

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DOJ01202

Curtis Canty Petitioner v. N C Criminal Justice Education And Training Standards Commission Respondent	PROPOSAL FOR DECISION
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This case came on for hearing on July 2, 2014 before Administrative Law Judge Donald W. Overby in Raleigh, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 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.

APPEARANCES

Petitioner: Mikael R. Gross
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Respondent: Lauren Tally Earnhardt
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Department of Justice
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ISSUES

Did Respondent properly deny Petitioner's law enforcement officer certification because Petitioner failed to meet or maintain one of the minimum employment standards in that Petitioner lacked the good moral character required for every criminal justice officer?

Did Respondent properly deny Petitioner's law enforcement officer certification because Petitioner committed the Class B misdemeanor offense of "Gifts and Favors Regulated"?

BURDEN OF PROOF

The question of which party has the burden of proof has been raised by Respondent as a separate issue which will be addressed below.

WITNESSES

Petitioner called no witnesses.

Respondent called Mr. Richard Squires, Deputy Director of the Criminal Justice Standards Division of the N.C. Department of Justice to testify. Additionally, Respondent called Alan Fields, retired Assistant Director for the Division of Alcohol Law Enforcement of the N.C. Department of Public Safety to testify.

STATUTES AND RULES APPLICABLE TO THE CONTESTED CASE

1. The General Statutes applicable to this matter are:
 - a. G.S. 17C-10
 - b. G.S. 133-32
2. The Rules Applicable to this matter are:
 - a. 12 NCAC 09A .0103(23)(b)
 - b. 12 NCAC 09A .0204(b)(2)
 - c. 12 NCAC 09A .0204(c)
 - d. 12 NCAC 09A .0205(b)(1)
 - e. 12 NCAC 09A .0205(b)(2)
 - f. 12 NCAC 09A .0205(c)(2)
 - g. 12 NCAC 09A .0100
 - h. 12 NCAC 09B .0101(3)

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by certified mail, the Proposed Denial of Justice Officer's Certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "The Commission"), on December 30, 2013.
2. The Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9, to certify justice officers and to deny, revoke, or suspend such certification.
3. Petitioner was employed as the General Manager of the City of Asheville's ABC Board from August 2004 until his resignation in September of 2011. While working as the Asheville ABC General Manager in 2008, Petitioner successfully completed BLET.

4. Petitioner was awarded certification as a law enforcement officer on May 2, 2008 with Asheville ABC Law Enforcement. He was a sworn ABC officer but received no additional salary. Petitioner was separated from Asheville ABC on September 27, 2011 after his resignation.
5. Asheville ABC Law Enforcement Chief Bottego noted on the F5B(LE) form that Petitioner's resignation "had nothing to do with any law enforcement duties, which were minimal."
6. Thereafter, Petitioner was employed by the Eastern Band of Cherokee Indians ABC Commission as the General Manager for the tribal ABC Commission. Petitioner applied for a position with the Cherokee Police Department as a law enforcement officer completing his application and appointment forms on September 19, 2012.
7. Although Petitioner finished his application and appropriate forms in September 2012, Respondent did not receive the Report of Appointment/Application for Certification Form from the Cherokee Indian Police Department on Petitioner's behalf until January 17, 2013. The form was signed and dated by a Captain with the Cherokee Indian Police Department on January 10, 2013.
8. Because the length of time between Petitioner's separation from Asheville ABC and the application for certification from Cherokee Indian Police is more than one year, Petitioner is not a lateral transfer and is, therefore, considered an applicant for certification purposes.
9. Respondent subsequently required Petitioner to submit additional forms for verification and required the submission of a new appointment form by the Cherokee Police Chief for the appointment of Petitioner as a probationary law enforcement officer with the Cherokee Police Department. The request for more information had no effect on the effective date of the submission of his application to Respondent.
10. During the application process, Petitioner was found to have no criminal record, a negative drug test, a psychological evaluation reflected no concerns, and a background investigation revealed no conduct that would disqualify Petitioner from holding a law enforcement certification.
11. Upon receipt of the Report of Appointment from Cherokee Indian Police Department, Richard Squires, an investigator for Respondent, looked into why Petitioner separated from Asheville ABC. Squires learned that Petitioner resigned in September 2011 following an ALE Internal Affairs Investigations and, therefore, requested all material and reports surrounding Petitioner's separation. ALE provided a summary of the Investigation performed by Alan Fields along with supporting documents.
12. Based on his investigation, Squires prepared a memorandum summarizing his findings. This memorandum was presented to the Probable Cause Committee on November 20, 2013.

