

STATE OF NORTH CAROLINA
COUNTY OF GASTON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 DOJ 03745

<p>Caleb Dean Costner Petitioner,</p> <p>v.</p> <p>NC Sheriffs Education and Training Standards Commission Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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This case came on for virtual hearing on March 14, 2022, before Administrative Law Judge Selina Malherbe. 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 17E of the North Carolina General Statutes.

APPEARANCES

Counsel for Petitioner: William A. Anthony
Bogle & Anthony, P.A.
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Counsel for Respondent: Robert J. Pickett
Attorney for Respondent
N.C. Department of Justice
Law Enforcement Liaison Section
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ISSUE

Does Petitioner lack the requisite good moral character required of a justice officer based upon the facts and circumstances surrounding his inappropriate sexual advances toward two different women while on duty and several acts of deception during the two subsequent internal affairs investigations?

RULES AT ISSUE

12 NCAC 10B .0204(b)(2)
12 NCAC 10B .0301(a)(8)
12 NCAC 10B .205(3)(b)

WITNESSES

For Petitioner:

Sergeant Caleb Dean Costner, Gaston County Sheriff's Office, Petitioner
Sheriff Alan Cloninger, Gaston County
Captain Monica Becton, Gaston County Sheriff's Office

For Respondent:

Dolores Rosario-Ortiz, Private Citizen, victim
Alexandria Todd, former Dispatcher, Charlotte-Mecklenburg Police Department, victim
Patrol Officer Alisha Ripoll, Charlotte-Mecklenburg Police Department
Sergeant J. Johnson, Charlotte-Mecklenburg Police Department
Sergeant Adam J. DeGeorge, Internal Affairs, Charlotte-Mecklenburg Police Department

EVIDENCE

Joint Stipulations: filed on March 4 and 7, 2022.

For Petitioner (P. Ex. __):

Exhibit 1 CMPD Step 18-19: Performance Review for Caleb Dean Costner

For Respondent (R. Ex. __):

Exhibit 1 Request for Administrative Hearing
Exhibit 2 Probable Cause Notification Letter
Exhibit 3 Officer's Complete History
Exhibit 4 Statement by Petitioner
Exhibit 5 Forms F-3 and F-4 Gaston County Sheriff's Office
Exhibit 6 CMPD 19-1515 Exhibit #2A (photo of victim and cellphone)
Exhibit 7 CMPD 19-1515 Exhibit 6 (photo of Caleb Costner)
Exhibit 8 CMPD 19-1515 Exhibit 1G (audiorecording, First IA interview, December 3, 2019)
Exhibit 9 CMPD 19-1652 Exhibit 1E (audiorecording, Second IA interview, January 4, 2020)

CONTESTED CASE HEARING

The hearing was held on the Webex virtual platform and audio-recorded. (References herein to the audio-recording of the contested case hearing are cited as "Tr.")

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the Joint Stipulations, 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 FACT. In making the FINDINGS OF FACT, 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.

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 the Petitioner received by certified mail, the proposed denial letter, mailed by Respondent, the North Carolina Sheriffs' Education and Training Standards Commission (hereinafter "the Commission"), on July 19, 2021. (R. Ex. 2; Joint Stipulation.)

2. The Commission has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify sheriffs and to revoke, suspend, or deny such certification under appropriate circumstances with valid proof of a rule violation. (Joint Stipulation.)

3. Petitioner is an applicant for justice officer certification with the Gaston County Sheriff's Office. (Joint Stipulation.)

