

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DOJ 09571**

PROPOSAL FOR DECISION

APPEARANCES

For Respondent: Matthew L. Boyatt, Assistant Attorney General
Attorney for Respondent
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Has the Petitioner committed or been convicted of any combination of four (4) or more crimes or unlawful acts defined as either Class A or Class B misdemeanors pursuant to the Commissions' Rules, such that Petitioner's application for certification is subject to denial?

EXHIBITS

Respondent's Exhibits 1-8 were introduced and admitted.
Petitioner Submitted a letter dated August 19, 2013 which was considered.

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 are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by mail the proposed Denial of Justice Officer's Certification letter, mailed by Respondent Sheriffs' Commission on January 2, 2013.

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter referred to as the "Commission" or "Sheriffs' Commission") has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.

3. Petitioner is an applicant for justice officer certification through the Edgecombe County Sheriff's Office.

4. 12 NCAC 10B .0204(d)(5) states the Sheriffs' Commission may deny the certification of a justice officer when the Commission finds that the applicant has committed or been convicted of:

(5) any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103 (10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103 (10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

5. The Petitioner was appointed as a detention officer through the Edgecombe County Sheriff's Office on August 29, 2011.

6. The Petitioner testified at the administrative hearing and does not dispute that he has been convicted of seven (7) misdemeanor offenses, as set out below.

7. On October 11, 1997, Petitioner was convicted of misdemeanor noise ordinance violation in Pitt County, North Carolina; Case No. 1997 CR 022214. (Respondent's Exhibit 5)

8. On November 20, 1998, Petitioner was convicted of misdemeanor noise ordinance violation in Pitt County, North Carolina; Case No. 1998 CR 025163. (Respondent's Exhibit 5)

9. On April 15, 1999, Petitioner was convicted of misdemeanor noise ordinance violation in Pitt County, North Carolina; Case No. 1999 CR 002653. (Respondent's Exhibit 5) On November 12, 1999, Petitioner was convicted of misdemeanor noise ordinance violation in Pitt County, North Carolina; Case No. 1999 CR 9012. (Respondent's Exhibit 5)

10. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, a Class A misdemeanor includes, among other things, an act committed or omitted in violation of any duly enacted ordinance, which is not classified as a Class B misdemeanor. Petitioner does not dispute that he has been convicted of four noise ordinance violations, which each constitute a separate Class A misdemeanor conviction pursuant to the Commission's Rules.

11. The above-referenced four noise ordinance convictions occurred approximately 15 years ago. Petitioner testified that at that time, he was in his late teens and early 20's and did not understand that pleading guilty to these noise ordinance violations could impact him later in life.

12. On December 13, 1994, Petitioner was convicted of simple affray in violation of North Carolina General Statute § 14-33 (a), in Pitt County, North Carolina; Case No. 1994 CR 024115. (Respondent's Exhibit 8) Pursuant to 12 NCAC 10B .0103 (10) (a), and the Class B Misdemeanor Manual adopted by the Respondent, simple affray constitutes a Class A misdemeanor. Petitioner testified that this incident occurred while Petitioner was in high school. At that time, Petitioner was involved in an argument with another student, which ultimately resulted in a fight breaking out. Petitioner believes he was charged by the school resource officer.

13. On July 2, 1996, Petitioner was convicted of misdemeanor simple assault in violation of North Carolina General Statute § 14-33 (a), in Pitt County, North Carolina; Case No.

1996 CR 015684. (Respondent's Exhibit 7) Pursuant to 12 NCAC 10B .0103 (10) (a), and the Class B Misdemeanor Manual adopted by the Respondent, simple assault constitutes a Class A misdemeanor.

14. On March 17, 1998, Petitioner was convicted of misdemeanor simple assault in violation of North Carolina General Statute § 14-33 (a), in Pitt County, North Carolina; Case No. 1998 CR 005531. (Respondent's Exhibit 6) Pursuant to 12 NCAC 10B .0103 (10) (a), and the Class B Misdemeanor Manual adopted by the Respondent, simple assault constitutes a Class A misdemeanor.

15. Petitioner testified that the victim in the case was his former girlfriend, Vickie Harper. Petitioner stated that he and Ms. Harper were having a disagreement at her residence. Petitioner attempted to leave, at which point Ms. Harper attempted to obtain Petitioner's keys. According to Petitioner, the two struggled and Ms. Harper struck Petitioner several times with her hand. In response, Petitioner pushed Ms. Harper to the bed in order to leave the residence. At the time of this incident, Petitioner was approximately 21 years old. Petitioner was initially charged with assault on a female; however, the record reflects that Petitioner was ultimately convicted of misdemeanor simple assault, was placed on probation and was ordered not to assault or threaten Vickie Harper. (Respondent's Exhibit 6) Petitioner and Ms. Harper have a child and are still in communication regarding the care of their child.

16. Based on the evidence presented at the administrative hearing, including Petitioner's sworn testimony and the exhibits introduced into the record, the Undersigned concludes that Petitioner has been convicted of seven Class A misdemeanor offenses.

