

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DOJ 04114

RONNIE EARL SMITH, JR.,)
)
Petitioner,)
)
v.)
)
N.C. CRIMINAL JUSTICE)
EDUCATION AND TRAINING)
STANDARDS COMMISSION,)
)
Respondent.)

PROPOSAL FOR DECISION

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, in Raleigh, North Carolina. This case was heard pursuant to N.C.G.S. § 150B-40, 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.

After presentation of testimony and exhibits, the record was left open for the parties' submission of materials, including but not limited to supporting briefs, further arguments and proposals after receipt of the official transcript. Mailing time was allowed for submissions including the day of mailing as well as time allowed for receipt by the Administrative Law Judge. Petitioner's motion for extension of time to file proposals and other post hearing materials was granted. Petitioner and Respondent filed timely materials on February 2, 2015 and February 5, 2015 respectively with receipt to the Undersigned from the OAH Clerk's Office being February 10, 2015 at which time the record was closed for further submissions. For good cause shown and by order of the Chief Administrative Law Judge, the Undersigned was granted an extension until April 17, 2015 to file the proposal for decision in this case.

APPEARANCES

For Petitioner: Steven R. Edelstein
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For Respondent: Lauren Tally Earnhardt
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ISSUE

Does substantial evidence exist to suspend Petitioner's correctional officer certification for three years for commission of the "DAC Misdemeanor" offense of Resisting a Public Officer?

APPLICABLE RULES

(including but not limited to the following)

12 NCAC 09G.0102; 12 NCAC 09G.0102(9)(cc);
12 NCAC 09G.0504(b)(3); 12 NCAC 09G.0505(b)(1)

EXHIBITS

For Petitioner: Petitioner's Exhibits 1, 2 and 3 were admitted into evidence.

For Respondent: Respondent's Exhibit 1 without attachments 10 and 11
Respondent's Exhibit 2 was admitted into evidence.

WITNESSES

For Petitioner: Ronnie Earl Smith, Jr.
Dwayne Anderson
Shamira Smith
Camellia Boone

For Respondent: Kevin Wallace
Kevin Byrd

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 by a preponderance of the evidence. In making these Findings of Fact, the Undersigned 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 witnesses, 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 this case.

FINDINGS OF FACTS

1. Petitioner Ronnie Earl Smith, Jr., was 24 years old at the time of the hearing. He received a Probationary Certification to be a correctional officer on January 9, 2012 and was awarded a General Certification on January 9, 2013. Petitioner is employed with the North Carolina Department of Public Safety. Petitioner testified at the hearing that he has been employed as a Correction Officer since 2011 and outside this incident, has been in good standing with his employer with only had a minor infraction. Petitioner is still working as a correctional officer as of the date of the hearing. His employer recommended continued certification and employment while his criminal trial and OAH hearing were pending.

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. On April 13, 2013 Petitioner was issued a warrant charging him with Resisting Public Officer. The statutory basis of the warrant was N.C.G.S. § 14-223. Petitioner also was issued a warrant for Disorderly Conduct and a citation for being Intoxicated in a Public Place.

4. After Petitioner was initially charged with Resisting a Public Officer and the two other charges he notified his employer the Department of Adult Corrections. The Department of Adult Corrections notified the Respondent.

5. Kevin Wallace, an investigator with Respondent since January 2013, testified at the hearing. On May 7, 2013, Respondent received a Report of Arrest memo from the North Carolina Department of Public Safety indicating that on April 13, 2013, Petitioner was arrested and charged with resisting public officer, disorderly conduct, and intoxicated and disruptive.

6. On October 21, 2013, The Honorable Thomas L. Jones, District Court Judge in Northampton County found Petitioner not guilty of all three charges after a District Court trial. At the trial Deputy Sheriff Pair, a Northampton deputy, and Officer Byrd, a Rich Square police officer, testified on behalf of the State. These two law enforcement officers were at the scene and participants in the events leading to the charges against Petitioner. Petitioner Ronnie Earl Smith Jr., and Camellia Boone, his mother, testified on behalf of the Petitioner.

7. On November 18, 2013, Mr. Wallace received a certified copy of the disposition in Petitioner's criminal case. Wallace was waiting for the results of the District Court criminal trial. After the acquittal of Petitioner on all three criminal charges including Resisting a Public Officer in violation of N.C.G.S. § 14-223, he continued his work on the accusations against Petitioner.

