

STATE OF NORTH CAROLINA
COUNTY OF CABARRUS

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DOJ 00649

TIMOTHY TYLER RUSSELL,)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA SHERIFFS')
 EDUCATION AND TRAINING)
 STANDARDS COMMISSION,)
)
 Respondent.)
 _____)

PROPOSAL FOR DECISION

On November 6-7, 2013, Administrative Law Judge Selina M. Brooks heard this case in Charlotte, North Carolina. This case was heard after Respondent requested, pursuant to N.C. Gen. Stat. § 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

For Petitioner:

J. Heydt Philbeck, Esq.
Bailey & Dixon, L.L.P.
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For Respondent:

Matthew L. Boyatt
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ISSUES

1. Is Respondent's proposed denial of Petitioner's justice officer certification based upon Petitioner's commission of the Class B misdemeanor offense of filing a false police report supported by a preponderance of the evidence?

2. Is Respondent's proposed denial of Petitioner's justice officer certification based upon Petitioner's failure to meet or maintain the minimum employment standards that every justice officer shall be of good moral character supported by a preponderance of the evidence?

APPLICABLE LAW

N.C. Gen. Stat. §§ 14-225; 12 NCAC 10B .0103, .0204, .0205, .0300, & .0301

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner's Exhibits ("P. Ex.") 1, 2, and 3

Respondent's Exhibits ("R. Ex.") 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11

WITNESSES

For Respondent:

Jerrold L. Saunders, Officer with Charlotte-Mecklenburg Police Department ("CMPD")

Katie Schwartz, Officer with CMPD

J. O. Holmes, Lieutenant with State Highway Patrol

Diane Konopka, Deputy Director of the Sheriffs' Education and Training Standards Commission

For Petitioner:

Ricky Hedden, friend

J.R. Rowell, former trooper with State Highway Patrol

Mike James, Chief of Police of Spencer

Randy Hagler, former Officer with CMPD and current Deputy Chief of Police of Charlotte-Mecklenburg Schools

Michele Russell, Petitioner's mother

Timothy Tyler Russell, Petitioner's father, former Master Trooper of State Highway Patrol and current Sergeant of Iredell County Sheriff's Office

Timothy Tyler Russell, Petitioner, current employee with Cabarrus County Sheriff's Office

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 makes the following findings of fact. In making the findings of fact, the Undersigned 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 interest, 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.

In the absence of a transcript, the Undersigned has reviewed her notes as well as the documentary evidence to refresh her recollection. All facts are supported by testimony and where additionally supported by documentary evidence it is so noted.

Wherefore, the Undersigned makes the following Findings of Fact, Conclusions of Law and Proposed Decision.

FINDINGS OF FACT

1. Petitioner was a probationary trooper with the North Carolina State Highway Patrol (hereinafter "Highway Patrol") from June 4, 2009 until August 25, 2010, approximately 15 months. He received certification as a sworn law enforcement officer through the North Carolina Criminal Justice Education and Training Standards Commission on June 4, 2009. R. Ex. 4

2. Petitioner's family has a history in law enforcement and it was his lifelong dream to follow in his father's footsteps as a Highway Patrol trooper. Petitioner admires his father and when he became a trooper, other troopers would comment that he "had big shoes to fill."

3. Petitioner met trooper Clay L. Amaral when he was first assigned to Charlotte. They were "good friends" and he "trusted" him. Trooper Amaral was not a family friend, but always appeared professional in his conduct. Upon inquiry, Petitioner's father assured him that Amaral was someone a new trooper could turn to for guidance. R. Ex. 9, p. 4, 22, 45 & 54

4. Petitioner knew that trooper Amaral was having personal difficulties and loaned him approximately \$200 which he never paid back.

