

STATE OF NORTH CAROLINA
COUNTY OF IREDELL

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 07775

<p>John James Klaver JR. 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 case came on for hearing on February 4, 2016 before Administrative Law Judge, David F. Sutton in Morganton, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 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: Clark Tew
HOMESLEY & WINGO LAW GROUP, PLLC
330 South Main Street
Mooresville, NC 28115

RESPONDENT: Lauren Tally Earnhardt
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

WITNESSES

The following witnesses testified for the Petitioner:

1. John J. Klaver, Petitioner

The follow witnesses testified for the Respondent:

1. Jana Munday, Wal-Mart Stores
2. Officer E. Windsor, Taylorsville Police Dept.

RULES AT ISSUE

12 NCAC 09G .0102(9)(K)

12 NCAC 09G .0504(b)(3)

EXHIBITS

Petitioner's exhibits ("P. Exhibits") 3 and 4 were admitted into evidence. Respondent's exhibits ("R. Exhibits") 1-6 were admitted into evidence.

ISSUE

Whether Petitioner committed misdemeanor larceny, such that his correctional officer certification should be suspended pursuant to 12 NCAC 09G .0504(b)(3)?

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 and CONCLUSIONS of LAW. 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 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.

BASED UPON the foregoing and upon the preponderance or greater weight of the evidence in the whole record, 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 "The Commission"), on September 15, 2015.

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 09G, to certify correctional officers and to revoke, suspend, or deny such certification.

3. Petitioner was at all times relevant to this matter a correctional officer with the North Carolina Department of Public Safety, and his certification remains active with the North Carolina Department of Justice Criminal Justice Education and Training Standards Division.

4. On March 21, 2014, Petitioner's certification was active and in good standing.

5. On March 21, 2014, Petitioner went to the Wal-Mart in Taylorsville located at 901 NC Hwy 16 South, Taylorsville, North Carolina, to pick up some medicines and purchase other items.

6. While at the Wal-Mart and waiting on prescription medicines to be filled, Petitioner picked up a pack of baseball cards from the shelf on which those cards are customarily and regularly displayed. This particular pack was a Topps-brand "deck" containing numerous cards, and valued at \$9.98.

7. No evidence was presented at the hearing on this matter as to the number of cards that would normally be found in such a deck, and no number of cards contained in the deck was printed on the packaging.

8. Petitioner is a collector of baseball cards, and collects specifically autographed baseball cards, including certain autographed baseball cards that can be purchased in commercially-available packs of cards.

9. Petitioner, as an avid baseball card collector, maintained as of March 21, 2014, a number of baseball cards that he would customarily and regularly trade with other collectors at flea markets, stores, or in encounters with them in public.

10. On March 21, 2014, Petitioner was carrying approximately four baseball cards with him in his leather badge wallet, which wallet Petitioner kept in his left back pants pocket.

11. After picking up the deck of cards on March 21, 2014, Petitioner began pushing a shopping basket throughout various sections of the store, including the automotive, pets, and paper goods/chemicals sections.

12. Upon picking up the deck of cards, Petitioner was followed by a Wal-Mart asset protection officer, Heather Isenhour, who later provided a written report (R. Exhibit. 6). This report was not, however, written until two days after the event, on March 23, 2014. Ms. Isenhour was not present at the hearing of this matter, and as such was not examined or cross-examined and her statement was unsupported by any other testimony provided at the hearing of this matter. Due to the foregoing, the undersigned has not given any weight to the contents of Heather Isenhour's written report.

13. Petitioner opened the deck of cards, in the automotive department, removed the plastic wrapping, and began to look through the individual cards contained therein.

14. Petitioner set the opened pack of baseball cards on a shelf in the paper goods section, but did not conceal them or secret them for later retrieval.

15. The Petitioner went from the Paper Goods section to speak with his son-in-law in the firearms and hunting section of the store, and they spoke for a significant period of time.

16. The Petitioner set the baseball cards on a shelf in order to go speak with his son-in-law; no evidence was presented at trial that he did so for a nefarious purpose.

17. Petitioner paid for prescription medication and ammunition while at Wal-Mart.

18. Petitioner was apprehended by Wal-Mart asset protection workers leaving the garden section at approximately 1:35 PM on March 21, 2014. Thereafter, law enforcement was called, and Petitioner was arrested on a number of criminal charges, including misdemeanor larceny and injury to personal property.

