

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DOJ 00527

WILLIAM BUCHANAN BURGESS,)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA SHERIFFS')
 EDUCATION AND TRAINING)
 STANDARDS COMMISSION,)
)
 Respondent.)
)

PROPOSAL FOR DECISION

In accordance with N.C. General Statute 150B-40(e), Respondent requested the designation of an Administrative Law Judge to preside at a N.C. General Statute 150B, Article 3A contested case hearing of this matter. Based upon Respondent's request, Administrative Law Judge Melissa Owens Lassiter was assigned to hear this contested case in Raleigh, North Carolina. On June 2, 2014, the undersigned heard this contested case in Raleigh, North Carolina. At the conclusion of all evidence, the undersigned ruled for Petitioner.

APPEARANCES

For Petitioner: T. Allen Swaim, Jr., Swaim Law, PLLC, Attorney at Law, PO Box 770, Wendell, NC 27591

For Respondent: Matthew L. Boyatt, and William P. Hart, Assistant Attorney General, NC Department of Justice, 9001 Mail Service Center, Raleigh, NC 27699-9001

ISSUES

1. Did Petitioner commit the offense of Making Harassing Phone Calls in violation of N.C. Gen. Stat. § 14-196 during the approximate time period of April 25, 2013 through May 13, 2013?

2. Did Petitioner commit the offense of Cyber-Stalking in violation of N.C. Gen. Stat. § 14-196.3 during the approximate time period of April 25, 2013 through May 13, 2013?

3. Did Petitioner commit the offense of Assault On A Female in violation of N.C. Gen. Stat. § 14-33(c)(2) on or about August 2011?

4. If Petitioner committed one or more of the foregoing offenses, whether extenuating circumstances exist?

5. The appropriate sanction, if any, which the Commission should impose against Petitioner's justice officer certification?

STATUTES AND RULES AT ISSUE

N.C. General Statute § 150B-40
N.C. Gen. Stat. § 14-196
N.C. Gen. Stat. § 14-196.3
N.C. Gen. Stat. § 14-33(c)(2)

FINDINGS OF FACT

Procedural Background

1. By letter dated December 23, 2013, Respondent notified Petitioner that Respondent's Probable Cause Committee had found probable cause exists to revoke Petitioner's justice officer certification based upon facts and circumstances that Petitioner had committed the following offenses between April 25, 2013 and May 13, 2013:

- a. Class B misdemeanor offense of "Harassing Phone Calls" in violation of N.C. Gen. Stat. § 14-196 by repeatedly telephoning his estranged wife, Lisa Burgess, for the purpose of abusing, annoying, threatening, terrifying, harassing, and embarrassing Ms. Burgess.
- b. Class B misdemeanor offense of "Cyber-stalking" in violation of N.C. Gen. Stat. § 14-196.3 by repeatedly sending text messages to his estranged wife, Lisa Burgess, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing Ms. Burgess.
- c. Class B misdemeanor offense of "Assault on a Female" in violation of N.C. Gen. Stat. § 14-33(c) by pushing Lisa Burgess down on the bed and holding her down by pushing on her chest and shoulders.

(Rasp Ex 1)

2. Petitioner timely requested an administrative hearing from Respondent, and Respondent thereafter requested the assignment of an Administrative Law Judge to hear this contested case.

Adjudicated Facts

3. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, and both parties received Notice of Hearing.

4. Respondent is authorized by Chapter 17E of the North Carolina General Statutes, and Title 12 of the North Carolina Administrative Code, Subchapter 10B, to certify justice officers and to revoke, deny, or suspend such certification.

5. 12 NCAC 10B .0204(d)(1) provides:

The Commission may revoke, suspend or deny the certification of a justice officer when the Commission finds that the . . . certified officer has committed or been convicted of . . . a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of appointment.

6. When the Commission suspends, revokes, or denies the certification of a justice officer for commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(1), the period of sanction shall be "not less than five years." 12 NCAC 10B .0205(2)(a). However, following an administrative hearing, the Commission may reduce or suspend this five-year period of sanction, or substitute a period of probation in lieu of revocation or suspension, if extenuating circumstances brought out at the administrative hearing warrant such action. 12 NCAC 10B .0205(2)

7. Violations of N.C. Gen. Stat. § 14-196 (annoying or harassing by repeated telephoning), N.C. Gen. Stat. § 14-196.3 (cyber-stalking), and N.C. Gen. Stat. § 14-33(c)(2) (assault on a female) are all classified as Class B misdemeanor offenses under Respondent's rules. Although the Commission has found probable cause to believe Petitioner has "committed" each of these offenses, Petitioner was not criminally charged with any of them in connection with the events at issue.

8. Petitioner was a police officer with the Angier Police Department from 1990 to 1993, and was a police officer with Clayton Police Department from 1993 to 1996. On or about August 19, 1996, Petitioner was appointed as a Deputy Sheriff with the Wake County Sheriff's Office. Petitioner has been certified as a justice officer with Respondent since that time.

