

NORTH CAROLINA
CUMBERLAND COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 DOJ 01197

THOMAS ROBBINS,)
Petitioner,)
)
v.)
)
N.C. DEPARTMENT OF JUSTICE,)
COMPANY POLICE PROGRAM,)
Respondent.)

FINAL DECISION

On June 28, 2016, Administrative Law Judge Melissa Owens Lassiter conducted a hearing in this matter in Raleigh, North Carolina, pursuant to Petitioner's petition appealing Respondent's January 25, 2016 denial of Petitioner's application for commission. On July 28, 2016, the parties filed their respective proposed Final Decisions with the Office of Administrative Hearings pursuant to the Undersigned's request.

APPEARANCES

For Petitioner: Robert O. Crawford III, Crawford & Crawford, PLLC, 6500 Creedmoor Road, Suite 104, Raleigh, NC 27613

For Respondent: Whitney Hendrix Belich, Assistant Attorney General, N.C. Department of Justice, 9001 Mail Service Center, Raleigh, NC 27699-9001

ISSUE

Whether Respondent Company Police Program acted erroneously, or failed to act as required by law or rule, in finding probable cause to deny Petitioner's application for commission as a company police officer for not less than three years on the grounds that Petitioner knowingly made material misrepresentations during the application process with Field Force Special Police in violation of 12 NCAC 2I.0212(c)(6)?

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. § 74E-4, N.C. Gen. Stat. § 74E-10
N.C. Gen. Stat. § 15A-145.5, N.C. Gen. Stat. § 15A-153(e)

12 NCAC 2I.0202, 12 NCAC 2I.0212(c)(6), 12 NCAC 2I.0213

Fla. Stat. § 784.021 Aggravated Assault
Fla. Stat. § 943.0585 Court-ordered Expunction of criminal history records

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner:

12. Petitioner's Sworn Statement dated 12/1/2005
13. Florida Department of Law Enforcement – Global Profile Sheet for Thomas C. Robbins

For Respondent:

1. Notice of Probable Cause (1/25/2016)
2. Petitioner's Personal History Statement (Form F-3) (6/29/2015) and Mandated Background Investigation (Form F-8) (6/1/2015)
3. Petitioner's Authorization for Release of Records (6/29/2015)
4. Petitioner's personnel file from Florida Fish and Wildlife Conservation Commission
5. Settlement Agreement regarding Petitioner's personnel action against Florida Fish and Wildlife Conservation Commission (5/25/2006)
6. Memo from SBI polygraph examiner (10/28/2015)
7. Probable Cause affidavit from Palm Beach County Sheriff's Office -July 10, 2010 Aggravated Domestic Assault w/ Firearm
8. Palm Beach County Sheriff's Office Offense Report
9. Dismissal of Assault charge (7/20/2010)
10. Order to Expunge Records (11/15/2013)
11. Police reports, narratives, and affidavits relating to Conspiracy to Commit Extortion investigation.

WITNESSES

For Petitioner: Thomas Robbins, Petitioner

For Respondent: Donna L. Sears, Administrator, Company Police Program

FINDINGS OF FACT

BASED ON the careful consideration of the sworn testimony of the witnesses presented at the hearing, the exhibits received and admitted into evidence, judicial notice of Florida and North Carolina statutes, and the entire record in this case, the undersigned makes the following:

Procedural Background

1. Both parties are properly before this administrative law judge in that jurisdiction and venue are proper, and both parties received notice of hearing.

2. Respondent Company Police Program, has the authority granted under Chapter 74E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 2I, to certify company police officers and agencies and to revoke, suspend, and deny such certifications.

3. On or about June 1, 2015, Petitioner submitted an “Application for Company Police Officer Commission,” in conjunction with a conditional offer of probationary employment with Field Force Special Police, to Respondent.

4. By letter dated January 25, 2016, the Company Police Administrator advised Petitioner that she had found probable cause to deny his application for knowingly making material misrepresentations of information on his Personal History Statement (Commission Form F-3), and a Mandated Background Investigation (Commission Form F-8) for application for certification with Respondent. (See Resp. Exh. 1)

5. On February 3, 2016, Petitioner filed a timely Petition for a Contested Case Hearing appealing Respondent's decision.

Petitioner's Personal Background

6. Petitioner Thomas C. Robbins is a native of the state of Florida. In 1983, Petitioner graduated from high school in Lake Worth, Florida. In August 1983, he entered the United States Army. During Airborne and Special Forces training at Fort Bragg, it was discovered that Petitioner had a congenital deformity in his knees. He was honorably discharged in July 1984 with a medical disability. Petitioner returned to Florida, and worked in construction and roofing from 1984 to 1990.

