

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 07703

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| <p>John Gordon Kaiser Petitioner,</p> <p>v.</p> <p>NC 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 July 19, 2016, before Administrative Law Judge Selina Malherbe Brooks in Charlotte, North Carolina. The matter was heard after Respondent requested, pursuant to N.C. Gen. Stat. § 150B-40(e), for 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: Kirk L. Bowling
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For Respondent: Whitney Hendrix Belich
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ISSUES

Whether Respondent's finding of probable cause to suspend Petitioner's law enforcement certification on the ground that Petitioner committed the Class B misdemeanor of forgery is supported by substantial evidence?

BURDEN OF PROOF

After discussion on the record, the Undersigned determined that Respondent bears the burden of proof because the Respondent's decision is based upon an allegation of the commission of a crime rather than the conviction of a crime. (Transcript ("Tr.") pp. 8-11)

EXHIBITS

Petitioner's Exhibits ("P. Ex.") 1, 2, and 3 were admitted into evidence.

Respondent introduced three exhibits, but did not move for their admission. (Tr. pp. 21, 46, 48, & 77)

Prehearing Statements compose a part of the pleadings in a contested case and, therefore, the Undersigned considered both Parties' Prehearing Statement and the letter, dated September 24, 2015, sent to Petitioner that was attached to Respondent's Prehearing Statement as the document constituting agency action from which this appeal rose.

WITNESSES

For Petitioner: Tony Underwood, former SBI Special Agent in Charge
 George Osborne, Assistant Chief, Gastonia Police Department

For Respondent: John Gordon Kaiser, Petitioner
 Richard Nelson Squires, Deputy Director of Certifications and
 Field Services for Respondent

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 FACTS**. In making the **FINDINGS OF FACTS**, 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. After hearing testimony, reviewing the evidence and case law presented, and hearing argument of counsel, the Undersigned makes the following:

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 suspension letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "Commission"), on September 24, 2015. (Attachment to Respondent's Prehearing Statement)

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 09A, to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. In 1995, Petitioner completed his undergraduate degree at the University of North Carolina Chapel Hill.

4. Petitioner was certified as a law enforcement officer in 1997 and has worked continually as a law enforcement officer in either patrol or investigations. He began his career in law enforcement in the Cleveland County Sheriff's Office where he worked for almost twenty years. He then worked for the Gastonia Police Department for four and a half years before joining the North Carolina State Bureau of Investigation ("SBI"). (Tr. pp. 12-13, 80-81, & 94-99)

5. During his law enforcement career, Petitioner consistently met or exceeded the expectations of his supervisors based on his personnel evaluations. (P. Exs. 1 & 3)

6. In addition, Officer Kaiser has received numerous certifications and awards throughout his career including the following:

- a. Master of Business Administration from Gardner-Webb
- b. John Vanderford Award
- b. Two FBI Director's Awards – 2010 and 2014
- c. Gastonia Police Department award for assistance in homicide investigation
- d. Distinguished Services Award from the Jaycees – 2016
- e. Medal of Valor from the Gaston County Police Department – May 18, 2016 for rescuing an elderly woman from a fire
- f. Cleveland County Sheriff's Office 2014 – Appreciation Plaque
- g. Gaston County Police Department Chief's Accommodation – 2014 and 2015
- h. Special Response Team for the SBI
- i. Crime Scene Search Specialist
- j. Certified Clandestine Lab Specialist
- k. Basic sniper and advanced sniper training
- l. Basic SWAT tactics
- m. FEMA training
- n. Practical homicide training and child death investigations
- o. DEA Narcotics Investigation School
- n. Numerous letters of commendation/appreciation while at the SBI
- o. Numerous compliment forms from Gaston County Police Department

(P. Ex. 2; Tr. pp. 111-117)

7. During 2012 and 2013, Petitioner was employed as an agent in the Southern Piedmont District of the SBI as a resident agent in Cleveland County. (Tr. pp. 13-14)

