

STATE OF NORTH CAROLINA  
COUNTY OF GASTON

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
16 DOJ 02998

<p>AUSTIN RAYE HINES PETITIONER,</p> <p>v.</p> <p>NC CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION RESPONDENT.</p>	<p><b>PROPOSAL FOR DECISION</b></p>
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This case came on for hearing on July 6, 2016 before Administrative Law Judge J. Randall May in Gastonia, North Carolina. This case was heard after Respondent requested, 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.

**APPEARANCES**

Petitioner: Daniel P. Roberts  
Goodman, Carr, Laughrun, Levine & Greene, P.A.  
301 S. McDowell St, Suite 602  
Charlotte, North Carolina 28204

Respondent: Whitney Hendrix Belich  
Attorney for Respondent  
Department of Justice  
Law Enforcement Liaison Section  
9001 Mail Service Center  
Raleigh, North Carolina 27699-9001

**ISSUES**

Does substantial evidence exist for Respondent to deny Petitioner's law enforcement officer certification for the commission of the Class B misdemeanor offense of Injury to Personal Property?

Does substantial evidence exist for Respondent to deny Petitioner's law enforcement officer certification for the commission of the Class B misdemeanor offense of Misdemeanor Larceny?

## **RULES AT ISSUE**

12 NCAC 09A .0103(23)(a)  
12 NCAC 09A .0204(b)(2)  
12 NCAC 09B .0111(1)(c)

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 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, or the lack thereof, 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.

## **FINDINGS OF FACT**

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that Petitioner received by certified mail, the proposed denial letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "The Commission"), on February 26, 2016.
2. Respondent, North Carolina Criminal Justice Education and Training Standards Commission, has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09A, to certify law enforcement officers and to revoke, suspend, or deny such certification.
3. Petitioner, Austin Raye Hines, is seeking certification with Respondent as a law enforcement officer with the Cherryville Police Department. He has held no previous certifications with Respondent.
4. On Petitioner's application, he disclosed a prior charge of Injury to Personal Property Greater than \$200," a violation of N.C.G.S. § 14-160, on September 14, 2013 and a prior charge of "Misdemeanor Larceny," a violation of N.C.G.S. § 14-72. Both offenses are listed as "Class B Misdemeanors" in Respondent's "Class B Misdemeanor Manuel."
5. Brittany Humphrey testified at the hearing. Ms. Humphrey and Petitioner were in a relationship in 2013. Prior to September 14, 2013, the relationship ended. On the night of the incident, Ms. Humphrey arrived at her home after work at approximately 2:00 a.m., driving her 2008 Honda Civic.

6. Petitioner pulled in behind Ms. Humphrey driving a car other than his own. He proceeded to argue with Ms. Humphrey and began kicking her car and throwing rocks at it. Petitioner then left Ms. Humphrey's home.

7. At 2:17 a.m. that same night, Ms. Humphrey received a text from Petitioner stating "[t]he only thing I can say is sorry about your car I'll pay to get it fixed have your mom call and tell me the once" then a second text correcting the last word to "price." Believing Petitioner would pay for the damage, Ms. Humphrey did not go immediately to the police.

8. Petitioner did not pay for the damage to Ms. Humphrey's car and Ms. Humphrey then went to the magistrate's office to take out a warrant against Petitioner for Injury to Personal Property. The warrant was issued on October 10, 2013.

9. Sometime between when the warrant was issued and when the case was resolved in court, Petitioner took out a warrant against Ms. Humphrey's new boyfriend. In exchange for dropping the assault charge against Ms. Humphrey's boyfriend, Ms. Humphrey agreed to drop the charge of Injury to Personal Property against Petitioner. This is reflected on the voluntary dismissals included in Respondent's Exhibit 1.

10. Brittany Gannon testified at the hearing. Ms. Gannon was Ms. Humphrey's neighbor at the time of the above incident. Ms. Gannon testified that she awoke sometime in the early morning hours to the sound of a male and a female fighting. She heard the sound of something hitting against metal and looked out the window to see Ms. Humphrey arguing with a male.

