

STATE OF NORTH CAROLINA
COUNTY OF PITT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 DOJ 03584

<p>Brittany Nicole Manley, Petitioner,</p> <p>v.</p> <p>NC Criminal Justice Education and Training Standards Commission, Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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THE ABOVE MATTER came on for hearing on July 18, 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. A transcript of the proceeding was ordered. The Respondent filed proposals and argument to the Office of Administrative Hearings on August 17, 2016. The record was held open for submission by Petitioner for an additional seven business days, and receiving no further materials, the record was closed on August 26, 2016.

APPEARANCES

For Petitioner:

Brittany Nicole Manley
500 East Brook Drive, Apartment D
Greenville, North Carolina 27858

For Respondent:

Lauren Tally Earnhardt
Department of Justice, Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Does substantial evidence exist for Respondent to deny Petitioner's correctional officer certification based upon failure to comply with the minimum employment standard that every correctional officer shall demonstrate good moral character?

RELEVANT RULES

(including but not limited to)

12 NCAC 09G .0206
12 NCAC 09G .0504(b)(2) 12 NCAC 09G .0505(c)(2)

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: Exhibits A-D

For Respondent: Exhibits 1-5

WITNESSES

For Petitioner: Brittany Manley, Dwight Manley, Johnny Outlaw, Clyde Moore

For Respondent: Michelle Schilling

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. The Petitioner received by certified mail, a proposed denial letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "The Commission"), on February 17, 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 9G, to certify correctional officers and to revoke, suspend, or deny such certification.

3. Petitioner was awarded a probationary correctional officer certification by the Respondent on July 13, 2015. Petitioner is employed as a correctional officer with the North Carolina Department of Public Safety, Odom Correctional facility.

4. On August 20, 2015, Respondent received a Report of Appointment/Application for Certification (Form F-5A) from the Division of Adult Correction and Juvenile Justice on behalf of Petitioner.

5. Michelle Schilling, an investigator with Respondent for approximately two (2) years, testified at the hearing. During the course of her investigation, Ms. Schilling conducted an Administrative Office of the Courts (AOC) inquiry, and discovered that on January 31, 2013, Petitioner was charged with five felonious criminal offenses of “Embezzlement” which occurred between November 15, 2012 and December 4, 2012. The warrants for arrest indicated Petitioner unlawfully, willfully and felonious did embezzle, fraudulently misapply and convert to her own use and knowingly misapply and convert to her own use ... U.S. currency, belonging to SHEETZ INC, DBA SHEETX STORE #415, At the time the [Petitioner] was over 16 years of age and was the employee of SHEETZ INC, DBA SHEETZ STORE #415 and in that capacity had been entrusted to receive the property described above and in that capacity the [Petitioner] did receive and take into her care and possession that property.” (R Ex. 3)

6. The AOC inquiry showed that on August 1, 2013, Petitioner entered into an Agreement for Deferred Prosecution in which Petitioner agreed to pay restitution in the amount of \$938.98, complete 72 hours of community service within a 6-month period and “not go on premises of any Sheetz store.” Petitioner signed an Admission of Responsibility in the criminal case where she stipulated and stated that she “...hereby agree and stipulate that all facts and matters of law recited herein are admitted and consented to by the [Petitioner] without objection, in that he/she did unlawfully, willfully did steal take and carry away US currency on five separate occasions, the property of Sheetz, Inc, DBA as Sheetz Store #415.” (R. Ex. 3)

7. On November 6, 2015, Ms. Schilling conducted a telephone interview with Petitioner. During the interview, Petitioner denied stealing any money from her employer, Sheetz, and stated that another female employee used her employee ID number to steal money from the cash register. She stated she did not know who the employee was or how she got her I.D. Petitioner told Ms. Schilling that she paid the restitution because she wanted the case dismissed. Schilling testified that the telephone interview was not consistent with the documentation she had received.

8. Ms. Schilling prepared a summary of all the information regarding this case to be presented to the Probable Cause Committee for their review. The allegation they would be considering was lack of good moral character based on the felony charges and lack of honesty during the course of the investigation. Schilling testified that the lack of good moral character rule had changed for the Department of Adult Corrections officers and the Committee would be looking at concerns regarding Petitioner’s truthfulness.

9. Petitioner testified at the hearing. Petitioner stated she appeared before the Respondent’s Probable Cause Committee and admitted to stealing the money. She also admitted that she gave false information to Ms. Schilling during her telephone interview and stated that she did so out of fear of losing her job. Petitioner stated that she will not lie again because she has children now and is working hard to get her life back on track. Petitioner has graduated from Pitt Community College since this incident; she is engaged to be married and has two children.

10. Dwight Manley, Petitioner's father, testified at the hearing. Mr. Manley stated that Petitioner has grown and matured since the time of these offenses, that Petitioner has had no other criminal charges, she is bright and intelligent, respected by her peers, and that he feels there will not be another problem with Petitioner's integrity. He did not believe the incident was reflective of her character. He stated that she comes from a Christian family and puts God first as well as being surrounded by good moral, church-going people. He believed that Petitioner was doing an excellent job at Odom and has the intelligence and education to move through the ranks.

