

WITNESSES

For Petitioner: Petitioner, Petitioner's father - Daniel O'Byrne

For Respondent: Petitioner

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent: 1 - 4

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 Petitioner received, by mail, Respondent's proposed Denial of Justice Officer's Certification letter mailed by Respondent Sheriffs' Commission on October 27, 2014. (Respondent's Exhibit 1)

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.

3. In 2014, Petitioner applied for deputy certification through the Wake County Sheriff's Office.

4. Petitioner attended Pitt Community College from 2006 through 2009. Petitioner earned an Associate in Arts Degree in Criminal Justice from Pitt Community College in 2009, and then attended East Carolina University where he earned a Bachelor of Arts degree in Criminal Justice.

5. 12 NCAC 10B. 0204(a)(1) states Respondent shall deny the certification of a justice officer when the Commission finds that the applicant has committed or been convicted of a felony. The denial of Petitioner's application for certification is based on Petitioner having committed the offense of "Larceny by Employee" in January 2010, in violation of N.C. Gen. Stat. § 14-74.

6. The events which gave rise to the Commission's proposed denial of Petitioner's application for certification occurred when Petitioner was a student at East Carolina University, and twenty-two years old. At that time, Petitioner was employed at the University Book Exchange (hereinafter "Book Exchange") in Greenville, North Carolina. (Respondent's Exhibit 3, p.8) Petitioner worked at the University Book Exchange from August 2008 until Petitioner was fired in January 2010. Petitioner worked approximately 30 to 35 hours a week, and was paid \$6.75 per hour. At the time of Petitioner's termination from employment, he was paid \$7.50 an hour.

7. While Petitioner's job title was a "customer service representative" at the Book Exchange, Petitioner was essentially a stock person. (Respondent's Exhibit 3, p.8) When Petitioner began his employment, his duties primarily consisted of restocking books that had been returned to the Book Exchange. As his employment progressed, Petitioner assumed other duties, including but not limited to helping customers find the correct textbooks for class, and keeping track of book orders "coming in & going out of the warehouse." (Respondent's Exhibit 3, p. 8) Petitioner had access to all the books. However, Petitioner had no supervisory duties, and no access to the registers.

8. During the time Petitioner worked at the Book Exchange, Petitioner had an acquaintance named Benjamin Akins. Mr. Akins was a former roommate of Petitioner's friend. Petitioner and Mr. Akins made an arrangement whereby Petitioner would steal a book from his employer, and would then give the book to Mr. Akins. Mr. Akins would in turn take the book back to the Book Exchange in order to sell it back for cash. Once paid by the Book Exchange, Mr. Akins would then pay Petitioner a portion of the money for the returned book.

9. In January 2010, Petitioner was working on the date in question. Following his shift, Petitioner selected a book from the Book Exchange's stock, and exited the premises. Petitioner provided the book to Mr. Akins, who then sold the book back to the Book Exchange the following day.

10. When Petitioner returned to work, Petitioner's supervisor, Yvonne Perry confronted Petitioner, and asked him if he had anything to do with the book. Perry knew that the book at issue was one of several books that were no longer being used by East Carolina University, and was slated to be returned to the publisher. Petitioner immediately accepted responsibility, and admitted that he stole the book in question so that it could be sold back to the Book Exchange for cash. At the contested case hearing, Petitioner was unsure if Atkins paid him any money Atkins received for reselling the book to the Book Exchange.

11. Petitioner was unaware if Mr. Aikens had sold approximately 39 books back to the Book Exchange in a five (5) month period. Petitioner thought that 39 books was not an unusually high number of books for an individual to sell back in a five (5) month period. Petitioner indicated that the January 2010 incident was the first time he had taken a book from the Book Exchange to give to Mr. Akins so that Akins could sell it back, and provide Petitioner with a portion of the money.

12. Petitioner's supervisor immediately terminated Petitioner from employment for theft. Petitioner was not charged criminally for stealing the book from the Book Exchange.

13. In January 2010, Petitioner's parents were withholding financial support, because Petitioner's grades were suffering.

14. Petitioner's father, Daniel O'Byrne, testified at the administrative hearing, Mr. O'Byrne opined that Petitioner has always been a good and respectful person. Petitioner's father believes that Petitioner's actions in stealing the book from the Book Exchange to obtain financial

benefit were out of character. Petitioner was not raised in such a manner, and was not the type of child that would get into trouble.

15. In September of 2012, the Wake County Sheriff's Office hired Petitioner. Petitioner has worked for the Wake County Sheriff's Office since then in the Wake County Courts. In 2013, Petitioner completed Basic Law Enforcement Training, and graduated at the top of his class. Three of Petitioner's coworkers at Wake County Sheriff's Office support his application for certification.