5. At some time in 2010, the Highway Patrol received a complaint by Mrs. Amaral regarding her husband. Mrs. Amaral and her husband were separated. Mrs. Amaral had concerns regarding a handgun her husband kept under the mattress in their home. According to Mrs. Amaral, he had told her that he obtained the weapon illegally following a vehicle stop in which he arrested somebody, but later he recanted this statement and told her that he really got the weapon from Petitioner and that he was considering purchasing the handgun from Petitioner.

6. Lieutenant Holmes and First Sergeant Dancy conducted the Highway Patrol's internal affairs investigation into Mrs. Amaral's allegations. Petitioner was interviewed three times, and the interviews were recorded and transcribed. R. Ex. 9

7. On July 21, 2010, the Petitioner was interviewed two times concerning the complaint against trooper Amaral and whether Petitioner possessed a Ruger handgun (hereinafter "Ruger") that he was considering selling to trooper Amaral. R. Ex. 9, p. 3 & 21

8. Petitioner denied ever loaning a Ruger to trooper Amaral with the intention of selling it. R. Ex. 9 p. 20-21

9. Petitioner explained how he received the Ruger from trooper Amaral. Petitioner was on-duty when his Sergeant gave approval for Petitioner to give Amaral a ride to his house in Monroe to pick up his motorcycle. Trooper Amaral gave Petitioner the Ruger and said that he had found it. P. Ex. 9 p. 12-14, 26-32

10. Petitioner stated that he had turned the Ruger over to the Charlotte-Mecklenburg Police Department (hereinafter "CMPD") because the weapon was not his. R. Ex. 9, p. 21

11. Based on this statement, Lieutenant Holmes contacted the CMPD in order to gather additional information regarding the Ruger and, on July 23, 2010, he interviewed CMPD Officers Katie Schwartz and Jarred L. Saunders who had knowledge regarding the manner in which Petitioner surrendered the Ruger. R. Ex. 9, p. 2

12. Officer Schwartz is a sworn law enforcement officer who received her justice officer certification in March 2007 and has served as a CMPD officer since July 2006. She began a casual dating relationship with Petitioner in early 2010.

13. On February 14, 2010, Petitioner removed the Ruger from his residence in Concord, placed it in his motor vehicle, and drove to the residence of Officer Schwartz in Charlotte, North Carolina. Petitioner told Officer Schwartz that he found the Ruger on the side of the road while on his way to her home and asked her what he should do with it. Petitioner did not disclose to Officer Schwartz that he obtained the Ruger approximately two (2) days earlier.

14. Officer Schwartz advised Petitioner that the Ruger should be turned over to the police immediately since Petitioner found the Ruger abandoned in public. She immediately contacted CMPD dispatch to report that a Ruger had been found near her residence and to request that an on-duty officer respond to take possession of it. R. Ex. 9 p. 15-16 & 33

15. Officer Saunders has been employed as a patrol officer with CMPD since 2008. He is a sworn justice officer through the North Carolina Criminal Justice Education and Training Standards Commission, and has held that certification since 2008.

16. Officer Saunders was on routine patrol on February 14, 2010 when he got a call for service in reference to a firearm that had been discovered in the vicinity of Officer Schwartz's residence. Officer Saunders had not met Officer Schwartz or Petitioner prior to February 14, 2010.

17. Officer Saunders was met by Petitioner and Officer Schwartz in the parking lot. Officer Schwartz identified herself to Officer Saunders as an off-duty CMPD officer.

18. Petitioner did not tell Officer Saunders that he was an off-duty Highway Patrol trooper or that he was a law enforcement officer. R. Ex. 9 p. 2, 12 & 34

19. Officer Saunders took possession of the Ruger and completed a CMPD Property Report and evidence sheet in order to document the manner in which the weapon was retrieved. He also ran an ATF trace form and checked through NCIC to determine whether the weapon had been stolen. All documents and the Ruger were then submitted to CMPD as a package. P. Ex. 3; R. Ex. 9, p. 2

20. On the CMPD Property Report, Officer Saunders recorded that the Ruger was "Found" property on February 14, 2010 and was found in the vicinity of Sardis Cove Drive in

Charlotte, North Carolina. Officer Saunders recorded that the owner of the Ruger was “Unknown” and that the owner’s address was unknown. P. Ex. 3

21. Officer Saunders completed the CMPD Property Report based upon the information given to him by the Petitioner. If Petitioner had told him that trooper Amaral gave him the handgun, then Officer Saunders would have noted the Ruger was surrendered rather than found on the property report form.

