

STATE OF NORTH CAROLINA
COUNTY OF PENDER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DOJ04106

<p>RICHARD FRANK DAMBAKLY PETITIONER,</p> <p>V.</p> <p>N C CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION RESPONDENT.</p>	<p>PROPOSAL FOR DECISION</p>
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THIS CASE CAME ON FOR HEARING on October 14, 2014 before Administrative Law Judge J. Randall May in Surf City, 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: Richard Dambakly, *pro se*
94 Century Road
Hampstead, North Carolina 28443

Respondent: Lauren Tally Earnhardt
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE(S)

1. Is Respondent's proposed denial of Petitioner's law enforcement certification supported by a preponderance of the evidence?

RULES AT ISSUE

12 NCAC 09A .0204(b)(2)
12 NCAC 09A .0204(b)(6)
12 NCAC 09A .0205(c)(2)
12 NCAC 09B .0101(3)

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 makes the following FINDINGS OF FACT.

In making the FINDING OF FACT, the undersigned has weighed all the evidence, or the lack thereof, 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 or 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 the Office of Administrative Hearings (“OAH”), and jurisdiction and venue are proper; both parties received notice of hearing; and Petitioner received, by certified mail, the Proposed Denial of Law Enforcement Officer Certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission, on March 12, 2014. (Respondent’s Exhibit 13)

2. Respondent has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify criminal justice officers and to revoke, suspend, or deny such certification.

3. Petitioner has never held certification as a law enforcement officer in the State of North Carolina.

4. Richard Squires (“Squires”), the Commission’s investigator during the certification process of Petitioner, was on vacation and did not appear at the hearing; therefore, he was not subject to cross-examination concerning the manner or content of his investigation. Kevin Wallace (“Wallace”), another investigator for the Commission, provided most of the testimony for Respondent based on Squires’ notes and documents, even though he did not investigate the case. (Tape 1)

5. Petitioner submitted an incomplete a Personal History Statement (“Form F-3”) for the Surf City, North Carolina, Police Department on June 6, 2013. Petitioner signed this document in the presence of a notary and in so doing “certif[ied] that each and every statement made on th[e] form [wa]s true and complete.” By signing the document Petitioner further acknowledged his understanding that “any misstatement or omission of information will subject [him] to disqualification or dismissal. (Respondent’s Exhibit 11) Petitioner never submitted that application but gave it to Chief Michael Halstead, Sr., Surf City Police Department.

6. The Form F-3 submitted by Petitioner to Surf City Police Department on June 6, 2013 did not include answers to questions nine and twenty-one. Question nine asked, “Have you

previously submitted an application for employment with this agency?” and offered Petitioner the option to check a box marked “Yes” or “No” with an accompanying blank for an “Approximate date.” Question twenty-one asked, “Have you ever been sued with a civil judgment being rendered against you?” and offered Petitioner the option to check a box marked “Yes” or “No” with accompanying space denoted, “If yes, give details.” Petitioner did not answer either question. (Respondent’s Exhibit 11, pp. 133-34)

7. At the request of Chief Halstead, Petitioner amended his June 6, 2013 Surf City Form F-3 twice (Tape 2): June 13, 2013 (Respondent’s Exhibit 11, p. 138) and June 22, 2013. (Respondent’s Exhibit 11, p. 140)

8. Petitioner first amended his Surf City Form F-3 on June 13, 2013. Petitioner submitted a notarized, amended statement that read, to wit: “While completing the F3 form I somehow forgot to answer questions #9 and #21. This was not an intentional act. I just got ahead of myself.” Petitioner set forth Question #21 as, “Have you ever been sued with a civil judgment being against (sic) you?” He answered this question by stating, “Yes, satisfied 09-26-2007 for construction material dispute. Judgment settled paid in full \$15,487. Case# SMC077751.” (Respondent’s Exhibit 11, p. 138)

9. Petitioner’s June 13, 2013 Form F-3 amended statement was notarized and he acknowledged that his new answers, as well as those in his initial June 6, 2013 Form F-3, were answered “true to fact and to the best of [his] memory.” (Respondent’s Exhibit 11, p. 138)

