

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 07342

<p>Robert Lee Benton 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 MATTER came on for hearing before Hon. J. Randolph Ward on October 15, 2015 in Raleigh, North Carolina, upon Respondent's request, pursuant to N.C. Gen. Stat. § 150B-40(e), for designation of an Administrative Law Judge to preside at the hearing of this contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: Robert O. Crawford, III
Crawford & Crawford, LLP
Raleigh, N.C.

Respondent: Whitney Hendrix Belich
Assistant Attorney General
Raleigh, N.C.

ISSUE

Does the Respondent Criminal Justice Education and Training Standards Commission have probable cause to suspend Petitioner's certification as a correctional officer for not less than three years on the grounds that Petitioner committed a misdemeanor offense in South Carolina (Criminal Domestic Violence) on November 8, 2014, in violation of 12 NCAC 9G.0504(b)(3)?

STATUTE AND RULES AT ISSUE

N.C. Gen. Stat. § 14-33; 17C-10; 150B-23; and, 150B-34. S.C. Code Ann. § 16-25-20. 12 NCAC 9G.0102; 12 NCAC 9G.0504; and, 12 NCAC 9G.0505.

WITNESSES

For Petitioner: Correctional Officer Robert L. Benton, Petitioner

For Respondent: Officer Jerry Blackwood, North Myrtle Beach Police Dept. (via telephone)
Ms. Michelle Schilling, Investigator, Criminal Justice Standards Division

EXHIBITS

Petitioner's Exhibits

1. Schilling's Interview Notes of Robert Benton
2. Schilling's Telephone Interview Notes of Jerry Blackwood
3. Schilling's Telephone Interview Notes of David Benton
4. Schilling's Telephone Conversation Log of Clifford Welsh
5. Schilling's Telephone Conversation Log of Heather Durfee
6. Charge Reduction Request dated February 18, 2015
7. McLeod Seacoast Hospital Records dated November 8, 2014 for Robert Benton
8. Victim Witness Rights for Robert Benton dated November 8, 2014

Respondent's Exhibits

1. Memo dated July 15, 2015, to the Probable Cause Committee and attached pages 1-24
2. Letter dated September 15, 2015, from Steven Combs to Petitioner

Sua Sponte Ruling on Admissibility of the Criminal Records

It is not clear that the records of Petitioner's criminal court proceedings are properly admissible without a South Carolina Court order. *See*, S.C. Code § 17-1-40(A) and (C)(1). Both Officer Blackwood, and a court official interviewed by the Commission's investigator identified these materials as "expunged." However, since they were offered in evidence without objection, tend to clarify the circumstances described by the witnesses with direct knowledge of the case, and yet are not critical to determining the ultimate question in this particular case, and thus are not prejudicial to either party, they remain in the record. N.C. Gen. Stat. § 803(8).

UPON DUE CONSIDERATION of the arguments and stipulations of counsel; the exhibits admitted; and the sworn testimony of each of the witnesses, viewed in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they may have, and whether their testimony is reasonable and consistent with other credible evidence; and, upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

FINDINGS OF FACT

The undersigned adopts verbatim the following undisputed facts stipulated by the parties:

1. Since 2010, Petitioner has been employed as a correctional officer at Central Prison with the N.C. Department of Public Safety - Division of Adult Correction and Juvenile Justice.
2. On November 9, 2014, a warrant was issued for Petitioner's arrest for Criminal Domestic Violence (S.C. Code Ann. § 16-25-20) in North Myrtle Beach, South Carolina, for an incident occurring on November 8, 2014.
3. On December 8, 2014, the arrest warrant was delivered to Petitioner when he turned himself in to the North Myrtle Beach Police Department.
4. Petitioner was released on a \$1,000 secured bond.
5. On February 18, 2015, the North Myrtle Beach Municipal Court prosecutor disposed of the charge with a "Nolle Prose." The charge was dismissed at the request of the victim by affidavit. The prosecutor noted that the victim and defendant reside out of state.
6. By letter dated September 15, 2015, Steven G. Combs of the Criminal Justice Standards Division notified Petitioner that the Criminal Justice Education and Training Standards Commission had found probable cause to believe that his certification as a correctional officer should be suspended for not less than three years.
7. On September 30, 2015, Petitioner timely requested an administrative hearing.