16. At the contested case hearing, Petitioner admitted that he knew what he had done was wrong when he stole the book, but did not know it was a felony. If he had known, he would not have taken the book. He made a mistake while attending college, and acknowledged that his actions were irresponsible and immature. After being fired, Petitioner moved back home to remove himself from that environment. He commuted to Greenville two to three times a week, attended ECU until he graduated, and worked part-time. Petitioner wants to be a law enforcement officer, loves his job, and is very good at his job. At the time of the hearing, Petitioner was twenty-seven years old, married, owned his own home, and his wife was expecting their first child.

17. The only evidence Respondent presented at the contested case hearing supporting the charge that Petitioner committed "Larceny by an Employee" was Petitioner's own admission. Respondent failed to present any evidence from its investigator, or anyone from the University Book Exchange corroborating Petitioner's testimony that he stole a book from his employer in order for his acquaintance to resell the book to the Book Exchange for cash.

18. Nonetheless, the evidence at hearing proved that Petitioner intentionally stole a book from his employer after the employer had entrusted Petitioner with the stocking and tracking of books during Petitioner's job at the Book Exchange. Petitioner was given direct access and control over book merchandise entering the Book Exchange. Petitioner stole a book with the purpose of defrauding the Book Exchange, and in order to receive financial benefit. Petitioner stole the book from his employer so that Petitioner's acquaintance, Benjamin Akins, could sell the book back to the Book Exchange for cash. Mr. Akins did in fact sell the stolen book back to the Book Exchange.

19. Based on the evidence presented at hearing, Petitioner's application for certification is subject to denial pursuant to 12 NCAC 10B .0204 (a)(1) and 12 NCAC 10B .0205.

CONCLUSIONS OF LAW

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 October 27, 2014.

2. Pursuant to 12 NCAC 10B. 0204(a)(1), the Commission shall deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified

officer has committed or been convicted of a felony. 12 NCAC 09G .0102 “DEFINITIONS” provides:

The following definitions apply throughout this Subchapter only:

(1) ‘Commission of an offense’ means a finding by the North Carolina Criminal Justice Education and Training Standards Commission or an administrative body that a person performed the acts necessary to satisfy the elements of a specified offense.

3. The elements of “Larceny by an Employee,” as defined by N.C. Gen.Stat. § 14–74, are:

(1) the defendant was an employee of the owner of the stolen goods; (2) the goods were entrusted to the defendant for the use of the employer; (3) the goods were taken without the permission of the employer; and (4) the defendant had the intent to steal the goods or to defraud his employer.

State v. Frazier, 142 N.C.App. 207, 209, 541 S.E.2d 800, 801 (2001). Unlike common law larceny, “[l]arceny by an employee requires *lawful* possession.” *State v. Brown*, 56 N.C.App. 228, 231, 287 S.E.2d 421, 424 (1982).

4. N.C.G.S. § 14-74 requires that “larceny by employee” be committed in violation of a trust relationship between the employee and the employer. *State v. Bullin*, 34 N.C.App. 589, 592, 239 S.E.2d 278, 280 (1977). *State v. Morris*, 156 N.C.App. 335, 576 S.E.2d 391 (N.C.App., 2003).

5. All elements of larceny must be established by sufficient competent evidence, and evidence that raises a mere suspicion, conjecture, and possibility is insufficient foundation for a verdict. *State v. Delk*, 194 S.E. 94 (N.C.,1937)

6. The evidence presented at the hearing established that Petitioner committed “Larceny by an Employee” within the meaning of N.C.G.S. § 14-74. Petitioner intentionally stole property that had been entrusted to Petitioner by the Book Exchange in January 2010 in order to defraud his employer. Specifically, Petitioner’s intent was to receive financial gain by providing the stolen book to an acquaintance, who would then sell the book back to the Book Exchange for cash. There was sufficient evidence presented at hearing to permit a reasonable mind to conclude that a trust relationship existed between defendant and his employer. Pursuant to 12 NCAC 10B .0204(a)(1), there is sufficient evidence in the record to support Respondent's denial of Petitioner’s application for certification based on Petitioner having committed the felony offense of “Larceny by Employee” in January 2010.

7. As the applicant for certification, Petitioner has the burden of proof in the case at bar. Petitioner has shown that his actions in January 2010 were due to Petitioner’s lack of judgment, and immaturity as a twenty-two year old college student. Petitioner has also shown sufficient remorse for such actions, and exhibited maturity and responsibility the past five years.

8. There are sufficient mitigating circumstances in this case that support a lesser sanction be imposed in lieu of a complete denial of Petitioner's certification for application. However, the "shall" language in 12 NCAC 10B .0204(a)(1) requires Respondent deny a justice officer certification when Respondent finds an applicant for certification has committed or performed the acts necessary to satisfy the elements of a specified felony offense.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends Respondent **DENY** Petitioner's application for justice officer certification based on Petitioner having committed the felony offense of "Larceny by Employee" in violation of N.C.G.S. § 14-74.

NOTICE

The North Carolina Sheriffs' Education and Training Standards Commission will make the Final Decision in this contested case. 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. N.C.G.S. § 150B-40(e).

This 13th day of August 2015.

Melissa Owens Lassiter
Administrative Law Judge