

STATE OF NORTH CAROLINA
COUNTY OF HERTFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DOJ02721

<p>Antwain Renae Smith Petitioner</p> <p>v.</p> <p>NC CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION Respondent</p>	<p style="text-align: center;">PROPOSED DECISION</p>
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THIS MATTER came on for hearing before Hon. J. Randolph Ward, on August 19, 2014 in Raleigh, North Carolina, upon the Respondent's request, pursuant to N.C.G.S. § 150B-40(e), for 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: James R. Theuer
Attorney at Law
555 E. Main Street, Ste. 801
Norfolk, Virginia 23510

Respondent: Matthew L. Boyatt
Assistant Attorney General
Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, North Carolina 27699

ISSUE

Did Petitioner's conduct leading to his arrest on May 27, 2013 violate N.C. Gen. Stat. § 14-223, "Resisting officers," and if so, should his General Certification as a Correctional Officer be suspended, revoked, or made subject to probation?

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. §§ 150B-34(a); 150B-40(e); 14-223; and 150B-41(a). 12 NCAC 09G .0102; 12 NCAC 09G .0102(9)(cc); 12 NCAC 09G.0504(b)(3); and 12 NCAC 09G.0505(b)(1).

WITNESSES

For Petitioner: Petitioner Antwain R. Smith, Correctional Officer
 Jessica Boone
 Rodney Newsom
 Quinton Lashley
 Rickie Robinson, Assistant Superintendent for Custody and Operations;
 Richard Duke, Assistant Superintendent for Programs
 Donald Greene, Unit Manager
 Clarence Jones, Lieutenant and Officer-in-Charge
 Gregory Poythress, Lieutenant and Officer-in-Charge
 Ryan Aycock, Unit Manager
 Christopher Jones, Assistant Unit Manager
 E.S. Pittman, Sergeant
 Robert Harris, Processing Assistant III
 Takira Lowe, Correctional Officer
 David Hartsfield, Training Officer

For Respondent: Petitioner Antwain R. Smith, Correctional Officer (adverse)
 Sgt. Justin W. Farmer, Ahoskie Police Department

UPON DUE CONSIDERATION of the arguments of counsel; the documents and exhibits admitted; and, the sworn testimony of each witness, considering their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests the witness might have, and whether their testimony is reasonable, and consistent with other credible evidence; and assessing the greater weight of the evidence from the record as a whole, and in light of the applicable law, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent sent Petitioner its *Proposed Suspension of Correctional Officer Certification* on March 13, 2014, with the appropriate notice of his right to a hearing. Upon Petitioner’s timely request for a contested case hearing, Respondent’s request for designation of an Administrative Law Judge to preside at the contested case hearing, and the undersigned’s assignment, the parties were given proper notice of hearing.
2. The North Carolina Criminal Justice Education and Training Standards Commission (hereinafter the “Commission” or “Respondent”) has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09G, to certify corrections officers and to revoke, suspend, or deny such certification.
3. The Commission may suspend or revoke the certification of a corrections officer when the Commission finds that the certified officer has committed or been convicted of a misdemeanor defined in 12 NCAC 09G.0102, after the initial date of certification. 12

NCAC 09G.0504(b)(3).

4. When the Commission suspends or denies the certification of a corrections officer pursuant to 12 NCAC 09G.0504, the period of sanction shall be not less than three (3) years. Following an administrative hearing, the Commission may, however, either reduce or suspend the period of sanction under this Rule or substitute a period of probation in lieu of suspension of certification, where the cause of sanction is commission or conviction of specified misdemeanors, including N.C. Gen. Stat. § 14-223, "Resisting officers." 12 NCAC 09G.0505(b)(1); 12 NCAC 09G.0102(9)(cc).
5. Petitioner Antwain R. Smith began work as a Correctional Officer at Caledonia Correctional Institution on September 27, 2010. He received his General Certification from Respondent Commission on September 27, 2011. Officer Smith is the primary caregiver for his wife, who was seriously disabled by a stroke approximately 7 years ago, and has had some problems with timely attendance, but otherwise has been an exemplary employee. In October 2012, his supervisor encouraged Petitioner to take the Sergeant's exam, and he passed it in July 2013.
6. Petitioner's managers, supervisors, and co-workers (listed above as his witnesses) testified without contradiction, from personal knowledge and observation, that Petitioner is a valued, competent, respected, and admired Correctional Officer at Caledonia Correctional Institution. This testimony is corroborated by Petitioner's performance records. (P. Ex. 1)
7. On May 27, 2013, during Memorial Day weekend, Officer Smith hosted family and friends -- approximately 15 to 20 people -- at a cook-out at his home, located at 907 Odom Street in Ahoskie. His car was parked in front of the house with its stereo system on loud enough for guests in the yard to enjoy the music. Petitioner estimated that he had between six and nine beers between noon and 10 p.m., along with water, Kool-Aid, punch, and food, while cooking and interacting with guests. The arresting officer described him as impaired. It is found as a fact that alcohol had an effect on Petitioner's judgment and ability to recognize social cues during the encounter that resulted in his arrest.
8. Between 2 and 4 p.m. on May 27, 2013, Officer Ashley of the Ahoskie Police Department came to Petitioner's residence in response to a noise complaint about the music from the car. Petitioner lowered the volume to a level that Officer Ashley agreed was acceptable. After declining the offer of some cookout food, Officer Ashley left the premises, and he did not return. The Police Department's protocol in such situations was to give the homeowner a description of the noise ordinance and a warning that another violation would result in a citation, but Petitioner does not recall hearing that. Officer Ashley did not write a report or testify at the hearing. In light of the tenor of his visit, and the fact that both men apparently felt the problem was resolved, it is found that Petitioner did not receive the standard warning.
9. After the fairly cordial encounter with Officer Ashley, Petitioner did not turn up the

