

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.

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 Suspension of Correction Officer's Certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission, on March 14, 2012. (Respondent's Exhibit 2)

2. The Respondent, 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) provides that the North Carolina Criminal Justice Education and Training Standards Commission shall suspend the certification of a correctional officer . . . when the Commission finds that the officer has committed or been convicted of a misdemeanor offense as defined by 12 NCAC 09G.0102.

4. 12 NCAC 09G.0102(9)(dd) provides that "False Reports to Law Enforcement Agencies or Officers" is a class B misdemeanor offense pursuant to N.C.G.S. §14-225.

5. 12 NCAC 09G.0505(b) provides that when the North Carolina Criminal Justice Education and Training Standards Commission suspends the certification of a correction officer, the period of sanction shall be not less than three years where the cause of the sanction is: "(3) the commission or conviction of a misdemeanor offense."

6. Petitioner was awarded probationary correctional officer certification by the North Carolina Criminal Justice Education and Training Standards Commission on June 24, 2004, and received general correctional officer certification on June 24, 2005. (Respondent's Exhibit 1)

7. The Criminal Justice Standards Division, on behalf of the Respondent, received notification from the North Carolina Department of Corrections on December 30, 2009, that the Petitioner had been charged on July 10, 2009 with the misdemeanor offense of false report to law enforcement. Edward Zapolsky, an investigator with the Criminal Justice Standards Division,

then obtained certified copies of the court paperwork related to the Petitioner's criminal charges from the Clerk of District Court in Cumberland County file number 09 CR 09248. (Respondent's Exhibit 2)

8. On July 10, 2009, Petitioner was charged in Cumberland County on a criminal citation with the misdemeanor offense of false report to law enforcement in violation of North Carolina General Statute §14-225. The date of offense was alleged to have been May 11, 2009. This incident involved Petitioner allegedly making or causing to be made a false report to law enforcement when Petitioner knew that the crime had not been committed. (Respondent's Exhibit 2) While the citation charges a violation of a criminal law statute and tracks the language of that statute, the citation actually states that Petitioner's wrongful act was "conspiracy."

9. An initial incident report was prepared by Deputy C.R. Murphy of the Cumberland County Sheriff's Office. This incident report by Deputy Murphy dated May 11, 2009, lists Petitioner's sister, Michelle McDaniel, as the alleged victim. Petitioner is listed on the incident report as an "other involved," a heading used on the side of the report for listing others tangential to the incident under investigation. The suspect on the incident report is James Richard Harrison, the boyfriend of Petitioner's Mother who was also listed as "other involved." (Respondent's Exhibit 1 pp. 6-8) There is no evidence that Deputy Murphy interviewed Petitioner or Mr. Harrison. There is no evidence as to why Petitioner is listed on the initial report form.

10. Detective Yovana Vest (hereinafter Detective Vest) a member of the Cumberland County Sheriff's Office since 2005, testified at the hearing. In May of 2009, she was a detective in the special victims unit and she received the incident report prepared by Deputy Murphy detailing an alleged sex offense. Detective Vest began her investigation by reviewing and recapitulating Deputy Murphy's report. She stated that she did not know why Petitioner's name was listed on that report, but hypothesized that it could have been because Petitioner was present or because she was just mentioned in conversation.

11. Detective Vest testified that Deputy Murphy's incident report contained a statement by Michelle McDaniel where she alleged sometime in the middle of April, in her home, Mr. Harrison approached her, started grabbing her breasts and inserted his finger into her vagina. Mr. Harrison was Michelle McDaniel's mother's boyfriend who lived in the home. Ms. McDaniel, age 17 at the time, reported that she got the courage to report this to law enforcement because Mr. Harrison was moving out of the home. (Respondent's Exhibit 1 p. 9)

12. Detective Vest attempted to contact the victim's mother, Karen Metcalfe, by telephone on May 18, 2009. Ms. Metcalfe did not return her call. On June 1, 2009, Detective Vest went to the home of the victim and interviewed her. Miss McDaniel was extremely standoffish towards Detective Vest and claimed she was "over it now." When pressed, Miss McDaniel provided a statement; however, it was inconsistent with the original report. Miss McDaniel now claimed she was on the couch in the living room watching TV when the assault occurred and did not indicate Mr. Harrison touched her breasts. (Respondent's Exhibit 1 p. 10)

13. Detective Vest then interviewed the victim's mother, Karen Metcalfe. Ms. Metcalfe indicated Mr. Harrison never touched her daughter. Ms. Metcalfe further disclosed that her daughter made the whole thing up with the help of her older sister, Petitioner. According to Ms. Metcalfe, Petitioner and Miss McDaniel hatched the plan while driving to a funeral in New Jersey in order to get back at Mr. Harrison for leaving their mother.

