

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DOJ 15453

MICHAEL KEITH FOX,)
)
 Petitioner,)
)
 v.)
)
 NC CRIMINAL JUSTICE EDUCATION)
 AND TRAINING STANDARDS)
 COMMISSION)
)
 Respondent.)

PROPOSAL FOR DECISION

On February 3, 2014, Administrative Law Judge Melissa Owens Lassiter conducted an administrative hearing in this contested case in Raleigh, North Carolina after Petitioner requested, pursuant to N.C. Gen. Stat § 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. In this petition, Petitioner appeals Respondent’s June 11, 2013 Proposed Denial of Correctional Officer Certification and Proposed Suspension of Law Enforcement Officer Certification.

APPEARANCES

Petitioner was represented by Allison Pope Cooper, Esq., Bailey & Dixon, LLP, P.O. Box 1351, Raleigh, North Carolina 27602.

Respondent was represented by Catherine F. Jordan, Assistant Attorney General, NC Department of Justice, P.O. Box 629, Raleigh, North Carolina 27602.

ISSUES

1. Whether Respondent’s proposed suspension of Petitioner’s law enforcement certification, for an indefinite time, for lack of good moral character is supported by a preponderance of the evidence?

2. Whether Respondent’s proposed denial of Petitioner’s correctional officer certification for lack of good moral character is supported by a preponderance of the evidence?

3. Whether Respondent's proposed denial of Petitioner's correctional officer certification for a knowing material misrepresentation is supported by a preponderance of the evidence?

APPLICABLE STATUTES AND RULES

Official notice is taken of the following:

- N.C. Gen. Stat. §17C-10, et seq.
- 12 NCAC 09B .0101(3)
- 12 NCAC 09A .0204(b)(2) & (c)
- 12 NCAC 09A .0205(b)(4)& (c)(2)
- 12 NCAC 09G .0206
- 12 NCAC 09G .0504(b)(6) & (c)
- 12 NCAC 09G .0505(b)(5) & (c)(2)

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1, 2, and 3.

For Respondent: 1 - 15

WITNESSES

For Petitioner: Marc Edwards, Correctional Administrative Services Manager for Marion Correctional Institution; Michael Fox, Petitioner; Steve Hensley, McDowell Co. Sheriff's Office; Janie Shutz, Chief of Police, Forest City, Oregon and former Sgt. Marion Police Department

For Respondent: Kevin Wallace, Respondent's Investigator; Marion Police Officer Angie Fineberg; Marion Police Officer Randy Seay; Josh Piercy, The Biltmore Company, former Corporal, Marion Police Department; Lt. Marion Police Scott Spratt

FINDINGS OF FACT

1. Pursuant to N.C. Gen. Stat. §17C, *et seq.*, and Title 12 NCAC 9A and 9G respectively, Respondent is charged with the duty of certifying, revoking, or suspending the certifications of law enforcement and correctional officers within this State.

2. Petitioner is a 23-year law enforcement veteran, having received his law enforcement certification from Respondent on August 31, 1988 through the Marion Police Department. (Resp. Exhs. 1, 14)

3. Since 1988, Petitioner has continuously held employment with a number of law enforcement agencies within this State, namely: Marion Police Department, Gaston Co. Sheriff's Department, and the McDowell County Sheriff's Department. (Resp. Exh. 1, 14)

4. On or about January 25, 1990, Petitioner completed a Personal History Statement Form F-3 to be submitted to the North Carolina Sheriffs' Education and Training Standards Commission for certification through the McDowell County Sheriff's Department. (Resp. Exh. 2) Question 47 on the January 25, 1990 McDowell County Sheriff's Department Form F-3 asked, "Have you ever used marijuana?" Petitioner answered: "one time approx. 10 years ago."

5. On or about October 1, 1995, Petitioner completed a Personal History Statement Form F-3 to be submitted to the North Carolina Sheriffs' Education and Training Standards Commission for certification as a Deputy Sheriff. (Respondent's exhibit 3) On October 1, 1995, Petitioner signed and notarized this Form F-3. The statement "I hereby certify that each and every statement made on this form is true and complete and understand that any misstatement or omission of information may subject me to disqualification or dismissal" existed above Petitioner's signature. Question 44 on the October 1, 1995 Form F-3 stated "Have you ever used marijuana?" Petitioner answered this question "yes" and explained "experimentation."

6. On or about September 30, 1998, Petitioner completed a Personal History Statement Form F-3 to be submitted to Respondent for certification with the Marion Police Department. (Resp. Exh. 5) On October 1, 1998, Petitioner signed and notarized this Form F-3. The following statement was typed above Petitioner's signature:

I hereby certify that each and every statement made on this form is true and complete and I understand that misstatement or omission of information will subject me to disqualification or dismissal.

Question 44 on the September 30, 1998 Form F-3 asked, "Have you ever used marijuana?" Petitioner answered "Yes," and explained "Experimented in High School." (Resp. Exh. 5)

7. On October 16, 1998, Respondent received a Report of Appointment Form F-5A from the Marion Police Department for Petitioner's certification. (Resp. Exh. 4), and issued a general certification for a law enforcement officer to Petitioner. (Resp. Exh. 6)

8. On October 20, 2010, Respondent received a Report of Separation Form F-5B from the Marion Police Department on behalf of Petitioner. (Resp. Exhs. 7, p. 9; 10) The Form F-5B stated that Petitioner resigned and that his date of final separation was on October 15, 2010. The Form F-5B stated that "this agency would not consider this individual for appointment."

