment, pay a fine of \$350.00 and a special assessment fee of \$20.00.

14. On November 13, 2009, Respondent received notice of Petitioner's toxicology report, his guilty plea, and his conviction for DWI Level 5 and failure to stop at the scene of an accident. (Respondent's exhibit 8)

15. On September 13, 2011, Respondent's Director Wayne Woodard suspended Petitioner's correctional officer certification because of Petitioner's criminal conviction of the Class B misdemeanor of failure to stop at the scene of an accident. (Respondents Exhibit 9)

16. It is noted that Petitioner's certification is being subjected to suspension only for the Class B misdemeanor and not the generally more serious offense of driving while impaired. It is further noted that Petitioner was not originally charged with failure to stop at the scene of an accident, the Class B misdemeanor. Instead, he was charged with failing to reduce speed causing an accident, an infraction. He plead guilty as result of a plea bargain wherein two Class B charges were dismissed.

17. Petitioner requested an administrative hearing.

18. Respondent's investigator Edward Zapolsky testified at the hearing that he investigates administrative rules violations for Department of Correction officers. Zapolsky testified that he collected the documents from Petitioner's criminal charges and convictions, and drafted a memorandum to be submitted to Respondent's probable cause committee. Zapolsky testified that Petitioner possessed a general certification as a correctional officer, and as a correctional officer, he was required not to commit or be convicted of Department of Corrections misdemeanors as set forth in the administrative code.

19. Gerald Pennington testified that he was employed by the United States Marine Corps, Provost Marshall's Office at Cherry Point, North Carolina. Pennington has been a police officer since 1975, he was a Connecticut State Trooper for 24 years, and he has investigated thousands of traffic accidents. Pennington testified that he had been employed in that position with the Provost Marshall's Office for four years. He had been employed as a civilian employee with the Department of Defense and is a certified officer with North Carolina. He attended the academy for the Marine Corp and completed BLET in 2003.

20. Pennington testified that on January 6, 2009, he had just been released from the Marine Corp Police Academy, and that he was working alone at the time. He was driving an unmarked white Chevrolet Impala with code lights in the visor on the front and back. A motorist flagged down Pennington and said that Petitioner's vehicle had just struck his vehicle on Roosevelt Boulevard, near the intersection of Roosevelt and C-Street. The motorist stated that he had been hit from behind and pointed to Petitioner's vehicle as the vehicle that hit his vehicle. Pennington turned on his emergency lights and sounded his siren on his vehicle to drive through the intersection in front of Petitioner's vehicle. Pennington drove his vehicle "in a 360 in the intersection" to try to get behind Petitioner's vehicle. As Pennington's vehicle came behind Petitioner's vehicle, the light at the intersection turned green and Petitioner began moving his vehicle forward. Petitioner's vehicle approached the Beaufort Road intersection, and Pennington's vehicle followed Petitioner's vehicle with its emergency lights flashing and its siren sounded. Petitioner stopped his vehicle, and Pennington stopped his vehicle behind Petitioner's vehicle. Pennington thought that Petitioner stopped his vehicle because of Pennington's flashing lights and siren, so Pennington exited his vehicle to approach Petitioner's vehicle. When Pennington walked up to his vehicle's front bumper, Petitioner began to drive

forward. Pennington returned inside his vehicle and drove his vehicle through the intersection, and followed Petitioner traveling 25 to 30 miles per hour on Beaufort Road. Petitioner made a left hand turn to approach the US Naval Clinic, and pulled into the second driveway. When he drove into the second driveway, his vehicle hit the curb, and he bounced off the curb, hit the sign behind the curb, and bounced off the sign. There was another vehicle driving out of the driveway, and the left of Petitioner's vehicle struck the left driver's side of the outbound vehicle. Petitioner's vehicle stopped, and Pennington stopped his vehicle behind Petitioner's vehicle. Petitioner was still trying to operate his vehicle when Pennington approached him. Petitioner stated that he did not need medical attention, and Pennington notified the accident investigation unit. Pennington testified that he was unsure whether any damage existed after the first accident, and any damage that existed on Petitioner's vehicle after the second accident was very minor. (Respondent's Exhibit 11)

21. Officer Pearson, formerly Officer Rosenthal, testified that she was employed with the Provost Marshall's Office, and had been employed in that position for four years. She had previously been employed at the Provost Marshalls Office for five years with the Marine Corp and two years as a civilian. She testified that on January 6, 2009, she was employed as an accident reconstructionist at Cherry Point, and she responded to the scene of Petitioner's accident. At that time, Petitioner was standing by the curb and Pennington explained the initial contact with Petitioner. Officer Pearson looked at Petitioner's vehicle for damage. Most of the damage occurred at the front portion of vehicle, after the first crash. Officer Pearson cited Petitioner for DWI, reckless driving, eluding a police officer, and failure to reduce speed to avoid a crash. Officer Pearson did not administer a field sobriety test on Petitioner because he could barely stand, he tripped over the curb, and she did not think that administering the test was safe. (Respondent's exhibit 10)

