

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 00215

COUNTY OF WAKE

EDWARD HOLLEY,
Petitioner,

v.

NORTH CAROLINA CRIMINAL
JUSTICE EDUCATION AND
TRAINING STANDARDS
COMMISSION,
Respondent.

PROPOSAL FOR DECISION

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 in this matter. Based upon the Respondent's request, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina on May 26, 2015. Pursuant to the undersigned's June 30, 2015 Order, Respondent filed a proposed Proposal for Decision with the Office of Administrative Hearings on July 9, 2015.

APPEARANCES

Petitioner: Edward Holley, Pro Se, 904 Kensington Drive, Apartment H, Cary, North Carolina 27511

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

ISSUE

Did the Respondent properly propose to suspend Petitioner's correctional officer certification for the commission of the DAC misdemeanor offense of Assault on a Female?

RULES AT ISSUE

- 12 NCAC 09G .0102
- 12 NCAC 09G .0504(b)(3)
- 12 NCAC 09G .0505(b)(1)

APPLICABLE STATUTE AND RULES

N.C. Gen. Stat. § 14-33(c)(2)
12 NCAC 9G .0201(9)(g), 12 NCAC 9G .0504(b)(3), 12 NCAC 9G .0505(b)(1)

FINDINGS OF FACT

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

2. On December 2, 2014, Respondent notified Petitioner, via certified mail, that its Probable Cause Committee had found probable cause to suspend Petitioner's correctional officer certification for committing the "DAC Misdemeanor" offense of "Assault on a Female," in violation of N.C.G.S. § 14-33(c)(2), by spitting in April Jones' face on [May 30, 2013]. (Respondent's Exhibit 5) Respondent's probable cause letter mistakenly references the date of offense as *March 7, 2014*. However, Respondent's investigator Michelle Schilling established at hearing that the matter presented to the Probable Cause Committee was the allegation was that Petitioner committed an "Assault on a Female" on victim April Jones Holley on *May 30, 2013*.

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

4. Petitioner currently holds a general certification as a correctional officer approved by Respondent on February 28, 2001. (Respondent's Exhibit 1)

5. On May 30, 2013, Petitioner was charged criminally with the offense of "Assault on a Female," for spitting in the face of victim April Jones (now April Holley) in violation of N.C.G.S. § 14-33. The criminal charge against Petitioner was dismissed after he complied with a deferred prosecution agreement in Wake County file number 13 CR 212781. (Respondent's Exhibit 3)

6. On August 20, 2013, Petitioner signed a domestic violence deferral agreement. On that form, Petitioner initialed beside the following sentences: "I HEREBY PLEAD GUILTY to this (these) charge(s)." and "I am PLEADING GUILTY because I am in fact guilty." In addition, Petitioner completed a Domestic Violence Deferral Statement of Guilt indicating in pertinent part:

I, Edward Holley, HEREBY ACKNOWLEDGE MY GUILT to the offense(s) of
AOF . . . I assaulted April Jones by spitting on her on or about 5/30/13.

(Respondent's Exhibit 3)

7. At the contested case hearing, Michelle Schilling, Respondent's investigator, investigated the allegation of Petitioner's commission of the "Assault on a Female" offense. Schilling obtained a certified copy of the arrest warrant, and obtained a copy of the Cary Police

Department report concerning the allegation of "Assault on a Female" by Petitioner. (Respondent's Exhibits 3-4)

8. Ms. April Holley, formerly April Jones, is Petitioner's wife. At the contested case hearing, Ms. Holley explained that on May 30, 2013, when Petitioner was arrested for the "Assault on a Female" charge, she and Petitioner were dating, and living together. Between 3:00 p.m. and 4:00 p.m. on May 30, 2013, Holley was playing on her cell phone, while Petitioner was grilling meats outside, and cooking vegetables and pasta in the house. Petitioner got upset with her about playing games on her phone, and they argued. During their argument, Petitioner spit on her face. April Holley left the house with her daughter, and returned around 11:00 p.m.

9. After April Holley returned home, she and Petitioner continued to argue. Petitioner tried to spit on her again, but his mouth seemed too dry. Ms. Holley called the police to get him out of the house, so she could get some peace, since she was leaving the next day to attend a family member's graduation.

10. After the May 30, 2013 incident occurred, Petitioner left the house for a month. Subsequently, she and Petitioner attended counseling, and got married.

11. Cary Police Officer Thomas Vibert has been an officer with the Cary Police Department for 8 years. On May 30, 2013, Officer Vibert was dispatched to the address of 244 Coconut Mews in Cary, North Carolina concerning a domestic violence issue. When Officer Vibert arrived at the scene, he made contact with Petitioner, Petitioner's then-girlfriend Ms. April Jones, and Ms. Holley's daughter Ariel Jones. Upon his arrival at 244 Coconut Mews, Vibert discussed what happened with April Jones, and documented their conversations in his police report as follows:

She had arrived home from work at around 1800 hours. She was sitting in the living room playing a game on her phone. The Petitioner came inside from cooking on the grill and started yelling at her because she spent too much time on the phone. The argument moved upstairs, so she went back downstairs but Petitioner followed her. She said that is when Petitioner spit food in her face. She reacted to being spit on by pushing Petitioner in the chest, went into the bathroom to clean the food off her face, and then she left the house with her daughter Ariel to go for a drive to cool down. When she returned to the apartment, the argument with the Petitioner began again, and he tried to spit on her for a second time but no spit came out. This is when she contacted the police.

