

STATE OF NORTH CAROLINA
COUNTY OF IREDELL

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DOJ07923

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| TIMOTHY MCCOY ROGERS PETITIONER, V. N C CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION RESPONDENT. | PROPOSAL FOR DECISION |
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This case came on for hearing on August 4, 2015 before Administrative Law Judge J. Randall May in Lenoir, 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: Kenneth B. Darty
 Attorney for Petitioner
 210 East Water Street
 Statesville, North Carolina 28677

Respondent: Matthew L. Boyatt
 Attorney for Respondent
 Department of Justice
 Law Enforcement Liaison Section
 P.O. Box 629
 Raleigh, N.C. 27602-0629

ISSUES

Does substantial evidence exist for Respondent to deny Petitioner's law enforcement officer certification for the commission of the Class B Misdemeanor offense of Assault on a Female?

Does substantial evidence exist for Respondent to deny Petitioner's law enforcement officer certification for failing to maintain the minimum standards required of all law enforcement officers?

RULES AT ISSUE

12 NCAC 09A .0204(b)(2)

12 NCAC 09B .0111(1)(c)

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 FACTS.

In making the FINDINGS OF FACTS, 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 facts for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences, about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that 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 (hereinafter the "Commission"), on September 10, 2014.

2. The Respondent Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09A, to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. Petitioner is 49 years old and is an applicant for certification as a law enforcement officer through the Oxford Police Department. Petitioner applied for certification on May 9, 2014. (Respondent's Exhibit 2A)

4. Petitioner was previously employed by the Iredell County Sheriff's Office. The proposed denial of Petitioner's application for law enforcement officer certification is based in part on Petitioner's actions while employed as a deputy sheriff in Iredell County, as set out in greater detail below. Petitioner was fired from the Iredell County Sheriff's Office on November 21, 2013, for reporting to duty with the strong odor of alcohol about Petitioner's person, and for testing positive for alcohol following the administration of two Alcosensor tests.

5. The events that gave rise to Petitioner's dismissal from the Iredell County Sheriff's Office began on November 20, 2013. Petitioner received a call from a female acquaintance named Keona Tisdale, who requested to stay with Petitioner for a couple of days. Petitioner was aware that Ms. Tisdale was homeless, but that she had family in Greensboro, North Carolina.

6. Petitioner has known Ms. Tisdale for approximately 11 years. Petitioner testified

that he did not date Ms. Tisdale. Rather, the two would get together 3 to 4 times every few months. During these meetings, Petitioner and Ms. Tisdale would engage in intercourse and intimate touching. Petitioner is married; however, he and his wife were living separate and apart on November 20, 2013.

7. Ms. Tisdale arrived at Petitioner's residence on November 20, 2013, at approximately 8:30 p.m. Petitioner testified that he had 3 vodka cranberry drinks that evening. Petitioner and Ms. Tisdale retired to Petitioner's bedroom, and Petitioner began to make sexual advances towards Ms. Tisdale. Ms. Tisdale continued to push Petitioner away, indicating she was too tired. Ms. Tisdale took a shower and returned to Petitioner's bed. Petitioner continued to make sexual advances towards Ms. Tisdale, who continued to insist she was too tired to engage in sexual intercourse.

8. At some point while Petitioner was making sexual advances towards Ms. Tisdale, she flatulated in the bed. Petitioner became angry at Ms. Tisdale for not engaging in sexual acts and for flatulating in his bed. Petitioner proceeded to kick Ms. Tisdale out of his house. While she was leaving, Ms. Tisdale asked for money so she could get back to Greensboro. Petitioner borrowed \$20.00 from his cousin and gave the money to Ms. Tisdale, along with a cigarette.

9. When Ms. Tisdale exited the residence, she turned and slapped Petitioner once in the face. Petitioner stated under oath that Ms. Tisdale hit him in the mouth and then ran down the steps. While under oath, Petitioner denied ever hitting Ms. Tisdale in retaliation. Petitioner's testimony is not credible given the evidence presented at the administrative hearing. Petitioner was interviewed the following morning by Major Andy Poteat (hereinafter "Major Poteat") of the Iredell County Sheriff's Office. Major Poteat has been a sworn justice officer for over 20 years and is an investigator in the criminal investigative unit of the Sheriff's Office. When asked about the altercation with Ms. Tisdale the night before, Petitioner admitted to Major Poteat that he hit Ms. Tisdale one time. Petitioner stated he hit her because she had struck him in the mouth when leaving the residence. Furthermore, Petitioner also spoke to Sergeant C.M. Benfield (hereinafter "Sergeant Benfield") on November 21, 2013, and disclosed to Sergeant Benfield that he hit Ms. Tisdale because she "pissed him off."

10. Officer Stikeleather responded to a call on November 20, 2013, when a woman had flagged down an Iredell County deputy sheriff at approximately 11:30 p.m. Statesville police became involved because the alleged defendant – Petitioner – was also a deputy in Iredell County. Officer Stikeleather interviewed Ms. Tisdale after she left Petitioner's residence. Officer Stikeleather observed that Ms. Tisdale had a knot on her forehead that was swollen. Ms. Tisdale told Officer Stikeleather that she hit Petitioner as she was leaving his residence, and that Petitioner caught up with her and punched her in the face.