7. In April 1991, after successfully completing 870 hours of basic law enforcement training, Petitioner commenced employment with the Florida Marine Patrol. Petitioner's duties and authority were similar to a North Carolina Highway Patrol trooper, except he was primarily on the water.

8. In 1999, the Florida Marine Patrol merged with the Florida Fish and Wildlife Conservation Commission (“Florida Wildlife Commission”). Petitioner remained employed in a similar law enforcement capacity and wildlife officer until March 11, 2005.

9. From 2005-2006, Petitioner opened a roofing business. From October 2006 to September 2008, Petitioner was employed by DynCorp International as an international police advisor in Afghanistan. Petitioner obtained additional training before his deployment. In September 2008, Petitioner suffered a life-threatening blood clot in his leg, and returned to the United States for emergency treatment and lengthy follow-up care, and was restricted from some physical activity.

10. From 2008 to 2013, Petitioner worked in various employments including some private security jobs in Florida. In 2009, Petitioner attended law enforcement training again at

Broward Community College, and was re-certified as a Florida law enforcement officer. In October 2013, Petitioner moved to North Carolina.

11. Petitioner completed North Carolina basic law enforcement training (BLET) at Robeson Community College where he finished as the top student. Petitioner asked that his award for being first in the class be given to the next highest performer, who was a rookie.

12. In July 2014, Petitioner re-married, and has three step-daughters. Petitioner is 51 years of age.

13. Petitioner seeks to work part-time as a company police officer, because he assists his wife with two of his step-daughters, who have special needs. Working as a company police officer is his last opportunity for him to return to a career in law enforcement that he enjoyed in Florida from 1991 – 2005. Petitioner also hopes to teach basic law enforcement.

Termination of Employment with Florida Fish and Wildlife Conservation Commission in 2005
(Alleged Material Misrepresentation Nos. 1, 4 and 8)

14. After reviewing Petitioner's application, Company Police Administrator Donna Sears investigated several inconsistencies between Petitioner's responses on the application and information she received.

15. Ms. Sears noted that Petitioner disclosed on his Personal History Statement (hereinafter Form F-3), submitted as a part of his application for commissioning, that Petitioner's law enforcement certification was suspended in the state of Florida. Petitioner's application was missing reference checks from his previous employers in Florida. Despite Sears' requests to the Chief at Field Force for reference checks, she never received reference checks for Petitioner.

16. As part of his application, Petitioner provided Respondent with a signed and notarized "Authorization for Release of Records," signed June 29, 2015, authorizing Petitioner's former employers, governmental agencies, or licensing commissions to provide copies of any and all information, including personnel records, whether of a privileged or confidential nature to Respondent. (Resp. Exh. 3).

17. Ms. Sears used Petitioner's signed "Authorization for Release of Records," and a public records request to obtain copies of Petitioner's complete personnel file from the Florida Wildlife Commission, including all information concerning his termination, and the Settlement Agreement including sealed documents. (Resp. Exh. 4).

a. Petitioner's file from the Florida Wildlife Commission (Resp. Exh. 4) showed that on March 11, 2005, the Florida Wildlife Commission – Division of Law Enforcement terminated Petitioner from his position for cause due to multiple disciplinary actions. Petitioner contested the grounds for his termination through a grievance procedure, and entered into an arbitration proceeding with the Florida Fish and Wildlife Commission. On May 25, 2006, Petitioner and the Florida Fish and Wildlife Commission resolved

Petitioner's grievance and arbitration through a negotiated Settlement Agreement. (Resp. Exh. 5)

b. Pursuant to the terms of the Settlement Agreement, Petitioner's termination was rescinded, Petitioner was reinstated to employment, the dismissal letter and related reprimands and warnings were sealed in Petitioner's personnel file, and Petitioner submitted a voluntary resignation effective March 11, 2005. Petitioner received monetary compensation in exchange for his release of claims against the Florida Wildlife Commission. The parties agreed not to make "any public, oral or written statements inconsistent with the terms of the Agreement." (Resp. Exh. 5, ¶ 10)

c. However, paragraph 4 of the Settlement Agreement indicated that production of the March 11, 2005 dismissal letter, and related documents including the Settlement Agreement, "is subject to a public records request in accordance with Chapter 119, Florida Statutes," such as the request made by Ms. Sears. (Resp. Exh. 5, ¶4)

18. Based on the Settlement Agreement, Petitioner understood that he could thereafter truthfully state that he voluntarily resigned from his employment.

