

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DOJ 13160**

PROPOSAL FOR DECISION

APPEARANCES

ISSUE

Does substantial evidence exist to suspend Petitioner's correctional officer certification for two commissions of the Class B Misdemeanor of assault on a female?

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1, 2

For Respondent: 1 - 11

RULES AT ISSUE

12 NCAC 09G .0102(9)
12 NCAC 09G. 0504(a) & (b)(3)
12 NCAC 09G. 0505(b)(1)

FINDINGS OF FACT

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.

Procedural Background

1. On September 12, 2011, Respondent notified Petitioner that Respondent's Probable Cause Committee had found probable cause to believe that his correctional officer certification must be suspended based on Petitioner's 2001 and 2009 commissions of the Class B Misdemeanor of assault on a female. (Respondent's Exhibit 6)

2. By letter dated November 3, 2011, Respondent requested the designation of an Administrative Law Judge to preside at a contested case hearing under Article 3A, Chapter 150B of the NC General Statutes.

3. In pretrial motions to dismiss, Petitioner argued that Respondent violated Petitioner's constitutional rights by violating Petitioner's due process rights in taking Petitioner's certification based on an incident from over 10 years ago. Petitioner also argued that 12 N.C.A.C. 09G.0504 is constitutionally infirm, because 12 N.C.A.C. 09G.0504 requires his client be found guilty of committing a crime, when Petitioner has neither pled guilty nor been found guilty of such offense in a criminal court. At the contested case hearing, the undersigned denied Petitioner's Motion to Dismiss. The Office of Administrative Hearings lacks subject matter jurisdiction to address Petitioner's constitutional arguments in a contested case hearing.

Adjudicated Facts

4. Respondent 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.

5. On December 8, 1993, Respondent awarded a probationary correctional officer certification to Petitioner. On December 8, 1994, Respondent awarded a general correctional officer certification to Petitioner. (Respondent's Exhibit 2)

6. By letter dated September 1, 2009, Respondent's investigator, Edward Zapolsky (hereinafter "Zapolsky"), received notification from the North Carolina Department of Corrections that Petitioner had recently been charged with the misdemeanor offense of assault on a female. After further investigation, Zapolsky learned that Petitioner was previously charged with assault on a female in April of 2001. Respondent did not receive notification of the 2001 charge, so Zapolsky requested additional information surrounding the charge. Zapolsky compiled the results of his investigation in a memorandum, and presented it to Respondent's Probable Cause Committee. (Respondent's Exhibit 1)

2001 ASSAULT ON A FEMALE

7. Zapolsky obtained a copy of an arrest warrant for Petitioner where Petitioner was charged with assault on a female in 2001 for allegedly assaulting and striking Tammy Becker, a female person, by grabbing her around the arms and causing marks. Along with the arrest warrant, Zapolsky obtained the incident report and statements from both Petitioner and Tammy Becker regarding the 2001 incident. (Respondent's Exhibit 4)

8. James Daniel Hinton (hereinafter "Hinton") was a patrol deputy with the Edgecombe County Sheriff's office in 2001. At the contested case hearing, Hinton explained that he was working patrol on April 30, 2001 when he received a call about a domestic dispute in progress at 2473 Sharppoint Road in Fountain, NC. He arrived at the residence and spoke with Tammy Becker. Ms. Becker stated that she and her husband, Petitioner, got into an argument, and she tried to leave with their children. As she tried to leave, Petitioner grabbed her arm, and pushed her against the back door of their home. She tried to use the phone, but Petitioner snatched it out of her hand, not allowing her to call for help. Petitioner grabbed her arm for a second time, and she stuck him in the forehead with the keys in her hand, cutting Petitioner above his left eye. Hinton took both Tammy Becker and Petitioner to the magistrate's office. (Respondent's Exhibit 4)