22. CMPD had recently responded to an armed robbery in the area where Petitioner claimed to have found the Ruger. Officer Saunders contacted CMPD’s Armed Robbery Unit in an attempt to determine whether the Ruger was involved in that crime. CMPD’s Armed Robbery Unit indicated they would follow up on this new information.

23. On July 23, 2010, Officer Saunders was contacted by Lieutenant Holmes and Sergeant Dancy and was questioned regarding Officer Saunders’ interaction with Petitioner on February 14, 2010. R. Exs. 9 & 11

24. Officer Saunders testified that at some point following this conversation, he received a message from his dispatcher. He returned the call and spoke with a man identifying himself as Petitioner, who asked questions about what Officer Saunders told the Highway Patrol internal affairs. Officer Saunders reported this contact to CMPD internal affairs.

25. CMPD conducted an internal affairs investigation of Officer Saunders and Schwartz as a result of Petitioner reporting the handgun as “found” on February 14, 2010. Both Officers were cleared of any wrongdoing.

26. Lieutenant Holmes and First Sergeant Dancy conducted the Highway Patrol’s internal affairs investigation of Petitioner as a result of Petitioner reporting the handgun as “found” on February 14, 2010. On July 23, 2010, they interviewed Officers Schwartz and Saunders. R. Ex. 9 p. 2

27. In his third interview with Lieutenant Holmes and First Sergeant Dancy on July 27, 2010, Petitioner stated that Amaral gave him the Ruger to do whatever he wanted with it. Petitioner did not question the gift of the gun. R. Ex. 9, p. 30-31

28. Petitioner did not remember trooper Amaral saying that he had “found” the gun. R. Ex. 9, p. 32

29. Petitioner did not recall telling Officer Schwartz or Officer Saunders that he found the Ruger on the sidewalk near a used car lot near Officer Schwartz’s residence. R. Ex. 9, p. 35

30. Petitioner stated that he did not tell Officer Schwartz or Officer Saunders where he got the Ruger because “it was a piece of crap gun and I didn’t wanna tell ‘em that –that a trooper gave it to me.” R. Ex. 9, p. 26 & 52

31. Petitioner agreed that his statements about finding the Ruger were a lie. R. Ex. 9, p. 37

32. Petitioner stated “I don’t even really recall talking to [Officer Saunders] except for telling him my name and address.” R. Ex. 9, p. 38

33. Petitioner admitted that he could have just turned the Ruger into evidence at the Highway Patrol. R. Ex. 9, p. 24

34. Petitioner could not articulate why he did not turn in the Ruger to the Highway Patrol. R. Ex. 9, p. 52-53

35. Petitioner stated that he told CMPD the story about finding the gun because “if I would’ve just told ‘em that I found it that they wouldn’t’ve took it. I mean, I thought that I had to—that I had to have had a story to turn it in.” p. 53.

36. Lieutenant Holmes testified that Petitioner was trained on how to surrender such property with the Highway Patrol.

37. Lieutenant Holmes and First Sergeant Dancy’s investigation determined that the Ruger had been stolen from a personal vehicle approximately one-and-a-half years prior to the investigation conducted in July 2010. R. Ex. 9 p. 3.