19. Petitioner retained his copies of the paperwork regarding the above settlement, but those records were either destroyed during storms in Florida, or thrown out by Petitioner's ex-wife while he was in Afghanistan.

20. Question #28 on Form F-3 asked, "Have you ever been discharged, requested to resign, or allowed to resign in lieu of termination, from any position because of criminal or personal misconduct or rules violations?" Petitioner answered "No," despite the fact that he had first been terminated then permitted to resign in lieu of that termination from the Florida Wildlife Commission. (Resp. Exh. 2) (Alleged misrepresentation #1)

21. Question #30 of the Mandated Background Investigation (Form F-8) asked, "Have you ever been terminated or asked to resign from any employment?" Petitioner responded "No" despite the circumstances of his discharge from the Florida Wildlife Commission. (Resp. Exh. 2) (Alleged misrepresentation # 4)

22. On Question #102 of Form F-8 asked, "Have you ever been disciplined asked to resign, been terminated, or released due to any criminal or personal misconduct?" Petitioner responded "No" despite his discharge for multiple disciplinary actions from the Florida Wildlife Commission. (Resp. Exh. 2) (Alleged misrepresentation # 8)

23. Petitioner's public Florida Department of Law Enforcement Global Profile Sheet stated that the reason for Petitioner's separation from employment with the Florida Wildlife Commission was "Voluntary Separation (Not involving misconduct)." (Resp. Exh. 13)

24. Pursuant to 12 NCAC 2I.0202(a)(5), an applicant who does not hold a general certification as a North Carolina law enforcement officer must submit to, and successfully complete, a polygraph examination administered by the State Bureau of Investigation. At the time

of his application with Respondent, Petitioner's Florida law enforcement certification had expired, and he was not certified in North Carolina, although he had completed BLET school.

25. On October 16, 2015, Petitioner disclosed to the SBI polygraph examiner that he received a reprimand for turning in his monthly paperwork one week late at the Florida Marine Patrol in 1992 or 1993. (Resp. Exh. 6) This was the only disciplinary action that Petitioner believed stood in his personnel file as he had filed successful grievances against all the others.

26. In his written rebuttal attached to his Prehearing Statement, and at the contested case hearing, Petitioner explained that he believed the Settlement Agreement "wiped the slate clean" regarding the termination for cause of his employment with the Florida Wildlife Commission, as if it [the termination] never happened.

27. When Petitioner completed the Form F-3 in June of 2015, he did not have a copy of the Settlement Agreement to review the above-cited Settlement Agreement, and thus, based his answers, on Form F-3 and Form F-8, solely on his memory and understanding of the terms of the Settlement Agreement.

28. Petitioner reasonably believed that this answers to the foregoing questions were truthful and accurate based on his recollection and understanding of the terms of the Settlement Agreement, that his termination was rescinded, and he voluntarily resigned. Petitioner's answers to the foregoing Form F-3 and Form F-8 questions were consistent with the requirement of the Settlement Agreement that neither party would make any statement inconsistent with its terms.

29. The preponderance of the evidence at hearing proved that Petitioner did not knowingly intend to mislead or make a material misrepresentation to Respondent with respect to the termination of his employment with the Florida Fish and Wildlife Conservation Commission.

"Detention" in April 2005
(Alleged Material Misrepresentation No. 5)

30. In response to Questions #27(a) and (b) on the Form F-3, Petitioner disclosed in a supplemental two-page written statement that his Florida law enforcement officer certification was suspended for two years in 2006 due to an incident that occurred on April 14, 2005. (Resp. Exh. 2)

a. Petitioner appealed the suspension of his certification, and attended an administrative hearing in May 2006, being represented by a policy union attorney. The administrative law judge ruled that it was more likely than not, that Petitioner knew what was going on during the April 14, 2005 incident, and recommended Petitioner's certification be suspended for two years.

b. Later in 2006, the Florida Department of Law Enforcement Commission conducted a hearing, and reviewed the administrative judge's decision. Petitioner did not attend such hearing as he was deployed to Afghanistan. The FDLE Commission upheld a two-year

suspension of Petitioner's law enforcement certification. (Resp. Exh. 2, Attachment for question 27(b))

31. On his Mandated Background Investigation (Form F-8), Petitioner indicated "No" in response to Question #35 which asks, "Have you ever been arrested, detained, or charged with a crime, even if the charges against you have been dismissed?" (Alleged material misrepresentation #5)

32. On October 16, 2015, during the pre-polygraph interview for the application at issue, Petitioner disclosed to the polygraph examiner that he had been previously charged with a felony assault offense in the state of Florida. This disclosure was included in the polygraph examiner's memorandum to the Company Police Administrator (Resp. Exh. 6).

