

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DOJ 12452**

V.

**NORTH CAROLINA CRIMINAL JUSTICE
EDUCATION AND TRAINING
STANDARDS COMMISSION,
Respondent.**

1

RULES AT ISSUE

12 NCAC 9E .0106 (a); 12 NCAC 9E .0107(b)
12 NCAC 9E .0108(a); 12 NCAC 9E .0108(b)
12 NCAC 9A .0206(a)(2)

EXHIBITS

Respondent's Exhibits 1-4 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. In making the FINDINGS OF FACT, the undersigned Administrative Law Judge 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 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. Both parties received Notice of Hearing, and Petitioner received the notification of probable cause to suspend law enforcement officer certification letter mailed by the Respondent on February 7, 2013.
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 9A, to certify law enforcement officers and to revoke, suspend, or deny such certification.
3. 12 NCAC 9E .0106(a) provides that all certified law enforcement officers shall qualify for both day and night use with their individual and department-approved service handgun(s) at least once each calendar year.
4. 12 NCAC 9E .0107(b) provides that upon notification that an officer has failed to meet the requirements for in-service firearms training and qualification as specified in 12 NCAC 9E .0106(a) of this Subchapter, the law enforcement officer's certification shall be suspended.
5. 12 NCAC 9E .0108 (a) provides that failure to successfully complete the annual in-service training topics as specified in 12 NCAC 9E .0102 within the calendar year shall result in suspension of the law enforcement officer's certification.

6. 12 NCAC 9E .0108 (b) provides that upon notification that a law enforcement officer, who has been continuously employed with an agency during the 12 month calendar year, has failed to meet the requirements for in-service training as specified in 12 NCAC 9E .0102, the officer's certification shall be suspended by the Standards Division Director.
7. 12 NCAC 9A .0206(a)(2) provides that the Commission, by and through the Probable Cause Committee, may summarily suspend the certification of a criminal justice officer when, in the opinion of the Probable Cause Committee, the public health, safety or welfare requires this emergency action of summary suspension. The Commission has determined that the Probable Cause Committee, may utilize summary suspension when the certified officer fails to satisfactorily complete the in-service training requirements as prescribed in 12 NCAC 9E.
8. Petitioner has been certified as a law enforcement officer with the New Bern Police Department since August 17, 2004. (Respondent's Exhibit 2)
9. On March 26, 2011, Petitioner injured her right knee while on duty. Petitioner had surgery on the knee and while recovering submitted medical document from Dr. R. J. Bradley to the New Bern Police Department stating she was medically unable to complete the required 2011 in-service. Petitioner received a medical waiver for the 2011 in-service requirements.
10. Sergeant Paul Brown is the training coordinator for New Bern Police Department. In October of 2012, Sgt. Brown began contacting officers who were delinquent in their 2012 in-service training hours. Sgt. Brown noticed that Petitioner was delinquent in her 2012 in-service training hours. He made multiple attempts to contact Petitioner and learned she had changed her phone number. In December of 2012, Sgt. Brown was able to reach Petitioner by phone. These phone calls were recorded. The recordings were introduced into evidence as Respondent's Exhibit 4 and played in court during the hearing. Sgt. Brown can be heard giving Petitioner detailed instructions regarding what paperwork he must receive from her for a medical waiver. He asked Petitioner to provide a letter, from her doctor, specifically outlining why she couldn't complete any of the 2012 in-service training. During the phone call, Petitioner explains that her old doctor "dropped her" and she would try to get another letter.
11. On December 14, 2012, Chief Summers of the New Bern Police Department sent a memorandum to Petitioner and Sgt. Brown in which he notified Petitioner the agency was required to notify Respondent that she did not complete any of New Bern Police Department's in-service training program for 2012.
12. On December 17, 2012, Sgt. Brown received a fax from Dr. Kitchen with the Crystal Coast Pain Management Center which stated "Petitioner should not handle firearms while on pain meds [sic]." (Respondent's Exhibit 1) This is the only documentation Petitioner provided to New Bern Police Department to explain her failure to complete the required 2012 in-service.

