

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DOJ07925

Darin Clay Whitaker Petitioner v. N C Criminal Justice Education And Training Standards Commission Respondent	PROPOSAL FOR DECISION
--	------------------------------

THIS MATTER came on for hearing before Hon. J. Randolph Ward on March 26, 2015 in High Point, North Carolina, upon Respondent's request, pursuant to N.C. Gen. Stat. § 150B-40(e), for designation of an Administrative Law Judge to preside at the hearing of this contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: *Pro se*

Respondent: Matthew L. Boyatt, Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC

ISSUE

Has Petitioner has shown by a preponderance of the evidence that Respondent erred in proposing to deny his application for law enforcement officer certification based upon a finding that Petitioner committed the acts necessary to satisfy the elements of the misdemeanor offense of "Assault on a Female" on December 13, 2011?

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. §§ 14-33(c)(2); 150B-23(a); 150B-29(a); 150B-34(a); 150B-40(e); 12 NCAC 09A .0103(4) & (23)(b); 12 NCAC 09A .0107(c), (d), & (e); 12 NCAC 09A. 0204(b)(2) & (3)(A); 12 NCAC 09A .0205(c)(2); 12 NCAC 09B .0100; and 12 NCAC 09B .0111(1)(c)

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None
For Respondent: Exhibits (“R. Exs.”) 1-5

WITNESSES

For Petitioner: Darin Clay Whitaker, Petitioner
For Respondent: Heather D. Jones

UPON DUE CONSIDERATION of the arguments of counsel; the documents and other exhibits admitted; and the sworn testimony of each of the witnesses, in light of their opportunity to see, hear, know, and recall relevant facts and occurrences; any interests they may have in the outcome of the case; and whether their testimony is reasonable and consistent with other credible evidence; and upon assessing the greater weight of the evidence from the record as a whole in accordance with the applicable law, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent North Carolina Criminal Justice Education and Training Standards Commission (hereinafter, “Respondent”) has the authority--granted under Chapter 17C of the N.C. General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A--to certify law enforcement officers and to revoke, suspend, or deny such certification. Upon Petitioner’s appeal of the proposed denial of his certification, on October 15, 2014, Respondent requested the designation of an Administrative Law Judge to preside at the contested case hearing.
2. Petitioner applied for certification as a law enforcement officer through the North State Company Police on January 9, 2014. At the time of the hearing, Petitioner was not employed with that firm. If certified, he anticipates becoming employed with another agency. Prior to his employment with North State Company Police, Petitioner had worked as a Deputy with the Forsyth County Sheriff’s Office for approximately 15 years, concluding on August 11, 2010.
3. Petitioner and Respondent’s witness, Ms. Heather D. Jones, were married in July 2010. Ms. Jones appeared at the administrative hearing under subpoena from Respondent. Petitioner and Ms. Jones were divorced within two (2) years. Petitioner denied ever assaulting Ms. Jones but testified that she was physically violent towards him two or three times a week, and he admitted drinking heavily at times during the marriage. Ms. Jones testified that Petitioner would become violent towards her a couple of times a week, especially when intoxicated. She alleged that on one occasion, Petitioner shoved her head into a wall and, on another occasion, smeared toothpaste in her hair.

