

STATE OF NORTH CAROLINA  
COUNTY OF NEW HANOVER

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
13DOJ19034

JAMES BRIAN GILMORE PETITIONER,  V.  N C CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION RESPONDENT.	<b>PROPOSAL FOR DECISION</b>
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This law enforcement certification case was heard on July 14, 2014 by Administrative Law Judge J. Randall May in Wilmington, North Carolina.

**APPEARANCES OF COUNSEL**

J. Michael McGuinness  
The McGuinness Law Firm  
P.O. Box 952  
Elizabethtown, N.C. 28337  
Counsel for Petitioner

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

**ISSUES**

1. Whether Respondent proved that Petitioner Gilmore made knowing, willful, material misrepresentations on documents relevant for law enforcement certification?
2. What sanction if any is appropriate in light of the totality of the facts and circumstances?

## **STATUTES/RULES AT ISSUE**

N.C.G.S. 17C-10  
12 NCAC 09A.0204(b)(6)

Based upon careful consideration of the sworn testimony of the witnesses who testified at the hearing, the exhibits admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following findings of fact. In making these findings of fact, the undersigned has weighed all of the evidence, or the lack thereof, and has assessed the credibility and believability 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, biases or prejudices the witness may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, and whether the testimony of the witnesses are reasonable and consistent with other believable evidence in the case. A preponderance of evidence exists to show:

### **FINDINGS OF FACT**

1. The first witness called was Sergeant Lisa Kittrell, employed with the Wilmington Police Department with 23 years of service. T7 Sergeant Kittrell met Petitioner Gilmore in the late 1990s when he was hired. T8 Sergeant Kittrell was a supervisor of Petitioner Gilmore and evaluated his performance and conduct. T8
2. Sergeant Kittrell testified that Petitioner Gilmore is “very honest, very good character. He treated people very well, with respect, did a good job when I worked with him; I was his supervisor, easy going.” T9
3. Sergeant Kittrell further testified that: “I never had any trouble with him; like I said, very respectful of the public. I enjoyed working with him.” T9 She further explained that “he’s professional, does his job, knows his job . . . never had really any trouble with him. . .” T9 Sergeant Kittrell explained that “he makes good decisions.” T10
4. The next witness called was retired Lieutenant Billy Maulsby. T12 He served for 28 years with the Wilmington Police Department and was the Chief of Staff when he retired. He served in the Internal Affairs Unit for several years. T13
5. Lt. Maulsby got to know Petitioner Gilmore in the Department and observed him performing his duties from time to time. Lt. Maulsby testified that Petitioner Gilmore is “honest.” T14 They had no complaints or concerns about Petitioner Gilmore’s professionalism. T15 He worked well with the public. T15
6. The next witness called was Larry Jennings. He served for 21 years with the Wilmington Police Department. T17 He served on the same platoon with Petitioner Gilmore and took calls with him. T17 - 18

7. Officer Jennings described Petitioner Gilmore as “professional.” T18 He had no problems dealing with the public. T18 Petitioner Gilmore was well prepared for court. T18 Officer Jennings described Petitioner Gilmore as “extremely honest.” Officer Jennings never heard anything negative regarding Petitioner Gilmore. T18

8. The next witness was Lieutenant Mary Green, who began serving with the Wilmington Police Department in 1986. T20 Lt. Green has had occasion to observe Petitioner Gilmore’s conduct and performance as an officer. T21 Lt. Green has “always known Brian, since I’ve been here, to be very honest. He is very thorough as he can be. He treats the public well . . . he’s an excellent police officer . . . if you could have a picture of a community policing officer, it would be Brian Gilmore.” T21

9. Lt. Green further explained that “Brian is very honest, - - he has a lot of integrity . . . he’s competent. He is professional.” T21

10. The next witness called was Richard Squires, an Investigator employed with the Respondent Commission. T26 Mr. Squires testified regarding the various Commission documents that were exhibits in the case. T32 - 33

11. Mr. Squires relayed the criminal history of Petitioner Gilmore. T35 That involved a charge of possessing “natural bait trout waters” from Jackson County and a fishing without I.D. from Jackson County. T35 There was also charge of sale/give malt beverage unfortified wine to a person less than 21 in Jackson County. There was another charge, drink beer/wine while driving - - drink beer/wine while driving in Jackson County. T36

