

STATE OF NORTH CAROLINA
COUNTY OF JONES

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 08608

JOHN LESLIE ERVIN,)
Petitioner,)
v.)
NORTH CAROLINA SHERIFFS')
EDUCATION AND TRAINING)
STANDARDS COMMISSION,)
Respondent.)
_____)

PROPOSAL FOR DECISION

This case came on for hearing on April 21, 2016 before Administrative Law Judge Melissa Owens Lassiter in New Bern, 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. On June 29, 2015, Respondent filed a proposed Proposal for Decision with the Office of Administrative Hearings pursuant the undersigned's request.

APPEARANCES

Petitioner: John Leslie Ervin
425 Pole Pocosin Road
Pollocksville, North Carolina 28573

Respondent: Matthew L. Boyatt, Assistant Attorney General
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUES

1. Did Respondent have sufficient evidence to support its finding that Petitioner knowingly made a material misrepresentation?
2. Does Petitioner lack the good moral character required by all law enforcement officers?

APPLICABLE RULES

Chapter 17E of N.C. General Statutes
12NCAC 10B .0204(c)(1) and (2)
12 NCAC 10B .0301(a)(8)
12 NCAC 10B .0204(b)(2)

FINDINGS OF FACT

1. Both parties were properly before the Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by mail the Notification of Probable Cause to Deny Justice Officer Certification letter mailed by Respondent North Carolina Sheriffs' Education and Training Standards Commission on September 24, 2015. (Respondent's Exhibit 1)

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter referred to as the "Respondent Commission" or "Sheriffs' Commission") has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.

3. 12 NCAC 10B .0204(c) provides the Sheriffs' Commission may deny the certification of a justice officer when the Commission finds that the applicant has:

(1) knowingly made a material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission; or

(2) knowingly and designedly by any means of false pretense, deception, defraud, misrepresentation, or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission.

4. 12 NCAC 10B .0301(a)(8) provides every justice officer employed or certified in North Carolina shall be of good moral character. 12 NCAC 10B .0204(b)(2) further provides the Sheriff's Commission shall revoke, deny, or suspend a justice officer's certification when the Commission finds that the justice officer no longer possesses the good moral character that is required of all sworn justice officers.

5. Petitioner is an applicant for certification through the Jones County Sheriff's Office. Petitioner was previously employed by the Jacksonville Police Department until Petitioner was dismissed from that agency on February 4, 2013. Petitioner was dismissed from the Jacksonville Police Department due to Petitioner's unbecoming conduct, failure to cooperate with investigators, and due to an excessive use of force incident which did not result in injury.

(Respondent's Exhibits 9-10) The Jacksonville Police Department would not consider Petitioner for rehire. (Respondent's Exhibit 8)

6. Jason Bettis (hereinafter "Officer Bettis"), a former Lieutenant of the Jacksonville Police Department, testified at the administrative hearing. The undersigned finds Officer Bettis' testimony to be credible. Officer Bettis was employed by the Jacksonville Police Department from 1996 until 2001, when he took a law enforcement position in Louisiana. Officer Bettis returned to the Jacksonville Police Department in 2007, and remained employed with this agency until 2014.

7. In 2013, Officer Bettis was a Lieutenant in the Investigative Unit at the Jacksonville Police department. The Jacksonville Chief of Police instructed Bettis to investigate allegations of misconduct involving Petitioner. Specifically, Officer Bettis was instructed to investigate a use of force incident that occurred on December 10, 2011, in addition to Petitioner's unbecoming conduct on January 21, 2013.

Lack of Good Moral Character

8. On January 21, 2013, Petitioner traveled to the Hampton Inn in Greenville, North Carolina, as part of his official duties. Petitioner and another Jacksonville PD officer were staying at this hotel in order to provide testimony in a federal court trial in Greenville the next day. Petitioner used his Jacksonville PD assigned vehicle to travel to the Hampton Inn, and was in uniform when he arrived at the hotel at approximately 5:00 p.m.

9. Petitioner changed out of his uniform, and met with Assistant United States Attorney Leslie Cooley to prepare for his testimony the following day. The Hampton Inn was having a social reception at the hotel that provided free beer and food. Petitioner began drinking beer during his meeting with the United States Attorney. At the conclusion of this meeting, Petitioner was warned by the U.S. Attorney that he needed to stop drinking, because Petitioner was going to be called as a witness the next day. Petitioner told Ms. Cooley that he was just getting started.

10. Despite Cooley's request, Petitioner made no effort to stop drinking on the evening of January 21, 2013. Petitioner continued to drink beer at the Hampton Inn in front of staff and patrons. The Hampton Inn staff and patrons were aware that Petitioner was a law enforcement officer who was in town to provide testimony in a federal trial.

