

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DOJ00871

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| Derek Andre Howell Petitioner v. N C Sheriffs' Education And Training Standards Commission Respondent | PROPOSAL FOR DECISION |
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THIS MATTER was tried before the Hon. J. Randolph Ward, Administrative Law Judge in Charlotte on June 3, 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: Petitioner Derek Andre Howell appeared *pro se*.

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

WITNESSES

Petitioner: Officer Derek Andre Howell, Petitioner.

Respondent: Officer Derek Andre Howell, Petitioner (adverse witness).

Captain Charles McGee, Mecklenburg County Sheriff's Office; Petitioner,
Derek Andre Howell

EXHIBITS

PETITIONER'S EXHIBIT

Exhibit 1 Petitioner's Prehearing Statement (letter) filed April 9, 2014

RESPONDENT'S EXHIBITS

- Exhibit 1 Petitioner's *General Deputy Sheriff Certification*, issued July 16, 2009
- Exhibit 2 *Notification of Probable Cause to Revoke Justice Officer Certification*,
December 23, 2013
- Exhibit 3 Petitioner's letter (undated) for Respondent's hearing
- Exhibit 4 Mecklenburg County Sheriff's Office's *Report of Separation* to Sheriffs'
Standards Commission
- Exhibit 5 *Case Summary*, by Capt. C. S. McGee of Respondent's Office
Professional Compliance
- Exhibit 6 Transcript of Petitioner's Interview on September 6, 2013
- Exhibit 7 Mecklenburg County Sheriff's Office's records of December 8, 2011 "A"
Violation of Rules of Conduct
- Exhibit 8 Petitioner's "Complete OPC [Office of Professional Compliance] History"
at the Mecklenburg County Sheriff's Office
- Exhibit 9 Petitioner's "Student Course Completion Record" at the Criminal Justice
Standards Division
- Exhibit 10 Respondent's Discovery Requests, with Petitioner's responses
- Exhibit 11 Seven (7) letters supporting Certification for Officer Howell

ISSUE

Does the preponderance of the evidence demonstrate that Petitioner's General Deputy Sheriff Certification should be revoked for failure to maintain the "good moral character" required, as a minimum standard set forth in 12 NCAC 10B .0301(a)(8) for every Justice Officer employed or certified in North Carolina, in violation of 12 NCAC 10B .0204(b)(2) and N.C. Gen. Stat. 17E-7(c)?

FINDINGS OF FACT

1. The parties and this cause are properly before the Office of Administrative Appeals, upon Respondent's December 23, 2013 *Notification of Probable Cause to Revoke Justice Officer Certification* served on the Petitioner by certified mail, and the Petitioner's timely Request for an Administrative Hearing.

2. Petitioner Derek Andre Howell was employed by the Mecklenburg County Sheriff's Office from November 9, 2005, until his discharge on September 26, 2013, shortly after the incident giving rise to this case. While working full-time as a Detention Officer, the Petitioner attended classes on his off-duty days for approximately 9 months to obtain his General Deputy Sheriff Certification from the Sheriffs' Commission. After receiving his certification on July 16, 2009, Petitioner was hired as a Deputy Sheriff and assigned to the Arrest Processing Center.

3. Since leaving the Sheriff's Office, Petitioner has been employed with G4S Secure Solutions, a private security company. He began working at the Transit Center of the Charlotte

Area Transit System (“CATS”) under G4S’s contract, and was promoted to a supervisory position after five months. In recent months preceding the hearing, he was providing “close quarter security” for the Transit System personnel handling cash. Because of the uncertainty about Petitioner’s ability to carry a firearm, and the preference of all G4S’s clients for armed guards, he was laid off by G4S on the Friday before the hearing. The company had planned to place him at an institution that used unarmed security, but their bid for that contract was unsuccessful. Petitioner believes that he will be rehired by G4S if he can retain his certification, and the letters in evidence from G4S personnel tend to verify that belief. Officer Howell is married, and the couple have a baby and an older adopted child.

