

STATE OF NORTH CAROLINA

COUNTY OF CABARRUS

JOSEPH O'DONNELL,

Petitioner,

v.

**NORTH CAROLINA CRIMINAL
JUSTICE EDUCATION AND
TRAINING STANDARDS
COMMISSION,**

Respondent

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DOJ 04108**

PROPOSAL FOR DECISION

This case came on for hearing on October 7, 2014 before Administrative Law Judge Craig Croom in Charlotte, 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: Mr. Joseph O'Donnell
Pro Se
418 Ross Street
China Grove, North Carolina 28023

Respondent: Lauren Tally Earnhardt
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
P.O. Box 629
Raleigh, North Carolina 27602-0629

ISSUES

Does substantial evidence exist for Respondent to suspend Petitioner's law enforcement certification for five years for his commission of the Class B misdemeanor of Assault by Pointing a Gun?

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 Law Enforcement Officer's Certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "The Commission"), on March 12, 2014.

2. Petitioner was certified as a full-time law enforcement officer with the Concord Police Department from June 12, 1989 until he resigned on January 23, 2012.

3. Petitioner now seeks certification as a part-time law enforcement officer with the Oakboro Police Department.

4. Richard Squires ("Squires"), an investigator for Respondent, reviewed Petitioner's request for certification with the Oakboro Police Department. Through his due diligence, Squires investigated why Petitioner left the Concord Police Department. Squires found that Petitioner resigned his position in 2012 after being investigated by the Concord Police Department for pointing his loaded service weapon at a fellow officer. No criminal charges were filed against Petitioner.

5. Squires contacted the Concord Police Department and requested documents pertaining to the investigation and separation of Petitioner. Squires also contacted Petitioner for a statement about the incident.

6. Based on his investigation, Squires prepared a memorandum summarizing his findings. That memorandum was presented to Respondent's Probable Cause Committee on February 19, 2014. Petitioner was present at the Committee meeting, able to speak with the Committee members, and able to present evidence.

7. The Probable Cause Committee found probable cause to believe that Petitioner committed the Class B Misdemeanor offense of Assault by Pointing a Gun in violation of N.C. Gen. Stat. § 14-34.

8. In December of 2012 Petitioner was employed with the Concord Police Department as a sergeant. Mr. Denan Sabanija ("Sabanija") was employed with the Concord Police Department as a law enforcement officer. Although Petitioner was assigned to a different district, he acted in a supervisory capacity with respects to Sabanija.

9. Sometime during the day of Friday, December 21, 2012, Petitioner left shift duty due to illness. Later, sometime after midnight on December 22, 2012, Petitioner arrived at the "Charlie" District Office of the Concord Police Department. Sergeant B.C. Kennerly, Officer Marty Ritchie, and Officer Sabanija were present at the district office when Petitioner arrived.

10. Upon Petitioner's arrival at the Charlie District Office, Sabanija raised his voice to shout at Petitioner, "Sarge, don't be bringing [your sickness] in here." When Petitioner

responded that he was not contagious, Sabanija retorted, “that’s not what I heard. I heard it was deadly.” Sabanija jokingly tapped his own service weapon and unsnapped the holster while speaking with Petitioner, but did not remove his weapon from his belt.

11. Petitioner approached Sabanija’s desk, raised his voice and said something along the lines of, “go ahead and draw if you’re going to. What are you going to do? Are you going to fucking shoot me, Sabanija?” While speaking, Petitioner drew his own service weapon, a loaded Glock .40 caliber, and pointed it at Sabanija.

12. Sabanija testified that Petitioner was “within arm’s reach” when he drew his weapon, further estimating that the drawn gun was “twenty inches away” from Sabanija’s body during the incident.

13. Petitioner placed both hands on his service weapon when he pointed it at Sabanija. His trigger finger remained off of the trigger and on the weapon’s frame rail during the incident. In total, Petitioner pointed his weapon at Sabanija for approximately twenty seconds.

14. After pointing his weapon at Sabanija for twenty seconds, Petitioner holstered his weapon and went to the office break room. Petitioner returned to Sabanija a few minutes later, unholstered his service weapon again, and attempted to hand the weapon to Sabanija handle first. While extending his weapon to Sabanija, Petitioner stated, “You know I’m just kidding. Here you go; you point the gun at me.” Sabanija declined Petitioner’s offer and stated, “I don’t want to do that. I do that if I want to hurt someone. I don’t point guns.”

15. Both Petitioner and Sabanija indicated that they had a positive working relationship prior to and after the December 22, 2012 incident. Neither Petitioner nor Sabanija characterized the incident as one of ill-will or malicious intent. Instead, both described the incident as a “joke carried too far” within the context of officer “camaraderie.” Despite this characterization, Petitioner’s assault of another officer by pointing a weapon is one of serious concern because it reflects a pattern of inappropriate conduct with respect to firearms.

16. Sabanija testified that he has seen officers tap or indicate their service weapons while joking with other officers, but that prior to the December 22, 2012 incident he had never seen an officer remove his or her weapon from its holster or point a weapon at a fellow officer in jest.

17. Petitioner admitted to pointing his service weapon on two other occasions at fellow law enforcement officers once in 1993 and 1998.