13. Respondent gave Petitioner notice of its concerns on November 1, 2013 and scheduled a Probable Cause hearing for November 20, 2013. Petitioner and his counsel were both present at the Probable Cause meeting and were able to speak to the Committee and present evidence.

14. The Probable Cause Committee found probable cause to believe Petitioner committed the Class B misdemeanor offense of "Gifts and Favors Regulated" and that he lacks the good moral character required of all sworn law enforcement officers. Petitioner was notified of this finding by a Proposed Denial of Justice Officer's Certification letter, mailed by Respondent through certified mail on December 30, 2013.

RESPONDENT'S INVESTIGATION

15. Mr. Squires was Respondent's first witness. He explained the administrative process of the Training and Standards Division in support of Respondent's mission.

16. Squires initiated the investigation into Petitioner when he received evidence that a report existed that alleged Petitioner had engaged in conduct that may disqualify Petitioner from holding a law enforcement officer certification.

17. The information Squires received was based almost if not entirely on an investigative report by Assistant Director Alan Fields which was conducted at the request of the NC ABC Commission Administrator, Michael Herring, and based on anonymous complaints. The anonymous complaints received included allegations of Petitioner "receiving things of value such as free meals by representatives of liquor distillers, liquor suppliers, and brokers." (Respondent's Exhibit 1, pg. 2)

18. Squires conducted no independent investigation, but stated that he had spoken with Fields and requested a copy of Fields' report.

19. After reading the report, Squires recommended that Petitioner be taken before the Respondent's Probable Cause Committee to answer for the alleged violations.

20. Squires did not independently corroborate any information in the report and spoke substantively only to the dates of appointment and separation of Petitioner's employment with law enforcement agencies.

21. Retired ALE Agent Alan Fields was called as a witness by Respondent. Fields conducted the investigation into Petitioner based on an anonymous complaint alleging improprieties by Petitioner. Fields interviewed liquor vendor representatives, employees at the Asheville ABC Board, and Petitioner. Fields also reviewed documents and business records from liquor distillers, liquor suppliers, and the Asheville ABC Board.

22. Agent Fields contends that from the information he received Petitioner received gifts of substantial value including, but not limited to meals, Carolina Panthers tickets, and charity event tickets from members of the liquor industry. ABC Administrative Code 04 NCAC 2T. 0711

provides that it is a violation for any industry member to provide anything of value either directly or indirectly to any retail permittee, or the owner of the premises on which the business of a retailer is conducted. It is also a violation of 04 NCAC 2T. 0711 for any retail permittee to accept from any industry member any item of value. Although Petitioner, as a local ABC General Manager, did not set the price for individual liquor bottles sold at any store, he was in charge of determining which types of liquor would be sold at each Asheville ABC Store and decided how much of each product would be available. Petitioner could also control shelf space and the display of the various products.

23. ABC Commission Rule 04 NCAC 02T. 0901 provides that distiller representatives shall not give liquor, including samples, or anything of value to local ABC board members or employees, which includes store managers and general managers at any time. Local ABC board members or employees, including store managers and general managers, shall not accept gifts, either directly or indirectly from any representatives.

24. Pursuant to ABC Law and Rules of the N.C. ABC Commission, Petitioner can receive gifts such as caps, shirts, and other items from wholesalers in the liquor industry.

25. Pursuant to the rules of the N.C. ABC Commission, it is not improper for employees of an ABC Board to accept liquor in the form of “added value” packages, so long as the liquor was placed with other liquor in the ABC Stores to enhance the sales or act as inducements.

