

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 05370

<p>Greg Wayne Galloway Petitioner,</p> <p>v.</p> <p>N C Criminal Justice Education And Training Standards Commission Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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This contested case came on for hearing on November 2, 2015, before Administrative Law Judge Selina M. Brooks in Charlotte, North Carolina. This case was heard after Respondent requested, pursuant to North Carolina General Statute §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: George V. Laughrun, II
301 S. McDowell Street
Suite 602
Charlotte, North Carolina 28204

For Respondent: Whitney Hendrix Belich
N.C. Department of Justice
Law Enforcement Liaison Section
P.O. Box 629
Raleigh, North Carolina 27602-0629

WITNESSES

For Petitioner: Gregory Wayne Galloway, on his own behalf
Sergeant Marsha A. Dearing
Sergeant J.J. Ojaniit

For Respondent: Deputy Director Richard N. Squires
Lieutenant Andy Harris

EXHIBITS

Petitioner's Exhibits 1 – 16 were admitted.

Respondent's Exhibits 1 and 2 were admitted.

ISSUES

1. Whether Petitioner's law enforcement certification should be suspended due to the Petitioner's willful failure to submit to a test of his urine as requested by the Charlotte Mecklenburg Police Department?
2. Whether Petitioner's law enforcement certification should be suspended for lack of good moral character based upon Petitioner's action in substituting his urine at the time of testing?

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. In the absence of a transcript, the Undersigned has reviewed her notes as well as the documentary evidence to refresh her recollection.

APPLICABLE LAW AND RULES

NC Gen. Stat. § 17C-10
12 NCAC 09A.0204(b)(2) & (12), and (c)
12 NCAC 09A.0205 (c)(2)
12 NCAC 09C.0310
12 NCAC 09B.0101(3)

FINDINGS OF FACT

1. Both parties, the Petitioner, Gregory Wayne Galloway, and the Respondent, North Carolina Criminal Justice Education and Training Standards Commission (hereafter "Commission"), 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 Proposed Suspension of Law Enforcement Certification through a letter mailed by Respondent on January 8, 2015. (Respondent's Exhibit #1)
2. 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 9, to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. The Petitioner received his Law Enforcement Certification from the Commission on September 10, 1987 and has been employed by the Charlotte Mecklenburg Police Department (hereafter "CMPD") since that date. (Respondent's Exhibit #1)

4. On January 9, 2015, the Commission's Deputy Director Richard N. Squires, drafted a memorandum to be submitted to the Commission's Probable Cause Committee (hereafter "Committee") proposing a suspension of the Petitioner's certification as a law enforcement officer based upon two (2) allegations: that Petitioner refused to submit to an in-service drug screen; and that Petitioner lacked good moral character. (Respondent's Exhibit #1)

5. On May 19, 2015, the Committee found that probable cause existed to suspend the Petitioner's Law Enforcement Certification based upon the Petitioner's refusal to submit to an in-service drug test and that the Petitioner lacked good moral character to continue to hold such certification.

6. The Petitioner was notified of the findings of the Committee by certified mail on July 1, 2015. (Respondent's Exhibit # 2)

7. The Petitioner filed an appeal on July 8, 2015 and a contested case hearing was held on November 2, 2015, in Charlotte, North Carolina before the Undersigned.

8. Sergeant Ojaniit is a supervisor sergeant in the Freedom Division and supervisor of the school resource officers. He was contacted by Sergeant Dearing of the Internal Affairs Division, to locate the Petitioner for a random drug test on August 28, 2014. (Petitioner's Exhibit #1).

9. Sergeant Ojaniit picked up Petitioner around 9:30 a.m. and they arrived at Presbyterian Urgent Care at approximately 10 a.m.

10. Petitioner was unable to provide a urine sample and eventually he and Sergeant Ojaniit left the facility. (Petitioner's Exhibits #2 & 3).

11. Petitioner testified that he suffers from what is called "Shy Bladder" and he was unable to urinate on demand.

12. Sergeant Ojaniit advised his supervisor, Lieutenant Jim Hummel, that the Petitioner was unable to provide a urine sample and was told that Petitioner's drug test would be rescheduled.

13. Sergeant Ojaniit testified that he had previously escorted the Petitioner for a drug test several months earlier, approximately in March or April, 2014, and it took Petitioner over two and a half hours to produce a urine sample.

14. Sergeant Ojaniit further testified that on August 28, 2014 Petitioner was visibly upset, embarrassed and apologetic about his inability to urinate on demand and asked him whether or not a blood test could be performed.

15. Sergeant Ojaniit testified that the Petitioner was not trying to be evasive, was calm prior to the test, cooperative and he noticed no indications of Petitioner being either impaired or under the influence of any controlled substances.