4. Petitioner previously held certification through the North Carolina Criminal Justice Education and Training Standards Commission as an officer with the Charlotte-Mecklenburg Police Department (CMPD) from June 1, 2017 to January 9, 2020. He transferred to the Gaston County Sheriff's Office in 2020. He had four years of prior law enforcement experience at other agencies. (R. Ex. 3 & 5)

5. Petitioner's performance reviews and other evidence presented at the hearing show that Petitioner was considered a good officer by his employers and appeared to perform at least most of the duties of his position well. (P. Ex. 1)

Events of November 21-22, 2018

6. On or about the evening of November 21, 2018 and into the early morning hours of November 22, 2018, Petitioner took a newly-hired dispatcher with CMPD, Alexandria Todd, as a ride-along passenger as part of her 911 training. (Tr. 0:28:54-29:50)

7. Early in the ride-along, Petitioner asked Officer Todd to follow him on Instagram because he posted a lot of community information about police work. He then began to ask Todd a line of personal questions that became inappropriate related to her relationship status, such as her willingness to cheat on her boyfriend. Petitioner also talked about himself: that because he was a police officer, he could "get any woman that he wanted" because "girls like police officers"; how

he had previously cheated on his wife; and alluded to having sex while in uniform on multiple occasions. This conversation made Officer Todd “pretty uncomfortable”. (Tr. 0:30:20–0:31:20)

8. During the ride-along, Petitioner became involved in the pursuit of a robbery suspect who was believed to be armed because there was insufficient available backup for the primary officer. Petitioner’s participation in the pursuit was against department policy because he had a ride-along passenger. When Petitioner arrived at the stop scene after the pursuit, he parked his car around the side of a gas station in an effort to keep Officer Todd out of sight and approached the stop scene on foot. (Tr. 0:32:55–0:33:20)

9. After this incident, Petitioner told Officer Todd that he would take her back to the team office because he would be working on the paperwork all night and there would not be much to do. Instead, he took a turn down a dark road towards a vacant parking lot that was poorly lit with no houses or people around. (Tr. 0:33:55–0:35:00) Petitioner parked and turned off the lights to the patrol car and said something to the effect of “I showed you a good time tonight, I think you should show me something in return.” Officer Todd took this to be a sexual advance and was “very uncomfortable”. When Officer Todd told him she was not interested, Petitioner replied to the effect of “come on, I got in trouble for you tonight, you owe me something.” (Tr. 0:35:00–0:36:18) When Officer Todd said no again, Petitioner turned on the car and went back to the station. (Tr. 0:36:20–0:36:28)

10. At headquarters, Officer Todd spoke to her trainer about Petitioner’s behavior during the ride-along, but decided not to file a complaint because she was a new employee at the department and because Petitioner never touched her, she thought it would not matter to anybody. (Tr. 0:36:29–37:40) She later provided a statement about the pursuit incident as part of an internal affairs investigation which was positive and supportive of Petitioner’s conduct during the pursuit because she agreed with Petitioner’s decision to engage in the pursuit. (Tr. 0:37:43–38:38)

Events of November 30, 2019

11. On or about November 30, 2019, Petitioner responded to a domestic disturbance call from Dolores Rosario-Ortiz at her residence on Spanish Quarters Circle, Charlotte, NC. Officer Alicia Ripoll served as the backup officer on this call. (Tr. 0:42:35–46)

12. Ms. Rosario-Ortiz is from Mexico and has lived in Charlotte for many years. She understands English but has a more limited ability to speak English. (Tr. 0:4:53–5:13) She called 911 because her estranged husband was inside her apartment, they had had a bad argument, and he was refusing to leave. (Tr. 0:06:30–08:18)

13. Petitioner and Officer Ripoll got the husband to leave the apartment and then both officers left.

14. Petitioner claimed that after they left the apartment, Officer Ripoll told him that Ms. Rosario-Ortiz had been “coming on” to him. (R. Ex. 8, 10:30–11:45, 26:00–26:10)

15. Officer Ripoll specifically denies that she ever made this or any similar comment. (R. Ex. 8, 10:30–11:45)

16. Officer Ripoll did not observe anything that would have indicated any interest by Ms. Rosario-Ortiz toward Petitioner. She did not observe Ms. Rosario-Ortiz act in any way that was “flirtatious” and she did not suggest to Petitioner that Ms. Rosario-Ortiz was flirting with him. (Tr. 0:42:47-46:33)

