

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 DOJ 00211

MICHAEL GLENN DAVIS, )  
 )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 N.C. CRIMINAL JUSTICE )  
 EDUCATION AND TRAINING )  
 STANDARDS COMMISSION, )  
 )  
 Respondent. )

**PROPOSAL FOR DECISION**

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In accordance with North Carolina General Statute § 150B-40(e), Respondent requested the designation of an Administrative Law Judge to preside at an Article 3A, North Carolina General Statute § 150B contested case hearing of this matter. On June 4, 2015, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina. The parties filed their proposed Proposals for Decision with the Office of Administrative Hearings on July 30, 2015, and August 19, 2015.

**APPEARANCES**

For Petitioner: Rita Henry, Attorney at Law, 4924B Windy Hill Drive, Raleigh, North Carolina 27609

For Respondent: J. Joy Strickland, Assistant Attorney General, Department of Justice, 9001 Mail Service Center, Raleigh, North Carolina 27699-9001

**ISSUE**

Did Respondent properly propose to suspend Petitioner's correctional officer certification for the commission of the DAC misdemeanor offense of "Resisting a Public Officer?"

**STATUTE AND RULES AT ISSUE**

N.C. Gen. Stat. § 14-223  
12 NCAC 09G .0102(9)(cc)  
12 NCAC 09G .0504(b)(3)  
12 NCAC 09G .0505 (b)(1)

## FINDINGS OF FACT

### Procedural Background

1. On November 19, 2014, Respondent notified Petitioner by Notice of Proposed Suspension that Respondent's Probable Cause Committee had found probable cause to suspend Petitioner's correctional officer certification for committing the "DAC Misdemeanor" offense of "Resisting Public Officer," in violation of N.C. Gen. Stat. § 14-223. On November 21, 2014, Petitioner received Respondent's Notice of Proposed Suspension of Correctional Officer Certification (Respondent's Exhibit 5).

2. On January 8, 2015, Respondent requested designation of an Administrative Law Judge to preside at a contested case hearing after Petitioner advised Respondent that he wished to appeal Respondent's proposed suspension of his correctional officer certification. (Petition)

### Contested Case Hearing

3. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, and both parties received Notice of Hearing.

4. Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09G authorize Respondent to certify correctional officers, and to revoke, suspend, or deny such certification.

5. On November 18, 1992, Respondent issued Petitioner a general certification to serve as a correctional officer. Petitioner held this certification without interruption until November 19, 2014. (Respondent's Exhibit 1)

6. Petitioner was employed by North Carolina Department of Public Safety as a correctional officer for twenty-three (23) years without any reprimands or disciplinary action before the current matter. In February 2013, Petitioner was promoted to Correctional Assistant Unit Manager at Tabor Correctional Institution, and worked in that position until his termination from employment on February 5, 2015.

7. On September 19, 2013, Petitioner was charged criminally with "Resisting Public Officer" on September 18, 2013 in violation of N.C. Gen. Stat. § 14-223. The magistrate's Order charged Petitioner as follows:

. . . the defendant named above unlawfully and willfully did resist, delay and obstruct S. PEREZ OF THE NAVASSA POLICE DEPARTMENT, a public officer holding the office of PATROL OFFICER, by REFUSING TO DROP AN AXE WHEN INSTRUCTED TO DO SO AND REFUSING TO ALLOW HIMSELF TO BE HANDCUFFED.

(Emphasis in original, Respondent's Exhibit 2)

8. On December 13, 2013, Petitioner was represented by an attorney, and entered into a deferred prosecution agreement in Brunswick County, file number 13 CR 54944, for the “Resisting Public Officer” charged offense. That agreement required Petitioner to be on unsupervised probation for 3 months, complete 18 hours of community service, and pay \$180.00 in costs. (Respondent’s Exhibit 3) On March 14, 2014, the District Court dismissed the above criminal charge against Petitioner. (Respondent’s Exhibit 3A)

9. Respondent’s investigator, Michelle Schilling, investigated the allegation whether Petitioner committed the offense of “Resisting a Public Officer.” Schilling obtained a certified copy of the magistrate’s order, the deferred prosecution agreement, and a copy of the Navassa Police Department report concerning the allegation of Petitioner “Resisting a Public Officer.” (Respondent’s Exhibits 3-4) She submitted and presented such information to Respondent’s Probable Cause Committee.