26. Agent Fields opined that the Rules of the ABC Commission are clear and have always been clear that employees of local ABC boards, including general managers, are prohibited from taking items of value from members of the liquor industry. While that may be true to a degree, Agent Fields acknowledged that from time to time in the past the Commission has given authority for member organizations or individuals to do various and sundry events that were prohibited by law. It is difficult to expect some within an organization to toe the line with strict and rigid enforcement, when the controlling and governing body not only turns a blind eye, but actively engages in the same conduct which violates North Carolina law.

RECEIVING GIFTS OR FAVORS

27. Petitioner contends that Respondent failed to prove that Petitioner received various and sundry improper gifts and/or favors from representatives of the liquor industry. It is true that there is no direct evidence of Petitioner’s state of mind when going to various events sponsored by distillers and/or their representatives; there seldom is direct evidence in such instances. Likewise, there is a lack of direct evidence that Petitioner actually attended many of the meals, that he knew who was paying for the meals, that he actually received gifts, or that he knew the source of the gifts.

28. A blanket objection to the introduction of evidence offered at the outset of the trial does not effectively address the myriad of evidentiary problems that may arise in the course of the trial. Some evidence might be admissible but given little to no weight; or alternatively some evidence might be admitted over an objection. It was suggested to the Petitioner that a specific objection should be raised during the course of the trial to anything he felt was objectionable.

29. Petitioner was interviewed by Agent Fields, where he admitted to accompanying liquor vender representatives to meals where they “discussed business” and the representative would pay for Petitioner’s meals. Petitioner accepted payment for 25 meals by various liquor vender representatives between January 2008 and September 2009. At least 5 of these meals were provided and paid for directly by distillers. When presented with a list of the 25 meals, Petitioner stated he “recognized a lot of these” and eventually admitted to attending all of the meals detailed in the list. Petitioner admitted liquor vendor representatives provided him complimentary admission tickets to Carolina Panthers football games on at least 4 different occasions between October 2006 and October 2009. Petitioner, along with members of his family, or members of his staff, attended the various Panthers games. Petitioner also admitted to accepting tickets to a “Chris Paul Weekend” charity event in September of 2008 which he provided to his son who ultimately attended. Petitioner did not reimburse any member of the liquor industry for any of the items of value provided to him.

30. Of particular interest is the fact that the NC ABC Commission itself apparently approved of the Chris Paul charity event, in effect waiving any prohibitive conduct that involved the liquor industry. The Commission does not have the authority to waive statutory prohibitions.

31. The fact that Petitioner “received” gifts such as the tickets to football games and then gave them away is of no consequence. What he did with the “gifts” after receiving them does not matter.

32. Petitioner offered no evidence to rebut or deny his admissions made to Agent Fields.

33. A memorandum issued in 1996 by Michael Herring, Administrator of the Commission, to all local ABC Boards to inform the boards that local ABC Boards and their employees were not to accept gifts or things of value is of no probative value. It was issued many years before Petitioner assumed his position with Asheville ABC, there is no evidence he ever saw or was provided a copy of that particular memo. That memo also states that while it may not be prudent to accept unsolicited meals and incidentals, it acknowledges that it had been an accepted practice to do so.

34. While there is some evidence that the NC ABC Commission may have engaged in irregular treatment of one entity as compared to another and thereby given disparate treatment, the Commission is not on trial in this contested case. This hearing is about the Petitioner’s actions and whether or not he will be recertified as a law enforcement officer.

35. Agent Fields stated that in years before 2010, many of the practices were fairly common which are complained about against Petitioner here.

36. Likewise, evidence from Agent Fields that many other employees at the Asheville ABC Board had allegedly received unlawful gifts and members of the liquor industry admitted to violations, some of which would have been criminal law violations, Agent Fields did not seek to prosecute anyone other than Petitioner. It is very interesting to note; however, the rather

significant number of people interviewed who admitted to violations and the only person attempted to be prosecuted criminally is Petitioner. Law enforcement officers exercise “discretion” daily, but this superficially seems to be abusive of that discretion; however, selective prosecution is not the issue here.

