

STATE OF NORTH CAROLINA

COUNTY OF WAKE

PHILLIP CHARLES FORD,

Petitioner,

v.

NORTH CAROLINA CRIMINAL
JUSTICE EDUCATION AND
TRAINING STANDARDS
COMMISSION,

Respondent

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DOJ 02725

PROPOSAL FOR DECISION

This case came on for hearing on August 29, 2014 before Administrative Law Judge Craig Croom in Fayetteville, North Carolina. This case was heard after Respondent requested, pursuant to N.C. Gen. Stat. § 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: Parisa Houshmandpour
Attorney for Petitioner
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Respondent: Lauren Tally Earnhardt
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
P.O. Box 629
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ISSUES

Does substantial evidence exist to suspend Petitioner's correctional officer certification for the commission of the "DAC Misdemeanor" offense of Injury to Personal Property greater than \$200?

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. § 14-160

12 NCAC 09G .0102

12 NCAC 09G .0102(9)(u)

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

12 NCAC 09G .0505(b)(1)

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following FINDINGS OF FACT.

In making the FINDINGS OF FACT, the undersigned Administrative Law Judge has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

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 Suspension of Correctional Officer Certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter “the Commission”), on March 13, 2014. (Respondent’s Exhibit 2)

2. Respondent, 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 9G, to certify correctional officers and to revoke, suspend, or deny such certification.

3. Petitioner was awarded probationary correctional officer certification by Respondent on September 24, 2012 and received general correctional officer certification on September 24, 2013. (Respondent’s Exhibit 1)

4. Petitioner is employed as a correctional officer with the North Carolina Department of Corrections, Harnett Correctional Institution.

5. Kevin Wallace, an investigator with Respondent since January 2013, testified at the hearing. On January 15, 2013, Respondent received a Report of Arrest memo from North Carolina Department of Public Safety indicating on December 24, 2012, Petitioner was arrested and charged with “Injury to Personal Property” in violation of N.C.G.S. § 14-160. The warrant for arrest indicates Petitioner unlawfully and willfully did wantonly injure clothing, shoes, school supplies, the personal property of Lorraine Nyakinyua and that the damage caused was in excess

of \$200.00.

6. On January 3, 2014, Mr. Wallace received a certified true copy of the disposition in Petitioners' case. The judgment showed that Petitioner pled not guilty to "Injury to Personal Property" and was found guilty as charged on April 23, 2013 in front of a Wake County District Court Judge. Mr. Wallace also received a document titled "Criminal Domestic Violence PJC Contract" from the Wake County Clerk of Court. The document is signed by Petitioner and has the charge of "Injury to Personal Property" on the top and contains the following agreement; "I understand that I have pled guilty or have been found guilty of the charges listed above. I agree to attend and successfully complete an educational program or programs for the express purpose of learning to be non-abusive. I understand if I am unable to successfully complete any aspect of this agreement, the State will pray judgment and the Court shall enter judgment against me." The agreement also indicates Petitioner will successfully complete an abuser treatment program, the Safechild program and will not threaten, harass, or assault Lorraine Nyakinyua or her son. The PJC compliance date was scheduled for April 23, 2014 and as of this hearing Petitioner still stands convicted of the "Injury to Personal Property."

