

STATE OF NORTH CAROLINA
COUNTY OF ROBESON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 DOJ 05195

Scottie Deese Petitioner, v. NC Sheriffs Education and Training Standards Commission Respondent.	PROPOSAL FOR DECISION
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THIS MATTER was heard before the Honorable Karlene S. Turrentine, Administrative Law Judge, on May 9, 2022, at the North Carolina Office of Administrative Hearings (“OAH”) in Wake County, North Carolina, following Respondent North Carolina Sheriffs’ Education and Training Standards Commission’s application for an administrative law judge to hear the case, pursuant to N.C.G.S. § 150B-40(e), based on Petitioner Scottie Deese’s request for an administrative hearing pursuant to N.C.G.S. § 150B, Article 3A.

Petitioner Scottie Deese appeared and was represented by Attorney Barry K. Henline, Law Offices of Barry K. Henline, PLLC. Respondent was represented by Assistant Attorney General Robert J. Pickett, North Carolina Department of Justice.

WITNESSES

For Petitioner: Scottie Deese, Petitioner
Joseph Gloga

For Respondent: None

EXHIBITS

For Petitioner: None.

For Respondent:

EXHIBIT NO.	RESPONDENT’S EXHIBITS ADMITTED WITHOUT OBJECTION
1	Request for Administrative Hearing
2	Probable Cause Letter
4	Form F-3 Personal History Statement
6	Email Correspondence with Scottie Deese
8	Release to Access Records

ISSUE

Whether Respondent erred in finding probable cause exists to revoke Petitioner's justice officer certification on the basis of: a) Petitioner having committed or been convicted of a felony in violation of 12 NCAC 10B .0204(a)(1) in or about 1996-97, and; b) Petitioner having failed to disclose the expunged charge on the personal history portion of his certification application.

APPLICABLE STATUTES AND REGULATIONS

12 NCAC 10B .0204

12 NCAC 10B .205

BASED UPON careful consideration of the sworn testimony of Petitioner (and his witness) presented at hearing, the arguments of counsel and, the entire record in this proceeding, including the parties' Joint Stipulations, filed April 27, 2022 pursuant to N.C.G.S. § 150B-41(c), the Undersigned makes the following

FINDINGS OF FACT

1. The parties stipulated that they are properly before the Undersigned Administrative Law Judge in that OAH is the proper venue and has subject matter and personal jurisdiction over the parties and, both parties received proper notice of hearing.

2. Respondent has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12, Chapter 10B of the North Carolina Administrative Code, to certify justice officers and to deny, revoke, or suspend such certification.

3. On or about August 30, 1996, when Petitioner was seventeen (17) years old¹ and a senior in high school, Petitioner was coerced by a much older man to take the blame for starting a fire that burned a third party's personal property. If convicted, the older man faced serious prison time as well as not being able to see his children and, possibly losing his wife, so he convinced Petitioner (and Petitioner believed) that if Petitioner took the blame, he would be prosecuted as a minor and get no jail time because of his clean record. Trying to help a "friend," Petitioner did, in fact, plead guilty and was convicted of felony burning personal property. *See* Respondent's Exh 3 and 6, p.0038.

4. When Petitioner was in court tendering his plea, "[t]he judge advised [him] not to be taken [sic] charges [he] didn't do and...let people that break the law handle their own crime but [Petitioner] thought [he] was helping [the older man] out. When [he] took the charge the judge [told Petitioner that he] would have to get a [sic] expungement to get it off of [his] record and that [he] didn't have to tell no one about it because it never happen [sic]." Respondent's Exh 6, p.0038.

¹ The NC Administrative Office of the Courts' Match Report reflects Petitioner was eighteen (18) at the time the crime was committed but, based on Petitioner's date of birth, Petitioner did not turn eighteen until several months later. *See* Respondent's Exh 3.

