

STATE OF NORTH CAROLINA
COUNTY OF AVERY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 02029

JOSEPH THOMAS BURRIS,)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA CRIMINAL)
 JUSTICE EDUCATION AND)
 TRAINING STANDARDS COMMISSION)
)
 Respondent.)

PROPOSAL FOR DECISION

On July 9, 2015, Administrative Law Judge Donald W. Overby heard this case in Waynesville, North Carolina. This case was heard after Respondent requested, pursuant to N.C. Gen. Stat. § 150B-40(e), designation of an administrative law judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

For Petitioner:
Pro Se
Joseph Thomas Burris
P.O. Box 484
Newland, North Carolina 28657

For Respondent:
Matthew L. Boyatt
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699

ISSUE

Is Respondent's proposed denial of Petitioner's application for law enforcement officer certification supported by a preponderance of the evidence?

APPLICABLE LAW

12 NCAC 09A .0204(b)(6)

12 NCAC 09A .0205(b)(4)

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner's Exhibits

Respondent's Exhibits 1 – 6.

WITNESSES

For Respondent:

Petitioner

For Petitioner:

Petitioner

Captain Tim Barnett, Beech Mountain Police Department

Chief of Police Christopher Freeman, Beech Mountain Police Department

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 makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, 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 all other believable evidence in the case.

Wherefore, the Undersigned makes the following Findings of Fact, Conclusions of Law and Proposed Decision.

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received Notice of Hearing, and Petitioner received the notification of probable cause to deny law enforcement officer certification letter mailed by the Respondent on February 24, 2015.

2. The North Carolina Criminal Justice Education and Training Standards Commission (hereinafter the "Commission") has the authority granted under Chapter 17C of the

North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. 12 NCAC 09A .0204(b)(6) provides that 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 ... has knowingly made a material misrepresentation of any information required for certification or accreditation.

4. 12 NCAC 09A .0205(b)(4) provides that when the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction under paragraph (b) 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 ... material misrepresentation of any information required for certification or accreditation.

5. Petitioner is currently applying for certification as a law enforcement officer with the Beech Mountain Police Department. Petitioner submitted his application on or about November 17, 2014.

6. Petitioner previously applied for certification by the Commission in 2011 through Davidson College Campus Police. However, Petitioner's conditional offer of employment at Davidson College was withdrawn due to Petitioner providing false information regarding prior drug use during the application process. Petitioner abandoned his application for certification in 2011 and Petitioner was never certified by the Commission. Petitioner is again seeking certification from the Commission.

7. Petitioner testified at the administrative hearing and does not dispute a prior history of drug use. Petitioner experimented in high school with various drugs that were not prescribed to Petitioner. During the time period of 2003-2004, Petitioner used the following pills: Adderall, Vicodin, Percocet, and Valium. Petitioner was taking these drugs at high school parties and Petitioner did not possess a valid prescription for these drugs. Petitioner admits to the use of Adderall without a prescription as recently as 2008.

8. Petitioner also admits to the use of marijuana in high school between 2003 and 2004, in addition to the use of a "duster." Petitioner explained that a duster is compressed gas in a can that is inhaled in order to get high.

9. As indicated above, Petitioner initially sought certification as a law enforcement officer through Davidson College Campus Police in 2011. In furtherance of his application for certification through Davidson College, Petitioner submitted to the Commission a Form F-3 (LE) Personal History Statement on July 26, 2011 (hereinafter the "F-3"). *See* Respondent's Exhibit 3. The F-3 was signed by Petitioner before a Notary. The Petitioner certified "that each and every statement made on this form is true and complete and I understand that any misstatement or omissions of information will subject me to disqualification or dismissal."

10. Question No. 45 of the F-3 asks, "Have you ever used any illegal drugs including but not limited to, opiates, pills, heroin, cocaine, crack, LSD, etc.?" Petitioner did not disclose the use of illegal drugs, and responded "No" to this question. The Petitioner knowingly failed to disclose that during 2003-2004, Petitioner had used a "duster" and that Petitioner had also used the following pills on various occasions in high school without a valid prescription: Adderall, Vicodin, and Valium.