16. Petitioner testified that on September 2, 2014, he went to Walmart and bought a cup to hold urine.

17. On September 3, 2014, Petitioner was again asked to provide a urine sample for a drug test. (Petitioner's Exhibit #3).

18. Petitioner testified that he filled the cup he had purchased at Walmart with his urine and concealed it on his person, to take to the drug screen test.

19. Sergeant Dearing, has been a sergeant with the Charlotte Mecklenburg Police Department for twenty-three (23) years and has been with Internal Affairs Division for approximately two (2) years. The Internal Affairs Division of the CMPD is responsible for investigating incidents of employee misconduct.

20. On September 3, 2014, Lieutenant Harris, Sergeant Robert Fey, Sergeant Dearing and the Petitioner drove to the Wolfe Testing Facility around 7:15 p.m. The Wolfe Testing Facility is a drug screening company approved by the CMPD for random drug testing.

21. Sergeant Fey and Lieutenant Harris went to visually witness Petitioner provide urine for the drug test.

22. Petitioner was provided several glasses of water and everything appeared normal.

23. Petitioner stated to Lieutenant Harris that he "could not pee in public" and then tried to urinate again at approximately 8 p.m.

24. Lieutenant Harris turned his back and did not watch Petitioner urinate.

25. Petitioner testified that he poured the urine from the concealed cup into the cup provided by the lab because he was afraid he was not going to be able to urinate on demand.

26. When Petitioner came out of the bathroom with the cup of urine, his hand was shaking and he appeared to be visibly nervous.

27. A Wolfe Testing Facility technician opened the cup of urine, used a temperature gauge to test the urine in the cup, and stated that the sample was not acceptable.

28. Lieutenant Harris asked the Petitioner if there was anything he wished to tell him. Petitioner admitted that he brought his own urine which he collected the day before at home because he was afraid that he would not be able to urinate on demand.

29. Lieutenant Harris was not aware of any use of drugs or alcohol by the Petitioner and at no time did the Petitioner exhibit any signs of being under the influence of any alcohol or controlled substances. Lieutenant Harris believes Petitioner experienced “stage fright” and could not urinate on demand at the lab.

30. On September 3 and 4, 2014, Petitioner’s breath tests were negative. (Petitioner’s Exhibits 4 & 5)

31. On September, 4, 2014, Petitioner was again transported to the Wolfe Testing facility. He was able to provide a valid urine sample, but it took two (2) hours and fifty seven (57) minutes, the limit being three (3) hours. This sample was negative for any controlled or banned substances. (Petitioner’s Exhibit 6)

32. The CMPD’s policy is not to obtain a blood test for individuals who are requested to submit a urine sample.

33. Petitioner has been seen by a physician and continues to receive treatment for Benign Prostatic Hyperplasia. (Petitioner’s Exhibit 8)

34. Pursuant to the City of Charlotte Drug Free Workplace Requirements, the Petitioner had five (5) days to obtain a medical review of his failure to urinate and the Petitioner complied. (Petitioner’s Exhibits 8, 15 & 16).

35. The CMPD took administrative action for Petitioner’s conduct and he was suspended for one hundred and sixty (160) hours.

36. The Petitioner did not exercise his a right to appeal this suspension to the City of Charlotte Civil Service Board.

37. The Petitioner accepts responsibility for his conduct and chose to accept the CMPD suspension.

38. Petitioner has been in full compliance with the suspension and as of the date of this contested case hearing had returned to work at the CMPD.

39. From 1987 to 2014, Petitioner has been rated by the CMPD under what is called Performance Review and Development Evaluations (PRD). These PRD’s are basically report cards from the supervisors who prepare and provide to subordinate officers regarding their job performance. Petitioner’s PRD evaluations range from “above average” to “exceptional performance” with the last three (3) years, 2011-2014, being rated “exceptional performance.” (Petitioner’s Exhibit # 13)

40. Petitioner’s Internal Affairs history reveals that he has two (2) sustained violations during his twenty-eight (28) years in law enforcement, to wit:

failing to activate his emergency equipment or notify dispatch of pursuit in 1989; and

in 1992, he improperly failed to document evidence as a result of a seizure of a gun and a knife.

(Petitioner's Exhibit # 14)

41. The Petitioner has no honesty or moral turpitude violations during his twenty-eight (28) years with the CMPD.

42. Petitioner is a twenty-eight (28) year veteran of the CMPD and has been employed in the capacity of a school resource officer at E.E. Waddell High School for the past fifteen (15) years.

