

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13DOJ01924

<p>SCOTT DOUGLAS NEUDECKER 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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On May 30, 2013, this contested case was heard before J. Randall May, Administrative Law Judge, in the High Point Courthouse, Guilford County, North Carolina. Without objection, 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: William L. Hill, Attorney at Law
Respondent: Lauren Talley Earnhardt, Assistant Attorney General

ISSUES

Given the totality of the circumstances, does substantial evidence exist to deny Petitioner's application for certification as a law enforcement officer?

EXHIBITS ADMITTED

1. Deposition of Steven Walton.
2. Statement of Non-Tobacco Use Form signed by Petitioner.
3. Probable Cause Committee Memorandum and Attachments.
4. Denial of Certification Letter.
5. Letters from Diane Konopka to Sheriff B. J. Barnes regarding Probable Cause Hearing.
6. Letter from Shena Evans to Sheriff B. J. Barnes regarding finding of no probable

cause.

STIPULATIONS

1. Petitioner Scott Neudecker was appointed as a Deputy with the Guilford County Sheriff's Office and was certified as such with the North Carolina Sheriffs Education and Training Standards Commission.

2. On December 13, 2011, the North Carolina Sheriffs Education and Training Standards Commission notified Guilford County Sheriff B. J. Barnes that the Probable Cause Committee of the Sheriffs Standards Commission had met and found that no probable cause existed to believe that Petitioner was disqualified for certification.

3. On or about December 7, 2012, Petitioner was notified that his application for certification as a law enforcement officer was denied by the North Carolina Department of Justice, Criminal Justice Standards Division, because the Commission's Probable Cause Committee found that probable cause existed to believe that Petitioner committed the felony offense of attempt to obtain property by false pretense.

4. Petitioner timely requested an Administrative Hearing, and the Commission thereafter requested the assignment of an Administrative Law Judge to hear the contested case.

5. The Office of Administrative Hearings has jurisdiction over the subject matter and over both parties in this case, and venue is proper.

6. When the Commission revokes or denies the certification of a criminal justice officer, the period of the sanction shall be permanent for a felony offense. 12 N.C.A.C. 09A .0205.

7. At the Hearing in this matter, Petitioner and Respondent may present such evidence as may be admissible and relevant to the issues in the contested case. 26 N.C.A.C. 03 .0122(1).

8. Additionally, the parties stipulate to the following circumstances relevant to the denial of Petitioner's application for certification as a law enforcement officer:

- a. Petitioner began his employment at the Guilford County Sheriff's Office in 2011.
- b. On July 19, 2011, Petitioner signed a Statement of Non-Tobacco Use form. The form states that the individual signing the form is not currently using tobacco products of any form, has not used any tobacco products within 90 days of making the selection, and will not use tobacco products during 2011.
- c. Petitioner was using tobacco products at the time he signed the Statement of Non-Tobacco Use form.
- d. On August 1, 2011, Petitioner's employment with the Guilford County Sheriff's

Office was terminated.

- e. On December 13, 2011, the North Carolina Sheriffs Education and Training Standards Commission notified Guilford County Sheriff B. J. Barnes that the Probable Cause Committee of the Sheriffs Standards Commission had met and found that no probable cause existed to believe that Petitioner was disqualified for certification.
- f. On December 7, 2012, the North Carolina Department of Justice, Criminal Justice Standards Division, notified Petitioner that his application for certification as a law enforcement officer was denied as the Probable Cause Committee found that probable cause existed to believe that Petitioner committed the felony offense of attempt to obtain property by false pretense.
- g. Petitioner has not been charged with, or convicted of, the felony offense of attempt to obtain property by false pretense, nor has Petitioner been charged with or committed any other criminal offense.
- h. Based upon the foregoing stipulations, the admitted documentary evidence, the testimony of witnesses, including the determination of witness credibility, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner was appointed on December 17, 2007 as a full time deputy with the Guilford County Sheriff's Office. He separated from this position on January 28, 2008. On July 19, 2010, he was certified with the Guilford County Sheriff's office.

2. On July 19, 2011, Petitioner, along with two other Guilford County Sheriff's Deputies, Daniel Hendrix and Stephen Walton, attended an information session for new County employees. The three Deputies were given a Statement of Non-Tobacco Use form by Sonja Thomas, an employee with the Human Resources Department of Guilford County. The Statement of Non-Tobacco Use form offered a ten dollar bi-weekly discount off of the employees' 2011 Guilford County health insurance plan premium if the employee was not currently using tobacco products of any form; had not used any tobacco products within 90 days of making the selection; and if the employee agreed to not use tobacco products during 2011. Petitioner and Deputies Walton and Hendricks all signed the Statement of Non-Tobacco Use forms on July 19, 2011.