Upon the preponderance of the evidence of record, the undersigned further finds as facts:

1. Petitioner Robert L. Benton, 35, is a 1999 graduate of North Myrtle Beach High School. He joined the United States Army in 2000, and was a rigger for the 82nd Airborne. He was honorably discharged in 2003 for medical reasons following a back injury in a parachute accident. Petitioner's back injury and resulting disability causes numbness in his legs and radiating pain if spinal nerves become inflamed.

2. Petitioner owns a home in Fayetteville, where he has resided for approximately 15 years. From 2003 to 2010, prior to becoming a correctional officer, he was employed in various jobs in Fayetteville and North Myrtle Beach, South Carolina.

3. In November 2014, Petitioner was working third shift at Central Prison (7 p.m. - 7 a.m.), and lived with Ms. Heather Durfee, and their eight-month old daughter in Fayetteville.

4. On November 7-8, 2014, Petitioner and Ms. Durfee make their first trip out of town since the birth of their baby to visit family and friends in their hometown of North Myrtle Beach, South Carolina. Due to his work schedule and the long drive, Petitioner arrived fatigued. However, the couple left their daughter in the care of Petitioner's stepmother, and went to a party

at the home of a couple named Smith at 503 Madison Drive. Among others, Petitioner's brother, David Benton, was present, as was his father during the evening hours. The party was in a recreation room on the ground floor of the Smiths' house with a pool table, bar and barstools, a television and a karaoke machine.

5. During the course of the night and early morning hours, Ms. Durfee consumed an unusual amount of alcohol. The drinking affected Ms. Durfee's behavior. She became irritable, and her speech was slurred. Petitioner had a beer when he first arrived, and then drank Coke and a lemonade throughout the night. He was sleep-deprived from working third shift at Central Prison, but partied with the group through the night.

6. At approximately 6:00 a.m., on November 8, 2014, Ms. Durfee wanted to go to Petitioner's father's house where their daughter was. Petitioner did not want to wake his parents and the baby, and felt that Ms. Durfee was not in a presentable condition for visiting his parents then.

7. An altercation ensued. Ms. Durfee hit Petitioner in the neck, causing him to fall off the barstool and onto the floor. As he fell backward, Petitioner hit the back of his head on the pool table and/or the concrete floor. He testified that he hit the floor with his weight right on the spinal disks damaged by his service-related injury.

8. Ms. Durfee jumped on top of Petitioner and was hitting him while he was on the floor. Petitioner testified that he tried to block her blows, but no injury consistent with a fist punch was observed. Another guest pulled Ms. Durfee off the Petitioner and shoved her away, and David Benton put himself between her and his brother. Their host, Mr. Smith, invited Ms. Durfee to go outside to break up the confrontation.

9. Police later observed that Ms. Durfee had sustained a bump on the head, which she attributed to this fracas, and a bruised elbow that was probably sustained either in this altercation, or later when she apparently fell in the parking lot of a restaurant.

10. David Benton believes that Petitioner briefly lost consciousness after his fall from the barstool. (Petitioner's Exhibit 3, page 2; hereinafter, "P Ex 3, p2.") Petitioner testified that he lost feeling in his legs and felt dizzy as a result of his fall, but that he got back on the barstool. Twenty or thirty minutes later, Petitioner went outside to get some fresh air.

11. Ms. Durfee again confronted Petitioner when he went outside, wanting to go to his parents' home. Petitioner responded that it was not a good time to go back to the house, particularly since she had just attacked him.