music volume during the rest of the day, nor did he perceive that anyone else had. In the absence of any evidence to the contrary, it is found as a fact that the volume of the music remained the same for the rest of the day, at the level Officer Ashley agreed was acceptable. Petitioner was not aware of any other complaints until Officer Farmer arrived at about 10:00 p.m. When Petitioner's niece came into the house to inform him that another officer had arrived because of the music, Petitioner determined to resolve the problem and to demonstrate complete cooperation by turning off the music altogether. He went straight to the car, brushing by the officer, and turned off the music, believing that this would satisfy the officer.

10. Patrol Sgt. Justin W. Farmer of the Ahooskie Police Department arrived with a much different perspective. His "Incidents/Investigation Report" (R. Ex. 4) does not even mention that Officer Smith turned off the music when he went to his car. Sgt. Farmer was coming from an incident that was dispatched as "a large crowd about to fight." He had been informed that there had been two previous noise complaint calls about the Smith residence -- at 8:22 p.m. and 9:35 p.m. -- and thought that Officer Ashley had warned Mr. Smith in response to the earlier of those, less than two hours before his arrival. Another officer "rode by ... and ... did not hear anything," but "[d]ue to the pending fight call he did not stop." Consequently, Sgt. Farmer thought Petitioner had turned off the music in response to the Officer Ashley's warning, then turned it back on again when he left, resulting in another complaint. Sgt. Farmer stopped on the nearby street, out of the line-of-sight of the Odom Street residence, and "could hear the bass ... coming from the vehicle." He drove to Petitioner's home intending to give him a citation.
11. When Sgt. Farmer arrived at Petitioner's residence, a man there asked if the music needed to be turned down and complied when the officer said "yes." Sgt. Farmer was wary of an incident developing because of the number of people around. He was asking for the owner of the automobile when Petitioner came out the house, walking towards his car and saying, "I got this, I got this." Sgt. Farmer accosted Petitioner and began asking questions to prepare the noise citation. Petitioner responded that "it ain't that serious man, I'll take care of it." When asked his name, Petitioner said, "What does it matter, if the problem is being solved?" Sgt. Farmer put out his hand to stop Petitioner, but Petitioner brushed by him, proceeded to the car, and turned off the music. When Petitioner turned around, Sgt. Farmer was "in his face" again, demanding his name. Petitioner was stunned by this and testified that he "froze up" and did not respond. When he started to step away, Sgt. Farmer grabbed him. An observer testified that "as soon as [Petitioner] hesitated" to answer, Sgt. Farmer arrested him. Petitioner cooperated with being handcuffed. When Petitioner's son came over, protesting that "He ain't done nothing," Sgt. Farmer pointed his Taser at him, and another man pulled Petitioner's son away. Sgt. Farmer testified that Petitioner was not aggressive, but exhibited signs of having consumed alcohol, including red glassy eyes and slurred speech.
12. Petitioner was charged under N.C. Gen. Stat. § 14-223 for "failing to give officer identification information when requested several times." In custody, Petitioner asked to speak to the police chief and continued to withhold his name, hoping to put off booking until he had a chance to appeal to the chief to avoid the charge. However, when told that

he would otherwise be booked as “John Doe,” Petitioner gave his name and information.

13. No charges were added for Petitioner’s actions after he was taken into custody, and no alleged misconduct then is cited in the Commission’s *Proposed Suspension*. Petitioner’s actions following arrest are found to be indicative of Petitioner’s intention to seek to avoid sanctions through persuasion, rather than resistance to Sgt. Farmer’s performance of his duty.
14. After speaking with Ahoskie’s police chief, Sgt. Farmer, and Sgt. Farmer’s Lieutenant, Petitioner wrote a letter of apology to Sgt. Farmer, and the resisting arrest charge was dismissed. Petitioner also paid a fine for the noise citation. He was not convicted of a crime.
15. North Carolina General Statute § 14-223, “Resisting officers,” provides, “If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.” By withholding his name, Petitioner intended to delay Sgt. Farmer from writing the noise citation, in the hope and expectation -- which was not unreasonable, from his point of view -- that turning off the music would “solve the problem,” and avoid the ticket altogether. However,

The word wilful [*sic*], used in a statute creating a criminal offence, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority - careless whether he has the right or not - in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute.” This definition has been quoted and approved in numerous cases since. Wilful means “without just cause, excuse, or justification[.]”