4. During the early morning hours of Thursday, September 5, 2013, the Petitioner was working “off-duty” providing security at the Charlotte Convention Center, with the prior approval of the Respondent for this “secondary employment job.” He was among a number of off-duty officers augmenting the Convention Center’s regular security staff. The outer perimeter of the complex, including the unlocked entryway area used by the officers, was under guard and surveillance by other security personnel. He and another officer were assigned to sit in an interior “20,000 square foot” room, “Hall C,” from midnight until 8 A.M. However, the other officer did not come, and Officer Howell was alone while in Hall C throughout his eight hour shift. Merchandise had been sold at this location to convention attendees during the day, but it was locked away when Officer Howell began his shift. No members of the public were in the building.

5. Petitioner testified that he was entitled to an hour of breaks during his eight hour shift - two of 15 minutes, and a 30 minute break, presumably provided as the meal period. A “meal period” is defined by the State, and the federal Fair Labor Standards Act, as “a span of at least 30 consecutive minutes during which an employee is *completely relieved of duty.*” *State Human Resources Manual* (rev. 04/1/2008), Sec. 3, p. 45. (Emphasis mine.) The evidence, including time stamps on video stills attached to the “Case Summary” prepared by the Respondent’s Office Professional Compliance, shows that Officer Howell left Hall C and went outside the building for approximately 40 minutes between 2:55 and 3:40 A.M. There is no evidence that his absence from Hall C for this period -- standing alone -- was unauthorized, a violation of duty, or exposed the property he was helping to guard to undue risk. Officer Howell’s use of break time allowed as a condition of his employment did not constitute abandonment of his post. The activity that the Sheriffs’ Commission found was misconduct giving rise to probable cause to revoke Petitioner’s certification was having intimate relations during this break.

6. While in Hall C, without anyone else there to talk to, Officer Howell spent much of his time playing games on his phone, and sending text messages to friends. One of them, an acquaintance named Jennifer, replied. During further texting and telephone conversation, a plan evolved for Jennifer to come to meet the Petitioner outside the convention center. During her brief visit, they had sexual relations in his truck while it was parked on the public street adjacent to the convention center parking area. There was little or no vehicular traffic, but three persons walked past the truck during the period they were together, although they apparently did not observe the couple through the tinted windows of the truck. While Petitioner was temporarily off-duty during this interlude, he remained armed, in uniform, with powers of arrest, and thus

was a representative of the Sheriff's Department with the obligation to display only proper behavior, as he acknowledged.

7. The truck was in view of one convention centers surveillance cameras. It captured images that at least raised the suspicion of inappropriate activity, and Petitioner's superiors were notified. When questioned the following day, Petitioner acknowledged having sexual relations in the truck. He was discharged immediately from his employment with the Sheriff's office for "conduct unbecoming" an officer. Petitioner testified that Respondent has a "no rehire" policy. The referenced "Rule of Conduct" applied to terminate the Petitioner "for cause," provides:

A. Employees shall conduct themselves at all times, both on and off duty, in a manner that is in keeping with the highest standards of the law enforcement profession.

B. Conduct unbecoming an employee is prohibited and shall include that which brings the Sheriff's Office or any Sheriff's Office employee into disrepute, reflects unfavorably upon the employee as a member of the Sheriff's Office, or impairs the operation or efficiency of the Sheriff's Office or any of its personnel.

"Rules of Conduct #2, Section 6(A & B) Unbecoming Conduct." While "conduct unbecoming an officer" certainly encompasses any activity that would bring into doubt a person's good moral character, it sets a higher standard to include errors in behavior that persons of good moral character might commit due to poor judgment, inattention to duty, or inappropriate demeanor.

8. One prior incident may have had a bearing on the decision to discharge the Petitioner. On December 8, 2011, while working an overnight shift, Petitioner took a call from and upset and crying young woman whose car had apparently been towed. He gave her a phone number she could call to determine the whereabouts of the vehicle, but she continued to complain that she would be unable to get work. He ascertained that he would be off duty by the time she needed to go to work, and offered to take her. By his account, he believed that she accepted this offer, so he asked for her address, phone number, and a picture so that he could recognize her when he came to pick her up. She called back to complain to his supervisor of feeling "freaked out" by these personal questions. He was cited for "conduct unbecoming" an officer, a "Category A" violation. Petitioner perceived that much of his supervisors' concern grew out of the exposure to liability created by off-duty contact with citizens met in the line of duty.

9. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter the "Sheriffs' 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 for good cause, to revoke such certification. Title 12, N.C. Administrative Code, 10B .0301(a)(8) provides that all justice officers employed or certified in the State of North Carolina shall "be of good moral character," and 12 NCAC 10B.0204(b)(2) empowers the Sheriffs' Commission to "revoke ... the certification of a justice officer when the Commission finds that ... the certified officer ... fails to ... maintain any of the employment or certification standards required by 12 NCAC 10B .0300 [*sic*]." Following receipt

the Mecklenburg Co. Sheriff's *Report of Separation* concerning Petitioner's discharge, the Respondent's held a hearing December 23, 2013 and determined that his certification should be revoked pursuant to this statute and regulation.

10. Few would question Sheriff Bailey's exercise of his prerogative to promptly fire the Petitioner for "conduct unbecoming an officer," both as a response to the individual's actions, and to uphold the standards of the organization he leads. The broader question of whether the Petitioner should be permitted to act as a sworn officer for any organization in the future has a more stringent criteria -- in this instance, whether he lacks "good moral character."

11. The applicable regulation defines "good moral character" by referencing specific North Carolina appellate case law.

(a) Every Justice Officer employed or certified in North Carolina shall: * * * (8) be of good moral character as defined in: *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975), *appeal dismissed* 423 U.S. 976 (1975); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989); *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); and their progeny;

12 N.C.A.C. 10B .0301(a)(8) (2014). The most recent of these cases, our Supreme Court's opinion in *In re Willis*, begins with a sobering warning to those who must apply the term "good moral character:" "It can be defined in an almost unlimited number of ways[,] for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal view and predilections, can be a dangerous instrument for arbitrary and discriminatory denial[.]" *Id.*, 288 N.C. at 10, 215 S.E.2d at 776. Having pointed to the need for informed and disciplined application of the phrase, the Court undertakes an inquiry into its meaning, which consideration of some other cases listed in the regulation.

Our Court first notes the United States Supreme Court's observation that, "the term 'good moral character,' although broad, has been so extensively used as a standard that its long usage and the case law surrounding that usage have given the term well-defined contours," and underscores the point with the observation that, "As early as 1760, every applicant to the Bar in this State was required by law to be of 'good character.'" *Id.*, 288 N.C. at 11, 215 S.E.2d at 777. The Court then proceeds to provide "a review of existing decisions [that] illustrates the contours given to the requirement of 'good moral character' by its long usage in this State." *Id.*, 288 N.C. at 12, 215 S.E.2d at 778.

In the case of *In re Dillingham*, ... the Court denied the applicant's application to practice law... [due to] conduct by the applicant during 1919, 1920 and 1921 'amounting in many instances to violations of the criminal law, including obtaining goods by false pretense, larceny, or conspiracy to commit it, forgery, extortion and others; all of them involving moral turpitude . . .'. The applicant made no substantial denial.... Instead, he claimed 'he (had) turned from his evil

practices ... The Court further noted that when one seeks to establish restoration of a character which has been deservedly forfeited, the question becomes essentially one 'of time and growth.'

In the case of *In re Applicants for License* ... on the question of an applicant's moral character, the Court denied the applications of two applicants. ...[T]he first applicant on grounds that 'in his office as a justice of the peace of Wilson County, he has not only failed to make due returns and account for moneys and things entrusted to him, but, in some instances, he has converted them to his own use; and that he has generally engaged in unethical practices.' ...[T]he evidence showed '... a lack of moral perception, or careless indifference to the rights of others'.... Chief Justice Stacy said: ... 'upright character,' ... expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing if it is right, and the resolve not to do the pleasant thing if it is wrong.