(Respondent's Exhibit 4)

12. Officer Vibert also spoke to Petitioner regarding the allegations, and documented their conversation in his police report as follows:

He began by saying that he and Ms. Jones had been arguing all night. Petitioner said that he had been outside grilling food. When he came inside, he saw Ms. Jones playing on her phone and he started yelling at Ms. Jones, because he thought she

spent too much time on her phone. He said that he and Ms. Jones argued for several minutes, and he admitted that at one point he spit on Ms. Jones, because he was frustrated with her and that after the spitting Ms. Jones had pushed him. After these statements, Petitioner began to change his story, and told Officer Vibert that he had in fact been washing dishes when Ms. Jones slapped him from behind, and he had spit on her in self-defense because his hands were wet from the dishwasher. Petitioner told Officer Vibert that he was going to file charges of communicating threats against Ms. Jones with the magistrate. Officer Vibert asked if the only reason Petitioner was going to file charges against Ms. Jones was to be vindictive, Petitioner responded yes.

(Respondent's Exhibit 4)

13. Officer Vibert discussed what happened with Ariel, Ms. Jones' daughter, and documented such conversation in his police report as follows:

Initially, Ariel did not want to be part of the investigation or talk to the police. However, later she asked to speak with Officer Vibert privately. Ariel told Officer Vibert that Petitioner had come in from the outside where he had been grilling, and started yelling at Ms. Jones to get off her cell phone. After the yelling, Petitioner and Ms. Jones went upstairs and continued to argue while Ariel stayed downstairs. She said that when Ms. Jones and Petitioner came back downstairs, Ariel saw Petitioner spit in Ms. Jones' face and Ms. Jones push the Petitioner away. Ms. Jones cleaned off her face after which she and her mother left the house. Ariel then told Officer Vibert that when she and her mother returned to the house she saw Petitioner try and spit on Ms. Jones again, but that no spit came out. That is when her mom called the police.

(Respondent's Exhibit 4)

14. Petitioner is currently working as a Corrections Sergeant at North Carolina Central Prison. He has worked in this facility for 15 years, 13 of them as a Sergeant. At the time of the incident, he and Ms. Jones had been living together for 5-6 years. The couple married approximately four months after the incident.

15. Petitioner gave a statement to the police on May 30, 2013, the night the incident occurred. Petitioner thought the officers were at his home only because Ms. Jones had wanted him out of the bedroom, so they could both get some sleep. Petitioner only told Officer Vibert about the spitting incident, after the officer asked him about the day that had led up to the call. Petitioner did not know, at the time of the incident, that spitting on someone was an assault. He thought that you had to actually touch them.

16. At hearing, Petitioner testified that he had not been grilling outside, but had been cooking on the stove and washing dishes, after which, he fixed himself a plate of food, and went upstairs. Ms. Holley followed him to the bedroom where she tried to knock the plate out of his

hands. When Ms. Holley started arguing with Petitioner, Ariel told Ms. Holley to leave Petitioner alone. Petitioner spit on Ms. Holley.

17. On or about June 1, 2013, Petitioner completed and signed a document titled "Employee/Witness Statement Form," at the request of his supervisor. The following language is written above the signature line:

I understand this statement will be considered part of the official investigation and that I may be called on to testify or provide written or verbal clarifying statements. The statement I have provided is an accurate account of the case to the best of my knowledge.

(Respondent's Exhibit 2)

18. When Petitioner completed the Employee/Witness Statement Form, he stated that his girlfriend and her daughter were having an argument, that he came downstairs to see what was happening, and decided to go back upstairs. As he walked upstairs, April Jones followed him. Ariel stood between them. Petitioner blew his breath over Ariel's shoulder into Ms. Holley's face. (Respondent's Exhibit 2)

19. At hearing, Respondent's counsel asked Petitioner why he indicated on the Employee/Witness form that the argument was between his girlfriend and her daughter, as opposed to he and Ms. Holley. Respondent's counsel also asked Petitioner why he had left out the spitting incident on that form. Petitioner replied that he had a lot on his mind, he was nervous, and generally overwhelmed from the situation.

20. Petitioner also wrote in the Employee/Witness Statement Form that the police officers had told him and Ms. Holley that they did not think a crime had been committed. (Respondent's Exhibit 2) However, at hearing, Officer Vibert denied making the statement that no crime had been committed. Instead, Vibert went to the magistrate's office to obtain a warrant for "Assault on a Female," because in his opinion, he had probable cause to believe that an assault on a female had occurred.

