

STATE OF NORTH CAROLINA
COUNTY OF PENDER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 07777

<p>Ryan Derek Hercher 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 case came on for hearing on March 14, 2016 in Bolivia, 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: Ryan Derek Hercher, pro se
315 South Dudley Street, Apartment 18
Burgaw, North Carolina 28425

Respondent: Lauren Tally Earnhardt
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUES

Does substantial evidence exist for Respondent to suspend Petitioner's correctional officer certification for the commission of the criminal offense of Assault on a Female?

RULES AT ISSUE

12 NCAC 09G .0504(b)(3)
12 NACA 09G .0102(9)(g)

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.

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. Theresa Hercher married the Petitioner on September 14, 2001. She and Petitioner have been legally separated for the last two (2) years.

4. On January 11, 2014, Petitioner and his wife were still living together. Ms. Hercher saw that Petitioner and their son were in the living room together and she got angry because she believed that Petitioner was shaking their son too hard.

5. Ms. Hercher and Petitioner began arguing, and Ms. Hercher threw a cup of water at the Petitioner.

6. Petitioner responded by kicking Ms. Hercher in the leg.

7. Ms. Hercher testified that Petitioner had never hit or touched her prior to this incident.

8. Ms. Hercher gathered the children, walked outside, got in the vehicle and drove up and down the road before calling the local law enforcement. Ms. Hercher stated that this incident was the point in her marriage where she knew she wanted a divorce.

9. When law enforcement arrived at the residence, Ms. Hercher in her vehicle with the children, and Petitioner was outside in the yard with his pet tortoise.

10. Ms. Hercher obtained an ex parte domestic violence protective order based on the Petitioner actions in this matter. A subsequent protective order was entered against Petitioner, but Ms. Hercher dismissed the matter.

11. Ms. Hercher testified that once she realized that the protective order was jeopardizing Petitioner's career and preventing him from attending training, she went back to the court and had it revoked. Ms. Hercher went to court to revoke the protective order on two occasions and was denied the first time because it was too soon after she initially obtained the order.

12. Ms. Hercher does not want Petitioner to lose his job and was never out to get his job taken from him. Petitioner pays child support to Ms. Hercher which helps her pay the mortgage and medical bills for the family.

13. Ms. Michelle Schilling is employed as an investigator with the Criminal Justice Standards Division. Ms. Schilling explained that upon receipt of a report of arrest from the Division of Adult Corrections, she was assigned to investigate this matter.

14. Ms. Schilling contacted the New Hanover County Sheriff's office and received the summary/narrative and photos from the responding officer. (Respondent's Exhibit 2)

15. The responding deputy swore out a warrant for Assault on a Female against Petitioner based on the incident. Petitioner's criminal charges were dismissed pursuant to a deferred prosecution agreement. Petitioner admitted the facts alleged in the warrant were true, and he attended counseling. (Respondent's Exhibit 3)

16. During her investigation, Ms. Schilling attempted to contact Ms. Hercher regarding this matter. However, Ms. Hercher refused to respond or cooperate.

17. Ms. Schilling presented the documents she obtained during the course of her investigation and report of her findings to the Respondent's Probable Cause Committee for review.

18. On August 20, 2015, Respondent's Probable Cause Committee met to review this matter. Petitioner attended the meeting and was able to speak with committee members. The Committee found there was probable cause to suspend Petitioner's certification for the commission of Assault on a Female.

19. Petitioner was made aware of the committee's decision at the meeting, and then was sent a letter with his appellate rights.

20. Petitioner testified he and Ms. Hercher started arguing over their son. Petitioner stated that his son was messing around and he was trying to keep him controlled and that Ms. Hercher thought Petitioner being too rough. Petitioner and Ms. Hercher started arguing and she

threw water at him. He and Ms. Hercher began arguing, and he picked his foot up and pushed her back away from him. Petitioner was not wearing shoes when he pushed her with his feet.

21. Petitioner did not see marks on Ms. Hercher after he pushed her but believed she had marks on her legs earlier that day. Petitioner does not remember if Ms. Hercher had anything in her hands, but Petitioner explained that when she came close to him he put his arm up to block her. Petitioner then got up and went into the kitchen she got in his face again. At that point, Ms. Hercher left the house and got into the vehicle. Petitioner went and changed his shirt and took his pet tortoise outside.

22. Petitioner agreed to attend counseling in order to get the charges against him dismissed. Petitioner paid \$750 to attend counseling and he attended classes once a week for one hour for 6 months. Once Petitioner received the certificate of completion he took it back to the court and had the charges dismissed. Petitioner has started the paperwork to get his record expunged and wants to continue to work.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein.

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

3. 12 NCAC 09 .0504(b)(3) (b) states that the 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;

4. 12 NCAC 09G .0102(9)(g) defines misdemeanors for corrections officers to mean those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses for corrections officers are classified by the Commission as follows: (g) 14-33(c) Assault, battery with circumstances.

5. N.C. Gen. Stat. § 14-33(c)(2) states [u]nless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

(2) Assaults a female, he being a male person at least 18 years of age.

6. 12 NCAC 09G .0505(b)(1) state when the Commission suspends or denies the certification of a corrections officer pursuant to 12 NCAC 09G .0504 of this Section, the period of

sanction shall be not less than three years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (c) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is:

(1) commission or conviction of a misdemeanor as defined in 12 NCAC 09G .0102.

7. The findings of the Probable Cause Committee of the Respondent are supported by substantial evidence and are not arbitrary and capricious.

8. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).

9. Petitioner has the burden of proof in the case at bar. Overcash v. N.C. Dep't of Env't & Natural Resources, 172 N.C. App. 697, 635 S.E. 2d 442 (2006).

10. Petitioner has failed to meet the burden of proof that he did not commit the criminal offense of assault on a female.

11. A preponderance of the evidence exists to show Petitioner committed the Class B misdemeanor of assault on a female when he kicked his wife.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is proposed that Respondent suspend Petitioner's correctional officer certification for a period of not less than three (3) years.

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.

This the 3rd day of June, 2016.

Philip E Berger Jr.
Administrative Law Judge