17. Petitioner has been employed by the Edgecombe County Detention Center for approximately two years. At the administrative hearing, Lieutenant Elijah Glass testified. Lt. Glass has been involved in law enforcement for 19 years and for the past three and one half years has been the Jail Administrator. He supervises 57 people and finds that Petitioner is an individual that he values as an employee. He sees that Petitioner carries himself well, is truthful, and works well with others. Lt. Glass relayed that it is tough to work in a jail and Petitioner is that type of dedicated hard worker that Lt. Glass would like to see get his certification.

18. Lieutenant Richard Allen also testified on behalf of Petitioner. He has 27 years in law enforcement. Based on his observations, Petitioner is an asset to the Edgecombe County Sheriff's Office. He stated that 300 to 400 persons apply to the Sheriff's Office each year and it is hard to find good workers. He believed that Petitioner is that type of good worker that is well suited for work in law enforcement. Lt. Allen was of the opinion that Petitioner is straightforward, extremely honest and always strives to do his best. Both Lieutenants Glass and Allen testified that Petitioner is aware of the seriousness of his prior criminal history, and that Petitioner has never made excuses for his past conduct and has accepted responsibility.

19. Petitioner testified regarding the above-referenced offenses appearing on his criminal record. Petitioner acknowledges his wrongdoing and has not made excuses for his prior behavior. Petitioner stated that many of these offenses occurred while Petitioner was in high school and shortly thereafter. With respect to the noise ordinance violations, Petitioner did not

imagine at the time he paid off the noise ordinance violations that they would come back later in life and impact his career choice. Since high school, Petitioner attended Pitt Community College where he earned an Associate in Arts Degree in Criminal Justice in 2011. Petitioner is currently studying for a Bachelor of Arts Degree in order to ultimately become a probation/parole officer. Petitioner is also active in his community where he volunteers teaching children basketball and football.

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 parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper. 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)(5), the Commission may revoke, suspend, or deny the certification of a detention officer when the Commission finds that the applicant for certification or certified officer has committed or been convicted of:

(5) any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

3. Pursuant to 12 NCAC 10B .0103(2), "convicted" or "conviction" means and includes, for purposes of that Chapter, the entry of (a) a plea of guilty; (b) a verdict or finding of guilt by a jury, judge, magistrate, or other duly constituted, established, and recognized adjudicating body, tribunal, or official, either civilian or military; or (c) a plea of no contest, nolo contendere, or the equivalent.

4. Pursuant to 12 NCAC 10B .0205(3)(d), when the Commission denies the certification of a detention officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(5).

5. A noise ordinance violation is classified as a Class A misdemeanor pursuant to 12 NCAC 10B .0103 and the Class B Misdemeanor Manual adopted by Respondent. Petitioner has been convicted of four separate noise ordinance violations, which constitutes four (4) separate

Class A misdemeanor convictions pursuant to the Commission's Rules. Petitioner does not dispute this record.

6. The criminal offense of simple assault under N.C.G.S. § 14-33 (a) is classified as a Class A misdemeanor pursuant to 12 NCAC 10B .0103 and the Class B Misdemeanor Manual adopted by Respondent. The record in this case establishes that Petitioner has been convicted of two separate simple assault offenses, 1998 CR 005531, and 1996 CR 015684.

7. The criminal offense of simple affray under N.C.G.S. § 14-33 (a) is classified as a Class A misdemeanor pursuant to 12 NCAC 10B .0103 and the Class B Misdemeanor Manual adopted by the Respondent. The record in this case establishes that Petitioner was convicted on December 13, 1994 of simple affray; 1994 CR 24115.

8. Petitioner has a total of seven) Class A misdemeanor convictions on Petitioner's record, and his application for certification is therefore subject to denial pursuant to 12 NCAC 10B .0204(d)(5). All convictions occurred over 13 years ago.

9. Pursuant to 12 NCAC 10B .0205, the Respondent may, in its discretion, reduce or suspend the period of sanction imposed for the Petitioner's record of a combination of four or more Class A or Class B misdemeanor convictions "when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension." "The use of the word 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act." *Brock and Scott Holding, Inc. v. Stone*, 203 N.C. App. 135, 137, 691 S.E.2d 37, 39 (2010) (quoting *Campbell v. First Baptist Church of the City of Durham*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979)) (emphasis added).

PROPOSAL FOR DECISION

The Undersigned holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law, and finds that Petitioner has been convicted of seven (7) Class A misdemeanor offenses cited above.

Based on the time that has elapsed between the present and the last conviction of Petitioner (all convictions occurred over 13 years ago) as well as the testimony of Lieutenants Glass and Allen, the Undersigned proposes that the Commission exercise its equitable discretion and suspend or greatly reduce any period of sanction and grant Petitioner his justice officer certification at the soonest possible time.

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.

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. N.C.G.S. § 150B-42. It is requested that the agency furnish a copy to the Office of Administrative Hearings.

IT IS SO ORDERED.

This the 15th day of November, 2013.

Augustus B. Elkins II
Administrative Law Judge