

STATE OF NORTH CAROLINA
COUNTY OF ROBESON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15DOJ00052

<p>Martin Luther Locklear Petitioner</p> <p>v.</p> <p>N C Criminal Justice Education And Training Standards Commission Respondent</p>	<p>PROPOSAL FOR DECISION</p>
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THIS MATTER came on for hearing before Hon. J. Randolph Ward on March 16, 2015 in Fayetteville, North Carolina, upon Respondent's request, pursuant to N.C. General Statute § 150B-40(e), for designation of an Administrative Law Judge to preside at the hearing of this contested case.

APPEARANCES

Petitioner: Daniel Locklear, Esq.
Attorney at Law
PO Box 1148
Lumberton, NC

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

ISSUE

Whether Petitioner committed the acts necessary to satisfy the elements of the misdemeanor offense of assault, by pointing a gun, such that Petitioner's Probation/Parole Certification is subject to suspension pursuant to 12 NCAC 09A .0204(a)?

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. §14-34, 12 NCAC 09A .0204(a), 12 NCAC 09G.0102(9)(h),
12 NCAC 09G.0504(b)(3)&(c), 12 NCAC 09G.0505(b)(1)

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent: Respondent's Exhibits ("R. Exs.") 1-7

WITNESSES

For Petitioner: Officer Martin L. Locklear, Petitioner
 Mr. Larry Bozzo
 Trooper C.R. Thompson

For Respondent: Officer Martin L. Locklear, Petitioner

UPON DUE CONSIDERATION of the arguments of counsel; the documents and other exhibits admitted; and the sworn testimony of each of the witnesses, the undersigned makes the following Findings of Fact. In making these Findings of Fact, the undersigned Administrative Law Judge has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility including, but not limited to, their opportunity to see, hear, know, and recall relevant facts and occurrences; any interests they witnesses may have; and whether their testimony is reasonable, and consistent with other credible evidence. 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" or "the Commission") has authority granted under Chapter 17C of the N.C. General Statutes, and Title 12, Chapter 9G of the N.C. Administrative Code, to certify probation/parole officers and to revoke, suspend, or deny such certification. Upon Petitioner's appeal of the proposed suspension of his certification, on January 5, 2015, Respondent requested the designation of an Administrative Law Judge to preside at the hearing of this contested case.
2. Petitioner was awarded Probationary Probation/Parole Officer Certification by the Commission on November 13, 2013, and received General Probation/Parole Officer Certification on July 1, 2014. (R. Ex. 7)
3. Petitioner joined the Armed Forces in 1974, served two tours in Iraq, and remains active in the Reserves. He has been in the field of law enforcement since approximately 1986. Petitioner first served as a campus police officer in Raleigh. He began work with the Division of Prisons in 1988, supervising and transporting inmates. Petitioner then moved to probation/parole in 1997, where he served until becoming a surveillance officer in 2013. His most recent duty assignment is as a Judicial Services Coordinator, handling intake in

the courtroom immediately following sentencing. Petitioner has approximately 29 years of experience in the field of corrections and law enforcement.

4. On November 8, 2013, before going on duty, Petitioner drove his wife to Emporia, Virginia, where she planned to stay with her niece's children while their parents took a trip. Petitioner's intention was to go directly from Virginia to work at Adult Corrections in Robeson County, and he was carrying his duty weapon in his holster on his right hip. Petitioner was not in a uniform, but was carrying his identification as a probation/parole officer.
5. While traveling on I-95 South, Petitioner overtook a heavy commercial tractor trailer truck operated by Mr. Larry P. Bozzo. Mr. Bozzo had been driving trucks commercially for 43 years--since his teens--and was certified by the Department of Defense to carry high value, heavy military cargo, such as "Humvees" and jet engines. Mr. Bozzo was required to undergo a background check and security clearance before becoming authorized to transport this kind of equipment for the United States military, and he has no criminal history. At the time of the hearing, Mr. Bozzo had driven his truck for 12 years and nearly one million miles without a traffic ticket. On a typical trip, he would carry large steel I-beams north for Nucor Steel and a military load south. Following the September 11, 2001 terrorist attack on the World Trade Center in New York, he was given training in responding to an attack while transporting defense-related equipment. Mr. Bozzo has seven children, and the youngest, a nine-year-old, is still at home. On November 8, 2013, his defense load in Virginia had been canceled, but he was being paid for his trip south with an empty truck to pick up a load in Charleston.
6. Officer Locklear and Mr. Bozzo have each had admirable careers in their respective fields, have no history that suggest any tendency to outrageous conduct, and each gave testimony at the hearing concerning the events of November 8, 2013 that was facially credible, but utterly irreconcilable with the other's. The two men had never met prior to this date.
7. Petitioner testified that while traveling on I-95 South in his white Lincoln Town Car on November 8, 2013, he overtook Mr. Bozzo's tractor trailer in a section of the highway with two southbound lanes. As he was passing the truck in the left lane, Mr. Bozzo's truck started coming over into the left lane, almost sideswiping Petitioner's vehicle. Petitioner stated that he blew his horn to avoid being struck and accelerated to get out in front of the tractor trailer. Mr. Bozzo's rig then came over into the left lane, behind Petitioner, to get around a slower red truck that he had been behind in the right lane. Petitioner testified that while Mr. Bozzo's truck was directly behind him, a vehicle in front of him slowed down suddenly, requiring him to brake sharply, and causing him to look in his rearview mirror to see if the truck had slowed enough to avoid hitting him. Mr. Bozzo steered his truck into the right lane and came up beside Petitioner. According to his testimony, Petitioner then drove on towards his workplace uneventfully. He recalled being stopped by the Highway Patrol about 10 minutes later. Petitioner denies that he repeatedly hit the brakes while Mr. Bozzo's truck was behind him. He denies removing his duty firearm from its holster during this roadway encounter with Mr. Bozzo and denies ever pointing the firearm