33. During the October 16, 2015 polygraph, Petitioner explained that on April 14, 2005, his then wife, Tamra, asked him to give her cousin, Kim, a ride to pick up some money from a "friend" in Royal Palm Beach, Florida. Petitioner agreed because he was going to the area anyway to get work done on his Jeep, and Kim did not have a vehicle or cell phone. Upon arrival at the designated location, police officers took Kim into custody. Petitioner explained to the officers that he was just doing his wife a favor by giving her cousin a ride, and provided a written witness statement to that effect. Kim pled guilty to charges of attempted extortion. (Resp. Exh. 6) Petitioner did not recall being "detained" or "Mirandized" during the April 14, 2005 incident. Petitioner did not recall being handcuffed.

34. During the October 16, 2015 polygraph process, Petitioner did not have or review any documents related to the April 14, 2005 incident, or the ensuing administrative allegation against his Florida law enforcement certificate for "Conspiracy to Commit Extortion." Petitioner based his supplemental two-page written explanation and statement to the SBI polygraph examiner on his memory alone. (Resp. Exh. 6)

35. Respondent's administrator Donna Sears obtained police reports concerning the April 14, 2005 incident (Resp. Exh. 11), and a copy of Petitioner's sworn statement, dated December 1, 2005, from the Florida Department of Law Enforcement (FDLE). (Resp. Exh. 12) The police reports indicated that (1) Petitioner was handcuffed, (2) Petitioner asked the officer why he was being detained, and (3) Petitioner advised the officer that he understood his Miranda rights, and that it was not necessary for the officer to read Petitioner his Miranda rights.

36. These reports also indicated Petitioner was to be charged, along with his then wife, with felony extortion and conspiracy charges. However, no charges were ever filed against Petitioner. (Resp. Exh. 11, p. 9) Instead, the April 14, 2005 report and other information was turned over to the Florida State's Attorney's Office.

37. A "No File" was issued as to Petitioner's involvement in the matter. Petitioner was not arrested. Petitioner was not charged with any offense. Petitioner did not hire an attorney. (Resp. Exh. 11)

38. In his 2005 sworn statement about this incident, Petitioner stated that he was handcuffed, advised the arresting officer that he understood his Miranda rights, and answered the officer's questions. (Pet. Exh. 12)

39. At the contested case hearing, Petitioner explained that he was never involved in his wife's scheme to extort a male subject on April 14, 2005. After reviewing Respondent's Exhibits 11 and 12 in preparation for this contested case hearing, Petitioner did not recall being handcuffed before giving his statement to the police officers on April 14, 2005. He claimed that he had been handcuffed many times as part of his law enforcement training and in-service training, and that probably accounted for his not remembering being handcuffed on April 14, 2005. Petitioner claimed that his memory was faulty and apologized for not disclosing being handcuffed and detained.

Expunged Arrest for Alleged Aggravated Assault on Brother in 2010
(Alleged Material Misrepresentation Nos. 2, 3, 6, and 7)

40. On his Form F-3, Petitioner indicated "No" in response to Question #49 which asks "Have you ever been arrested by a law enforcement officer or otherwise charged with a criminal offense?" (Resp. Exh. 2) (Alleged material misrepresentation #2.)

41. On his Form F-3, Petitioner indicated "No" in response to Question #53 which asks "Have you ever been charged with a felony (including charges expunged pursuant to N.C.G.S. §§15A-145.4 and 15A-145.5.)" (Resp. Exh. 2) (Alleged material misrepresentation #3.)

42. On his Mandated Background Investigation (Form F-8), Petitioner indicated "No" in response to Question #35 which asks "Have you ever been arrested, detained, or charged with a crime, even if the charges against you were dismissed?" (Resp. Exh. 2) (Alleged material misrepresentation #6.)