3. Ms. Thomas testified there was some discussion around the form during the July 19, 2011 class. She was asked by one of the new hires whether Guilford County tests for tobacco use. Ms. Thomas answered that Guilford County does not currently test for tobacco use but could start testing at any time. She was also asked by a new hire if you quit using tobacco products, can you sign the form at a later date. Ms. Thomas explained that if a new hire quits using tobacco, and does not use it for 90 days preceding the open enrollment period in October, he or she can then sign the "Non-Tobacco Use Form" during the October 2011 open enrollment

period, and will get the reduced health premium starting the following year. It was this parole evidence that apparently led to the confusion as to the execution of the form.

4. When Ms. Thomas finished her portion of the presentation, none of the new hires had signed the “Non-Tobacco Use Form”. Another co-worker continued teaching the new hires about Guilford County Policy and gathered all completed forms. Later in the day, Ms. Thomas realized Petitioner had signed his “Non-Tobacco Use Form”. Based on the questions during the presentation, Ms. Thomas brought this to the attention of her manager, who then notified the Guilford County Sheriff’s office.

5. An internal investigation by the Sheriff’s Office was initiated when Guilford County Human Resource employees Sonja Thomas and Brenda Keplinger informed the Sheriff’s Office that they believed the Deputies were currently using tobacco products and were not in compliance with the Statement of Non-Tobacco Use form. Following the investigation, Petitioner’s employment with the Guilford County Sheriff’s Office was terminated on August 12, 2011.

6. The North Carolina Sheriffs Education and Training Standards Commission reviewed the report of separation regarding Petitioner and found that **no probable cause** existed to believe that Petitioner was disqualified for certification with the Sheriffs’ Standards Commission. The Sheriffs’ Commission did so in December 2011.

7. Respondent received a Report of Appointment/Application for Certification Law Enforcement Officer Form F-5A, from Gibsonville Police Department, on behalf of Petitioner seeking certification as a patrol officer on July 25, 2012.

8. Upon receipt of the Report for Appointment from Gibsonville Police Department, Richard Squires (hereinafter Squires), an investigator for Respondent testified he investigated why Petitioner was dismissed from Guilford County Sheriff’s office. Squires learned Petitioner was terminated from employment with Guilford County after he, during a County human resources orientation, signed a form stating he was not using tobacco products in order to receive reduced medical insurance premiums when, in fact, he was currently using tobacco. Guilford County had a policy to provide non-tobacco users a ten (10) dollar discount from their health insurance premium, taken off each pay check, twice a month.

9. In December 2012, The North Carolina Department of Justice, Criminal Justice Standards Division denied Petitioner’s application for certification as a law enforcement officer as the Probable Cause Committee for same found that **probable cause** existed to believe that Petitioner committed the felony offense of attempt to obtain property by false pretense in violation of N.C. Gen. Stat. § 14-100 and North Carolina Common Law.

10. Sonja Thomas of the Guilford County Human Resources Office testified at the Hearing on May 30, 2013 explaining the Tobacco Use policy, that there was confusion among the three Deputies regarding the language of the policy, and that it was her first time teaching this orientation class.

11. Captain Kenneth Whitesell, a Captain and veteran with the Guilford County

Sheriff's Office, testified in support of Petitioner. He testified to Petitioner's excellent character and that Petitioner, Hendricks, and Walton had all completed their Basic Law Enforcement Training and field training as volunteers. Whitesell testified that no monetary gain was made by Petitioner and further that it would take 30 years for Petitioner, Hendricks, or Walton to give back the money from serving as volunteer(s) in total discounts, if they received any tobacco waiver, which they did not. Whitesell further testified he would gladly serve as alongside Petitioner and re-hire him if he could.

12. Daniel Hendricks, who has been certified and is currently a Sheriff's Deputy with the Randolph County Sheriff's Office, testified that it was his understanding if the deputies stopped using tobacco during the time period prior to the policy coming into effect, that their signing the form was permissible, meaning if they quit within 90 days. Hendricks testified that he had decided to use his employment with the Guilford County Sheriff's Office as a reason to quit using tobacco. Hendricks further testified that he routinely answered calls with Asheboro and other agencies licensed by Criminal Justice making the different commission outcomes confusing.