37. Buncombe County District Attorney, Ron Moore refused to prosecute Petitioner.

N.C. GEN. STAT. § 133-32 REQUIREMENTS

38. The only evidence offered by Respondent that general managers or others in supervisory positions might enter into the preparing of plans, specifications, or estimates for public contracts; or the awarding or administering of public contracts; or inspecting or supervising construction authorized by a contract pursuant to N.C. Gen. Stat. § 133-32 was offered by Agent Fields. There was no evidence as to how he may have gained that knowledge.

39. There was no evidence offered to show that Petitioner engaged in the preparing of plans, specifications, or estimates for public contracts; or the awarding or administering of public contracts; or inspecting or supervising construction authorized by a contract pursuant to N.C. Gen. Stat. § 133-32.

40. Although the Asheville ABC Board built two ABC stores during Petitioner’s employment as general manager, there was no evidence that Petitioner was responsible for any of the preparation, oversight, or issuance requirements of the contracts as set forth in N.C. Gen. Stat. § 133-32.

41. Pursuant to N.C. Gen. Stat. § 18B-801, the opening, construction, and closing or moving of ABC stores is an authority delegated only to the members of the local ABC Board who were appointed by the appointing authority.

42. In addition, before an ABC store may be built or moved by a local ABC Board, the Alcohol Law Enforcement Section of the N.C. Department of Public Safety must conduct an ABC Store Investigation and the N.C. ABC Commission must approve all locations and plans for local ABC stores.

CREDIT CARD USE

43. Respondent contends that Petitioner improperly used a credit card issued to him by the Asheville ABC Board on a number of occasions from 2005-2010, as shown by Respondent’s Exhibit 1 on pages 164 through 177.

44. Respondent’s letter dated December 30, 2013 is the document which begins the process of this Article 3A contested case. That letter sets forth all of the grounds upon which the Respondent is proposing to take action. It is the notice to the Petitioner of what he is confronted with.

45. The issue of improper use of the credit card was the basis for allegations that Petitioner had committed a felony; however, no probable cause was found for those allegations. It appears that Respondent is attempting to boot strap those same allegations to show a lack of good moral character.

46. Respondent's determination letter dated December 30, 2013, specifically states that the foundation for suspending or revoking his law enforcement officer recertification for lack of good moral conduct is based on the allegations that he took things of value in violation of N.C. Gen. Stat. § 133-32.

47. The letter dated December 30, 2013 makes no mention of improper use of a credit card issued to Petitioner by the Asheville ABC Board. From the very specific allegations set out in the letter, not even an inference can be drawn that Petitioner improperly used that credit card.

48. Although the actions taken by Petitioner in the alleged improper use of the credit card are perhaps very concerning, Petitioner was not on notice that he would have to address that issue. It is therefore not necessary to address the substance of the purported evidence of the credit card use.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this 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 that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. To the extent that certain portions of the foregoing Findings of Fact constituted mixed issues of laws and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law.

BURDEN OF PROOF

3. Respondent has raised the issue of burden of proof and that the burden has shifted to the Petitioner. Since the issue of burden of proof bears heavily on the outcome of this case, the issue of burden of proof will be discussed fairly at length.

4. Respondent contends that Petitioner's break in service in excess of 12 months has caused Petitioner to lose any property interest he has in his certification and therefore, that the burden of proof somehow shifts. That assumption is incorrect on several bases.

5. Respondent is correct in that Petitioner's failure to meet the 12 month cut-off does indeed change his status in the reapplication, but it does not totally negate his ability to contest the Respondent's action. The change is from Petitioner being a lateral transfer to being a probationary certification.

6. 12 NCAC 09A .0204(b) states that "The Commission may suspend, revoke or deny the

certification of a criminal justice officer” Thereafter is a specific listing of sixteen enumerated means by which an applicant could have failed to meet a standard and thus been facing the possibility that his or her certification would be suspended or revoked or denied. Several of those means listed are specific to new applicants who have not been previously certified. Certainly the Petitioner would be in no worse position than one who has never been certified. Petitioner did not lose any property rights in his ability to be certified by Respondent.