### Contested Case Hearing

10. Crystal Freeman is Petitioner’s sister, and one of eight siblings. Freeman, Petitioner, and their six siblings all live near one another on land they inherited from their parents in Leland, North Carolina. Seven houses of family live within walking distance of each other. On September 18, 2013, Petitioner, his brother, and his sister, Crystal Freeman, lived in separate homes on approximately 2 acres of such land. Petitioner lived at 10166 Davis Way NE, Leland, North Carolina, while Freeman lived in their parents’ home at 10180 Davis Way NE, Leland, North Carolina. Freeman and Petitioner’s homes were less than 100 feet apart. Petitioner and Freeman’s parents are deceased.

11. Petitioner and his father had built a shed on the property line that divided Petitioner’s property and his parents’ property, and both had used the shed. After Petitioner’s father died three years ago, Petitioner continued to use the shed to store his tools, lawn mower, and lawn equipment as the shed belonged to Petitioner. Freeman acknowledged at hearing that the shed belonged to Petitioner. After Petitioner and Freeman’s father died, Petitioner and his other siblings agreed to let Freeman live in their parents’ home, because of necessity. Petitioner and his siblings also paid the mortgage and bills for their parents’ home, but Freeman did not. On or about September 18, 2013, Freeman placed a dog kennel in the shed without speaking with Petitioner first.

12. On September 18, 2013, Petitioner arrived home around 11:30 or 11:45 pm after working a ten-hour shift at Tabor Correctional Institution. Petitioner saw his equipment and tools had been removed from the storage shed, the shed door was open, and a dog kennel was in the shed. Petitioner thought someone might have broken into his shed. Petitioner’s brother Fredrick came outside, and told Petitioner that he did not move Petitioner’s tools, but their sister (Freeman) might have moved Petitioner’s tools.

13. Petitioner became angry, walked to his sister’s (Freeman’s) house, and knocked on the door. Petitioner awakened Freeman, and told Freeman not to pull his stuff out of the shed. Freeman told Petitioner she wanted to put a dog in the shed. Petitioner told Freeman, “No,” he did not agree with her, and told her she should not move his things out of the shed without telling him.

Freeman slammed the door in Petitioner's face. Freeman called the police. Petitioner walked away from Freeman's house, removed the doghouse from the shed, and started putting his tools back into the shed. Petitioner picked up the axe to put back into the shed. He also used the axe to destroy the dog kennel.

14. On September 18, 2013, Navassa Police Sgt. Barry S. Perez was dispatched to 10180 Davis Way in response to a disturbance call. Perez was driving an unmarked car that was equipped with police lights and a siren. Perez was wearing a polo shirt with a police badge, and khaki pants. When he arrived at the residence, it was extremely dark. Sgt. Perez saw a man in front of the shed, approximately 30 feet from the back of the property, coming around the porch of the house holding an item. Perez observed a truck parked near the shed, but the truck was not running, and the lights were not on.

15. Perez turned on the blue lights on his patrol car, which are located across the windshield. The headlights on Perez' unmarked car shone on Petitioner. Perez immediately identified himself as a police officer, and ordered Petitioner to put the weapon down. When Perez realized Petitioner was holding an axe, he told Petitioner to put the axe down, but Petitioner failed to do so. Perez drew his sidearm, and again requested Petitioner to put down the axe. Perez told Petitioner at least 3 times to put the axe down. Petitioner did not comply with Perez's requests, but replied, "This is my house," and "I am not putting down [nothing]."

16. Eventually, Petitioner put down the axe, and Perez instructed him to get down on the ground on his knees. Instead of getting on his knees, Petitioner replied, "I know my rights," and that he was a correctional officer. Perez told Petitioner to get down on his knees again, and Petitioner complied with this order. Perez approached Petitioner, and told him to put his hands behind his back to be handcuffed. Petitioner responded, "You are not putting cuffs on me, and you [Perez] are going to need backup to cuff me." Perez backed away from Petitioner, held him at gunpoint, and waited for a deputy from the Brunswick County Sheriff's office to arrive on the scene.

17. When Sgt. Perez first arrived, Ms. Freeman walked out on her porch to greet him. She heard the police officer say, "Put down the weapon," and "Put the axe down." She also heard Petitioner respond, "This is my house," and "This is my shed." She heard Petitioner say that he did not want to get on the ground, that he was a corrections officer, and that the officer would have to call for back up to put handcuffs on him. Freeman walked back inside her home after Perez asked her to go back inside.

18. Once Leland Police arrived as backup, Perez and the police officer approached Petitioner, and told Petitioner him that he would be "tased" if he did not comply with being handcuffed. Petitioner was handcuffed, placed in Perez' patrol car, and taken to the magistrate.