8. At that time, the SBI was undergoing procedural changes with how agents were to submit discovery documents. A new program, called Infoshare, was being implemented and there

was confusion among the agents and even supervisors as to how that program was to work. Memorandums were coming out frequently on changes to the program and what kinds of things could be uploaded into Infoshare. Additional problems with Infoshare were that certain parts of it were not working. Agents were supposed to be able to submit pictures and audio files, but during the time period in question, agents were unable to submit audio files and pictures and could only submit text. (Tr. pp. 16-18, 88-98)

9. Agents were expected to type their unofficial discovery reports into the Infoshare system and those reports were on white paper. If an agent printed those documents, there was a watermark printed on the paper that identified it as an unofficial document. (Tr. pp. 16-17, 89-90)

10. After a review from the Records division, agents were required to request the official discovery documents through a supervisor and then they would receive the official discovery documents printed on blue paper without the watermark. (Tr. p. 17)

11. An official SBI form 135 was used to certify that the SBI agent had delivered discovery to the local district attorneys but the form did not have a designated place for anyone to sign and acknowledge receipt of the discovery. (Tr. pp. 18, 84-86)

12. Special Agent in Charge (“SAC”) Tony Underwood together with another SAC developed the Southern Piedmont District Discovery Dissemination form (“local form”). This local form had a signature line so that SBI agents would have a record of who had received the discovery in the local district attorney’s office and spaces for the page numbers of the discovery documents delivered. This local form was never used throughout the entire SBI and never became an official form. (Tr. pp. 18-19, 84-86, & 101-104)

13. The local form was not required to be filed in the official file in Raleigh. In fact, the Records Division discouraged the use of the local form as it was not used statewide. (Tr. pp. 104-105, 109)

14. In August of 2012, Petitioner investigated a clandestine meth lab case in Cleveland County. (Tr. p. 20)

15. Sometime in September of 2012, while discussing various cases with Cleveland County District Attorney Bill Bozin, Petitioner learned that the Defendant in the meth lab case had pled guilty to one charge arising from Petitioner’s investigation on September 11, 2012, before Petitioner had typed the discovery from his investigation into the Infoshare system. (Tr. p. 21)

16. Sometime after talking to the District Attorney, Petitioner typed the discovery from the clandestine meth lab case in Cleveland County into the Infoshare system and submitted it to the Records division.

17. Over a year later and after the defendant pled guilty, Petitioner submitted form 135 indicating the date the defendant pled guilty and his sentence.

18. SAC Amy Schnurr requested additional forms.

19. Petitioner submitted the local form in December of 2013. Petitioner had signed Sharon Jones's name to the local form, indicating that he had delivered the official discovery to Sharon Jones in December of 2012. Ms. Jones was an administrative assistant in the Cleveland County District Attorney's Office. (Tr. pp. 20, 26-28, & 36-37)

20. Petitioner never actually delivered the official discovery to the Cleveland County District Attorney's Office. The official discovery was still available through the Infoshare system and could have been retrieved at any point if it was needed.

21. Around February of 2014, SAC Underwood informed Petitioner that he had received correspondence from the Records division requesting that he review the district office case files. (Tr. p. 82)

22. After Petitioner reviewed the case files, he discovered that case file 1723 was a case where he had signed Sharon Jones's name to the local form. Petitioner called SAC Schnurr and self-reported what he had done and also self-reported the events to SAC Underwood. (Tr. pp. 29, 36-37, & 90-91)

23. The SBI conducted an internal investigation and Petitioner was interviewed by internal affairs investigator David Whitley in approximately March of 2014. (Tr. pp. 31-32)

24. The SBI never charged Petitioner with any crime. (Tr. pp. 87, 92)

25. In May of 2014, Petitioner began looking for other jobs in order to be home more often with his son and family. Upon being interviewed by Gaston County Police Department, he disclosed the SBI's internal investigation and he was hired in June 2014. (Tr. p. 33)

26. Sometime after that, Deputy Director of Certifications and Field Services Richard Squires investigated Petitioner. His investigation consisted of reviewing the SBI's internal investigative file, typing his findings in a Probable Cause Memorandum and submitting it to the Commission's Probable Cause Committee. Deputy Director Squires did not independently interview any witnesses.

