

STATE OF NORTH CAROLINA
COUNTY OF SWAIN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 02027

Robert Walter Clark Petitioner, v. N C Criminal Justice Education And Training Standards Commission Respondent.	PROPOSAL FOR DECISION
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This contested case was heard before the undersigned Chief Administrative Law Judge on November 3, 2015 and December 8, 2015 in the Haywood County Courthouse, Waynesville, North Carolina, pursuant to designation under N.C.G.S. § 150B-40(e) and procedurally under Article 3A, Chapter 150B of the North Carolina General Statutes. The record closed with the receipt of the transcript and counsels' submissions of draft proposed decisions.

APPEARANCES

Petitioner: David A. Sawyer
Attorney for Petitioner
Attorney at Law
Post Office Box 1927
Bryson City, North Carolina 08713

Respondent: Matthew L. Boyatt, Assistant Attorney General
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
P.O. Box 629
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WITNESS LIST:

Charles Ray Robinson
Tony Sutton
Brian Edgar Kirkland
Carolyn Posey
Robert Walter Clark, Petitioner
Tina Sheppard

ISSUE

Whether Respondent should deny Petitioner's law enforcement officer certification for an indefinite period for failure to comply with the rules listed below in Chapter 10B of Title 12 of The North Carolina Administrative Code:

RULES AT ISSUE

12 NCAC 09A .0204(b)(2)

12 NCAC 09A .0205(c)(2)

12 NCAC 09B .0101(3)

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Chief Administrative Law Judge, by the preponderance of the evidence, makes the following FINDINGS OF FACTS.

In making the FINDINGS OF FACTS, the undersigned Chief Administrative Law Judge has weighed all the admissible evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with other credible evidence in the case.

FINDINGS OF FACT

1. Both parties in this contested case are properly before this Administrative Law Judge in that jurisdiction and venue are proper; both parties received notice of hearing; and the Petitioner received by certified mail, the proposed denial letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "The Respondent"), on February 24, 2015.

2. Respondent is a component of the North Carolina Department of Justice and was created in accordance with Chapter 17C of the North Carolina General Statutes.

3. Respondent has the authority pursuant to Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09A, to certify law enforcement officers and to revoke, suspend, or deny such certification.

4. Petitioner is currently a resident of the County of Scotland, State of North Carolina. Petitioner previously served as a police officer with the Town of Carthage and a Deputy with the Swain County Sheriff's Office. Petitioner is a graduate of Scotland High School and completed basic law enforcement training at Sand Hills Community College. Petitioner is an applicant for certification as a North Carolina justice officer. (Robert Clark TR. at 38)

5. On February 24, 2015, Respondent mailed a letter to Petitioner, via Certified United States Mail, Return Receipt Requested, stating that Respondent had “found probable cause to believe your certification as a justice officer should be denied.” (Respondent’s Exhibit 1.)

6. Petitioner timely submitted a letter to Respondent (Petitioner’s Exhibit 21) requesting an administrative hearing with respect to the above-referenced Notification of Probable Cause to Deny Justice Officer Certification. This contested case was scheduled for hearing before Chief Administrative Law Judge Julian Mann III on November 3, 2015.

7. Both Petitioner and Respondent appeared on November 3, 2015 for the contested case hearing and presented evidence in support of their respective positions. (TR. at 1 - 290.)

8. A second day of evidence and closing argument was then taken on December 8, 2015. (TR. at 291 - 608.)

9. Petitioner served as a Police Officer with the Town of Carthage. Petitioner first began his employment at this agency on or about August 28, 2012. (Respondent’s Exhibit 5) On October 28, 2012, Petitioner was counseled by Chief of Police B.A. Davis for excessive use of force involving a handcuffed inmate.

10. Petitioner was given the option to resign from the Carthage Police Department (“Carthage PD”) in lieu of termination from that agency. The basis of Petitioner’s separation was that Petitioner engaged in law enforcement action outside of his jurisdiction and also that Petitioner used more force than necessary to effectuate an arrest. (See also Respondent’s Exhibit 5)

“April 5, 2014 Incident”

11. On April 5, 2014, Petitioner was travelling on Highway 501 North in Carthage, N.C. when he noticed a large group of people gathering at a restaurant parking lot. (Robert Clark, TR. at 410.)

12. Petitioner stopped, exited his vehicle, and began to hear profanity. (Robert Clark, TR. at 410.)

13. Petitioner saw Charles Bryant (hereinafter “assailant”), who appeared impaired. (Robert Clark, TR. at 410.)

14. Petitioner approached assailant and asked if he had any weapons. (Robert Clark, TR. at 410.) Assailant had previously communicated death threats to and/or concerning Petitioner. (Robert Clark, TR. at 412, 422.)