11. Petitioner does not dispute that he was drinking in front of patrons and staff of the Hampton Inn. Petitioner also admitted that he consumed approximately six beers.

12. While Petitioner was drinking on January 21, 2013, he was rude and obnoxious towards staff and patrons of the Hampton Inn. Petitioner does not dispute that he told Ms. Merle Pereira, an employee of Hampton Inn, that she was pretty. Petitioner asked Pereira her age, and commented that Pereira was too young for Petitioner. Later in the evening, Petitioner was seen waving money in front of patrons at the hotel, implying that Petitioner wagered he could have sex

with Ms. Pereira if he wanted to. Petitioner was also seen eating a cookie in front of Ms. Pereira, and was overheard telling Ms. Pereira that the cookie was “warm and moist, just like her.”

13. At the contested case hearing, Petitioner admitted that he would say something like this based on his personality, but denied that he specifically told Ms. Pereira that the cookie was warm and moist. The undersigned finds that Petitioner’s testimony and general denial is not credible.

14. Petitioner also admits that he showed patrons of the Hampton Inn sexually-explicit photographs of women on Petitioner’s cell phone. Petitioner does not dispute that the patrons and staff of the Hampton Inn knew Petitioner was a law enforcement officer who was there to testify in a federal court case the following day. Petitioner provided these patrons with a general description of the case, and referred to the defendant in the case as a “crack head.”

15. Petitioner admits that he told patrons of the hotel that another female officer that traveled with Petitioner, Officer Smallwood, would not come to Petitioner’s room, because Petitioner would “rape her.”

16. Petitioner admits that he walked outside of the Hampton Inn on January 21, 2013, in order to urinate in public, and in fact, hotel patrons observed Petitioner urinating outside. Petitioner made no effort to go to his room to use the bathroom.

17. Petitioner also admits that he used the term “Haji Mart” in front of patrons of the Hampton Inn when referring to individuals of Middle Eastern descent that owned local businesses in Jacksonville. Petitioner claims that he was unaware that this term was derogatory, and acknowledges that he used that term because other officers used the term. Petitioner’s claimed ignorance of the term “Haji Mart” being a derogatory term is not credible. The undersigned finds Petitioner’s insistence at the hearing that he was unaware “Haji mart” was a derogatory term was unbelievable, and indicative of Petitioner’s lack of good moral character.

18. Petitioner further admits that he was calling one of the patrons of the Hampton Inn “Lumbee” based on that individual’s heritage. Petitioner insists this was not offensive, because he has always called descendants of the Lumbee Tribe “Lumbees.” Petitioner did not personally know the patron he was calling “Lumbee,” and had not met this individual before January 21, 2013. Petitioner’s conduct displayed a complete lack of integrity and respect for the rights of others.

19. Petitioner has expressed no genuine remorse for his actions on January 21, 2013. During the contested case hearing, Petitioner’s testimony was evasive at times, and Petitioner further attempted to justify his conduct on January 21, 2013. Petitioner claimed this type of behavior is common, and accepted at law enforcement conferences such as the OCDEF conference. Petitioner’s attempt to explain away his conduct is further evidence of Petitioner’s lack of integrity and lack of good moral character.

20. Petitioner's actions at the Hampton Inn on January 21, 2013 formed the basis for a recommendation of dismissal from the Jacksonville Police Department. (Respondent's Exhibit 10)

21. The evidence at the contested case hearing showed that Petitioner was also insubordinate during an investigation into whether Petitioner had used excessive force. During Petitioner's testimony in the January 22, 2013 federal trial, the defense team showed Petitioner and the jury a videotape from Officer Wilson's car and asked Petitioner if he kicked a defendant. A federal juror from that case filed a complaint after observing the video of Petitioner kicking a passive detainee following an arrest on December 10, 2011. Officer Bettis was required to investigate this matter in 2013 based on the complaint by the federal juror. Petitioner was asked to provide a statement, but refused to do so. Petitioner was then given a direct order through his chain of command to cooperate with the investigation, but Petitioner refused.

22. On December 10, 2011, Petitioner was not justified in kicking a handcuffed detainee who was lying on the ground not resisting. Petitioner's actions on this date exhibit his lack of respect for the rights of others and for the laws of this State.

23. The preponderance of the evidence presented at the administrative hearing established that Petitioner no longer possesses the good moral character that is required of a sworn justice officer in this State.

24. A preponderance of the evidence presented at hearing showed that Respondent's proposed denial of Petitioner's application for certification, based on Petitioner no longer possessing the good moral character required of a sworn officer, is justified.

