

STATE OF NORTH CAROLINA
COUNTY OF HERTFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 05371

<p>Timothy Arnold Ruffin Petitioner,</p> <p>v.</p> <p>N C Criminal Justice Education And Training Standards Commission Respondent.</p>	<p style="text-align: center;">PROPOSAL FOR DECISION</p>
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THIS MATTER came on for hearing on December 14, 2015 before Administrative Law Judge William T. Culpepper, III in Elizabeth City, 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

Petitioner: Thomas B. P. Wood
Godwin & Godwin
Post Office Box 44
Gatesville, North Carolina 27938
Attorney for Petitioner

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

ISSUES

Does substantial evidence exist for Respondent to revoke Petitioner's correctional officer certification for the commission of the felony offense of knowingly possessing a gun on educational property?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. 14-269.2(b)
12 NCAC 09G .0504(a) & .0505(a)(1)

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 the Petitioner received, by certified mail, the proposed revocation letter mailed by Respondent.

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

3. Petitioner is employed as a correctional officer with the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice.

4. Petitioner was awarded a probationary certification by Respondent on July 23, 2007, to serve as a correctional officer. He was awarded a general certification on July 28, 2008, and is currently certified with the Division of Adult Correction and Juvenile Justice.

5. Petitioner is, and has been for over 5 years, a member of the Security Threat Group (STG) of the Division of Adult Correction and Juvenile Justice that deals with gang members. He checks gang members in prison to make sure that they are not in possession of any contraband, cell phones, or social media devices. Over the course of years dealing with gang members, he has been threatened by high ranking gang members in the State of North Carolina, both inside and outside of prison. This is the main reason that he routinely openly carries his personal firearm, a black semiautomatic .40 caliber Taurus serial #35325 handgun, when he is off-duty, because he has actually encountered these gang members outside of prison.

6. The K. E. White Graduate & Continuing Education Center (“K. E. White Center”, “K. E. White building”, “White Center”, “White facility”, or “White building”) is a part of Elizabeth City State University (“ECSU” or “university”) located in Elizabeth City, North Carolina. The White facility is located on Weeksville Road adjacent to, but not within, the main campus of the university. The main campus of ECSU is enveloped by a brick and metal fence with flags. The White facility is not located within the confines of this area of the university. The main campus of the university and the White facility are separated by non-university buildings and

a street. The flags that are recognized as being present on the campus of ECSU do not extend out to the K. E. White Center.

7. The White building is used for both ECSU educational purposes and by outside groups that rent the building for private parties unrelated to the university.

8. There is letter signage on the front of the White building that identifies its affiliation with Elizabeth City State University; however, this signage is not illuminated at night.

9. There are 3 entrances to the K. E. White Center. One entrance is on Edgewood Drive. There is a sign at the Edgewood Drive entrance which has a small round courtesy-type frontal light as is shown in one of the photographs contained in Respondent's Exhibit 1. The words "Elizabeth City State University" on this sign are located at the bottom of the sign and are significantly smaller in letter size and area relative to the other lettering on this sign.

10. Another entrance to the K. E. White Center is located on Weeksville Road. Near this entrance is a larger brick sign with white lettering. A small frontal light is located some distance from this sign as is shown in one of the photographs contained in Respondent's Exhibit 1. The words "Elizabeth City State University" are again located at the bottom of this sign and are dwarfed by the size and area of the "K. E. White Graduate & Continuing Education Center" lettering on the sign.

11. There is another entrance to the White facility down Weeksville Road past the main Weeksville Road entrance, which is a third entrance. The sign at this entrance sits back from the entrance and is not illuminated at night.

12. On the night of April 20, 2014, a group of black biker organizations unrelated to the university were having a party at the K. E. White Center. Well over 400 people were present at this party, which began at 10:00 PM and ended at 2:00 AM. There was nothing about this party that, in and of itself, would lead a person to reasonably know that it was being held on educational property.

13. On the night of April 20, 2014, Petitioner received a call from his cousin, Wayne Hathaway, who stated that he was at a function at the K. E. White building and requested that Petitioner come over to see him. Prior to this night, Petitioner had never been to or heard about the K. E. White Center. Prior to obtaining his correctional officer certification, Petitioner had worked two years for a private security company doing security work for ECSU. During this period Petitioner never worked at, or had any knowledge of, the K. E. White building.