9. Petitioner and Lisa Burgess were married for 9 years, after having dated for one year. Petitioner and Ms. Burgess had one child, a 5 year old son. Ms. Burgess had two children, 19 and 11 years old respectively, from former marriages. At the relevant time, Lisa Burgess was approximately 5'4" to 5'-5" tall, weighing 145 pounds, while Petitioner was 6'2" tall, weighing 230 pounds.

10. In August of 2011, Petitioner caught Lisa passionately kissing, and in an intimate embrace with, another woman at a friend's birthday party. He was upset and embarrassed. At home, Petitioner and Lisa discussed the incident. Lisa screamed in Petitioner's face, flailed her arms, and advanced on Petitioner. Petitioner placed his hands on Lisa's shoulders, pushed her down on the bed, and held Lisa down on the bed. Petitioner intended to calm Lisa down. Petitioner and Lisa talked about the kissing incident. He forgave her for kissing another woman,

and she forgave him for holding her down on the bed. The day after the incident, Petitioner and Lisa told Petitioner's mother, Judy Burgess, about their fight, and that Petitioner pushed Lisa.

11. In April 2013, Petitioner returned vacation, and noticed that his wife was not as affectionate or talkative with him. He asked Lisa what was wrong, and offered to move to his mother's house for two days, and then get back together with her to talk. After Petitioner moved to his mother's home, he didn't hear from Lisa. Petitioner and Lisa had a very good marriage for a long time, and they usually talked two to three times a day.

12. On April 25, 2013, Petitioner began calling his wife repeatedly, but Lisa wouldn't take his calls. Petitioner talked with Lisa on the phone two times, but never raised his voice. He admitted that he was insistent with Lisa. Petitioner didn't want their son to grow up in a divorced home. He wanted to keep his marriage and family together. He explained at hearing that he didn't intend to harass Lisa with the phone calls. During this time, Petitioner also sent numerous texts to Lisa telling her he loved her, and asking her to please talk with him.

13. On or about May 11, 2013, Petitioner went out with friends, and drank two beers. He was upset about his relationship with his wife. Around 2:00 am on May 12, 2013, Petitioner went to his home. He didn't intend to cause harm or expect to find Lisa with someone. After walking around his home, Petitioner discovered Lisa was not home. Petitioner knew Lisa Burgess was having an affair, but he wanted to talk with her. He thought, but didn't know for sure, that Lisa was with another man that night. Petitioner's 18 year old step-daughter, Katie, was asleep in her bed. Katie did not know where her mother was located. Katie called her mother on the telephone. Petitioner raised his voice when talking to Lisa, asking her, "Where are you at?" Lisa Burgess told Petitioner that it was none his business where she was, and hung up.

14. Shortly thereafter, Lisa Burgess exited a vehicle outside a local bar in Knightdale, NC, and approached two Knightdale police officers. She told the police that she was afraid her husband would hurt her, and gave Petitioner's name to the police. The Knightdale police officers called the Raleigh Police Department regarding Lisa Burgess' statement.

15. Five to ten minutes later, a police officer arrived at Petitioner's home, and knocked on the front door. Petitioner told the officer that he wanted to see his wife, and suspected she was seeing someone. Petitioner was obviously upset. In a commanding voice, Petitioner told the officers to bring Lisa home. After speaking with Lisa Burgess, a police officer told Katie that he would take her to her mother. Petitioner told the officer, "No, she's not." Petitioner indicated that he used his "command" tone of voice, which is an elevated tone that he was taught to use in a stressful situation. Petitioner stared at the police officer for several seconds, but calmed down. Petitioner apologized to the officer for raising his voice. The police officer did not issue an arrest warrant to Petitioner. After that, Petitioner called the Wake County Sheriff, and described what happened. The Sheriff sent two sergeants to take Petitioner home because he was upset.

16. On May 21, 2013, Petitioner and his wife Lisa Burgess entered into a Consent Domestic Violence Protective Order (DVPO) against Petitioner in Wake County District Court (file number 13CVD5645). Judge Jennifer Green approved such Order.

17. A short time thereafter, Petitioner retrieved personal items from his home, accompanied by 3 friends. Approximately one week later, Knightdale police officers saw Petitioner's car parked at the town park. Petitioner had parked at the Knightdale Park to go running. Petitioner parked his car at the park and ran on a regular basis. The town park was located approximately $\frac{3}{4}$ of a mile from the marital residence. The Knightdale police took dogs to walk around Petitioner's home, and called the magistrate. The magistrate said that Petitioner violated the DVPO (50B) Order by retrieving property from the marital home one week ago. However, the District Attorney chose not to prosecute Petitioner, and said Petitioner had not violated the DVPO (50B) Order since a Deputy Sheriff is on duty all the time.

