

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 DOJ 02996

Robert Claude Smith, Petitioner, v. NC Criminal Justice Education and Training Standards Commission, Respondent.	PROPOSAL FOR DECISION
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THE ABOVE MATTER came on for hearing on September 26, 2016 before the Undersigned Augustus B. Elkins II, Administrative Law Judge in Halifax, North Carolina. This case was heard 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. The record was left open for parties' submission of further materials including supporting briefs, memorandums of law and proposals. The Petitioner and Respondent filed proposals and argument to the Office of Administrative Hearings on October 31, 2016 and the Undersigned upon receiving the same, closed the record on November 3, 2016.

APPEARANCES

For Petitioner:

Mikael R. Gross, Attorney for Petitioner
1501 Ramson Court
Raleigh, NC 27603-9299

For Respondent:

Whitney Hendrix Belich, Attorney for Respondent
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ISSUE

Whether grounds exist for Respondent to revoke Petitioner's law enforcement officer certification for the commission of the felony offense of "Larceny by Employee," and thereby failing to comply with the minimum standards for such certification.

STATUTES AND RULES APPLICABLE TO THE CONTESTED CASE

(including but limited to)

The General Statute applicable to this matter is N.C. Gen. Stat §14-74.

The Rules Applicable to this matter are:

12 NCAC 09A .0204

12 NCAC 09A .0205

12 NCAC 09B .0111(1)

WITNESSES

Respondent called Petitioner Robert Claude Smith, Judy Kelly, Investigator with the Criminal Justice Standards Division of the N.C. Department of Justice, and Robert Lane, retired Chief of Police, Glen Alpine Police Department to testify.

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: Exhibits 1-7 (Official Notice was taken of Exhibits 8-10)

For Respondent: Exhibits 1 (consisting of approximately 53 pages) and 2

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing 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 the witnesses by taking into account the appropriate factors 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.

FINDINGS OF FACT

1. Petitioner received by certified mail, the proposed revocation letter dated February 26, 2016, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "The Commission").

2. Respondent, North Carolina Criminal Justice Education and Training Standards Commission, has the authority under the North Carolina General Statutes and the North Carolina Administrative Code, to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. Petitioner holds a certification as a law enforcement officer originally issued by the Respondent in 1992, and has last held the certification since 2007, when he was sworn in as a company police officer with Delta Company Police, LLC. Petitioner is seeking certification with Respondent to work part time at the Glen Alpine Police Department (herein after "Glen Alpine"). Petitioner is currently certified by Respondent.

4. On July 27, 2015, the Respondent initiated an investigation into Petitioner's conduct leading to Petitioner's 2003 resignation from Glen Alpine Police Department based on an anonymous phone call to Respondent that alleged Petitioner had been investigated by the SBI for "stealing from the Department's evidence room."

5. Respondent investigated incidents occurring in 2002-2003 while Petitioner was previously employed by Glen Alpine. Petitioner resigned from the Glen Alpine Police Department on March 27, 2003, as the result of an investigation by the Chief of that department, Chief Robert Lane, and the State Bureau of Investigation into Petitioner's alleged misuse of undercover monies.

6. During the internal investigation and the SBI's criminal investigation, Petitioner was forthcoming with Chief Lane, and the SBI Agent, Christopher Chambliss, investigating the cases. Petitioner admitted that he had used some of his undercover monies to pay for construction work at his home until he could receive his funds from a construction loan he had been approved for so that he could pay the money back. Petitioner stated during the investigation the monies were to complete some repairs to his home before being sent to Afghanistan on active duty because he was under the impression that his girlfriend was pregnant and that the repairs were necessary for the baby to have a safe place to stay while he was gone.

7. Judy Kelley, investigator for Respondent, testified at the hearing. During her investigation, Investigator Kelley reviewed police reports and other documentation related to Chief Lane's investigation into this matter in 2003. These reports indicated that Chief Lane found that there was \$2,253.02 unaccounted for from town funds. He testified that his investigation began due to a complaint about Petitioner using the town's credit card to put gas into his personal vehicle and, in reviewing receipts for that, he found other unaccounted for money. This money had been withdrawn by Petitioner for use in "drug buys" as part of his position as a police officer with the town of Glen Alpine.