19. Sgt. Perez never advised Petitioner why Petitioner was being arrested. Petitioner did not understand why he was being arrested until the magistrate told him the charges against him. The magistrate charged Petitioner with "Resisting a Public Officer" in violation of N.C. Gen. Stat. § 14-223.

20. Since this incident, Sgt. Perez has seen Petitioner on more than one occasion, and Petitioner apologized to Perez for how he acted on the night in question.

21. In Sgt. Perez' Incident Report of this matter, Perez noted:

I approached [sic] the Black Male, and I explained that he was not under arrest, but that I was cuffing him for my safety and his. The Black Male then stated, "You [sic] not going to put those cuffs on me." I then released the Black Male, because I did not have the scene secure, and felt that he was going to resist.

(Respondent's Exhibit 4)

22. The next day, September 19, 2013, Petitioner reported his arrest and criminal charge to his employer as required.

23. On or about October 1, 2013, Petitioner completed and signed an "Employee/Witness Statement Form" for his employer. (Respondent's Exhibit No. 2) On that form, Petitioner indicated that while he was putting his tools back into the storage building:

[S]omeone pulled up with High Beam lights, No Siren on, No Blue Lights on, Saying, Hay [sic] put the axe down. I said I'm my [sic] building at my property. He never acknowledged who he was and yelling and I said I live there. He said get down on the ground. I said for what, I haven't done anything. . . So I had my hands up in the air when I seen the [sic] had a gun drawn at me. . . . The officer wasn't listening to what I was saying so other officer came and they handcuff me. . . [I] asked what is the problem.

(Respondent's Exhibit 2)

24. Petitioner's testimony at the contested case hearing was inconsistent with his written "Employee/Witness Statement" and Petitioner's Response to Respondent's First Set of Request for Admissions, Interrogatories, and Requests for Production.

a. In the "Employee/Witness Statement," and in Petitioner's response to Respondent's discovery documents, Petitioner admitted that after a car pulled up, he heard someone tell him to put the axe down. Petitioner responded by telling Perez that he was in his building on his own property. (Respondent's Exhibits 2, p. 6) In his response to Respondent's First Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents, Petitioner admitted that he actually heard what Perez was saying when Perez drove up, and questioned Sgt. Perez. Petitioner admitted he did not comply with Perez' orders, but questioned Perez as follows:

. . . He told me to put the axe down and I told [him] I was in my building on my own property. He began yelling and I told him I lived there. He told me to get down on the ground and I asked what for. I told him I haven't done anything wrong. When I saw he had a gun, I put my hands up in the air."

(Respondent's Exhibit 6)

b. However, at the contested case hearing, Petitioner said he could not hear the person, whom he later realized was an officer, at all, because Perez was 30 to 50 feet away from him. Later in his testimony, Petitioner added that he could not hear Sgt. Perez, because Petitioner's truck was running, and it was loud. In contrast, Perez opined that Petitioner's truck was not running when Perez pulled onto Petitioner's property.

20. Petitioner's additional responses to Respondent's First Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents were also inconsistent with Sgt. Perez's testimony, and the court documentation.

a. In his Responses to the Requests for Admissions, Petitioner denied being told on more than one occasion (whether by an identified law enforcement officer or other person) to put the axe down, to get down on the ground, to turn around, and get down on his knees. Yet, Sgt. Perez was clear in his testimony that he instructed Petitioner multiple times to comply with these instructions. In responding to the Interrogatories, Petitioner contradicted his answer in his "Responses" by admitting he did not comply with Perez' order, but responded that he lived there and that he was on his own property.

b. At hearing, Petitioner denied being obligated to perform community service, pay court costs, and be on unsupervised probation pursuant to the deferred prosecution agreement. Yet, the certified copy of the deferred prosecution agreement in Brunswick County file number 13 CR 054944 showed that community service, paying court costs, and unsupervised probation were all conditions of Petitioner's deferred prosecution. (Respondent's Exhibit 3)

21. Further, Petitioner's testimony at hearing that he did not commit the offense of "Resisting a Public Officer" is not credible given Petitioner's own contradictory statements.

a. At hearing, Petitioner claimed that Investigator Schilling advised him that he could not, and did not need to attend the Probable Cause hearing. However, on rebuttal, Investigator Schilling denied telling Petitioner he could not have an attorney represent him at the Probable Cause hearing, and denied telling Petitioner he did not need to attend such hearing. Petitioner's allegation makes no sense given that Respondent's letter to individuals, whose cases are presented to the Probable Cause Committee, strongly encourages officers to attend such meeting.

b. Petitioner changed his testimony regarding when he realized that Perez was a police officer. At first, Petitioner indicated that his brother told him that the person at the house with the gun was the police. However, later in his testimony, Petitioner indicated that it was not until much later that he realized that Perez was a police officer, and he then put the axe on the ground.

c. The testimony of Sgt. Perez that Petitioner repeatedly failed to follow his instructions to put down the weapon, get down on his knees and allow himself to be handcuffed is credible, and is corroborated by Crystal Freeman's testimony that she heard Perez and Petitioner's statements to each other during the incident.

