

STATE OF NORTH CAROLINA

COUNTY OF PITT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DOJ 03844

ANTONIO CORNELIUS HARDY,
Petitioner,

v.

N.C. CRIMINAL JUSTICE
EDUCATION AND TRAINING
STANDARDS COMMISSION,
Respondent.

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PROPOSAL FOR DECISION

This case came on for hearing on October 17, 2012, before Administrative Law Judge Donald W. Overby in Greenville, 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: Antonio Cornelius Hardy, pro se

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

ISSUE

Did substantial evidence show that Petitioner committed the Department of Correction misdemeanor of resist, delay, and obstruct a law enforcement officer while in the performance of his duties while Petitioner was certified as a Correctional officer which justified revocation of Petitioner's certification?

RULES

12 NCAC 09G .0504(b)(3)
12 NCAC 09G .0102(9)(cc)
12 NCAC 09G .0505(b)(1)
N.C.G.S. § 14-223

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 Petitioner received the notification of Proposed Suspension of Correctional Officer Certification through a letter mailed by Respondent on March 14, 2012. (Respondent's Exhibit 19)
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 October 18, 2004, Respondent received a Report of Appointment Form F-5A on behalf of Petitioner for his application for certification as a correctional officer. (Respondent's exhibit 1)
4. On October 21, 2004, Petitioner received his Probationary Certification as a correctional officer from Respondent. (Respondent's exhibit 2) On October 18, 2005, Petitioner received his General Certification as a correctional officer from Respondent. (Respondent's exhibit 3) Petitioner has been employed as a correctional officer since October 18, 2004. (Respondent's exhibit 4)
5. On December 30, 2008, Respondent received a Craven County Sheriff's Department Incident/Offense Report. (Respondent's exhibit 5) The report stated that on November 30, 2008, law enforcement officers responded to the Hardy residence at 5610 Highway 118 in Vanceboro, North Carolina at 04:16 hours. The report lists the Petitioner as the suspect for committing the offenses of assault on a female and resist, delay, and obstruct. The victim is listed as Kokeisha Hardy ("Ms. Hardy"), who is Petitioner's wife. The report states that Ms. Hardy had a swollen lip and cuts and that she was sober. Although this report states that the victim had cuts, the only weapon listed as shown in three separate places on the form is "hands." The form does not speak to Petitioner's sobriety. The report listed that Petitioner was 6 feet, 2 inches tall and weighed 350 pounds. Included with the report are three narrative reports from Craven County Sheriff's Office Deputies Jason Buck ("Deputy Buck"), Scott Gaskins ("Deputy Gaskins"), and Bradley Tabor ("Deputy Tabor"). (Respondent's exhibits 6-8)
6. On November 30, 2008, Deputy Buck obtained a magistrate's order for Petitioner for the charges of assault on a female, alleging that Petitioner "unlawfully and willfully did assault and strike Kokeisha Hardy, a female person, by hitting her about the head and face with his hands. The defendant is a male person and was at least 18 years of age when the assault

and striking occurred.” (Respondent’s exhibit 9) Petitioner was also charged with resisting a public officer, alleging that Petitioner “unlawfully and willfully did resist, delay and obstruct J Buck, a public officer holding the office of deputy sheriff with the Craven County Sheriff’s Department, by refusing to obey commands and pushing away from that officer. At the time, the officer was discharging and attempting to discharge a duty of his office, arresting the defendant for domestic violence assault on a female.”