18. On June 6, 2013, Petitioner resigned from his job with Wake County Sheriff's Department. Petitioner resigned because he couldn't give the "right time" to his job and because of the stress with his wife. Petitioner planned to return to the Sheriff's office once he got his life back together. The Sheriff told Petitioner that he wanted to hire Petitioner back, but his hands were tied because of Respondent's Probable Cause Committee's finding. (Resp. Ex. 1) On or about November 13, 2013, Ms. Burgess requested the DVPO be set aside, citing that "volatile situation is much improved . . . no problems in the preceding month." (Resp. Ex. 3) By Order dated December 16, 2013, Judge Jennifer Green set aside the DVPO, noting that Petitioner and Ms. Burgess "have not had any further problems. . . . Defendant has attended counseling." (Resp. Ex. 4)

19. Petitioner attended pastoral counselling for two weeks in December 2013.

20. Judy Burgess testified at the administrative hearing on Petitioner's behalf. During the relevant time period discussed above, Detective Jeff Moore called Judy Burgess and told her he was investigating Petitioner for Lisa. Moore also called Judy Burgess two-three days before this hearing, and told her that Monday was "D day."

CONCLUSION OF LAW

1. The Office of Administrative Hearings has the personal and subject matter jurisdiction over the contested case. The parties received proper notice of the hearing in the matter. To the extent that the Findings Of Fact contain Conclusions Of Law, or vice versa, they should be so considered without regard to the given labels.

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

3. 12 NCAC 10B .0204(d)(1) provides in pertinent part:

(d) The Commission may revoke, suspend or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of:

(1) A crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor which occurred after the date of appointment;

4. N.C.G.S. § 14-196 provides:

(a) It shall be unlawful for any person:

(3) To telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number;

5. N.C.G.S. § 14-196.3 states:

(b) It is unlawful for a person to:

(2) Electronically mail or electronically communicate to another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing, or embarrassing any person.

6. At hearing, Respondent failed to present any evidence of the total number of phone calls or the substance of those phone calls that Petitioner made to his wife to “harass” her, other than the one 2:00 am call. Similarly, Respondent failed to present any evidence of the total number of texts Petitioner sent to his wife or the substance of those texts during the subject time period. One harassing phone call to your wife, who isn’t at home at 2:00 a.m., and asking her “Where are you?” is not sufficient to constitute harassment under N.C.G. S. 14-196. Both misdemeanor offenses of “Harassing Phone Calls” or “Cyber-stalking” have a common element of Mens Rea. In this case, a preponderance of the evidence showed that Petitioner did not telephone his wife nor send her text messages “for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing” her. Instead, the preponderance of evidence showed that Petitioner phoned or texted his wife from April 25, 2013 through May 13, 2013, because he loved her, and wanted for them to get back together as man and wife, and resume their marriage. For the foregoing reasons, Petitioner did not commit the misdemeanor offense of “Harassing Phone Calls” in violation of N.C.G.S. §14-196, and did not commit the misdemeanor offense of “Cyberstalking” in violation of N.C.G.S. §14-196.3.

7. N.C.G.S. § 14-33 provides:

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

(2) Assaults a female, he being a male person at least 18 years of age;

8. An assault is an intentional offer or attempt by force or violence to do injury to the person of another. *State v. Thompson*, 27 N.C. App. 576, 219 S.E. 2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976) Conviction of misdemeanor assault requires proof of infliction of or attempt to inflict serious injury. *State v. Malloy*, 53 N.C. App. 369, 280 S.E.2d 640 (1981)

9. In this case, while Respondent’s probable cause committee found probable cause existed to prove Petitioner committed the act of “Assault on a Female” in August of 2011, the preponderance of the evidence at this hearing proved that Petitioner was defending himself after his wife advanced on him while screaming in his face and flailing her arms. Petitioner admitted that he pushed his wife down on the bed, and restrained her to calm her down. There was no evidence at hearing to rebut Petitioner’s testimony about this incident, to show that Petitioner attempted to inflict serious injury on Lisa Burgess during that argument, or to show that Lisa Burgess was injured by Petitioner during such argument. For the foregoing reasons, Petitioner did not commit an “Assault on a Female” in violation in N.C.G.S. § 14-33(c)(2).

10. Following an administrative hearing, the Commission may reduce or suspend this five-year period of sanction, or substitute a period of probation in lieu of revocation or suspension, if extenuating circumstances brought out at the administrative hearing warrant such action. 12 NCAC 10B .0205(2)

11. Even if Respondent finds that Petitioner committed an “Assault on a Female,” the undersigned finds that the above-referenced circumstances justify extenuating circumstances sufficient to warrant a lesser sanction, such as probation, be imposed against Petitioner.

PROPOSAL FOR DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that Respondent **ISSUE** Petitioner’s justice officer certification.

NOTICE AND ORDER

The North Carolina Sheriffs’ Education and Training Standards Commission will make the Final Decision in this contested case. 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). In accordance with N.C. Gen. Stat. § 150B-36(b), that agency shall also serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina, 27699-6714.

This 2nd day of September, 2014

Melissa Owens Lassiter
Administrative Law Judge