at Mr. Bozzo. He testified that while his Smith & Wesson “P 40” semiautomatic pistol was holstered, its grip and trigger guard remained visible.

8. When Petitioner overtook him, Mr. Bozzo was coming up behind a red truck that he thought had a governor that held its speed down to 62 mph. He testified that he did not hear Petitioner blow his horn, but that “you can’t hear anything” in his truck. As Petitioner pulled even with the red truck, Mr. Bozzo moved over to the left lane behind him. Mr. Bozzo testified that Petitioner began slamming on his brakes in the left lane, forcing him to have to brake and/or change lanes, then sped up to get beside the red truck again, thus forming a rolling roadblock to keep Mr. Bozzo from getting by them. Mr. Bozzo testified that this happened “at least 10 times,” and was not caused by a vehicle in front of the Petitioner. As this continued, Mr. Bozzo increased the distance between himself and Petitioner’s vehicle.
9. Mr. Bozzo testified that he was able to contact the driver of the red truck by radio, and obtained his cooperation to break the roadblock. With Mr. Bozzo behind him in the right lane, the driver of the red truck pulled into the left lane in front of Petitioner after he hit his brakes, freeing Mr. Bozzo to pass Petitioner in the right lane. Mr. Bozzo testified that he looked down into the Lincoln as he pulled even with Petitioner, and that Petitioner had his service pistol in his right hand, and with his elbow resting on the armrest in the middle of the front seat, Petitioner was pointing the gun up at Mr. Bozzo. He described the gun to law officers that day as a black automatic, and testified that he knew it was automatic by the box-shaped muzzle of the gun.
10. In keeping with his Department of Defense training, Mr. Bozzo immediately slowed and pulled in behind Petitioner’s vehicle, where it would be most difficult to shoot at him, and called 911. Although shaken by the incident, Mr. Bozzo remained within sight behind Petitioner until law enforcement arrived. Trooper C.R. Thompson of the North Carolina State Highway Patrol responded to the 911 call and pulled Petitioner over about 20 minutes after the call came in. Petitioner appeared to be calm, and Trooper Thompson did not perceive him as a threat. He testified that Petitioner identified himself as a probation/parole officer, and he saw the firearm holstered on his right side. The Trooper testified he could identify the pistol as an automatic from the shape of its exposed handle. Petitioner’s firearm matched the description of the gun provided by Mr. Bozzo. However, Petitioner denied to the Trooper that he drew his duty weapon or pointed it at Mr. Bozzo. Trooper Thompson testified that Mr. Bozzo was upset and adamant that he wanted something be done about the assault.
11. Mr. Bozzo went before a magistrate following the November 8, 2013 incident, resulting in a criminal summons being issued against Petitioner for Assault by Pointing a Gun in violation of North Carolina General Statute § 14-34. Mr. Bozzo went to court each time the case was set for hearing, and on the third such occasion, the case was tried. Neither Trooper Thompson nor any other law enforcement officer responding to the incident testified. Petitioner’s trial in Wilson County District Court, under the higher criminal standard of proof, resulted in a verdict of not guilty.