17. Officer Ripoll thought Petitioner stayed behind in his patrol car to complete the paperwork on the call. (R. Ex. 8, 10:30–11:45, 26:00–26:10) She specifically denies that there was any legitimate reason to return to Ms. Rosario-Ortiz’s apartment. (Tr. 0:46:36)

18. Petitioner returned to Ms. Rosario-Ortiz’s apartment where he used a “spoofing app” commonly used by officers to conceal their real phone number, to call Ms. Rosario-Ortiz and had her come to the door of her apartment. (Tr. 1:08:50-1:10:16) He asked her several inappropriate questions including asking her to have sex. (Tr. 1:017:14)

19. Ms. Rosario-Ortiz was intimidated because Petitioner was a police officer and she did not feel that she could say no to him. (Tr. 0:13:56-15:01) Even though she was not interested, she agreed that he could return the next day to have sex so that he would leave. (Tr. 0:06:42-20:55)

20. After Petitioner left her apartment, Ms. Rosario-Ortiz called CMPD to complain about Petitioner’s actions. (Tr. 0:22:15-43) This resulted in a supervisor call for her address being entered into the dispatch system which usually indicates some sort of complaint has been received.

21. Ms. Rosario-Ortiz also contacted her estranged husband because she did not know what to do and was concerned about Petitioner’s actions.

22. After leaving Ms. Rosario-Ortiz’s apartment, Petitioner called his on-duty supervisor, Sergeant Johnson, to request permission to start his shift at a later time the next day. (Tr. 0:54:01-39)

23. Sergeant Johnson received the supervisor call later that evening. Before he responded to the call, Petitioner heard that a supervisor call had been made from Ms. Rosario-Ortiz’s address and contacted Sergeant Johnson to request information about it. Although Sergeant Johnson had not given him any details about the complaint, Petitioner commented “I don’t do things like that”, claimed that Ms. Rosario-Ortiz had touched him inappropriately and that Officer Ripoll could corroborate his story. A CMPD dispatcher also contacted Sergeant Johnson to advise him that Petitioner had contacted the dispatch office to get more information about the supervisor call. (Tr. 54:40-59:15)

24. Petitioner also contacted Officer Ripoll and seemed concerned about the supervisor call. (Tr. 0:47:00-48:10)

25. Sergeant Johnson responded to the supervisor call with Sergeant Torres, a bilingual officer, and discussed with Ms. Rosario-Ortiz her complaint. She told them about the earlier call and Petitioner asking her to have sex with him. She identified a photo of Petitioner and showed them her cellphone call log with Petitioner's calls. (Tr. 0:22:18-24:04)

26. Petitioner canceled his request for time off the next day.

First Internal Affairs Investigation

27. Sergeant DeGeorge conducted an internal investigation into the allegation of unbecoming conduct that after responding to a domestic disturbance call, Petitioner returned and asked the victim inappropriate questions in an attempt to get her to have sex with him. (Tr. 0:03:57-05:19).

28. Sergeant DeGeorge interviewed Sergeant Johnson, Sergeant Torres, Officer Ripoll, Ms. Rosario-Ortiz and Petitioner. (Tr. 1:06:01)

29. Ms. Rosario-Ortiz identified Petitioner from a photograph. (R. Ex. 7; Tr. 1:06:42)

30. Sergeant DeGeorge took a photograph of Ms. Rosario-Ortiz with her cellphone call log showing that Petitioner had called her. (R. Ex. 6)

31. Sergeant DeGeorge interviewed Officer Ripoll and took her statement about the domestic disturbance call for service. She denied telling Petitioner that Ms. Rosario-Ortiz had flirted with him. (Tr. 0:48:08-49:05) She did not observe Petitioner acting inappropriately toward Ms. Rosario-Ortiz during the call. (Tr. 0:51:30-37)