15. Petitioner attempted to grab assailant and, when he did, assailant tried to punch Petitioner in the face. (Robert Clark, TR. at 412.)

16. When assailant attempted to punch Petitioner in the face, Petitioner ducked, avoiding being struck. (Robert Clark, TR. at 411.)

17. Petitioner leaned back and attempted to protect his gun and gun holster. (Robert Clark, TR. at 412.)

18. There were approximately 12 people outside the restaurant, in the parking area. (Robert Clark, TR. at 412.) Petitioner was without backup at the time.

19. Assailant then attempted to avoid arrest and Petitioner advised Moore County Communications that he was in a foot chase. (Robert Clark, TR. at 412.)

20. As they were running, Petitioner observed assailant reaching in his waistband but could not determine what he was reaching for. (Robert Clark, TR. at 413.)

21. Petitioner lost sight of assailant but could hear him yelling back at Petitioner, using profanity and indicating that assailant was going to kill Petitioner. (Robert Clark, TR. at 414.)

22. Petitioner advised Moore County Communications that he had lost sight of assailant. (Robert Clark, TR. at 414.)

23. Petitioner was then joined by Officer John Wesley Coleman at the scene. (Robert Clark, TR. at 414.)

24. Officer Coleman was the senior officer at the scene. Upon his arrival, Petitioner advised Coleman that he lost assailant in the woods and that assailant had a firearm. (Robert Clark, TR. at 415)

26. Officer Coleman instructed Petitioner to go back to the parking lot and try to obtain statements while Coleman attempted to locate assailant. (Robert Clark, TR. at 415.)

27. Petitioner then returned to obtain the statements and, while doing so, he heard Officer Coleman advise that he was in a foot chase with assailant. (Robert Clark, TR. at 416.)

28. Officer Coleman continued to search for assailant. Officer Coleman heard and observed assailant lying in the grass and quickly approached the subject. Assailant then fled on foot again and Officer Coleman called on his radio advising there was another chase on foot. Assailant then began to reach for his leg, which caused Officer Coleman to draw his weapon. Assailant removed his shoe and continued to run. Petitioner was not present during this portion of the foot chase. Officer Coleman re-holstered his weapon and continued to chase assailant. According to Officer Coleman's testimony, assailant then placed his hands in the air and lay face down on the ground. According to Officer Coleman's testimony, it was obvious that assailant was "worn slap out," and assailant was compliant, not resisting, and assailant allowed Officer Coleman to place his right hand behind his back. Officer Coleman had assailant's left hand pinned with his leg. There were approximately three (3) deputies present watching as Officer Coleman began to handcuff assailant.

29. According to Petitioner's testimony and observation, Officer Coleman had not secured assailant's hands with handcuffs and assailant's left hand was still under him. (Robert Clark, TR. at 418.) Assailant failed at first to withdraw his hand from under his body.

30. Petitioner ran towards the scene, carrying a small plastic Stingray flashlight in his hand. (Robert Clark, TR. at 419.) Officer Coleman observed Petitioner running into the scene "really hot."

31. Petitioner slid into both Officer Coleman and assailant, striking them with his shoe and, further, striking assailant in the head with his hand containing the flashlight. (Robert Clark, TR. at 419.) Petitioner intended to strike assailant at that time, but not in the head. (Robert Clark, TR. at 555.)

32. According to Petitioner's testimony, assailant then released his left arm and Officer Coleman was able to place both hands in handcuffs. (Robert Clark, TR. at 419.)

33. Assailant was searched, and it was determined that he did not have a weapon with him. (Robert Clark, TR. at 419.)

34. Petitioner was concerned that, if assailant fired a weapon, the bullet could harm Petitioner or Officer Coleman. (Robert Clark, TR. at 513)

35. Petitioner believed that assailant was armed with a weapon; that is, a handgun. (Robert Clark, TR. At 432-433) There were several deputies at the scene that perceived no such threat and had no cause to intervene in the arrest.

36. During the time that Officer Coleman was attempting to place assailant in custody, Petitioner believed that he or Officer Coleman were in danger. (Robert Clark, TR. at 432 - 433. Carthage PD Chief Bart Davis, Petitioner's Exhibit 15.)

37. When one side of the handcuffs are free, the handcuff can become a dangerous weapon and the officer could be struck by the loose handcuff if the subject's arm swings free. (Lt. Charles Robinson, TR. at 310 - 311, 313 - 314.)