18. In 1993 Petitioner was employed by the Concord Police Department as a law enforcement officer. At some point during the year he was assigned to field train Officer Lawrence Lentz (“Lentz”). Petitioner admitted that on one occasion, he and Lentz were both in a patrol car when Lentz continued to pass gas. In response, Petitioner admitted that he drew his weapon, at that time a 9mm, and pointed it at Lentz in jest. Petitioner described this incident as a “quick draw” in which he drew his loaded weapon with the safety on, took his finger off of the trigger, and pointed it at Lentz for a few seconds.

19. In 1998 Petitioner remained employed by the Concord Police Department as a law enforcement officer. At the time Petitioner was assigned to field train Officer Stephen Brian Kelly ("Kelly"). Petitioner testified that sometime during the summer of 1998 he was in a patrol car with Kelly conducting a surveillance operation. Sometime during the evening Kelly passed gas. Petitioner stated that Kelly, who knew of the 1993 incident with Lentz, asked Petitioner whether Petitioner was going to "do [him] like he did . . . the other officer." Petitioner admitted that he then drew his loaded weapon, with the safety on, and pointed it at Kelly for a few seconds in jest before holstering it. Petitioner also characterized this incident as a "quick draw."

20. At the time of each "quick draw" incident (1993, 1998, and 2012) Petitioner was in a senior position to the officers he pointed his weapon at. As a senior officer Petitioner was tasked with setting an example for and teaching younger officers. Petitioner acknowledged that drawing his service weapon and pointing it at a fellow officer did not set a good example.

21. Petitioner admitted that drawing a firearm on a fellow officer in jest is inappropriate and that his actions reflected "poor judgment," "a poor form of camaraderie," and a "bad example."

22. Petitioner has at least twenty-four years of experience with handling firearms. Petitioner acknowledged that the most basic rule of that training is not to point a weapon at another individual.

23. Petitioner presented four character witnesses: Concord Police Department Officer Kem England, Retired Belmont Police Chief David James, Concord Police Department Detective Deckster Barlowe, and retired Concord Police Department District Captain Tim Templeton.

24. Petitioner is an asset to the law enforcement community.

24. Petitioner serves as a mentor to character witnesses England and Barlowe and their association with Petitioner directly contributed to their own success as law enforcement officers.

25. Petitioner took responsibility for his actions and has learned what conduct to avoid in the future.

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. 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 criminal justice officers and to revoke, suspend, or deny such certification.

3. 12 NCAC 09A.0204(b)(3) 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 NCAC 09A.0103 as a Class B misdemeanor

4. 12 NCAC 09A.0103(23)(b) states that:

(23) ...Misdemeanor offenses are classified by the Commission as follows:

(b) “Class B Misdemeanor” means an act committed or omitted in violation of any common law, criminal statute, or criminal traffic code of this state that is classified as a Class B Misdemeanor as set forth in the Class B Misdemeanor Manual as published by the North Carolina Department of Justice. . .

5. The Class B Misdemeanor Manual published by the North Carolina Department of Justice includes as a Class B misdemeanor the offense of “Assault by Pointing a Gun” set forth in N.C. Gen. Stat. § 14-34.

6. N.C. Gen. Stat. § 14-34, “Assaulting by Pointing Gun,” states that:

If any person shall point any gun or pistol at any person, **either in fun or otherwise**, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor. (emphasis added)

7. The North Carolina Criminal Justice Education and Training Standards Commission has some discretion granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to determine the period of suspension for the commission of specific offenses.

8. 12 NCAC 09A.0205(b)(1) states that:

(b) When the Commission suspends or denies the certification of a

criminal justice officer, the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (b) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of action is:

- (1) commission or conviction of a criminal offense other than those listed in Paragraph (a) of this Rule.

9. 12 NCAC 09A.0205(a)(1-3) include the following offenses:

- (1) commission or conviction of a felony offense; or
- (2) commission or conviction of a criminal offense for which authorized punishment included imprisonment for more than two years; or
- (3) the second suspension of an officer's certification for any of the causes requiring a five-year period of suspension.

10. The commission of the criminal offense Assault by Pointing a Gun is not recognized under 12 NCAC 09A.0205(a)(1-3). Because the offense is not listed, the Commission may, but is not required to, reduce or suspend the default five year period of sanction or substitute a period of probation in lieu of the default five-year suspension of certification.

11. The party with the burden of proof in a contested case must establish the facts required by G.S. § 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).

12. Respondent has the burden of proof in the case at bar.

13. Petitioner admitted, and Respondent has shown by a preponderance of the evidence, that Petitioner committed the Class B misdemeanor offense of Assault by Pointing a Gun on December 22, 2012, when Petitioner drew his service weapon and pointed it at fellow Concord Police Department Officer Denan Sabanija.

14. The findings of the Probable Cause Committee of the Respondent are supported by substantial evidence.

15. Petitioner is an asset to the law enforcement community and mentors younger officer. Furthermore, he does not deny that his conduct was wrong, and he takes full responsibility for his actions. He has shown remorse as well. Therefore, Respondent has not shown by a preponderance of the evidence that Respondent's proposed five-year suspension of Petitioner's law enforcement certification based on his commission of the offense of Assault by

Pointing a Gun, a Class B misdemeanor, is supported by substantial evidence. Probation is more appropriate under these circumstances.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends two years of probation for Petitioner's certification as a law enforcement officer in lieu of the default five-year suspension of certification.

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.

This the 16th day of December, 2014.

Craig Croom
Administrative Law Judge