32. On December 3, 2019, Petitioner was interviewed by Sergeant DeGeorge and Sergeant Gibbs which was audio-recorded. (Petitioner's Exhibit 8)

33. Initially, Petitioner maintained that: Officer Ripoll "seems satisfied with what we're telling" Ms. Rosario-Ortiz (R. Ex. 8, 0:08:33-36); he had done nothing wrong and that Ms. Rosario-Ortiz had made inappropriate sexual advances by grabbing his arm in a "flirtatious way" and made him "uncomfortable" with her advances and that she "grabbed me ... and ... it was not appropriate." (R. Ex. 8, 09:31-58 & 11:04) He also said that Officer Ripoll told him after leaving that Ms. Rosario-Ortiz "flat wanted him". (R. Ex. 8, 11:12-26)

34. Petitioner then claimed that after he started filling out paperwork in his car, he realized his name tag was missing and that he returned to the apartment. Ms. Rosario-Ortiz invited him into the apartment, but he did not enter because he was uncomfortable. He later found the name tag under the stairs outside. He called Ms. Rosario-Ortiz two times using a call spoofing app to call her to make sure her husband had not returned. An hour later, he heard a supervisor call for her address. Petitioner called Officer Ripoll about the supervisor call and his concerns that Ms. Rosario-Ortiz's behavior and "initiation stuff" meant that there would be trouble for him. (R. Ex. 8, 9:30-19:25).

35. Sergeant DeGeorge questioned Petitioner about asking to come in late the next day. (R. Ex. 8, 21:30–23:00) Petitioner claimed that he asked to change his schedule because his father had called him and asked for help fixing the water heater before church. Petitioner also commented on the age difference between Ms. Rosario-Ortiz and her husband and opined it as a reason for her touching him because Petitioner “would be more her type.” (R. Ex. 8, 25:30-26:30)

36. Sergeant DeGeorge asked for consent to look at Petitioner’s cellphone, then used the call log on it to point out that the alleged call from his father about the water heater did not happen. (R. Ex. 8, 0:26:45–29:20 & 1:15:00-1:16:15.)

37. Petitioner then admitted that after Officer Ripoll left, he returned to Ms. Rosario-Ortiz’s apartment; that he told Ms. Rosario-Ortiz that he was having issues at home; that he asked her if she would mind if he took her out some time; that she said she liked younger guys; that they arranged a time to go out; and that he asked for a hug and left after receiving two. He claimed that this was the “God’s honest truth”. (R. Ex. 8, 29:15–30:45)

38. Petitioner vehemently and repeatedly denied asking Ms. Rosario-Ortiz to have sex with him and stated that he only asked her if she had a bedroom. (Res. Exh. 8, 30:45–32:30, 37:00-38:34)

39. During his interview of Petitioner, Sergeant DeGeorge assessed Petitioner’s language as lying. (Tr. 1:24:02-1:24:41)

40. Sergeant DeGeorge confronted Petitioner with the fact that after the conversation with Ms. Rosario-Ortiz, he requested time off from Sergeant Johnson and then later cancelled his request. (R. Ex. 8, 32:30-33:33)

41. After Sergeant DeGeorge confronted him with the significance of deception and discrepancies in his story, Petitioner admitted to asking Ms. Rosario-Ortiz to have sex with him. (R. Ex. 8, 39:25–40:50 & 47:10-39)

42. Petitioner also admitted to prior acts of extramarital sexual misconduct with multiple women he had met while on duty. (R. Ex. 8, 43:00)

43. At the end of the interview, Petitioner made the statement that “I made a grave mistake and I have done nothing but try to be the best person, officer, for kids, community beyond that I had a moment ... I shouldn’t have had. I’m sorry.” (R. Ex. 8, 46:06-44)

44. Petitioner resigned from CMPD before this internal affairs investigation was concluded.

45. When Officer Todd heard about the internal affairs investigation of Petitioner for his actions toward Ms. Rosario-Ortiz, she felt obligated to come forward and provide details of Petitioner’s behavior toward her which initiated a separate internal affairs investigation of Petitioner. (Tr. 0:38:43-39:43)