The character of the second applicant in *In re Applicants for License* was challenged by ... showing, without contradiction, that in August 1922 the applicant, a former deputy sheriff of Guilford County, attended a ball game, became intoxicated, engaged in a fight, used a deadly weapon, and as a result was indicted in six cases. He pleaded guilty to nuisance (using profane and indecent language on highway), assault and carrying a concealed weapon, and was fined by the court. Judgment was continued in the other three indictments on payment of costs. Consequently, the applicant was discharged as a deputy sheriff. The affidavits further showed that a judgment had been recovered against the applicant in a civil action for wrongful assault and that the applicant's wife had obtained a divorce from him on grounds of adultery. In the divorce proceeding the applicant was found not to be a fit and suitable person to have custody of his daughter.

In re Willis, 288 N.C. 1, 11-14, 215 S.E.2d 771, 777-79 (1975).

The applicant in *Willis*, while in the Air Force two decades earlier, had been disciplined for dereliction of duty and failure to obey an order, had been given a "general" (not "honorable") discharge for "continuous poor performance." Some 10 years before, he had been arrested for burglary, but convicted of trespass after failing to appear in court. He had been convicted five years earlier of driving under the influence of alcohol, which the Court felt "does not evince such a lack of good moral character as to deprive the applicant of a license [but] does indicate a willful disregard for the ... laws ... compounded by his subsequent driving in violation of the restrictions placed on his driving privileges." *Id.*, 288 N.C. at 18, 215 S.E.2d at 781-82. However, the evasions and omissions in his application were perhaps the most damaging evidence of his untrustworthiness in the eyes of the Court.

In *State v. Benbow*, the defendant appealed his sentence to life imprisonment upon his plea of second degree murder. The court determined that a showing that he was "young man who, apart from one incident with the law for which he appeared to have been making

satisfactory amends, was generally well-behaved, considerate, and respectful to family and friends,” did not entitled defendant to a finding in mitigation that he was person of “good character” or that he had a “good reputation.” *State v. Benbow*, 309 N.C. 538, 548, 308 S.E.2d 647, 653 (1983).

In re Legg concerned an unsuccessful applicant for a law license who was denied licensure due to “willfully convert[ing] funds” entrusted to him for a third-party, failure to disclose a loan from a decedent to her executor, and “evasive responses and misleading statements, a purposeful pattern of failing to disclose material matters ... inconsistent with the truthfulness and candor required of a practicing attorney.” The Court emphasized that, “Good moral character has many attributes, but none are more important than honesty and candor.” It also cited with favor the observation that, “Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.”

In *State v. Harris*, our Supreme Court overturned the defendant’s conviction for “engaging in the business of dry cleaning without having procured a license” by finding that the statute requiring a state license to operate a dry cleaning business was unconstitutional. 216 N.C. 746, 6 S.E.2d 854 (1940). The Court found that, “The Legislature may, through appropriate laws, protect the public against incapacity, fraud, and oppression where, from the nature of the business or occupation or the manner of its conduct, the natural consequence may be injurious to the public welfare.” *Id.*, 6 S.E.2d at 861. By contrast, the defendant’s business was one in which any “danger to the public comes from the character of the man and not from any unusual opportunity afforded him in the business, which is inherently amoral. Like any other business, morality is imparted to it only by the character of the men engaged in it.” *Id.*, 6 S.E.2d at 864. In the context of the “good moral character” regulation, *Harris* serves to emphasize that the nature and conduct of law enforcement, and the unusual trust and confidence the public invests in law enforcement officers, requires that only persons of integrity should be entrusted with powers of arrest.

11. Sexual misconduct is referenced only once in the six cases listed in 12 N.C.A.C. 10B .0301(a)(8) to define “good moral character” -- a passing mention of adultery in a litany of crimes of intemperance and violence. *In re Willis*, 288 N.C. 1, 14, 215 S.E.2d 771, 779 (1975). But as paramilitary organizations staffed primarily with young men, sexual misconduct is cited with some regularity in personnel disciplinary actions by law enforcement agencies. [*Evington v. N.C. Criminal Justice Education and Training Standards Commission*](#), 09 DOJ 3070, 2009 WL 4912691 (NC OAH, 13 Nov. 2009), catalogs a dozen cases of sexual misconduct in which the officers received suspensions or reduced pay, but retained their both their certifications and their jobs. All involved misuse of agency property, neglect of duty, and/or endangerment of the public. All were objectively more egregious than the present case.