14. After interviewing Ms. Metcalfe, Detective Vest re-interviewed Miss McDaniel. Detective Vest confronted Miss McDaniel, the alleged victim, who admitted that no sex offense had occurred. (Respondent's Exhibit 1 p. 11) During this second interview with Miss McDaniel, her mother Ms. Metcalfe encouraged Miss McDaniel to tell Detective Vest what had happened during the ride home from the funeral in New Jersey. Miss McDaniel stated that "nothing happened."

15. Detective Vest then attempted to contact Petitioner who did not return her first phone call. Detective Vest and Petitioner exchanged several phone calls and left each other messages. Eventually Detective Vest interviewed Petitioner near the end of June 2009. She asked if Petitioner had anything to do with falsifying a report. Petitioner, clearly irritated, answered: "Not that I'm aware of. Even if I did, I didn't make the report." Petitioner was asked if she conspired to falsify a report, to which she responded "I might have. I don't remember." Petitioner claimed not to remember events around that time because of her cousins passing. (Respondent's Exhibit 1 p. 12)

16. Detective Vest spoke again with Miss McDaniel who this time stated that on the way to or from New Jersey, she and Petitioner, together, made up the whole story. Miss McDaniel claimed she and Petitioner were in the car when they came up with the idea to accuse Mr. Harrison of sexual abuse after hearing that Mr. Harrison had broken up with their mother. Detective Vest then wrote citations for Petitioner, her sister and her mother. (Respondent's Exhibit 1 pp. 2, 12)

17. The case against Petitioner came before Cumberland County District Court on October 28, 2009. Petitioner's charge of false report to a police station was voluntarily dismissed by the State. (Respondent's Exhibit 1 p. 5) According to Respondent's investigator, Miss McDaniel and Ms. Metcalfe were convicted.

18. Petitioner testified at the hearing that she was not a part of the conspiracy to file a false police report alleging her mother's boyfriend had assaulted her sister. Petitioner claims that she, along with her sister and grandmother, drove to New Jersey on May 8, 2009 to attend a funeral. The car trip was about eight hours one way, with her grandmother sitting in the back seat, and her sister sitting in the front passenger seat while Petitioner drove. Petitioner claims she had no conversations with her sister during the sixteen (16) hour round trip car ride because her sister slept the whole time.

19. During the trip, Petitioner received a call from her mother who explained Mr. Harrison (Mother's Boyfriend) had left her. Petitioner claims she was not upset or worried about her mother. Petitioner testified that the next day she returned to North Carolina and went to her mother's house to pick up her children, but did not have a conversation with her mother, even

though her mother was distraught over the breakup with Mr. Harrison. Petitioner did not live with her mother and picked up her children and went home. After she left, she would not have been part of anything that transpired between her mother and her sister.

20. Petitioner claimed to have no idea about the police report alleging a sexual offense. Petitioner testified that only after Detective Vest started calling her, did she call her mother to ask what was going on. Petitioner claims that it was only then that her mother told her that Mr. Harrison had sexually assaulted Petitioner's sister, Miss McDaniel. There is no evidence that refutes her assertion. Petitioner also stated that she told her mother she wanted nothing to do with any of the assertions of sexual assault of her sister, even though Petitioner admitted she had been sexually assaulted in the past. She did not seek out her sister to offer assistance and claims she did not want to know anything about it.

21. Petitioner admitted she did not immediately tell Detective Vest she had concerns about the validity of the police report. When Detective Vest called her, she had no memory of conspiring with her sister to falsify a police report. Petitioner explained that her memory was clouded during that time because she was in a state of grief where all she thought about was her cousin to whom she had been close lying in a coffin.

22. Petitioner testified she often provides money to her sister and mother and could not think of a reason they would add her name to a police report, possibly causing her to lose her job.

23. Miss McDaniel and Petitioner's mother did not testify at the hearing. Petitioner was the only person with first-hand knowledge of the events who testified under oath. Petitioner's first-hand testimony must be given more credence than statements not made under oath and not subject to examination and cross-examination. Both Ms. Metcalfe's and Miss McDaniel's stories were not consistent each time they were interviewed.