8. Chief Lane investigated this money and was unable to find "Expenditure of Funds" reports for the money. He confronted Petitioner about it. Petitioner produced some "Expenditure of Funds" reports but then admitted when asked about the money further that he had used the money to pay for work on his house. During the internal investigation, Chief Lane asked Petitioner if he was going to pay the money back before he was confronted about the discrepancies and Petitioner replied yes. Chief Robert Lane testified at this hearing that he believed Petitioner did plan on paying the money back before he was questioned about the expenditures and stated that he also believed that Petitioner was an honest person who made a mistake

9. Chief Lane asked Petitioner to resign immediately and Petitioner did so. Chief Lane informed Petitioner that the State Bureau of Investigation would also be conducting an investigation into the matter.

10. Petitioner and Chief Lane both testified that Petitioner did receive the construction loan funds and did repay the monies to the town within two weeks of his resignation. Although no specific amount or receipt was located, the testimony was that the amount owed had been repaid.

11. An agent with the State Bureau of Investigation (SBI) also investigated this matter. The agent confirmed the findings of Chief Lane during his investigation. The results of the SBI's investigation were submitted to the local District Attorney's Office who declined to prosecute, citing the fact that Petitioner had by that time paid restitution and since been deployed overseas with the military.

12. Petitioner provided an affidavit during the hearing from the current District Attorney who stated, that based on the facts, some 12 years later, that he too would decline to prosecute the matter.

13. Upon learning of the allegations in 2015, Investigator Kelley spoke to the parties involved. Petitioner told Investigator Kelley that, when confronted by Chief Lane initially, he had "scrambled to make up the reports" to account for the missing money including making up names of alleged "informants" who supposedly received the money he himself had taken. Petitioner stated he did so to justify the unaccounted for money.

14. Petitioner testified that, in order to receive "buy money," he would go to the town clerk and request it. He would then receive a check and was to file an "Expenditure of Funds" to account for how the money was used. Petitioner testified that only officers had the ability to get such money and he would not have been able to receive these funds as a typical citizen. Petitioner admitted to making up several "Expenditure of Funds" reports and also changing a receipt for tires in order to attempt to cover up for the missing money.

15. Petitioner testified that he had taken the money to complete work on his home before he deployed, which he believed could happen at any time. Petitioner was placed on active duty on January 15, 2004, at the National Guard Center in Lenoir, N.C and was later deployed to Afghanistan with his National Guard Unit. Petitioner remained on active duty until December of 2005 and on orders for activation until April 25, 2006.

16. Upon return and release from active duty from the National Guard; Petitioner wrote a letter to Respondent requesting his certification remain current due to his active duty service. Respondent allowed Petitioner to maintain his certification without a break in service requiring additional training based upon the request submitted by Petitioner.

17. Petitioner made application to the North Carolina Company Police Program within the N.C. Department of Justice as a company police officer with United Special Police, a company police agency. Petitioner completed all required documents to include a Form F-3, Personal History Statement. At the conclusion of a background investigation, the Company Police Program Administrator inquired as to the reason for Petitioner's resignation from the Glen Alpine Police Department and the circumstances of the investigation. On June 23, 2005, Petitioner wrote an

explanation to the Company Police Administrator explaining the circumstances of the internal and SBI investigation, the misuse of drug monies, and that the district attorney declined prosecution. Petitioner was granted sworn status by Respondent through the Company Police Program to be a company Police Officer with United Special Police, LLC.

18. Petitioner remained a sworn law enforcement officer with United Special Police, LLC, until December 31, 2007, when Petitioner resigned. On September 10, 2007, Petitioner completed another Form F-3, Personal History Statement, to complete an application for sworn status as a company police officer with Delta Company Police, LLC, a company police agency. On September 25, 2007, Petitioner was again appointed a company police officer by the Respondent through the Company Police Program, an agency of the N.C. Department of Justice. Petitioner has been sworn as a law enforcement officer with Delta Company Police, LLC, since September 25, 2007, and has remained a sworn law enforcement officer with Delta Company Police, LLC, throughout this entire administrative process.