7. Raleigh Police Officer Nathan A. Jackson testified at the hearing. Officer Jackson was on duty as a patrol officer on December 22, 2012 and around 8:45 a.m. was called to Lorraine Nyakinyua's apartment on Walnut Creek Parkway in Raleigh, North Carolina. Officer Jackson spoke with Ms. Nyakinyua who explained that she had worked over night the previous night and when she arrived back at her apartment that morning she noticed her apartment had been damaged. Ms. Nyakinyua appeared upset. Officer Jackson investigated the two bedroom apartment and found kitchen trash dumped on the living room floor, and a liquid all over the couch and the floor in the living room. The couch and carpet were wet to the touch. Ms. Nyakinyua found her son's book bag and a large trash bag containing her clothing and some of her son's clothing in the apartment dumpster. The book bag was dark in color and full of completely wet school books. Officer Jackson also found some of Lorraine's clothing including shoes, and a bra, submerged in the apartment toilet. The total damage to the property was estimated by Officer Jackson to be over two hundred dollars (\$200.00). Officer Jackson determined there was no forced entry into the apartment and that Ms. Nyakinyua had been living there with her 8 year old son and her boyfriend, Petitioner. Almost all of Petitioner's personal items were no longer in the apartment. Officer Jackson made multiple attempts to contact Petitioner by phone to get his side of the story, but was unsuccessful. Officer Jackson did not determine any other location where Petitioner was living. Officer Jackson then went to the Magistrate and received a warrant charging Petitioner with Injury to Personal Property of more than \$200.00.

8. Lorraine Nyakinyua was served two subpoenas by Respondent to testify at the hearing but did not appear. Officer Jackson was aware of Ms. Nyakinyua's previous testimony under oath at the district court criminal trial where Petitioner was found guilty of "Injury to Personal Property." Petitioner was present at the trial and was able to cross examine Ms. Nyakinyua about her testimony. Ms. Nyakinyua was declared an unavailable witness under Rule 804(a)(5) of the North Carolina Rules of Evidence, and her former testimony was recounted by Officer Jackson and admitted under Rule 804(b)(1) of the North Carolina Rules of Evidence. Officer Jackson was surprised by Ms. Nyakinyua's testimony because, while it was consistent

with what she told him at the scene, she arrived and left the district courtroom with Petitioner. Ms. Naykinyua testified in Wake County District Court that she and Petitioner had an argument over rent earlier on December 21, 2012. When she left for her overnight shift everything seemed fine and Petitioner was at the apartment they shared together. However, when she arrived home from work on the morning of December 22, 2012, she found her apartment and personal property damaged. Ms. Naykinyua testified that Petitioner was the only one other than herself who had a key to the apartment.

9. Petitioner did not testify at the hearing. He did not call any witnesses to testify on his behalf or offer any exhibits. The evidence at trial is uncontroverted.

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. 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.

3. 12 NCAC 09G .0504(b)(3) provides that the North Carolina Criminal Justice Education and Training Standards Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer: (3) has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification.

4. 12 NCAC 09G .0505(b)(1) provides that when the North Carolina Criminal Justice Education and Training Standards Commission suspends or denies the certification of a corrections officer for the commission of a misdemeanor, the period of sanction shall be not less than three years, however, the Commission may either reduce or suspend the period of sanction or substitute a period of probation in lieu of suspension of certification.

5. Injury to Personal Property greater than \$200.00 in violation of N.C. Gen .Stat. § 14-160 is a DAC misdemeanor as defined in 12 NCAC 09G. 0102(9)(u).

6. N.C. Gen. Stat. §14-160 states that if any person shall wantonly and willfully injure the personal property of another, causing damage in an amount in excess of two hundred dollars (\$200.00), he shall be guilty of a Class 1 misdemeanor.

7. 12 NCAC 09G .0102(9)(u) defines "Misdemeanor" for corrections officers means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses for corrections officers are classified by the Commission as follows: (u) willful and wanton injury to personal property greater than two hundred dollars (\$200.00).

8. The party with the burden of proof in a contested case must establish the facts required by N.C. Gen. Stat. § 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a).

9. Respondent has the burden of proof in the case at bar. Respondent shall show by a preponderance of evidence that Petitioner committed the offense of Injury to Personal Property greater than \$200.00. While Officer Jackson estimated the damage to be over two hundred dollars (\$200.00), we have no basis of knowledge to rely on this estimate. Therefore, Respondent has failed to meet its burden of showing damage in excess of two hundred dollars (\$200.00).

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned finds that Respondent has failed to show by a preponderance of evidence that Petitioner committed the offense of Injury to Personal Property greater than \$200.00.

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. Gen. Stat. § 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.

This the 14th day of November, 2014.

Craig Croom
Administrative Law Judge