24. Edward Zapolsky, hereinafter "Zapolsky," testified at the hearing. Zapolsky has been employed with the Criminal Justice Standards Division for twelve years. Zapolsky serves as an investigator and acted as the lead investigator regarding the allegations against Petitioner.

25. Based on his investigation regarding Petitioner's commission of a Class B Misdemeanor, Zapolsky prepared a memorandum with thirteen (13) pages attached in support (Respondent's Exhibit 1). This information was presented to the members of the Probable Cause Committee of the North Carolina Criminal Justice Education and Training Standards Commission on February 22, 2012. The Probable Cause Committee found probable cause to believe that the Petitioner had committed the misdemeanor offense of false report to law enforcement officer in violation of N.C.G.S. §14-225 "by conspiring to make a false police report knowing a crime had not been committed.". The Petitioner was notified of the findings of the Probable Cause Committee via a certified letter sent to her on March 14, 2012. (Respondent's Exhibit 2)

26. Detective Vest is a credible witness in this case; however, her testimony is based entirely on reporting what she has been told by others who have not appeared and been subject to

examination and cross-examination. In particular, Miss McDaniel changed her story every time she was questioned. Ms. Metcalfe's version was not consistent. The versions of the events as related by Miss McDaniel and Ms. Metcalfe as offered through Detective Vest have little to no credibility.

27. Petitioner's contention that she and her sister had no conversations and that her sister slept the entire sixteen hours as they drove to and from New Jersey for a funeral is somewhat implausible. Her claim to have a better memory at the time of the hearing than she did soon after the incident at question seems somewhat suspect and such claims may or may not be reliable. While Petitioner lacks credibility in some regards, she is the only person with first-hand knowledge who testified in this matter. While she did not directly and straight-forward deny the assertions of wrong-doing when interviewed, she likewise did not admit to wrong-doing.

BASED UPON the foregoing FINDINGS OF FACT and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

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. At the conclusion of this administrative hearing this Tribunal articulated a proposed decision. After careful review of the evidence and the testimony as well as the applicable law, it is concluded that decision as articulated in open court should be modified as set forth herein.

3. The Respondent, 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.

4. Pursuant to 12 NCAC 09G .0504(b), the Commission shall suspend the certification of a correctional officer when the Commission finds that the officer has committed or been convicted of a misdemeanor offense.

5. Petitioner was not convicted of any criminal offense and her charge was dismissed. Respondent seeks to prove she "committed" the offense of filing a false police report as opposed to her having been convicted of the crime. Her mother and sister were apparently convicted of filing the false report.

6. Pursuant to 12 NCAC 09G.0505(b), when the North Carolina Criminal Justice

Education and Training Standards Commission suspends the certification of a correction officer pursuant to 12 NCAC 09G.0504(b) of this Section, the period of sanction shall be not less than three years where the cause of sanction is: (3) the commission or conviction of a misdemeanor offense.

7. “False Report to Law Enforcement”, in violation of N.C.G.S. § 14-225 is a Class 2 misdemeanor. A person is guilty of “False Report to Law Enforcement” if that person:

- (1) willfully
- (2) makes or causes to be made
- (3) to a law enforcement agency of officer
- (4) a false or misleading or unfounded report
- (5) for the purposes of
 - (a) interfering with the operation of a law enforcement agency or
 - (b) hindering or obstructing any law enforcement officer in performing official duties.

8. 12 NCAC 09G.0102(9)(dd) provides that “false reports to law enforcement agencies or officers” is a class B misdemeanor offense pursuant to N.C.G.S. §14-225.

9. The Probable Cause Committee seeks to suspend Petitioner’s certification based upon a commission of the class B Misdemeanor of filing a false report to a law enforcement officer by conspiring. The only allegation asserted against Petitioner, and therefore the only allegation for which her certification is to be suspended, is a violation of N. C. G. S. §14-225, which is listed in 12 NCAC 09G.0102(9)(dd). All evidence in this case indicates that what the Petitioner did, if anything, and taken in the light most favorable to Respondent, was to conspire with her mother and sister to perform an illegal act, i.e., file a false police report.