10. Petitioner amended his Surf City Form F-3 again on June 22, 2013. On this occasion, Petitioner submitted a notarized statement to amend both his June 6, 2013 Form F-3 and his June 13, 2013 amended statement. The statement set forth “Question #21 Have you ever been sued with a civil judgment being (sic) against you?” Petitioner responded, “Yes, March 4, 2000 Civil NO. 000900841, I was an employee of the firm RD White & Co. and was named along with all RD White & co. employees, I did no (sic) pay any fines and there was no further action taken on (sic) me.” Petitioner also amended his answer to question #21 to include the following, “Yes, Disciplinary Proceeding Sept 17, 1999 No. C3A980077, I was a branch manager of an office Paragon Capital, when they went under investigation, I was questioned, but no further action was taken against me I paid no fines and was not charged.” Petitioner again certified that the foregoing answers, as well as “all others in the F3”, were answered “true to fact and to the best of [his] memory.” (Respondent’s Exhibit 11, p. 140)

11. Chief Halstead testified that Petitioner informed him that he no longer wished to pursue certification with Surf City. The Chief placed Petitioner’s Form F-3 in a “closed” file and put it in his desk drawer. Subsequently Squires arrived at Chief Halstead’s office and demanded that the Chief turn over the Form F-3. The Chief stated that it had never been submitted to the Commission; however, under threat of a subpoena from Squires, and to comply with his duties to the Commission, the Chief turned over the entire file. Chief Halstead testified that this file contained additional personal information concerning some of the events of this appeal. (Tape 2, Side 1)

12. Chief Halstead further testified that he called Squires prior to the probable cause hearing to see if he needed to attend. The Chief stated that Squires told him that he did not see a problem and saw nothing in the “file” that he was able to corroborate. (Tape 2, Side1)

13. Petitioner completed an additional Form F-3 for the Topsail Beach, North Carolina, Police Department on July 12, 2013. Petitioner signed this document in the presence of a notary and in so doing “certif[ied] that each and every statement made on th[e] form [wa]s true and complete.” By signing the document Petitioner further acknowledged his understanding that “any misstatement or omission of information will subject [him] to disqualification or dismissal. (Respondent’s Exhibit 12)

14. The Form F-3 submitted by Petitioner to Topsail Beach Police Department on July 12, 2013 included question twenty-one, “Have you ever been sued with a civil judgment being rendered against you?” This question offered Petitioner the option to check a box marked “Yes” or “No” with accompanying space denoted, “If yes, give details.” Petitioner marked the “Yes” box and answered as follows, “Satisfied 09-26-07 for construction material dispute, Judgement (sic) settled in full \$15,487. Case #SMC077751;” “-March 4, 2000 Civil No. 000900841 I was employed by R. D. White & Co. and was named along with all employees, I did not pay any fine and no further action was taken against me;” and “-Sept 17, 1999 Disciplinary Proceeding No. C3A980077, I was a branch manager of a (sic) office of Paragon Capitol, when they went under investigation, I was questioned, but no further against me” (sic). (Respondent’s Exhibit 12, p. 143)

15. On August 5, 2013, Respondent received a Report of Appointment/Application for Certification, Form F-5A, requesting that certification be awarded to Petitioner as a part-time law enforcement officer with the Topsail Beach Police Department.

16. As part of the certification process Squires, as investigator for Respondent, reviewed Petitioner’s Surf City Form F-3; Petitioner’s Topsail Form F-3; and Petitioner’s Topsail Beach Report of Appointment/Application for Certification (Form F-5A), along with other supporting documentation to ensure that Petitioner answered all questions fully, accurately, and truthfully.

17. During his investigation Squires obtained additional documentation to corroborate Petitioner’s notarized answers regarding civil suits and judgments. Additional documentation included: a Hearing Panel Decision of the National Association of Securities Dealers, Department of Enforcement v. Richard F. Dambakly (Respondent’s Exhibit 4); a FINRA (Financial Industry Regulatory Authority) record check of Petitioner (Respondent’s Exhibit 5); a January 2007 story about the Petitioner reported in “The Sentinel, Newsletter of the Utah Division of Securities” (Respondent’s Exhibit 6); as well as a verified complaint and entry of default against Petitioner from the Third Judicial District in and for Salt Lake City County, Utah, in the matter of The State of Utah v. R.D. White & Co., Inc., et al. (Respondent’s Exhibits 7-9).

