

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DOJ 10187**

GREGORY PAUL KELLY,

Petitioner,

v.

N.C. SHERIFFS' EDUCATION AND
TRAINING STANDARDS COMMISSION,

Respondent.

PROPOSAL FOR DECISION

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, in Raleigh, 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. The Petitioner submitted proposals and argument on May 13, 2013 which was received by the Undersigned on May 20, 2013. The record was held open until August 13, 2012 for submissions by Respondent. Receiving no proposal or other materials by Respondent, the record was closed on August 13, 2013.

APPEARANCES

For Petitioner: Shea B. Maliszewski, Esq.
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For Respondent: Matthew L. Boyatt, Assistant Attorney General
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ISSUES

Whether probable cause exists to deny Petitioner's certification for a period of five years pursuant to Rule .0204 of Chapter 10B of Title 12 of the North Carolina Administrative Code,

because it is alleged that Petitioner committed a Class B misdemeanor, Assault Inflicting Serious Injury, which occurred after the date of initial certification.

Whether probable cause exists to deny Petitioner's certification indefinitely pursuant to Rule .0204 of Chapter 10B of Title 12 of the North Carolina Administrative Code, because Petitioner does not have good moral character.

EXHIBITS

Respondent's Exhibits 1-7, 9 and 10 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. Petitioner was certified with the Criminal Justice Commission through the Durham Police Department from 2005 - 2008.
2. Petitioner was working for the Durham Police Department in his official capacity as a police officer on November 1, 2007.
3. Petitioner was dispatched to a disturbance at 1601 Morehead Avenue, Durham, NC, 27701, on November 1, 2007. Upon arrival on scene and after observing several people in a physical struggle, Petitioner requested another officer (back-up) to come to the scene.
4. Petitioner was able to separate the parties and became aware that a Hispanic male, who had nunchaku (nun chucks or chain sticks), had committed the crimes of aggravated assault, larceny, and possession of drug paraphernalia. The Hispanic male was bleeding from the head upon Petitioner's arrival on scene. The Hispanic male was belligerent, acting irrational, and admitted to being under the influence of "crack", and was placed under arrest and handcuffed behind his back.

5. The actual identity of the Hispanic male, who is the subject of the arrest and alleged assault, has never been verified. Because he remained belligerent, Petitioner's supervisor could not interview the suspect. Moreover, once at the jail, the suspect produced a different identification with a different name, and the magistrate informed the officers that since the warrant had the wrong name, the suspect had to be released. No one has been able to locate the Hispanic male again.

6. Three Emergency Medical Services (EMS) persons were called to the scene to treat the Hispanic Male. They included Matthew Baker, Grant Newport, and Elizabeth Aronin.

7. All three EMS personnel began to observe and treat the Hispanic Male. At this time, Petitioner had a hold of the Hispanic Male's arm while EMS Grant Newport and Elizabeth Aronin were beginning to treat the head wound from behind the Hispanic male. Without provocation, the Hispanic male became violent towards Grant Newport and Elizabeth Aronin, and attempted to assault them by head-butting them and hitting them with his shoulder. As the Hispanic male attempted to assault the EMS workers, he wrestled himself out of the grasp of the Petitioner.

8. EMS Grant Newport and Elizabeth Aronin were so frightened that each of them ran away from the Hispanic male and back to the ambulance.

9. The Hispanic male then took up a fighting stance and squared up with the Petitioner. At this time, EMS Baker felt that the Hispanic Male "needed to be taken down", and even considered going "hands-on" with the Hispanic male himself.

10. Almost immediately, Petitioner perceiving a threat against himself and the EMS workers, hit the Hispanic male with a punch to the face. Though staggering, the Hispanic male was not down so Petitioner kicked him forcing the Hispanic male to fall on to the ground, which was a concrete sidewalk, and land on his stomach and face.

11. Petitioner immediately got on top of the Hispanic male and laid on him to insure that he stayed down. Petitioner called for a supervisor to come to the scene. At this time, Petitioner was still the only police officer on scene.

12. The Petitioner swore under oath that he did not throw nor land any more punches when the Hispanic male was on the ground.

13. EMS Baker is the only party who has alleged that after the Hispanic male was on the ground that Petitioner then straddled the Hispanic male and punched him at least ten times in the face.