14. Petitioner telephoned his cousin when he arrived in Elizabeth City. Petitioner stayed on the phone with his cousin who was giving him directions to the White building, because Petitioner had never been there and did not know how to get there. Petitioner came to a stoplight and made a right turn to go to the K. E. White Center. After Petitioner made the right turn, he did not observe anything leading up to the White facility to indicate to him that he was on university property.

15. Petitioner did not park his vehicle close to the White building and did not park in the parking lot area. Petitioner had to park on the grass some distance past and away from the White building, because there were a high number of other vehicles already parked. When Petitioner parked, he did not observe any signage that related the White Center to ECSU. It was approximately 15 minutes before midnight at the time Petitioner parked his vehicle.

16. When Petitioner exited his vehicle, he was still on the phone talking to his cousin who was telling Petitioner where to walk to get to where the cousin was standing. Petitioner began walking up a sidewalk to get to where his cousin was located at the White building. At this time Petitioner was openly carrying his black .40 caliber Taurus handgun in a black holster attached to his belt.

17. As Petitioner approached his cousin, who was standing 3-5 feet from ECSU security officer John Williams ("Officer Williams"), and while Petitioner was continuing to walk along the sidewalk, the holster broke free from Petitioner's belt. Petitioner reached down to catch his gun to keep it from hitting the ground. Officer Williams observed that Petitioner was in possession of a weapon and yelled to Petitioner: "stop", "weapon", "place your hands over your head". Petitioner put his gun in his back pocket and raised his hands over his head like Officer Williams had told him to do.

18. Officer Williams escorted Petitioner, with his arms raised in the air, over to a police vehicle. At the vehicle Petitioner was handcuffed with his hands behind his back. Officer Williams asked Petitioner where his gun was located. Petitioner told Officer Williams that the gun was in his back pocket and turned his body toward Officer Williams to show him that the gun was in his back pocket. Officer Williams pulled the holster out of Petitioner's back pocket and showed it to Petitioner and said to Petitioner that the gun was not in his back pocket.

19. Petitioner told Officer Williams that if the gun was not in his back pocket, then his cousin must have it, because he had been standing next to him and there had been no one else standing near or beside Officer Williams and Petitioner other than Petitioner's cousin. Petitioner gave Officer Williams his cousin's name.

20. ECSU police officer Paul Cherry ("Officer Cherry") arrived on the scene. Officer Williams had control of Petitioner at that time. When Officer Cherry inquired as to what was going on, Officer Williams responded that Petitioner had a gun. Officer Cherry conducted his own body search of Petitioner and did not find a weapon on him, only an empty holster in Petitioner's right rear pocket. Officer Cherry then placed Petitioner in the rear of his patrol vehicle which was sitting in front of the White building.

21. At this time the police officers were still in search of the subject firearm. The officers were trying to find out who had the weapon and if the weapon was still on the ECSU campus. After approximately 10 minutes Petitioner's cousin, Wayne Hathaway, approached Officer Williams and handed him the .40 caliber Taurus handgun. Officer Williams handed the gun to Officer Cherry who then placed the weapon in the rear of his vehicle's trunk.

22. Petitioner was subsequently charged with the felony offense of “Possessing a Gun on Educational Property” on the campus of Elizabeth City State University in Pasquotank County, North Carolina, in violation of N.C. Gen. Stat. 14-269.2(b).

23. At the time of his detention by the officers, Petitioner was informed by them that he was being detained because he was in possession of a gun on educational property. At that time, the Petitioner explained to the officers that he did not know that he was on educational property.

24. During the hearing of this contested case, the Petitioner testified adamantly that he did not know that he was on educational property at the time of the subject incident. The testimony of the Petitioner in this regard is credible in light of all of the other facts and circumstances of this case.