19. During this present application and appointment process, an unknown and anonymous caller contacted the Deputy Director, Richard Squires, of the Respondent agency, and stated that “[Petitioner] was previously employed by the Glen Alpine Police Department, [had] been investigated by the [SBI] for stealing from the evidence room, and no charges were filed because [Petitioner] left for Afghanistan.” Investigator Kelley testified that she found no evidence that Petitioner had stolen any evidence from the evidence room at Glen Alpine Police Department.

20. Petitioner testified and he admitted under oath that he had misused the undercover funds to complete work on his home because he had been going through a bad divorce and that his girlfriend was supposedly pregnant. He asserted that he had planned all along to repay the money back as soon as the loan money was available to him. Petitioner testified that he falsified expenditure reports to cover the missing money because he was surprised by Chief Lane’s request for an accounting and he had not had time to replace the money.

21. Petitioner testified that when confronted by the Chief, he was honest, explained all of the inconsistencies, pointed out which reports were inaccurate, and gave the reason for the misuse of the funds. Petitioner further testified that the Chief advised him he would need to resign and that he was going to turn the investigation over the SBI for a criminal investigation. Petitioner stated that Chief Robert Lane was like a father to him and he was embarrassed and sorry for the actions he took.

22. Petitioner testified that he provided all information requested by Agent Chambliss of the SBI, and that he “walked” him through the receipts and expenditure reports. He further explained that he often used his personal car for work because he used it as an undercover car. Petitioner testified that the Chief of Police knew this and had allowed him to put gas in his personal car on the agency credit card when the vehicle was being used for police business.

23. Robert Lane, former Chief of Police at Glen Alpine Police Department, testified that he believed Petitioner had been honest during the investigation and that he had agreed to resign under the circumstances. Chief Lane testified that he believed Petitioner when he stated he

intended to return the money from his loan proceeds and that Petitioner did in fact pay the monies back as he stated he would.

24. Investigator Kelley testified that she believed that Petitioner had been honest with her during the course of her investigation into his actions and that Petitioner actually met with her and walked her through all of the receipts and expenditure reports and pointed out which ones were accurate and which ones were not.

25. Investigator Kelly also testified that all of the allegations in her report were based on events from 2002 or 2003, and that Petitioner had been certified and sworn with two different agencies after submitting the proper paperwork and Respondent having approved the appointment and certification. She stated that Petitioner had completed the required forms showing he had resigned and why, and his mandated background investigation revealed Petitioner's resignation, SBI investigation, and the District Attorney's decision not to prosecute. Petitioner complied with all requests for information related to his certification by Respondent, was honest in his answers, and never attempted to evade discovery of the information by Respondent. He, in fact, believed Respondent was aware of all information submitted to the Company Police Program.

BASED UPON the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Both parties are properly before the Office of Administrative Hearings (OAH) and this Administrative Law Judge.

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. 12 NCAC 09A .0204(a)(1) states that Respondent shall revoke the certification of any officer found to have committed or been convicted of a felony offense.

4. From its inception, the North Carolina Administrative Procedures Act (NC APA), N.C. Gen. Stat. Chapter § 150B, has contained two separate and distinct sets of administrative hearings provisions. The manner in which a contested case is commenced and conducted varies depending on which set of provisions applies. Article 3A of the Act governs, among other things, occupational licensing agencies, including Respondent. *See* John Aycok McLendon, Jr., Contested Case Hearings Under the North Carolina Administrative Procedure Act: 1985 Rewrite Contains Dual System of Administrative Adjudication, 64 N.C. L. Rev. 852, 857-58 (1986). Article 3 of the NC APA applies to administrative hearings conducted by the OAH before an administrative law judge, while Article 3A applies to "other administrative hearings" which are conducted by state agencies enumerated in § 150B-38(a). Each article contains separate provisions

governing all aspects of the administrative hearings to which they apply. Homoly v. N. Carolina State Bd. of Dental Examiners, 121 N.C. App. 695, 697, 468 S.E.2d 481, 483 (1996). An important difference between Article 3 and Article 3A contested cases is that in Article 3 cases, the agency has already taken an action that is adverse to the interests of the petitioner and the petitioner files the contested case petition. In Article 3A cases, the agency decision has not yet been made and in Article 3A, the Agency initiates the process, not a petitioner.