Second Internal Affairs Investigation

46. On January 3, 2020 and before the effective date of his resignation from the CMPD, Petitioner was interviewed a second time by Sergeant DeGeorge and Sergeant Gibbs concerning allegations of harassment and conduct unbecoming made by Officer Todd. (R. Ex. 9)

47. After he was confronted about his untruthful statements, Petitioner admitted that he was not truthful during the first internal affairs interview. (R. Ex. 9, 0:7:42-8:25)

48. Petitioner discussed the ride-along with Officer Todd: he said that she was nice and that he may have mentioned something about having some issues at home; he asked her if she had a boyfriend, but he did not remember talking about cheating on his wife, but he may have; he claimed to not remember what happened after the pursuit or what they talked about; he may have been “flirtatious”; and about dropping her off at the police station. (R. Ex. 9, 17:25–23:10)

49. Sergeant DeGeorge confronted Petitioner over CAD records which provided location information and showed that he had parked in an area away from the station. Petitioner stated that this area is a business park where he would go when he did not want to be bothered while on duty. (R. E. 9, 23:10–24:42)

50. Petitioner vehemently denied that he had said to Officer Todd, “I’m probably going to get in trouble for this, now what are you going to do for me.” Sergeant DeGeorge reminded Petitioner that he had made the exact same kind of denial concerning the Rosario–Ortiz incident and reminded him about the consequences of deception and various evidence contradicting his story. (R. Ex. 9, 9:14-30:31)

51. Petitioner then claimed he was “very remorseful for what [he] did.” (R. Ex. 9, 30:31-34)

52. Petitioner expressed a lack of knowledge about why Officer Todd requested to end the ride-along early. (R. Ex. 9, 38:47-41:30)

53. Toward the end of the interview, Petitioner admitted that: “I lied to you about Spanish Quarters” and then remembered asking Ms. Rosario-Ortiz to have sex. (R. Ex. 9, 48:26-40)

54. Petitioner admitted to having extramarital sex with three other women whose names he did not remember that he had met while on duty while employed by CMPD. (R. Ex. 9, 49:16–54:30)

Petitioner’s Written Statement, dated March 23, 2021

55. After he was hired by the Gaston County Sheriff’s Office (GCSO) and had applied for certification as a justice officer with the Commission, Petitioner provided a written statement to the Commission in which he discusses his departure from CMPD and the subject incidents of both CMPD internal affairs investigations. (R. Ex. 4)

56. Concerning his departure from CMPD, Petitioner states that “I simply resigned under my own decision from no other influence or pressures from within the department after I was offered a Deputy Sheriff position with the Gaston County Sheriff’s Office.” (R. Ex. 4, p. 1)

57. Concerning the incident involving Ms. Rosario-Ortiz, Petitioner claims “she was being flirtatious and had some form of interest in me.” He describes leaving her apartment with Officer Todd, then returning to her apartment and Ms. Rosario-Ortiz “being flirty” and him asking “if she would like to hang out ... would she like to screw.” (R. Ex. 4, p. 1)

58. Concerning the first internal affairs interview, Petitioner admitted that he initially denied the allegation that he had asked Ms. Rosario-Ortiz for sex. (R. Ex. 4, p. 2)

59. Concerning the incident involving Officer Todd, Petitioner denied that he “had ever came [sic] on the [sic] any of them in a sexual manner.” He wrote: “Questions I kept asking myself was why would a female who accused me of coming on to her in any type of sexual manner ask me to go out for drinks after a supposed incident like that?” (R. Ex. 4, p. 2)

60. Officer Todd denies ever inviting Petitioner to have drinks with a group of dispatchers after work. (Tr. 0:37:30-37:37)