11. Petitioner made a material misrepresentation with respect to Question No. 45 of the F-3 when Petitioner knowingly and intentionally withheld his prior drug use while in high school. Petitioner was under a duty to disclose his use of a "duster" and to further disclose his use of Adderall, Vicodin, and Valium pills. Petitioner's application for certification is subject to denial based on Petitioner's material misrepresentation in response to Question No. 45 of the F-3.

12. Question No. 46 of the F-3 goes on to ask, "Have you ever used prescription drugs other than under the supervision of, or as prescribed by, a physician?" Petitioner answered "Yes" to this question, but Petitioner only disclosed the use of Percocet associated with a broken knee. The Petitioner knowingly and intentionally failed to disclose that during high school he had used Adderall, Vicodin, and Valium on various occasions without a valid prescription. Petitioner's application for certification is subject to denial based on Petitioner's second material misrepresentation in response to Question No. 46 of the F-3.

13. Petitioner claims that he did not disclose his drug use on Questions 45 and 46 of the July 26, 2011, F-3 Personal History Statement out of mistake. Petitioner claims that his then fiancé completed a go-by F-3 Personal History Statement on behalf of Petitioner, and that the Petitioner later transferred the answers from the Personal History Statement prepared by his wife to the F-3 Petitioner completed and submitted to the Commission, which appears at Respondent's Exhibit 3.

14. Petitioner admits that he completed the F-3 in his own handwriting and that he was not rushed to complete the form. Petitioner had ample opportunity to fully disclose his drug use in questions 45 and 46 of the F-3. Petitioner understood the questions being asked and understood his duty to provide accurate and complete responses. At the time Petitioner completed the F-3 in 2011, Petitioner had already earned two advanced degrees, an AA in criminal justice from Caldwell Community College, and a BS in criminal justice from Appalachian State University. Petitioner's material misrepresentations on questions 45 and 46 of the 2011 F-3 did not rise out of mistake or oversight.

15. The evidence establishes that Petitioner made additional material misrepresentations regarding his illegal drug use during the mandatory background investigation conducted by Davidson College Campus Police. Petitioner was asked by the interviewer to explain his involvement with illegal drugs. Petitioner's response was recorded in Question No. 49 of the Form F-8 Mandated Background Investigation Form (hereinafter the "F-8"), which was submitted to the Commission in furtherance of Petitioner's application for certification. See Respondent's Exhibit 4.

16. In response to Question No. 49 of the F-8, Petitioner stated that he smoked marijuana 4 or 5 times in high school. However, the Petitioner knowingly and intentionally failed to disclose to the interviewer that he had used a “duster” in high school and also failed to disclose that he illegally used Adderall, Vicodin, and Valium on various occasions in high school without a valid prescription. Petitioner’s knowing and intentional misrepresentation when responding to Question No. 49 of the F-8 constitutes a material misrepresentation of information required by the Commission. Petitioner’s application for certification is subject to denial based on Petitioner’s third material misrepresentation when responding to Question No. 49 of the F-8.

17. Petitioner made a final material misrepresentation in response to Question No. 59 of the F-8. Petitioner was asked whether he had ever used prescription drugs without a valid prescription. Petitioner responded “Yes;” however, Petitioner only disclosed that he had used Percocet without a prescription on two (2) occasions. Petitioner knowingly and intentionally failed to disclose to the interviewer that he had used Adderall, Vicodin, and Valium on various occasions in high school without a valid prescription. Petitioner’s application for certification is subject to denial based on Petitioner’s fourth material misrepresentation in responding to Question No. 59 of the F-8.

18. Captain Tim Barnett and Chief of Police Christopher Freeman of the Beech Mountain Police Department appeared on behalf of Petitioner as character witnesses. Captain Barnett opined that Petitioner self-reported to the Beech Mountain Police Department his previous misrepresentations regarding past drug use that were made during the application process with Davidson College Campus Police. Captain Barnett conceded that Petitioner’s explanation that he did not realize he omitted the drug use on the F-3 when transferring the responses his wife prepared for him to the F-3 Petitioner submitted to the Commission was not a reasonable explanation. Notwithstanding the foregoing, Captain Barnett believes Petitioner is an individual who possesses integrity and that Petitioner would make a good law enforcement officer if provided a second chance.