38. Officers are trained that, if a suspect's arm cannot be secured, the officer should use a Taser, baton or firearm, to secure the suspect's free arm. (Lt. Charles Robinson, TR. at 315.)

39. After the incident, Petitioner was permitted to drive assailant to Moore Regional Hospital where he continued to be threatening and hostile. He was medically cleared by the hospital staff. (Robert Clark, TR. at 430.)

40. Officer Coleman had minimal supervisory experience and was impatient with Petitioner. (Carthage PD Chief Bart Davis, Petitioner's Exhibit 15)

“Petitioner’s Actions Outside His Jurisdiction”

41. On March 15, 2014, Petitioner was alleged to have engaged in excessive force and in law enforcement functions outside of his jurisdiction and beyond the scope of his legal authority. Petitioner was working in an off-duty capacity for the Whispering Pines Police Department. Petitioner was handing out stickers at a public event in Whispering Pines. Petitioner was armed with his duty belt and dressed in his Carthage PD duty uniform. When Petitioner finished his Whispering Pines assignment, Petitioner drove to his girlfriend’s residence located at Lee Branch Road in Whispering Pines. This residence is located approximately 10 miles outside of the city of Carthage.

42. Petitioner was not on duty when he arrived at his girlfriend’s residence on March 15, 2014. Petitioner had removed his duty shirt. At that point, Petitioner heard a loud crash outside the residence. Petitioner then observed a vehicle being driven by Ricardo Zaldana (hereinafter “accused”) at a high rate of speed and observed the accused hit the retaining wall on an adjoining property. Petitioner called dispatch and gave them his call sign of “364,” and Petitioner then advised dispatch of the hit and run. (Robert Clark, TR at 435-437)

43. Petitioner entered his personal vehicle, a white Jeep Patriot, and began to pursue the hit and run vehicle. Petitioner observed the accused run another vehicle off the road and observed the accused’s vehicle riding on one rim. (Robert Clark TR. At 438-439) Petitioner observed the accused’s vehicle enter the City of Vass. Vass is outside Petitioner’s jurisdiction. Petitioner followed the vehicle into the parking lot of a Kwik Stop in Vass and then confronted the accused. Petitioner handcuffed the accused and placed him face down on the ground behind his personal vehicle.

44. Officers Benjamin Haddock and Tim Blake of the Vass Police Department responded to the Kwik Stop incident. Petitioner was not in uniform at the time Haddock and Blake arrived at the Kwik Stop and Petitioner was not operating a police vehicle. Petitioner requested of the accused permission to detain him. (Robert Clark TR at 444) Petitioner was wearing a duty belt and a vest, but had no identification which would indicate he was a law enforcement officer. When they arrived, Haddock observed Petitioner with his weapon drawn and the male subject handcuffed on the ground.

45. Officers Haddock and Blake assisted the accused from the ground. The accused smelled of alcohol. The Vass officers observed that the accused had an object in his mouth, which he was moving around but would not spit out. Officer Haddock then placed his hand on the individual’s chest in an attempt to get the accused to spit the object out. At this point, Petitioner placed his hand to the accused’s face and throat area and continued to squeeze. (Robert Clark TR at 446-447) A quarter was dislodged from the accused’s mouth.

46. The accused was charged with several crimes. (Robert Clark TR at 449) The Vass police officers were required to call EMS. Officer Blake was concerned because of Petitioner’s prolonged grasp of the accused. According to Officer Blake’s testimony, the accused’s voice sounded like he was on helium. The accused received medical clearance as there was no injury. (Robert Clark TR at 451)

47. Petitioner was not within his Carthage jurisdiction when he first engaged the vehicle in Whispering Pines, North Carolina, or when Petitioner effectuated an arrest in Vass, North Carolina.

“Gatorade Incident”

48. According to the testimony of Chief Davis, officers are not allowed to leave their post or jurisdiction without prior approval from the chain of command. Petitioner left his post and jurisdiction on March 28, 2013, in order to visit his girlfriend’s house in Whispering Pines. Petitioner did not obtain prior approval through his chain of command, although according to Petitioner’s testimony, he called Sergeant Martin Key with the Moore County Sheriffs’ Department and explained he was sick and to monitor his radio. (Robert Clark TR. at 451-454) Petitioner does not dispute that he left his post on March 28, 2013 to travel to his girlfriend’s house. Petitioner testified that he was sick and needed Ibuprofen and Gatorade, which he acquired. There were at least two convenience stores open and available to Petitioner where he could have purchased aspirin and a drink. Petitioner was suspended for neglect of duty and abandoning his post. (Respondent’s Exhibit 18)

