

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DOJ 05716

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Respondent: Matthew L. Boyatt, Assistant Attorney General

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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 mail the proposed Denial of Justice Officer's Certification letter, mailed by Respondent Sheriffs' Commission on June 20, 2014.

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter referred to as the "Commission" or "Sheriffs' Commission") has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.

Background

3. Petitioner is 46 years of age. Petitioner previously worked as a framing contractor in the construction industry. He was the owner and operator of Anderson Building Company. Petitioner built high end homes and also constructed home additions and engaged in home renovations. Petitioner desires to enter the field of law enforcement as a second career due to the decline in the construction industry in 2008 and the general lack of work in that industry.

4. Petitioner Anderson has been married since 2001 and has children who are 8 and 6 years of age, and two step children who are 21 and 25. (T. p. 57)

5. Petitioner completed Basic Law Enforcement Training Program at Brunswick Community College from July 8, 2011 until January 26, 2012. He successfully completed the program, had a perfect attendance record, attained the highest state exam score for his class and had a handgun qualification score of 99.7. See Petitioner's Exhibit 3, 4, 5, 6, 7.

6. Petitioner is an applicant for justice officer certification through the Pender County Sheriff's Office and was appointed for certification as a justice officer through that agency on September 26, 2013. Captain Billy Sanders and Sergeant Ryan Wilson of the Pender County Sheriff's Office appeared at the administrative hearing and testified on behalf of Petitioner.

7. Petitioner voluntarily disclosed his Maryland criminal history to Captain Sanders and to Respondent. Petitioner has been cooperative with the Pender County Sheriff's Office and Respondent regarding his criminal history. (T. p. 33)

8. Petitioner began as a reserve deputy. He trained with a Field Training Officer for three-four months on a voluntary basis with compensation, so he could eventually be employed full time as a Deputy Sheriff. (T. p. 23) Sergeant Wilson served as his Field Training Officer and as his current supervisor. (T. p. 36)

9. Petitioner is very professional in the performance of his duties. He has integrity, and he has no issues of misconduct or any type of significant problem while at the Pender County Sheriff's Office. (T. p. 22)

10. Pender County Sheriff Carson Smith, Jr wants Petitioner certified as a sworn justice officer and for him to remain with the Pender County Sheriff's Office. (T. p. 22)

12. Reverend Trish Archer, one of the pastors at Pine Valley United Methodist Church in Wilmington, also testified on behalf of Petitioner. She has known Petitioner since January 2002. (T. p. 47) Reverend Archer believes that Petitioner is an honest and trustworthy individual. (T. p. 51) Reverend Archer is aware that Petitioner has a past criminal history; however, she is not aware of the specifics regarding any one incident.

13. Petitioner is an active and respected member of Pine Valley United Methodist Church. He has served as a musician, trustee, Sunday School teacher, a youth counselor, and as vice president. He also served as the Church Coordinator for the Habitat for Humanity Program for two years. (T. p. 63)

14. The Respondent previously summarily denied Petitioner's application for certification pursuant to 12 NCAC 10B .0307 (a)(2) based solely on one (1) misdemeanor Battery conviction which occurred in the State of Maryland, and which carried with it the potential punishment of greater than two (2) years confinement under Maryland common law. Petitioner requested an administrative hearing and an Administrative Law Judge was assigned to preside over that contested matter. *See Andrew George Anderson v. NC Sheriffs' Education and Training Standards Commission*, 13 DOJ 03417.

15. During the pendency of Petitioner's 2013 administrative case, Petitioner obtained an order from the Maryland court setting aside his Battery conviction. Therefore, the Respondent Commission did not oppose Petitioner's Motion for Summary Judgment in 13 DOJ 03417, insofar as Petitioner no longer stood "convicted" of the Battery offense in Maryland. The Order granting Petitioner's Motion for Summary Judgment was limited to whether Petitioner stood "convicted" of Battery, and did not adjudicate whether Petitioner committed this crime, or whether he was otherwise qualified to hold certification.