9. Following his resignation with the Marion Police Department, Petitioner sought employment with the McDowell County Sheriff's Department. Petitioner is currently employed as a part-time Deputy Sheriff with the McDowell County Sheriff's Department. (Resp. Exh. 14)

10. On or about June 19, 2012, Petitioner submitted Form F-5A, Report of Appointment - Application for Certification, to Respondent for certification as a NC Department of Corrections Correctional Officer. (Resp. Exh. 12)

11. On or about July 1, 2012, Petitioner began employment with the North Carolina Department of Corrections through the Marion Correctional Facility located in McDowell County. (T. p. 189)

12. On or about September 24, 2012, at Respondent's request, Petitioner completed a revised Form F-5A, clarifying his responses on his original Form F-5A. Petitioner particularly clarified his response to Question 3 on Form F-5A regarding prior illegal drug use. (Resp. Exh. 13) On the revised Form F-5A, Petitioner included the following handwritten notations in the explanation section:

2. Oversight. I am not a drug user. Experimented in high school therefore I checked no to the Form F-5A. F3 checked yes because of marijuana experimental use in high school. I have went back and checked yes on the F-5A due to this experimental use in high school. To my knowledge, I checked yes on my Sheriff's Certification forms concerning drug use. . . .

6. Currently on reserves with the McDowell Co. Sheriff's Dept. I am not employed at all with the Rutherford Co. Sheriff's Office. . . .

3. Oversight that I failed to list Marion Police Dept. in approximately 1988 for a year and left on good terms went to the McDowell Co. Sheriff's Dept. Rutherford Co. held my certification however I never worked for the Rutherford Co. Sheriff's Dept. I worked at the Gaston Co. Sheriff's Dept. from approx.. 19 __ (date cut off) to 1998 then returned to the Marion Police Dept. in 1998. I left Marion Police in Oct. 2010. I left Marion Police Dept in Oct. 2010 due to philosophical differences with new Chief.

(Resp. Exh. 13)

13. On March 27, 2013, Respondent's investigator Kevin Wallace drafted and a memorandum to Respondent's probable cause committee proposing denial of Petitioner's correctional officer certification and suspension of Petitioner's law enforcement officer certification. (Resp. Exh. 14) The memorandum was based upon an allegation that Petitioner knowingly made a material misrepresentation on his June 19, 2013 Form F-5A when he answered question 3 and question 1(a). Question 3 asked he had ever used any illegal drug. Question 1(a) asked whether Petitioner had ever held a position requiring criminal justice certification. The memorandum also alleged that Petitioner lacked the good moral character required of a correctional officer and a law enforcement officer. (Resp. Exh. 14)

14. On May 21, 2013, Petitioner appeared before the Probable Cause Committee of the Commission, and requested approval of his pending correctional officer certification, and reinstatement of his law enforcement certification.

15. On June 11, 2013, Respondent notified Petitioner that the Probable Cause Committee found probable cause to deny Petitioner's correctional officer certification for not

less than three years, and to suspend Petitioner's law enforcement officer certification for an indefinite time, because there was probable cause that:

(1) Petitioner knowingly made two material misrepresentations when he submitted his June 19, 2012 Form F-5A to Respondent for certification, and

(2) Petitioner lacked the good moral character required of a correctional officer and a law enforcement officer. (Resp. Exh. 15)

16. On or about August 13, 2013, the North Carolina Department of Corrections/Marion Correctional Facility discharged Petitioner from his position, solely as a result of Respondent's notification of probable cause to deny his certification, and for failure to obtain correctional officer certification from Respondent. (T. p. 192)

17. At the administrative hearing, Respondent's Investigator, Kevin Wallace ("Investigator Wallace") confirmed that Respondent's Probable Cause Committee found probable cause to deny Petitioner's correctional officer certification because:

- a. Petitioner made a material misrepresentation in reference to the drug use on Form F-5A; and
- b. Petitioner made a material misrepresentation in reference to failing to list the Marion Police Department and the Rutherford County Sheriff's Office on Form F-5A; and
- c. Petitioner failed to meet or maintain the minimum employment standards that every correctional officer should demonstrate good moral character due to the circumstances surrounding Petitioner's employment with the Marion Police Department (T. p. 45)

Material Misrepresentation on Form F-5A - (Correctional Officer Certification)

18. At hearing, Investigator Wallace explained that Petitioner made two material misrepresentations in response to Questions 1(a) and (3) on Form F-5A. (T. p. 51-54) However, Question 3 on Form F-5A, unlike Respondent's Form F-3, did not list marijuana as an "illegal drug." The evidence presented by Respondent showed that the law enforcement certification Form F-3 differentiates between "marijuana" and "illegal drug" use by asking the applicant separate questions regarding the same. (T. p. 51) (Resp. Exhs. 2, 5,13) Wallace noted that Petitioner had disclosed prior marijuana use to the Respondent on at least four other occasions on his F-3, including his most recent September 1, 2011 Form F-3 Personal History Statement. (T. p. 52) (Resp. Exh. 11)

19. Investigator Wallace corroborated that when Petitioner learned of the inconsistency of his response on Form F-3 to Form F05A, Petitioner corrected his answer, and provided a written explanation that it was an oversight and mistake that he failed to check "yes" for his prior marijuana use. (T. p. 53)

