

STATE OF NORTH CAROLINA
COUNTY OF MARTIN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DOJ 03839

RODNEY LYNDOLPH BLAND,)
)
 PETITIONER,)
)
 v.)
)
 NORTH CAROLINA CRIMINAL)
 JUSTICE EDUCATION AND)
 TRAINING STANDARDS)
 COMMISSION,)
)
 RESPONDENT.)

PROPOSAL FOR DECISION

In accordance with North Carolina General Statute § 150B-40(e), Respondent requested the designation of an administrative law judge to preside at an Article 3A, North Carolina General Statute § 150B, contested case hearing of this matter. Based upon the Respondent's request, Administrative Law Judge Donald W. Overby heard this contested case in Greenville, North Carolina on October 17, 2012.

APPEARANCES

Petitioner: Rodney Lyndolph Bland (Petitioner did not appear at the hearing)
118 Perry Street
Williamston, North Carolina 27892

Respondent: Lauren D. Tally, Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUES

Is Respondent's proposed denial of Petitioner's certification as a correctional officer based upon Petitioner's knowingly making material misrepresentations of any information required for certification, supported by a preponderance of the evidence?

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

RULES AT ISSUE

12 NCAC 09G.0206
12 NCAC 09G.0504(b)(6)
12NCAC 09G.0504(b)(2)
12 NCAC 09G.0505(b)(5)
12 NCAC 09G.0505(C)(2)

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.

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, Petitioner received the notification of Probable Cause to Deny Correctional Officer Certification letter mailed by the Respondent on March 13, 2012. (Respondent's Exhibit 2)
2. This case was originally scheduled to be heard on September 21, 2012, however Petitioner did not received proper notice of the hearing. On October 10, 2012, Vickey Bullock, assistant to the presiding Administrative Law Judge, contacted both Petitioner and Respondent who both indicated they would be available for hearing on October 17, 2012. Around 10:30 am on October 17, 2012, Respondent received a phone call from Petitioner who stated he did not have any gas to get to the hearing. The undersigned treated this as a request for a continuance by Petitioner, which was denied since Petitioner previously indicated he could be at the hearing date and gave no prior notice to Respondent or to the Court that he would not be able to attend. Respondent presented evidence in Petitioners absence.
3. 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. 12 NCAC 09G.0504(b)(6) provides that the Commission may suspend, revoke, or deny the certification of a correctional officer when the Commission finds that the applicant for certification or the certified officer has knowingly made a material misrepresentation of any information required for certification or accreditation.

5. 12 NCAC 09G.0505(b) provides that when the Commission suspends or denies the certification of a correctional officer pursuant to 12 NCAC 09G.0504, the period of sanction shall be not less than three (3) 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 material misrepresentation of any information required for certification or accreditation.
6. 12 NCAC 09G.0504(b)(2) provides that the Commission may suspend, revoke or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer fails to meet or maintain one or more of the employment standards required by 12 NCAC 09G.0200.
7. 12 NCAC 09G.0206 provides that a minimum standard for certification is every person employed as a correctional officer shall demonstrate good moral character.
8. 12 NCAC 09G.0505(c) provides that when the Commission suspends or denies the certification of a correctional officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction or impairment continues to exist, where the cause for sanction is: (2) failure to meet or maintain the minimum standards for certification
9. Petitioner previously held certification as a correctional officer from December 29, 2003 until August 18, 2004. Petitioner separated after the Probable Cause Committee of Respondent found probable cause to suspend Petitioner's certification indefinitely for failing to demonstrate good moral character after he committed the offense of Aid and Abet Prostitution.
10. Respondent was unable to serve Petitioner with the notification of finding of Probable Cause to Deny Correctional Officer Certification in 2004; therefore, Respondent served Petitioner with the notification at the probable cause committee meeting in February of 2012.
11. In 2011, Petitioner applied for certification as a full time correctional officer with the North Carolina Department of Corrections.
12. The North Carolina Department of Corrections submitted to Respondent a Report of Appointment/Application for Certification, Form F-5A(DOC), that was signed by Petitioner on September 22, 2011. (Respondent's Exhibit 1)