16. Following the granting of Petitioner's Motion for Summary Judgment in 13 DOJ 03417, the Respondent Commission was required to finish processing Petitioner's application for certification, which involved assigning an investigator to look into Petitioner's numerous other misdemeanor criminal charges arising out of the State of Maryland. Furthermore, the Commission was required to investigate whether Petitioner actually committed the Battery offense that was at issue in 13 DOJ 03417.

17. This Court must decide whether Petitioner stands convicted of 4 or more misdemeanor offenses. In addition, this Court must decide whether Petitioner committed the following offenses in the State of Maryland: 1) Battery; 2) Resisting Arrest; 3) Possession of Drug Paraphernalia; and 4) Disorderly Conduct.

Petitioner's Criminal Convictions

18. 12 NCAC 10B.0204(d)(5) provides the Sheriffs' Commission may deny the certification of a justice officer when the Commission finds that the applicant has committed or been convicted of:

(5) any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103 (10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103 (10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

19. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, a Class A misdemeanor is classified as those misdemeanor offenses for which the maximum period of confinement is less than 6 months. Included as Class A misdemeanors are offenses such as ordinance violations for which no period of confinement is possible.

20. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Class B misdemeanors are those North Carolina criminal offenses set out in Respondent's Class B Misdemeanor Manual, in addition to out-of-state criminal offense which carry a potential punishment greater than 6 months, but less than 24 months confinement.

21. The record before this Court establishes Petitioner has been convicted of four (4) or more misdemeanors, such that his application for certification is subject to denial pursuant to 12 NCAC 10B.0204(d)(5).

22. On August 7, 1991, Petitioner was convicted of unlawful Possession of a Controlled Dangerous Substance in the State of Maryland, case number 91-175. *See* Respondent's Exhibit 9, p.3. Petitioner does not dispute this conviction which remains on Petitioner's criminal record. Petitioner indicates the substance was marijuana.

23. On July 24, 1989, Petitioner was also convicted of unlawful Possession of a Controlled Dangerous Substance in the State of Maryland, case number 00000318Q3. *See* Respondent's Exhibit 15. Petitioner does not dispute this conviction remains on Petitioner's criminal record. Petitioner indicates the substance was again marijuana, less than 1/4 ounce.

24. A conviction for the unlawful possession of marijuana in the State of Maryland during the period in question carried with it a potential maximum sentence of one (1) year confinement. *See* Article 27, subparagraph (e) of section 287 of the Maryland Code. Respondent's Exhibit 22.

25. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's two (2) possession of marijuana convictions in the State of Maryland constitute separate Class B misdemeanor convictions.

26. On June 16, 1989, Petitioner was convicted of Entering Area Closed to Public, case number 00026462Z2. *See* Respondent's Exhibit 13. Petitioner does not dispute this conviction remains on Petitioner's criminal record. Petitioner indicates he was essentially trespassing. Petitioner and a friend were target shooting on private property when the owner of the property called the police. This resulted in criminal charges and ultimately a guilty plea on June 16, 1989.

27. The Entering Area Closed to Public conviction is classified as a Class A misdemeanor conviction because it appears Petitioner could not have been sentenced to a period of confinement greater than six (6) months for this criminal offense. Petitioner was ordered to pay a \$150.00 fine as a result of this conviction. *See* Respondent's Exhibit 13; Respondent's Exhibit 14.

28. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's Entering Area Closed to Public conviction in the State of Maryland constitutes a Class A misdemeanor conviction.

29. On September 21, 1988, Petitioner was convicted of Failing to Report a Boat Accident in the State of Maryland, case number 00026352Z4. *See* Respondent's Exhibit 11. Petitioner does not dispute this conviction remains on Petitioner's criminal record. Petitioner was operating his father's boat in the dark when he struck a pier that was recently installed in the area. Petitioner did not report the accident to the police. Petitioner's father submitted a claim to his insurance carrier to cover the damages. The insurance carrier required a police report to process the claim. The police were notified approximately two (2) days following the collision, which resulted in Petitioner being charged criminally.