20. Investigator Wallace explained that Petitioner truthfully answered "yes" in

response to Question 1(a) on the F-5A question as to whether he had ever held a position requiring criminal justice certification. Wallace indicated that Petitioner was certified as a law enforcement officer with Rutherford County Sheriff's Office with a date of appointment on December 7, 1994 and a date of separation of February 18, 2013. (T. p. 19) However, Wallace noted that Petitioner's incomplete explanation of his prior places of employment where he had held such positions was deemed a material misrepresentation. (T. p. 36 and 47) Wallace testified that truthfulness and honesty are important characteristics of a law enforcement officer. (T. p. 37)

21. The preponderance of the evidence established that Form F-5A, unlike Form F-3, did not require the applicant to list all places of prior employment in the last 10 years, or supplemental information such as the reasons for leaving and date of separation. Question 1(a) on Form F-5A required the applicant to answer "yes" or "no" to the question whether he had ever held a position requiring criminal justice certification, and if the answer was "yes," to explain on a separate page. In response to Question 1(a), Petitioner wrote "Police Department" in the explanation section, but failed to include "Marion" on his original Form F-5A. Petitioner had disclosed his former employment with the Marion Police Department to Respondent on his prior Form F-3, dated September 1, 2011. (Resp. Exh. 11, 13)

22. Investigator Wallace acknowledged that the Rutherford County Sheriff's Department would have been the agency responsible for reporting a law enforcement officer's separation to the Respondent. (T. p. 19-20)

23. At hearing, Petitioner explained that he misread the question about whether he had ever used illegal drugs on his original Form F-5A, and mistakenly marked "no." Petitioner noted that he had previously disclosed prior marijuana use on three or four occasions on prior Personal History Statements (Form F-3) to Respondent. (T. p. 211)

24. Petitioner has never failed a drug test, and his only drug use was experimentation in 1977 when he was in high school. (T. p. 217)

25. Petitioner pointed out that Respondent's Form F-5A did not direct him to list all places where he has held a criminal justice certification, and that his failure to write "Marion" before "Police Department" was an oversight. He never tried to hide his prior employment with the Marion Police Department. Petitioner did not list the Rutherford County Sheriff's Department as a place in which he has held a certification, because he never actually worked at the Rutherford County Sheriff's Department, and wasn't aware that this certification was active in Respondent's system until it was brought to his attention in 2012 in connection with his correctional officer certification. (T. p. 212-13)

Lack of Good Moral Character

26. Respondent relied solely on documents contained in Petitioner's personnel file that were submitted by the Marion Police Department in determining whether Petitioner lacked good moral character. The Marion Police Department's Notice of Rule Violations by Petitioner listed the following statements as a basis for Petitioner's alleged violations:

'[C]lean the brown off of your nose, you've been running around with your nose up her ass' (Oct. 10, 2010), 'you better hope your shit ain't broken into, out stopping all these cars' (Oct. 1, 2010), 'you're like every other female around here, you're going to keep on til you get your ass beat like Janie, running your mouth,' 'fat ass, your ass has saddle bags, shave your mustache.' MPD Policy 03.01.13 - Conduct Toward Fellow Employees, MPD Policy 0301.30 - Harassment

'If you had a choice to eat Lacy's pussy or shoot yourself, which one would you do?' 'I would jack off a double barrel shotgun in my mouth before I would touch that fat ugly bitch.' 'you need to stop following her around like a fucking dog in heat' (Oct. 11, 2010)

Failure to perform duties as required (Sept. 26, 2010). Failure to back up officer after being requested. (Oct. 1, 2010) MPD Policy 301.10 Performance of Duty: Failure to perform duties as required, 301.1 Neglect of Duty: Failed to back up officer asking for assistance, 305.3 Officers are to respond as promptly as possible to calls for service.

301.1 Standards of Conduct: Failure to conduct himself in a manner becoming the office he holds.

(Resp. Exh. 7)

27. Respondent did not conduct any interviews or speak to any persons, including the Petitioner, before determining that Petitioner lacked good moral character, and recommending suspension of his current law enforcement certification and denial of his correctional officer certification. (Resp. Exh.7-8) (T. p. 55-56)

28. As evidence of Petitioner's lack of good moral character, Respondent presented an October 14, 2010 Marion Police Department Notice of Pre-Disciplinary Conference. The Notice cited Rule Violations of 301.1 Standards of Conduct, 301.10 Performance of Duty, 301.13 Conduct towards fellow Employees, 302.1 Neglect of Duty, and 301.30 Harassment. (Resp. Exh. 7)

29. The preponderance of the evidence at hearing established that on or about February 8, 2013, Petitioner in connection with Respondent's investigation, provided a notarized, handwritten explanation to Respondent addressing the alleged Marion Police Department Rule Violations, wherein he stated:

- a. 301.1 Standards of Conduct. I feel as though I conducted myself to the best I could in the performance of my job.
- b. 301.10 I performed all duties that was required during my employment.
- c. 301.13 I treated all officers and employees with respect. The only time I used insolent or abusive language was around other officers while goofing around.

- d. 302.1 Neglect of Duty: It was alleged that I did not back up another officer. I did not hear that officer call for back up nor would I have failed to back the officer up if I had heard same.
- e. 301.30 Harassment: Me and other officers were talking and joking around about people. I was not the only one using the language.