“The Mayor of Carthage”

49. On January 11, 2014, Petitioner was dispatched and responded to a “shots fired” call in Carthage. At approximately 3:05 a.m., Petitioner arrived at the residence of Anthony Picerno (hereinafter “Resident”) located at 507 E Saunders Street. Petitioner observed Resident as belligerent inside the dwelling when he knocked on the door. Resident was swearing at the officers. (Robert Clark TR. at 459) Petitioner observed a pistol sitting on the kitchen counter, and also an expended shotgun shell. (See Respondent’s Exhibit 16) (Robert Clark, TR. at 459)

50. Petitioner explained to Resident that he was a police officer. Petitioner was accompanied by another Moore County deputy. Petitioner inquired if Resident had been firing a weapon. Resident was impaired. (Robert Clark, TR. at 459.)

51. Resident informed Petitioner that Petitioner could “go inside the house and look for guns.” (Robert Clark, TR. at 459.)

52. Petitioner found a weapon, but Resident “would never admit to shooting the weapon.” (Robert Clark, TR. at 459.)

53. According to Petitioner’s testimony, Petitioner inquired of Moore County Sheriff’s Deputy Cameron if the Resident could be charged under a city ordinance. (Robert Clark, TR. at 460.) Deputy Cameron responded: "Can you testify -- can you put your hand on the Bible and testify that you saw this man shoot that gun?" Petitioner said, "Well, no, sir." Deputy Cameron replied: "Okay. Well, how can you charge it?" (Robert Clark, TR. at 460.) Resident was not charged. (Robert Clark, TR. at 460.)

54. Petitioner asserted that he had not been trained on whether a person could be charged under a city ordinance. (Robert Clark, TR. at 460.) Petitioner also asserted that he was unclear on how to deal with town ordinances at the time. Petitioner's incident report documented that he explained to the mayor that he could charge Resident with the offense of discharging a firearm within the city. (Respondent's Exhibit #15)

55. Resident asked Petitioner to call the mayor. Petitioner did so. (Robert Clark, TR. at 461.) Petitioner testified: "[I] felt the best and safest thing to do -- he's impaired with guns in the house, [was to] call the mayor and have the mayor come get him or come get the weapons." (Robert Clark, TR. at 462.)

56. The mayor arrived at the scene, and said "he would take care of it. He was going to take him and the gun -- and the weapons." (Robert Clark, TR. at 462.) The mayor thanked Petitioner for calling him "so he could secure the gentleman." (Robert Clark, TR. at 463.)

57. According to Petitioner's testimony, his concern was "about the safety of the individual [and] the community," feeling that the subject was "impaired and there's a weapon inside the residence." (Robert Clark, TR. at 462 - 463.)

58. The mayor had previously called Petitioner on several occasions regarding police matters. (Robert Clark, TR. at 463.)

59. According to the testimony of Corporal Steve Martin of Carthage PD, Petitioner was not authorized to bypass his chain of command in order to contact the mayor regarding a criminal investigation. Petitioner was counseled by Corporal Martin for 1) not seizing evidence of a crime; 2) breaking the chain of command; and 3) failing to charge Resident with the criminal offense of discharging a firearm within the City of Carthage.

"September 13, 2013 Incident Involving A Magistrate"

60. During his time as an officer with Carthage PD, Petitioner had several encounters with Magistrate Charlie Smoak while on duty. (Robert Clark, TR. at 472) (Sgt. Tina Sheppard (Ret.), TR. at 578)

61. Other officers from Carthage PD and other departments had similar issues from time to time involving this Magistrate. (Robert Clark, TR. at 473, Sgt. Tina Sheppard (Ret.), TR. at 578)

62. On September 16th, 2013, Petitioner had a verbal altercation with this Magistrate in his office. (Robert Clark, TR. at 476) (Respondent's Exhibit 17)

63. At issue was the service of certain warrants. (Robert Clark, TR. at 477) (Respondent's Exhibit 17)

64. Petitioner and this Magistrate became engaged in a verbal disagreement regarding the proper respect that Petitioner should demonstrate to the "bench" while in the Magistrate's Office. (Robert Clark, TR. at 478)

65. Petitioner and this Magistrate offered mutual apologies to each other regarding the incident. (Robert Clark, TR. at 481)

66. Petitioner pointed his finger at this Magistrate at least two times.

67. Petitioner conceded that he acted improperly and Petitioner received discipline and counselling as a result of the incident. (Respondent's Exhibit 17)

“Kicking The Windows Out Incident”

68. On September 3, 2013, Petitioner “stopped [a] subject on a moped for driving while impaired.” (Robert Clark, TR. at 465 - 466.) The subject was placed under arrest. (Robert Clark, TR. at 451 - 454.)

