

STATE OF NORTH CAROLINA
COUNTY OF CATAWBA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 DOJ 01719

<p>David Shannon Dellinger Petitioner,</p> <p>v.</p> <p>North Carolina 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 June 6, 2016 before Administrative Law Judge Selina M. Brooks in Morganton, North Carolina. This case was heard after Respondent requested, pursuant to N.C. Gen. Stat. § 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: Wesley Sigman
Attorney for Petitioner
Sigmon Clark Mackie Hutton Hanvey & Ferrell, PA
Post Office Drawer 1470
Hickory North Carolina 28603

Respondent: Lauren Tally Earnhardt
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
P.O. Box 629
Raleigh, N.C. 27602-0629

ISSUE

Does substantial evidence exist for Respondent to suspend Petitioner's law enforcement officer certification for a positive drug screen?

RULES AT ISSUE

12 NCAC 09A .0204(b)(13)
12 NCAC 09C .0310

EXHIBITS

Petitioner's Exhibit A was admitted upon consent pursuant to written Stipulations submitted by the Parties at the hearing.

Respondent offered no Exhibits.

WITNESSES

For Petitioner: David Shannon Dellinger, Petitioner
 Daniel Hipps, Chief, Maiden Fire Department

For Respondent: No witnesses were called.

STIPULATIONS

The Parties submitted the following written Stipulations of findings of fact at the hearing:

1. On December 2, 2105, Petitioner deposited a urine sample through his employment as part of a random drug screen. This untampered sample was delivered to Laboratory Corporation of America (LabCorp) in Research Triangle Park, North Carolina for testing on December 3, 2015. The chain of custody for this urine sample was untainted and untampered.

2. LabCorp reported the Petitioner's urine sample to be positive for the presence of Marijuana Metabolite. The Petitioner produced a positive result on a drug screen for Marijuana Metabolite administered in accordance with the procedures authorized and mandated by the United States Department of Health and Human Services for Federal Workplace Drug Testing Programs. This positive result for Marijuana Metabolite revealed a level above the threshold established for a screen and confirmation test conducted in accordance with the standards established by the United States Department of Health and Human Services for Federal Workplace Drug Testing Programs.

3. The Petitioner's drug test consisted of a confirmatory test on the initial positive result using a gas chromatography/mass spectrometry.

4. The chain of custody on Petitioner's urine sample has been maintained from collection to the present.

5. The drugs tested for included amphetamines, cocaine, marijuana metabolite, opiates, and PCP.

6. The test threshold values used were those established by the Department of Health and Human Services for Federal Workplace Drug Testing Programs.

7. The confirmation cutoff for Marijuana Metabolite is 16 ng/mL. The Petitioner's urine sample tested positive for Marijuana Metabolite at a level of above 300 ng/mL.

8. LabCorp is a laboratory certified for Federal Workplace Drug Testing Programs.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, the above Stipulations, 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. In the absence of a transcript, the Undersigned has relied upon her notes to refresh her recollection.

FINDINGS OF FACT

1. Both parties received Notice of Hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.

2. The North Carolina Criminal Justice Education and Training Standards Commission ("Commission") has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, ("Title 12") to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. Petitioner has been employed as a certified company police officer with Duke Energy for 14 years. Petitioner has never had a certification issue come before Respondent until now. Petitioner is also a volunteer fire fighter for Maiden Volunteer Fire Department in Maiden, North Carolina.

4. In the fall of 2015, Petitioner and his then wife were separated and pursuing divorce. The two had legal disputes over the custody of their young son. Petitioner was depressed and distraught about not being able to see his son.

5. On November 28, 2015, Petitioner attended his High School reunion and while at a party smoked Marijuana. Petitioner admitted that he regularly smoked marijuana in high school, but that he had not smoked again until this reunion party. He denied purchasing or bringing the marijuana. A few attendants at the party knew he was a sworn law enforcement officer.

6. On December 2, 2015, Petitioner was selected for a random drug test through his employer, Duke Energy. Before taking the test, Petitioner went to his boss and disclosed that the drug test would be positive for marijuana.

7. The drug test results indeed showed a positive reading for marijuana. Duke Energy provided Petitioner with counseling for possible substance abuse between January 2016 and April 2016. Petitioner was released early from the counseling and passed two random drug tests.

8. At the hearing, Petitioner was candid about the incident and admitted that he broke the law when he smoked marijuana. Petitioner said that he had learned from the experience, will manage any future stress better and would not repeat this mistake.

9. Petitioner presented letters of recommendation from Colleen M. Serreno, LPC, LCAS; Danny Hipps, Fire Chief, Maiden Fire Department; Kenneth Huffman, Assistant Fire Chief, Maiden Fire Department; Tracy Caldwell, Assistant Fire Chief, Maiden Fire Department; Luke Shoffner; Jonathan Harbinson; Phillip Cranford, Security Officer, McGuire Nuclear Station; Christopher A. Nitzu, Company Police Officer, Duke Energy; Lee Fowler, Bravo Captain, Company Police Officer, McGuire Nuclear Station; and Yvonne Travis, Preschool Director. All recommend Petitioner for certification by Respondent.

10. Maiden Fire Chief, Daniel Hipps testified at the hearing. He has known Petitioner his whole life and said Petitioner was very honest with him about the positive drug screen. Petitioner was actively volunteering for Chief Hipps when the drug test was taken and Chief Hipps immediately put Petitioner on administrative duty. Petitioner could not go on calls and was given one random drug test and a physical examination before he was reinstated with the ability to perform all duties. Chief Hipps opined that Petitioner handles stress better now, and that he is not worried about Petitioner smoking marijuana ever again.

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. 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. Under 12 NCAC 9A.0205, when Respondent suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years; however, Respondent may either reduce or suspend the period of sanction under Paragraph (b) 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 production of a positive result on a drug screen reported to Respondent under 12 NCAC 9C .0310, where the positive result cannot be explained to Respondent satisfaction.

4. A preponderance of the evidence exists to conclude Petitioner had marijuana in his system on December 2, 2015. The positive result is not due to any medically indicated cause. Petitioner's law enforcement officer certification is subject to suspension pursuant to 12 NCAC 9A. 0205.

5. Petitioner has been without his law enforcement certification during the hearing process for approximately six (6) months.

6. The findings of Respondent are supported by substantial evidence and are not arbitrary and capricious.

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

8. Petitioner has the burden of proof in the case at bar.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned recommends the Petitioner's certification as a law enforcement officer be suspended for the six months which he has already served, and then the remaining term (4.5 years) of his suspension should be suspended on the condition that Petitioner not violate any law (other than infractions) of this state or any other state, any federal laws, or any rules of this Commission, the Company and Campus Police Program or the North Carolina Sheriffs' Education and Training Standards Commission.

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.

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 Sheriffs' Education and Training Standards Commission.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. § 150B-42(a).

IT IS SO ORDERED.

This the 29th day of June, 2016.

Selina Malherbe Brooks
Administrative Law Judge

STATE OF NORTH CAROLINA
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Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Proposal For Decision, issued from this Office on June 29, 2016 is amended as follows:

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned recommends the Petitioner's certification as a law enforcement officer be suspended for the six months which he has already served, and then the remaining term (4.5 years) of his suspension should be suspended on the condition that Petitioner not violate any law (other than infractions) of this state or any other state, any federal laws, or any rules of this Commission, the Company and Campus Police Program or the North Carolina Sheriffs' Education and Training Standards Commission.

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 30th day of June, 2016.

Selina Malherbe Brooks
Administrative Law Judge