43. On his Mandated Background Investigation (Form F-8), Petitioner indicated "No" in response to Question #43 which asks "Have you ever been arrested or convicted of a felony?" (Resp. Exh. 2) (Alleged material misrepresentation #7)

44. The instructions to Form F-3 state in part:

If any doubt exists in your mind as to whether or not you were arrested or charged with a criminal offense at some point in your life or whether an offense remains on your record, you should answer 'Yes.'

(Resp. Exh. 2)

45. On October 16, 2015, during the pre-polygraph interview, Petitioner argued with the SBI polygraph examiner that he was not required to disclose expunged arrests. (Resp. Exh. 6). The examiner advised Petitioner that she would not administer the polygraph if Petitioner did not disclose the arrest. As a result, Petitioner told the polygraph examiner that he was arrested and

charged with a felony assault offense in Florida in 2010, and obtained a subsequent expunction of that charge in 2013. (Resp. Exh. 6)

46. Ms. Sears learned about the 2010 felony charge from the polygraph examiner's Memorandum to Respondent. Thereafter, Sears obtained records from the Palm Beach County Sheriff's Office for a July 10, 2010 felony charge against Petitioner for Aggravated Domestic Assault with Firearm. (Resp. Exhs. 6, 7, 8) Those law enforcement reports indicated law enforcement was called to a possible assault between Petitioner and his brother, Steven Robbins on July 10, 2010. Steven Robbins told police that his brother had pointed a gun at his chest during a verbal argument. Petitioner was arrested, and charged with the felony offense of Aggravated Domestic Assault with a Firearm.

47. At the contested case hearing, Petitioner explained that he allowed his younger brother, Steven Robbins, to move into a trailer on his property for free in 2010. Steven Robbins was a drug addict and a petty criminal. Steven had used Petitioner's name and the name of their other brother, Kenny, as an alias to avoid arrest and prosecution. Petitioner allowed Steven to move into his trailer with the understanding Steven would get off drugs, and get a job.

48. On July 10, 2010, Petitioner discovered that Steven had pawned \$900 - \$1,000 worth of Petitioner's power tools. Petitioner told Steven that he had two weeks to leave or he would be evicted. Steven said, "We'll see about that." Steven Robbins called "911" and falsely accused Petitioner of pulling a handgun from the waistband of his gym shorts and pointing it at him. Steven knew that Petitioner would be arrested, because the officers have no discretion not to arrest on a sworn statement in a domestic situation. (Resp. Exhs 7 and 8).

49. Petitioner was arrested for Aggravated Assault in violation of Florida Stat. § 784.021 (Assault with a Deadly Weapon Without Intent to Kill), which is a third degree felony. Petitioner was released on his own recognizance a few hours later. Ten days later on July 20, 2010, the District Attorney's Office issued a "No File," and declined to file charges against Petitioner. (Resp. Exh. 9).

50. Steven Robbins died in 2013.

51. On November 15, 2013, Petitioner, through legal counsel, obtained an "Order to Expunge Records" pursuant to Florida Stat. § 943.0585. The Court ordered all records pertaining to the July 10, 2010 arrest and case be expunged. (Resp. Exh. 10)

52. Florida Stat. § 943.0585(4)(a)(1) states in pertinent part that a person who is the subject of a criminal history record that is expunged may lawfully deny or fail to acknowledge the arrests covered by the expunged record, except when the person is a candidate for employment with a criminal justice agency.

53. Florida Stat. § 943.0585(4)(c) states in pertinent part that information relating to the existence of an expunged criminal history record is confidential and exempt from disclosure, except the department shall disclose the existence of the expunged criminal history record to criminal justice agencies for their respective criminal justice purposes.

54. The Company Police Program under Chapter 74E of the North Carolina General Statutes is not a criminal justice agency. The Program receives administrative support from the Criminal Justice Standards Division, and uses the same forms used for certifying law enforcement officers. Company police officers must meet the same minimum standards and take the same oath as law enforcement officers, and have the same powers of arrest within their defined, limited jurisdiction.

55. At the contested case hearing, Petitioner explained that he believed expunged arrests did not have to be disclosed in North Carolina based upon his conversation with a Cumberland County sheriff's deputy, and based on his own subsequent review and understanding of the North Carolina expunction statute, N.C. Gen. Stat. § 15A-153(e). A Cumberland County Sheriff's Deputy advised Petitioner that he did not need to disclose an expunged matter. Petitioner believed the Florida expunction was valid in whatever state he resided. Petitioner also believed the exception requiring disclosure by applicants for law enforcement certification did not apply, because he was only arrested, but was neither charged nor convicted of a felony.