MATERIAL MISREPRESENTATION

13. On the Form F-5A(DOC) completed in 2011, Petitioner indicated on Question #6 that he was previously convicted of Defacing Public Buildings in 2000. He further indicated on

Question #3 that he had previously used the illegal drug of “marijuana in college and in high school and that [he] is not currently using.” (Respondent’s Exhibit 1)

14. Upon receipt of the 2011 Form F-5A (DOC), Ed Zapolsky (hereinafter Zapolsky), an investigator for Respondent, compared it with Petitioner’s 2003 Form F-5A (DOC). Zapolsky found that Petitioner failed to indicate that he had previously used marijuana on the 2003 F-5A. Zapolsky also found Petitioner failed to list that he had been convicted of Defacing Public Buildings on his 2003 F-5A. (Respondent’s Exhibit 1 p. 16)

15. On both of the F-5A (DOC) Forms the following statement appears above the Petitioner’s signature:

As the applicant for certification, I attest that I am aware of the minimum standards for employment, that I meet or exceed each of those requirements, that the information provided above and all other information submitted by me, both oral and written throughout the employment and certification process, is thorough, complete, and accurate to the best of my knowledge. I further understand and agree that any omission, falsification or misrepresentation of any factor or portion of such information can be the sole basis for termination of my employment and/or denial, suspension or revocation of my certification at any time, now or later. I further understand that I have a continuing duty to notify the Commission of all criminal offenses which I am arrested for or charged with, plead no contest to, plead guilty to or am found guilty of. If applicable, I specifically acknowledge that my continued employment and certification are contingent on the results of the fingerprint records check and other criminal history records being consistent with the information provided in my Personal History Statement and as reflected in this application.

16. Petitioner provided a written statement to Respondent where he admits “I[n] 2003 I was a year removed from college and had done drugs in the recent past at that time (2003). I thought that being truthful would’ve kept me from getting the job... I marked no because I thought that marking yes to drug usage would hinder me from getting that job at the time.” (Respondent’s Exhibit 1 pp. 12-13)

17. Petitioner submitted answers to Respondent’s Requests for Admissions and Interrogatories. In this document, Petitioner admits to using marijuana in 2003 and claims he failed to list the marijuana use on his 2003 F-5A because “being young and immature I thought that it would hinder my chances of being hired.” (Respondent’s Exhibit 4 p. 2)

18. Petitioner also admitted being convicted of defacing a public building on August 9, 2000 in Durham County but claims he failed to list it on his 2003 F-5A because it was “not on his record at the Durham County courthouse.” (Respondent’s Exhibit 4 p. 3)

19. Petitioner did not appear at the hearing and therefore did not present any evidence showing his falsifications on Respondents forms were not material misrepresentations.

LACK OF GOOD MORAL CHARACTER

20. Petitioner submitted a pre-hearing statement in which he admitted he was “guilty as charged to aid and abetting prostitution in 2004” and that he is “not disputing any charges.” (Respondent’s Exhibit 3)
21. Officer Bond with the Durham Police Department testified at the hearing that she was working as an undercover prostitute on the night of February 18, 2004. She encountered the Petitioner who requested oral sex from her for ten dollars. Petitioner was immediately arrested and charged with one count of “aid and abet prostitution” a DOC class B Misdemeanor. Officer Bond testified that she was upset and embarrassed when she found out the Petitioner was certified as a DOC officer. In Officer Bond’s opinion anyone who propositions a prostitute should not continue to hold any type of law enforcement certification.
22. Petitioner entered into a deferred prosecution agreement with the State on the charge of Aid and Abet Prostitution. In this agreement, Petitioner agreed to complete twenty hours of community service within ninety days and in return the charge was voluntarily dismissed. This agreement was reduced to writing and contained a check mark by #4 where Petitioner admitted the following “the admission of responsibility given by me and any stipulation of facts shall be used against me and admitted into evidence without objection in the State’s prosecution against me for this offense should prosecution become necessary as a result of these terms and conditions of deferred prosecution.” (Respondent’s Exhibit 1)
23. Petitioner did not appear at the hearing and therefore did not present any evidence showing his moral character had be restored since Respondents 2004 finding that he lacks good moral character.
24. Based on the information above regarding Petitioner’s material misrepresentations and lack of good moral character, Zapolsky prepared a memorandum with nineteen (19) pages attached in support. This information was presented to the members of Respondent’s Probable Cause Committee. The Committee found probable cause to believe that Petitioner’s application for certification as a correctional officer should be denied indefinitely. The proposed denial was based upon Petitioner’s material misrepresentation of information in completing the F-5A(DOC) in 2003 and Petitioner’s failure to meet or maintain the minimum employment standards that every correction shall be of good moral character.
25. On March 12, 2012, Respondent sent Petitioner a letter by certified mail noticing him of their finding of Probable Cause on the allegations of material misrepresentation and lack of good moral character, proposing an indefinite denial of Petitioner’s correctional officer certification. (Respondent’s Exhibit 2) Petitioner requested an administrative hearing. (Respondent's Exhibit 3)