5. A distinction exists between Article 3 and Article 3A cases which is made clear in N.C. Gen. Stat. § 150B-40: “The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.” If the legislature had intended Article 3 provisions to be read into Article 3A, it would not have been necessary to include the same or similar provisions in each article. Clearly, the legislature intended each article to fully govern the administrative hearings to which each applies without overlap. Homoly v. N. Carolina State Bd. of Dental Examiners, 121 N.C. App. 695, 468 S.E.2d 481 (1996).

6. N.C. Gen. Stat. § 150B-40(e) provides that “[w]hen a majority of an agency is unable or elects not to hear a contested case,” the agency is to apply to the OAH for designation of an ALJ. In such case, “[t]he provisions of [Article 3A], rather than the provisions of Article 3, shall govern a contested case....” N.C. Gen. Stat. § 150B-40(e). If the legislature had intended Article 3 to apply to Article 3A hearings and procedure, it would not have been necessary to include language that Article 3A provisions rather than Article 3 provisions apply when an Article 3A agency requests an ALJ to conduct an agency hearing. Homoly p. 698-99.

7. Article 3, a general provision, applies to all administrative agency hearings not covered by Article 3A. Those agencies covered under Article 3A are specifically listed in N.C. Gen. Stat. § 150B-38(a). “It is a well-established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] sections which are general in their application.” Utilities Comm. v. Electric Membership Corp., 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citing Utilities Comm. v. Coach Co., 236 N.C. 583, 73 S.E.2d 562). In this case, hearings conducted by Respondent are governed by the specific provisions of Article 3A, rather than the general provisions of Article 3 of the NC APA. Homoly p. 698-99. The contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely. Homoly p. 699.

8. N.C. Gen. Stat. § 150B-38(h) provides “Every agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.” The article which is referred to is Article 3A. Respondent’s rule for the administrative hearings is found at 12 NCAC 09A .0107. That rule specifically states that an administrative hearing in contested cases “shall be governed by procedures set out in Article 3A of G.S. 150B.” The rule 12 NCAC 09A .0107 goes on to say that the “rules establishing procedures for contested case. . . contained in Title 26, Chapter 3 of the North Carolina Administrative Code are hereby incorporated by reference.” Many of the rules contained within Title 26, Chapter 3 of the NCAC are not consistent with Article 3A, but are in line with Article 3 hearings. To the degree that the rules are inconsistent with N. C. Gen. Stat. § 150B Article 3A, those rules shall not apply to hearings conducted under Article 3A. Further, though 12 NCAC 09A .0107 also attempts to draft the powers and duties given to the

Administrative Law Judges in Title 26, Chapter 3 of the NCAC to the conduct of an Article 3A hearing, the powers of the presiding officer are enumerated in N. C. Gen. Stat. § 150B-40. The provisions within the statute take priority and as such 12 NCAC 09A .0107(d) is void in this case. The dictates of a statute are paramount and shall control.

9. In Peace v. Employment Sec. Comm'n of N. Carolina, the North Carolina State Supreme Court addressed the burden of proof. Although Peace is an Article 3 case, the discussion of burden of proof is instructive in this instant case since neither the Constitution nor the General Assembly has addressed the burden of proof in Article 3A cases. Peace states

In the absence of state constitutional or statutory direction, the appropriate burden of proof must be “judicially allocated on considerations of policy, fairness and common sense.” 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 37 (4th ed.1993). Two general rules guide the allocation of the burden of proof outside the criminal context: (1) the burden rests on the party who asserts the affirmative, in substance rather than form; and (2) the burden rests on the party with peculiar knowledge of the facts and circumstances. Peace v. Employment Sec. Comm'n of N. Carolina, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998).