11. The undersigned found the testimony of Brittany Humphrey, Mary Sue Bradley, and Brittany Gannon to be reasonable and credible. Although Brittany Gannon was an interested witness, her testimony was clear, cogent, and she was not impeached by cross-examination.

11. Mary Sue Bradley testified at the hearing. Ms. Bradley is Ms. Humphrey's grandmother. She testified that Ms. Humphrey showed her the damage to the Honda Civic the morning after the events described above. She obtained an estimate to repair the damage to the car, which was \$1295.00. Ms. Bradley corroborated that her granddaughter believed Petitioner would pay for the damage and that only after it became apparent that he would not did she go to seek a warrant.

12. Petitioner testified at the hearing. Petitioner claimed that he was at a party for his sister's birthday the night of the incident. He claimed that he went to bed at approximately 11:00 p.m. that night. He admitted to possibly sending the text to Ms. Humphrey stating he would pay for the damage, but insisted that he only did so because he was in love with her at the time.

13. Several witnesses testified on Petitioner's behalf. These witnesses stated that Petitioner was at the party for his sister that night, but admitted that no one had seen him after he went to bed and that they themselves went to bed sometime around 12:00 a.m. Petitioner's mother testified that his car was still in the driveway when she went to bed.

14. Judy Kelley, investigator for Respondent, testified at the hearing. Ms. Kelley testified that court records reflected that on June 14, 2014, Petitioner was charged with Misdemeanor Larceny. Police reports and other documentation obtained by Ms. Kelley during her investigation, included in Respondent's Exhibit 1, show that Petitioner took toiletries valued at approximately \$25.56 and concealed them within a bag and attempted to leave the store with the items without first paying for them. Reports from the loss prevention officer stated that he stopped Petitioner with the items past the last point of sale within the Walmart store.

15. Petitioner stated that taking the items was a mistake. He indicated that he entered into an "informal deferred prosecution agreement" and, after completing community service, his charge was dismissed.

### **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. 12 NCAC 09A .0204(b)(2) states that Respondent may deny an applicant for certification if an applicant fails to meet the minimum standards for employment.

4. 12 NCAC 09B .0111(1)(c) states that one such minimum standard is that an applicant not have committed or been convicted of a crime or unlawful act defined as a "Class B Misdemeanor" within five years of application.

5. The "Injury to Personal Property Greater than \$200," a violation of N.C.G.S. § 14-160 is listed as a Class B misdemeanor.

6. The respondent has argued vigorously that the crime of larceny was committed at the Walmart during the business hours and within the retail area of the store. Her argument that asportation was complete within the store is based on two cases; however, the facts more clearly fit the elements of shoplifting N.C.G.S. § 14-72.1, a Class A misdemeanor, defined as follows:

- (a) Whoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided in subsection (e). Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment.

7. To prove larceny there must be some proof of an intent to permanently deprive the owner of the property. Therefore, concealment of goods is the better choice for these facts.

8. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).

9. Petitioner has the burden of proof in the case at bar. Overcash v. N.C. Dep't. of Env't & Natural Resources, 172 N.C. App 697, 635 S.E. 2d 442, (2006).

### **PROPOSAL FOR DECISION**

Whether Petitioner committed the crime of Larceny, Attempted Larceny, or Concealment of Merchandise in a mercantile establishment (shoplifting) need not be discussed in great detail. The facts and the law of this case most clearly fits N.C.G.S. § 14-721 (2005), a Class A misdemeanor.

The second issue involving Injury to Personal Property (a Class B misdemeanor) produced a preponderance of evidence of Petitioner's guilt, which was clear, cogent, and convincing.

Based on the foregoing Findings of Fact and Conclusions of Law, it is proposed that Petitioner's application for law enforcement certification be DENIED.

### **NOTICE AND ORDER**

The North Carolina Criminal Justice Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency 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 pursuant to N.C. Gen. Stat. § 150B-40(e).

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6700.

IT IS SO ORDERED.

This the 18th day of August, 2016.

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J Randall May  
Administrative Law Judge