

STATE OF NORTH CAROLINA
COUNTY OF HALIFAX

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DOJ 8008

SHANNON PENDERGRASS,

Petitioner,

v.

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

Respondent.

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PROPOSAL FOR DECISION

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, in Northampton County, North Carolina. This case was heard 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.

The record was left open for the parties' submission of further materials, including but not limited to supporting briefs, memorandums of law and proposals.

Respondent made a Motion to Strike after Petitioner provided letters of recommendation following the above hearing. The Undersigned considered arguments from Respondent as well as the applicable statutes and rules followed by the Office of Administrative Hearings regarding admission of evidence. Taking into account the fact that Petitioner is *pro se*, the Undersigned did not admit the letters for purposes of the hearing but is including them in the record as offers of proof to be reviewed by the Commission with both Respondent and Petitioner present.

The Respondent submitted proposals and argument on September 30, 2013 which was received by the Undersigned on October 7, 2013. The record was held open for two weeks for submission by Petitioner in light of the ruling in response to Respondent's Motion to Strike. Receiving no further proposal or other materials from Petitioner by October 21, 2013, the record was closed on October 22, 2013.

APPEARANCES

Petitioner: Shannon Pendergrass
203 Oak Drive
Murfreesboro, NC 27855

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

ISSUE

Does substantial evidence exist to deny Petitioner's correctional officer certification?

RULES AT ISSUE

12 NCAC 09G.0504(b)(2); 12 NCAC 09G.0206; 12 NCAC 09G.0505(c)(2)

EXHIBITS

Respondent's Exhibits 1-6 were introduced and admitted.

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 by a preponderance of the evidence. In making these 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 witnesses, 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 this case.

FINDINGS OF FACT

1. Both parties received Notice of Hearing, and Petitioner received the notification of Probable Cause to Deny Law Enforcement Officer Certification letter mailed by the Respondent on July 20, 2012.

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. 12 NCAC 09G.0504(b)(2) provides the Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a correctional 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 Section 200 of 12 NCAC 09G.
4. Respondent cites 12 NCAC 09G.0206 out of Section 200 as its cause for the proposed denial of correctional officer certification.
5. 12 NCAC 09G.0505(c)(2) provides 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... continues to exist, where the cause of sanction is (2) failure to meet or maintain the minimum standards for certification.
6. Petitioner applied for certification as a full time correctional officer with the North Carolina Department of Corrections on December 8, 2011.
7. 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 November 9, 2011.
8. On the Form F-5A(DOC), Petitioner indicated on Question number 6 that he had been charged with indecent liberties with a student on June 26, 2003 and pled guilty to the reduced charge of assault on a female on January 7, 2004.
9. Edward Zapolsky, an investigator with Respondent gathered documents surrounding Petitioner's charge and conviction. The documents included an incident report from Major D. Harmon with the Northampton County Sheriff's office, and a written statement from the victim Shavonda Shearin. These documents were presented in the case against Petitioner to the Probable Cause Committee of the North Carolina Criminal Justice Education and Training Standards Commission on May 23, 2012. The Probable Cause Committee found probable cause to believe that the Petitioner lacks the good moral character required of all correctional officers. The Petitioner was notified of the findings of the Probable Cause Committee via a certified letter sent to him on July 20, 2012.
10. Shavonda Shearin grew up in Northampton County attending East Northampton County high school from 2001 until graduating in 2005. She played basketball and volleyball

and knew Petitioner because he taught a computer class and helped coach football at her high school. On June 25, 2003, Shavonda, a 16 year old rising 11th grader was at her home in the evening when Petitioner arrived at her door. Petitioner had been drinking and was upset because he had failed the state teachers' exam. Petitioner asked Shavonda to get into his car and she complied.