25. Petitioner also testified that when he was taken before a magistrate for processing and the officers informed the magistrate that the Petitioner was to be charged with possession of a gun at the K. E. White Center, the magistrate remarked to the officers that they needed to “label that building, because a lot of people don’t know that it is educational property”. Petitioner further testified that the officers agreed with the magistrate’s statement. Petitioner further testified that one of the officers with the Elizabeth City Police Department thereafter remarked that he would do everything he could to help Petitioner because “a lot of people don’t know” that the K. E. White Center is educational property. Petitioner also testified that Officer Williams was one of the officers present at that time and that he also told Petitioner the same thing. The foregoing testimony of Petitioner corroborates all of the other facts and circumstances of this case that indicate that the Petitioner did not have knowledge that the K. E. White Center was educational property at the time of the alleged offense.

26. On April 20, 2014, when Petitioner was in possession of his .40 caliber Taurus handgun on the premises of the K. E. White Center, the Petitioner did not know that the K. E. White Center was a part of Elizabeth City State University.

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 of Law are Findings of Fact, they should be so considered without regard to the given labels.

3. 12 NCAC 09G .0504(a) provides, in pertinent part, that the North Carolina Criminal Justice Education and Training Standards Commission may, based on the evidence for each case, revoke the certification of a correctional officer when the Commission finds that the certified officer has committed or been convicted of a felony offense.

4. 12 NCAC 09G .0505(a)(1) provides, in pertinent part, that when the North Carolina Criminal Justice Education and Training Standards Commission revokes the certification of a corrections officer pursuant to 12 NCAC 09G .0504, the period of the sanction shall be 10 years where the cause of sanction is commission of a felony offense.

5. N.C. Gen. Stat. 14-269.2(b) provides, in pertinent part, that it shall be a Class I felony for any person **knowingly** to possess or carry, whether openly or concealed, any gun, rifle, pistol, or any other firearm of any kind on educational property. (emphasis supplied).

6. In *State v. Huckelba*, 771 S.E. 2d 809 (2015) (Bryant, J. dissenting), the North Carolina Court of Appeals recently held that the word “knowingly”, as used in N.C. Gen. Stat. 14-269.2(b), modifies *both* the “possess or carry” clause *and* the “on educational property” clause. Thus, a conviction under N.C. Gen. Stat. 14-269.2(b) cannot be had without proof that Petitioner *both* knowingly entered educational property *and* knowingly possessed a firearm or prohibited weapon. Whether the Petitioner had knowledge of his presence on educational property is determined by reference to the facts and circumstances surrounding this contested case.

7. The North Carolina Supreme Court subsequently reversed the Court of Appeals in *State v. Huckelba*, 780 S.E.2d 750 (2015) “For the reasons stated in the dissenting opinion”. However, in pertinent part, that dissenting opinion (Bryant, J.) reads: “The question here regards whether the trial court committed **plain error when instructing the jury** on the felony charge of possessing a weapon on campus or other educational property in violation of N.C.G.S. 14-269.2(b). . . . The majority opinion carefully considers whether ‘knowingly’ modifies only ‘possess or carry’ or whether it extends to the phrase ‘on educational property’. . . . [T]he majority holds that ‘the “knowingly” mental state in N.C. Gen. Stat. 14-269.2(b) must modify both clauses – “possess or carry” and “on educational property”.’ **I do not necessarily take issue with the analysis of the statute.** However, . . . the critical inquiry here is whether in failing to instruct the jury they had to find the defendant was knowingly on educational property . . . the trial court’s error amounted to plain error. I submit that it does not.” (emphasis supplied). 771 S.E.2d at 827. Thus, the holding of the Court of Appeals described in Conclusion of Law 6 above remains the law of North Carolina.

8. On April 20, 2014, the Petitioner did not commit the felony offense of knowingly possessing a gun on educational property in Pasquotank County, North Carolina, on the campus of Elizabeth City State University, in violation of N.C. Gen. Stat. 14-269.2(b), because he did not know that he was on educational property at the time of the alleged offense.

9. Respondent may not properly revoke Petitioner’s certification for the commission of a felony offense following his certification.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that the Petitioner’s certification as a correctional officer **not** be revoked for a period of 10 years for the commission of a felony criminal offense.

NOTICE AND ORDER

The agency making the final decision in this contested case may make its final decision only after this Proposal For Decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the agency. N.C. Gen. Stat. 150B-40(e). The agency that will make the final decision in this contested case is the North Carolina Criminal Justice Education and Training Standards Commission.

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.

This the 26th day of February, 2016.

William T Culpepper III
Administrative Law Judge