(Citations omitted.) State v. Dickens, 215 N.C. 303, 1 S.E.2d 837, 838-39 (1939), quoting *State v. Whitener*, 93 N.C. 590 (1885). See also, *State v. Hales*, 256 N.C. 27, 33, 122 S.E.2d 768, 773 (1961): “‘Willfully conceals’ as used in the [shoplifting] statute means that the concealing is done ... voluntarily, intentionally, purposely and deliberately, indicating a purpose to do it without authority, and in violation of law....”

16. Based on his information and belief that Petitioner had deliberately violated the noise ordinance after being warned perhaps an hour before by Officer Ashley, followed by apparently defiant behavior in his presence, Sgt. Farmer was justified in arresting Petitioner. However, in light of the evidence adduced in this hearing and the criminal burden of proof, i.e., “beyond a reasonable doubt,” it is not entirely clear that Petitioner would have been convicted of “purposely and deliberately” violating the law had his case gone to trial.
17. It is found by a preponderance of the evidence that Petitioner’s conduct leading to his arrest on May 27, 2013 violated N.C. Gen. Stat. § 14-223, “Resisting officers,” a Class 2

misdemeanor defined at 12 NCAC 09G .0102(9)(cc). Because Sgt. Farmer reiterated his demand for Petitioner's name multiple times, and Petitioner was aware that the information was sought for the purpose of writing a citation, Petitioner knew he was defying the policeman's lawful order.

18. The Appraisal Process evaluation forms, or "TAPs sheets," prepared by Petitioner's supervisors included praise for his willingness to work during inclement weather and on his days off to help deal with staff shortages; for discovering contraband cigarettes and "prison made" shanks; and for catching a group of inmates taking illegal drugs. Among his 25 ratings are 10 "Good," 13 "Very Good," and two "Outstanding" marks.
19. An impressive number of Petitioner's superiors and colleagues at Caledonia Prison came to court to testify to his valuable service at that facility:
 - Rickie Robinson, Assistant Superintendent for Custody and Operations, spoke of Petitioner's productive and harmonious relationships with other members of the staff.
 - Richard Duke, Assistant Superintendent for Programs, praised Petitioner's willingness to volunteer when additional staff was needed.
 - Donald Greene, Unit Manager, noted that Petitioner was one of the few to pass all sections of the Sergeant's exam the first time he took the tests.
 - Clarence Jones, Lieutenant and Officer-in-Charge, said that Petitioner was very professional and reliable and that he wished he "had 10 more like him."
 - Gregory Poythress, Lieutenant and Officer-in-Charge, described Petitioner as an "asset" to the unit who "gets things done."
 - Ryan Aycock, Unit Manager, testified that he calls on Petitioner to help train other Correctional Officers.
 - Christopher Jones, Assistant Unit Manager, described Petitioner as an excellent officer and asset to the unit.
 - E.S. Pittman, Sergeant, referred to Petitioner as "one of my best officers."
 - Robert Harris, Processing Assistant III, praised Petitioner's demeanor and ability to work with others.
 - Takira Lowe, Correctional Officer, described Petitioner as trustworthy and reliable.
 - David Hartsfield, Training Officer, testified that Petitioner was the first man he called when he needed help.
20. The Division of Adult Correction, and the public it serves, would be best served by allowing Petitioner to remain in public service as a Correctional Officer.
21. 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.

Upon the foregoing Findings of Fact, the undersigned makes the following:

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 hearing are properly before the Office of Administrative Hearings. N.C. Gen. Stat. §150B-40(e).
3. The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. N.C. Gen. Stat. § 150B-34(a).
4. The trial judge is not required to find all the facts shown by the evidence, but only enough material facts to support the judgment. *Green v. Green*, 284 S.E.2d 171,174, 54 N.C.App. 571, 575 (1981); *In re Custody of Stancil*, 179 S.E.2d 844,847, 10 N.C.App. 545, 549 (1971).
5. Petitioner committed a violation of N.C. Gen. Stat. § 14-223 by recalcitrance, and not aggression, due to misjudgment while impaired by alcohol.
6. The North Carolina Criminal Justice Education and Training Standards Commission may, in its discretion, suspend or revoke the certification of a corrections officer when the Commission finds that the certified officer has committed a misdemeanor as defined in 12 NCAC 09G.0102, even if it does not result in a conviction. 12 NCAC 09G.0504 (b)(3).
7. The Commission may substitute a period of probation in lieu of suspension of certification, following an administrative hearing, where the cause of sanction is commission of certain misdemeanors, including N.C. Gen. Stat. § 14-223. 12 NCAC 09G.0505(b)(1); 12 NCAC 09G.0102(9)(cc).

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned respectfully recommends that the Commission allow Petitioner's General Certification to serve as a Correctional Officer to remain in force and effect, subject to a period of probation.

NOTICE AND ORDER

The North Carolina Criminal Justice 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 31st day of October, 2014.

J. Randolph Ward
Administrative Law Judge