12. Ms. Durfee angrily shoved Petitioner, who fell on the driveway. He temporarily lost feeling in his legs again. David Benton saw Petitioner on the driveway and called 911. (P Ex 3). Ms. Durfee went to her mother's home in North Myrtle Beach. (P Ex 1) At approximately 8:00 a.m., an EMS unit arrived, and put Petitioner on a backboard to transport him for medical attention.

13. Officer Jerry Blackwood of the North Myrtle Beach Police Department gave testimony at the hearing by telephone, with the consent of the parties. He had recently returned to work after a medical leave due to an employment-related injury. While responding to a domestic disturbance call, his leg had been broken in four places.

14. Officer Blackwood arrived at 503 Madison Drive at about the same time as the EMS unit. He spoke to Petitioner, who said he had been punched and knocked out by his girlfriend, Heather Durfee. Officer Blackwood observed a minor scratch on Petitioner's neck. Ms. Durfee was not on the scene and was reported to have walked off. He observed that the group had been partying and, felt that others present were too intoxicated to provide useful information. To some degree, he may have mistaken the effects of Petitioner's fatigue, sleep deprivation, pain, immobility and upset over the assaults for the effects of alcohol.

15. Petitioner was transported by EMS to the emergency department of McLeod Seacoast Hospital. At the emergency department, Petitioner reported being assaulted by his girlfriend and that he had head and neck pain. (P Ex 7). A CT scan of Petitioner's head and cervical spine was negative for a fracture. (P Ex 7). Petitioner was discharged at 10:25 a.m. on November 8. His father picked him up and took him to the house. (P Ex 7). Petitioner took some ibuprofen and rested the remainder of the afternoon.

16. Officer Blackwood went to the hospital to speak to Petitioner, and to notify him of his rights as a victim. Petitioner asked to be informed of any police action against Ms. Durfee (P Ex 8).

17. At approximately 12:36 p.m. on November 8 -- 4 ½ hours after Petitioner received medical attention -- a 911 call resulted in EMS being dispatched to Benny Rappa's Trattoria restaurant a few blocks away from the party location on Madison Drive for Ms. Durfee. Officer Blackwood was dispatched to that location with other officers. Officer Blackwood testified that Ms. Durfee portrayed Petitioner as the aggressor in their altercation, and that a bump on her head was observed. The dispatcher's notes read, "County states that behind the restaurant is a female that was knocked out;" and, "the female doesn't remember much/she has been drinking." (Resp Ex 1, pp, 8-9, 12).

18. Ms. Durfee was transported to the emergency department where she was seen and released. Officer Blackwood testified that he notified her of her victim's rights at the hospital, recalled that she did not wish to say much to him. She did state that she lived with Robert Benton in North Carolina.

19. On March 26, 2015, Ms. Schilling interviewed Ms. Durfee via telephone. (P Ex 5). Ms. Durfee stated that she pushed Petitioner and that he never struck her. She said she was at Benny Rappa's to eat, and called 911 when a pre-existing bladder problem flared up. Ms. Durfee's hospital visit records were not obtained, but circumstances suggest that she may have been suffering from postpartum bladder dysfunction, exacerbated by drinking alcohol. She attributed the elbow bruise observed by police to an accident in her yard three days before the altercation. She stated that she never told the police that Petitioner assaulted her, and told them when asked that she did not want to press charges against Petitioner. (P Ex 5).

20. Later on November 8, at approximately 5:00 p.m. – 6:00 p.m., Ms. Durfee’s mother dropped her off at Petitioner’s father’s house. Petitioner and Ms. Durfee returned together to Fayetteville the following morning.

21. On November 9, 2014, Officer Blackwood applied for a warrant for arrest for Petitioner for “Criminal Domestic Violence.” (Resp Ex 1, p. 6).

22. On December 8, 2014, after learning of the charge and arrest warrant, Petitioner made arrangements to turn himself in. He was released on a \$1,000 bond. (Resp Ex 1, p. 4). The court determined that a protective order was not needed.