30. The Failing to Report a Boat Accident conviction is classified as a Class A misdemeanor conviction because it appears Petitioner could not have been sentenced to a period of confinement greater than six (6) months for this criminal offense. Petitioner was ordered to pay a \$50.00 fine as a result of this conviction. Respondent's Exhibit 11 and Exhibit 12.

31. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's Failing to Report a Boat Accident conviction in the State of Maryland constitutes a Class A misdemeanor conviction.

32. On March 11, 1992, Petitioner was convicted of violating his probation in case number 00606649Q1. *See* Respondent's Exhibit 17. Petitioner admits that he stands convicted of this misdemeanor probation violation; however, Petitioner does not recall the circumstances surrounding this violation. *See* Respondent's Exhibit 21 (response to Request for Admission number 5). At the hearing of this matter, Petitioner stated he may have failed a drug screen, which ultimately resulted in the adjudication of guilt for violating a condition of probation. It appears from the record in this case that Petitioner's probation violation bears the same case number as Petitioner's Battery conviction that was set aside in 2013. *See* Respondent's Exhibit 17 and Exhibit 6. Notwithstanding the foregoing, Petitioner did not present any evidence which

would show that the misdemeanor probation violation conviction was set aside at the same time Petitioner's Battery conviction was set aside. The record establishes that the probation violation adjudication occurred two (2) years after Petitioner was charged with the Battery offense on September 20, 1990.

33. The Respondent Commission classified the probation violation conviction as a Class A misdemeanor conviction because it appears Petitioner could not have been sentenced to a period of confinement greater than six (6) months for this probation violation.

34. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's March 11, 1992 probation violation conviction in the State of Maryland constitutes a Class A misdemeanor conviction.

35. Petitioner has been convicted of a combination of 4 or more offenses classified as either Class A or Class B misdemeanors. In total, Petitioner has 5 misdemeanor convictions on his record: three (3) class A misdemeanor convictions and two (2) class B misdemeanor convictions. Petitioner's application for certification is, therefore, subject to denial pursuant to 12 NCAC 10B .0204(d)(5).

Commission of Maryland Battery Offense

36. As stated above, Petitioner was previously convicted of Battery in the State of Maryland. *See* Respondent's Exhibit 6. In 2013, Petitioner had this criminal conviction set aside and subsequently dismissed **after** Petitioner requested an administrative hearing in case number 13 DOJ 03417. This Court must decide whether Petitioner committed the Battery offense on or about September 20, 1990.

37. Petitioner was arrested for Battery in St. Mary's County Maryland on September 20, 1990. *See* Respondent's Exhibit 6. Petitioner recalls the events of that day, although Petitioner has attempted to minimize his unlawful conduct.

38. The victim in the battery case was Brad McElroy ("Mr. McElroy").

39. On or about September 20, 1990, Petitioner learned from his girlfriend that she had been having sex with Mr. McElroy. This upset Petitioner and Petitioner went to confront Mr. McElroy. Petitioner drove to the home of Mr. McElroy and confronted him at the front door. Petitioner admits taking a "fighting stance" when he approached Mr. McElroy. However, at this hearing, Petitioner denied that he struck Mr. McElroy first. This is at odds with Petitioner's prior statement to Diane Konopka at the Sheriff's Training and Standards Division where Petitioner admitted to punching Mr. McElroy in the face. Further, in Petitioner's written statement to the Respondent Commission, Petitioner stated he "confronted [McElroy] with the situation. A fight broke out and I left." *See* Respondent's Exhibit 7.

40. Petitioner admitted under oath that several witnesses were present who observed the altercation at Mr. McElroy's residence. These individuals were other residents of the apartment complex where Mr. McElroy resided. Petitioner was the only one charged with Battery on September 20, 1990. Mr. McElroy was not charged criminally.

41. A preponderance of the evidence presented at the administrative hearing establishes Petitioner committed a Battery against Mr. McElroy when Petitioner went to McElroy's home on September 20, 1990, confronted him, and subsequently punched him.