21. On December 22, 2014, Respondent received Petitioner's request for a hearing. In that request, Petitioner stated that Ms. Holley followed him upstairs, knocked his plate of food out of his hands, and physically hit him. Petitioner also stated that as he stood up from picking up the food, Ms. Holley tried again to knock the plate out of his hands, and that he spit food on her. Furthermore, Petitioner stated that Ms. Holley never made a complaint to the police about him spitting on her, and the police told Ariel that Ms. Holley could be arrested for assault. (Respondent's Exhibit 6)

22. In contrast, Officer Vibert alleged that Ms. Holley did complain about the spitting incident while he was taking the report, and that he never made a statement to Ariel Jones that Ms. April Jones could be arrested for assault.

23. In his request for a hearing, Petitioner claimed that the police officer said he needed to call his supervisor to let the supervisor make the decision, because Ms. Holley never complained, and never mentioned Petitioner spitting on her. Furthermore, Petitioner claimed that on the way to jail, the arresting officer told Petitioner that from what he saw at Petitioner's house, the Petitioner was right to defend himself, and that is why he had called his supervisor. (Respondent's Exhibit 6)

24. At hearing, Officer Vibert explained that Petitioner's assertions regarding Vibert, in this request for hearing, were not true. Officer Vibert reiterated that when he was taking the domestic violence report, Ms. Holley told him that Petitioner spit on her. Officer Vibert informed his sergeant of the investigation as was normal procedure, but it was his decision alone to arrest Petitioner.

25. Petitioner's assertions that he spit on Ms. Holley in self-defense are not credible in light of Petitioner's inconsistent statements, and the other evidence presented against him. Ms. April Jones Holley testified at hearing that Petitioner spit in her face without provocation. Jones Holley's testimony, together with Petitioner's own admission on May 30, 2013, that he spit on Ms. Holley Holley, and Petitioner's admissions of guilt in the deferred prosecution paperwork, show that Petitioner committed the criminal offense of "Assault on a Female."

26. Petitioner committed the DAC misdemeanor of "Assault on a Female," in violation of N.C.G.S. § 14-33, on May 30, 2013, when he assaulted April Jones (Holley) by spitting food in her face.

27. The May 30, 2013 incident between Petitioner and April Jones Holley is the only time an incident of that nature has occurred between Petitioner and Ms. Holley. Petitioner and Ms. Holley have attended marriage counseling sessions, and are on a great path. At hearing, Ms. Holley further opined that Petitioner's job is his livelihood, and is all he knows. Mr. and Ms. Holley are buying a home together, and are trying to put the May 30, 2013 incident behind them. Ms. Holley described how May 30, 2013 was a bad night, and Petitioner never physically hit her. They now try to talk to each other, and not at each other. Ms. Holley opined that her husband is a good man, that he made a mistake when this May 30, 2013 incident happened, and he has grown from it.

28. There was no evidence presented at hearing that Petitioner had been involved in, or was disciplined for, engaging in any violent acts during his employment with the NC Department of Correction (now Division of Adult Correction with NC Department of Public Safety).

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. 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.

3. The North Carolina Criminal Justice Education and Training Standards Commission has 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 to revoke, suspend, or deny such certification.

4. Pursuant to 12 NCAC 09G .0504(b)(3), the Commission may suspend, revoke, or deny certification of a corrections officer when the commission 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.

5. Pursuant to 12 NCAC 09G .0102, a "Misdemeanor" for corrections officers means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses are classified by the Commission as the following as set forth in G.S. Or other state or federal law ... (g) Assault, Battery with circumstances.

6. Pursuant to 12 NCAC 08G .0505(b)(1), when the Commission suspends or denies the certification of a corrections officer, the period of sanction shall be not less than three years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (c) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing where the cause of sanction is ... commission or conviction of a misdemeanor.

7. North Carolina General Statute § 14-33(c) (2), "Assault on a Female," states:

Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

Assaults a female, he being a male person at least 18 years of age.

N.C.G.S. §14-33(c)(2013).

8. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).

9. A preponderance of the evidence exists to support the conclusion that Petitioner committed the "DAC Misdemeanor Offense" of "Assault on a Female" when Petitioner spit in Ms. Holley' face on or about May 30, 2013.

10. The findings of the probable cause committee of the Respondent are supported by substantial evidence and are not arbitrary and capricious.

11. The preponderance of the evidence also showed that the May 30, 2013 incident between Petitioner and April Jones Holley was a result of a domestic argument, wherein both parties acknowledged fault. Petitioner admitted to spitting in his wife's face, and expressed remorse for doing so. Petitioner and April Jones Holley are now married, have received marital counseling, are buying a home, and are committed to making their marriage work. Petitioner has worked as a correctional officer for Central Prison for 15 years without being involved in, or was disciplined for, engaging in any violent acts during his employment, and worked 13 of those years as a sergeant.

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 assault on a female. The Undersigned recommends the Respondent exercise its discretion pursuant to 12 NCAC 9G .0505(b)(1), and place Petitioner on probation in lieu of suspending Petitioner's certification. During this period of probation, Petitioner shall obey all state and federal laws and the rules of the Respondent.

NOTICE AND ORDER

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 16th day of July, 2015.

Melissa Owens Lassiter
Administrative Law Judge