STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
15SOS02345

John Bradford Pittman Petitioner v. State of North Carolina Department of the Secretary Of State Respondent	**FINAL DECISION GRANTING SUMMARY JUDGMENT FOR PETITIONER**

THIS MATTER came on for hearing before Hon. J. Randolph Ward on August 6, 2015 in Raleigh, North Carolina, upon Respondent's Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, to resolve a contested case before the Office of Administrative Hearings pursuant to 18 NCAC 07B .0907.

Based on the pleadings and admissions of the parties, the undersigned takes note of the following:

UNDISPUTED FINDINGS OF FACT

1. Petitioner John Bradford Pittman is an active member in good standing of the North Carolina State Bar, licensed on April 23, 2010, with no public disciplinary history.

2. On October 20, 2014, Respondent received Petitioner's Application for Initial Appointment as a North Carolina Notary Public. Petitioner answered "Yes" to question 14 which asks, "Have you ever been convicted by any court of a felony or misdemeanor?" With his application, Petitioner provided the information that on November 17, 2009, he was found guilty of the misdemeanor offense of reckless driving in Amherst County, Virginia, and was sentenced to 30 days in jail, with 20 days suspended. Petitioner states that he served this sentence by spending approximately five (5) days in jail, presumably with day-for-day "good time" credit. Petitioner was released from jail on November 27, 2009.

3. On January 22, 2015, Respondent sent Petitioner a letter denying his application pursuant to N.C. Gen. Stat. § 10B-5(d)(2), which bars an applicant for "ten (10) years after release from **prison**," because of Petitioner's "release from **jail** … within 10 years of your application." (Emphasis added.) The parties represent that this is the sole reason that Respondent did not issue a notary commission to Petitioner.

4. N.C. Gen. Stat. § 10B-5 "Qualifications" specifies these grounds for denying an application for a notary commission:

> (d) The Secretary may deny an application for commission or recommission if any of the following apply to an applicant:
>
> (1) Submission of an incomplete application or an application containing material misstatement or omission of fact.
>
> (2) The applicant's conviction or plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude. **In no case may a commission be issued to an applicant within 10 years after release from prison, probation, or parole, whichever is later**.
>
> (3) A finding or admission of liability against the applicant in a civil lawsuit based on the applicant's deceit.
>
> (4) The revocation, suspension, restriction, or denial of a notarial commission or professional license by this or any other state or nation. In no case may a commission be issued to an applicant within five years after the completion of all conditions of any disciplinary order.
>
> (5) A finding that the applicant has engaged in official misconduct, whether or not disciplinary action resulted.
>
> (6) An applicant knowingly using false or misleading advertising in which the applicant as a notary represents that the applicant has powers, duties, rights, or privileges that the applicant does not possess by law.
>
> (7) A finding by a state bar or court that the applicant has engaged in the unauthorized practice of law.

(Emphasis added.) There is no parallel provision in the statutes against granting a notary commission to a person within 10 years of release from "jail."

5. Petitioner timely filed a Petition for a contested case hearing in the Office of Administrative Hearings to appeal Respondent's adverse decision.

Upon consideration of the pleadings, admissions, and arguments of counsel, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the parties and the subject matter pursuant to N.C. Gen. Stat. §§ 150B-1, 10B-2, and 18 NCAC 07B .0907(a).

2. There are no genuine issues of material fact in dispute.

3. There is a significant distinction between the length of sentences that the statutes provide may be served in North Carolina jails and prisons. The terms "jail" and "prison" are not synonymous and are not used interchangeably in the statutes. N.C. Gen. Stat. §§ 15-6, 15A-1352, and 148-32.1.

4. "Statutory interpretation properly begins with an examination of the plain words of the statute. If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms. Thus, [w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. Therefore, a statute clear on its face must be enforced as written." *Lanvale Properties, LLC v. County of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800, 809-10, *reh'g denied*, 366 N.C. 416, 733 S.E.2d 156 (2012). (Internal cites and quotations omitted.)

5. Respondent improperly denied Petitioner's application for a North Carolina Notary Public Commission under a misapprehension of law, specifically that "jail" was synonymous with the term "prison," as used in N.C. Gen. Stat. § 10B-5(d)(2).

6. It is appropriate to render summary judgment against the moving party under the circumstances in this case. Petitioner is entitled to summary judgment on the issue of whether his application is barred by N.C. Gen. Stat. § 10B-5(d)(2) as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c).

FINAL DECISION

Consequently, based upon the foregoing Undisputed Facts of Record and applicable law, IT IS ORDERED:

1. Summary Judgment for Petitioner is GRANTED; and

2. Notwithstanding Petitioner's incarceration concluding on November 27, 2009, he shall be issued a Notary Commission upon due compliance with any unfulfilled requirements of the Notary Public Act.

MEMORANDUM OF DECISION
(per 26 NCAC 03 .0127(c)(8))

In its Reply to Petitioner's Response to the Motion, Respondent observes that, "Petitioner is essentially arguing that the word 'prison' does not include 'jail' within the meaning of N.C. Gen. Stat. § 10B-5(d)." As the denial letter of January 22, 2015 makes plain, Respondent contends that it does. That raises the single, dispositive legal issue presented by this Motion for Summary Judgment.