11. Johnny Outlaw testified at the hearing. Mr. Outlaw is the Pastor at New Vision Ministry in Murfreesboro where Petitioner and her family have attended the entire time of his ministry. He has known Petitioner for eleven (11) years. Pastor Outlaw stated that he encouraged Petitioner to be honest and truthful, that he has seen a lot of growth and maturity in Petitioner and that she is a better person now.

12. Lieutenant Clyde Moore testified at the hearing. Lt. Moore is currently employed with the North Carolina Department of Public Safety, Odom Correctional facility, and is Petitioner's Officer in Charge. Lt. Moore stated that Petitioner currently has two (2) active written warnings and one pending investigation. Lt. Moore explained that Petitioner's written warnings included one instance where Petitioner was found on a computer instead of watching an inmate and the other included her missing work without providing documentation for the absence. Lt. Moore explained that Petitioner has been on the Time Management program since November 2015 because her attendance is not good and that she has missed work 23 times. Lt. Moore stated that he believes Petitioner has the capability to do the job but that she has to be there to do it and when she is not, it puts a burden on the shift.

13. Petitioner provided character letters at the hearing from Mr. Harvey D. Manley, Jr., Mark A. Barfield, Chowaine M. Whitehead, and Laquitta Green Cooper. (P. Ex. A-D)

14. Mark Barfield is the Principal at Northwest Halifax High School and was Petitioner's 11th and 12th grade English teacher. He stated she was well-mannered, outgoing, respectful and a leader and model student who strove to do her best. Chowaine M. Whitehead is a Mathematics teacher at Lunenburg Middle School and has known Petitioner all of her life. She stated Petitioner was in the gifted program in school as well as played basketball for Northampton County High School. She knows Petitioner to have great communication skills, leadership abilities and an enthusiastic attitude about learning.

15. Harvey Manley is a Navy Veteran, an Industrial Engineer and Petitioner's uncle. He described her as a responsible adult, a Christian young lady and a person of great moral character. He stated she works hard and never gives up. Laquitta Green Cooper is the Northampton County Clerk of Superior Court and stated she has known Petitioner all of her life. Ms. Cooper stated that Petitioner had a wonderful personality, was self-motivated and represented herself, her family and her community well.

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. The North Carolina Office of Administrative Hearings has jurisdiction to hear this matter. The parties received proper notice of the hearing in this matter. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law.

2. 12 NCAC 09G .0206 states that every person employed as a correctional officer or probation/parole officer by the Department of Public Safety, Division of Adult Correction and Juvenile Justice shall demonstrate good moral character as evidenced by the following: (6) being truthful in providing information to the Department of Public Safety, Division of Adult Correction and Juvenile Justice and to the Standards Division for the purpose of obtaining probationary or general certification.

3. 12 NCAC 09G .0504(b)(2) states the Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer fails to meet or maintain one or more of the employment standards required by 12 NCAC 09G .0200 for the category of the officer's certification or fails to meet or maintain one or more of the training standards required by 12 NCAC 09G .0400 for the category of the officer's certification.

4. 12 NCAC 09G .0505(c)(2) states when the Commission suspends or denies the certification of a corrections officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is the failure to meet or maintain the minimum standards for certification.

5. The burden of proof rests on the Petitioner challenging an agency decision. *Overcash v. N.C. Dept. of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447 (2006). The Petitioner bears the burden of proof by a preponderance of the evidence in showing that the Agency has substantially prejudiced its rights as well as whether the agency acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. See *Surgical Care Affiliates, LLC v. NC. Dep't of Health & Human Servs., Div. of Health Serv. Regulation, Certificate of Need Section*, 762 S.E.2d 468, 474-75 (N.C. Ct. App. 2014), *review denied*, 768 S.E.2d 564 (N.C. 2015). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).

6. [A]gency action is considered 'arbitrary and capricious' if it indicates a 'lack of fair and careful consideration' and fails 'to indicate 'any course of reasoning and the exercise of judgment.'" *Watson v. NC. Real Estate Corn'n*, 87 N.C. App. 637, 649, 362 S.E.2d 294, 301 (1987), quoting *State ex rel. Comm 'r of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980).

7. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S.E. 2d 285, 289 (1995), *aff'd*, 343 N.C. 119, 468 S.E.2d 57 (1996); *Comm'r of Ins. V Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "It is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982)

8. In weighing evidence which detracts from the agency decision," "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand." *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983) (citations omitted).

9. In accordance with 12 NCAC 09G .0206 the issue is a demonstration of good moral character. Petitioner has failed to show by a preponderance of the evidence that Respondent's proposed denial of Petitioner's correctional officer certification has not been not supported by the evidence.

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

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, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency as required under N.C. Gen. Stat. § 150B-34.

The Undersigned holds that Petitioner failed to carry her burden of proof by a greater weight of the evidence that the Respondent erred in its Proposed Denial of Correctional Officer Certification. 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 Petitioner's evidence does not overbear in that degree required by law the weight of evidence of Respondent to the ultimate issue.

In accordance with 12 NCAC 09G .0505(c)(2), the denial period continues so long as the stated deficiency, infraction, or impairment continues to exist. Based on the testimony at hearing and the character letters submitted by Petitioner, the Undersigned proposes that the Commission

review and examine whether Petitioner's deficiency still exists in setting forth a period of sanction, if any.

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.

IT IS SO ORDERED.

This the 30th day of September, 2016.

Augustus B Elkins II
Administrative Law Judge