61. Subsequently, by letter dated July 19, 2021, the North Carolina Sheriffs’ Education and Training Standards Commission found probable cause to deny Petitioner’s justice officer certification on the ground that he lacked the good moral character required of all justice officers. (R. Ex. 2)

Contested Case Hearing

62. Ms. Rosario-Ortiz testified that this incident was the first time in 20 years that she has called the police. (Tr. 0:17:19-18:20) She felt “disappointed and deceived” because she had called the police because of a problem with her husband and then was approached by a police officer. (Tr. 0:18:21-20:32)

63. Ms. Rosario-Ortiz was a credible witness. Her testimony was consistent with her previous statements, and with other credible evidence and testimony presented, and is given greater weight.

64. Gaston County Sheriff Alan Cloninger and Captain Monica Becton spoke glowingly of Petitioner’s work since joining the GCSO. They spoke well of Petitioner’s character and believe he will be an asset moving forward. In his two years with the GCSO, Petitioner has been promoted to the rank of sergeant.

65. Sheriff Cloninger’s knowledge concerning the events that resulted in the CMPD internal affairs investigations comes from review of the summary that the GCSO Internal Affairs Department made from their review of the CMPD Internal Affairs files. He has not personally reviewed any of the CMPD internal affairs investigation records. (Tr. 01:48:30-1:58:00)

66. Captain Becton's knowledge concerning the events is based upon Petitioner's statements and his admission of untruthfulness. (Tr. 0:41:32-44:46) She has not reviewed any information from either the CMPD or the GCSO Internal Affairs Departments. She has not observed any "inappropriate things" and believes Petitioner has learned from his mistakes. (Tr. 01:44:47-48:30)

67. Sheriff Cloninger and Captain Becton are credible witnesses concerning Petitioner's performance and conduct at the GCSO.

68. Sergeant Johnson, Officer Todd and Officer Ripoll were credible witnesses whose testimony was consistent with all other credible evidence and is given greater weight.

69. Sergeant DeGeorge's testimony was consistent and credible concerning the Petitioner's conduct and statements in interviews at CMPD, consistent with other credible evidence and testimony presented and is given great weight.

70. Petitioner testified on his own behalf:

- Denies telling Officer Todd that the "uniform gets women" (Tr. 0:2:20);
- Admits he "had sex with women he met while on duty" (Tr. 0:2:20-21);
- Admits not being truthful during the first internal affairs investigation and that he lied to Ms. Rosario-Ortiz about losing his name tag (Tr. 0:2:21);
- States he did not want to leave the CMPD until after the first internal affairs investigation began (Tr. 0:2:26);
- Admits saying inappropriate things to Officer Todd but it was his expectation that she would object.

(Tr. 0:2:20-29:0)

71. Upon questioning by the Undersigned, Petitioner admitted his fault in his poor conduct toward Ms. Rosario-Ortiz. (Tr. 2:30:57-2:31:55) He also stated that in the past, he was too "prideful" to get help, but now he has the support of his wife and pastor and that "his wife is analyzing" him daily and that he does not deserve the opportunity to be a law enforcement officer, that it "can be stricken" from him and that he "is under a microscope" because of "one decision." (Tr. 2:34:20-2:36:30)

72. The Undersigned finds the following untruthful written statements by Petitioner:

- During the first internal affairs interview by Sergeant DeGeorge and Sergeant Gibbs, Petitioner was untruthful when he denied asking Ms. Rosario-Ortiz to have sex with him.
- In his written statement, Petitioner was untruthful when he denied making inappropriate and sexual advances toward Ms. Rosario-Ortiz.
- In his written statement, Petitioner was untruthful when he claimed that his resignation from CMPD was not influenced by pressures within the department when he knew that he was being investigated by Internal Affairs.

- Petitioner was untruthful every time that he asserted Ms. Rosario-Ortiz was “flirtatious” with him or had touched him.

73. The Undersigned finds that Petitioner’s poor conduct was not a single bad decision or act, but, rather, a series or pattern of bad actions or decisions.