11. Ms. Tisdale did not appear and testify at the administrative hearing, although Petitioner has spoken with Ms. Tisdale recently. The Respondent is unable to locate Ms. Tisdale due to her transient nature. Although this Court finds that Petitioner did strike Ms. Tisdale in the face after she struck Petitioner first, this Court cannot find that Petitioner assaulted Ms. Tisdale due to her failure to appear and testify in this matter. Without further evidence, it is impossible to speculate on the criminality or culpability of this event; or alternatively, whether a defense was

available to Petitioner.

12. Petitioner reported for work at the Iredell County Sheriff's Office the following day, November 21, 2013. Petitioner woke up at approximately 6:00 a.m. Petitioner maintains that he stopped drinking at 9:00 p.m. the night before, and that he only consumed 3 vodka cranberry drinks the night before. Petitioner woke up for work and shaved, brushed his teeth, and showered. Petitioner then put on his deputy sheriff uniform and proceeded to work at approximately 7:00 a.m.

13. When Petitioner reported for duty on November 21, 2013, Petitioner responded to several calls for service. Petitioner was driving his marked patrol vehicle and was armed and in uniform. Petitioner then went to breakfast. Following breakfast, Petitioner again responded to calls for service in his marked patrol vehicle.

14. When Petitioner initially reported for duty on November 21, 2013, he spoke with Sergeant Benfield. Petitioner told Sergeant Benfield about the incident the night before with Ms. Tisdale. Petitioner told Sergeant Benfield that Ms. Tisdale hit him in the face and that Petitioner was "pissed off," so he hit her back. Sergeant Benfield suspected that Petitioner had alcohol on his breath; however, he was not certain at first. Therefore, Petitioner was allowed to continue with his duties.

15. Sergeant Benfield immediately informed Lieutenant Robin Miller (hereinafter "Lieutenant Miller") of the Iredell County Sheriff's Office regarding the incident between Petitioner and Ms. Tisdale, and what he suspected to be the odor of alcohol coming from Petitioner's person. Lieutenant Miller has been a sworn justice office since 1983. Once Sergeant Benfield advised of what he observed, Lieutenant Miller contacted Petitioner and instructed him to return to the Sheriff's Office. However, before Lieutenant Miller could meet with Petitioner, another call for service came in that Petitioner responded to. Lieutenant Miller contacted Petitioner and again instructed him to return to the Sheriff's Office when he completed the call for service.

16. When Lieutenant Miller met with Petitioner at the Sheriff's Office, he noticed that Petitioner had an obvious odor of alcohol coming from his person. Lieutenant Miller told Petitioner to wait in the squad room. Lieutenant Miller then went to advise Chief Marty Byers (hereinafter "Chief Byers") of Petitioner reporting for work with alcohol coming from his breath. Chief Byers is the second in command at the Iredell County Sheriff's Office and has been a sworn justice officer for 26 years.

17. Petitioner met with Chief Byers, Lieutenant Miller, and Sergeant Benfield in Lieutenant Miller's office. Lieutenant Miller noted that you could smell the alcohol in the room where Petitioner was interviewed. Lieutenant Miller opined that he could smell alcohol coming from Petitioner's person approximately 4 feet away from Petitioner. Chief Byers confirmed that Petitioner had an odor of alcohol coming from his person. Chief Byers asked if Petitioner had been drinking alcohol, and Petitioner stated that he drank the night before. Petitioner advised that he only consumed 3 mixed drinks the night before and that he stopped drinking at 9:00 p.m.

18. Chief Byers then requested that Petitioner submit to an Alcosensor test. Sergeant

Benfield is a certified chemical analyst and was asked to perform the Alcosensor test on Petitioner. Petitioner submitted to the Alcosensor test and produced a positive breath alcohol concentration. Petitioner maintained that he should not have a positive result on the Alcosensor test because he only consumed 3 drinks the night before and stopped drinking at 9:00 p.m. Based on Petitioner's statements, Lieutenant Miller instructed Sergeant Byers to recalibrate the Alcosensor device. Sergeant Byers recalibrated the Alcosensor and Petitioner was given a second test. Petitioner's subsequent Alcosensor test produced another positive breath alcohol concentration result.

19. Chief Byers offered to have Petitioner take an Intoximeter test. Petitioner refused to submit to this test. Chief Byers consulted with the Sheriff regarding Petitioner's conduct. The Sheriff terminated Petitioner's employment for Petitioner having reported for duty with alcohol on Petitioner's breath. Chief Byers opined that this is a serious violation. Sworn law enforcement officers are strictly forbidden from reporting for work and operating a patrol vehicle with alcohol on their breath. Further, Chief Byers opined that sworn law enforcement officers are strictly forbidden from carrying a firearm on duty with alcohol on their breath. Chief Byers opined that Petitioner's actions on November 21, 2013 demonstrate that he lacks honesty and integrity and that he does not possess the good moral character that is required of a sworn justice officer. Furthermore, Petitioner's actions on November 21, 2013 demonstrate Petitioner's lack of respect for the laws of this State, insofar as Petitioner operated a county patrol vehicle while alcohol remained in his system; and insofar as Petitioner carried a firearm while on duty and with alcohol remaining in his system.

