

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 SOS 00711

<p>Matthew M. Leach Petitioner,</p> <p>v.</p> <p>NC Department of the Secretary of State Respondent.</p>	<p>FINAL DECISION GRANTING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT</p>
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THIS MATTER comes before the Honorable Karlene S. Turrentine, Administrative Law Judge, upon consideration of Respondent’s Motion for Summary Judgment (“Motion”) filed April 5, 2022. The Undersigned issued an Order for Petitioner’s Response to Motion, which response was due filed on or before April 21, 2022. No response was received. This matter is ripe for disposition.

Although “. . . ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal[.]” *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 261, 400 S.E.2d 435, 440 (1991), having reviewed the entire file, the Undersigned makes the following

UNDISPUTED FINDINGS OF FACTS

1. The Office of Administrative Hearings has jurisdiction over the subject matter and the parties herein pursuant to Article 3 of Chapter 150B and Chapter 10B of the North Carolina General Statutes.

2. Respondent is the State agency in North Carolina responsible for enforcing the rules that govern individuals holding a Notary Public Commission. Under the North Carolina Notary Public Act, N.C.G.S. § 10B-1 *et seq.*, Respondent has the authority and responsibility to administer, regulate, grant, or deny applications, and otherwise enforce the laws and rules pertaining to commissioning and discipline of Notaries Public in this State.

3. The purpose of the Notary Public Act is to promote, serve, and protect the public interest, and to prevent fraud and forgery. N.C.G.S. § 10B-2.

4. Notaries public are public officers. *NationsBank v. Parker*, 140 N.C. App. 106, 109, 140 S.E.2d 597, 599 (2000) (citation omitted); N.C.G.S. § 10B-3(13).

5. On February 25, 2022, Petitioner filed a Petition for a Contested Case Hearing (“Petition”) with the North Carolina Office of Administrative Hearings (“OAH”) stating, “Im [sic] asking for a review of the NC Secretary of State’s decision to deny my notary commission. I was convicted of a Level 5 DUI (plead guilty) in Oct 2021. I made a terrible mistake. I am a first time [sic] offender and I’ve previously held a commission with no errors or wrong-doings. It is a requirement of my job to hold a stamp. I cannot afford to lose my job and start a new career at this point in my life while supporting a family.” *Petition*, ¶3 (original in all caps).

6. On February 28, 2022, this Tribunal issued an Order for Prehearing Statements and a Scheduling Order which required the parties to file Prehearing Statements within thirty (30) days.

7. On March 16, 2022, Respondent filed its Prehearing Statement, Document Constituting Agency Action and an Amended Prehearing Statement. In its Amended Prehearing Statement, Respondent asserts:

a) “In his application for a notary public commission, received by Respondent on January 20, 2022, Petitioner disclosed that he plead guilty to driving while impaired on October 7, 2021, for which he received a sentence that included a Probationary term of one year.” Section 2, ¶1;

b) “Respondent lacked the authority to issue the commission based upon Petitioner’s probationary status. Section 10B-5(d)(2) of the North Carolina General Statutes provides, in part, that the Secretary may deny an application for commission if the applicant has been convicted or plead guilty to a felony or any crime involving dishonesty or moral turpitude and that in no case may a commission be issued to an applicant **within 10 years after release from prison, probation, or parole, whichever is later.**” Section 2, ¶2 (emphasis added); and,

c) “Respondent has discretionary power under N.C.G.S. §10B-5(d)(2) to deny an application based upon the applicant’s conviction or admission of guilt to a felony or any crime involving dishonesty or moral turpitude. The applicable North Carolina Administrative code defines driving while impaired as a crime of dishonesty or moral turpitude. 18 N.C.A.C. 07B .0201(b)(10).” Section 2, ¶3.

8. On January 18, 2022, in a letter attached to his Application for Initial Appointment as a North Carolina Notary Public, Petitioner admitted to Respondent that:

“[On] Oct[ober] 4th, [he] made a very poor and dangerous decision to drink and drive. [He] was celebrating a recent promotion and drank more than [he] should have. . . . [He] wasn’t really thinking about it until it was too late. [He] was pulled over and arrested on sight Fortunately, there were no other involved parties (accident, damage to property, injuries, etc.). . . . [He] plead guilty on Oct. 7th and was convicted and sentenced for a [sic] impaired driving (level 5). [He] was sentenced to 24 hr [sic] community service (COMPLETED), substance abuse class (COMPLETED), 1 year probation (unsupervised upon completion of community service), fines and court costs (PAID).”

Respondent's Exh A, attached to Motion (emphasis in original).

9. In its background check, Respondent found nothing adverse other than the DUI Petitioner reported showing up in his criminal check. Petitioner's character references are excellent, including one from his ex-wife. *Id.*

10. In its Document Constituting Agency Action letter, dated February 15, 2022, Respondent timely notified Petitioner that it was denying his application for Notary Public under N.C.G.S. § 10B-5(d)(2) because he was "found guilty of (T) DWI-LEVEL 5 [a first and least offense under N.C.G.S. § 20-138.1 and N.C.G.S. § 20-179], which is considered a crime of dishonesty or moral turpitude" under 18 NCAC 7B .0201(b)(10) and because he is "currently on **supervised probation**[".]” Respondent's Exh B, attached to Motion (emphasis in original).

11. There are no disputed facts in this case. Petitioner was convicted of driving while impaired, a misdemeanor, has not yet completed his court-ordered probation, and applied for a notary commission within ten (10) years after his release from probation.