12. Had the Petitioner’s assignation occurred in private, it is very unlikely that any report of it would have sparked an investigation or discipline by his employer. The Petitioner’s unacceptable behavior -- as he repeatedly confessed from his first interview, in writing and in testimony -- was undertaking this activity in the midst of performing a service as an armed and uniformed representative of the Sheriff’s office. While the fact that he was also a married man casts the shadow of immorality on the episode, from a fitness for service perspective, it was more

of an error of judgment than the kind of dishonesty and selfish abuse of other persons' rights and property associated with the lack of "good moral character." He failed to "resolve not to do the pleasant thing if it is wrong." The "one or two incidents" in this officer's record -- which does contain other scattered, less serious lapses in judgment - does not conclusively portray the lack of "good moral character," as defined by the cases referenced above.

13. The facts in this case are analogous to those in the decision, *Ashley v. N.C. Criminal Justice Education and Training Standards Commission*, 04-DOJ-2256, 2005 WL 3946388 (NC OAH, 17 Oct. 2005). A legally separated highway patrolman was questioned by the supervisors due to repeated complaints from his estranged wife about his subsequent relationship with another woman. He disclosed that on one occasion when he met his girlfriend for lunch, they had engaged in sexual relations. After reviewing the evidence adduced by a full evidentiary hearing, the Standards Commission chose to allow the officer to obtain certification, as the Administrative Law Judge had recommended.

14. Petitioner creditably testified to his remorse over the incident, the dramatic impact of his discharge and this threat to his livelihood on his young family, and on his attitude towards his public and private duties, and his rededication to faithfully performing his law enforcement duties.

15. Petitioner produced seven letters (appearing in the record as Respondents Exhibit 11) from his Captain at G4S Secure Solutions and other law enforcement colleagues attesting to his attributes as an officer. These go beyond the perfunctory endorsement, and credibly portray him as a responsible person of good moral character.

16. The preponderance of the evidence adduced at the hearing of this matter does not show that the Petitioner lacks the requisite "good moral character," within the meaning of 12 N.C.A.C. 10B .0301(a)(8) (2014), to obtain and retain certification as a sworn justice officer.

17. Although relevant, the undersigned declined to receive into evidence Respondent's proffered videotape of the incident, from which the photographs in the record were abstracted by Respondent, pursuant to N.C. Gen. Stat. § 8C-1, Rule 401 of the Evidence Code, as it would be a needless presentation of cumulative evidence, illustrating only uncontroverted facts.

18. To the extent that portions of the following Conclusions of Law include Findings of Fact, such are incorporated by reference 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 incorporated by reference into these Conclusions of Law.

2. The parties and the subject matter of this contested case hearing are properly before the Office of Administrative Hearings. N.C. Gen. Stat. §§ 150B-1(e) and 150B-23.

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

4. As a "minimum standard" for certification and retention of certification, every justice officer employed or certified in North Carolina shall "be of good moral character as defined in: *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975), *appeal dismissed* 423 U.S. 976 (1975); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989); *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); and their progeny." 12 NCAC 10B .0301(a)(8).

5. The Commission shall revoke the certification of a justice officer when the Commission finds that (s)he "fails to meet or maintain any of the employment or certification standards required by 12 NCAC 10B .0300, " an apparent reference to 12 NCAC 10B.0301, titled "Minimum Standards for Justice Officers."

6. The Petitioner's certification as a sworn justice officer is not due revocation for failure to maintain "good moral character," within the meaning of 12 N.C.A.C. 10B .0301(a)(8) (2014).

PROPOSAL FOR DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned recommends the Respondent take no action against the Petitioner Law Enforcement Officer's certification.

NOTICE AND ORDER

The N C 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 22nd day of August, 2014.

J. Randolph Ward
Administrative Law Judge