14. EMS Baker did not write down or otherwise record the events that occurred on November 1, 2007.

15. EMS Baker admitted that he may have “mis-remembered” some of the events of November 1, 2007.

16. Respondent presented no visual evidence of the Hispanic male’s injuries at the hearing.

17. Other than bleeding from the nose and mouth, there was no medical evidence of injuries by a licensed medical doctor. Respondent presented no medical evidence by a doctor diagnosing the Hispanic male with fractures of any kind at the hearing.

18. Sergeant Scott Pennica of the Durham Police Department performed an internal affairs investigation into the events of November 1, 2007. Sergeant Pennica concluded that the Petitioner punched the Hispanic male in the face and then kicked the Hispanic Male in the face, while he was in handcuffs.

19. Sergeant Scott Pennica only found one person alleging the Petitioner punched the Hispanic male after he was on the ground, that person was EMS Baker. Sergeant Pennica did not conclude that Petitioner punched the Hispanic male in the face after the Hispanic Male fell to the ground.

20. Petitioner has been taught not to become complacent with individuals in handcuffs. He and other officers have been attacked by persons who were handcuffed. Petitioner has admitted that his kick to the face of the Hispanic male was excessive. Petitioner has no criminal history, and has never been charged with a crime in connection with the events of November 1, 2007.

21. Other than the events which occurred on November 1, 2007, Respondent did not offer any other evidence suggesting Petitioner lacks good moral character.

22. Deputy Director of the North Carolina Sheriffs’ Education and Training Standards Commission, Diane Konopka, admitted the Respondent’s finding of probable cause to believe that Petitioner does not possess the good moral character to become a Justice Officer is solely based on the events surrounding November 1, 2007.

23. Petitioner has been employed with the Durham County Sheriff’s Office for the past two years, working as a detention officer in the jail. Petitioner, as a detention officer, works almost exclusively with prisoners in handcuffs and has never had a single complaint of use of excessive force.

24. Durham County Staff Sergeant Justin Ellerbee has worked with, supervised, and observed Petitioner for the past two years. Staff Sergeant Ellerbee has had many instances where “hands-on” physical force was needed to subdue unruly prisoners in and out of handcuffs. Staff Sergeant Ellerbee admitted that Petitioner is the first officer he seeks out to help because of Petitioner’s self-control under such stressful situations. Staff Sergeant Ellerbee has found Petitioner to be of excellent moral character and honest.

25. Petitioner's former colleague and friend, Angela Kelley, admitted that she has known Petitioner since 2008, in a professional and friendly manner. Angela Kelley testified that she observed Petitioner in high stress situations and found Petitioner to be under control and of excellent moral character and truthful.

26. Petitioner has been a member, in good standing and without incident, of the Armed Forces since 2002, and has served his country overseas, and is a current member of the National Guard.

27. Since the events of November 1, 2007, Petitioner has shown that he possesses good moral character by maintaining a good standing in the Armed Forces, by maintaining employment with the Durham County Sheriff's Office as a correction officer and without incidents, and by being truthful and forthright in his application for certification by the NC Sheriffs' Education and Training Standards Commission, and by being truthful in his applications for law enforcement employment at other agencies.

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 certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. A court need not make findings as to every fact, which arises from the evidence, and need only find those facts that are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

2. Pursuant to 12 NCAC 10B .0204(d)(1), the Commission may revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed a crime or unlawful act defined in 12 NCAC 10B. 0103(10)(b) as Class B Misdemeanor and which occurred after the day of initial certification.

3. Petitioner was neither convicted of assault inflicting serious injury in a court of law nor was he otherwise found civilly liable for such in a court of law.

4. To find that Petitioner “committed” the offense of assault inflicting serious injury Petitioner must have “performed the acts necessary to satisfy the elements of a specified criminal offense.” *Britt v. Commission*, 348 N.C. 573, 501 S.E2d 75 (1998)

5. The North Carolina Supreme Court “generally defines the common law offense of assault as ‘an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.’” The common law rule regarding assault followed by the North Carolina courts places “emphasis on the intent or state of mind of the person accused.” *State v. Roberts*, 270 N.C. 655, 155 S.E.2d 303 (1967)

6. In this case, the preponderance of the evidence does not show that willful and calculated intent by Petitioner required of assault. Given the situation that Petitioner was in, his excess force was immediate and done in part to protect others, though it did reveal a lack of professional judgment. However, the evidence in this case cannot and does not support a finding that Petitioner committed the Class B Misdemeanor offense of Assault Inflicting Serious Injury.