18. Squires discovered four material misrepresentations when comparing Petitioner’s, Form F-3, specifically, disclosures about civil suits to the documentation discovered by Respondent. Squires submitted a memorandum to Respondent’s Probable Cause Committee

regarding the consideration of denial of law enforcement officer certification to Petitioner. (Respondent's Exhibit 1)

19. Squires' memorandum included four allegations as the basis for which the Probable Cause Committee should consider the denial of law enforcement certification to Petitioner. These allegations included: (1) Commission of an offense for which the authorized punishment included imprisonment for more than two years (Bad Check—Third Degree Crime, filed 1991); (2) Commission of an offense for which the authorized punishment included imprisonment for more than two years (Theft by Deception—Third Degree Crime); (3) Material Misrepresentation; and (4) Lack of good moral character. (Respondent's Exhibit 1)

20. Based on the lack of evidence of the first two allegations above, the lack of testimony by Squires, and the passage of time, they will not be further considered by the undersigned.

21. Respondent's Probable Cause Committee convened to review the matter of Petitioner's law enforcement certification on February 19, 2014. Petitioner was present at this meeting. Upon reviewing Squires' memorandum and supporting documentation, the Committee found probable cause existed to deny Petitioner's law enforcement certification for not less than five years because probable cause existed to believe that Petitioner committed the offense of passing a bad check; that Petitioner committed the offense of theft by deception; that Petitioner knowingly made misrepresentations of information required for certification; and that Petitioner lacked the good moral character required of all law enforcement officers. (Respondent's Exhibit 13, p. 2-3)

22. At the October 14, 2014, hearing Wallace testified regarding material misrepresentations made by the Petitioner in his Form F-3 documentation submitted to the Surf City Police Department and the Topsail Beach Police Department. Wallace testified to four total material misrepresentations, two each submitted to the Surf City and Topsail Beach agencies.

23. Petitioner made his first material misrepresentation in response to question twenty-one on the Form F-3 through an amended statement to the Surf City Police Department. The question asked Petitioner whether he had "ever been sued with a civil judgment being rendered against [him]?" Petitioner marked "Yes," and stated, "Yes, March 4, 2000 Civil NO. 000900841, I was an employee of the firm RD white & Co. and was named along with all RD White & co. employees, I did no (sic) pay any fines and there was no further action taken on me." Wallace testified that Petitioner materially misrepresented the outcome of Civil No. 000900841. Wallace testified that documentation obtained by Respondent showed that the State of Utah, Division of Securities of the Department of Commerce, took action against Petitioner by naming him as a defendant in the suit The State of Utah v. R.D. White & Co., Inc., et al. (Respondent's Exhibit 7) Records from the Third Judicial District Court in and for Salt Lake County additionally reflect that a default judgment was entered against Petitioner in the above-captioned case, and that as a result he was "enjoined from (1) making cold calls within and/or to residents of the State of Utah; (2) soliciting or opening new accounts within or with residents of the State of Utah; or (3) exercising any discretionary authority relative to existing accounts within, and/or with residents of, the State of Utah." (Respondent's Exhibit 9, pp. 105-6)

Petitioner was additionally ordered to pay a fine of \$6,500.00 and restitution in the amount of \$48,494.27. (Respondent's Exhibit 9, p. 106) Petitioner did not disclose the judgment or the fines against him in his Form F-3 to the Surf City agency.

24. Petitioner made his second material misrepresentation in response to question twenty-one on the Form F-3 through an amended statement to the Surf City Police Department. The question asked Petitioner whether he had "ever been sued with a civil judgment being rendered against [him]?" Petitioner marked "Yes," and stated, "Yes, Disciplinary Proceeding Sept. 17, 1999 No. C3A980077, I was a branch manager of an office Paragon Capitol , when they went under investigation, I was questioned, But no further action was taken against me I paid no fines and was not charged." Wallace testified that Petitioner materially misrepresented the outcome of this disciplinary proceeding. Wallace further testified that Respondent had obtained a Hearing Panel Decision entered by the Department of Enforcement of the National Association of Securities Dealers, Inc. against Petitioner ordering that he "pay costs in the amount of \$2,479.25," and that he be "fined \$25,000, barred in his capacity as a principal, and suspended for one year from associating with any NASD member firm in any capacity." (Respondent's Exhibit 4) Petitioner did not disclose any of these sanctions in his Form F-3 to the Surf City agency.

