

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13DOJ19148

<p>Howard Ron Simons Petitioner</p> <p>v.</p> <p>N C Sheriffs' Education And Training Standards Commission Respondent</p>	<p>PROPOSAL FOR DECISION</p>
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THIS MATTER was tried before the Hon. J. Randolph Ward, Administrative Law Judge in Waynesville, North Carolina on April 7, 2014, upon Respondent's request, pursuant to N.C.G.S. § 150B-40(e), for the designation of an administrative law judge to preside at the hearing of this contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: Sarah Patterson ("Patsy") Brison
Roberts & Stephens, P.A.
PO Box 7647
Asheville, N.C. 28802

Respondent: Matthew L. Boyatt,
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, N.C. 27699

WITNESSES

Petitioner: Sgt. Joseph Lee Riddle, Craggy Correctional Center; Sgt. Kenneth Donald Varner, Buncombe County Detention Center; Sgt. James "Rusty" Bell, Buncombe County Detention Center

Respondent: Petitioner (as an adverse witness); Ms. Diane Konopka, Deputy Director, Sheriffs' Standards Division

ISSUE

Did Petitioner knowingly misrepresent a material fact on his application to Respondent for certification as a justice officer and/or knowingly and designedly attempt to obtain certification as a justice officer by means of a false representation?

UPON DUE CONSIDERATION of the written contentions of the parties, the exhibits admitted, and the sworn testimony of each witness presented at the hearing, assessing its weight and credibility in light of the demeanor of the witness; the opportunity of the witness to see, hear, know, and recall relevant facts and occurrences; the interests and predisposition of the witness; whether the testimony of the witness is reasonable and consistent with the other credible evidence; weighing all the evidence of the facts alleged, or lack thereof, and the reasonable inferences to be drawn therefrom, weighed with the record as a whole, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner Howard Ron Simons (hereinafter “Petitioner”) is a resident of Haywood County, North Carolina and is presently employed by the Buncombe County Sheriff’s Department as a detention officer at the Buncombe County Detention Center. He was 42 years of age when he prepared the document discussed herein.
2. Petitioner prepared an application for justice officer certification with Respondent North Carolina Sheriffs’ Education and Training Standards Commission (hereinafter “Respondent”) when seeking the position of detention officer with the Sheriff of Buncombe County, where he began work on March 12, 2012. Petitioner was previously certified as a DOC Correctional Officer by the Criminal Justice Education and Training Standards Commission and was employed as a Correctional Officer by the State of North Carolina at Haywood Correctional Facility for approximately three years, until it closed. (See P. Ex. 4; R. Ex. 2, p. 7; & Petitioner’s testimony)
3. Petitioner’s application for justice officer certification with Respondent included a Form F-3, “Personal History Statement” (R. Ex. 2), and Form F-8, “Summary of Background Investigation” (P. Ex. 1). Petitioner signed the completed form F-3 before a Notary Public and certified that each statement on the form was “true and complete.” The Form F-3 cautions that any misstatements or omissions could result in the denial of the application for certification.
4. Question No. 42 on Form F-3 asks the applicant to disclose the following:

“Have you ever been arrested by a law enforcement officer or otherwise charged with a criminal offense?”

Prominent instructions with Question No. 42 advise:

“If any doubt exists in your mind as to whether or not you were arrested or charged with a criminal offense at some point in your life or whether an offense remains on your record, you should answer ‘YES.’”

Petitioner answered Question No. 42, “No,” indicating that he had never been arrested by a law enforcement officer or otherwise charged with a criminal offense.