56. Petitioner did not consider whether he was required to disclose the arrest based on the Florida expunction statute, or whether the Company Police Program could or would obtain that information from Florida. At hearing, he explained that he would have disclosed the expunged July 10, 2010 arrest if he had thought he needed to disclose it. Petitioner believed he had a legal right not to disclose the expunged arrest based on North Carolina law.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter over this contested case. The parties received proper notice of the hearing. 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 so considered without regard to the given labels.

2. Respondent has the authority under Chapter 74E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 2I, to commission company police officers and to revoke, suspend or deny such certification.

3. Petitioner has the burden of proving that Respondent Company Police Program acted erroneously, or failed to act as required by law or rule, in finding probable cause to deny Petitioner's application for commission as a company police officer for not less than three years on the grounds that Petitioner knowingly made material misrepresentations during the application process with Field Force Special Police in violation of 12 NCAC 2I.0212(c)(6). (See N.C. Gen. Stat. § 150B-23(a))

4. The party with the burden of proof in a contested case must establish the facts required by N.C. Gen. Stat. § 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a).

5. The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a).

6. 12 NCAC 2I.02012 sets forth the minimum standards for company police officer. Officers must provide complete and accurate information during the application process.

7. 12 NCAC 2I.02012(c) states in pertinent part that a company police commission shall be denied upon a finding that the applicant:

(6) knowingly made a material misrepresentation of any information required for commissioning or certification from the Company Police Administrator, the North Carolina Criminal Justice Education and Training Standards Commission or the North Carolina Sheriffs' Education and Training Standards Commission.

8. "A misrepresentation or omission is 'material' if, had it been known to the party, it would have influenced the party's judgment or decision to act." *Latta v. Rainey*, 202 N.C. App. 587, 599, 689 S.E.2d 898, 909 (2010). Materiality is a question of fact for the fact-finder. *Id.*

Termination of Employment with Florida Fish and Wildlife Conservation Commission in 2005
(Allegations of Material Misrepresentations Nos. 1, 4, 8)

9. In this case, Petitioner's negative answers to Questions #28 of Commission Form F-3, #30 and #102 of Commission Form F-8, did not constitute a knowing material misrepresentation.

a. A preponderance of the evidence at hearing showed that the Settlement Agreement between Petitioner and the Florida Wildlife Commission sealed the March 11, 2005 dismissal letter, related documents, and the Settlement Agreement. Under that Settlement Agreement, Petitioner was lawfully justified in answering "No" to Questions 28, 49, and 53 on Form F-3.

b. Although the Settlement Agreement authorized the sealed documents to be produced pursuant to a public records request, the preponderance of the evidence showed that Petitioner did not possess a copy of the Settlement Agreement when he completed the Form F-3.

c. A preponderance of the evidence showed that Petitioner reasonably believed that his answers to the above questions on Forms F-3 and F-8 were truthful and accurate based on his recollection and understanding of the terms of the Settlement Agreement, that his termination was rescinded, and he voluntarily resigned.

d. The preponderance of the evidence at hearing proved that Petitioner did not knowingly intend to mislead or make a material misrepresentation to Respondent with respect to the termination of his employment with the Florida Fish and Wildlife Conservation Commission.

Expunged Arrest for Alleged Aggravated Assault on Brother in 2010
(Alleged Material Misrepresentation Nos. 2, 3, 6, and 7)

10. N.C. Gen. Stat. § 15A-145.5 provides:

(d) No person as to whom an order has been entered pursuant to subsection (c) of this section shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of that person's failure to recite or acknowledge the arrest, indictment, information, trial, or conviction. **Persons pursuing certification under the provisions of Chapter 17C or 17E of the General Statutes, however, shall disclose any and all convictions to the certifying Commission, regardless of whether or not the convictions were expunged pursuant to the provisions of this section. . . .** (Emphasis added)

11. N.C. Gen. Stat. § 15A-153 "Effect of expunction; prohibited practices by employers, educational institutions, agencies of State and local governments" provides:

(d) State or Local Government Agency, Official, and Employee Inquiry Regarding Disclosure of Expunged Arrest, Criminal Charge, or Conviction. - Agencies, officials, and employees of the State and local governments who request disclosure of information concerning any arrest, criminal charge, or criminal conviction of the applicant shall first advise the applicant that State law allows the applicant to not refer to any arrest, charge, or conviction that has been expunged. An applicant need not, in answer to any question concerning any arrest or criminal charge that has not resulted in a conviction, include a reference to or information concerning charges or convictions that have been expunged. Such application shall not be denied solely because of the applicant's refusal or failure to disclose information concerning any arrest, criminal charge, or criminal conviction of the applicant that has been expunged.

