

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15DOJ00053

Shenikwa Janay Barefield Petitioner v. NC Criminal Justice Education and Training Standards Commission Respondent	PROPOSAL FOR DECISION
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THIS MATTER came on for hearing before Hon. J. Randolph Ward on July 28, 2015 in Raleigh, 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: Mr. Howard A. Marsilio, Attorney
La Mantia & Marsilio, PLLC
Raleigh, North Carolina

Respondent: Ms. Lauren Tally Earnhardt, Asst. Attorney General
Ms. Whitney Belich, Asst. Attorney General
N.C. Department of Justice
Raleigh, North Carolina

ISSUES

Whether Respondent may revoke Petitioner's correctional officer certification on the grounds that she performed the acts necessary to satisfy the elements of the specified offense of felonious "Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury" on May 28, 2012.

STATUTES and ADMINISTRATIVE RULES AT ISSUE

N.C. Gen. Stat. §§ 8C-803, Rule 803(6) & (8); 14-32(a); 150B-41(a); 12 NCAC 09G .0102(1); 26 NCAC 03 .0122; and 12 NCAC 09G .0504(a).

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner	Exhibit 1 – Verdict sheet from the Superior Court of Wake County in Case Number 12 CRS 211942
Respondent	Exhibit 1 – Probable Cause Committee Memorandum w/ Attachments (admitted for a limited purpose, see below) Exhibit 2 – Proposed Revocation of Correctional Officer Certification (admitted for a limited purpose, see below)

WITNESSES

Petitioner	Correctional Officer Shenikwa Janay Barefield Mr. Richard Squires, Dep. Director, N.C. Criminal Justice Education and Standards Commission
Respondent	Ofc. Eric Wegner, Raleigh Police Department Ofc. Mick Styers, Raleigh Police Department Ofc. Daniel Twiddy, Raleigh Police Department

MOTIONS

The parties stipulated to admission into evidence of the jury's verdict in Petitioner's trial in Wake County Superior Court, which appears in the record as Petitioner's Exhibit 1 and again as pages 6-8 of Respondent's Exhibit 1. Otherwise, Petitioner objected to the admission of Respondent's exhibits.

Initially, Petitioner filed a motion *in limine* to prohibit admission of statements made by the victim of Petitioner's alleged crime to a police officer and recorded in his report, and the ruling on this matter was deferred until the hearing. At the hearing, this and other statements taken by the police officers were received into evidence, in the form of the original police reports. Additionally, excerpts from these reports were included in the synopsis of the incident prepared for the Commission's consideration. These documents were admitted into evidence for the limited purpose of putting into the record the facts that the officers and the Commission relied upon in making their decisions to arrest Petitioner and to propose revocation of her certification, respectively.

However, the undersigned declined to treat them as proof of the matters declared by the witnesses, as conditionally permitted under appropriate circumstances by the exceptions to the hearsay rule codified at N.C. Gen. Stat. § 8C-803, Rule 803(8) of the N.C. Rules of Evidence,

“Public Records and Reports,” and Rule 803(6), “Records of Regularly Conducted Activity.” See, *Wentz v. Unifi, Inc.*, 89 N.C.App. 33, 365 S.E.2d 198, *disc. rev. denied*, 322 N.C. 610, 370 S.E.2d 257 (1988) (highway accident report recording “first hand” witness statements accepted as proof of driver’s fault). Evidence Rule 803(8), “as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present.” *Official Commentary* on Rule 803(8)¹. The hearsay statements in these documents – standing alone without the support of testimony by any of the witnesses on which the police and the Commission relied, and contradicted by the verdict of a Superior Court jury, as well as exculpatory testimony of Petitioner at the hearing – could not be considered trustworthy enough to receive as evidence that it was Petitioner who committed the crime.

Respondent’s Exhibit 2 is the document constituting agency action. This document, dated December 3, 2014, is titled “Proposed Revocation of Correctional Officer Certification.” It was admitted as Respondent’s statement of its action and the required notice to Petitioner of her right to a contested case hearing pursuant to Article 3A of Chapter 150B.

Petitioner also filed a prehearing Motion for Summary Judgment on the grounds that the State should be collaterally estopped from revoking Petitioner’s certification for committing a crime for which she was acquitted in a criminal trial. This Motion was denied for the reasons set forth in the undersigned’s Order of July 24, 2015.