9. Petitioner gave a statement to Hinton, and admitted to touching Tammy Becker on the arm twice to prevent her from leaving during their argument. Hinton observed that Petitioner was cut above his left eye, and that Tammy Becker had bruising on her left arm from someone grabbing her forcefully. Hinton made sure to place Petitioner and Tammy Becker in separate rooms when getting their statements. In their statements to Hinton, both Petitioner and Tammy Becker gave consistent accounts of what happened on April 30, 2001. Petitioner was charged with assault on a female, while Tammy Becker was charged with simple assault. On October 22, 2001, Petitioner's charge was dismissed after he paid court costs. (Respondent's

Exhibit 4)

2009 ASSAULT ON A FEMALE

10. Zapolsky received a copy of the 2009 warrant for Petitioner's arrest, which alleged Petitioner assaulted Tammy Becker, a female person, by hitting her about the head with his elbows, head butting her several times, ripping her clothes, and kneeling her in the chest. In addition, Respondent received a written statement from Petitioner, whereby Petitioner admitted to grabbing his wife by the shoulders, and subsequently ripping her shirt after she confronted him about his seeing another woman. (Respondent's Exhibit 3)

11. Zapolsky obtained copies of the incident report from the Tarboro Police Department that were written by Sergeant LaNorris Archer. He also obtained copies of court paperwork related to Petitioner's criminal charges from the Edgecombe County Clerk of Court in Edgecombe County file number 09 CR 52814. The Court paperwork included a copy of the District Attorney's dismissal of the assault on a female charge based on Tammy Becker's refusal to testify. Attached to the dismissal is Tammy Becker's statement claiming that she and Petitioner "are in counseling trying to work out some issues in our marriage." Tammy Becker also wrote that if the "charges were not dismissed. Petitioner would lose his job which is the only income they have." (Respondent's Exhibit 3)

12. Sergeant LaNorris Archer (hereinafter "Archer"), an officer with the Tarboro Police Department, has been in law enforcement for 25 years. On August 15, 2009, Archer was driving on Granville Street, and working patrol as the shift supervisor. While on patrol, he noticed a vehicle sitting in the roadway with traffic going around it. Archer pulled up to the driver's side door, and observed Tammy Becker walking around the stopped vehicle. Tammy Becker told Archer she had been assaulted by her husband, Petitioner. She was holding her shirt together, because it was torn. She appeared to be visibly shaken and frantic. Tammy Becker got into Archer's patrol vehicle, and Archer drove to the Becker residence. Once there, Tammy Becker stayed in the car while Archer walked to the front door. (Respondent's Exhibit 3)

13. Archer knocked on the front door, and observed two children ages 8 and 5 alone, crying at the front door. A few minutes later Petitioner dove up, got out of his car and yelled to Archer, "I didn't do anything. "(Respondent's Exhibit 3) Archer requested that Petitioner sit in his patrol car, because Tammy Becker was walking towards the house to console the children. Archer spoke with the eight year old daughter of Tammy and Petitioner, who stated that she overheard Petitioner on the phone saying "I love you" to someone. The young girl told her mother, who confronted Petitioner about the conversation. (Respondent's Exhibit 3)

14. At the scene, Tammy Becker told Archer that when she confronted Petitioner about his possible relationship with another woman, Petitioner pushed her into the unlit living room and onto the couch. Petitioner was on top of her with his knee on her chest, and began hitting her with his elbows and head butting her with his head. Tammy Becker stated that Petitioner was choking her. She was having a hard time breathing, but got enough air in to tell

Petitioner he was choking her. She managed to get away from Petitioner, and pushed her way out of the house to get help. She stated she was completely defenseless, and never tried to fight Petitioner back. (Respondent's Exhibit 3)

15. Tarboro Police Department's communications received three 911 calls regarding the assault. The first was from Tammy Becker, saying her husband was attacking her. The second was from her 8-year-old daughter, frantically asking for help. The third was from a neighbor reporting a domestic dispute. After getting Tammy Becker's statement, Archer investigated further, and noticed bruising appearing around Tammy's neck, throat, face, and arms.