38. In each interview with Lieutenant Holmes and First Sergeant Dancy, Petitioner stated that he turned the Ruger in to CMPD as a “lost” or “found” weapon even though trooper Amaral gave the Ruger to Petitioner. R. Ex. 9, p. 9, 11, 12, 23, 31, 32, 33, 34, 36 & 38

39. On August 25, 2010, Petitioner was charged with violating Highway Patrol policy, specifically: (1) filing a false police report on February 14, 2010, in violation of N.C. Gen. Stat. § 14-225; (2) engaging in conduct unbecoming of a sworn law enforcement officer; and (3) untruthfulness. R. Ex. 6

40. Lieutenant Colonel Gilchrist concurred with the recommendation that Petitioner should be dismissed by memorandum dated August 25, 2010. R. Ex. 7.

41. Petitioner submitted his resignation from the Highway Patrol on August 25, 2010. R. Ex. 4.

42. Petitioner is now an employee of the Cabarrus County Sheriff’s Office and an applicant for justice officer certification through the Sheriffs’ Commission. Petitioner has not previously held certification through this Commission. R. Ex. 10

43. The Sheriffs’ Commission certifies deputy sheriffs in the State of North Carolina, ensuring that all applicants meet the minimum standards for certification.

44. The Sheriffs' Commission received a Report of Separation from the Highway Patrol regarding Petitioner's employment, dated August 30, 2010, and investigated the nature of Petitioner's separation from the Highway Patrol prior to certifying Petitioner. R. Ex. 4

45. Petitioner's case was submitted to the Sheriffs' Commission's Probable Cause Committee (hereinafter "Committee") for consideration. The Committee is comprised of five (5) elected Sheriffs that meet regularly to review cases and to determine whether probable cause exists to believe an applicant and/or certified justice officer's certification should be denied, revoked, or suspended.

46. Among other things, the Committee considered the Highway Patrol charging documents, investigative reports, Rules of Conduct, report of separation, and transcribed interviews of Petitioner. R. Ex. 1

47. The Committee found probable cause existed to deny Petitioner's application for justice officer certification for commission of a Class B misdemeanor of False Police Report and for lack of good moral character. R. Exs. 2 & 3

48. An administrative hearing was held before the Undersigned on November 6-7, 2013.

49. Petitioner testified that he discussed the Ruger with his father who advised him to turn it in as "found property" and so two days later he went to Officer Schwartz's home to turn it in.

50. Officer Schwartz testified that Petitioner told her that he had found the Ruger by the side of the road or by the side of the sidewalk.

51. Officer Saunders testified that Petitioner told him that he found the Ruger on the sidewalk near a used car dealership and wanted to turn it in as found property.

52. Petitioner testified that he did not tell Officer Schwartz or Officer Saunders that he found the Ruger by the road.

52. To the extent that Petitioner believed the handgun was trooper Amaral's weapon, Petitioner was required to disclose that ownership to Officer Saunders.

53. Petitioner was untruthful when he reported to Officer Saunders that he found the Ruger on the way to Officer Schwartz's residence.

54. Regrettably, Petitioner's untruthfulness caused a CMPD internal affairs investigation of Officers Schwartz and Saunders.

55. Petitioner offered several character witnesses at the administrative hearing. These witnesses generally testified as to Petitioner's upbringing in a household within the law enforcement community, and also testified that they believed Petitioner to be of good character.

These character witnesses were not aware of the circumstances surrounding the internal affairs investigation at the Highway Patrol involving Petitioner's conduct on February 14, 2010.

56. Petitioner testified that he disagreed with certain facts as stated in the document entitled "Petitioner's Prehearing Statement", filed on March 6, 2012, to wit: he was not forced to resign but rather chose to resign before a termination decision was made.

57. The Undersigned finds the testimony of Lieutenant Holmes, Officers Saunders and Officer Schwartz to be credible and of greater weight.

58. The Undersigned finds the testimony of Petitioner to be not credible and of lesser weight.

59. There is no competent evidence before the Undersigned which suggests that Petitioner was coerced or intimidated at any time during the pendency of the Highway Patrol's investigation.

60. For the reasons set out above, Petitioner's actions and conduct during the pendency of the Highway Patrol's investigation demonstrate that Petitioner does not possess the good moral character that is required of all sworn law enforcement officers in this State.