12. Petitioner was written up in a TAPS report for violating a policy of the North Carolina Division of Adult Corrections on the day of the above-referenced incident. The basis of the violation was that Petitioner was not allowed to carry his duty weapon while on a personal errand. Petitioner testified that this was a policy that he was not aware of at the time, but that he could not argue with the citation, because his wife had been in the car. Petitioner testified that this was the first time he has ever been reprimanded while employed in corrections.
13. When recalling blowing his horn as Mr. Bozzo's truck began to come into his lane, Petitioner testified that he had driven semis while in the military and knew their drivers had blind spots. It is probable Officer Locklear used his horn with an enthusiasm that would anger another driver if it was not justified. But it is likely that any driver, and particularly Mr. Bozzo (if he had actually heard the horn), would understand that Petitioner was genuinely fearful of an accident in the near-miss situation he described. The single incident of sharply braking in front of Mr. Bozzo's vehicle that Petitioner described in his testimony could have been shocking to the operator of the big truck. But particularly from the higher vantage point of the truck's cab, it would have been clear to Mr. Bozzo that Petitioner was not at fault, if the incident was caused by another vehicle suddenly braking in front of the Lincoln, as Petitioner testified. Mr. Bozzo testified that he was "cut off" in traffic "every day" as he operated his truck and spoke of handling the discourtesies and irritating incidents of driving as being a routine part of his job. Petitioner's testimony does not describe a situation that would likely inspire an average driver, and particularly not one of Mr. Bozzo's maturity and experience, to falsely swear out a complaint and attend four hearings to give his testimony out of anger and spite. It is plausible that an inattentive lane change that threatened the life of Officer Locklear might have caused him to stage the punitive demonstration that Mr. Bozzo described and that his anger would spike enough when Mr. Bozzo was foiling him to make him want to frighten Mr. Bozzo by brandishing his weapon.
14. The greater weight of the evidence presented at the administrative hearing shows Petitioner did commit the offense of Assault by Pointing a Gun on November 8, 2013. Mr. Bozzo's recollection and testimony regarding the events of November 8, 2013 are credible. Mr. Bozzo did not know Petitioner prior to the date in question. This incident was troubling enough to Mr. Bozzo to cause him to immediately contact 911 and to stay with law enforcement for approximately 20 miles until Petitioner was stopped.
15. A preponderance of the evidence presented at the administrative hearing shows that on November 8, 2013, Petitioner committed the acts necessary to satisfy the elements of the misdemeanor offense of Assault by Pointing a Gun in violation of N.C. Gen. Stat. § 14-34 --specifically, by intentionally pointing his gun at Mr. Bozzo. That statute provides: "If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor." The gun "must be pointed intentionally and not accidentally." *State v. Evans*, 40 N.C. App. 730, 733, 253 S.E.2d 590, 592 (1979), citing *State v. Kluckhohn*, 243 N.C. 306, 90 S.E.2d 768 (1956).

16. Petitioner received the Commission's Proposed Suspension of Probation/Parole Officer Certification letter by certified mail on November 19, 2014. (R. Ex. 1) Petitioner made a timely request to the Commission for a contested case hearing, which was received at the Commission on December 16, 2014. (R. Ex. 2)
17. 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. On due and timely notice, the parties are properly before the Office of Administrative Hearings, which has jurisdiction over the parties and cause.
3. Respondent, the 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 probation/parole officers and to revoke, suspend, or deny such certifications.
4. 12 NCAC 09G .0504(b)(3) provides that the North Carolina Criminal Justice Education and Training Standards Commission may, suspend, revoke, or deny the certification of a probation/parole 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.
5. Pursuant to 12 NCAC 09G.0505(b)(1), when the Commission suspends or denies the certification of a probation/parole officer pursuant to 12 NCAC 09G.0504 of this Section, the period of sanction shall be 3 years where the cause of sanction is the commission or conviction of a misdemeanor as defined in 12 NCAC 9G.0102. The Commission has the discretion to issue a period of probation in lieu of suspension under this rule.
6. "Assault by Pointing a Gun" in violation of N.C.G.S. § 14-34 is classified as a DAC misdemeanor pursuant to 12 NCAC 09G.0102(9)(h). A person is guilty of "Assault by Pointing a Gun" if that person: (1) Intentionally; (2) points a gun; (3) at another.
7. The party with the burden of proof in a contested case must establish the facts required by N.C. Gen. Stat. § 150B-23(a) by a preponderance of the evidence. The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a). Respondent has the burden of proof in the case at bar. A preponderance of

the evidence shows that Petitioner committed the misdemeanor offense of Assault by Pointing a Gun on November 8, 2013.

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

PROPOSAL FOR DECISION

That Respondent suspend Petitioner's probation/parole officer certification for a period of not less than three (3) years based upon Petitioner's commission of the DAC misdemeanor Assault by Pointing a Gun in violation of N.C.G.S. § 14-34; and

That the Commission exercise its discretionary authority to issue a period of probation in lieu of active suspension under 12 NCAC 09G.0505.

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.

IT IS SO ORDERED.

This the 5th day of June, 2015.

J. Randolph Ward
Administrative Law Judge