12. Petitioner received a driving while impaired charge from Alamance County, purchase/possess beer/wine under age charge in Alamance County and a hit and run of an unattended vehicle in Alamance County. T36 There was a purchase/possess beer/wine underage in Guilford County and a fishing without a license charge in Chatham County. T36

13. The next witness called was Attorney George Franklin Jones, who has served as an attorney since 1985. T56 Attorney Jones has known Officer Gilmore for approximately 15 years. T57 Mr. Jones has observed Officer Gilmore’s performance and conduct. T58

14. Mr. Jones testified that “Brian Gilmore is honest. I think that he is straight forward.” T59 Mr. Jones characterized Petitioner Gilmore as “exceedingly professional.” T56 Petitioner Gilmore’s reputation is that he is honest, straight forward and personable. T61

15. The next witness called was Captain James Varrone, of the Wilmington Police Department. Captain Varrone dealt with Petitioner Gilmore regarding the arrest for DWI in July, 2011. T64 (It should be noted that this charge, any reprisals, or the lack thereof, taken by the Wilmington Police Department are not before the undersigned for consideration.) With regard to the issues involving failing to list the criminal charges, Petitioner Gilmore had a little trouble but there was no denying that any of those charges were his. T66

16. Petitioner Gilmore was suspended from employment as result of his DWI. T72 At the time of the trial for the DWI, he was assigned and serving SE Command on patrol as a Corporal with the Wilmington Police Department but was then assigned in the downtown unit of the Wilmington Police Department. T72 The suspension was a 30 day suspension without pay for the DWI. T73

17. Captain Varrone testified that there was no disciplinary action taken against Petitioner Gilmore in connection with the omissions from the documents T73, which is the subject of this case before the Commission.

18. When Petitioner Gilmore served under Captain Varrone's supervision, he was a good, honest, effective law enforcement officer. T74 - 75

19. The next witness called was Petitioner James Brian Gilmore. T77 Petitioner Gilmore is 42 years of age, married and has three children with the ages of 11, 6 and 5. T78 Petitioner Gilmore graduated from high school in Burlington in 1990, attended Western Carolina University and graduated in 1995. T79

20. Petitioner Gilmore currently holds an advanced law enforcement certification and his certification has never been subjected to any previous punishment. T79

21. Petitioner Gilmore was charged with a DWI offense in July, 2011. T83 He pled guilty to that offense. T84 Petitioner Gilmore had been serving as a Corporal with the police department up to that time. T84 As a result of the DWI conviction, he was punished with a 30 day suspension and a demotion from Corporal back to patrol officer. T84

22. Officer Gilmore explained the criminal charges and his background. T88 - 89 With respect to the alleged offense of possess natural bait trout waters in 1995, he was aware of that but he did not know to include that on his application. T89 Officer Gilmore recalled paying the citation. T90 He did not realize necessarily that he was pleading guilty. T90 He did not consider it to be a criminal offense. T90

23. Petitioner Gilmore had a DWI charge and a collateral provisional licensee violation back in 1989. T91, Exhibit R-1 He was also cited for possession of beer while under age. T92 Petitioner Gilmore's father retained an attorney to represent him in connection with those charges. T92 Petitioner's father handled the matter for him. T92 Petitioner did not recall that there had been a DWI charge. T92

24. There was a charge in 1989 of a hit and run of an unattended vehicle. T93 Petitioner Gilmore described that he had been driving with his girlfriend and it had been sleeting; he was driving his dad's car and he lost control and hit a parked car. T94 He had called his dad, who told him to come on home; the police were called and he met with the police and they took a report and left him with a ticket. T94 The ticket was dismissed. T94

25. There was a charge of possessing beer/wine while underage in 1990. Petitioner Gilmore recalled that his father had the ticket taken care of. T95

26. Petitioner Gilmore had a ticket for fishing without a license in Chatham County in 1993.  
T95 Petitioner Gilmore did not remember getting this citation. T95

27. When Petitioner Gilmore executed the form F5 and form F3, he did not knowingly and intentionally exclude any information from the forms for purpose of deceiving the Commission.  
T97 At the time when he executed both forms, it was his intent to be truthful. T97

28. As Petitioner Gilmore reflected back to 1997 when he prepared the forms, he was not sufficiently thorough in his answers. T98