Commission of Maryland Resisting Arrest

42. Petitioner was charged with Resisting Arrest on September 5, 1988. Petitioner completed a deferred prosecution and that the criminal case was ultimately dismissed in 1989. Petitioner recalls the events of September 5, 1988, although Petitioner was grossly intoxicated on the evening in question.

43. On the date in question, Petitioner attended a Grateful Dead concert with some friends in Landover Maryland. The police report indicates Petitioner was ejected from the concert. *See* Respondent's Exhibit 4. Petitioner denies that he was kicked out of the concert, although he concedes he was intoxicated.

44. Upon exiting the concert, Petitioner jumped into the back of a marked police car and demanded that the police drive him home. The patrol vehicle was running at the time Petitioner jumped into the backseat of the vehicle, but the officer was not inside the vehicle at that time. Petitioner recalls that the officer was in uniform and that the officer demanded that Petitioner get out of the vehicle. The Petitioner refused. As the officer reached into the vehicle to remove Petitioner, the Petitioner crawled to the opposite side of the vehicle.

45. The Petitioner then crawled from the backseat of the running patrol vehicle into the front seat of the vehicle in an attempt to drive the vehicle away. The Petitioner admitted under oath that by the time the officers were able to extricate Petitioner from the patrol vehicle, there were several police officers that had been dispatched to the scene. Petitioner does not dispute the officers were at the concert venue discharging their official duties.

46. Once out of the vehicle, the Petitioner continued to fight with the police after being advised he was under arrest. The Petitioner also attempted to run from the officers. Petitioner denies that he continued to struggle after he was removed from the vehicle. Petitioner's testimony is not credible given the record before this Court. Petitioner admits to being intoxicated at the time, and does not dispute that his behavior was so irrational that it caused him to attempt to steal a running patrol vehicle from a uniformed police officer. It is obvious that the officer had the legal authority to place Petitioner under arrest. By continuing to fight with the officers after being advised he was under arrest, Petitioner committed the offense of Resisting Arrest.

47. In Maryland, Resisting Arrest is a common law offense that requires a showing of resistance of a lawful arrest made by an officer of the law in the performance of his official duties. *See Busch v. State of Maryland*, 289 Md. 669, 675; 426 A.2d 954, 957 (1981). A preponderance of the evidence presented at the administrative hearing shows Petitioner committed the misdemeanor offense of Resisting Arrest in the State of Maryland on September 5, 1988.

Commission of Maryland Possession of Drug Paraphernalia Offense

48. Petitioner was arrested and charged with possession of marijuana, possession of marijuana with the intent to distribute, and possession of drug paraphernalia in 1991. As stated above, Petitioner entered a plea of guilty to the possession of marijuana charge, and the remaining charges were dismissed. See Respondent's Exhibit 9.

49. Petitioner testified that he was arrested on the date in question because his marijuana dealer, Brad McElroy, was attempting to set Petitioner up. The police arrived at Petitioner's residence with a search warrant. Petitioner was residing in a two (2) bedroom apartment with another individual at the time. When the police searched the apartment, several marijuana plants were found in the room occupied by Petitioner's roommate. Petitioner claims to have been completely unaware that his roommate was growing marijuana within the apartment.

50. When the police searched Petitioner's room they discovered marijuana. Petitioner does not dispute this fact. The marijuana discovered in Petitioner's room formed the basis of Petitioner's criminal conviction for possession of a Controlled Dangerous Substance in case number 91-175.

51. Although Petitioner admits to having possessed marijuana at the time of the police search, he denies that he possessed drug paraphernalia. This is at odds with Petitioner's previous statements to the Respondent Commission. Petitioner was interviewed by Respondent's investigator on April 21, 2014, regarding this incident. During that interview, Petitioner admitted that marijuana was found in Petitioner's bedroom, along with a smoking device. See Respondent's Exhibit 10. This admission by Petitioner is consistent with his statement made in the presence of Diane Konopka at the Sheriff's Training and Standards Division.

52. A preponderance of the evidence presented at the administrative hearing establishes Petitioner committed the misdemeanor offense of Possession of Drug Paraphernalia in Maryland case number 91-175.