22. Petitioner testified that a prescription for Ambien (Zolpidem) was issued to him on December 23, 2008, and he did not know the effects of Ambien on January 6, 2009. He took Ambien and tried to go to sleep, and then he received a call from his wife to bring money to the Naval Clinic where she worked. He got up and felt like he could proceed. Petitioner left his residence and proceeded to drive to the military base. He approached the first stoplight and was unaware that he had bumped the individual. Petitioner testified that if had known he had struck the first vehicle, he would have exited his vehicle and assessed the vehicles for damage. He testified that he did not see Pennington, or Pennington's vehicles lights or siren. He testified that he remembered a man exiting his vehicle at the first intersection, and approaching his vehicle and that he said something to Petitioner. Petitioner testified that he did not realize the first accident happened. He testified that he was 55 years old, that he had been in the Marine Corp for 22 years, and have resided in Havelock since 1994. He testified that he had never been charged with a crime, and that the only blemish on his record with the Marine Corp was that he was a recruiter and he failed to make mission, so he had to be removed from recruiter duties.

23. There is no evidence that Petitioner has ever been charged with or convicted of any crime. There is no evidence that he has had any infractions of any sort with his employment with Department of Corrections.

24. From the testimony and evidence in this contested case, the Petitioner completed all punishment administered as a result of his pleas of guilty to the two charges, including obtaining substance abuse assessment and completing any recommended treatment.

25. Based upon the facts and circumstances of this contested case, there are sufficient mitigating factors that justify not suspending Petitioner's certification.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

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 9G, to certify correctional officers and to revoke, suspend, or deny such certification.

3. 12 NCAC 09G .0504(b)(3) states:

(b) The Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer:

(3) has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification[.]

4. 12 NCAC 09G .0102(2) states:

The following definitions apply throughout this Subchapter only:

(2) "Convicted" or "Conviction" means and includes, for purposes of this Subchapter, the entry of:

(a) a plea of guilty;

(b) a verdict or finding of guilt by a jury, judge, magistrate, or other duly constituted, established adjudicating body, tribunal, or official, either civilian or military; or

(c) a plea of no contest, nolo contendere, or the equivalent.

5. 12 NCAC 09G .0102(9)(vvv) states:

The following definitions apply throughout this Subchapter only:

(9) “Misdemeanor” for corrections officers means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses for corrections officers are classified by the Commission as follows:

(vvv) 20-166(c) Duty to stop in event of accident or collision

6. N.C.G.S. § 20-166(c) states:

Duty to stop in event of a crash; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

(c) The driver of any vehicle, when the driver knows or reasonably should know that the vehicle which the driver is operating is involved in a crash which results:

(1) Only in damage to property; or

(2) In injury or death to any person, but only if the operator of the vehicle did not know and did not have reason to know of the death or injury;

shall immediately stop the vehicle at the scene of the crash. If the crash is a reportable crash, the driver shall remain with the vehicle at the scene of the crash until a law enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury.

Prior to the completion of the investigation of the crash by a law enforcement officer, or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene, for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment, or to remove oneself or others from significant risk of injury. If the driver does leave for a reason permitted by this subsection, then the driver must return with the vehicle to the accident scene within a reasonable period of time, unless otherwise instructed by a law enforcement officer. A willful violation of this subsection is a Class 1 misdemeanor.

7. 12 NCAC 09G .0505(b)(1) states:

(b) When the Commission suspends or denies the certification of a corrections officer pursuant to 12 NCAC 09G .0504 of this Section, the period of sanction shall be not less than three years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (c) of this Rule or substitute a period of probation in lieu of

suspension of certification following an administrative hearing, where the cause of sanction is:

(1) commission or conviction of a misdemeanor as defined in 12 NCAC 09G .0102[.]

8. The administrative law judge concludes that a preponderance of the evidence supports the conclusion that Petitioner was convicted of the criminal offense of failure to stop at the scene of an accident, a Class B misdemeanor.

9. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).

10. Respondent has the burden of proof in the case at bar.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge recommends that Respondent find that Petitioner committed and pled guilty to an offense for which his certification could be revoked, but that his certification should not be revoked, and that he should be given a probationary status for a period of two years.

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 6th day of July, 2012.

Donald W. Overby
Administrative Law Judge