7. On December 1, 2008, a release order was entered by the presiding District Court Judge. Conditions of release were established requiring a secured bond. Further conditions were set as customary in domestic violence case in that Petitioner would be arrested if he has contact with Ms. Hardy or if he uses, possesses, or consumes illegal drugs, alcohol, firearms, or weapons. (Respondent’s exhibit 10)
8. On December 30, 2008, Respondent received a statement from Petitioner about the incident. (Respondent’s exhibit 11) Petitioner stated that on November 30, 2008, he was arrested for assault on a female and resisting arrest. He stated that he and Ms. Hardy were having an argument and that she hit him a few times, and that when the deputies arrived he could not understand them so he placed his hands behind his head. He also notes that his mother in law posted the secured bond for his release.
9. On December 30, 2008, Respondent also received a memorandum from the North Carolina Department of Corrections written by Michael Lamm, Superintendent of the Pamlico Correctional Institution to Danny Safrit, Eastern Region Director, concerning Petitioner’s arrest for assault on a female and resisting a public officer. (Respondent’s exhibits 12, 13) The memo summarized Mr. Lamm’s understanding of the facts of the incident. Mr. Lamm states that he initiated an internal investigation. Both the Petitioner and his wife submitted written statements which refute the allegations of the police report concerning the alleged assault on a female. Both contend that both were drinking and that Petitioner did not hit her, but instead she did strike him.
10. Mr. Lamm concluded in the December 30, 2008 memorandum that Petitioner’s “personal conduct is no longer acceptable for an employee of the Department of Correction. I have lost faith in his ability to properly perform his duties as a Correctional Officer. It is my recommendation that the Criminal Justice Standards and Training Council suspend his certification.” (Respondent’s exhibit 12)
11. On May 21, 2009, Respondent received two memoranda from the North Carolina Department of Corrections written by Michael Lamm, Superintendent of the Pamlico Correctional Institution to Danny Safrit, Eastern Region Director, both dated May 5, 2009. (Respondent’s exhibits 13 and 14). The first memo indicated that the charges of assault on a female and resisting a public officer were dismissed based upon agreement of the parties and “compliance.” According to the memo, the only requirement with which Petitioner was required to comply was a substance abuse assessment. Petitioner obtained that assessment which required no treatment, indicative of no substance abuse problem. (Respondent’s exhibit 13). Mr. Lamm states in this memo that he has obtained permission from Mr. Safrit to pursue dismissal of Petitioner through the chain of command. (Respondent’s exhibit 13)

12. In the second memo dated May 21, 2009, Mr. Lamm restates at length the facts from the officers reports and briefly the facts as alleged by Petitioner and his wife. He restates his intention to seek dismissal of Petitioner through the chain of command. (Respondent's exhibit 14)
13. Prior to the last two memos from Mr. Lamm, Petitioner's charges for assault on a female and resist, delay, and obstruct a public officer were dismissed in Craven County District Court on April 21, 2009, as Mr. Lamm acknowledges. (Respondent's exhibit 15-17)
14. More than three years after the incident was first reported to the Respondent, on January 26, 2012, Respondent's investigator Edward Zapolsky ("Zapolsky") drafted a memorandum to be submitted to Respondent's probable cause committee for consideration of suspension of Petitioner's correctional officer certification based upon the allegation of the commission of the DOC misdemeanor offenses of assault on a female and resist, delay, and obstruct. (Respondent's exhibit 18)
15. On March 14, 2012, Respondent's probable cause committee found probable cause to suspend Petitioner's correctional officer certification based upon the commission of the DOC misdemeanor of resist, delay and obstruct a public officer. (Respondent's exhibit 19)
16. Petitioner requested an administrative hearing.
17. At the administrative hearing, Mr. Zapolsky testified that he investigates administrative rules violations on Department of Correction officers. Mr. Zapolsky testified that he collected the documents concerning Petitioner's criminal charges, and drafted a memorandum to be submitted to Respondent's probable cause committee. Mr. Zapolsky was asked why it took so long to bring this issue before Respondent's probable cause committee, and Mr. Zapolsky stated that at the time when he received these documents in 2008, he was handling several other investigations, and that this case "just fell through the cracks."
18. Craven County Sheriff's Office Deputy Jason Buck ("Deputy Buck"), Deputy Scott Gaskins ("Deputy Gaskins"), and Deputy Bradley Tabor ("Deputy Tabor") completed three separate narrative reports for the incident. Each testified at the administrative hearing generally in accord with his respective written report. (Respondent's exhibit 6-8) Although there are some discrepancies between the reports and the officer's testimonies, the deputies are found to be credible.
19. According to Deputy Buck's testimony, he responded to a call for a domestic assault on November 30, 2008. The call indicated that there was a screwdriver was involved. It took Deputy Buck approximately ten minutes to respond to the call. On arriving on the scene, he and Deputy Tabor spoke with Petitioner's wife Ms. Hardy, who had a swollen cut lip and a cut on the top of her right hand. Ms. Hardy stated that Petitioner had started drinking heavily and that he was intoxicated. Ms. Hardy indicated that Petitioner was next door at their residence. As Deputy Buck and Deputy Tabor walked next door to find Petitioner and before they could knock on his front door, Petitioner started yelling profanities across the front yard at the officers. Immediately Deputy Buck told Petitioner that he was under arrest, to which Petitioner responded with more profanity. Deputy Buck repeated the

command that Petitioner was under arrest and for Petitioner to put his hands behind his back. Deputy Buck and Deputy Tabor continued to yell loud verbal commands to Petitioner, telling him that he was under arrest for domestic assault and telling him to put his hands behind his back. Petitioner put his hands behind his head, not behind his back. Deputy Buck and Deputy Tabor were dressed in their uniforms, and their service weapons on their persons.

