

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 DOJ 05188

<p>Gerrod Bennett Gay Petitioner,</p> <p>v.</p> <p>N C Sheriffs' Education And Training Standards Commission Respondent.</p>	<p><b>PROPOSAL FOR DECISION</b></p>
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On November 18, 2015, Administrative Law Judge Melissa Owens Lassiter heard this case in Raleigh, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), the 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: Andy Gay, Esq.  
Darren G. Jackson, Esq.  
Gay, Jackson & McNally, L.L.P.  
P.O. Box 10  
500 North Arendell Avenue  
Zebulon, North Carolina 27597

Respondent: Matthew L. Boyatt, Assistant Attorney General

#### **ISSUE**

Whether Petitioner's application for certification should be denied based on Petitioner testing positive for the controlled substance Butalbital following a pre-employment drug screen on or about May 4, 2015.

Pursuant to N.C.G.S. §150B-41, the parties do hereby stipulate to the following Findings of Fact and Conclusions of Law.

#### **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 Summary Denial of Justice Officer's Certification letter mailed by Respondent Sheriffs' Commission on June 15, 2015.

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter referred to as "The Sheriffs' Commission") has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.

3. 12 NCAC 10B .0301(a)(6) (c) provides that every Justice Officer employed or certified in North Carolina shall have produced a negative result on a drug screen administered according to the following specifications:

(C) The drugs whose use shall be tested for shall include at least cannabis, cocaine, phencyclidine (PCP), opiates and amphetamines or their metabolites.

4. Further, 12 NCAC 10B .0204(b) (5) provides that the Commission shall revoke, deny, or suspend a law enforcement officer's certification when the Commission finds that the applicant for certification or certified officer has produced a positive result on any drug screen reported to the Respondent Commission, or reported to any other commission, agency, or board established to certify a person as a justice officer, corrections officer, or criminal justice officer, unless the positive result is due to a medically indicated cause.

5. Pursuant to 12 N.C.A.C. 10B .0205, when Respondent suspends or denies the certification of a justice officer for a positive drug screen, the period of sanction shall be not less than five years; however, Respondent may either reduce or suspend the period of sanction under Paragraph 2 (g) of this Rule, or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension.

6. Petitioner is currently an applicant for certification through the Franklin County Sheriff's Office.

7. On Saturday, May 2, 2015, Petitioner traveled to the Epsom Fire Department to meet with his father in order to pick up a water pump for Petitioner's tractor. Petitioner had not been feeling well and was suffering from a headache and chest/sinus congestion. Petitioner met with his father at approximately 10:00 a.m. Petitioner's father noticed that Petitioner did not appear to be feeling well. Petitioner told his father that he was suffering from a severe headache and congestion.

8. Petitioner's father gave Petitioner one (1) pill on May 2, 2015, and advised Petitioner that the pill was headache medication and that it would alleviate Petitioner's symptoms. Petitioner took the medication provided by his father and did not give the matter much thought at the time. At the time Petitioner took this medication, Petitioner did not have a prescription for Butalbital or Floricet. Petitioner later learned from his father that he had been provided the drug Floricet, which contains Butalbital, a schedule III controlled substance.

9. Two (2) days later on May 4, 2015, Petitioner presented to Urgent Care in order to submit to a drug screen in furtherance of his application for certification through the Sheriffs' Commission. Petitioner willingly submitted his urine sample for analysis.

10. Immediately following his drug screen, Petitioner saw a physician at Urgent Care on May 4, 2015 due to Petitioner's persistent cough and congestion. Petitioner was diagnosed as suffering from an acute upper respiratory infection. Petitioner was prescribed Zithromax, Hycodan, and Proventil.

11. On May 13, 2015, Petitioner learned that he tested positive for the controlled substance Butalbital. It was at this time that Petitioner contacted his father to inquire as to exactly what medication his father provided to Petitioner on May 2, 2015. As indicated above, Petitioner learned that his father gave him the prescription medication Floricet, which contains Butalbital, a schedule III controlled substance.

12. Petitioner's taking of medication without a valid prescription was limited to a one (1) time occurrence on May 2, 2015, when Petitioner took the prescription Floricet pill provided by his father.

13. Having reflected on his actions, Petitioner regrets having taken the medication provided by his father without first seeking medical attention and receiving a prescription from a licensed medical provider. Having accepted responsibility for his actions, it does not appear as though Petitioner poses a risk of engaging in similar activity once he is certified as a justice officer.