BASED ON the above findings, the Undersigned makes the following

CONCLUSIONS OF LAW

1. Respondent contends that it is entitled to summary judgment "because there are no genuine issues as to material fact," and it is therefore "entitled to a judgment as a matter of law." Motion, p.1.

2. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56.

3. An Administrative Law Judge is authorized to grant summary judgment under the provisions of the North Carolina Administrative Procedure Act. *See* N.C.G.S. § 150B-34(e) (an administrative law judge may grant "summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56 . . .").

4. "Summary judgment is a drastic remedy." *First Fed. Sav. & Loan Ass'n of New Bern v. Branch Banking & Tr. Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972). Thus, the party moving for summary judgment "has the burden of establishing the lack of any triable issue of fact. His papers are carefully scrutinized, and all inferences are resolved against him." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976).

5. 18 NCAC 7B.0201(b) requires that, when applying to be a Notary Public:

“An applicant shall list on his or her application all misdemeanor and felony convictions related to crimes of dishonesty and moral turpitude. For purposes of this Chapter, those crimes include:

- (1) Arson;
- (2) Assault;
- (3) Battery;
- (4) Burglary;
- (5) Carrying a concealed weapon without a permit;
- (6) Child molestation;
- (7) Child pornography;
- (8) Discharge of a firearm in a public place or into a dwelling;
- (9) Domestic violence;
- (10) Driving under the influence;**
- (11) Unlawful possession or sale of drugs;
- (12) Embezzlement;
- (13) Failure to comply with a court order;
- (14) Failure to pay child support;
- (15) Failure to return to confinement;
- (16) False financial statements;
- (17) Forgery;
- (18) Fraud;
- (19) Identity theft;
- (20) Impersonation of a law enforcement officer;
- (21) Hit and run;
- (22) Kidnapping;
- (23) Prostitutions;
- (24) Multiple worthless checks showing a pattern of behavior indicating moral turpitude and dishonesty;
- (25) A worthless check in excess of five hundred dollars (\$500.00);
- (26) Possession of an unregistered firearm;
- (27) Practicing law without a license;
- (28) Rape;
- (29) Receipt of stolen goods or property;
- (30) Resisting arrest;
- (31) Robbery;
- (32) Statutory rape;
- (33) Tax evasion;
- (34) Terrorist threats or acts;
- (35) Theft;
- (36) Threats to commit a crime or cause bodily injury;
- (37) Spousal abuse.”

18 NCAC 7B.0201(b)(emphasis added).

6. Thus, in this Rule, “driving under the influence” is considered a crime related to dishonesty and moral turpitude. *Id.* Yet, driving under the influence is the *only* crime on the list

of which motive or intent is not an essential element and, there can be no dishonesty or moral turpitude without motive or intent.

7. Our courts have long held that “moral turpitude is considered ‘[c]onduct that is contrary to justice, honesty, or morality.’ *Black’s Law Dictionary*, 1030 (8th ed. 2004). . . . **But our courts have not equated illegality with moral turpitude.**” *In re M.G.*, 187 N.C. App. 536, 551, 653 S.E.2d 581, 590 (2007), *rev’d on other grounds*, 363 N.C. 570, 681 S.E.2d 290(2009) (emphasis added). As such, the Undersigned is unconvinced that Respondent has the authority to redefine moral turpitude by attaching it to a crime that has no knowledge aforethought. Additionally, Respondent would certainly have exceeded its authority or jurisdiction in adding motive or intent as an element of simple driving under the influence when neither our Legislature nor our courts have seen fit to do so. Thus, under either of these scenarios, Petitioner *may* have had opportunity to obtain his Notary Public commission.

8. Nevertheless, N.C.G.S. § 10B-5 states, in pertinent part, that:

(d) “[Although t]he Secretary ***may*** deny an application for commission or recommission if any of the following apply to an applicant: . . .

(2) The applicant’s conviction or plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude. **[However, i]n no case may a commission be issued to an applicant within 10 years after release from prison, probation, or parole, whichever is later.”**

N.C.G.S. § 10B-5(d)(2)(emphasis added).

9. Thus, although the General Assembly, through the use of the word “*may*” gave the Secretary discretion in whether to grant a commission as a NC Notary Public to someone who had been convicted of a felony or any crime involving dishonesty or moral turpitude, there is no discretion to commission an applicant who either is or has been released from prison or on probation or parole, prior to a period of ten (10) years passing following the imprisonment, probation or parole.

10. Since Petitioner’s criminal conviction (for whatever crime) resulted in probation, N.C.G.S. § 10B-5(d)(2) mandates that Respondent deny Petitioner’s application at least until it has been ten (10) years following the termination of that probation.

11. It is undisputed that Petitioner was convicted of a DWI-Level 5 and placed on a 12-month probation on October 7, 2021. Petitioner applied to be a Notary Public even before his probation period is set to expire on October 7, 2022 and, well before the 10-year period after his release from the probation.

12. In denying Petitioner’s application, Respondent acted in the only way that it could under the law and, since the provisions of N.C.G.S. § 10B-5(d)(2) prohibit Respondent from issuing to him a notary public commission, there is no genuine issue of material fact in this case and Respondent is entitled to a judgment as a matter of law.

BASED ON the foregoing findings of fact and conclusions of law, the Undersigned issues the following

FINAL DECISION

IT IS ORDERED that Respondent's Motion for Summary Judgment is hereby **GRANTED**. There being no remaining issues, this contested case is hereby **DISMISSED** with prejudice.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

SO ORDERED. This the 2nd day of May, 2022.



Hon. Karlene S. Turrentine
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 2nd day of May, 2022.



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