

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 02530

HUGH GEORGE LUSTER,)
Petitioner,)
)
v.)
)
NORTH CAROLINA CRIMINAL)
JUSTICE)
EDUCATION AND TRAINING)
STANDARDS COMMISSION,)
Respondent.)

PROPOSAL FOR DECISION

This case came on for hearing on July 15, 2015 before Administrative Law Judge Melissa Owens Lassiter in Fayetteville, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 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

Petitioner: Hugh George Luster
213 Lee Street
Spring Lake, North Carolina 28390

Respondent: Whitney Hendrix Belich
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUES

Does substantial evidence exist for Respondent to deny Petitioner's correctional officer certification for three years for knowingly making material misrepresentation?

RULES AT ISSUE

12 NCAC 09G .0504(b)(6)
12 NCAC 09G .0505(b)(5)

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 Administrative Law Judge makes the following Findings of Fact. In making the Findings of Fact, the undersigned Administrative Law Judge has weighed all the 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 all other believable evidence in the case.

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 that the Petitioner received by certified mail, the proposed denial of correctional officer certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "The Commission"), on March 3, 2015.

2. Respondent, 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 09G, to certify correctional officers and to revoke, suspend, or deny such certification.

3. Petitioner completed a 2006 Report of Appointment/Application for Certification Form F-5A for the Division of Adult Correction and Juvenile Justice on or about February 17, 2006. On March 13, 2006, Respondent issued Petitioner a probationary certification, and subsequently issued Petitioner a general certification on March 17, 2007.

4. Petitioner left employment with the Department of Corrections in April of 2007 and, at some point after leaving that employment, joined the Armed Forces. In June of 2014, after being discharged from the military in 2013, Petitioner again filled out a Report of Appointment/Application for Certification Form F5A (DAC). This form was signed on June 23, 2014.

5. In response to Question #3 on Petitioner's 2006 application, which asked, "Have you ever used any illegal drugs?" Petitioner answered "No."

6. In response to the same question on Petitioner's 2014 application, Petitioner answered "Yes. Experimented with marijuana in high school no more than five times."

7. On both the 2006 application and the 2014 application, Petitioner's signature indicated that, among other things, he understood and agreed that "any omission, falsification, or misrepresentation of any factor or portion of such information can be the sole basis for termination of my employment and/or denial, suspension, or revocation of my certification at any time."

8. When asked to clarify this discrepancy, Petitioner explained in notarized written statements provided to Criminal Justice Training and Standards Division on January 5, 2015 and March 31, 2015 that his use of marijuana had not, in fact, taken place in high school as he stated in his 2014 application. Instead, Petitioner stated that he had used marijuana after his original employment with the Department of Corrections but prior to entering the military. In his March 31, 2015 statement, Petitioner accounted for his misrepresentation by stating that he used marijuana not in high school but instead with friends he had “known since the beginning of high school.”

9. As in Petitioner’s written statement provided on March 31, 2015, Petitioner did not deny that his sworn statement on his 2014 application was a misrepresentation of the circumstances of his previous drug use at the hearing held July 15, 2015. Specifically, the fact that his drug use occurred much more recently than he stated on the 2014 application in that he did not use marijuana in high school but instead sometime after 2007. Given Petitioner’s age, high school would have been four to seven years prior to the time Petitioner now admits he used marijuana.

10. Petitioner’s account in the hearing on this matter was consistent with the written statements he provided on January 5, 2015 and again on March 31, 2015, which tended to indicate inadvertence in his misrepresentation of information on his 2014 application.

11. There is a significant difference in the time frame represented in Petitioner’s statement on his 2014 application and the time frame Petitioner now represents to be an accurate account of his drug use. Petitioner failed to provide a plausible reason for this discrepancy, as any person of ordinary intelligence would have no difficulty differentiating from drug use that occurred in high school to drug use that occurred as an adult, several years after high school. Therefore, Petitioner’s misrepresentation regarding his drug use on his 2014 application constitutes a knowing misrepresentation.

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. Pursuant to 12 NCAC 09G .0504(b)(6), the Commission may suspend, revoke, or deny the certification of a corrections 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 09G .0505(b)(5) provides that the period of sanction for a material misrepresentation of any information required for correctional officer certification shall be not less than three years; however, the Commission may either reduce or suspend the period of sanction or

substitute a period of probation in lieu of suspension of certification following an administrative hearing.

5. The findings of the Probable Cause Committee of the Respondent are supported by substantial evidence, and are not arbitrary and capricious.

6. 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).

7. Petitioner has the burden of proof in the case at bar. Petitioner has not shown by a preponderance of the evidence that he did not knowingly make a material misrepresentation on his 2014 Report of Appointment/Application for Certification. Respondent's proposed sanction regarding Petitioner's application for certification is supported by substantial evidence.

PROPOSAL FOR DECISION

Based on the foregoing Proposed Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge recommends Respondent deny Petitioner's corrections officer certification for a period of not less than three (3) years based upon Petitioner's material misrepresentations of information required for certification.

NOTICE

The North Carolina Criminal Justice Education and Training Standards Commission will make the Final Decision in this 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 18th day of August, 2015.

Melissa Owens Lassiter
Administrative Law Judge