(Resp. Exh. 7)

30. Before Respondent found probable cause to deny and suspend Petitioner's certification, Respondent did not interview Petitioner about any of the explanations provided in February 2013, or ask Petitioner to explain any of the records and documents contained in his Marion Police Department personnel file. (T. p. 56)

31. At hearing, Respondent offered a one page Memorandum ("Brooks Memo"), dated October 15, 2010, that summarized Petitioner's Pre-Disciplinary Hearing held on October 15, 2010 before Marion Police Chief Mark. L. Brooks. The memorandum included Brooks' typed name at the bottom of the document, but was not signed by Chief Brooks. The Brooks Memo included five alleged statements made by Petitioner during the disciplinary conference, but did not make any specific findings of fact that corresponded with any of the alleged Rule Violations noted in the October 14, 2010 Notice. (Resp. Exh. 7, page 9). Chief Mark L. Brooks did not testify at the contested case hearing held in this matter.

32. The Brooks Memo does not state any specific findings of fact as to the enumerated Rule Violations noted in Petitioner's Pre-Disciplinary Conference, or provide with specificity what questions Petitioner responded to during the disciplinary conference. (T. p. 55-56) (Resp. Exh. 7)

33. Petitioner did not admit to the alleged misconduct or any of the alleged Rule Violations during his conference held on October 15, 2010.

34. At the contested case hearing, Petitioner explained that this conference lasted approximately 10 minutes, and that he chose to resign from the Department because of disagreements with the Chief of Police. (T. p. 201)

35. Respondent also offered into evidence two statements prepared by Marion Police Officers Randy Seay and Angie Fineberg ("Seay and Fineberg Statements"), dated October 12, 2010. The testimony revealed that the Seay and Fineberg Statements were obtained from Petitioner's personnel file with the Marion Police Department. (Resp. Exhs. 8 and 9). At hearing, Lt. Spratt noted that the Seay and Fineberg Statements were written in conjunction with Petitioner's disciplinary proceedings held on October 15, 2010. (T. p. 174)

36. The evidence clearly established that the Marion Police Department did not give Petitioner any chance to review the Seay and Fineberg Statements before his October 15, 2010 disciplinary conference, and did not provide Petitioner a full opportunity to refute any or all of the allegations contained therein. (T p. 201)

37. The majority of the alleged comments and allegations contained in the Seay and Fineberg Statements were not included, with specificity, in the Marion Police Department October 14, 2010 Notice of Rule Violations (Resp. Exh. 7, 8, and 9). Further, the record is devoid of the actual statement and allegations that were discussed at Petitioner's October 15, 2010 Disciplinary Hearing.

38. At the contested case hearing, Respondent offered the following witnesses from the Marion Police Department who testified as to Petitioner's character: Office Angie Fineberg, Officer Randy Seay, Lt. Scott Spratt, and Josh Piercy.

39. Officer Angie Fineberg was employed with the Marion Police Department from 2004 through 2007, then returned in 2010. (T. p. 67-68) Petitioner was one of her field-training officers in 2004. Fineberg worked on Petitioner's shift when she returned in 2010, and Petitioner supervised her work. (T. p. 69) Petitioner, Corporal Piercy, Officer Seay, and Officer Fineberg worked on a shift together as the only four officers on that shift. (T. p. 70)

40. During her testimony, when Officer Fineberg was unable to recall facts and comments made to her by Petitioner, she testified from her written statement. (Resp. Exh. 9) Officer Fineberg's Statement included a number of allegations and complaints about offensive comments Petitioner made to her. Some of comments included: encouraging her to perform business checks instead of stopping cars; discouraging her from using the term "show me" when calling into dispatch; telling Officer Seay to "Get out of here rookie;" telling Officer Seay to stop following her [Fineberg] around like a dog in heat, and that Seay needed to wipe the brown off of his nose; telling Fineberg that she needed not to park her car crooked, and that she had blonde roots; and telling Fineberg that she had saddlebags.

41. Petitioner made statements to Officer Fineberg such as "you needed to knock it off with stopping any cars." (T. p. 71) Fineberg understood that Petitioner wanted them to quit stopping cars or doing so many vehicle stops. (T. p. 71) She made a statement saying "when we're all productive, it makes our sergeant look good," and he responded, "No, it does not." (T. p. 71) Petitioner made a statement that Frieda is tired of hearing us, and was getting mad for them stopping all these cars. (T. p. 72)

42. Officer Fineberg explained that Petitioner used lewd language. Petitioner called Officer Fineberg names, such as stupid, dummy, stated that she had blonde roots, meaning that she was dumb. He stated that she had saddlebags that she needed to turn sideways to get in the door that she needed to shave her mustache before she came to work. These statements made Officer Fineberg feel angry. (T. p. 99) On one occasion at Marion travel plaza, Petitioner stated that she had saddlebags, that her ass was too wide, that she needed to turn sideways to get in the door. (T. p. 99) Officer Fineberg heard Petitioner call other female officers bitch, whore, and cunt. (T. p. 100) Petitioner also uses language such as "goddamn" and "nigger."