23. On December 14, 2014, Petitioner provided an initial written statement of the incident for his employer. (Resp Ex 1, pp. 13-14). On January 21, 2015, Petitioner provided a second and more detailed written statement of the incident to his employer. (Resp Ex 1, pp. 15-16).

24. Ms. Durfee submitted a notarized affidavit to the prosecutor stating, in pertinent part, that she and petitioner “had been drinking good bit ... something we do not actually do ...”; that “a verbal confrontation” had gotten out of control; and, that they had “no history of violence between each other.” (Resp Ex 1, pp. 17-18). On February 18, 2015, the North Myrtle Beach Municipal Court dismissed the charge at the request of the prosecutor. (P Ex 6).

25. On March 25, 2015, Commission’s investigator, Michelle Schilling, interviewed Petitioner at Central Prison. (P Ex 1). His verbal statement was consistent with his two prior written statements given to his employer.

26. The record contains the testimony or statements three witnesses to the altercation. Each avers that Petitioner did not assault Ms. Durfee.

27. As of May 6, 2015, Ms. Durfee separated from Petitioner and returned to live in North Myrtle Beach for reasons unrelated to the incident on November 8, 2014. (Resp Ex 1, p. 19). Petitioner and Ms. Durfee have a joint custody and child support agreement currently in place and there are no pending issues between them. Petitioner has his daughter two weeks per month during his short work week. Petitioner is current in his child support obligation.

28. Since the date of the incident, Ms. Durfee’s statements and actions have been consistent with her representations to the South Carolina Court and Respondent’s investigator that Petitioner did not assault her, and that he has been a “good father and great friend,” before and after their amicable separation. (Ex. 1, p. 19)

29. There is no evidence of a history or pattern of domestic abuse between Petitioner and Ms. Durfee. Other than the incident Petitioner described, there is no report or suggestion of another physical altercation between them in the record.

30. Petitioner creditably testified that he did not assault Ms. Durfee on November 8, 2014.

31. The preponderance of the evidence presented at the hearing, taken as a whole, fails to establish that Petitioner committed the misdemeanor offense of Criminal Domestic Violence in South Carolina.

BASED UPON the foregoing 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. N.C. Gen. Stat. 150B-23.

2. To the extent that the foregoing Findings of Fact contain conclusions of law, or that the Conclusions of Law below are findings of fact, they should be so considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

3. 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 correctional officers, and to revoke, suspend, or deny such certification.

4. The Commission may suspend, revoke, or deny the certification of a corrections officer when the Commission finds that a certified officer has committed a misdemeanor in North Carolina or a comparable offense in another jurisdiction. 12 NCAC 09G.0504(b)(3).

5. When the Commission suspends or denies the certification of a correctional officer pursuant to 12 NCAC 09G.0504, the period of sanction shall be not less than three years. 12 NCAC 09G.0505(b)

6. The South Carolina misdemeanor of “Domestic/Criminal Domestic Violence,” S.C.Code Ann. §16-25-20(A)(1), is comparable to “Assault on a Female,” N.C. Gen. Stat. § 14-33(c) as defined by 12 NCAC 09G.0102(9)..

7. A *nolle prosee* disposition of a criminal charge suggests neither guilt nor innocence. *Nicholas v. Wal-Mart Stores, Inc.*, 33 Fed. Appx. 61, 64-65, 2002 WL 506424 (4th Cir., 2002).

8. The administrative law judge shall decide a contested case upon the preponderance of the evidence. N.C. Gen. Stat. 150B-34(a).

9. The preponderance of the competent evidence of record fails to establish that Petitioner assaulted the alleged victim.

BASED UPON the foregoing findings and conclusions, the undersigned respectfully offers the following:

PROPOSAL FOR DECISION

The certification of Correctional Officer Robert L. Benton should not be suspended.

ORDER AND NOTICE

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file Exceptions to the Proposal for Decision, to submit 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 IS SO ORDERED.

This the 22nd day of April, 2016.

J Randolph Ward
Administrative Law Judge