16. About 30 minutes after arriving on the scene, Sgt. Archer took pictures of the marks on Tammy Becker's body. (Respondent's Exhibits 7-11) Archer opined that the marks on Tammy Becker's neck were consistent with strangulation. Sgt. Archer observed no marks on Petitioner.

17. On July 20, 2011, Respondent notified Petitioner that a probable cause hearing was scheduled for August 25, 2011 based on violations of several provisions of the administrative code that apply to corrections officers. This notice was Petitioner's first notice that he was subject to discipline for offenses that occurred 2 years and 10 years ago.

18. Respondent's July 20, 2011 Notice alleged that Petitioner failed to provide proper notification of the misdemeanor arrest in 2001, and that he committed the (1) felony offense of assault by strangulation from the 2009 arrest, and (2) misdemeanor offenses from each incident.

19. On August 25, 2011, Respondent's Probable Cause Committee determined that no probable cause existed for the strangulation offense, and that matter could not be considered at this hearing. Tammy Becker did not testify or participate in any way at the probable cause hearing. Likewise, the Committee found no probable cause that Petitioner failed to provide notification for the initial arrest, because Petitioner provided notice to his employer in each instance. Plaintiff appeared at the probable cause hearing pro se.

20. Petitioner has been continuously employed with the NC Department of Correction as a certified correctional officer for eighteen (18) years. He is currently employed with the Department of Correction as a Unit Manager in the Bertie Correctional Facility. As Unit Manager, he oversees a large number of felons and supervises numerous DOC personnel. He has received numerous promotions over 18 years, and is a certified Firearms and CRDT Instructor.

21. Petitioner and Tammy Becker have been married since 2000. At the time of the hearing, they remain married, and have four children.

22. At hearing, Petitioner explained that he immediately notified his supervisors of his arrests for assaulting his wife in 2001 and in 2009. Both times, the NC Department of Correction took no disciplinary action after being notified of Petitioner's arrest. Subsequently,

Petitioner received a promotion. The 2001 and 2009 criminal charges were dismissed by the local District Attorney.

23. Petitioner claimed that he was acting in self-defense during both the 2001 and 2009. He claimed that in 2001, his wife struck him on the head with some keys, causing a wound on top of his head. She had injured him on other occasions, but he did not tell anyone about her abuse of him for several reasons, one of which was embarrassment. He also stated that the inter-racial nature of his marriage contributed to his desire to keep these matters private. The fact that his wife was previously employed as a probation officer, and the incidents could have affected her employment was another fact in keeping the incidents private.

24. Petitioner had no explanation for why he never called the police if he was afraid for his safety. Petitioner also claimed that he has never been afraid of Tammy Becker, and would never want to leave her. He had no explanation for why he would not just leave if she had a knife. Petitioner denied ever putting his hands on Tammy Becker's neck and throat, and claimed to have no idea how she received the bruises in 2009. (Resp. Exhs. 7-11)

25. Both Petitioner and Tammy Becker asserted that they had worked through their problems that the incidents were few, and there had been no further encounters since the 2009 incident.

26. At the contested case hearing, Archer opined that the pictures of Tammy Becker from 2009 show such severe bruising around Tammy Becker's neck, that such bruising was caused by two hands.

27. At the contested case hearing, Tammy Becker explained that she and Petitioner are still married, and his income is the only money coming into the family. She admitted she did not want him to lose his job. Her testimony about the assaults differs greatly from both officers. She claimed she was always the aggressor, and that she pulled a knife on Petitioner during the 2009 incident. Tammy Becker claimed that although she had her two hands on her neck, her arms were free to use the knife she allegedly had in her hand to free herself from Petitioner. However, Petitioner had no marks on his body. Tammy Becker's new story is implausible.

28. Tammy Becker admits being worried about what will happen to their family if Petitioner were to lose his job. At the scene in 2009, neither Tammy Becker, nor Petitioner, nor their daughter mentioned anything to Sgt. Archer about a knife being involved.