7. Respondent’s letter of December 30, 2013 informs Petitioner that probable cause had been found to either suspend or deny his certification. The letter is captioned and the text states the alternative “suspend or deny.” There is nothing in the letter which even remotely infers that a lapse in 12 consecutive months affects what the Probable Cause Committee was considering. The 12 months only affects how he would have been re-certified; not if he would be recertified.

8. Respondent relies on a series of cases which have ruled on the burden of proof in cases in Chapter 150B, Article 3, including particularly Overcash v. N.C. Dep’t of Env’t & Natural Res., 179 N.C. App. 697, 635 S.E.2d 442, rev. denied 361 N.C. 220, 642 S.E.2d 445 (2007); Britthaven, Inc. v. N.C. Dep’t of Human Res., 118 N.C. App. 379, 455 S.E.2d 455, disc. review denied, 341 N.C. 418, 461 S.E.2d 754 (1995); and Holly Ridge Assocs., LLC v. N.C. Dep’t of Env’t & Natural Res., 176 N.C. App. 594, 627 S.E.2d 326 (2006).

9. All of these cases decide the issue of burden of proof according to Article 3 of Chapter 150B of the North Carolina General Statutes—not on Article 3A. This instant case is brought pursuant to Article 3A.

10. From its inception, the North Carolina Administrative Procedures Act, N.C. Gen. Stat. Chapter § 150B, has contained two separate and distinct sets of administrative hearings provisions. The manner in which a contested case is commenced and conducted varies depending on which set of provisions applies. Article 3A of the Act governs, among other things, occupational licensing agencies, including Respondent herein. *See* John Aycock McLendon, Jr., Contested Case Hearings Under the North Carolina Administrative Procedure Act: 1985 Rewrite Contains Dual System of Administrative Adjudication, 64 N.C. L. Rev. 852, 857-58 (1986).

11. In the almost thirty years since its inception, the APA has contained these two separate and distinct provisions for administrative hearings. Although many similarities exist, they are decidedly different. Throughout the APA’s history, the General Assembly has had the ability to change this process, making one type of procedure, but has not. Therefore, the distinction between the two is important and must be acknowledged.

12. Article 3 of the NC APA applies to administrative hearings conducted by OAH before an administrative law judge, while Article 3A applies to “other administrative hearings” which are conducted by state agencies enumerated in § 150B-38(a). Each article contains separate provisions governing all aspects of the administrative hearings to which they apply. Homoly v. N. Carolina State Bd. of Dental Examiners, 121 N.C. App. 695, 697, 468 S.E.2d 481, 483 (1996).

13. Unlike Article 3, Article 3A does not require that a petition be filed to commence a

contested case. Article 3A simply provides that in N.C. Gen Stat. 150B-38(b) “prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing.” In Article 3A, the Agency initiates the process, not a petitioner. Generally in Article 3A cases, the petitioner does not file any responsive pleadings at all, which is quite different from Article 3 cases. *See* McLendon, 64 N.C. L. Rev. 852, 859-60 (1986).

14. A critical distinction between Article 3 and Article 3A contested cases is that in Article 3 cases, the agency has already taken an action that is adverse to the interests of the petitioner and the petitioner thus files the contested case petition. In Article 3A contested cases, the agency is proposing to take an action and the agency decision will be made based upon the Article 3A contested case. In Article 3A cases, the agency decision has not yet been made.

15. In Article 3A cases, OAH, through an ALJ, is to sit and preside over the hearing in the place of the agency, and makes a “proposal for decision” back to the agency. N.C. Gen. Stat. § 150B-40. At the time of the initiation of the process the agency has not yet made a final decision which is the springboard for commencing a contested case under Article 3. This distinction is even more significant now that OAH has final decision making in Article 3 cases.

16. That a distinction exists between Article 3 and Article 3A cases is made clear in N.C. Gen. Stat. § 150B-40: “The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.” (Emphasis added)

17. Any attempt to use the standards of Article 3 within an Article 3A proceeding is without merit.

18. Article 3 and Article 3A both contain provisions which are the same or very similar, such as provisions governing venue, conduct of hearing, depositions and discovery, evidence, and designation and power of ALJ or presiding officer. Homoly v. N. Carolina State Bd. of Dental Examiners, 121 N.C. App. 695, 696, 468 S.E.2d 481, 482 (1996).