A review of the statutes helps make clear that the Legislature's intent in specifying "prison" sentences -- rather than just "felonies" or all incarcerations -- was to extend the prohibition beyond the various types of "moral turpitude" listed -- misstatements of fact, tortious deceit, official misconduct, unauthorized practice of law -- to include felons and misdemeanants sentenced to more than 180 days in jail. Most misdemeanors are not considered crimes of moral turpitude, but an accumulation of them, or aggravating factors that would cause the judge to give a sentence exceeding since six months, could raise the same concerns about character as the commission of a felony. (See, e.g., the Sheriffs' Education and Training Standards Commission's classification of

misdemeanor offenses that may affect certification or retention of law enforcement officers. 12 NCAC 10B .0204(d).)

In North Carolina, jails are operated exclusively by the Sheriffs of each County, and in their counties, with the exception of a few facilities shared with other sheriffs. As last amended in 1973, with a history traced to 1797, N.C. Gen. Stat. § 15-6 states in its primary cause that, "No person shall be imprisoned except in common jail of the county, unless otherwise provided by law…." It is "otherwise provided" that persons convicted of felonies and misdemeanants sentenced to confinement for more than 180 days are sent to prisons operated by the State's Department of Public Safety's Division of Adult Correctional, which houses the Section of Prisons (formerly, Division of Prisons). Misdemeanants sentenced to confinement for more than 90 days, but less than 180 days, are consigned to the Statewide Misdemeanants Confinement Program, administered by the prisons system at State expense, but placing the misdemeanants in vacant jail space throughout the State. N.C. Gen. Stat. §§ 15A-1352; 148-32.1. There are exceptions to this arrangement, but "In no event, however, shall a prisoner whose term of imprisonment is less than 30 days be assigned or ordered transferred to a facility operated by the Division of Adult Correctional." 148-32.1(b).

In summary, jails house prisoners with short sentences, and prisons house inmates with longer sentences. At one time, the Legislature used this distinction both to impose the degree of punishment deemed commensurate with the crime and to classify offenses as either felonies or misdemeanors.

> [I]t will be seen throughout chap. 32 on "Crimes and Punishments," that wherever imprisonment in the penitentiary is annexed as the punishment of the offence, the crime is either "infamous, or done in secrecy and malice, or done with deceit and intent to defraud." On the other hand, where the punishment prescribed "is fine or imprisonment," nowhere will it be found that the imprisonment is described to be in the State's prison or penitentiary. All offences, therefore, which are misdemeanors at common law or made such by statute, where no punishment is specified, or prescribed to be as at common law, or by fine or imprisonment, can be punished by imprisonment in the common jail only, unless the offences are infamous, done in secrecy and malice, &c., as prescribed in sections 108 and 29 as before cited. This rule covers our case. *In re Schenck*, 74 N. C., 607.

State v. McNeill, 75 N.C. 15, 17 (1876). The attempt to align felonies and misdemeanors with the two types of incarceration persisted well into the 20th century, albeit without the current precision.

> Although perpetrators of such crimes [burglary] were subject to incarceration in the State prison after the abolition of corporal punishment, the aggravated offenses now under examination were called misdemeanors by the legislature and retained such grade in law down to 1891, when they were controverted into felonies despite their designation as misdemeanors by the statute declaring all crimes "punishable by either death or imprisonment in the state's prison" to be felonies. In 1905, however, these offenses reverted to their original classification of aggravated misdemeanors by virtue of a statutory alteration restricting imprisonment therefor to the county

> jail. But they were transformed to the grade of felony a second time in 1927 by an amendment restoring the former provision authorizing confinement of violators in the State prison as well as in the county jail.

State v. Surles, 230 N.C. 272, 52 S.E.2d 880, 886 (1949). In more modern times, it is clear that our Legislature continued to perceive a qualitative difference between the State's prisons and counties' jails. Generally, the Legislature has made it "unlawful to place a juvenile in 'any jail, prison or other penal institution,'" but "when 'no juvenile detention home' is available," a juvenile may be placed in "temporary detention in a 'local jail.'" *State v. Puckett*, 43 N.C.App. 596, 259 S.E.2d 310, 312 (1979) (quoting contemporary statutes).

It is easy to imagine an anomalous result from either interpretation of § 10B-5(d)(2), as illustrated by this case of a gentleman accepted by the State Bar, but rejected for a notary commission. It may be that the drafters of the statute felt that providing that the "Secretary *may* deny" would ameliorate, e.g., the disparate treatment of an unsupervised probationer versus a misdemeanant who spent months in jail for a non-"moral turpitude" offense. In any case, "Whether it would be better that the law should be different is a matter solely for the lawmaking body to decide, and not for us." *State v. Norfolk Southern R. Co*., 168 N.C. 103, 82 S.E. 963, 966 (1914).

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 19th day of October, 2015.

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J. Randolph Ward
Administrative Law Judge