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. 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. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made two material misrepresentations of information required for correctional officer certification when he completed a F-5A(DOC) Report of Appointment/Application for Certification on December 2, 2003 as a part of his application for certification with the North Carolina Department of Corrections. In response to Question #3 which states "Have you ever used any illegal drugs?" Petitioner checked the box to indicate "No." Petitioner failed to disclose that he used marijuana in high school and college. In response to Question #6 which states "list all convictions other than minor traffic violations below." Petitioner failed to disclose his prior conviction of Defacing Public Buildings in 2000. A preponderance of evidence also exists to support the conclusion that Petitioner lacks good moral character based on his charge and subsequent admission of guilt for the offense of aid and abet prostitution.
4. The Respondent may properly deny Petitioner's certification pursuant to 12 NCAC 9G.0504(b)(6) for material misrepresentations. Pursuant to 12 NCAC 9G .0505(b)(5), the period of sanction shall be not less than three (3) years for material misrepresentation of any information required for certification. The Respondent may also properly deny Petitioner's certification pursuant to 12 NCAC 09G.0504(b)(2) and 12 NCAC 09G.0206 for failure to meet or maintain the minimum employment standards that every correctional officer shall be of good moral character. Under 12 NCAC 09G.0505(C)(2), the period of sanctions shall be for an indefinite period of time for lack of good moral character.
5. The actions of Respondent are constitutional, within the statutory authority of the agency, made upon lawful procedure, not affected by error of law, supported by substantial evidence and are not arbitrary, capricious or an abuse of discretion.
6. The findings of the Probable Cause Committee of the Respondent are supported by substantial evidence and are not arbitrary and capricious.
7. The party with the burden of proof in a contested case must establish the facts required by 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).

8. Petitioner has the burden of proof in the case at bar. (See Overcash v. N.C. Dep't of Env't & Natural Res., 179 N.C. App. 697, 704, 635 S.E.2d 442, 444, disc. rev denied 361 N.C. 220, 642 S.E.2d 445 (2007)). Petitioner has failed to meet this burden. Petitioner has failed to show by a preponderance of the evidence that Respondent's proposed denial of Petitioner's correctional officer certification is not supported by substantial evidence. Petitioner has failed to show that he did not knowingly make material misrepresentations of any information required for certification and that he possesses good moral character.
9. Respondent has shown by a preponderance of the evidence that Petitioner knowingly made material misrepresentations of information required for certification and lacks good moral character. Respondent's proposed denial of Petitioner's correctional officer certification is supported by a preponderance of the evidence.

PROPOSAL FOR DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned Administrative Law Judge recommends Respondent deny Petitioner's correctional officer certification for a period of not less than three (3) years based upon Petitioner's material misrepresentations of information required for certification and for an indefinite period based on Petitioner's lack of good moral character. Respondent's proposed denial of Petitioner's correctional officer certification is supported by a preponderance of the evidence.

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.

This the 11th day of January, 2013.

Donald W. Overby
Administrative Law Judge