11. Shavonda Shearin testified that while inside Petitioner's car they spoke about school and sports and then Petitioner began to feel her breasts. She told him several times to stop, but Petitioner continued to fondle her breasts. She further testified that Petitioner asked her "what would you do if I drove off with you?" She told him she would jump out of the car. Ms. Shearin testified that when Petitioner stuck his hand down the front of her pants touching the top of her private area, she told him to stop. Petitioner denied that these series of events took place.
12. Ms. Shearin got out of Petitioner's car and he drove away. Shavonda went inside her home and eventually told her mother, Sandra Shearin, what had happened while she was in Petitioner's vehicle.
13. Sandra Shearin called law enforcement to report a sexual assault. Major Daryl Harmon responded and recorded statements from Shavonda and Sandra Shearin. He then interviewed Petitioner who admitted being at the Shearin residence on June 25, 2003, claiming he and Shavonda were just talking in his car. Petitioner also admitted he had been drinking alcohol prior to going to Shavonda's home. Based on the investigation, Major Harmon secured a warrant against Petitioner for the felonious charge of indecent liberties with a student. Petitioner pled guilty to the misdemeanor charge of assault on a female on January 7, 2004.
14. Sandra Shearin was displeased that Petitioner was allowed to plead guilty to a misdemeanor offense without the consent of the Shearin family. Sandra was a detention officer in the Northampton County Jail for three and a half years. Sandra testified that she told the District Attorney that she did not want to see Petitioner go to jail because it went no further. She does not, however, believe Petitioner should be able to be a correctional officer because he took advantage of her daughter.
15. Petitioner testified he did not do anything wrong and the only reason he pled guilty to the assault on a female charge was because his attorney led him to believe that a plea was the only way out. He admitted he should not have been at Shavonda's home on the evening of June 25, 2003. Although he no longer teaches students, Petitioner continues to coach youth football in Halifax County.
16. Sandra, Shavonda and Major Harmon testified they have no knowledge of Petitioner's activity for the past ten years since the assault occurred.
17. Petitioner has a Bachelor of Science degree from Elizabeth City State University. He taught from 1994 to 2003. From 2003 to 2009 in worked in the mental health field with

at risk youth, including both male and female. The Petitioner testified that he has spoken in several schools in 2010 and 2011 in a Reaching Forward program as part of his work with youth and positive actions. His work ended in the program due to loss of funding. Besides continuing to coach football, Petitioner stated that he serves as a basketball referee in middle schools. Petitioner stated that he never missed work and he believed that he was a good officer.

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 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.
3. Respondent may properly suspend the Petitioner's certification pursuant to 12 NCAC 09G.0504(b)(2) for the failure to meet or maintain the required employment standard of demonstrating good moral character required by Section 200 of 12 NCAC 09G.
4. Respondent cites 12 NCAC 09G.0206 as its cause for the proposed denial of correctional officer certification. 12 NCAC 09G.0206 provides the following:

12 NCAC 09G .0206 MORAL CHARACTER

Every person employed as a correctional officer, probation/parole officer, or probation/parole officer-intermediate by the Department of Public Safety, Division of Adult Correction shall demonstrate good moral character as evidenced by, but not limited to:

- (1) not having been convicted of a felony;
- (2) not having been convicted of a misdemeanor as defined in 12 NCAC 09G .0102(9) for three years or the completion of any corrections supervision imposed by the courts whichever is later;
- (3) not having been convicted of an offense that, under 18 USC 922, (<http://codes.lp.findlaw.com/uscode/18/I/44/922>) would prohibit the possession of a firearm or ammunition;