25. Petitioner made his third material misrepresentation in response to question twenty-one on the Form F-3 submitted to the Topsail Beach Police Department. The question asked Petitioner whether he had "ever been sued with a civil judgment being rendered against [him]?" Petitioner marked "Yes," and stated, "Yes, March 4, 2000 Civil NO. 000900841, I was an employee of the firm RD white & Co. and was named along with all RD White & co. employees, I did no (sic) pay any fines and there was no further action taken on me." Wallace testified that Petitioner materially misrepresented the outcome of Civil No. 000900841. Wallace testified that documentation obtained by Respondent showed that the State of Utah, Division of Securities of the Department of Commerce, took action against Petitioner by naming him as a defendant in the suit The State of Utah v. R.D. White & Co., Inc., et al. (Respondent's Exhibit 7) Records from the Third Judicial District Court in and for Salt Lake County additionally reflect that a default judgment was entered against Petitioner in the above-captioned case, and that as a result he was "enjoined from (1) making cold calls within and/or to residents of the State of Utah; (2) soliciting or opening new accounts within or with residents of the State of Utah; or (3) exercising any discretionary authority relative to existing accounts within, and/or with residents of, the State of Utah." (Respondent's Exhibit 9, pp. 105-6) Petitioner was additionally ordered to pay a fine of \$6,500.00 and restitution in the amount of \$48,494.27. (Respondent's Exhibit 9, p. 106) Petitioner did not disclose the judgment or the fines against him in his Form F-3 to the Topsail Beach agency.

26. Petitioner made his fourth material misrepresentation in response to question twenty-one on the Form F-3 submitted to the Topsail Beach Police Department. The question asked Petitioner whether he had "ever been sued with a civil judgment being rendered against [him]?" Petitioner marked "Yes," and stated, "Yes, Disciplinary Proceeding Sept. 17, 1999 No. C3A980077, I was a branch manager of an office Paragon Capitol, when they went under investigation, I was questioned, But no further action was taken against me I paid no fines and was not charged." Wallace testified that Petitioner materially misrepresented the outcome of this

disciplinary proceeding. Wallace further testified that Respondent had obtained a Hearing Panel Decision entered by the Department of Enforcement of the National Association of Securities Dealers, Inc. against Petitioner ordering that he “pay costs in the amount of \$2,479.25,” and that he be “fined \$25,000, barred in his capacity as a principal, and suspended for one year from associating with any NASD member firm in any capacity.” (Respondent’s Exhibit 4) Petitioner did not disclose any of these sanctions in his Form F-3 to the Topsail Beach agency.

27. Respondent did not present victim statements or witness testimony regarding Petitioner’s alleged commission of the offenses of passing a bad check and theft by deception.

28. Petitioner testified at the hearing and stated that his failure to disclose the judgments and fines entered against him was not intentional. Petitioner explained that the National Association of Securities Dealers, Inc. (“NASD”) licensed him as a securities broker in approximately 1992. Petitioner admitted that he worked at the stock brokerage firm of R.D. White & Co. before leaving around 1998. Petitioner stated that both the NASD disciplinary proceeding and the Utah civil suit occurred after he left R.D. White & Co. and that according to his understanding he did not need to pay the fines against him unless he wanted to return to the securities industry.

29. Petitioner stated that the NASD disciplinary hearing derived from the misconduct of his supervisors who “threw [him] under the bus.” A review of the Hearing Panel Decision of the NASD Department of Enforcement, however, demonstrates that Petitioner’s own misconduct and violation of NASD rules resulted in his sanctions. (Respondent’s Exhibit 4, p. 45-47)

30. Petitioner similarly blamed his involvement in the Utah civil suit on his superiors and supervisors stating that the “brokerage firm was the problem.” The Default Judgment from the Third Judicial District Court in and for Salt Lake County, Utah, however, reflects that Petitioner was among several defendants individually sanctioned for personal improper conduct. (Respondent’s Exhibit 9, p. 106)

31. During the hearing, Petitioner admitted that the NASD supervises the actions of securities brokers much in the same way that Respondent supervises the actions of law enforcement officers. Petitioner admitted that he had twice been recognized as violating rules set forth by the NASD. The NASD differs from the Securities and Exchange Commission (“SEC”) in that it monitored over-the-counter securities, and the SEC is primarily concerned with public securities listed on the New York Stock Exchange. In 2007 they merged. When asked how he will follow the Respondent’s rules, Petitioner stated that he will, “read every detail of what [he] do[es] before [he] proceed[s],” and “understand every rule and regulation before [he] go[es] any further in anything [he] do[es].”

