

STATE OF NORTH CAROLINA  
COUNTY OF CHATHAM

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 SOS 6035

CABELL J. REGAN, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 NORTH CAROLINA DEPARTMENT )  
 OF THE SECRETARY OF STATE, )  
 )  
 Respondent. )

**FINAL DECISION**

This contested case came on for hearing before the Honorable Donald W. Overby on December 15, 2015 in Raleigh, North Carolina.

**APPEARANCES**

For Petitioner: Cabell J. Regan, pro se  
P.O. Box 1595  
Pittsboro, N.C. 27312

For Respondent: Daniel S. Johnson  
Special Deputy Attorney General  
North Carolina Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001

**WITNESSES**

The following witnesses were called to testify by Petitioner:  
Cabell J. Regan, Petitioner  
Ozzie Stallworth, Director of Respondent's Notary Enforcement Division

**EXHIBITS**

The following exhibits were admitted into evidence on behalf of Petitioner:

1. 2009 criminal case verdict sheet
2. 2009 criminal case Judgment-08 CRS 003869
3. 2009 criminal case Judgment-08 CRS 003872
4. Interrogatory answers and document production from Respondent
5. 2009 application for re-commissioning
6. 2009 Commission

7. 2009 Document recommending issuance of commission
8. Criminal Application Checklist
9. 2015 application for re-commissioning
10. All Entities record
11. 2015 Document recommending denial
12. June 15, 2015 denial letter
13. Petition in this case
14. State Bar Order of Discipline.
15. Consent Amendment to State Bar Order.

The following exhibits were admitted into evidence on behalf of Respondent:

1. 2015 application for re-commissioning
2. 2015 letter denying commission
3. Petition for contested case hearing
4. Records from Petitioner's 2009 criminal convictions
5. N.C. State Bar Order of Discipline against Petitioner
6. 2009 application for re-commissioning
7. Interrogatory answers and document production from Respondent
8. Respondent's Prehearing Statement and Document Constituting Final Agency Action

### **ISSUE**

Did Respondent exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrary or capriciously, or fail to act as required by law or rule in denying Petitioner's 2015 application to be re-commissioned as a Notary Public?

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. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of each witness by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, 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. Wherefore, the undersigned makes the following Findings of Fact, Conclusions of Law and Decision.

### **FINDINGS OF FACTS**

1. Petitioner Cabell Regan was initially commissioned as a Notary Public by the North Carolina Secretary of State on July 3, 1978; and was subsequently re-commissioned on July 3, 1983; October 21, 1988; October 21, 1993; January 27, 1999; February 16, 2004; and November 30, 2009.

2. The North Carolina Secretary of State has not received any complaints involving Mr. Regan's performance as a notary public since he was first commissioned in 1978.
3. Mr. Regan has been an attorney duly licensed to practice law at all relevant times since September 4, 1979.
4. The parties stipulated in the Pretrial Order that Petitioner was convicted in Wake County Superior Court on January 28, 2009, of five counts of willful failure to file tax returns in violation of N.C. Gen. Stat 105-236(a)(9) which are Class 1 misdemeanors.
5. Petitioner had pled not guilty to the five charges of willful failure to file income tax returns in Wake County Superior Court, but was convicted. Petitioner was found guilty of five counts of failure to file North Carolina Individual Tax Returns for the years 2002, 2003, 2004, 2005, and 2006. According to Petitioner, his wife was also convicted of willful failure to file tax returns in a separate trial.
6. Two Judgments documenting Petitioner's 2009 convictions and sentences showed that Petitioner was placed on supervised probation for 36 months. Prior to entry of judgment all tax returns had been filed and taxes paid in full.
7. On November 25, 2009, Mr. Regan applied for re-commissioning as a Notary Public. That application listed the five (5) misdemeanor convictions of failure to file North Carolina Individual Tax Returns and included copies of the judgments entered as a result of those convictions. The application for re-commissioning included affidavits of moral character by three (3) affiants which included a statement that each affiant was aware of the criminal charges against Mr. Regan.
8. At the time Petitioner applied for re-commissioning on November 25, 2009, he was still on probation as a result of the convictions of failure to file North Carolina Individual Tax Returns as he admitted on the application.
9. On November 30, 2009, Gayle P. Holder, Certification and Filing Division Director of the Department of Secretary of State re-issued the commission of Mr. Regan as a notary public. Ms. Holder retired from her employment with Respondent in late 2009 or early 2010.
10. NCGS 10B-5(d) provides in part as follows: The Secretary may deny an application for commission or recommission if any of the following apply to an applicant:  
...  
(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 ... probation... (Emphasis added)
11. On May 5, 2015, Petitioner Regan applied for a re-commissioning as a notary public. The May 5, 2015 application included the information on the five misdemeanor convictions of failure to file tax returns just as had been included on the November 29, 2009 application.