- (4) having submitted to and produced a negative result on a drug test within 60 days of employment or any in-service drug screening required by the Department of Public Safety, Division of Adult Correction which meets the certification standards of the Department of Health and Human Services for Federal Workplace Drug Testing Programs. A list of certified drug testing labs may be obtained from National Institute on Drug Abuse, 5600 Fisher Lane, Rockville, Maryland 20857 at no cost, (http://workplace.samhsa.gov/DrugTesting/Level_1_Pages/CertifiedLabs.html) to detect the illegal use of at least cannabis, cocaine, phencyclidine (PCP), opiates and amphetamines or their metabolites;
- (5) submitting to a background investigation consisting of:
- (a) verification of age;
 - (b) verification of education; and
 - (c) criminal history check of local, state, and national files; and
- (6) being truthful in providing all required information as prescribed by the application process.
5. Though charged with an alleged felonious taking of indecent liberties with Ms. Shearin, Respondent's evidence shows that Petitioner was convicted of a misdemeanor assault on a female on January 7, 2004. Respondent's evidence further shows that Petitioner was "placed on 24 months unsupervised probation, paid a fine of \$250.00 costs \$246.00 and restitution \$200.00." (R. Ex. 1)
6. 12 NCAC 09G.0206 provides for good moral character by "not having been convicted of a misdemeanor as defined in 12 NCAC 09G .0102(9) for three years or the completion of any corrections supervision imposed by the courts whichever is later." Petitioner was convicted in January of 2004 and completed supervision in 2006, which is beyond the three years referred to in Respondent's rule.
7. The Petitioner has the burden of proof, by a preponderance of evidence to show that Petitioner is of good moral character. "The initial burden of showing good character rests with the applicant. If the Board relies on specific acts of misconduct to rebut this *prima facie* showing, and such acts are denied by the applicant, then the Board must establish the specific acts by the greater weight of the evidence. *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989).
8. The term 'good moral character' is unusually ambiguous and it can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences and prejudices of the definer. *See id.* at 776 (citing *Konigsberg v. State Bar of California*, 353 U.S. 252, 262-63 (1957)).
9. In the case of *In re Dillingham*, 124 S.E. 130, 131 (N.C. 1924), the applicant admitted that one year prior to his application to North Carolina Bar he had broken the law including, obtaining goods by false pretense, larceny, forgery, conspiracy, extortion and others; all involving moral turpitude. In denying the applicant's application, the *Dillingham* Court noted that, "[W]hen one seeks to establish restoration of a character which has been

deservedly forfeited, the question becomes essentially one ‘of time and growth.’” See *Willis*, 215 S.E.2d at 778 (citing *Dillingham*, 124 S.E. at 132); see also *In re Applicants for License*, 131 S.E. 661, 663 (N.C. 1926) (reaffirming that a man’s character can be restored where there is a showing of time and growth); but see *In re Legg*, 386 S.E.2d 174, 183 (N.C. 1989) (denying applicants application to the North Carolina Bar because evidence showed a “*systematic pattern* of carelessness, neglect, inattention to detail and lack of candor”) (emphasis added).

10. Pursuant to Respondent’s standard, as set forth in 12 NCAC 09G.0206, the time has passed on reliance of Petitioner’s conviction. Moreover, the Undersigned is not in a position and the evidence at hearing would not allow a reversal of North Carolina judicial court ruling. Further, the evidence shows that what occurred nearly 10 years ago was an isolated incident for which time and growth have allowed Petitioner’s character to be restored as no further incidents have occurred against Petitioner, per *In re Willis*, supra. Respondent has not shown a systematic pattern of bad acts by the Petitioner, as set forth in *In re Legg*, supra, nor were any alleged.
11. Probable cause does not exist to show Petitioner lacks good moral character as defined by the Respondent.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

PROPOSAL FOR DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based on those conclusions and the facts in this case, Respondent’s determination that probable cause existed that Petitioner failed to meet or maintain the minimum employment standards that every correctional officer shall demonstrate good moral character (12 NCAC 09G .0504(b)(2) and 12 NCAC 09G 0206) cannot be and is not supported by the testimony and evidence in this case. As such, Petitioner’s Appointment/Application for certification as a correctional officer should not be denied.

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.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addresses to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. It is requested that the agency furnish a copy to the Office of Administrative Hearings.

IT IS SO ORDERED.

This the 5th day of December, 2013.

Augustus B. Elkins II
Administrative Law Judge