19. Again, if the legislature had intended Article 3 provisions to be read into Article 3A, it would not have been necessary to include the same or similar provisions in each article. Clearly, the legislature intended each article to fully govern the administrative hearings to which each applies without overlap. Homoly p. 698.

20. There are also distinctions between the two. Article 3 provides for mediated settlement conferences while Article 3A does not. Article 3A provides a party who has been served with a notice of hearing the opportunity to file a written response with the agency prior to hearing, while Article 3 does not provide parties with a similar opportunity. If Article 3 applied to hearings before agencies listed in Article 3A, these and other provisions would conflict. Homoly p. 698.

21. N.C. Gen. Stat. § 150B-40(e) provides that “[w]hen a majority of an agency is unable or elects not to hear a contested case,” the agency is to apply to the OAH for designation of an ALJ. In such case, “[t]he provisions of [Article 3A], rather than the provisions of Article 3, shall

govern a contested case....” N.C. Gen. Stat. § 150B-40(e). If the legislature had intended Article 3 to apply to Article 3A hearings and procedure, it would not have been necessary to include language that Article 3A provisions rather than Article 3 provisions apply when an Article 3A agency requests an ALJ to conduct an agency hearing. Homoly p. 698-99.

22. Article 3, a general provision, applies to all administrative agency hearings not covered by Article 3A. Those agencies covered under Article 3A are specifically listed in N.C. Gen. Stat. § 150B-38(a). “It is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] sections which are general in their application.” *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citing *Utilities Comm. v. Coach Co.*, 236 N.C. 583, 73 S.E.2d 562). In this case, hearings conducted by Respondent are governed exclusively by the specific provisions of Article 3A, rather than the general provisions of Article 3 of the NC APA. Homoly p. 698-99.

23. Thus, the contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely. Homoly p. 699.

24. Article 3 is entitled “Administrative Hearings,” and governs administrative hearings which are conducted by the Office of Administrative Hearings (OAH) and are heard by an administrative law judge (ALJ). Article 3A of the NC APA is entitled “Other Administrative Hearings,” and governs hearings involving specifically identified agencies. Homoly p. 696

25. N.C. Gen. Stat. § 150B-38(h) provides “Every agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.” The article which is referred to is Article 3A.

26. Respondent’s rule for the administrative hearings is found at 12 NCAC 09A .0107. That rule specifically states that an administrative hearing in contested cases “shall be governed by procedures set out in Article 3A of G.S. 150B.” (Emphasis added).

27. The rule 12 NCAC 09A .0107 goes on to say that the “rules establishing procedures for contested case. . . contained in Title 26, Chapter 3 of the North Carolina Administrative Code are hereby incorporated by reference.” Many of the rules contained within Title 26, Chapter 3 of the NCAC are not consistent with Article 3A, but are in line with Article 3 hearings. To the degree that the rules are inconsistent with N. C. Gen. Stat. § 150B Article 3A, those rules shall not apply to hearings conducted under Article 3A. The dictates of the statute are paramount and shall control.

28. The rule 12 NCAC 09A .0107 also attempts to draft the powers and duties given to the Administrative law Judges in Title 26, Chapter 3 of the NCAC to the conduct of an Article 3A hearing. The powers of the presiding officer are enumerated in N. C. Gen. Stat. § 150B-40. The provisions within the statute are paramount and therefore 12 NCAC 09A .0107(d) is void.

29. In Peace v. Employment Sec. Comm’n of N. Carolina, the North Carolina State Supreme Court addressed the burden of proof. Although Peace is an Article 3 case, the discussion of

burden of proof is instructive in this instant case. The Supreme Court recognizes that neither the North Carolina Constitution nor the North Carolina General Assembly has specifically addressed the proper allocation of the burden of proof in “just cause” termination cases. This instant case is not a “just cause” case, but likewise neither the Constitution nor the General Assembly has addressed the burden of proof in Article 3A cases.