69. Prior to stopping the subject, Moore County Communications had received several calls concerning fighting between the subject and his brother. (Robert Clark, TR. at 466.)

70. Petitioner, who was alone at the time, was able to talk the suspect into handcuffs without using force. (Robert Clark, TR. at 466.)

71. Petitioner suspected that the subject was on narcotics and, as a consequence, would have to be taken to the hospital. (Robert Clark, TR. at 466.)

72. The subject was in the back seat of a cage car. (Robert Clark, TR. at 467 - 468.)

73. On route to the hospital, the subject began to kick out the rear window. (Robert Clark, TR. at 468.)

74. Petitioner contacted Moore County Communications with a status report and requested assistance. Petitioner then drove at speeds between 100 to 112 mph in an attempt to quickly meet a Pinehurst police unit. (Robert Clark, TR. at 468.) (Respondent's #19)

75. Petitioner met the Pinehurst unit. Petitioner and Pinehurst PD Lt. McDonald got the subject out of the car. (Robert Clark, TR. at 469.)

76. The subject was breathing hard, sweating profusely, and had bloodshot eyes. (Robert Clark, TR. at 469.)

77. Petitioner and Lt. McDonald placed leg restraints on the subject, got him back in Petitioner's patrol car, and secured him in his seat belt. Subject was then taken to the hospital. (Robert Clark, TR. at 469.)

78. Lt. Mabe reprimanded Petitioner for driving at an excessive speed and said that Petitioner “should have pulled over and handled him.” (Robert Clark, TR. at 469 - 470.)

79. On September 21, 2013, Petitioner was again operating his patrol vehicle at speeds exceeding 100 miles per hour for the purpose of making a simple traffic stop. All officers of Carthage PD are provided a copy of the standard operating procedures.

“Petitioner’s Relationship With Chain Of Command”

80. According to the testimony of Sgt. Martin, there was “noticeable tension” between Petitioner and Corporal John Wessley Coleman of the Carthage Police Department, mainly the fault of Coleman “trying to start trouble” and “spreading rumors.” (Sgt. Steven Martin, TR. at 157 - 158.)

81. According to the testimony of Sgt. Martin, there was “tension” between Petitioner and Lt. Robbie Mabe of the Carthage Police Department. (Sgt. Steven Martin, TR. at 162.) According to Petitioner’s testimony, Sgt. Martin once told Petitioner: "You know that Lieutenant Mabe is out to get you and he's going to try to get you fired." (Robert Clark, TR. at 482.)

82. Lt. Robbie Mabe “failed Petitioner by not training him the way he should have been trained.” (Pinehurst PD Sgt. Tina Sheppard (Ret.), TR. at 577.)

“Petitioner’s Performance as a Narcotics Officer”

83. Petitioner has done a “phenomenal job” getting dope off the street. (Carthage PD Sgt. Steven Martin, TR. at 153.)

84. Petitioner has a “special ability, particularly ... in the narcotics area. He was very good at that.” (Carthage PD Chief Bart Davis, TR. at 245.)

85. Petitioner is a “good young officer” ... “very diligent” ... “works real hard at whatever he does ... “has a passion for narcotics enforcement,” that is, he would “catch more drugs than anybody ... I’ve ever encountered.” (Swain County Captain Tony Sutton, TR at 338, 348.)

86. Petitioner “had a natural ability ... working ... narcotics”. (Swain County Lt. Charles Robinson, TR at 304.)

87. Petitioner “would make more drug arrests than the Moore County Sheriff’s Office narcotics team on a tour of duty. Every tour of duty he was making arrests. (Sgt. Tina Sheppard (Ret.), TR. at 576 - 577.)

88. Petitioner was the recipient of the Robbie Bishop Award, a national award presented by the National Criminal Enforcement Conference, based upon Petitioner’s street level narcotics interdiction efforts. (Robert Clark, TR. at 556 - 557.)

