

STATE OF NORTH CAROLINA
COUNTY OF RICHMOND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DOJ10199

<p>TIMOTHY ALLEN BRUTON Petitioner,</p> <p>v.</p> <p>NC CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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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 J. Randall May heard this contested case in High Point, North Carolina on March 28, 2013.

APPEARANCES

Petitioner: Michael Harmon, Attorney at Law
The Angel Law Firm, PLLC
109 Church Street North
Concord, NC 28025

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

ISSUE

Whether Respondent's proposed suspension of Petitioners Correction Officer Certification was supported by substantial evidence.

RULES AT ISSUE

12 NCAC 09G.0504(b)(3)
12 NCAC 09G.0102(9)(bb)
12 NCAC 09G.0102(2)
12 NCAC 09G.0505(b)(1)

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, or the lack thereof, 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. Petitioner, Timothy Allen Bruton, holds correctional officer certification with Respondent, North Carolina Criminal Justice Education Training and Standards Commission. He had held this certification continually since February 2006.
2. On or about July 3, 2012, Petitioner was notified that the Commission found probable cause exists to believe his correctional officer certification should be suspended.
3. Petitioner timely requested an administrative hearing, and the Commission thereafter requested the assignment of an administrative law judge to hear the contested case.
4. The Office of Administrative Hearings has jurisdiction over the subject matter and over both parties in this case, and venue is proper. Petitioner received the Proposed Suspension of Correctional Officer Certification letter mailed by the Respondent on July 3, 2012.
5. 12 NCAC 09G.0504(b)(3) 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 committed or has been convicted of a misdemeanor, as defined in 12 NCAC 09G. 0102 after certification.
6. 12 NCAC 09G.0505(b)(1) 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 the commission or conviction of a misdemeanor as defined in 12 NCAC 09G. 0102.
7. On or about October 10, 2009, Petitioner was charged in Hoke County, N.C. with solicitation of prostitution in violation of N.C.G.S. § 14-204(5). On or about February 11, 2011, a Hoke County Assistant District Attorney served Petitioner with an additional

charge of solicitation of prostitution and a charge of entering or remaining in a place for prostitution in violation of N.C.G.S. § 14-204(6), by a misdemeanor statement of charges. The case came on for trial in Hoke County District Court on or about May 25, 2011. The state dismissed one count of solicitation of prostitution, but proceeded on the other charges of solicitation of prostitution and entering or remaining in a place for prostitution. Petitioner pled not guilty to all charges and was represented by retained attorney, Debbie Baker. Petitioner was found not guilty of the solicitation of prostitution charge, but was convicted of the charge of entering or remaining in a place for prostitution by the Honorable William McIlwain, District Court Judge presiding. Petitioner therefore stands convicted of the offense in questions and does not contest this fact.

8. As defined in 12 NCAC 09G .0102(9)(bb), the offense of entering or remaining in a place for prostitution in violation of N.C.G.S. § 14-204 is a Department of Correction misdemeanor.
9. As defined in 12 NCAC 09G .0102(2)(b), “Convicted” or “Conviction” means and includes the entry of: . . . (b) a verdict or finding of guilty by a jury, judge, magistrate, or other duly constituted, established adjudicating body, tribunal, or official, either civilian or military.
10. Because Petitioner was convicted of a Department of Correction misdemeanor after the date of his appointment to a corrections officer, his certification is subject to suspension for a period of not less than 3 years pursuant to 12 NCA NCAC 09G.0504(b)(3) and 12 NCAC 09G.0505(b)(1).
11. Petitioner testified at the hearing that on October 10, 2009, he and his wife were attending a “swingers’ party”. They each paid forty (40) dollars to attend. According to Petitioner, this money was to pay for the DJ and snacks. Petitioner and his wife had sex in a bedroom and were enjoying the party when a shooting occurred. The police were called who investigated the scene and charged many attendants of the party with Prostitution and Solicitation of Prostitution. Petitioner admits being convicted in Hoke County District Court to the offense of entering or remaining in a place for prostitution. He did not appeal the conviction to Superior Court and the conviction in District Court still stands.
12. At this hearing, Petitioner did not contest his May 25, 2011 conviction of the offense of entering or remaining in a place for Prostitution.