19. Petitioner removed four baseball cards from his back left pocket during his period of detention. Petitioner claimed throughout the time of his detention by Wal-Mart and his questioning by law enforcement that the baseball cards found in his back left pocket, inside his badge wallet, were his cards that he brought from home; Petitioner did admit, however, to opening the pack of cards.

20. Petitioner eventually plead guilty to Injury to Personal Property, and prayed that judgment be continued in the matter, which was granted; additionally the remaining criminal charges against Petitioner were dismissed and Petitioner was assessed, and paid, restitution, court costs, and fines in the total amount of \$180.00. (P. Exhibit. 5, *inter alia*)

21. Petitioner was provided notice of the Proposed Suspension from the Respondent.

22. Petitioner timely appealed his Proposed Suspension and was given the opportunity to present evidence at the hearing of this matter before the undersigned.

CONCLUSIONS OF LAW

1. All 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 Fact 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.

3. Petitioner is and remains a certified correctional officer subject to the protections and requirements of Chapter 17C of the North Carolina General Statutes and the related Administrative Code, specifically provisions of N.C. Gen. Stat. §17C-11 and 12 NCAC 09G .0504 & .0505.

4. The Respondent's Letter of Proposed Suspension of September 15, 2015 specified that the Petitioner's certification as a correctional officer was being suspended for no less than three years for the commission of misdemeanor larceny at the Wal-Mart in Taylorsville on March 21, 2014.

5. Respondent complied with the procedural requirements for issuing its proposed suspension.

6. Petitioner similarly complied with the procedural requirements for appealing the Respondent's proposed suspension, and is properly before the undersigned.

7. 12 NCAC 09G .0504(b)(3) provides that the North Carolina Criminal Justice Education and Training Standards Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer: (3) has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G.0102 after certification.

8. 12 NCAC 09G .0505(b)(1) provides that when the North Carolina Criminal Justice Education and Training Standards Commission suspends or denies the certification of a correction officer pursuant to 12 NCAC 09G.0504 of this Section, the period of sanction shall be 3 years where the cause of sanction is: (1) the commission or conviction of a misdemeanor as defined in 12 NCAC 9G.0102.

9. 12 NCAC 09G .0102(9)(k) defines "Larceny of property ... not more than one thousand dollars (\$1000.00) (14-72(a))" as a Class B Misdemeanor.

10. Misdemeanor larceny is a "DAC Misdemeanor" pursuant to 12 NCAC 09G .0102; injury to personal property valued at less than \$200.00 is not (12 NCAC 09G .0102(9)(u)).

11. Respondent has the burden of proof in this contested case filed pursuant to Article 3A of Chapter 150B of the North Carolina General Statutes.

12. Here, the preponderance of the evidence shows that Petitioner engaged in some, but not all, of the conduct alleged by Respondent. He admittedly opened a sealed package of baseball cards, and removed certain baseball cards from said package for inspection, thus destroying the personal property of Wal-Mart Stores.

13. This destruction of personal property amounted to \$9.98.

14. Misdemeanor larceny is a crime rooted in the common law, and is defined as: (1) the taking of property of another person, (2) and the carrying away of that property, (3) without the consent of the property's owner, (4) with the intent to deprive the owner of the use of the property forever, and (5) with the knowledge that the Petitioner was not permitted to take the property. *See* N.C.P.I. Criminal 216.05 Misdemeanor Larceny.

15. The preponderance of the evidence demonstrates that Petitioner did not take and carry away any baseball cards belonging to Wal-Mart stores on March 21, 2014.

16. The preponderance of the evidence also demonstrates that Petitioner did not intend to deprive Wal-Mart stores of the use of the baseball cards forever, at any point, on March 21, 2014.

17. The preponderance of the evidence demonstrates that the Petitioner did not commit misdemeanor larceny.

On the basis of the above-noted Findings of Fact and Conclusions of Law, the undersigned makes the following:

PROPOSAL FOR DECISION

The undersigned recommends and proposes that Petitioner's certification as a correctional officer NOT be suspended pursuant to 12 NCAC 09G.0504(b)(3).

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.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. § 150B-42(a).

David F Sutton
Administrative Law Judge

STATE OF NORTH CAROLINA
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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 Decision, issued from this Office on April 6, 2016 is amended to correct the agency to make that will make the final decision as follows:

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 Criminal Justice Education and Training Standards Commission.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. § 150B-42(a).

Save and except the amendment to the notice provision, the final decision entered April 6, 2016 remains in full force and effect.

This the 6th day of April, 2016.

David F Sutton
Administrative Law Judge