27. Petitioner appeared before the Probable Cause Committee which determined that there was probable cause to suspend Petitioner's law enforcement certification for not less than five years on the ground that he had committed the class B misdemeanor of forgery. (Tr. p. 34)

28. Petitioner Kaiser timely requested this administrative hearing.

29. Two of Petitioner's former supervisors, SAC Underwood and Gastonia Police Chief George Osborne testified that they found Petitioner honest and forthcoming in his disclosure of his actions to them. (Tr. pp. 99, 111-117)

30. Respondent initially proposed that Petitioner's law enforcement certification be suspended on the basis of lack of good moral character, but abandoned that issue.

BASED UPON the foregoing, Findings of Fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

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 suspension letter, mailed by Respondent on September 24, 2015. (Respondent's Prehearing Statement) 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.

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 09A, to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. 12 NCAC 09A .0204(b)(6) states that 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 has knowingly made a material misrepresentation of any information required for certification or accreditation.

4. 12 NCAC 09A .0205(b)(4) states that when the North Carolina Criminal Justice Education and Training Standards 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: (6) has knowingly made a material misrepresentation of any information required for certification or accreditation.

5. The party with the burden of proof in a contested case must establish the facts required by N.C. Gen. Stat. § 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a). The Administrative Law Judge shall decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a).

6. In a contested case involving the employment of a state employee, the North Carolina Supreme Court has stated that "the burden of proof in any dispute is on the party attempting to show the existence of a claim or cause of action." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 328 (1998).

7. Respondent has proposed to suspend Petitioner's law enforcement certification on the ground that Petitioner has committed forgery even though Petitioner has not been convicted of (or even charged with) forgery. The burden of proof rightly rests on Respondent to prove that Petitioner has committed the act of forgery.

8. The essential elements of forgery are (1) a false making or other alteration of some instrument in writing, (2) fraudulent intent, and (3) the instrument must be apparently capable of effecting fraud or capable of legal effect. See *State v. Gherkin*, 7 Ired. 206, 29 N.C. 206 (1847),

et al. In addition, the possibility that the instrument be capable of legal effect is not just any speculative possibility, but a “reasonable possibility”. See State v. Brown, 9 N.C. App. 498, 176 S.E. 2d. 88 (Ct. App. 1970).

9. Respondent has not shown by a preponderance of the evidence that Petitioner committed the offense of forgery, a class B misdemeanor, because although Petitioner did sign someone else’s name to a document without authority, there was no reasonable possibility that the document would have any legal effect as the form was not an official form as part of the discovery process, the defendant had pled guilty on September 11, 2012, and the form was not submitted until December of 2013, more than a year after the defendant’s plea of guilty.

10. The findings of the Probable Cause Committee of the Respondent are not supported by substantial evidence.

PROPOSAL FOR DECISION

Based on the foregoing Findings Of Fact and Conclusions Of Law, it is hereby proposed that Petitioner’s law enforcement certification not be suspended pursuant to 12 NCAC 09A.0204 (b)(3)(A).

NOTICE

The North Carolina Sheriffs’ 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.

This the 28th day of November, 2016.

Selina Malherbe Brooks
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 07703

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| <p>John Gordon Kaiser Petitioner,</p> <p>v.</p> <p>NC Criminal Justice Education and Training Standards Commission Respondent.</p> | <p>ORDER AMENDING PROPOSAL FOR DECISION</p> |
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Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Proposal for Decision, issued from this Office on November 28, 2016, is amended as follows:

NOTICE

The North Carolina 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.

This the 29th day of November, 2016.

Selina Malherbe Brooks
Administrative Law Judge