5. The Buncombe County Sheriff's Office prepared the Form F-8, “Summary of Background Investigation”--including a “Verification of Criminal History or Any Disciplinary Actions”--with information obtained from Buncombe and Haywood Counties and the State of Florida, where Petitioner lived prior to moving to North Carolina. No criminal records were found for Petitioner, other than traffic and minor motor vehicle violations. (P. Ex. 1)
6. In keeping with its general policy, Respondent also requested criminal history records from the county in New Jersey where Petitioner had attended high school. New Jersey records were obtained showing that Petitioner had been arrested in New Jersey on June 29, 1989, two days after his nineteenth birthday, for burglary, possession of burglary tools with intent to employ, larceny greater than \$500, and criminal mischief. (R. Exs. 4, 5, 9-11, & 13-15) Based on these records, Respondent convened a meeting of its Probable Cause Committee.
7. Prior to the Probable Cause Committee meeting, Respondent requested that Petitioner provide two separate statements regarding the omission of the criminal arrest in New Jersey in 1989 by Petitioner on his Form F-3 in 2012. (R. Exs. 7 & 8) Consistent with his subsequent testimony, Petitioner's statements indicated that he recalled that he and his friend were confronted by officers at a car lot, that he was questioned for “seven or eight hours” at a police station, and was coerced into giving a statement that “implicated” himself in order to be released. Petitioner stated, however, that he did not think he was arrested and “never appeared in court or remember having any further dealings regarding this incident, after that night.” He pointed out that he had passed a polygraph test administered during the Buncombe County Sheriff's hiring process, during which he denied ever being arrested. He related that during a recent conversation with his mother, she recalled retaining a lawyer to “look into the situation,” but he did not recall any contact with a lawyer.
8. Following a September 2013 hearing at which Petitioner appeared, Respondent's Probable Cause Committee notified Petitioner in a letter dated September 25, 2013, that it had found “that probable cause exists to believe that your justice officer certification should be denied,” citing violation of 12 NCAC 10B .0204(c)(1) and (2) by his denial of any prior arrest in his application's Form F-3 Personal History Statement. (R. Ex. 1) These rules provide, in pertinent part:

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

- (1) has knowingly made a material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. [...]
 - (2) has knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission.
9. Respondent subsequently obtained the complete police record concerning Petitioner's arrest, including additional documents generated during the booking process. The New Jersey documents include:
 - A Consent to Search form, signed by Petitioner, authorizing the police to search his automobile (R. Ex. 6). The form shows that "one (1) pair of rubber gloves" was taken from the car as evidence. In his written statement, Petitioner recalls his friend apologizing to him at the police station "about a glove being found in my car."
 - A Vehicle Report form indicating that Petitioner's Pontiac was impounded as a result of his arrest on June 29, 1989. (R. Ex. 4, Att. 2)
 - Fingerprint cards, signed by Petitioner, prominently labeled "CRIMINAL ARREST," and listing "Charges: Burglary, Theft, Tamper w/auto" and "Charge: 1 Burglary 2 Theft," respectively. (R. Exs. 9 & 10)
 - Front and profile mugshots, which Petitioner testified depicted him. (R. Ex. 11)
10. It appears from the New Jersey court records that Petitioner was arrested on June 29, 1989; indicted in July 1989; appeared in Middlesex County Superior Court on October 2, 1989; and was ordered into a "Diversion Program." It further appears from the New Jersey court records that the charges were dismissed on May 2, 1991. (R. Ex. 4, Att. 2)
11. Petitioner testified that this was his only adverse contact with law enforcement. According to his Arrest Report, he was employed as a "guard" at that time (R. Ex. 4, Att. 2). While living in Florida, Petitioner worked for 11 years at a job involving security for a community, including dispatching sworn officers and other first responders. During the three years immediately prior to completing the application, Petitioner worked as a Correctional Officer. Even without these experiences to remind him of his own brush with the law, it is extraordinarily difficult to believe that a person with apparently normal faculties could have forgotten being arrested, booked, fingerprinted, photographed, indicted, and being brought before a judge with his liberty at stake.
12. Petitioner denied suffering from any cognitive disability or mental impairment at any relevant time. He specifically denied being under the influence of alcohol at the time of his arrest. In light of the foregoing facts, Petitioner's claim that he did not know that he had been arrested is not credible.