29. Petitioner Gilmore's employer requested back in 1997 that he undergo a polygraph examination and he complied with that request. T102 He met with the polygraph examiner and answered his questions to the best of his ability and completed the polygraph examination.  
T102 After the polygraph examination, he was offered employment. T102

30. Petitioner Gilmore explained that he did not consider some of the matters as being a crime; rather he understood them to be tickets. T118

31. Petitioner Gilmore recognized that he should have included further information on the pertinent forms, but that he did not intentionally leave that information out. T103

32. It would appear that Petitioner made material misrepresentations in 1997 on his application, required by the Respondent for certification when he completed Commission Form F-5A (LE) and Form F-3, "Personal History Statement," as to his past charges and/or convictions. However, there was no evidence to support a finding by the greater weight that this was done with the knowledge or cognitive awareness to deceive the Respondent. *See*, 12 NCAC 9A .0204(b)(6). In fact, Petitioner testified that there was no intent to deceive but that it was attributable to a lack of thoroughness on his part.

33. Petitioner's witnesses and the character and performance evidence demonstrated mitigating factors that Petitioner Gilmore is highly respected as a police officer. This evidence demonstrated that Petitioner Gilmore has very favorable character traits including that of honesty, truthfulness, integrity, professionalism and dedication to law enforcement service. Petitioner's witnesses were credible and believable.

34. Additional mitigating factors gleaned from the evidence are that the misrepresentation was made when Petitioner was in the very beginning of his career. Some seventeen (17) years of good police work have occurred since then and his chief (Ralph M. Evangelous) with full knowledge of his situation still considers him to be a "good police officer". Petitioner's Exhibit 8. Other than the seventeen year old misrepresentations, there is nothing else before the undersigned to require action against Petitioner's certification. It is suggested that he has redeemed himself for that error in judgment.

## **EXHIBITS**

35. Petitioner's Exhibit 1 included Petitioner's educational documents, diploma and references to training courses. T80
36. Petitioner's Exhibit 2 was some of Petitioner's recent certifications from the Criminal Justice Education Training & Standards Commission. T81
37. Petitioner's Exhibits 4, 5, 6 and 7 are copies of Petitioner's recent performance appraisals from 2009-2013. T81 Petitioner's Exhibit 4 is a performance appraisal for 2009-2010. Petitioner's Exhibit 5 is a performance appraisal for 2011. Petitioner Exhibit 6 is a performance appraisal for 2011-2012. Petitioner's Exhibit 7 is a performance appraisal for 2012-2013.
38. Petitioner's Exhibit 8 is a letter from Chief of Police Ralph Evangelous of the Wilmington Police Department. T83
39. Respondent's Exhibit 1 is a Committee memorandum dated July 30, 2013, prepared by Investigator Richard Squires for the members of the Probable Cause Committee. This Committee memorandum attached various documents relating to the charges against Petitioner Gilmore.
40. Respondent's Exhibit 2 is a letter dated September 23, 2013 from the Director of the Respondent Commission setting forth the proposed suspension of Petitioner Gilmore's law enforcement certification.

## **CONCLUSIONS OF LAW**

1. The undersigned has jurisdiction over the parties and the subject matter.
2. The totality of the evidence before the undersigned is insufficient to establish that Petitioner knowingly violated any of the Commission's regulations.
3. The evidence failed to establish that there is sufficient evidence for the revocation or suspension of Petitioner's law enforcement certification.
4. Petitioner did not willfully make knowing material misrepresentations on relevant documents for law enforcement certification.
5. 12 NCAC 09A .0204(b)(6) provides that 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.
6. 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.

7. A preponderance of the evidence supports the findings of fact herein. N.C.G.S. 150B-29(a) and 150B-34(a). In consideration of the admissible evidence, there is no legal basis for any adverse action against Petitioner's law enforcement certification.

### **PROPOSAL FOR DECISION**

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned recommends that the Commission exercise its power to desist from suspending or otherwise adversely affecting Petitioner's law enforcement certification. It is recommended that this Commission find that Petitioner has not committed the alleged offense with the required knowledge or animus to materially misrepresent his personal history.

### **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.

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(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

This the 10<sup>th</sup> day of December, 2014.

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J. Randall May  
Administrative Law Judge