43. She recited, from her October 2010 Statement, a particular incident in which Petitioner allegedly tried to get Officer Seay to ask her whether she would rather "jack off a double-barrel shotgun in my mouth or eat Lacy's pussy," and when Officer Seay wouldn't ask

the question, that Petitioner did. Fineberg thought Petitioner was talking about Lacey, Officer Hink's wife. Officer Seay's Statement does not include any mention of Petitioner making this statement. (T. p. 115 and p.146)

44. One Sunday night, Officer Fineberg arrested a suspect on Grayson Street on a warrant. (T. p. 85) This suspect had run from her before, so she thought that he might run again. She called for backup, and asked Petitioner to come to the location. Petitioner arrived at the location after the suspect had been handcuffed. Petitioner stated to her "You're like every other female around here, you're going to keep on till you get your ass beat, like Janie did, running that mouth." He stated "You're just like Kelly and the rest of them can't wait for backup." Petitioner was referring to an occasion when another officer was beat up by a suspect. Officer Fineberg thought that Petitioner's delayed response presented an officer safety issue.

45. Officer Fineberg also heard Petitioner make harassing statements to other females in the office. In particular, she heard Petitioner call Ms. Schutz "fat ass" when Ms. Schutz was in the vicinity. In contrast, Chief Schutz indicated, at hearing, that she never worked with Officer Fineberg as she had left the Marion Police Department by 2004, and thus, it would have been impossible for Officer Fineberg to hear Petitioner make such comments. (T. p. 115 and p. 255)

46. Around 9:45 on September 26, 2010, Officer Seay responded to a call for a domestic dispute. (T. p. 122) At the time, Petitioner was located in the dispatch room watching drag racing. Officer Fineberg asked Petitioner whether he was going to back up Officer Seay, and Petitioner stated that he would back up Officer Seay. A few minutes later, Officer Fineberg noticed that Petitioner's vehicle was still in the parking lot. Officer Fineberg left to back up Officer Seay. Petitioner eventually arrived at the domestic call. Officer Fineberg and Officer Seay testified that this incident presented an officer safety issue when Petitioner stated that he would back up Officer Seay on a domestic call, and did not back up Officer Seay. Officer Seay was at the call for approximately nine minutes before a backup officer arrived. (T. p. 123)

47. Around 3:00 a.m. on October 1, 2010, Officer Fineberg stopped a vehicle. There were three known drug users in the vehicle. Officer Fineberg prepared to search the vehicle, and her flashlight broke. Officer Fineberg called over the radio for Petitioner to come to her location. He never answered her over the radio. One of the occupants of the vehicle gave her a flashlight from his pocket, and she used that flashlight to perform the vehicle search. Officer Fineberg alleged Petitioner failed to back her up on during this traffic stop.

48. Petitioner was at a stop at the time waiting for a tow truck from Amy's tow truck company to arrive, but the individuals from Petitioner's stop were no longer present. (T. p. 126) Officer Fineberg admitted that Petitioner was on a vehicle stop with Officer Seay at the time she radioed for back up. Officer Fineberg did not believe Officer Seay left the stop with Petitioner to respond to her call. Petitioner admitted that he heard Officer Fineberg call for him. Officer Seay explained that he did in fact leave the stop with Petitioner on October 1, 2010 to assist Officer Fineberg, at the direction of Petitioner. (T. p. 115 and 142)

49. Petitioner and Amy from Amy's tow truck company had a relationship on or

around October 6, 2010. (T. p. 128) Officer Seay opined that every time Amy's towing or B&B towing was called, Petitioner would stay and wait on the vehicle even though Officer Seay did not need assistance.

50. Officer Fineberg admitted that she did not know anything about Petitioner's personal life or community involvement, and that her motive in writing the October 12, 2010 report was to make sure nothing happened to Officer Seay when she left the shift. Officer Fineberg acknowledged that before October 2010, she never reported to any other supervisor that Petitioner made her feel uncomfortable (T. p. 115)

51. Officer Fineberg opined that it was not common for other officers or superiors to use the type of language that Petitioner used while on the job. (T. p. 103)

52. The documents submitted from Petitioner's October 15, 2010 disciplinary proceeding is devoid of any of these statements being cited as specific grounds for misconduct, or being admitted to by Petitioner. (T. p. 95-103). Officer Fineberg also admitted to using crude and crass language, including profanity, but stated that she did not "cross the line." (T. p. 115)

53. Officer Randy Seay acknowledged that he had only worked with Petitioner for four months before writing his October 12, 2010 Statement. Officer Seay explained that Petitioner bad mouthed other officers in the department, and did not want him to do his job. Officer Seay stated that Petitioner called others "pieces of shit," and called pastor Bruce Ward "a piece of shit." (T. p. 121) Petitioner has also called Corporal Piercy a "fat ass" or a "lazy ass." (T. p. 121) Petitioner called Officer Seay and Officer Fineberg "stupid" if they made mistakes or did not do things his way.

54. On one occasion, Petitioner pulled over a vehicle with three underage children who all had alcohol in their system. (T. p. 136) The driver blew .06, and the two other children blew a .03 or a .04. Petitioner had the child with the lowest BAC drive his car about a mile and a half. (T. p. 137) Officer Seay thought that law enforcement officers are meant to protect the public, and that Petitioner failed to protect the public by letting them back in the vehicle to drive the vehicle. (T. p. 137) Officer Seay thought that Petitioner put other people's lives in danger. (T. p. 137)

55. Officer Seay thought that his job was on the line every night. (T. p. 138) He felt like Petitioner was always talking bad about him, and that he was walking on eggshells. He also bragged about the reasons why individuals do not work on the police force. Officer Seay stated Petitioner made inconsistent decisions as his supervisor, and that he used lewd language.