12. Petitioner's probation for violation of the five counts of misdemeanor Failure to File Income Tax Returns was terminated on January 28, 2012, which was stipulated by the parties in the Pretrial Order.
13. Subsequent to the November 30, 2009, re-commissioning of Mr. Regan as a notary public, Ozzie Stallworth replaced Mrs. Holder in the duties of the Certification and Filing Division. Subsequent to Mrs. Holder's retirement, the duties previously exercised by Mrs. Holder were divided. The duties of the Notary Enforcement Section were assigned to Ozzie Stallworth. The relevant duties and responsibilities exercised by Mrs. Holder in 2009 and Mr. Stallworth in 2015 were those of the Notary Enforcement Section.
14. By letter dated June 15, 2015, Mr. Stallworth denied the application for re-commissioning of Petitioner as a notary public due to the convictions of the five misdemeanor convictions of failure to file income tax returns.
15. Respondent's denial of Petitioner's 2015 application was based on two grounds. First, that Petitioner's criminal convictions were deemed to be crimes of tax evasion, which the Department of the Secretary of State has declared to be crimes of dishonesty and moral turpitude by its regulation 18 NCAC 7B.0201(b)(33). Second, that Petitioner was released from supervised probation within ten years of his 2015 application and was thus ineligible for a commission based on N.C. Gen. Stat. § 10B-5(d)(2).
16. For purposes of this decision it is not necessary to decide whether or not the crimes for which Petitioner was convicted are crimes "involving dishonesty or moral turpitude."
17. There are no legally significant or relevant facts in the May 5, 2015 application of Mr. Regan that are different from those in the November 30, 2009 application of Mr. Regan.
18. Counsel for Respondent stated on the record in open hearing that Respondent does not seek to undo any notarial acts performed by Petitioner under the apparent authority of his 2009 commission.

BASED UPON the foregoing Findings of Facts, the undersigned Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. All parties were properly before the Administrative Law Judge and jurisdiction and venue are proper. To the extent that the Findings of Fact contain Conclusions of Law or that the Conclusions of Law are Findings of Fact, they should be considered without regard to the given labels.
2. Respondent has the authority and responsibility to regulate and enforce the laws and regulations pertaining to commissioning and discipline of Notaries Public in this State.

3. There are seven (7) specifically enumerated provisions within N.C. Gen. Stat. 10B-5(d) which specify the conditions under which the “Secretary may deny an application for commission or recommission.” (Emphasis added)
4. The provisions of N.C. Gen. Stat. 10B-5(d)(2) are only one of the seven subsections which speaks to the effect that crimes and criminal law has on the issuance of a notary commission. The first sentence speaks to the effect if the person is convicted or enters a “plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude.” This sentence speaks to specific crimes which are subject to being determined with some degree of specificity.
5. The second sentence of N.C. Gen. Stat. 10B-5(d)(2) deals with a different set of crimes than the first sentence. The second sentence states very plainly that it applies to any applicant who has been released from prison, who has been on probation or who has been paroled from prison. It is very possible within the criminal law for someone to be sent to prison, and thus paroled, for misdemeanors which are not crimes of dishonesty or moral turpitude. It is very possible for someone to be placed on probation for misdemeanors which are not crimes of dishonesty or moral turpitude. Thus, this sentence deals, in part, with a different set of people who have run afoul of the criminal law than those in the first sentence of this subsection.
6. In enacting subsection (2), the General Assembly very pointedly delineated what crimes it thought should have an effect on the issuance of the notary commission. The introductory language of N.C. Gen. Stat. 10B-5(d), and thus the first sentence of subsection (2) as well, is permissive. However, the second sentence is mandatory. The provisions of N.C. Gen. Stat. 10B-5(d)(4) are similar in nature and structure while dealing with a different subject matter.
7. The plain language of N.C. Gen. Stat. 10B-5(d)(2) prohibits Respondent from issuing a commission to Petitioner. Where the terms of a statute are clear and unambiguous, the Courts must give a statute its plain and definite meaning. The Courts “are without power to create provisions and limitations not contained in the language of a statute itself.” Gibbons v. Cole, 132 N.C. App. 777, 780, 513 S.E.2d 834, 836 (1999).
8. Petitioner contends that the decisions as to whether to recommission him as a notary have been arbitrary and capricious. They are not. The decision by Mrs. Holder in 2009 was in error. Her error in recommissioning Mr. Regan was to his benefit; however, to rule for the Petitioner at this point would be to perpetuate that error. Worse, to rule with Petitioner would be to invalidate a specific provision of the law, the entire second sentence of N.C. Gen. Stat. 10B-5(d)(2).
9. The fact that Mr. Regan was re-commissioned in 2009 does not automatically validate into perpetuity what is otherwise an error. When the exercise of a right is dependent upon legislative authority, and the Legislature has either failed to

authorize it or has forbidden it, a ministerial officer cannot create a right to do that which is unauthorized or forbidden by the legislature. Wallace v. Bd. of Trustees, Local Gov't Employees Ret. Sys., 145 N.C. App. 264, 278, 550 S.E.2d 552, 561 (2001).

10. Petitioner has stipulated that he was released from probation in January of 2012, less than ten years before his 2015 application. The provision in N.C. Gen. Stat. §10B-5(d)(2) is an absolute bar to the issuance of a Notary Public commission regardless of the nature of the underlying offense and regardless of whether the conviction was for a felony or a crime involving dishonesty or moral turpitude.
11. Respondent properly denied Petitioner's 2015 application for re-commissioning as a Notary Public. Respondent did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrary or capriciously, or fail to act as required by law or rule in denying Petitioner's 2015 application to be re-commissioned as a Notary Public?

### **DECISION AND ORDER**

Respondent's decision to deny Petitioner's 2015 application for a commission as a Notary Public should be, and is hereby, **AFFIRMED** and Petitioner's Petition should be, and is hereby **DISMISSED**.

### **NOTICE**

This is the Final Decision in this contested case. Pursuant to N.C. Gen. Stat. § 150B-43, N. C. Gen. Stat. § 150B-45 and N. C. Gen. Stat. § 150B-46, any party aggrieved by this final decision in this contested case is entitled to judicial review of this decision. To obtain judicial review of this Final Decision the party seeking review must file a petition within 30 days after the person is served with a written copy of the decision. The petition must be filed in the superior court of the county where the party aggrieved by the administrative decision resides. A copy of the Petition for Judicial Review must be served by personal service or by certified mail upon all parties of record to the contested case hearing.

This the 26<sup>th</sup> day of February, 2016.

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Donald W Overby  
Administrative Law Judge