22. The evidence at hearing showed that the September 18, 2013 incident between Petitioner and his sister was one of many arguments among Petitioner, Ms. Freeman, and Petitioner's family members. The police have been called to their homes several times since September 18, 2013 due to arguments among Petitioner and his siblings, and Ms. Freeman.

23. The evidence at hearing established that Petitioner never threatened Sgt. Perez or Crystal Freeman, nor attempted to flee from the police on September 18, 2013. Sgt. Perez acknowledged at hearing that while Petitioner did not immediately get on the ground when asked, he also didn't think Petitioner understood why he was being arrested or held at gunpoint during the incident.

24. Petitioner committed the DAC misdemeanor of "Resisting a Public Officer" on September 18, 2013 when he failed to follow the instructions of Officer Perez by failing to put down the axe, and refusing to be handcuffed in violation of N.C.G.S. § 14-223.

### **CONCLUSIONS OF LAW**

1. 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.

2. Respondent is authorized by 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 revoke, suspend, or deny such certification.

3. Pursuant to 12 NCAC 09G .0504(b)(3), Respondent may suspend, revoke, or deny certification of a correctional officer when the Respondent finds 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.

4. 12 NCAC 09G .0102(9) defines "misdemeanor" as:

[T]hose criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses are classified by the Respondent as the following as set forth in G.S. Or other state or federal law

(cc) . . . 14-223 Resisting officers.

5. 12 NCAC 09G .0505(b) states:

When the Commission suspends or denies the certification of a corrections officer pursuant to 12 NCAC 09G .0504 of this Section, the period of sanction shall be not less than three years; however, the Respondent may substitute a period of probation in lieu of suspension of certification following an administrative hearing where the cause of sanction is:

(1) commission or conviction of a misdemeanor as defined in 12 NCAC 09G .0102.

6. N.C. Gen. Stat. § 14-223 “Resisting a Public Officer” states:

If any person shall willfully and unlawfully resist, delay, or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.

N.C.G.S. §14-223 (2013).

7. At hearing, Petitioner established that the September 18, 2013 incident was a domestic family dispute between Petitioner and his sister that has occurred before, and has reoccurred since September 18, 2013.

8. It was reasonable for Petitioner to be alarmed, cautious, and noncompliant when an unknown person, driving an unmarked car, pulls onto Petitioner’s property at midnight, and pulls a gun on Petitioner. Sgt. Perez agreed that it was extremely dark, and that Petitioner did not understand why he was being handcuffed and arrested.

9. Nevertheless, even if Petitioner could not hear Sgt. Perez, he admitted he heard his brother say the person who was there was the police. At that point, and given Petitioner’s 23 years of correctional officer experience, Petitioner should have complied with Sgt. Perez’ command to put the axe down.

10. A preponderance of evidence exists to support Respondent’s conclusion that Petitioner committed the DAC misdemeanor offense of “Resisting a Public Officer” on September 18, 2013 when he refused to comply with Officer Perez’ commands to put down the axe, and submit to being handcuffed. Therefore, the findings of the Probable Cause Committee of the Respondent are supported by substantial evidence, and are not arbitrary and capricious.

### **PROPOSAL FOR DECISION**

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned recommends Respondent suspend Petitioner’s correctional officer certification for a period of not less than three (3) years based upon Petitioner’s commission of the DAC misdemeanor of "Resisting a Public Officer." Nonetheless, given the circumstances surrounding the September 18, 2013 incident with Petitioner’s sister, and Petitioner’s 23 year career as a correctional officer with no prior disciplinary actions, the undersigned Respondent has the grounds



to exercise its discretion under 12 NCAC 09G .0505(c), and impose a lesser sanction in lieu of suspension of Petitioner's certification.

**NOTICE**

The North Carolina Criminal Justice 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 11th day of September, 2015.

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Melissa Owens Lassiter  
Administrative Law Judge