43. At the time of the contested case hearing, Petitioner was only 6 months away from retirement.

44. That Sergeant Dearing testified that it was her understanding that the type of conduct engaged by the Petitioner does not fall under the *Giglio* mandate that would require the CMPD to turn over the results of the Petitioner's actions to any defense lawyer in any criminal proceeding where the Petitioner would be called to testify.

BASED UPON the forgoing FINDINGS OF FACT, 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 9G, to certify law enforcement officers and to revoke, suspend or deny such certification.

3. Respondent's Probable Cause Committee found that probable cause existed that Petitioner failed or refused to submit to a lateral or in-service drug screen as required and reported by the CMPD pursuant to 12 NCAC 09A .0204(b)(12) & (c) ; 12 NCAC 09A .0205(b)(2) and 12 NCAC 09C .0310.

4. That 12 NCAC 09A.0204 (Suspension: Revocation: or Denial of Certification) states, in pertinent part:

(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:

(12) has refused to submit to an applicant or lateral transferee drug screen as required by the rules in this Chapter, or has refused to submit to an in-service drug screen pursuant to the guidelines set forth in the Drug Screening Implementation Guide as required by the agency through which the officer is certified;

(c) Following suspension, revocation, or denial of the person's certification, the person may not remain employed or appointed as a criminal justice officer and the person may not exercise any authority of a criminal justice officer during a period for which the person's certification is suspended, revoked, or denied.

5. That 12 NCAC 09A.0205 (Period of Suspension: Revocation: or Denial) states, in pertinent part:

(b) When the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five (5) years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (b) of this Rule or substitute of period of probation in lieu of suspension of certification following and administrative hearing, where the cause of sanction is:...

(2) refusal to submit to the applicant or lateral transferee drug screen required by these Rules; ...

6. That 12 NCAC 09C.0310 (Agency Reporting of Drug Screening Results) states that:

(a) Each agency shall report in writing to the Criminal Justice Standards Division all refusals and all positive results of required drug screening obtained from applicants and lateral transfers unless the positive result has been explained to the satisfaction of the agency's medical review officer who shall be a licensed physician.

(b) Each agency, if it conducts a drug screen for in-service officers, shall report in writing positive results or refusals to submit to an in-service drug screening to the Criminal Justice Standards Division within 30 days of the positive result or refusal unless the positive result has been explained to the satisfaction of the agency's medical review officer to the extent the drug screen conducted conforms to the specifications of 12 NCAC 09B.0101(5)(a),(b),(c),(d) and (f).

(c) For reporting purposes, a result is considered "positive" only in those cases where the drug screen reveals the presence of an illegal drug at a level equal to or greater than the threshold value as established by the Department of

Health and Human Services for Federal Workplace Drug Testing Programs and incorporated by reference in 12 NCAC 09B.0101(5)(d).

- (d) All written reports required to be submitted to the Criminal Justice Standards Division by this Rule shall contain the individual's name, date of birth and either the date the test was administered or the date of the refusal.

7. Respondent's Probable Cause Committee also found that Petitioner failed to comply with the minimum employment standard of good moral character as required by N.C. Gen. Stat. § 17C-10, 12 NCAC 09A .0204(b)(2), 12 NCAC 09B .0101(3), NCAC 09A .0205(c)(2).

8. N.C. Gen. Stat. §17C-10 states: "In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, shall fix other qualifications for the employment, training, and retention of criminal justice officers including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of criminal justice officer, and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements."

9. That 12 NCAC 09A.0204 (Suspension: Revocation: or Denial of Certification) states, in pertinent part:

- (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;

10. That 12 NCAC 09B.0101, states the minimum qualifications for criminal justice officers, in pertinent part:

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

11. That 12 NCAC 09A.0205(c)(2) states: "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 case of sanction is...(2) failure to meet or maintain the minimum standards of employment."

12. That evidence supports the conclusion that the Petitioner willfully failed to submit to an in-service drug screen test.

13. That a preponderance of the evidence does not exist to support the conclusion that the Petitioner lacks good moral character required of law enforcement officers.

14. The Respondent has shown that Petitioner's refusal to submit to an in-service drug screen is supported by substantial evidence thereby subjecting him to possible suspension of his Law Enforcement Training certification.

15. The Petitioner has met this burden of proving that he has good moral character.

DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned Administrative Law Judge, Selina M. Brooks, recommends that the Petitioner's law enforcement certification be suspended for a period of five (5) years but that the suspension be suspended pursuant to 12 NCAC 09A .0205(c)(2).

NOTICE

The N. C. Criminal Justice Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, 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 pursuant to N.C. Gen. Stat. § 150B-40(e).

It hereby is ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

IT IS SO ORDERED.

This the 3rd day of February, 2016.

Selina M Brooks
Administrative Law Judge