“Petitioner’s Moral Character”

89. Petitioner's assertions of good moral character was supported by Carthage Chief of Police Bart Davis (TR. at 248, Petitioner's Exhibit 15 - Clark was "very polite", "respectful", "honest" and had "good character"), Swain County Sheriff's Office Captain Brian Kirkland (TR. at 365 - "Clark is an outstanding individual"), Swain County Sheriff's Office Captain Tony Sutton (TR. at 340 - "He's a good, honest man."), Swain County Sheriff's Office Lt. Carolyn Posey (TR. at 374 - "sterling character"), Swain County Sheriff's Office Lt. Charles Robinson (TR. at 305, 308 - "character was ... outstanding"), and Sgt. Tina Sheppard, (Ret. - Pinehurst P.D. - TR. at 578 - Everyone liked Officer Clark.)

90. Petitioner received positive recommendations to the North Carolina Criminal Justice Education and Training Standards Bureau from Officer Buck Mimms (Petitioner's Exhibit 2), Detective Chris Strickland, (Petitioner's Exhibit 3), Sergeant Frank Rodriguez, (Petitioner's Exhibit 4), Trooper R.T. Correy (Petitioner's Exhibit 5), Trooper C.L. Pridgen, (Petitioner's Exhibit 6), Detective Captain Michael Scott Waters, (Petitioner's Exhibit 7), K9 Sergeant Chad Shoe, (Petitioner's Exhibit 8), Patrol Officer Joshua L Gibson, (Petitioner's Exhibit 9), and Sgt Tina Shepherd (Ret.) , (Petitioner's Exhibit 10).

91. Petitioner was "honest to a fault", even to the point of getting himself in trouble with his honesty. (Carthage PD Chief Bart Davis, TR. at 256 - 257.)

92. Petitioner was not charged with any crime based upon any incidents found herein. (Carthage PD Chief Bart A. Davis, TR. at 289.)

93. Petitioner, at the time of the hearing in response to the undersigned's questions, disclosed he was the father of an eight-month old baby. Petitioner is not married to his former girlfriend who is the mother. Neither is Petitioner nor his former girlfriend in a familial relationship. This former girlfriend is the same person whom Petitioner visited, on at least two occasions, as found herein. (Robert Clark, TR. at 541-542)

**Petitioner as a Justice Officer in Swain County;
Swain County Deputy Sheriff Robert Clark and Field Training**

94. After leaving Carthage PD, Petitioner was employed by the Swain County Sheriff's Office. (Swain County Lt. Charles Robinson, TR. at 305.)

95. Field training is very important to a young, inexperienced police officer. (Cpl. John Coleman, TR. at 37); (Vass PD Officer Timothy Blake, TR. at 112); (Lt. Robbie Mabe, TR. at 195 - 196).

96. There was a problem with Carthage PD providing training for its officers. (Pinehurst PD Sgt. Tina Sheppard (Ret.), TR. at 571 - 572.)

97. The field training program at Carthage PD was insufficient. (Sgt. Tina Sheppard, TR. at 574 - 575.)

98. Petitioner had not been trained well prior to arriving at the Swain County Sheriff's Office. (Swain County Captain Tony Sutton, TR. at 339.) Petitioner had been exposed to obsolete law enforcement practices. (Carthage PD Chief Bart Davis, Petitioner's Exhibit 15.)

99. Petitioner needed mentoring, that is, he needed field training. (Swain County Captain Tony Sutton, TR. at 338.)

100. Petitioner was receptive to field training in Swain County. (Swain County Captain Tony Sutton, TR. at 339.)

101. Field trainers in Swain County had "high regards" for Petitioner. (Swain County Captain Brian Kirkland, TR. at 364 - 365.)

102. Petitioner went through several months of training while in Swain County, (Swain County Captain Tony Sutton, TR. at 341), and when he finished the training, he was a good officer. (Swain County Captain Tony Sutton, TR. at 342.) Petitioner had a good performance record while in Swain County. (Swain County Captain Tony Sutton, TR. at 350.)

103. After receiving field training from, and working with, supervisors and officers in Swain County, Petitioner realized that "there's more -- more to law enforcement than -- than getting out ... and hunting narcotics.... it helps out to get out ... and talk to people, or if you see that car broke down on the side of the road, you ... stop and see if they need help." (Robert Clark, TR. at 499 - 500.)

Having considered the evidence, by its preponderance, and having heard the arguments of the parties, and having made the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that the Findings of Fact 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. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper in this contested case. The parties received proper notice of the hearing in this contested case.

3. 12 NCAC 09B .0101 entitled "Minimum Standards for Criminal Justice Officers" states:

Every criminal justice officer employed by an agency in North Carolina shall:

....

(3) be of good moral character pursuant to G.S. 17C-10 and as determined by a thorough background investigation[.]

4. 12 NCAC 09A .0204, entitled “Suspension: Revocation: or Denial of Certification” states:

(b) The Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:

....