19. Chief of Police Freeman also opined that he believed Petitioner was of good character and that he would like to see Petitioner receive certification. Chief Freeman would consider Petitioner for continued employment with the Beech Mountain Police Department. Chief Freeman testified that he would not have made the trip from Beech Mountain to Waynesville if he did not believe in Petitioner’s ability to become a good police officer.

20. Petitioner’s wife appeared at the administrative hearing in support of her husband. Petitioner’s wife expressed genuine remorse and a sense of guilt and responsibility for Petitioner’s conduct. She demonstrated an amazing recall of the significant events of Petitioner’s life. It is believable that Petitioner’s wife did prepare a “go by” for Petitioner to use in order to give consistent and hopefully accurate answers. It is believable that Petitioner relied on the form his wife prepared. However, his wife would have had only the information supplied to her by Petitioner. Even assuming that she had the knowledge of his prior drug usage, it was still the responsibility of Petitioner to insure that even the stock form he would use was accurate. Ultimately, despite his wife’s best intentions, it was his responsibility.

21. Without question, the evidence presented establishes that Petitioner's own actions have placed him in a circumstance wherein the denial of his application for certification is justified based on the Commission's rules and Petitioner's material misrepresentations regarding his past drug use.

20. The Commission does have the authority to issue a lesser sanction than outright denial of Petitioner's application for certification.

BASED UPON the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

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 the matter. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. Pursuant to 12 NCAC 09A .0204(b)(6), 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 ... has knowingly made a material misrepresentation of any information required for certification or accreditation.

4. Pursuant to 12 NCAC 09A .0205(b)(4), when the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (b) 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 ... material misrepresentation of any information required for certification or accreditation.

5. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when he failed to disclose his use of a "duster," in addition to his illegal use of Adderall, Vicodin, and Valium pills in high school when responding to Question No. 45 of the F-3.

6. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made an additional material misrepresentation of information required for certification when he failed to disclose his use of Adderall, Vicodin, and Valium pills in high school without a valid prescription when responding to Question No. 46 of the F-3.

7. Finally, a preponderance of the evidence exists to support the conclusion that Petitioner knowingly made two (2) additional material misrepresentations of information required for certification during his interview with the Davidson College Campus Police, which resulted in false information being provided to the Commission on the F-8 form. Petitioner made a material misrepresentation when responding to Question No. 49 of the F-8, insofar as Petitioner failed to disclose his illegal use of a “duster,” in addition to his illegal use of Adderall, Vicodin, and Valium pills. Petitioner made a second material misrepresentation on the F-8 when in response to Question No. 59, Petitioner failed to disclose that he had used Adderall, Vicodin, and Valium pills on several occasions without a valid prescription.

8. The Respondent may properly deny Petitioner’s application for certification pursuant to 12 NCAC 9A .0204(b)(6). Pursuant to 12 NCAC 9A .0205(b)(4), the period of sanction shall be not less than 5 years for material misrepresentation of any information required for certification.

9. Respondent’s finding of probable cause to deny Petitioner’s application for certification is supported by substantial evidence and is not arbitrary and capricious.

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

11. Petitioner has the burden of proof in the case at bar. Petitioner’s blind reliance on a form prepared by his wife was misplaced in that regardless of his faith in her abilities it remained his duty to insure the form was reporting accurate information. Beech Mountain Police Department has shown a willingness to give Petitioner an opportunity to demonstrate his ability to capably serve as a sworn law enforcement officer. However, Petitioner has failed to show by a preponderance of the evidence that Respondent’s proposed denial of Petitioner’s law enforcement officer certification is not supported by substantial evidence.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is proposed that the Respondent issue Petitioner certification and that Petitioner be placed on a 36 month probationary period, during which time Petitioner shall not violate an law (other than infractions and minor traffic offenses) of this state or any other state, any federal laws, any ordinances, any rules of this Commission. At the expiration of this 36 month period, Petitioner’s certification shall remain in full force and effect, provided Petitioner remains in compliance with all rules established by the Commission.

NOTICE

The agency making the final decision in this contested case 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 Commission. N.C.G.S. § 150B-40(e).

The Commission that will make the final decision in this contested case is the North Carolina Criminal Justice Education and Training Standards Commission.

This the 1st day of October, 2015.

Donald W. Overby
Administrative Law Judge