20. While Deputy Buck and Deputy Tabor were continuing to give loud verbal commands to Petitioner, Deputy Gaskins arrived and approached Petitioner from behind. When Deputy Buck told Petitioner to put his hands behind his back, Petitioner placed his hands behind his head. Deputy Gaskins walked behind Petitioner and attempted to handcuff him. The officers generally agree that Petitioner did not know Deputy Gaskins was behind him and that he was startled when Deputy Gaskins grabbed his wrist. Petitioner turned abruptly and in doing so bumped Deputy Gaskins, pushing him away. Petitioner did not put his hands on Deputy Gaskins to push him in any regard. Deputy Gaskins was also in his uniform and had his service weapon on his person when he approached and interacted with Petitioner.
21. Deputy Buck deployed his Taser which struck Petitioner on his shirt in the center of his chest. Petitioner bent over, then stated “this ain’t shit” and pulled the probes from his body.
22. Deputy Buck grabbed Petitioner and started leaning him towards the ground when Deputy Gaskins stated that he was going to deploy his Taser. Deputy Buck stepped away from Petitioner to avoid the Taser, and Deputy Gaskins deployed his Taser and struck Petitioner on his chest. Petitioner bent over and stated again “this ain’t shit,” and broke off the probes.
23. Deputy Buck extended his ASP baton and struck Petitioner three times on his right leg while giving him verbal commands to stop resisting and to put his hands behind his back. Deputy Gaskins also extended his ASP Baton and struck Petitioner on his left leg. Petitioner’s knees buckled and he fell to the ground. Deputy Buck placed handcuffs on Petitioner. Deputy Gaskins removed the Taser probes from Petitioner’s stomach.
24. Deputy Gaskins and Deputy Tabor picked up Petitioner and walked him to Deputy Buck’s patrol vehicle. Petitioner refused to enter the vehicle and told the officers to “give me some names and I’ll get in your vehicle.” The deputies were able to force Petitioner into the patrol vehicle. Deputy Buck testified that he was on the scene approximately twenty to thirty minutes.
25. Deputy Buck transported Petitioner to the Craven County jail. Petitioner vomited in the back seat of Deputy Buck’s patrol vehicle while he was being transported. Deputy Buck asked whether he was okay, and Petitioner stated “I work for the Department of Corrections, I’m not worried.”
26. On the date of this administrative hearing Petitioner had been employed by the Department of Correction for one day short of exactly eight years. Petitioner testified that he has had a good career with the Department of Corrections and he had been promoted to sergeant

since the date of the incident at issue herein. Petitioner contends that what happened one night four years ago should not cause him to lose his 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 09G, 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(9)(cc) 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:

(cc) 14-223 Resisting officers

5. N.C.G.S. §14-223 (2011) states: If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.
6. 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

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). Respondent has the burden of proof in the case at bar.
8. Respondent has shown by a preponderance of the evidence that Petitioner committed the offense of resist, delay, and obstruct law enforcement officers on November 30, 2008.
9. Although Mr. Lamm stated in his December 30, 2008, memo that he had “lost faith in [Petitioner’s] ability to properly perform his duties as a Correctional Officer and in two separate memos dated May 21, 2009 that he was going to seek dismissal of Petitioner through the chain of command, nevertheless Respondent did not dismiss Petitioner. In fact, Respondent promoted Petitioner to sergeant since all of the events at issue took place.
10. The fact that it took almost four years to bring this case forward worked in Petitioner’s benefit. In light of the Petitioner’s continued valuable service to Respondent, sufficient enough for a promotion, it would be a grave miscarriage of justice to revoke his certification at this point. Had the process was started in a more timely fashion, then the outcome may have been different. The Petitioner’s interaction with the deputies cannot be totally ignored simply because of the passage of time. The passage of time merely mitigates in his favor.

PROPOSAL FOR DECISION

NOW, THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned recommends Respondent Commission impose a suspension for thirty days but that his suspension is stayed for three years and Petitioner is placed on probationary status for a period of three years. The Undersigned also recommends thirty days without pay.

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 19th day of November, 2012.

Donald W. Overby
Administrative Law Judge