Material Misrepresentation

25. Petitioner was charged with simple assault on March 20, 1996, in Duplin County, North Carolina, case number 1996 CR002272. (Respondent's Exhibit 2)

26. Petitioner completed a Personal History Statement and Report of Appointment in 2002 in furtherance of his application for certification through the Jacksonville Police Department. (Respondent's Exhibits 3 - 4) Petitioner was instructed to answer the questions on these forms accurately and completely. Petitioner signed each form, and attested that the information was complete and accurate. Petitioner knowingly omitted that he had been charged with criminal assault on March 20, 1996, despite being asked on these forms whether he had ever been arrested or charged with a criminal offense.

27. On May 13, 2013, Petitioner completed a F-3 Personal History Statement in furtherance of his application for certification through the Jones County Sheriff's Office. (Respondent's Exhibit 5) Petitioner signed the F-3 before a notary, and attested that the information on the F-3 was accurate and complete. Petitioner knowingly failed to disclose on this F-3 that he had been served with a criminal assault charge on March 20, 1996, despite being asked on the F-3 whether he had ever been arrested or charged with a criminal offense.

28. Jones County Sheriff Danny Heath testified on Petitioner's behalf at the contested case hearing. Sheriff Heath has employed Petitioner for almost three years, and has had no problems with Petitioner. Heath knew about the Onslow County matter involving Petitioner. He considers Petitioner a friend, a great employee, and is someone he wants beside him, if he ever goes somewhere where his life would be in danger. Heath described how Petitioner is an outstanding employee, and a great asset to his office. It would be a disservice if Petitioner was not there. If Petitioner loses his certification, Heath will find a nonsworn position for Petitioner to work in his office.

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 mail the proposed Denial of Justice Officer's Certification letter, mailed by Respondent Sheriffs' Commission on September 24, 2015.

2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they should be so considered without regard to the given label.

3. The North Carolina Sheriffs' Education and Training Standards Commission has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.

4. 12 NCAC 10B .0204(c)(1) and (2) provide the Sheriffs' Commission may deny the certification of a justice officer when the Commission finds that the applicant has:

(1) knowingly made a material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission; or

(2) knowingly and designedly by any means of false pretense, deception, defraud, misrepresentation, or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission.

5. Pursuant to 12 NCAC 10B .0301(a)(8), every justice officer employed or certified in North Carolina shall be of good moral character. 12 NCAC 10B .0204(b)(2) further provides the Sheriffs' Commission shall revoke, deny, or suspend a justice officer's certification when the Commission finds that the justice officer no longer possesses the good moral character that is required of all sworn justice officers.

6. Good moral character has been defined as honesty, integrity, fairness, and respect for the rights of others and for the laws of the state. In Re Willis, 288 N.C. 1, 10 (1975).

7. A preponderance of the evidence presented at the administrative hearing established that Petitioner made a material misrepresentation of information required by the Commission in violation of 12 NCAC 10B .0204(c)(1), by knowingly failing to disclose his 1996 criminal assault charge on the following forms: 1) 2002 Report of Appointment (Jacksonville PD) ; 2) 2002 Personal History Statement (Jacksonville PD); and 3) 2013 F-3 Personal History Statement (Jones County). Petitioner's application for certification is therefore subject to denial pursuant to 12 NCAC 10B .0204(c)(1) and 12 NCAC 10B .0205 for Petitioner's material misrepresentation on multiple forms submitted to Respondent Commission and the Criminal Justice Commission.

8. Based on the preponderance of evidence at hearing, the undersigned concludes Petitioner no longer possesses the good moral character that is required of a sworn justice officer in this state. Petitioner has exhibited a lack of integrity through his actions described above, and has also exhibited a lack of respect for the laws of this state and for the rights of others. Further, Petitioner's continued failure to accept full responsibility for his actions at the hearing of this matter and his continued attempt to explain away his extreme and outrageous conduct is further indicative of Petitioner's lack of good moral character.

9. Respondent's proposed denial of Petitioner's justice officer certification due to Petitioner's lack of good moral character and failure to maintain the minimum standards required of all sworn justice officers under 12 NCAC 10B .0301 is supported by a preponderance of the evidence.

10. Petitioner has the burden of proof in this case. Petitioner has failed to show that Respondent's proposed denial of his application for certification is not justified.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned proposes that Respondent **DENY** Petitioner's justice officer certification.

NOTICE

The North Carolina Sheriffs' Education and Training Standards Commission will make the Final Decision in this contested case. That Commission 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).

This the 15th day of July, 2016.

Melissa Owens Lassiter
Administrative Law Judge