13. Deputy Hendricks, Petitioner, and Ms. Thomas presented as credible witnesses.

14. As previously indicated, Squires, an Investigator with the Criminal Justice Standards Division, testified at the hearing regarding his investigation.

15. The deposition of Stephen Walton, who was unavailable to testify at the hearing due to military service, was offered as an exhibit. Walton's deposition provided testimony that he, like Hendricks and Petitioner, were under the impression it was acceptable to sign the form if he intended to quit using tobacco products. Walton was using nicotine patches upon his return from active duty in Afghanistan.

16. Petitioner testified at the hearing that he, likewise, felt it was permissible to sign the form if he intended to quit within 90 days. Further he had been assigned to the bailiff's office where tobacco was prohibited so he had to quit using tobacco.

17. None of the three received any monetary benefit, nor had the 90 day period preceding open enrollment commenced, upon their execution of the form.

BASED ON the foregoing Stipulations and Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case.

2. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Title 12 of the North Carolina Administrative Code, Chapter 9B to certify law enforcement officers and to deny, revoke or suspend such certification.

3. Pursuant to 12 N.C.A.C. 9A .0204(b), the Commission may suspend, revoke or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification has failed to meet or maintain one or more of the minimum employment standards required by 12 N.C.A.C. 9B .0101 and 12 N.C.A.C. 9B .0111 for the category of officer certification.

4. Pursuant to 12 N.C.A.C. 9B .0111(1), an applicant for certification as a law enforcement officer may not have committed or been convicted of a felony.

5. Pursuant to 12 N.C.A.C. 9A .0103(4), commission of an offense means a finding by the North Carolina Criminal Justice Education Training and Standards Commission or an administrative body that the person performed the acts necessary to satisfy the elements of a specified criminal offense.

6. Pursuant to N.C. Gen. Stat. § 14-100, the criminal offense of attempt to obtain property by false pretense constitutes a felony.

7. Pursuant to N.C. Gen. Stat. § 14-100(a), the criminal offense of obtaining property by false pretenses is defined as “when any person **knowingly and designedly** (emphasis added) by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment of event, obtain or attempt to obtain from any person within the state any money, goods, property, services, chose in action or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value.”

8. Our courts have consistently held that in statutory crimes, such as Obtaining Property by False Pretense, more is required than a reasonable belief to prove knowledge. In its attempt to define knowledge our Supreme Court has ruled that, “Knowledge connotes a more certain and definite mental attitude than reasonable belief...” *State v. Miller*, 212 N.C. 361,363 (1937).

9. In the case *sub judice*, it is suggested that the Commission should consider two primary components, *inter alia*, which are discussed as follows:

- a. First, is the act of the former Guilford County deputy and the sanction rendered. It is imperative that consideration be given to the totality of the facts in this case to determine whether a preponderance of substantial evidence exists to believe Petitioner had sufficient knowledge of the consequences of his act, and that he had the specific intent to attempt to defraud the alleged victim. There is no doubt that Petitioner should not have signed the form, and there is no attempt to excuse that conduct; however, other than the act itself, there is little to show his intent at the time. After hearing Ms. Thomas’ testimony, which was credible, and that of the witnesses for Petitioner, which was also credible, it has been shown that there was confusion as to the timing of the execution of the form and the understanding of the 90 day period. Basically there was an insufficient showing that there was a

specific intent to attempt to obtain property by false pretense by knowledge and design, and that Petitioner has successfully refuted this allegation by the greater weight of the evidence.

- b. The second component is basically a question of the lack of good moral conduct, or simply put, character. Consideration of this trait, and the question of what is acceptable, is universal. Without knowing what evidence was heard by the two commissions, it is impossible to offer an opinion as to why they differed; however, once our governing bodies have heard similar evidence, they should have a singleness of mind, heart, and purpose to determine the meddle of candidates.

PROPOSAL FOR DECISION

The undersigned concludes that based upon the Findings of Fact and Conclusions of Law, there is insufficient evidence to rule that probable cause exists to believe that Petitioner committed the felony offense of the attempt to obtain property by false pretense (N.C. Gen. Stat. § 14-100). If the Commission accepts this proposal, it will moot the further inquiry of good moral character.

Further, it is the recommendation of the undersigned that Respondent should certify Petitioner as a law enforcement officer.

NOTICE AND ORDER

The North Carolina Criminal Justice Education Training and 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 3rd day of September, 2013.

J. Randall May
Administrative Law Judge