4. Petitioner testified that he once called the Sheriff's Office due to an altercation with Ms. Jones, and both of them were arrested. Petitioner suggested that his separation from the Forsyth County Sheriff's Office was due, at least in part, to an internal affairs investigation involving domestic violence between Ms. Jones and him, because his domestic situation was perceived to reflect poorly on the Sheriff's Office.
5. On December 13, 2011, Ms. Jones was home sick at the rental property she shared with Petitioner. When the couple moved into the residence, they had acquired a pet dog. On or shortly before December 13, 2011, Petitioner had received a letter from the landlord reminding him of the no-pet policy and demanding that he remove the dog from the premises. Prior to leaving for work that day, Petitioner told Ms. Jones to get rid of the dog. Ms. Jones, however, had become attached to the dog and kept it. Ms. Jones testified that when Petitioner returned to their residence on December 13, 2011, they argued about the pet, and Petitioner became angry and violent and assaulted her. Ms. Jones testified that Petitioner grabbed her by the arm and slapped her and also dragged her into the kitchen and shoved her face down onto the landlord's notice lying on a counter or table. Ms. Jones testified that she suffered bruising under her left eye and on her arm as a result of this assault. She further testified that this event left her emotionally distraught and that she then resolved to separate from Petitioner and to seek protection from the courts. The following day, a Complaint and Motion for Domestic Violence Protective Order was filed on her behalf, and an Ex Parte Domestic Violence Order of Protection was granted the same day. (R. Ex. 4) Petitioner testified that he was not convicted of a crime as a result of any of the domestic incidents.
6. On June 8, 2012, Petitioner and Ms. Jones appeared in the Forsyth County District Court on Ms. Jones' Complaint and Motion for Domestic Violence Protective Order, filed December 14, 2011. Both Petitioner and Ms. Jones were represented by counsel. Following a hearing, the Court found that Petitioner committed an act of domestic violence against Ms. Jones on December 13, 2011, by grabbing Ms. Jones and by slapping her. The Court entered a Domestic Violence Order of Protection, effective through December 14, 2013, requiring Petitioner to stay away from Ms. Jones. (R. Ex. 5)
7. The preponderance of the evidence presented at the administrative hearing shows that on December 13, 2011, Petitioner committed the acts necessary to satisfy the elements of the misdemeanor offense of "Assault on a Female," in violation of N.C. Gen. Stat. § 14-33(c)(2). Proof of this crime requires a showing "that (1) the assailant be male, (2) the assailant be at least eighteen years old, and (3) the victim of the assault be female." *State v. Martin*, 222 N.C.App. 213, 221, 729 S.E.2d 717, 724 (2012). The sworn testimony of the witnesses and the evidence introduced into the record at the hearing establish that on December 13, 2011, Petitioner, who was born in 1967, assaulted his then-wife by grabbing her, slapping her, dragging her, and shoving her face onto a solid surface, resulting in bruising under her left eye and on her arm.
8. Petitioner received Respondent's *Proposed Denial of Law Enforcement Officer Certification* letter by certified mail on September 13, 2014. Respondent received Petitioner's timely request for an administrative hearing on October 7, 2014. The Office

of Administrative Hearings provided the Parties with due and timely notice of the hearing on February 27, 2015 and March 11, 2015.

9. To the extent that portions of the following Conclusions of Law include findings of fact, such are incorporated by reference into these Findings of Fact.

Upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that portions of the foregoing Findings of Fact include conclusions of law, such are incorporated by reference into these Conclusions of Law.
2. The Parties are properly before the Office of Administrative Hearings, which has jurisdiction over the parties and the cause.
3. The North Carolina Criminal Justice Education and Training Standards Commission is empowered to suspend, revoke, or deny the certification of a criminal justice officer when: the applicant or certified officer fails to meet or maintain one or more of the minimum employment standards required by Chapter 12, Subchapter 09B, Section 100 of the North Carolina Administrative Code; or the applicant or certified officer “has *committed* or been convicted of a criminal offense or unlawful act defined in 12 NCAC 09A .0103 as a Class B misdemeanor.” (Emphasis added.) 12 NCAC 09A. 0204(b)(2) & (3)(A). A person is considered to have committed a criminal offense if (s)he is found to have “performed the acts necessary to satisfy the elements of a specified criminal offense.” 12 NCAC 09A .0103(4).
4. Chapter 12, Subchapter 09B, Section 100 of the North Carolina Administrative Code provides, in pertinent part, that every 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 (5) year period prior to the date of application for employment. 12 NCAC 09B .0111(1)(c). Petitioner applied for certification as a law enforcement officer on January 9, 2014.
5. “Assault on a Female” in violation of N.C.G.S. § 14-33(c)(2) is classified as a Class B misdemeanor pursuant to Respondent’s rule 12 NCAC 09A .0103(23)(b) and the Class B Misdemeanor Manual adopted by Respondent.
6. The party with the burden of proof in an administrative contested case hearing must establish the facts required by G.S. § 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. §§ 150B-29(a) and 150B-34(a) (applicable through 12 NCAC 09A .0107(c) & (d)). As an applicant for certification, Petitioner has the burden of proof in this case. See *Overcash v. N.C. Dep’t of Env’t & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447, *disc. rev denied*, 361 N.C. 220, 642 S.E.2d 445 (2007). Petitioner has failed to show

by a preponderance of the evidence that Respondent's proposed denial of Petitioner's law enforcement officer certification is not supported by substantial evidence.

7. The finding of Respondent's Probable Cause Committee that Petitioner's application is subject to denial due to commission of a Class B misdemeanor, as defined by applicable rules, is supported by substantial evidence.

Consequently, based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge respectfully enters the following:

PROPOSAL FOR DECISION

It is proposed that Respondent deny Petitioner's law enforcement certification for a period of five (5) years from the date of Petitioner's commission of a Class B misdemeanor on December 13, 2011.

Should the Commission adopt this proposed penalty, then by law, Petitioner could reapply for certification when the five (5) year period from the date of the offense has elapsed.

NOTICE AND ORDER

The North Carolina Criminal Justice Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

It hereby is ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This the 12th day of June, 2015.

J. Randolph Ward
Administrative Law Judge