(e) [Exceptions.] The provisions of subsection (d) of this section do not apply to any applicant or licensee seeking or holding any certification issued by the North Carolina Criminal Justice Education and Training Standards Commission pursuant to Chapter 17C of the General Statutes or the North Carolina Sheriffs Education and Training Standards Commission pursuant to Chapter 17E of the General Statutes: . . .

(2) Convictions expunged pursuant to G.S. 15A-145.5. - Persons pursuing certification under the provisions of Chapter 17C or 17E of the General Statutes shall disclose any and all convictions to the certifying Commission regardless of whether or not the convictions were expunged pursuant to the provisions of G.S. 15A-145.5.

12. N.C. Gen. Stat. § 74E-8 "Minimum standards for company police officers" provides:

Applicants for commission as a company police officer and a commissioned company police officer must meet and maintain the **same minimum preemployment and in-service standards as are required for State law enforcement officers by the North Carolina Criminal Justice Education and Training Standards Commission, and must meet and maintain any other preemployment and in-service requirements set by the Attorney General.**

(Emphasis added)

13. In this case, before Petitioner applied to take the BLET in North Carolina, he knew there might be an issue regarding his expunged arrest from July 10, 2010, because he asked a Cumberland County Deputy Sheriff if he needed to disclose a matter that had been expunged. The Deputy Sheriff advised Petitioner that he did not need to disclose a matter that had been expunged. Petitioner also read North Carolina's statute regarding expunctions, i.e. N.C. Gen. Stat. § 15A-153(e), although he claimed he did not read N.C. Gen. Stat. § 15A-145.4 or 145.5, because he already had an expunction.

a. At hearing, Petitioner explained that he did not disclose his expunged July 10, 2010 Aggravated Assault arrest because he thought he had a legal right not to disclose it to Respondent since such arrest had been expunged.

b. However, Respondent's Commission Form F-3 specifically advised Petitioner, as an applicant, that "If any doubt exists in your mind as to whether or not you were arrested or charged with a criminal offense at some point in your life or whether an offense remains on your record, you should answer 'Yes.'" (Resp. Exh. 2, p. 12)

c. The preponderance of the evidence established that given Petitioner's extensive level of law enforcement experience and educational level, and the language of the Commission Form F-3, Petitioner should have known he should have disclosed his July 10, 2010 Aggravated Assault charge in answering Questions #49 and 53 on Commission Form F-3, and Questions 35 and 43 on Commission Form F-8. Petitioner's negative answers to such questions constitute a knowing material misrepresentation in violation of 12 NCAC 02I .0212(c)(6).

d. Petitioner's disclosure of the July 10, 2010 Aggravated Assault charge to the polygraph examiner in October 16, 2015 does not negate his nondisclosure of such arrest on the Commission Form F-3 and Form F-8.

"Detention" in April 2005
(Alleged Material Misrepresentation No. 5)

14. Petitioner's negative answer to Question 35 on Commission Form F-8 constituted a knowing material misrepresentation in violation of 12 NCAC 02I .0212(c)(6). Given Petitioner's level of law enforcement experience, and the circumstances surrounding the April 14, 2005

incident, Petitioner's explanation that he could not recall being detained, being handcuffed, and telling an officer he understood his Miranda rights was not believable.

15. Petitioner failed to meet his burden of proving by a preponderance of the evidence that the Respondent Company Police Program acted erroneously or failed to act as required by law or rule in finding probable cause to deny Petitioner's application for a commission.

16. The preponderance of evidence proved that Respondent had probable cause to deny Petitioner's application for commission pursuant to 12 NCAC 2I.0212(c)(6).

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's denial of Petitioner's application for a company police officer commission pursuant to 12 NCAC 2I.0212(c)(6).

NOTICE

Under the provisions of N.C. Gen. Stat. § 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 in which the party resides. **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(a)(3), 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 9th day of September, 2016.

Melissa Owens Lassiter
Administrative Law Judge