14. William Dennis, M.D., is a licensed physician in Henderson, North Carolina, who is familiar with the facts of this case. Dr. Dennis has reviewed Petitioner's medical records, to include Petitioner's positive drug screen result dated May 13, 2015, in addition to the records related to Petitioner's medical examination at Urgent Care on May 4, 2015.

15. It is Dr. Dennis's opinion to a reasonable degree of medical certainty that Petitioner's drug screen is consistent with Petitioner having taken one (1) tablet of Floricet. Dr. Dennis opined that the drug screen report and record in this case does not support the conclusion that Petitioner has a history of taking and abusing controlled substances.

16. Petitioner's use of the drug Butalbital without a valid prescription was limited to his one-time use of Floricet on May 2, 2015. Petitioner admits that what he did was wrong and that it was unlawful for him to take a prescription medication that had been prescribed to another person.

17. Petitioner's certification is subject to denial pursuant to 12 NCAC 10B .0204 (b)(5) based on Petitioner having produced a positive drug screen through the Sheriffs' Commission on or about May 13, 2015. Petitioner's positive drug screen was not the result of a medically indicated cause insofar as Petitioner had not consulted with a physician and had not been prescribed Floricet and/or Butalbital prior to May 2, 2015.

18. The Respondent has the discretion to issue a lesser sanction than outright denial of Petitioner's application for certification where extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension. See 12 N.C.A.C. 10B .0205 (2)(g).

19. The record in this case establishes that at the time Petitioner used the Floricet that had been prescribed to his father, Petitioner was suffering from significant congestion and a persistent headache. On May 4, 2015, Petitioner underwent a medical examination which resulted in a diagnosis of acute upper respiratory infection. Petitioner was prescribed Zithromax, Hycodan, and Proventil. These circumstances weigh in favor of issuing Petitioner certification.

20. Petitioner has the support of the law enforcement community, as evidenced by the Sheriff of Franklin County appearing at the hearing of this matter in support of Petitioner's application for certification.

### **CONCLUSIONS OF LAW**

1. The parties are properly before the Office of Administrative Hearings.
2. 12 N.C.A.C. 10B .0301(6)(c) requires every justice officer employed in North Carolina to produce negative drug screen results. The drug Butalbital is classified as a barbiturate, a schedule III controlled substance.
3. 12 N.C.A.C. 10B .0204(b)(5) provides that the Sheriffs' Education and Training Standards Commission shall revoke, deny, or suspend certification when the Commission finds that the applicant or certified officer has produced a positive drug screen reported to the Respondent Commission or to any other commission, agency, or board established to certify a person as a justice officer.
4. Petitioner tested positive for Butalbital on or about May 13, 2015. Petitioner did not possess a valid prescription for this controlled substance at the time he took the medication on May 2, 2015. Petitioner's conduct was unlawful insofar as Petitioner took medication that had been prescribed to his father. Petitioner is not in compliance with rule 12 N.C.A.C. 10B .0301(6)(c) and 12 N.C.A.C. 10B .0204(b)(5), and Petitioner's application for certification is therefore subject to denial
5. Pursuant to 12 N.C.A.C. 10B .0205(2)(g), when Respondent denies the certification of a justice officer for a positive drug screen result, the period of sanction shall be not less than five (5) years.
6. However, Pursuant to 12 N.C.A.C. 10B .0205(2)(g), Respondent may either reduce or suspend the period of sanction under this rule or substitute a period of probation in lieu of revocation or denial of certification following an administrative hearing, where extenuating circumstances brought out at the administrative hearing warrant such a reduction.

## **PROPOSAL FOR DECISION**

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned recommends Respondent issue Petitioner's justice officer's certification. Extenuating circumstances brought out at the administrative hearing warrant the issuance of Petitioner's certification. Petitioner's use of the Floricet that had been prescribed to his father was limited to one-time use on May 2, 2015. At that time, Petitioner was suffering from a significant headache and chest/sinus congestion. Petitioner has admitted that his actions were unlawful. The Petitioner regrets having taken the medication. There is no indication that Petitioner will engage in such behavior in the future. Therefore, the undersigned recommends that Petitioner be certified through the Respondent 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 Agency. N.C.G.S. § 150B-40(e).

The Agency that will make the Final Decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

This the 3<sup>rd</sup> day of December, 2015.

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Melissa Owens Lassiter  
Administrative Law Judge