8. Mr. Wallace received statements from Deputy Sheriff Pair, Officer Byrd and Petitioner Ronnie Earl Smith, Jr. He talked with Pair but did not talk with the Petitioner. It does

not appear that Wallace interviewed Amika Solomon, Dwayne Anderson, Shamira Smith, or Camellia Boone or any other witnesses on the scene.

9. Officer Byrd, a Rich Square police officer, was at the scene during the interaction between Pair and Petitioner and participated in the interaction. The statement of Officer Byrd was dated April 9, 2013 and referred to an incident that occurred on April 5, 2013. There is no evidence from Byrd in the incident/investigation report concerning an incident on April 12 and 13, 2013.

10. The arresting officer, Jimmy Pair, did not testify at this hearing. Kevin Byrd did testify. He was employed at the time of this hearing with Eastside EMS in Rich Square, North Carolina. He stated the “police chief was resigning, and the Town Council decided to go another route for the police chief’s position that I didn’t agree with, so I left.” Tr. 68.

11. On December 20, 2013 a Memorandum from Mr. Wallace to the members of the Probable Cause Committee was prepared. It summarized his investigation and included Pair’s statement (not admitted into evidence), a conversation with Pair (substance not admitted into evidence), Byrd’s statement, Petitioner’s second statement (Petitioner’s first statement taken at the scene was in the custody of Deputy Sheriff Pair and its whereabouts are unknown) and the warrants charging Petitioner with three misdemeanors of which one was a DAC misdemeanor (Resisting a Public Officer).

12. Based on his investigation, Mr. Wallace prepared a memorandum summarizing his findings and that memorandum was presented to Respondent’s Probable Cause Committee on February 20, 2014. He made no recommendation to the Committee. Petitioner was present at the Committee meeting and was able to speak with the Committee members and present evidence.

13. The Probable Cause Committee found probable cause to believe that Petitioner committed the DAC Misdemeanor offense of “Resisting a Public Officer.” R.Ex. 2

14. On the evening of April 12, 2013, Petitioner was at his home in Rich Square. A friend came by about 10:30 pm. Petitioner had drunk a couple of beers at home. The friend asked Petitioner if he wanted to go to a party and Petitioner agreed to go. Petitioner did not drive as he had two beers and also would drink at the party. The party was about a mile and a quarter from the home of Petitioner.

15. Petitioner drank three more beers at the party. After being at the party for on or about 45 minutes, it appeared a fight might break out between a group of individuals from Rich Square and a group from another town. To avoid becoming involved in the fight Petitioner decided to leave the party. As Petitioner began to walk away from the party he was hit on his head from behind, and someone stole his cell phone. When he turned around he was hit in the face. Petitioner could not get a ride from his friend because his friend’s car was blocked in by other vehicles. Petitioner began to walk home on Highway 258. His home was about one and a quarter miles from the location of the party. It was a warm evening and Petitioner had taken off his shirt.

16. After walking about a quarter of a mile, Petitioner saw a deputy sheriff’s car across the road. Dwayne Anderson resided approximately across the road from where the deputy sheriff

had his patrol car. Mr. Anderson was standing in front of his home between 28 and 40 feet from where the deputy sheriff's vehicle was located. Mr. Anderson stated the lighting was such that he and others could see what was happening.

17. Kevin Byrd testified that he was a police lieutenant for Rich Square Police Department at the time of the incident. Mr. Byrd was working as a patrol officer and was called to an incident regarding a chase with multiple people involved. The incident was on the outer bounds of his jurisdiction so he accompanied the responding Sheriffs' Deputy, Deputy Pair to the location. Byrd spoke with the victim, Ms. Solomon, who explained that some unknown individuals were chasing her vehicle and had shot at her. This was not related to Petitioner.

18. Petitioner saw a deputy sheriff and crossed the road to ask for a ride home and to report the assault upon him and the theft of his cell phone. The Deputy Sheriff was Jimmy Pair of the Northampton Sheriff's Department. Pair stated loudly that couldn't Petitioner see what he was doing. Since it appeared Petitioner would not receive a ride home from Pair, he crossed the road and began walking home. Pair asked the Petitioner to come back. He did so loudly enough to have Dwayne Anderson hear him. The Petitioner did so.

19. Mr. Byrd heard an escalation in volume between Petitioner and Deputy Pair so he approached the two. Pair informed Byrd that Petitioner would not give him his name and Byrd identified Petitioner to Pair as Mr. Smith. Byrd testified that he has known Petitioner and his family for years. Byrd observed that Petitioner was shirtless, had red marks on his chest, his face was swollen, he was rather impaired, and upset.