30. Peace states:

In the absence of state constitutional or statutory direction, the appropriate burden of proof must be “judicially allocated on considerations of policy, fairness and common sense.” 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 37 (4th ed.1993). Two general rules guide the allocation of the burden of proof outside the criminal context: (1) the burden rests on the party who asserts the affirmative, in substance rather than form; and (2) the burden rests on the party with peculiar knowledge of the facts and circumstances. *Id.*

Peace v. Employment Sec. Comm’n of N. Carolina, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998).

31. Applying these general principles to this contested case, with “considerations of policy, fairness and common sense,” the Respondent should bear the burden of proof in an action in which the Respondent has investigated a license/certificate holder or applicant and based on that investigation wants to take some action against that license/certification.

32. Historically, in Article 3A hearings, a license or certification is considered “property or rights” such that entitle the applicant or holder to a contested case hearing pursuant to Article 3A. When a license or certification is at issue, whoever is trying to take that license or certificate away has the burden of proof.

33. N.C. Gen. Stat. § 150B-40 provides that the “hearings shall be conducted in a fair and impartial manner” and that the presiding officer, including the ALJ, may “regulate the course of the hearings.” That statutory provision allows the presiding officer to dictate who has the burden of proof, which has always been the agency. In this very case, the Respondent was asked to put on its evidence first and did so without any question of who had the burden of proof. The issue of burden of proof has not previously been raised with this ALJ in Article 3A hearings, and the Respondent has always assumed the burden. Even in this case the argument seems to rest on the asserted position that the Petitioner somehow lost any property right he may have had and thus the burden of proof changed. Stated differently, but for the asserted loss of property right, the Respondent would still have the burden of proof.

34. Based upon the foregoing, the Respondent bears the burden of proof in this Article 3A hearing.

FACTUAL ISSUES

35. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9, to certify law enforcement officers and to revoke, suspend, or deny such certification.

36. 12 NCAC 09A .0204(b)(3)(A) states that:

(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:

(3) has committed or been convicted of:

(A) a criminal offense or unlawful act defined in 12 NCAC09A .0103 as a Class B misdemeanor

37. N.C. Gen. Stat. §133-32(a) is listed as a Class B misdemeanor in Respondent's Class B misdemeanor manual.

38. N.C. Gen. Stat. §133-32(a) states:

(a) It shall be unlawful for any contractor, subcontractor, or supplier who:

- (1) Has a contract with a governmental agency; or
- (2) Has performed under such a contract within the past year; or
- (3) Anticipates bidding on such a contract in the future

to make gifts or to give favors to any officer or employee of a governmental agency who is charged with the duty of:

- (1) Preparing plans, specifications, or estimates for public contract;
or
- (2) Awarding or administering public contracts; or
- (3) Inspecting or supervising construction.

It shall also be unlawful for any officer or employee of a governmental agency who is charged with the duty of:

- (1) Preparing plans, specifications, or estimates for public contracts; or
- (2) Awarding or administering public contracts; or
- (3) Inspecting or supervising construction

willfully to receive or accept any such gift or favor.

39. The evidence establishes that Petitioner accepted gifts and favors. These gifts and favors were accepted by Petitioner while he was employed by the Asheville ABC Board, a State governmental agency, and while Petitioner was acting in his official capacity for that governmental agency. Petitioner used his position as General Manager for a local ABC Board to obtain numerous gifts of significant value for himself, his family, and his staff.

40. Respondent failed to prove that Petitioner was responsible for the preparing of plans, specifications, or estimates for public contracts; or the awarding or administering of public contracts; or inspecting or supervising construction or otherwise as required in order to violate N.C. Gen. Stat. § 133-32.

41. Therefore, Respondent failed to prove that Petitioner committed a Class B misdemeanor as defined in 12 NCAC 09A .0103. Petitioner was not convicted of a Class B misdemeanor as defined in 12 NCAC 09A .0103

42. 12 NCAC 09B .0101(3) states that: 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[.]