56. Officer Seay also heard other officers employed with the Marion Police Department, other than Petitioner, use profanity. Seay conceded that Seay felt intimidated by Petitioner, and felt that he would lose his job. (T. p. 140)

57. When Officer Seay was questioned as to why his October 12, 2010 Statement (Resp. Exh. 8) failed to mention the alleged comment made by Petitioner regarding "Lacy" that Officer Fineberg included in her report and testimony, Officer Seay responded "...I don't

remember exactly what was said and how it was said, and I wasn't going to put something in the report that was going to be a lie." (T. p. 146)

58. Lt. Scott Spratt served as the Patrol Lieutenant for the Marion Police Department. Lt. Spratt participated in the 2010 investigation of Petitioner by gathering information from Officer Fineberg related to the investigation, and drafting the summary of Petitioner's Rules Violation, included as Respondent's Exhibit 7, with Chief Brooks. Sergeant Spratt opined it was a totality of the circumstances type of case. (T. p. 171) He thought that the more egregious statements were the ones about Officer Hink's wife. (T. p. 171) Sergeant Spratt agreed officers using crude and crass language is generally accepted within the Department; that is, "crude and crass is normal . . . that's normal to a point, but there is a line to be drawn. That line was clearly passed [with Petitioner.] (T. p. 179)

59. Sergeant Spratt noted that the Marion Police Department issued a written warning to Petitioner on June 8, 2009. (T. p. 181) The Marion Police Department investigated Petitioner, because he was dating Amy of Amy's towing service, Petitioner was caught cheating on Amy, and there was friction between Petitioner and Amy's stepsister Kellie Duncan, who was a corporal on a shift with the Marion Police Department. Petitioners told Corporal Duncan that he could not back her up anymore, or work with her anymore, because of his relationship with Amy, and that led to Petitioner being transferred to night shift and away from Duncan. There were other allegations of Petitioner failing to back up other officers. Failing to back up officers affects everyone, including the officers, and the public in general. (T. p. 181)

60. Lt. Spratt confirmed that Chief Brooks recommended Petitioner's termination at Petitioner's October 15, 2010 hearing. Lt. Spratt could not say what specific statements Marion Police Chief Brooks considered more highly than others during Petitioner's October 15, 2010 hearing, and he couldn't speak for Chief Brooks. Lt. Spratt also verified that Petitioner was not provided a copy of the Seay and Fineberg Statements prior to his disciplinary hearing, and explained that was Chief Brooks' decision. (T. p. 170-175) Lt. Spratt confirmed that crude and crass language was normal in the Marion Police Department, but that a line has to be drawn somewhere. (T. p. 179)

61. Lt. Spratt opined that Petitioner was a good officer that had a good heart. Spratt did not know of any deficiencies in the Petitioner's willingness or ability to back up other officers. (T. p. 173-75) Lt. Spratt thought that Petitioner had a good heart, because he saw Petitioner purchase a bicycle, with his own money, for a kid whose bike had been stolen. Petitioner had done things like this on numerous occasions. (T. p. 178)

62. In 2010, Josh Piercy served as a Corporal under Petitioner, while Piercy supervised Officer Fineberg and Officer Seay on his shift. Mr. Piercy vaguely remembered Petitioner asking the question about "Lacy," but he could not recall exactly the way it was stated. He also recalled Petitioner stating "something about getting the brown off his nose where he's been up [Officer] Fineberg's ass." (T. p. 156) Corporal Piercy remembered Petitioner telling Officer Seay that he needed to quit following Officer Fineberg around like a dog in heat. (T. p. 156)

63. Mr. Piercy believed Petitioner was a good person. Piercy acknowledged that the majority of the personnel in the Marion Police Department would cuss and carry on with each other. He was not aware of any policy that prohibited profanity, and in his opinion, the statements made by Petitioner were said in a joking manner. Mr. Piercy noted that neither Officer Fineberg nor Officer Seay ever came to him, as their supervisor on the shift, to report any misconduct or complaints related to Petitioner. (T. p. 155-159)

64. Petitioner offered the following character witnesses: Marc Edwards, Steve Hensley and Janie Schutz.

65. Marc Edwards is the Correctional Administrative Services Manager for the Marion Correctional Institution (“Marion Correctional”) who handles hiring, accounting, and warehouse procedures. Edwards is responsible for keeping and storing personnel records.. Edwards reviewed Petitioner’s personnel file. Petitioner’s personnel file reflects that he received exemplary evaluations, which included “good” and “very good” ratings by his supervisors, while employed with Marion Correctional (Pet. Exh. 1). Mr. Edwards indicated there was no evidence of substandard work performance by Petitioner, and no disciplinary action taken against Petitioner while he was employed at Marion Correctional. Mr. Edwards confirmed that Petitioner was recently terminated from Marion Correctional for failure to obtain his certification from Respondent, but that Petitioner would be eligible for employment with Marion Correctional if he were to receive his certification. (T. p. 198)