74. The Undersigned finds that the Petitioner’s conduct toward Ms. Rosario-Ortiz and Officer Todd, and his extramarital conduct with women he has met while on duty, demonstrate a lack of good moral character.

75. The Undersigned finds that the untruthfulness of Petitioner in the CMPD internal affairs interviews and in his written statement to the Commission, and his lack of complete candor with superior officers at the GCSO is further evidence of a lack of good moral character.

76. The Undersigned finds that the Petitioner lacks the good moral character required for justice officer certification in North Carolina.

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. 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)

4. 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).

5. Justice Officers certified by the Sheriffs’ Education and Training Standards Commission must meet certain minimum standards as set forth in 12 NCAC 10B .0301. Pertinent to the within contested case, is the provision that “(a) Every Justice Officer employed or certified in North Carolina shall: ... (9) be of good moral character as defined in ... [various cited court decisions] and later court decisions.” Specific court decisions referenced in this rule provide insight and direction for the within case, to wit: Good moral character is defined as “honesty, fairness, and respect for the rights of others and for the laws of the state and nation.” In re Willis, 288 N.C. 1, 10 (1975) “Good moral character has many attributes, but none are more important than honesty and candor.” In re Legg, 325 N.C. 658, 672 (1989) Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. In re Rogers, 297 N.C. 48, 58 (1979) Evidence that a person is “generally well-behaved, considerate,

and respectful to family and friends ... does not rise to the level which would entitle ... a finding ... of 'good character'" State v. Benbow, 309 N.C. 538, 548 (1983)

6. There is precedent for a finding of lack of good moral character based upon on-duty extramarital sexual conduct by a law enforcement officer. Final Agency Decision, Luke Thomas Marcum v NC Criminal Justice Education and Training Standards Commission, 15 DOJ 7702, entered on June 5, 2017. The Respondent Commission found that the law enforcement officer's behavior demonstrated a lack of good moral character but noted "he was completely open and forthcoming regarding what had occurred" and was "very remorseful regarding his behavior." Several witnesses testified on Marcum's behalf. Ultimately, the Respondent determined that the petitioner had "show[n] a lack of good moral character, however, Petitioner has shown through competent endorsement that his moral character has been rehabilitated since that time."

7. Petitioner's present good conduct is recent, of short duration and, at this time, is not sufficient to show that he has been rehabilitated.

8. Petitioner lacks the good moral character based upon the two separate admitted incidents of making inappropriate sexual advances while on duty.

9. His lack of good moral character is confirmed by the fact he repeatedly lied on multiple occasions about the incidents and only admitted wrongdoing when confronted with concrete evidence that contradicted his story.

10. Petitioner's good job performance at the GCSO is not an assurance that Petitioner has remedied his character. Petitioner has all along done generally good police work and had a good reputation. It was only when he made advances on women who were strong enough to stand up to his coercive behavior and there was hard evidence to corroborate their stories, that his misconduct came to light and he admitted wrongdoing.

11. The evidence presented in this case shows that Petitioner lacks the good moral character required of every Justice Officer in the State of North Carolina.

12. The evidence presented in this case shows that Petitioner lacks good moral character in that: he repeatedly lied about both the Rosario-Ortiz and Todd incidents; he was not well-behaved and did not show respect for either victim; his conduct in these incidents was not an isolated event; he was not completely forthcoming with his superior officers at the GCSO about the events while employed by the CMPD and about the CMPD internal affairs investigations; his current good behavior does not rise to a level that entitles him to a finding of good moral conduct; his expressions of remorse follow the pattern of conduct in his internal affairs interviews of admitting guilt only after confrontation with evidence of his poor conduct.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of law, it is proposed that Petitioner's justice officer certification be denied on the ground that he lacks the good moral character.

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.

The agency shall serve a copy of its Final Decision in this case on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6700.

IT IS SO ORDERED.

This the 31st day of May, 2022.



Selina Malherbe
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 31st day of May, 2022.



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