61. For the reasons set out herein, Petitioner filed a false police report with CMPD in violation of N.C.G.S. § 14-225 and also was untruthful and engaged in conduct unbecoming of a sworn law enforcement officer.

CONCLUSIONS OF LAW

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 Notification of Probable Cause to Deny Justice Officer Certification letter, mailed by Respondent on December 20, 2011.

2. The North Carolina Sheriffs' Education and Training Standards 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(a)(8) provides that all justice officers employed or certified in the State of North Carolina shall be of good moral character.

4. 12 NCAC 10B .0204(d)(1) provides the Sheriffs' Commission may deny the certification of a justice officer when the Commission finds that the applicant has committed or been convicted of:

(1) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor which occurred after the date of initial certification.

5. Facilitating the filing of a false police report in violation of N.C. Gen. Stat. § 14-225 is classified as Class B Misdemeanor pursuant to 12 NCAC 10B .0103 (10)(b) and the Class B Misdemeanor Manual adopted by Respondent.

6. N.C. Gen. Stat. § 14-225 provides that it shall be a misdemeanor to “wilfully make or cause to be made to a law enforcement agency or officer any false, misleading or unfounded report, for the purpose of interfering with the operation of a law enforcement agency, or to hinder or obstruct any law enforcement officer in the performance of his duty.”

7. While a false statement to the police, standing alone, does not amount to the filing of a false police report, conduct that is designed to interfere with the functioning of a law enforcement agency or officer, or that is designed to mislead or obstruct the officer or agency in the performance of its official duties, clearly does constitute a violation of N.C. Gen. Stat. §§ 14-225. State v. Dietze, 190 N.C. App. 198, 660 S.E. 2d 197 (2008).

8. The preponderance of the evidence presented at the administrative hearing, establishes that Petitioner intentionally lied and provided false information to Officers Schwartz and Saunders on February 14, 2010.

9. For the reasons set out herein, Petitioner facilitated the filing of a false police report on February 14, 2010, within the meaning of N.C.G.S. § 14-225. A preponderance of the evidence supports the finding that on or about February 14, 2010, Petitioner committed the Class B Misdemeanor offense of filing a false police report.

10. 12 NCAC 10B .0204(b)(2) further provides the Sheriffs’ Commission shall revoke, deny, or suspend a justice officer’s certification when the Commission finds that the justice officer no longer possesses the good moral character that is required of all sworn justice officers.

11. Good moral character has been defined as “honesty, fairness, and respect for the rights of others and for the laws of the state and nation.” In Re Willis, 288 N.C. 1, 10 (1975).

12. Given the totality of the evidence presented at the administrative hearing, the Undersigned concludes Petitioner no longer possesses the good moral character that is required of all sworn justice officers in this State for the reasons set out herein. Pursuant to 12 NCAC 10B .0205, the period of denial shall be for an indefinite period based on Petitioner’s lack of good moral character.

13. Based on the evidence presented and the testimony of the witnesses at the administrative hearing, the Respondent’s proposed denial of Petitioner’s certification due to Petitioner’s lack of good moral character and failure to maintain the minimum standards required of all sworn justice officers under 12 NCAC 10B .0301 is supported by a preponderance of the evidence.

14. Pursuant to 12 NCAC 10B .0205(2)(a), when the Commission denies the certification of a justice officer, the period of sanction shall be for a period of 5 years where the cause of sanction is commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(1).

PROPOSAL FOR DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Undersigned recommends the Respondent deny Petitioner's certification due to Petitioner's failure to maintain the good moral character that is required of sworn justice officers under 12 NCAC 10B .0300, in addition to Petitioner's commission of the Class B Misdemeanor offense of filing a false police report on or about February 14, 2010.

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. Gen. Stat. § 150B-40(e).

The Agency that will make the Final Decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

This the 28th day of February, 2014.

Selina M. Brooks
Administrative Law Judge