13. Consequently, it is found by the greater weight of the evidence of record that Petitioner knowingly made a material misrepresentation of information required by Respondent for certification or accreditation when he answered “No” to Question 42 of Respondent’s Form F-3, “Personal History Statement,” and thereby denied that he had ever been arrested, in violation of 12 NCAC 10B .0204(c)(1). The evidence does not support a finding that Petitioner designedly undertook to commit any of the additional and more egregious acts of cheating, fraud, and deception to which 12 NCAC 10B .0204(c)(2) refers.
14. Petitioner presented mitigating evidence at the administrative hearing. This included the testimony of Sergeant Rusty Bell and Sergeant Kenneth Varner, Petitioner’s former and current supervisors at the Buncombe County Detention Center, and Sergeant Joseph Lee Riddle of Craggy Correctional Center, who worked with and supervised Petitioner at Haywood Correctional Center from the time Petitioner was hired until that facility was closed in 2011. These witnesses knew Petitioner as a hardworking and honest officer and colleague and held the sincere and informed opinion that Petitioner would make a good corrections officer, based on their personal knowledge of his current and previous work.
15. In the 23 years that elapsed since his arrest, Petitioner moved to Florida and worked in “Access Control” for a community, including dispatching “a contract deputy.” He got married, had two daughters, and began raising them as single parent after his wife left the family. While also working to support his family, he earned a GED and then earned an Associate’s degree in Criminal Justice from Haywood Community College. Subsequently, Petitioner earned a Bachelor’s degree in Criminal Justice from Western Carolina University. He obtained a real estate license and briefly worked in that field until the recent recession struck. One of his daughters currently attends the University of North Carolina at Asheville, and the other remains in his home. There is no report or suspicion of illegal conduct since 1989 in this record. From a law enforcement perspective, his is a story of a successful intervention at an early formative age.
16. In light of his previous clean criminal background checks in Florida as well as North Carolina, it is unlikely that Petitioner contemplated that he was entering into a scheme of deception when he prepared his application for Respondent. It is common for the public to question the relevance of long ago mistakes, and many legally-mandatory criminal background checks are required to cover only five years. See, e.g., N.C. Gen. Stat. §114-19.6 (positions in the Division of Juvenile Justice providing direct care for youth); § 114-19.23(b) (positions in the Department of Public Instruction); §131D-10.3A(e) (adults living in foster homes). Although he denied being aware of expungement of criminal records, the fact that he was initially “diverted” from the corrections system, and that his charges were all ultimately dismissed, together with the passage of time and his own good record, may well have caused him to form the attitude that his arrest was essentially nullified.
17. The greater weight of the evidence is that Petitioner has been and in all probability would continue to be a good detention officer. While it is disturbing that he maintained throughout this process that he did not recall being arrested, when he most likely did, this

arose from a unique situation, and it is now in his record, should future employers deem it relevant. On balance, it appears that the public would best be served by allowing Petitioner the opportunity to continue in his employment as a detention officer.

18. Petitioner received proper notice by certified mail of the proposed Denial of Justice Officer's Certification and participated in Respondent's Probable Cause Committee's hearing. Petitioner made a timely request for a hearing.
19. To the extent that portions of the following Conclusions of Law include findings of fact, such are deemed incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. To the extent that portions of the foregoing Findings of Fact include conclusions of law, such are deemed incorporated into these Conclusions of Law.
2. The parties and this controversy are properly before the Office of Administrative Hearings upon the Applicant's timely request following Respondent's notice of proposed action duly given on September 25, 2013, pursuant to N.C. Gen. Stat. §150B-40, Chapter 17E, and 12 NCAC 10B .0105(d).
3. Respondent 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.
4. 12 NCAC 10B .0204(c)(1) and (2) states that the Sheriffs' Commission may deny the certification of a justice officer when the Commission finds that the applicant has "knowingly made a material misrepresentation of any information required for certification or accreditation from the Commission."
5. 12 NCAC 10B .0205 provides in relevant part that:

When the Commission suspends, revokes, or denies the certification of a justice officer, the period of sanction shall be:

[...]

(2) not less than five years where the cause of sanction is:

[...]

(b) material misrepresentation of any information required for certification or accreditation from the Commission

[...]

The Commission may [...] substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating

circumstances brought out at the administrative hearing warrant such a reduction or suspension.

6. Respondent had probable cause to deny Petitioner's justice officer certification for material misrepresentation of any information required for certification or accreditation from the Commission for a period of not less than five years.
7. Extenuating circumstances brought out at the administrative hearing warrant a substitution of a period of probation in lieu of the denial of Petitioner's certification.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that Respondent substitute a period of probation, in the discretion of Respondent, in lieu of denying Petitioner's justice officer certification.

NOTICE AND ORDER

The North Carolina Sheriffs' Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

It hereby is ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This the 20th day of June, 2014.

J. Randolph Ward
Administrative Law Judge