(2) fails to meet or maintain one or more of the minimum employment standards required by 12 NCAC 09B .0100 for the category of the officer’s certification or fails to meet or maintain one or more of the minimum training standards required by 12 NCAC 09B .0200 or 12 NCAC 09B .0400 for the category of the officer’s certification[.]

5. 12 NCAC 09A .0205, entitled “Period of Suspension: Revocation: or Denial” states:

(c) When the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is:

....

(2) failure to meet or maintain the minimum standards of employment[.]

6. Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. *In Re Rogers*, 297 N.C. 48, 58 (1979) (whether a person is of good moral character is seldom subject to proof by reference to one or two incidents).

7. Under *In Re Rogers*, an instance of conduct amounting to poor judgment, especially where there is no malice or bad faith, would not ordinarily rise to the level required to reflect a lack of good moral character. Notwithstanding, there were several findings that Petitioner at times used excessive force while at Carthage PD. These incidents arising from a lapse in judgment do not alone establish lack of good moral character. Petitioner was never charged with or convicted of a crime. These incidents may well be indicative of a lack of training in the proper exercise of authority, or at least in part.

8. Petitioner has also acted at times beyond the scope of his legal authority granted to him by pursuing and arresting an individual outside of his jurisdiction on March 15, 2014. However, the officers in that jurisdiction subsequently participated in the arrest, which resulted from a sudden emergency, and apparently ratified and completed the arrest, taking the subject in custody. In another incidence, Petitioner engaged in an unprofessional interaction in a legal setting by engaging in a verbal dispute with a Magistrate Judge while Petitioner was discharging his duties. In another incidence, Petitioner operated his patrol vehicle in a manner that could affect the safety of others, in violation of the posted speed limits. In another incidence, Petitioner left his post on at least one occasion for personal business.

9. Petitioner's untoward actions as found herein are based upon conflicting or incomplete testimony, shaded in many respects by the witness' perception or relationship with Petitioner as to these events. These events mostly involve the exercise of Petitioner's duties and judgment as job related performance. Although at times poorly performed, in the judgment of his superiors, these incidences insomuch as job related performance, do not establish a lack of good moral character but can be evidence of such. This type of determination cannot be left unaided to the trier of fact without promulgated standards or expert testimony to assist the trier of fact in making these adverse and causal determinations.* Evidence of poor job performance cannot be the exclusive evidence for lack of good moral character as it contains little evidence as to moral turpitude. If Petitioner's application is ultimately accepted and he is allowed to continue as a law enforcement officer, his superiors now and in the future, are clearly on notice of Petitioner's prior failures in job performance, and if not corrected, the potential for harm to the public.

10. The undersigned does find and conclude that Petitioner has engaged in immature and irresponsible conduct. Petitioner has exercised poor, and at times, dangerous judgment in the exercise of official duties. However, Petitioner was not properly trained before being "released" on the public and was the product, in some respects, of an "unhealthy" managerial environment. Petitioner lacked a mentor to advise him of the proper boundaries for the exercise of authority by a police officer. Petitioner largely trained himself under very poor standards and consistently rejected or ignored the advice, authority, and directives of his superiors, deferring rather often to his own judgment.

11. Good moral character has been defined as "honesty, fairness, and respect for the rights of others and for the laws of the state and nation." In Re Willis, 288, N.C. 1, 10 (1975). "Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983). The Court looks to "the slow spreading influence of opinion," In Re Willis, 299 N.C. 1, 215 S.E. 2d 771, appeal dismissed, 423 U.S. 976 (1975), or, as Benbow allowed, "[i]t is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does." Petitioner's motivations, almost always exercised with good intent, at times were questionable but were not conclusive on the issue of mal-intent. I conclude that Petitioner, although tarnished, maintained his good name and character.

12. Petitioner is now the father of a child born out of wedlock, a fact Petitioner volunteered. In addition, Petitioner voluntarily established his own paternity when not compelled or required to do so. However, as much as this admission of paternity is a further indication of poor decision making, it does not establish a lack of good moral character; nevertheless, it draws attention to the findings of fact where Petitioner's girlfriend (and mother of his child) is involved. In one incident, Petitioner's questionable activities prompted an out of jurisdiction pursuit which originated at her residence on March 15, 2014. The other incident involved an intentional visit to her residence in the early morning hours of March 28, 2013. The admitted reason for the latter

*If poor job performance were to equate to the lack of good moral character, then the final decision maker as expert law officials would have the requisite expertise to make those determinations under the facts as found in applying those standards.