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. Both parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. 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, 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 certifications.
3. Pursuant to 12 NCAC 09G.0504(b)(3), 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 committed or been convicted of a misdemeanor, as defined in 12 NCAC 09G. 0102 after certification.
4. Pursuant to 12 NCAC 09G. 0505(b)(1), 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 the commission or conviction of a misdemeanor as defined in 12 NCAC 09G. 0102.
5. Pursuant to N.C.G.S. § 14-204 and 12 NCAC 09G .0102(9)(bb), the crime of entering or remaining in a place of prostitution constitutes a DOC misdemeanor. Respondent has met its burden of proving Petitioner was convicted of a DOC misdemeanor offense while holding certification as a correctional officer
6. The North Carolina Administrative Code, at 12 NCAC 09G .0102(9)(bb), lists the misdemeanor as N.C.G.S. § 14-204 Prostitution (14-207; 14-208). N. C. G. S. § 14-204 has seven (7) subsections and states, "It shall be unlawful:
 - (1) To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignation.
 - (2) To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignation; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.
 - (3) To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignation, or to permit any person to remain there for such purpose.
 - (4) To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge

or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution or assignation.

(5) To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation.

(6) To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution or assignation.

(7) To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever.”

7. Petitioner argued that because 12 NCAC 09G.0102(9) (bb) does not include a subsection of N.C.G.S. § 14-204, Petitioner’s conviction under § 14-204(6) cannot be a Department of Correction misdemeanor. This argument must fail for although, 12 NCAC 09G .0102(9)(bb) does not list each subsection of § 14-204 individually, it is implied that the rule includes each and every subsection. Other portions of 12 NCAC 09G.0102(9) provide subsections as a part of the definition (See 12 NCAC09G.0102(9)(c), 12 NCAC09G.0102(9)(f), and 12 NCAC09G.0102(9)(i)). While Respondent chose to expressly state subsections for certain misdemeanors, it did not do so under NCAC 09G .0102(9)(bb). Upon reviewing the canons of statutory construction and in contrast to *eiusdem generis*, the maxim *expressio unius est exclusio alterius*: the expression of one thing is the exclusion of another, is applicable here. (See State v. Dewalt, 209 N.C. App. 187). Respondents express listing of specific statutory subsections in some rules but failure to do so under 12 NCAC 09G.0102(9) (bb) is purposeful. Respondent’s intent is to have the commission or conviction of any and all subsections of N.C.G.S. § 14-204 potentially subject a Correctional Officer to sanction of his/her certification.
8. A preponderance of the evidence exists to support the conclusion that Petitioner has committed a sanctionable act by being convicted of a Department of Corrections misdemeanor.
9. 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.
10. The findings of the Probable Cause Committee of the Respondent are supported by substantial evidence and are not arbitrary and capricious.
11. 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).
12. Respondent 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)). Respondent has met this burden. Respondent has shown by a preponderance of the evidence that Respondent's proposed denial of Petitioner's correctional officer certification is supported by substantial evidence.

13. The Commission may suspend Petitioner's correctional officer certification for a period of not less than three years for the conviction of a misdemeanor as defined in 12 NCAC 09G. 0102.

PROPOSAL FOR DECISION

NOW, THEREFORE, 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 conviction of entering or remaining in a place for prostitution, a misdemeanor as defined in 12 NCAC 09G 0102.

NOTICE AND ORDER

The North Carolina Criminal Justice Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency 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 pursuant to N.C. Gen. Stat. § 150B-40(e).

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This the 17th day of July, 2013.

J. Randall May
Administrative Law Judge