13. Sgt. Brown testified that this letter from Dr. Kitchens did not specifically outline why Petitioner could not complete the classroom portions of in-service training and why she could not preform the firearms qualification while not on her pain medications.
14. On December 17, 2012, the New Bern Police Department submitted to the Criminal Justice Standards Division an In-Service Compliance Report, Form F-9, which indicated that Petitioner did not successfully complete the required in-service training, including firearms training and qualification, during the 2012 calendar year. A copy was also mailed to Petitioner (Respondent's Exhibit 1)
15. On February 7, 2013 the North Carolina Criminal Justice Education and Training Standards Commission sent the Petitioner a Notice of Summary Suspension of Law Enforcement Officer Certification for failing to satisfactorily complete the required in-service training topic(s), including firearms training and qualification, during the 2012 calendar year. (Respondent's Exhibit 3)
16. On March 4, 2013, the Petitioner requested a hearing regarding the suspension of her Law Enforcement Officer Certification.
17. The Petitioner testified that since her certification has been suspended she has not gone forward in completing her in-service requirements for 2012. Petitioner testified that she did not complete the in-service training, including firearms training and qualification, for the 2012 calendar year, as required by the North Carolina Criminal Justice Education and Training Standards Commission to maintain certification.

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 this 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. 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. 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 9A, to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. Pursuant to 12 NCAC 9E .0106(a) all certified law enforcement officers shall qualify for both day and night use with their individual and department-approved service handgun(s) at least once each calendar year. Pursuant to 12 NCAC 9E .0107(b) a law enforcement officer's certification shall be suspended when that officer has failed to meet the requirements for in-service firearms training and qualification as provided in 12 NCAC 9E .0106(a).
4. Pursuant to 12 NCAC 9E .0108(a) failure to successfully complete the annual in-service training topics as specified in 12 NCAC 9E .0102 within the calendar year shall result in suspension of the law enforcement officer's certification. Pursuant to 12 NCAC 9E .0108(b) when a law enforcement officer, who has been continuously employed with an agency during the 12 month calendar year, and has failed to meet the requirements for in-service training as specified in 12 NCAC 9E .0102, the officer's certification shall be suspended by the Standards Division Director.
5. Pursuant to 12 NCAC 9A .0206(a)(2) the Commission may summarily suspend the certification of a criminal justice officer when the certified officer has failed to satisfactorily complete the in-service training requirements as prescribed in 12 NCAC 9E.
6. A preponderance of the evidence exists to support the conclusion that Petitioner was issued General Certification by the Respondent on August 17, 2004.
7. A preponderance of the evidence exists to support the conclusion that Petitioner failed to successfully complete the required in-service training, including firearms training and qualification, during the 2012 calendar year. A preponderance of the evidence also exists to support the conclusion that Petitioner failed to present clear and complete medical documentation to show she was entitled to a medical waiver for the 2012 in-service requirements.
8. The Respondent may properly suspend Petitioner's certification pursuant to 12 NCAC 9E .0106, 12 NCAC 9E .0107, 12 NCAC 9E .0108 and 12 NCAC 9A .0206.
9. Pursuant to 12 NCAC 9E .0107 Petitioner must enroll and successfully complete the "Basic Law Enforcement Training" course in firearms training within the 12 month period following the summary suspension.
10. Pursuant to 12 NCAC 9E .0108 Petitioner must successfully complete the 2012 in-service training requirements before she is eligible to be re-certified as a law enforcement officer.
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. Petitioner has failed to show by a preponderance of the evidence that Respondent's proposed suspension of Petitioner's law enforcement officer certification is not supported

by substantial evidence. Petitioner, a certified officer, has failed to show that she did satisfactorily complete the in-service training requirements as prescribed in 12 NCAC 9E during the 2012 calendar year. Petitioner has also failed to show she was entitled to a medical waiver for the 2012 required in-service training.

13. Respondent has shown by a preponderance of the evidence that Petitioner, a certified officer, failed to satisfactorily complete the required in-service training topics, including firearms training and qualification, during the 2012 calendar year. Respondent's suspension of Petitioner's law enforcement officer certification is supported by substantial evidence.

PROPOSAL FOR DECISION

The Undersigned holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law, and further holds that 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.

Based upon the foregoing, the undersigned Administrative Law Judge proposes that Respondent's summary suspension of the Petitioner's law enforcement officer certification stand until the Petitioner has completed the 2012 in-service training, including 48 hours of firearms training and qualification.

NOTICE

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file Exceptions to the Proposal for Decision, to submit proposed Findings of Fact and to present oral and written arguments to the Agency. N.C. Gen. Stat. §150B-40. 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 addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any 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 9th day of December, 2013.

Augustus B. Elkins II
Administrative Law Judge