Commission of Maryland Disorderly Conduct

53. On or about October 6, 1987, Petitioner was arrested and charged with disorderly conduct in a public place. *See* Respondent's Exhibit 18 (MD case number 00001173W4) Petitioner was a student at Frostburg State University at the time. Petitioner admits that he was intoxicated at the time he was arrested. According to Petitioner's testimony at the administrative

hearing, a group of students were being loud outside their dorm rooms. The campus police arrived to disperse the crowd. According to Petitioner, the police were in uniform and were discharging their official duties. Petitioner testified that he returned to his dorm room, as ordered by the police. Petitioner testified that a short time later, he again went outside of his dorm room and was arrested at that time. Petitioner stated he did not recall being disruptive when he went outside the second time.

54. Petitioner's testimony at the administrative hearing is at odds with Petitioner's previous admission made to the Respondent Commission regarding this incident. On March 29, 2012, Petitioner completed a F-3- Personal History Statement in furtherance of his application for certification. Attached to that F-3, Petitioner provided a signed statement regarding his past criminal history. In that signed statement, Petitioner wrote: " I was at a college party where I drank way to (sic) much. After my friends took me back to my dorm room, I refused to stay in my room and the campus police were called. Campus police told me to go to my room and I refused." See Respondent's Exhibit 20, attachment entitled "Criminal History."

55. Petitioner's testimony at the administrative hearing regarding this incident is not credible given Petitioner's prior statements regarding his refusal to cooperate with campus police and his "refusal" to stay in his dorm room. Petitioner is attempting to minimize his previous conduct. During the time period in question, it was unlawful to be intoxicated and to create a public disturbance in a public place in the State of Maryland. *See* Article 27, section 123 of the Maryland Code; Respondent's Exhibit 24. A preponderance of the evidence presented at the administrative hearing establishes that Petitioner committed the offense of Disorderly Conduct in Maryland on or about October 6, 1987.

56. In addition to Petitioner's convictions, this Court finds that Petitioner committed the following criminal offenses in the State of Maryland, such that Petitioner's application for certification is subject to denial pursuant to the Commission's Rules: 1) Battery, MD case number 00606649Q1; 2) Resist Arrest, MD case number 00000988E1 3) Possession Drug Paraphernalia, MD case number 91-175 ; and 4) Disorderly Conduct, MD case number 00001173W4.

CONCLUSIONS OF LAW

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

2. Pursuant to 12 NCAC 10B .0204(d)(5), the Commission may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant for certification or certified officer has committed or been convicted of:

(5) any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

3. The preponderance of the evidence presented at the administrative hearing does establish that Petitioner has been convicted of a combination of 4 or more Class A or Class B misdemeanors.

4. Pursuant to 12 NCAC 10B .0103(2), “convicted” or “conviction” means and includes, for purposes of that Chapter, the entry of (a) a plea of guilty; (b) a verdict or finding of guilt by a jury, judge, magistrate, or other duly constituted, established, and recognized adjudicating body, tribunal, or official, either civilian or military; or (c) a plea of no contest, nolo contendere, or the equivalent.

5. Pursuant to 12 NCAC 10B .0205(3)(d), when the Commission denies the certification of a justice officer for a combination of 4 or more misdemeanor convictions, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(5).

6. The record establishes Petitioner stands convicted of two (2) separate counts of unlawful possession of marijuana in the State of Maryland, MD case numbers 91-175 and 00000318Q3. A conviction for the unlawful possession of marijuana in the State of Maryland during the period in question carried with it a potential maximum sentence of one (1) year confinement. See Article 27, section 287 subparagraph (e) of the Maryland Code.

7. Pursuant to the Commission’s Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner’s two (2) possession of marijuana convictions in the State of Maryland constitute separate Class B misdemeanor convictions. The basis of this classification is that these out-of-state offenses carried with them maximum sentences in excess of 6 months confinement.