66. Janie Schutz is the Chief of Police for Forest Grove Police Department who traveled from Oregon to testify in this matter, because she is a firm believer of Petitioner. Chief Schutz has known Petitioner since 1994. She left the Marion Police Department in 2003, and never worked with Officer Fineberg. Chief Schutz worked the same shift with Petitioner while employed at Marion Police Department. She has never known Petitioner to fail to back up any other police officer, and in fact, Petitioner backed her up on many occasions. Chief Schutz explained how Petitioner helped saved her life in September 2003 after she was seriously assaulted at gunpoint on a stop. Petitioner was the first one on the scene. Chief Schutz also explained that Petitioner saved the life of another female Marion Police Officer after quickly responding to a burglary with an operational meth lab. Petitioner risked his own life to get the female officer out of the house. (T. p. 250, 255, 256-262)

67. Chief Schutz witnessed Petitioner act very professional in speaking to victims, and always conducted thorough investigations. Chief Schutz heard Petitioner use inappropriate language within the Department, but that was part of the culture of the Department and generally accepted. Chief Schutz reported that when she was employed with the Marion Police Department she even heard Lt. Spratt use crude language. She opined that while using crude language may not be appropriate, it is a way officers handle stress. (T. p. 262)

68. Chief Schutz also detailed a number of other representative examples of Petitioner’s good character, as reflected in her recommendation letter to the Respondent; particularly, Petitioner’s willingness to help neighbors and assist his elderly parents. (Pet. Exh. 3).

69. Steve Hensley has known the Petitioner since 1988, and worked with the Petitioner at the McDowell County Sheriff's office and the Marion Police Department. Mr. Hensley opined that Petitioner was an honest person. Hensley never heard any complaints from other officers that the Petitioner failed to back them up. Mr. Hensley acknowledged that all officers use crude and crass language. Mr. Hensley worked with Officer Fineberg, but never heard her express any complaints about Petitioner until this matter. (T. p. 234-246).

70. At hearing, Petitioner explained that he misread the question on the Form F-5A about his drug usage, and that error was an oversight. Petitioner never worked in Rutherford County, and thought that Rutherford County held his certification as inactive. His failure to list the word "Marion" in front of "Police Department" was an oversight.

71. At hearing, Petitioner opined that he is an honest person, and that he goes out of his way to help other people. He has never been arrested or convicted of any crime, and has never been terminated from a position. Petitioner disputed the allegations that were brought to his attention in 2010 when he worked at the Marion Police Department. At his October 15, 2010 disciplinary hearing with Chief Brooks, Petitioner was not afforded a chance to read the Seay and Fineberg Statements, or refute any of the allegations in writing. Neither Brooks nor Lt. Spratt read or reviewed Seay and Fineberg Statements at the October 15, 2010 hearing. Petitioner explained that Chief Brooks and Lt. Spratt just read the Violation Codes during the 10-minute hearing. At the time of his 2010 disciplinary hearing with the Marion Police Department, Petitioner was not advised that his law enforcement certification could be revoked or suspended because of the alleged misconduct at the Marion Police Department. (T. p. 198-201)

72. Petitioner disagreed that he failed to back up fellow officers on two different occasions, and stated that he responded to both calls. Petitioner was shocked to learn, on the evening of October 14, 2010, that he would be subject to a disciplinary hearing, because he was never asked by any officer within the Marion Police Department to refrain from using crude or crass language, and was never reprimanded for the use of such language before his disciplinary proceeding. Petitioner explained that just about everybody at the Marion Police Department, including Officer Fineberg and Seay, joked and cussed with each other. That kind of language was a day-to-day thing that occurred. (T. p. 203-204, 207-208)

CONCLUSIONS OF LAW

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

2. Respondent 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 certification.

3. Respondent 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.

4. 12 NCAC 09G .0504(b)(2) states:

The Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer . . . (2) fails to meet or maintain one or more of the employment standards required by 12 NCAC 09G .0200 for the category of the officer's certification or fails to meet or maintain one or more of the training standards required by 12 NCAC 09G .0400 for the category of the officer's certification[.]

5. 12 NCAC 09G .0505(c)(1) states:

When the Commission suspends or denies the certification of a corrections 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 . . . (2) failure to meet or maintain the minimum standards for certification.

6. 12 NCAC 09A .0204(b)(2) states:

The Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer . . . (2) fails to meet or maintain one or more of the minimum employment standards required by 12 NCAC 09B .0100 for the category of the officer's certification or fails to meet or maintain one or more of the minimum training standards required by 12 NCAC 09B .0200 or 12 NCAC 09B .0400 for the category of the officer's certification[.]

7. 12 NCAC 09A .0205(c)(2) provides:

When the Commission suspends or denies the certification of a criminal justice 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 . . . (2) failure to meet or maintain the minimum standards of employment[.]

Material Misrepresentation

8. 12 NCAC 09G .0504(b)(6) provides that the Commission may deny licensure of any applicant when the Commission finds that the applicant for certification or the certified officer has knowingly made a material misrepresentation of any information required for certification or accreditation.

9. 12 NCAC 09G .0505(b)(5) states:

When the Commission suspends or denies the certification of a corrections officer pursuant to 12 NCAC 09G .0504 of this Section, the period of sanction shall be not less than three 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

(5) material misrepresentation of any information required for certification or accreditation[.]

10. 12 NCAC 09A .0204(b)(6) states:

(b) The Commission may suspend, revoke or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:

(6) has knowingly made a material misrepresentation of any information required for certification or accreditation[.]

11. 12 NCAC 09A .0205(b)(4) provides that when the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years. However, the Commission may either reduce or suspend the period of sanction under Paragraph (b) 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 material misrepresentation of any information required for certification.