29. At the contested case hearing, Investigator Zapolsky acknowledged that he learned of the 2009 incident soon after Petitioner's August 15, 2009 arrest. Because of the relative low priority of the case and limited resources, he took no action about the matter until July 20, 2011. Mr. Zapolsky admitted that he did not inform Respondent that the "victim" (Tammy Becker) of the 2001 alleged assault was also arrested for assaulting Petitioner, and that Zapolsky probably should have as that fact was relevant to their determination.

30. The fact that Tammy Becker was also charged with simple assault of Petitioner in 2001 is a very relevant factor in Respondent's determining whether Petitioner committed an assault on a female, and what action, if any, Respondent should take regarding Petitioner's certification for being involved in domestic disputes with his wife.

31. There was no evidence presented at hearing that Petitioner had been involved in, or was disciplined for, engaging in any violent acts during his employment with the NC Department of Correction.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and the preponderance of the evidence, the Undersigned concludes:

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. Respondent 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) provides that the North Carolina Criminal Justice Education and Training Standards 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 .0505(b)(1) provides that when the North Carolina Criminal Justice Education and Training Standards Commission suspends or denies the certification of a correction officer pursuant to 12 NCAC 09G.0504 of this Section, the period of sanction shall be 3 years where the cause of sanction is: (1) the commission or conviction of a misdemeanor as defined in 12 NCAC 9G.0102.

5. 12 NCAC 09G.0102 (9)(g) defines "assault, battery with circumstances" as a Class B Misdemeanor.

6. N.C.G.S. §14-33(c)(1) states that a person who commits any assault, assault and battery or affray is guilty... if, in the course of the assault... he or she: assaults a female, he being a male person at least 18 years of age.

7. 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).

8. In this case, Respondent has the burden of proof. Respondent has shown by a preponderance of the evidence that Respondent's proposed suspension of Petitioner's correctional officer certification is supported by substantial evidence.

9. Respondent may properly suspend Petitioner's certification pursuant to 12 NCAC 09G .0504(b)(3) for the commission of a misdemeanor as defined in 12 NCAC 09G.0102 after certification.

10. "Assault on a Female", in violation of N.C.G.S. § 14-33(c)(2) is a Class A1 misdemeanor. A person is guilty of "Assault on a female" if that person:

- (1) Commits any assault, assault and battery or affray
- (2) Against a female
- (3) With the defendant being a male at least 18 years of age or older.

11. A preponderance of the evidence shows that Petitioner committed the two misdemeanor criminal offenses of assault on a female when he assaulted his wife, Tammy Becker, on two occasions. In 2001, Petitioner assaulted Tammy Becker when Petitioner grabbed Tammy's arm and pushed her against the back door of their home. Tammy Becker was also arrested for simple assault because of this same incident. In 2009, Petitioner assaulted Tammy Becker when Petitioner pushed Tammy into the unlit living room and onto the couch. Petitioner got on top of Ms. Becker with his knee on her chest, and began hitting her with his elbows, and head butting her with his head. During this assault, Petitioner was choking Tammy Becker.

12. The findings of Respondent Probable Cause Committee are supported by substantial evidence, and are not arbitrary and capricious.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends Respondent suspend Petitioner's correctional officer certification for a period of not less than three (3) years based upon Petitioner's commission of two Class B Misdemeanors. The undersigned further recommends that given the circumstances of the subject assaults, and Petitioner's employment history, Respondent suspend that suspension, and place Petitioner on probation for a term certain. As a condition of probation, the undersigned recommends that Respondent require Petitioner to attend anger management counseling.

NOTICE AND ORDER

The North Carolina Criminal Justice Education and Training Standards Commission will make the Final Decision in this case. That agency is required to give each party an opportunity to file Exceptions to the 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).

This the 16th day of August, 2012.

Melissa Owens Lassiter
Administrative Law Judge