7. In licensing those who desire to engage in professions or occupations as may be proper subjects of such regulation, the Legislature may confer upon executive officers or bodies of power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. See *In re Willis*, 215 S.E.2d 771, 779 (N.C. 1975) (quoting *State v. Harris*, 6 S.E.2d 854, 860 (N.C. 1940).

8. The Petitioner has the burden of proof, by a preponderance of evidence to show that Petitioner is of good moral character, as described in 12 NCAC 10B .0301(a)(8), which states: “Every Justice Officer employed or certified in North Carolina must . . . be of good moral character as defined in: *In re Willis*, 299 N.C. 1, 215 S.E.2d 771 appeal dismissed 423 U.S. 976 (1975) ;*State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989); *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); and their progeny”.

9. “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).

10. 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)).

11. 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).

12. "When the defendant in his sentencing hearing produces evidence of his good character in order to take advantage of that particular mitigating circumstance . . . character is 'a direct issue in the case' and thus not limited to the traditional methods of proof but may be proved by specific acts as well as by reputation and by the opinions of others." *State v. Benbow*, 308 S.E.2d 647, 652-53 (N.C. 1983).

13. Pursuant to *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989), Petitioner has shown by a preponderance of evidence that he possesses good moral character by introducing evidence of Petitioner's good moral character by way of Petitioner's own admission of the events of November 1, 2007, his good standing in the Armed Forces, and his good standing at the Durham County Sheriff's Office for the past two years; as well as the testimony of Petitioner's honesty and good moral character by Durham County Staff Sergeant Justin Ellerby, and Angela Kelley's testimony concerning Petitioner's good moral character, and Petitioner's candor in his application with Respondent and several other law enforcement agencies regarding the events of November 1, 2007.

14. Pursuant to Respondent's standard, as set forth in 12 NCAC 10B .0301(a)(8), which states: "Every Justice Officer employed or certified in North Carolina must . . . be of good moral character as defined in: *In re Willis*, 299 N.C. 1, 215 S.E.2d 771 appeal dismissed 423 U.S. 976 (1975) ;*State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989); *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); and their progeny", Petitioner has shown that what occurred nearly six years ago was an isolated incident for which time and growth have allowed Petitioner's character to be restored, as established in *In re Willis*, supra. Petitioner offered evidence of his employment in situations involving prisoners in handcuffs and acting unruly, yet Petitioner, as testified to by Staff Sergeant Ellerby, has had no instances of misconduct as a Durham County corrections officer.

15. 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. In fact, Respondent, through Diane Konopka admitted the sole reason for finding probable cause to deny Petitioner's certification for lack of good moral character was based on the events of November 1, 2007; and nothing more.

16. Probable cause does not exist to show Petitioner lacks good moral character as defined by the Respondent.

17. Petitioner has satisfied his initial burden of showing good character, and because the Board is relying on specific acts of misconduct to rebut this *prima facie* showing, and such acts have been denied by the Petitioner, then the Board must establish the specific acts by the greater weight of the evidence.” See *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989). Respondent has failed to establish, by the greater weight of the evidence, that Petitioner currently lacks good moral character pursuant to *In re Dillingham* and *In re Willis*.

18. Moreover and in addition to the above, Respondent’s probable cause finding that there was a belief that Petitioner did not possess the good moral character required of justice officers is founded solely on the allegation that Petitioner committed the Class B Misdemeanor offense of Assault Inflicting Serious Injury. Having found that not to be the case, no other evidence was presented that would call into question Petitioner’s moral character.

19. Insufficient evidence exists to show Petitioner currently lacks the good moral character required of all justice officers. In fact, the evidence points to the fact that Petitioner is a person of good moral character. Although Petitioner’s actions were indicative of poor professional and personal judgment, they are not indicative of bad character. Petitioner was truthful and cooperative during all investigations, and is employed in good standing with the Durham County Sheriff’s Office. Petitioner has maintained his good name as a consequence. See generally *In re Farmer*, 191 N.C. 235, 130 S.E. 661 (1926). The circumstances of this hearing lead to the conclusion that the Petitioner is that type of individual suited for law enforcement.

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 committed the Class B Misdemeanor offense of Assault Inflicting Serious Injury and/or that Petitioner lacked the moral character required of justice officers cannot be and is not supported by the testimony and evidence in this case. As such, Petitioner Gregory Paul Kelly’s detention officer certification through the Durham County Sheriff’s Office should be granted.

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 Sheriffs' 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 is the 23rd day of September, 2013.

Augustus B. Elkins II
Administrative Law Judge