12. In this case, Respondent presented evidence that Petitioner made a misrepresentation regarding his prior illegal drug use on his original Form F-5A application. However, the preponderance of the evidence presented at the hearing established that Petitioner did not knowingly or intentionally make this misrepresentation to Respondent in connection with his Form F-5A correctional officer application, because he admitted to marijuana use on at least four other Forms submitted to Respondent. Additionally, the evidence at hearing showed that the Respondent's forms used inconsistent questions regarding the applicant's prior "illegal drug use" and "marijuana use" and that Petitioner promptly revised his response when the inconsistency on his Form F-5A, as compared to his previous responses on his Form F-3s, was brought to his attention.

13. The preponderance of the evidence established that Petitioner did not make a material misrepresentation to Respondent by failing to list the word "Marion" before the listed words "Police Department," and by failing to list "Rutherford County Sheriff's Department" as prior law enforcement certification on his correctional officer application. In addition, Petitioner truthfully answered "yes" in response to the question as to whether he had ever held law enforcement certification.

Lack of Good Moral Character

14. 12 NCAC 09G .0206(6) provides that every person employed as a correctional officer shall demonstrate good moral character by “being truthful in providing all required information as prescribed by the application process.”

15. 12 NCAC 09B .0101(3) states:

Every criminal justice officer employed by an agency in North Carolina shall . . .

(3) be of good moral character pursuant to G.S. 17C-10 and as determined by a thorough background investigation[.]

16. Pursuant to N.C. Gen. Stat. 17C-10, every criminal justice officer employed by an agency in North Carolina shall be of good moral character. That statute states in pertinent part:

In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, shall fix other qualifications for the employment, training, and retention of criminal justice officers including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of criminal justice officers, and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements.

17. Pursuant to 12 NCAC 09A .0204(b)(2), Respondent may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer fails to meet or maintain one or more of the minimum employment standards required by 12 NCAC 09B .0100 for the category of the officer's certification.

18. Good moral character is defined as “honesty, fairness, and respect for the rights of others and for the laws of the state and nation.” *In re Willis*, 288 N.C. 1, 10 (1975).

19. Whether an applicant is of good moral character is seldom subject to proof by reference to one or two incidents. Good moral character is something more than the absence of bad character. *In the Matter of David Henry Rogers, Applicant to the 1975 Bar Exam*, 297 NC 48; SE 2d 912 (1979) (reversing judgment of the lower courts on the basis that the applicant's moral character was based on two incidents and the applicant denied involvement in either incident, the board made no finding of fact that the applicant was involved in either incident, and merely recited its evidence presented and stated its conclusion that the applicant had not satisfied the board of his good moral character.)

20. An applicant for admission cannot be denied on the basis of suspicion or accusations alone. Further, an applicant may only be able to meet a charge of wrongdoing only with his denial. *Id.*, 297 NC at 58.

21. At hearing, Petitioner produced evidence that he was honest and truthful in responding to his prior criminal justice certifications. Petitioner showed by a preponderance of the evidence that he mistakenly checked “no” in response to his prior marijuana use on the subject Form F5A , as evidenced by Petitioner truthfully disclosing his prior marijuana usage on a number of other Forms that Petitioner completed and submitted to Respondent.

22. With respect to the alleged misconduct that occurred while Petitioner was employed with the Marion Police Department, it is unclear from the record which allegation contained in Officer Seay’s and Officer Fineberg’s Statements were actual Rule Violations, and the extent to which these Statements were considered during Petitioner’s October 15, 2010 Marion Police Department disciplinary conference.

23. The undisputed evidence presented by both parties was that Petitioner denied making many of the alleged comments, was not afforded an opportunity to review Seay and Fineberg’s Statements before his hearing with Marion Police Chief Brooks, and was not afforded an opportunity by Chief Brooks to respond in writing to all such allegations. Since Petitioner resigned, he was not actually terminated due the alleged Rule Violations.

24. The preponderance of the evidence established that Petitioner’s crass or crude language was consistent with language within the Marion Police Department as other officers within the Department frequently participated in using crude and crass language. Assuming Petitioner’s language was as crass and crude Officer Seay and Fineberg alleged, Petitioner did not receive a warning or reprimand, prior to his disciplinary hearing on October 15, 2010, for using the alleged crude and crass language. Furthermore, Petitioner produced evidence of motive as to why Officer Fineberg and Officer Seay produced the statements. Petitioner also produced consistent testimony from other witnesses that Petitioner possessed good moral character, and conduct as a law enforcement officer.

25. Respondent failed to prove by a preponderance of the evidence that Petitioner lacks good moral character. The preponderance of the evidence presented at the hearing establishes that Petitioner possesses good moral character that is required of certified law enforcement officers and correctional officers.

26. Given the preponderance of the evidence presented at the administrative hearing, the undersigned concludes that Petitioner possesses the good moral character that is required of law enforcement and correctional officers in this State for the reasons set out herein.

27. In light of the evidence presented and the testimony of the witnesses at the administrative hearing, Respondent’s proposed denial of Petitioner’s correctional officer certification, and proposed suspension of his law enforcement certification is not supported by a preponderance of the evidence.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby recommends that the Respondent certify Petitioner as a correctional officer, and not suspend Petitioner's law enforcement certification.

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 Criminal Justice Education and Training Standards Commission.

This 27th day of May, 2014.

Melissa Owens Lassiter
Administrative Law Judge