20. Petitioner and Deputy Pair continued to have a discussion and Mr. Byrd heard Petitioner state he wanted to go home and Deputy Pair told him that they were in the middle of a call and the Petitioner was being detained. Deputy Sheriff Pair handcuffed Petitioner with Petitioner's hands behind his back and placed him in the rear seat of his patrol car. Petitioner did not resist being handcuffed. Mr. Anderson witnessed this sequence of events. Petitioner was not given a reason for being handcuffed and detained by Pair.

21. Mr. Byrd testified that Petitioner was handcuffed for safety reasons. However, Petitioner was only told by Pair that: "We don't know what's going on. We're retaining you right now." Tr. 75

22. A few minutes after being detained in the rear seat of Deputy Sheriff Pair's car, Amika Solomon (victim of the drive by shooting) told Pair that Petitioner was not involved.

23. Petitioner was kept in a very warm vehicle with the windows rolled up for about an hour more or less, handcuffed behind his back. Petitioner was upset while he was in the back of the car. Mr. Byrd and Deputy Pair periodically returned to the car to try and calm Petitioner down.

24. Petitioner kept on asking why he was being detained. Sometime in the next hour, his mother, Camellia Boone, and his sister, Shamira Smith, arrived at the scene. Petitioner told them he had done nothing wrong and did not know why he was being detained.

25. After about an hour, Petitioner was told if he wrote a statement he would be released. Petitioner still had not been given a reason for his detention and handcuffing. He was still detained in the back seat of the patrol car but had his handcuffs taken off by Pair. Pair gave him paper and pen or pencil. Petitioner wrote a statement and gave it to Pair. Deputy Pair reviewed the statement and said he could not read it, folded it and placed it in the front seat of his vehicle.

26. Byrd testified that after getting a statement he could not read, Deputy Pair “decided to charge Mr. Smith with, I believe it was standing in the roadway or intoxicated in public or something along that line.” Tr. 80

27. As a result of being detained for an hour handcuffed in the back of a hot car, after being assaulted and robbed and after being frustrated by law enforcement officials, Petitioner admits he began cursing. Up to this time Petitioner had not disturbed any person. Byrd testified that Petitioner was irate and cursing and had slammed his hand against the Plexiglas petition.

28. Mr. Byrd testified that he told Petitioner to calm down, and Deputy Pair told him to calm down or he would be arrested. Byrd testified that Pair opened the patrol car to place Petitioner under arrest, and Petitioner laid on his back on the back seat. Byrd stated that Deputy Pair told Petitioner to let him handcuff him or he would be pepper sprayed. Deputy Pair used his pepper spray on Petitioner.

29. Byrd testified that at this time there were 20 to 30 people, including Petitioner’s family members across the street in Mr. Anderson’s driveway. Anderson testified there was lighting from a road lamp and from houses to see what was happening. Petitioner testified that he did not physically resist being handcuffed. What was witnessed by others was that Deputy Pair opened the door and handcuffed Petitioner, with Petitioner being pepper sprayed after being handcuffed. The testimony of Petitioner, Ms. Boone and Ms. Smith support these findings and also support the finding that Petitioner was handcuffed and then pepper sprayed by Pair. Anderson testified he saw no resistance on the part of Petitioner and he also saw Pair pepper spray Petitioner and close the car door.

30. Camellia Boone, Petitioner’s mother, testified under oath both at this hearing and at the District Court hearing before Judge Jones. She stated she was in Mr. Anderson’s front yard and was about 20 feet from her son where she could see. She relayed that about 20 minutes passed from her arrival on the scene before she saw Deputy Pair come to the car area. She asked him if she could talk to Petitioner and he informed her that if she went over to her son, he would carry her off to jail. Boone observed Deputy Pair place a piece of paper in the front seat of his car and then heard him tell Petitioner he could not go home but that he was being taken to “Jackson”. She witnessed her son being pepper sprayed then the car door being closed with Petitioner inside with no ventilation.

31. According to Byrd’s statement, Petitioner was resisting arrest because he did not want to be charged with public intoxication with an E-citation. The warrant charging Petitioner with Resisting Public Officer (13 CR 050320) states that Deputy Sheriff Pair was discharging the duty of “CONDUCTING AN INVESTIGATION OF A FIGHT AND THE SHOOTING OF A VEHICLE” (capitalization in the original). The Public Intoxication charge was not mentioned.