32. Petitioner testified regarding his character and explained that although the NASD disciplinary process and the Utah civil suit were “things that happened in [his] life” he has “grown from th[em.]” Petitioner detailed a career including military service; intensive civilian volunteer service at Ground Zero in the wake of September 11, 2001; and building his own business. Petitioner stated that he “can do [a law enforcement] job 100% and do it very well.”

33. Two character witnesses testified on behalf of Petitioner at the hearing: Chief of the Surf City Police Department, Michael Halstead Sr., and Chief of the Topsail Beach Police Department, Samuel Gervase. Chief Halstead testified that he has known Petitioner for eight years, both professionally and personally, and that Petitioner is a pillar of the local community. Chief Halstead indicated that he would himself hire Petitioner. Chief Gervase testified that he has known Petitioner for four years. Gervase stated that he still wishes to hire Petitioner. The testimony of these two chiefs, especially Chief Gervase, was very impressive and assuaged concerns that the undersigned had concerning the previous misstatements of facts. It is felt that Chief Gervase and his law enforcement career could be vulnerable if he made a mistake as to the character of his hires and, therefore, his judgment is given great weight.

CONCLUSIONS OF LAW

1. The parties are properly before the OAH and jurisdiction and venue are proper.
2. The OAH 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 Facts 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 09A .0204(b)(6) provides that the North Carolina Criminal Justice Education and Training Standards 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: (6) has knowingly made a material misrepresentation of any information required for certification or accreditation.
4. 12 NCAC 09A .0205(b)(4) provides that when the North Carolina Criminal Justice Education and Training Standards Commission suspends or denies the certification of a criminal justice officer for material misrepresentation, the period of sanction shall be not less than five 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. The findings of the Probable Cause Committee of the Respondent are supported by substantial evidence and are not arbitrary and capricious.
6. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).
7. Petitioner, as an applicant, has the burden of proof in the case at bar.
8. Petitioner showed by a preponderance of the evidence that Respondent's proposed denial of Petitioner's certification on the grounds of Petitioner's commission of the offenses of (1) passing a bad check and (2) theft by deception is unsupported by substantial evidence. Respondent failed to present sufficient witnesses or factual allegations to support those charges.

9. Petitioner showed by a preponderance of the evidence that Respondent's proposed denial of Petitioner's certification on the grounds of Petitioner lacking good moral character is not supported by substantial evidence. Petitioner demonstrated, through his own testimony and the testimony of two character witnesses, that his good character has been restored.

10. Petitioner has shown by a preponderance of the evidence that Respondent's proposed denial of Petitioner's certification on the grounds of material misrepresentation may be unsupported by substantial evidence. Respondent has shown that Petitioner made material misrepresentations on his June 22, 2013 amended statement for the Surf City Police Department Form F-3, and on his July 12, 2013 Topsail Beach Police Department Form F-3 when Petitioner knowingly failed to report civil judgments and fines entered against him. However, it is the opinion of the undersigned that the testimony of the two police chiefs, with over 48 years of law enforcement between them, should outweigh the Respondent's showing. It is believed that Petitioner's work and reputation in this small beach community has shown that he has rehabilitated himself and restored his reputation. This is based upon his service in the Navy; his work as a first responder in New York City during "9 -11", his work with youth in the Topsail/Surf City area; and his character references that designate him as a pillar of the community.

PROPOSAL FOR DECISION

BASED ON the foregoing Findings of Fact and Conclusions of Law, it is proposed that Respondent suspend a five-year suspension for the Petitioner; and that he should be monitored under terms of probation as the Commission should determine for making material misrepresentations on his June 22, 2013 amended statement for the Surf City Police Department Personal History Statement (Form F-3) and on his July 12, 2013 Topsail Beach Police Department Personal History Statement (Form F-3).

NOTICE AND ORDER

The North Carolina 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 is hereby 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, in accordance with N.C. Gen. Stat. § 150B-36(b).

This the 20th day of January, 2015.

J. Randall May
Administrative Law Judge