20. Petitioner's Notice of Separation states Petitioner was dismissed due to "Alcohol use while on duty." (Respondent's Exhibit 6) Chief Byers clarified that this statement meant Petitioner reported for duty with a strong odor of alcohol coming from Petitioner's person. This odor was noticed by at least 3 different deputies. Petitioner submitted to an Alcosensor test, which confirmed Petitioner had alcohol in his system. Petitioner was never accused of physically drinking alcohol after he reported for duty.

21. Major Poteat, Iredell County Sheriff's Office, was instructed to conduct the internal affairs investigation into Petitioner's conduct prior to his termination. When interviewed, Petitioner advised Major Poteat that he needed help for his drinking problem. However, Petitioner appeared before the Commission's Probable Cause Committee and admitted to that Committee that he lied to Major Poteat in order to save his job. Petitioner maintains that he did not have an alcohol problem, and that he gave this self-serving and false statement to Major Poteat during the pendency of an internal affairs investigation with the hope that the Sheriff would not fire him. Petitioner's admitted false statement to an investigating officer during the pendency of an internal affairs investigation demonstrates Petitioner's continued lack of honesty and integrity. Petitioner testified that he possesses the good moral character required of a sworn justice officer. However, the preponderance of the evidence presented at the administrative hearing establishes that Petitioner does not possess the good moral character that is required of a sworn law enforcement officer.

CONCLUSIONS OF LAW

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

jurisdiction and venue are proper.

2. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. To the extent that the Findings of Facts contain Conclusions of Law, or that the Conclusions or Law are Findings of Fact, they should be so considered without regard to the given labels.

3. 12 NCAC 09A .0204(b)(2) and 12 NCAC 09B .0111 (1)(c) provide that a law enforcement officer employed by an agency in North Carolina shall not have committed or been convicted of a crime or unlawful act defined as a Class B misdemeanor within the five year period prior to the date of application for employment. N.C. Gen. Stat. §14-33(c)(2) is listed as a Class B misdemeanor in Respondent's Class B misdemeanor manual.

4. The undersigned finds that Petitioner did not assault Ms. Tisdale on November 20, 2013, within the meaning of N.C. Gen. Stat. § 14-33(c)(2). Ms. Tisdale did not appear and testify at the administrative hearing. Therefore, Petitioner's application for certification is not subject to denial pursuant to 12 NCAC 09A .0204(b)(2) and 12 NCAC 09B .0111 (1)(c).

5. However, 12 NCAC 09B .0101(3) states that: Every criminal justice officer employed by an agency in North Carolina shall:

- (3) be of good moral character pursuant to G.S. 17C-10 and as determined by a thorough background investigation[.]

6. For the reasons set out in the Findings of Fact hereinabove, the evidence establishes that Petitioner does not possess the good moral character required of a law enforcement officer in this State. Petitioner reported for work as a Deputy Sheriff on November 21, 2013, with alcohol remaining in his system. Petitioner operated an Iredell County Sheriff's patrol vehicle and responded to numerous calls for service while Petitioner had alcohol remaining in his system. Further, Petitioner was carrying a firearm while on duty and while Petitioner had alcohol remaining in his system. Petitioner's actions on November 21, 2013 are particularly egregious and establish that Petitioner does not possess the good moral character required of a law enforcement officer. The evidence presented at the administrative hearing also established that Petitioner made false statements to the internal affairs investigator when Petitioner claimed to have a substance abuse problem just to save his job. Petitioner expressed no remorse for his admitted false statements during the pendency of the internal affairs investigation. This is further evidence of Petitioner's lack of good moral character and his lack of honesty and integrity.

7. The findings of the Probable Cause Committee of Respondent that Petitioner does not possess the good moral character required of a criminal justice officer are supported by substantial evidence and are not arbitrary and capricious.

8. 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).

9. Petitioner has the burden of proof in the case at bar and has failed to demonstrate that he possesses the good moral character required of a criminal justice officer.

PROPOSAL FOR DECISION

There was insufficient evidence to find, by a preponderance of evidence, that Petitioner perpetrated the offense of Assault on a Female. However, to appear for duty and to respond to duty calls with the odor of alcohol on or about your person negates the minimum standards that are expected of all sworn law enforcement officers. Petitioner not only set an abhorrent example to the public he served, but also ran the risk of incurring great liability to the Iredell County Sheriff's Office.

THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that Petitioner's certification as a law enforcement officer be DENIED.

ACKNOWLEDGMENT

It is acknowledged that whenever, in this document, reference is made to the Undersigned, the undersigned Judge, or the Court, reference is being made to the undersigned Administrative Law Judge with the Office of Administrative Hearings.

NOTICE AND ORDER

The agency that will make the final decision in this contested case is the North Carolina Criminal Justice Education and Training Standards Commission. 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. 27699-6700.

This the 7th day of October, 2015.

J. Randall May
Administrative Law Judge