BASED UPON the foregoing findings of fact and upon the preponderance of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings (OAH), and jurisdiction and venue are proper. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that any of the following Conclusions of Law is a Finding of Fact, it shall be so considered in spite of its designation as a Conclusion of Law.

2. The Undersigned need not make findings as to every fact which arises from the evidence and need only find those facts which are material to resolution of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

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 “has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification.” “Resisting Public Officer” in violation of N.C.G.S. § 14-223 is a DAC misdemeanor as defined in 12 NCAC 09G .0102(9)(cc). N.C.G.S. § 14-223 states that 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.

4. The preponderance of the evidence cannot establish that Petitioner was lawfully handcuffed and detained. Petitioner was called back and detained and handcuffed by Deputy Sheriff Pair after Petitioner began walking home. He asked for help and when he did not receive help he proceeded home. No reason for the arrest was given at that time to Petitioner. Petitioner was not disturbing the peace.

5. The preponderance of the evidence cannot establish that Petitioner was lawfully arrested. In accordance with the North Carolina Supreme Court “when the law enforcement officer by word or actions, indicates an individual must remain in the officer’s presence and come to the police station against his will, the person for all practical purposes is under arrest if there is a substantial imposition of the officer’s will over the person’s liberty.” *State v. Sanders*, 295 N.C. 361, 375-76, 245 S.E.2d 674, 684 (1978), *cert. denied* 454 U.S. 973 1981.

6. The offense of resisting arrest both by common law and statutory law presupposes a lawful arrest. The preponderance of the evidence cannot establish that Petitioner physically resisted arrest. The warrant stated that Petitioner pulled away from Pair. Four witnesses, Petitioner, Ms. Boone (Petitioner’s mother), Dwayne Anderson and Ms. Smith (Petitioner’s sister)

contradict this. Four witnesses did not see any physical resistance. Petitioner could be heard begging Pair not to pepper spray him.

7. Deputy Sheriff Pair (who did not testify at this hearing) failed to preserve important evidence. Pair claimed that the statement written by Petitioner that would have allowed him to leave the vehicle he had been detained in for an hour or more was not readable, yet the statement was not preserved to be admitted into evidence.

8. Mr. Byrd indicated he did not know why Pair detained Petitioner. Then he stated Petitioner was detained for his own protection but no testimony revealed that this was ever revealed to Petitioner himself and the facts of this case cannot justify this reasoning on its face. Byrd stated Petitioner resisted arrest when he was told he would be arrested for Public Intoxication. The warrant states the duty being discharged by Pair was “CONDUCTING AN INVESTIGATION OF A FIGHT AND THE SHOOTING OF A VEHICLE.”

9. Petitioner was found not guilty by the Northampton District Court in a trial held on October 21, 2013. At the trial Pair and Byrd both testified for the State. Petitioner and Camellia Boone testified on behalf of Petitioner.

10. Respondent has the burden of proof in this case. As set forth by the United States Supreme Court, “we have held that “the burden of proof” is a “‘substantive’ aspect of a claim.” *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 849, 187 L. Ed. 2d 703 (2014) (quoting *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20–21, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000)); see also *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 271, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) (“[T]he assignment of the burden of proof is a rule of substantive law ...”); *Garrett v. Moore–McCormack Co.*, 317 U.S. 239, 249, 63 S.Ct. 246, 87 L.Ed. 239 (1942) (“[T]he burden of proof ... [is] part of the very substance of [the plaintiff’s] claim and cannot be considered a mere incident of a form of procedure”).”

11. Our own North Carolina courts have emphasized in multiple cases that “[t]he rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests, and therefore it should be carefully guarded and rigidly enforced by the courts.” *Tippite v. Atl. Coast Line R. Co.*, 234 N.C. 641, 644, 68 S.E.2d 285, 288 (1951).

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

PROPOSAL FOR DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Proposal for Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned holds that Respondent failed to carry its burden of proof by a greater weight of the evidence regarding the issue presented in this contested case. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side. The weight of Respondent's evidence does not overbear the weight of evidence of Petitioner to the ultimate issues, and as such the Probable Cause Committee's finding that probable cause exists to believe Petitioner's certification as a correction officer should be suspended cannot be affirmed.

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. A copy of the final agency decision or order shall be served upon each party personally or by certified mail addresses to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. N.C.G.S. § 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

IT IS SO ORDERED.

This is the 10th day of April, 2015.

Augustus B. Elkins II
Administrative Law Judge