8. Pursuant to the Commission’s Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, a Class A misdemeanor is classified as those misdemeanor offenses for which the maximum period of confinement is less than 6 months. Included as Class A misdemeanors are offenses such as ordinance violations for which no period of confinement is possible. The record establishes that Petitioner stands convicted of the following Class A misdemeanors: 1) Failing to Report a Boat Accident, MD case number 00026352Z4; 2) Entering Area Closed to Public, MD case number 00026462Z2; and 3) Probation violation, MD case number 00606649Q1. These convictions are classified as Class A misdemeanors pursuant to the Commission’s Rules because punishment in excess of 6 months confinement is not authorized under Maryland law.

9. Petitioner stands convicted of two (2) Class B misdemeanors and three (3) Class A misdemeanors. Petitioner’s application for certification is, therefore, subject to denial for an indefinite period pursuant to 12 NCAC 10B .0204(d)(5).

10. However, the record further establishes that Petitioner has committed several unlawful offenses, such that his application is subject to denial pursuant to 12 NCAC 10B .0204(d)(5) and 12 NCAC 10B .0204(a)(2).

11. Petitioner unlawfully committed the offense of Battery in the State of Maryland on or about September 20, 1990, when Petitioner punched the victim, Brad McElroy. Petitioner traveled to the victim's home in order to confront the victim about an affair. By striking Mr. McElroy with a punch, Petitioner committed the common law offense of Battery. *See Ireland v. State of Maryland*, 310 Md. 328; 529 A.2d 365 (1987).

12. Battery in the State of Maryland is a common law offense that carries with it a potential period of confinement greater than two (2) years. *Ireland v. State of Maryland*; *See also* Respondent's Exhibit 26 and Exhibit 27. This would pose a complete bar to Petitioner's certification pursuant to 12 NCAC 10B .0307 (a)(2) and 12 NCAC 10B .0204 (a)(2). In *Ireland*, the defendant was sentenced to a term of three (3) years for hitting and kicking his wife. The Maryland Court of Appeals held this punishment did not constitute cruel and unusual punishment, thereby affirming the sentence. *Id.* at 341. Even assuming *arguendo* that the common law does not apply, Maryland's current Code with respect to the offense of Battery specifically provides for a penalty of not more than 10 years confinement. (emphasis added) see Article 27, section 12A of the Maryland Code (1996).

13. 12 NCAC 10B .0204 (a)(2) of the Commission's Rules provides the Commission shall deny certification when the Commission finds that the applicant for certification has committed or been convicted of "a crime for which the authorized punishment could have been imprisonment for more than two years." Petitioner's commission of the offense of Battery in Maryland, whether considered a common law offense or statutory, constitutes the commission of a crime that carries with it an authorized punishment in excess of two (2) years. Petitioner is therefore not in compliance with 12 NCAC 10B .0204 (a)(2) and his application for certification is therefore subject to denial.

14. This Court further finds that Petitioner unlawfully committed the offense of Possession of Drug Paraphernalia in violation of Maryland law in 1991, MD case number 91-175. Petitioner's apartment was searched by police pursuant to a warrant, which produced marijuana in Petitioner's bedroom, accompanied by a smoking device. Prior to the administrative hearing, Petitioner admitted to the Respondent Commission that he had a smoking device in his drawer along with the marijuana on the date in question.

15. Pursuant to Maryland law at the time in question, a first conviction for the unlawful Possession of Drug Paraphernalia did not carry with it a potential maximum sentence of six (6) months or greater. *See* Article 27, section 287A of the Maryland Code; *See also* Respondent's Exhibit 23. Therefore, pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's Possession of Drug Paraphernalia in the State of Maryland in case number 91-175 constitutes the commission of a Class A misdemeanor offense.

16. This Court also finds that Petitioner committed the offense of Disorderly Conduct on or about October 6, 1987. Petitioner was intoxicated outside his dorm room which resulted in the police being called. Petitioner continued to argue with the police and refused to go back to his dorm room. This resulted in Petitioner's arrest. Disorderly conduct in Maryland is classified as a misdemeanor offense punishable by a maximum period of confinement of 90 days. See Article 27, Section 123 of the Maryland Code. The Code prohibits an individual acting in a disorderly manner to the disturbance of the peace. Under the Code, apartment houses constitute public places. The preponderance of the evidence presented at the administrative hearing establishes Petitioner committed this offense. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's Disorderly Conduct offense constitutes the commission of a Class A misdemeanor offense.