10. The United States Supreme Court has stated that retaining employment is an important private interest. Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494. And the North Carolina Courts have continually stated that substantial weight must be accorded an employee's interest in retaining the employment in which he or she possesses a constitutionally protected property right. Historically, in Article 3A hearings, a license or certification is considered “property or rights” such that entitle the holder to a contested case hearing pursuant to Article 3A. When an already held license or certification is at issue, whoever is trying to take that license or certificate away has the burden of proof. With this reality in mind and applying the general principles of “considerations of policy, fairness and common sense,” the Respondent bears the burden of proof in this case in which the Respondent has investigated a license/certificate holder and based on that investigation wants to take action against that license/certification which would further necessarily have substantial impact on employment.

11. In Respondent’s Proposed Revocation of Law Enforcement Officer Certification, it specifically states that Petitioner “committed the felony offense of “Larceny by Employee” in violation of North Carolina General Statute § 14-74.”

12. North Carolina General Statute § 14-74, Larceny by Employee, is a felony offense. The elements of this offense are that the suspect is an employee who willfully goes away with a thing of value with the intent to steal the same or embezzles or converts for his or her own use a thing of value which was entrusted to the employee with the like purpose (intent) to steal them or defraud.

13. Larceny is a common law offense which requires one to have the intent to permanently deprive an owner of property. Petitioner was not convicted of this offense as the District Attorney at the time declined to prosecute the matter. To prevail on Petitioner committing

the offense, Respondent must show by the greater weight of the evidence that Petitioner had the intent to steal and defraud the employer. No witness contradicted the testimony of Petitioner who stated he was going to pay the money back after he received monies from his construction loan. Moreover, the evidence shows that when Chief Robert Lane asked Petitioner if he was going to pay the money back before he was confronted about the discrepancies, the Petitioner replied yes. Chief Lane testified at this hearing that he believed Petitioner did plan on paying the money back before he was questioned about the expenditures and stated that he also believed that Petitioner was an honest person who made a mistake. In the instant matter, the preponderance of the evidence shows that Petitioner lacked the intent required to support concluding that he committed Larceny by Employee.

14. Though the Proposal for Decision in this matter is set forth on the above cited grounds, the Undersigned draws the Commission's attention to the case of Scroggs v. North Carolina Criminal Justice Educ. and Training Standards Com'n., 400 S.E.2d 742, 101 N.C.App. 699 (N.C. App., 1991). In Scroggs, the Court stated that the decision to revoke a law enforcement officer certification was arbitrary and capricious when,

“the respondent commission had received a memorandum detailing the extent of petitioner's drug use in November of 1982, and had access if not actual possession of all other necessary documents from 1982, since which petitioner has passed review both for probationary certification and general certification, and since which time petitioner's files have been subject to periodic review by appellant's representatives. In light of the passage of time since petitioner's original application, respondent's long-term access to the information, petitioner's exemplary service, and the fact that petitioner volunteered to the commission the extent of his drug use near the beginning of the process and prior to the submission of the 30 December 1982 personal history statement, we agree with the reviewing court that the agency's decision was "arbitrary and capricious." Lewis v. Dept. of Human Resources, 92 N.C.App. 737, 740, 375 S.E.2d 712, 714 (1989).”

15. The Scroggs case may have relevance to the Commission in light of the passage of time since Petitioner's 2005 and 2007 applications and Respondent's long-term access to the information brought forth in this case.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Proposal for Decision.

PROPOSAL FOR DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Proposal for Decision based upon the preponderance of the evidence and finding that the burden of proof in this matter is upon the Respondent. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the

weight upon the other side. The weight of Respondent's evidence does not overbear in that degree required by law the weight of evidence of Petitioner to the ultimate issues. The Undersigned holds that Respondent failed to carry its burden of proof by a greater weight of the evidence and as such should not proceed with the proposed revocation of Petitioner's certification as a law enforcement officer.

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.

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 his attorney of record. N.C.G.S. § 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

IT IS SO ORDERED.

This the 16th day of December, 2016.

Augustus B Elkins II
Administrative Law Judge