43. A preponderance of the evidence offered at the hearing establishes Petitioner lacks the good moral character required of all law enforcement officers. Petitioner demonstrates a pattern of unethical conduct. Evidence shows Petitioner accepted items of value (meals, NFL tickets, liquor) from members of the liquor industry from 2008-2010. Petitioner's pattern of conduct is clearly unacceptable. Petitioner abused his authority to the detriment of the public.

44. Petitioner failed to follow North Carolina General Statutes and the ABC Administrative Code. He also did not require his employees or the liquor industry representatives who interacted with him to follow North Carolina law or the ABC Administrative Code. The character required of a law enforcement officer is more than just not breaking the written law; it is the capacity to make the right choices when those around him or her are making the wrong ones.

45. North Carolina case law provides that "[g]ood moral character is honesty, fairness and respect for the rights of others and for the laws of the state and nation." In re Willis, 288 N.C. at 10, 215 S.E.2d at 776 (1975). A lack of good moral character can be shown where the findings viewed as a whole reveal a pattern of conduct "that permeates the applicant's character and could seriously undermine public confidence . . ." In re Legg, 325 N.C. 658, 675, 386 S.E.2d 174, 183 (1989). The evidence presented at the administrative hearing demonstrates Petitioner does not possess the good moral character within the meaning of In re Willis and Respondent's Administrative Code.

46. 12 NCAC 09C .0306(a)(4) provides:

- (a) A law enforcement officer with general certification from either the Criminal Justice Education and Training Standards Commission or the Sheriffs' Education and Training Standards Commission may transfer from one law enforcement agency to another law enforcement agency with less than a 12 month break in law enforcement service. Prior to employing the officer, the employing agency shall:

...

- (4) notify the Commission, by submitting a Report of Appointment, that the officer is being employed and stating the date on which employment will commence.

47. Because Petitioner had a break in law enforcement service of more than 12 months, he had to reapply for certification, was considered an applicant, and had to do additional training as required under 12 NCAC 09B .0402. Petitioner and the Cherokee Indian Police Department's failure to comply with 12 NCAC 09C .0306(a)(4) means that Petitioner is not a lateral transfer and his certification has lapsed. This has no effect on whether or not the Petitioner may be recertified, but only that he will be required to be recertified in a probationary status.

48. The information leading to this investigation and hearing was initiated in June of 2010, for matters occurring on or before that date. Although the investigative report was made a public record by providing copies of the report to the District Attorney of Buncombe County, the N.C. ABC Commission, and ultimately to the *Asheville Citizen Times* newspaper, there was nothing about Petitioner's law enforcement certification to prompt an investigation by this Respondent.

49. The report was available and accessible to the Respondent for three years before the Respondent decided to take action and to which the Respondent stated it had no duty to act until Petitioner applied for an appointment to be a sworn law enforcement officer again, although petitioner continued to hold his law enforcement officer certification.

50. At the time Respondent acted on the information, all of the allegations were a minimum of three years old, and some of the information as much as six years old. Since August of 2010, no allegation of wrong doing has been made and no evidence was entered to show that Petitioner had not rehabilitated his moral character. (See *Scroggs v. North Carolina Criminal Justice Educ. and Training Standards Comm'n.*, 400 S.E.2d 742, 101 N.C. App. 699 (N.C. App., 1991)).

51. According to 12 NCA 09A .0204, the revocation, suspension, or denial is discretionary. According to 12 NCA 09A .0205(c)(2) the period of time is mandatory once it is determined that revocation, suspension, or denial is appropriate.

52. Based on the facts and circumstances of this case, taking into account the seriousness of the offenses, the age of the alleged violations, the evidence of selective prosecution, the evidence of disparate treatment by the ABC Commission itself, the fact that there is no further evidence of wrong-doing by Petitioner in the intervening years, and the fact that Petitioner will be recertified on a probationary status, denial of certification for an indefinite period of time would not be appropriate.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that Petitioner's certification as a law enforcement officer be **GRANTED** on a probationary status as allowed by law.

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.

IT IS SO ORDERED.

This the 31st day of October, 2014.

Donald W. Overby
Administrative Law Judge