10. 12 NCAC 09G.0102(9) provides a very long and exhaustive listing of the various criminal laws violation of which is sufficient to suspend a corrections officer’s certification. 12 NCAC 09G.0102(9)(dd) is the basis of this action against Petitioner as stated in the probable cause letter to Petitioner. There is no specific criminal law statute listed in the rule for conspiracy. 12 NCAC 09G.0102(9)(vvvv) very specifically lists common law misdemeanors for which corrections officers would be subject to punishment by Respondent for a violation. Conspiracy is not listed among those common law offenses. Conspiracy is not to be found at all in 12 NCAC 09G.0102(9).

11. Conspiracy is a specific crime in North Carolina as it is in every jurisdiction in this country. It is a specific crime with a specific punishment assessed. In North Carolina, conspiracy is a common law crime, which is punished at one level below the actual crime the conspirators conspired to commit. North Carolina is unlike the majority of states in that in North Carolina conspiracy is complete once the agreement to commit the crime is made and no overt act in furtherance of the conspiracy is required.

12. Conspiracy is not a lesser included offense of filing a false police report. The sole basis upon which Petitioner was charged in the criminal offense and upon which Respondent

seeks to suspend her certification is her conspiring to file a false report. Assuming *arguendo*, that Petitioner entered into discussions with her sister and her mother about filing such a report, there is no evidence that an agreement was made with Petitioner that either her sister or her mother would file the report with the police. Merely discussing the commission of acts which might be criminal with nothing more showing may be extremely imprudent, but it is not a crime in and of itself.

13. Assuming *arguendo* that Petitioner did in fact make such agreement and the conspiracy was complete, conspiracy is not a criminal offense listed in 12 NCAC 09G.0102(9) which would subject Petitioner's certification to any suspension for commission of that criminal offense.

14. The charge of filing a false report to the police requires that the person "make or cause to be made" the false report. This Tribunal, having practiced criminal law and/or presided over criminal court as a district court judge for twenty six years, as well as having taught criminal law for nine years, is of the opinion that a conspiracy cannot be used as the bootstrap of causing the report to be made; i.e., changing the commission of a conspiracy into a wholly different substantive offense. However, assuming *arguendo* that such could in fact be allowed, there is no evidence that the conspiracy was complete; no agreement was made by Petitioner for others to file the false report.

15. The charge of filing a false report to the police requires that the person commit an act for the specific purpose either of interfering with the operation of a law enforcement agency or of hindering or obstructing any law enforcement officer in performing official duties. The law in North Carolina is clear that the offense of filing a false police report is committed only if the person acted with one of the required purposes. In this regard, the offense of filing a false police report is a "specific intent" crime.

16. Taking the evidence in the light most favorable to Respondent and assuming *arguendo* those facts to be true, there is no evidence that Petitioner had a purpose of interfering with the operation of any law enforcement agency. There is no evidence that Petitioner had a purpose of hindering or obstructing any law enforcement officer in the performance of his or her official duties. The purpose of reporting any sexual offense to the police was to get Mr. Harrison into trouble, not with any intent or purpose to in any manner infringe on the performance of the police officers official duties. The fact that the law enforcement officer may have been hindered or obstructed in some way, or that the investigation caused a waste of police resources, is not sufficient—that is not the test.

17. Many of the foregoing paragraphs make a specific point based upon assumptions for the sake of argument of that specific point. It must be made clear that this Tribunal is not finding nor concluding that any of those points have been established by the evidence presented, but merely that even if it had been shown by credible evidence, such was not sufficient to support the conclusion that Petitioner committed an act that would support the contentions of Respondent. In that regard it is not necessary to find as fact or conclude as a matter of law each of those specific points in that they would lack legal sufficiency even if so found.

18. 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. Gen. Stat. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a).

19. Respondent has the burden of proof in the case at bar. Respondent has failed to show by a preponderance of the evidence that Respondent's proposed suspension of Petitioner's correctional officer certification is supported by substantial evidence. The Respondent has failed to prove by a preponderance of the evidence that Petitioner committed the offense of filing a false police report in violation of N.C.G.S. § 14-225.

20. The findings of the Probable Cause Committee of the Respondent are not supported by substantial evidence.

PROPOSAL FOR DECISION

NOW, THEREFORE, based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned Administrative Law Judge recommends that Respondent should not suspend Petitioner's Correctional Officer certification.

NOTICE

The Agency making the Final Decision in this contested case 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. Gen. Stat. §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.

IT IS SO ORDERED.

This the 24th day of January, 2013.

Donald W. Overby
Administrative Law Judge