UPON DUE CONSIDERATION of the arguments of counsel; the 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, and whether their testimony is reasonable and consistent with other credible evidence; and upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

FINDINGS OF FACT

1. Respondent North Carolina Criminal Justice Education and Training Standards Commission (hereinafter, “the Commission”) has authority granted under Chapter 17C of the North Carolina General Statutes and Title 12, Chapter 9G, of the North Carolina Administrative Code to certify correctional officers, juvenile justice officers, criminal justice instructors, and law enforcement officers, and to revoke, suspend, or deny such certification.
2. Petitioner Shenikwa Barefield attained probationary Correctional Officer certification on July 21, 2008. She received general Correctional Officer certification on July 21, 2009, and she has retained that status during all times pertinent hereto.
3. On November 12, 2014, the Commission’s Probable Cause Committee considered the police reports, the arrest warrant and indictment, and Petitioner’s written statement

¹ “Public...reports that are not admissible under Exception 8 are not admissible...under Exception 6.” *Official Commentary* on Rule 803(8).

concerning allegations that she committed the crime of felonious “Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury” (hereinafter, “AWDWIKISI”), N.C. Gen. Stat. § 14-32(a), on May 28, 2012. On December 12, 2014, the Committee gave Petitioner notice that it found probable cause to believe that she had committed this crime and that it proposed that the Commission should revoke her Correctional Officer certification.

4. Three officers of the Raleigh Police Department who responded to the first report and investigated the assault credibly testified to gathering evidence showing probable cause to arrest Petitioner.
5. Petitioner testified that she did not assault the victim; that she saw the victim after the victim was bloodied by the assault; and that she was herself assaulted and fled to avoid further injury.
6. Each of the witnesses at the hearing testified to the assault occurring in an open outdoor area where numerous people had gathered. Counsel represented to the undersigned in open court that the victim and other witnesses named in the police reports had been subpoenaed for the hearing. However, no person present at the time of the assault appeared at this hearing to give testimony contradicting Petitioner’s exculpatory testimony.
7. Petitioner was tried in the Superior Court of Wake County and, on September 6, 2013, was found “not guilty” by the jury of the charge of AWDWIKISI and five lesser included offenses, including “Simple Assault.” Additionally, she was found “not guilty” of “Assault Inflicting Serious Bodily Injury.”
8. The evidence adduced at the hearing failed to make out a *prima facie* case that Petitioner committed the acts necessary to satisfy the elements of the specified offense of felonious “Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury” on May 28, 2012.
9. Petitioner received Respondent’s Proposed Revocation of Correctional Officer Certification, which included due notice of her right to appeal, on December 10, 2014. Petitioner timely requested a contested case hearing, and, on January 6, 2015, Respondent requested designation of an administrative law judge to hear the case and recommend a disposition of the matter. The parties were timely served with notice of this hearing on June 26, 2015.

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

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that the Conclusions of Law below are findings of fact, they should be so considered without regard

to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

2. The parties are properly before the Office of Administrative Hearings, which has jurisdiction over the parties and the cause.
3. The North Carolina Rules of Evidence, as found in Chapter 8C of the General Statutes, shall govern in all contested case proceedings, except as provided otherwise in Title 26, Chapter 3 of the North Carolina Administrative Code and N.C. Gen. Stat. § 150B-29. 26 NCAC 03 .0122.
4. The “Commission shall revoke the certification of a correctional officer or probation/parole officer when the Commission finds that the officer has committed or been convicted of a felony offense.” 12 NCAC 09G .0504(a). For the purpose of this regulation, a person has committed an offense when (s)he has been found by Respondent or an administrative body to have “performed the acts necessary to satisfy the elements of a specified offense.” 12 NCAC 09G .0102(1).
5. 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 when proposing to revoke a certification. *Leiphart v. North Carolina School of the Arts*, 80 N.C.App. 339, 348, 342 S.E.2d 914, 921-22 (1986).
6. The preponderance of the evidence produced at the hearing failed to substantiate the allegation that Petitioner committed the specified offense of felonious “Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury” on May 28, 2012.

Upon the foregoing Conclusions of Law, the undersigned makes the following:

PROPOSAL FOR DECISION

As the evidence submitted at the hearing will not support a finding that Petitioner committed the specified offense, it must be recommended that her certification not be revoked.

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 15th day of October, 2015.

J. Randolph Ward
Administrative Law Judge