17. Finally, this Court concludes that Petitioner committed the Maryland common law offense of Resisting Arrest on September 5, 1988, when Petitioner attempted to drive away in a marked police vehicle and continued to fight and run from the police after Petitioner had been advised he was under arrest. As set out in greater detail in Findings of Fact numbers 33 through 38 above, Petitioner's actions on September 5, 1988 were extreme and outrageous. Petitioner struggled with police in the backseat of a patrol vehicle, after which Petitioner crawled through to the front seat of the patrol vehicle in an attempt to drive away. The patrol car was running at the time. Once police were able to remove Petitioner from the car and advise him that he was under arrest, Petitioner continued to fight and ran from the police.

18. Under Maryland law at the time in question, Resisting Arrest was a common law offense that required a showing of resistance of a lawful arrest made by an officer of the law in the performance of his official duties. See Busch v. State of Maryland, 289 Md. 669, 675; 426 A.2d 954, 957 (1981). A preponderance of the evidence presented at the administrative hearing shows Petitioner committed the misdemeanor offense of Resisting Arrest in the State of Maryland on September 5, 1988.

19. Under Maryland common law, Resisting Arrest was punishable by any period of confinement not deemed to be cruel and unusual. In the case of Preston v. Warden of Md., 225 Md. 628, 169 A.2d 407 (1961), the defendant received a 10 year active sentence for resisting arrest. The Maryland Court of Appeals held that the "sentence imposed was neither excessive nor illegal." Id. at 629.

It is also instructive to consider Maryland's current Code with respect to the offense of Resisting Arrest. Currently, this offense is codified in Title 9 of the Maryland Criminal Code, section 9-408. This section provides it shall be unlawful for any person to resist a lawful arrest. The offense is classified as a misdemeanor. The penalty provides: "A person who violates this section is guilty of a misdemeanor and is subject to imprisonment not exceeding three years." MD Criminal Law Code Ann. 9-408 (2014).

20. 12 NCAC 10B .0204 (a)(2) of the Commission's Rules provides the Commission shall deny certification when the Commission finds that the applicant for certification has

committed or been convicted of “a crime for which the authorized punishment could have been imprisonment for more than two years.” Petitioner’s commission of the offense of Resisting Arrest in Maryland, whether considered a common law offense or statutory, constitutes the commission of a crime that carries with it an authorized punishment in excess of two (2) years. Petitioner is therefore not in compliance with 12 NCAC 10B .0204 (a)(2) and his application for certification is therefore subject to denial.

21. As an applicant for certification through the Respondent Commission, the Petitioner has the burden of proof. The undersigned admires and applauds Petitioner’s willingness to serve as a Deputy Sheriff. Furthermore, the undersigned recognizes that Petitioner has not committed any new offenses in over twenty years. However, the undersigned cannot ignore the multiple convictions and offenses committed. The Petitioner has failed to show by a preponderance of the evidence that the Respondent Commission improperly proposed to deny Petitioner’s application for certification.

PROPOSAL FOR DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned recommends the Respondent deny Petitioner’s application for certification. The basis of the denial is that, pursuant to 12 NCAC 10B .0204 (d)(5), Petitioner has committed or been convicted of a combination of four (4) or more Class A or Class B offenses. Petitioner’s application for certification is further denied based on Petitioner having committed the offenses of Resisting Arrest and Battery in the State of Maryland, offenses that carry with them an authorized punishment in excess of two (2) years. Petitioner is therefore not in compliance with 12 NCAC 10B .0204 (a)(2).

NOTICE

The Agency making the Final Decision in this contested case are 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 Sheriffs’ Education and Training Standards Commission.

This the 19th day of December, 2014.

Craig Croom
Administrative Law Judge