visit was to procure liquids and pain medication. Petitioner left his post and jurisdiction. The admitted reasons in light of Petitioner's paternity admission raises questions of credibility in addition to the lack of concern for the protection of the public, no matter how briefly

13. What more closely approaches a determination of lack of good moral character is the apparent misrepresentation as to his motives on March 28, 2013. I do not find that Petitioner intentionally misrepresented his motives or mixed motives, but I do conclude that Petitioner did not tell "the whole truth," however, Petitioner's omission as to motive is less material than leaving his post and jurisdiction. "Misrepresentations and evasive or misleading responses, which could obstruct full investigation into the ... applicant are inconsistent with truthfulness and candor ..." in Re Willis, 288 N.C. 1, 18 (1975).

14. Petitioner by all accounts is an excellent narcotics officer and has been recognized as such with a national award. Winning a national award for good policing in competition with other deserving officers is indicative of exemplary character traits of an outstanding narcotics officer. This is indicative of an impartial standard of care for the proper exercise of job performance, some evidence of good moral character, and a predictable measure of future performance as an asset to society. No one can deny the onerous burden placed on society with distribution, sale and consumption of illegal drugs. Having effective police officers, such as Petitioner, in containing this societal burden is a positive factor to support the admission of Petitioner's application.

15. Petitioner's cumulative pattern of immature and questionable conduct as found herein indicates poor judgment in exercising his police authority, both individually and collectively, but these patterns do not establish a lack of good moral character. Some of this pattern can be attributed to lack of judgment at a young age (the applicant's age at the time of the conduct – see ABA Bar Admission Comprehensive Guide, 2007)¹ and some to the absence of appropriate training. Most of his conduct in question was candidly admitted at the time of occurrence as well as in testimony. (the applicant's candor in the admissions process - see ABA Admission Comprehensive Guide, 2007)² Much of this previous misconduct has been rectified while under proper supervision and training in Swain County. (the evidence of rehabilitation – see ABA Bar Admission Comprehensive Guide, 2007)³ Petitioner is now older and by experience more understanding of the necessity of following directions, executing the proper role of police authority, and responsiveness to training as evidenced by his receptiveness to training in Swain County. Prior behavior such as to bring into question moral character is a tool used to predict later dishonest or reprehensible behavior before the admission to a profession. In this incidence, the behavior occurred on the job as a professional law enforcement officer and as previously concluded was less about the lack of good moral character as it was questionable job performance.

16. Poor judgment is not synonymous with lack of good moral character. What may be paramount to service as an effective member of the policing profession is rational behavior under stressful conditions. This may be one of Petitioner's more obvious failures, but impulsivity

¹ Larry Craddock "Good Moral Character" as a Licensing Standard, 28 Journal of the Nat'l ALJ p. 448,458 (2008).

² Id.

³ Id.

and immaturity do not automatically compel the conclusion that Petitioner lacks good moral character.

17. 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). The preponderance of the evidence, upon close analysis, indicates that the Petitioner in the incidents found herein demonstrated an ineptness in exercising good judgment and an ineptness in job performance. However, the preponderance of the evidence also demonstrates a lack of motivation or intent on Petitioner's part to do harm as would be indicative of malice, bad faith, or moral turpitude. It does not rise to the commonly accepted or legal understanding of good moral character. Petitioner is not immoral.

18. Petitioner carried his burden of proof by the preponderance of the evidence to permit his application for his law enforcement officer certification. There was conflicting evidence and a close case in law and fact. However, Petitioner has shown by a preponderance of the evidence that Respondent's proposed denial of Petitioner's law enforcement officer certification is not supported by the preponderance of the evidence on the grounds of lack of good moral character or otherwise, as one who has failed to meet the minimum standards as an applicant to be a law enforcement officer.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned proposes the Petitioner's application for certification as a law enforcement officer be placed in suspension for an additional period of six months from the date of the Respondent's (affirming) final decision, and require of Petitioner a supplemental or amended application to allow Petitioner to update all current warrants, citations, civil or criminal judgments. If there are none at that time, then Petitioner's application for certification should be granted.

Thereafter, if granted, Respondent should continually monitor Petitioner's law enforcement conduct in Swain County. If Petitioner transfers or managerial conditions change in Swain County, Respondent should monitor any changes in venue or management with vigilance.

NOTICE

The North Carolina Criminal Justice Education and Training Standards Commission will make the Final Decision in this contested case. The Commission 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 the 22nd day of July, 2016.

Julian Mann III
Chief Administrative Law Judge