5. After Petitioner finished high school, he went into the army and served honorably. After four (4) years, he was wounded in Iraq in 2003 and honorably discharged due to his injury and returned home to North Carolina. Thereafter, Petitioner started a nonprofit through which children were taught to be wiser and to make better choices.

6. Petitioner petitioned for and was granted an expungement of the 1996 charge on October 31, 2017. Respondent's Exh 3.

7. On October 1, 2018, Petitioner applied for justice officer certification which was granted by Respondent. He did not disclose the expunged charge on the Personal History Statement, Form F-3 of the application even though question #44 of Form F-3 states, in pertinent part:

“NOTE: In response to the following question, include all offenses other than minor traffic offenses. ...If any doubt exists in your mind as to whether or not you were arrested or charged with a criminal offense at some point in your life or whether an offense remains on your record, you should answer “YES.” You must include any and all convictions regardless of whether or not the convictions were expunged pursuant to NCGS 15A-145.4 and 15A-145.5.

44. Have you ever been arrested by a law enforcement officer or otherwise charged with a criminal offense?”

And in response to question #47 which asked: “Have you ever been charged with or convicted of a felony?” Petitioner checked the “No” box even though the question further advised “You must include any and all felony convictions regardless of whether or not the convictions were expunged pursuant to N.C.G.S. 15A-145.4 and 15A-145.5[.]”

Respondent's Exh 4, p.0021-0022.

8. Petitioner held justice officer certification through the Robeson County Sheriff's Office from January 8, 2019 through December 31, 2020 when the Robeson County Sheriff terminated Petitioner for political reasons.

9. Then on October 25, 2021, Respondent notified Petitioner that it had “found probable cause to revoke [his] justice officer certification” because he had committed or been convicted of a felony. Document Constituting Agency Action (“Notice”) p.1, attached to Respondent's Prehearing Statement (“PHS”).

10. Respondent further found that “probable cause exists to revoke [Petitioner's] justice officer certification pursuant to...*Rule .0204(c)(1)* [and] *(2)* of Chapter 10B of Title 12...” because Petitioner failed to disclose the “1997 Burning Personal Property conviction[.]” on his Personal History Statement, Form F-3, portion of the application. Notice, p.1 (emphasis in original).

UPON THE FOREGOING findings of fact, the Undersigned makes the following

CONCLUSIONS OF LAW

1. The Tribunal has personal and subject matter jurisdiction over this contested case. The parties received proper notice in this matter.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

3. Rule .0204(a), Chapter 10B of Title 12 of the North Carolina Administrative Code reads, in pertinent part, that: “The Commission **shall** revoke or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of[...] a felony....” *Id.* (emphasis added).

4. However, in the present case, the charge/conviction upon which the Commission has chosen to revoke Petitioner’s certification was expunged.

5. N.C.G.S. § 17E-12(b) states, in pertinent part, that: “The Commission **may** deny, suspend, or revoke a person’s certification based solely on that person’s felony conviction, whether or not that conviction was expunged.” Thus, although Respondent has the authority, pursuant to 12 NCAC 10B .0204(a), to revoke the certification of a criminal justice officer when the Commission finds that the applicant for certification has committed or been convicted of a felony, by using the word “*may*”, the General Assembly specifically gives Respondent discretion as to *whether* it will revoke such certification when the underlying conviction has been expunged.

6. Moreover, it has been twenty-five (25) years since Petitioner was convicted and twenty-four (24) years since the commission of the crime. Petitioner was seventeen (17) at the time the crime occurred and at the time of the hearing before this Tribunal, he is forty-four (44).

7. The *wiggle room* described in G.S. 17E-12 is right in line with the legislative intent of expunctions:

“‘The purpose of the statute is to clear the public record of entries so that a person who is entitled to expunction may omit reference to the charges to potential employers and others, and so that a records check for prior arrests and convictions will not disclose the expunged entries.’ *State v. Jacobs*, 128 N.C. App. 559, 569, 495 S.E.2d 757, 764, *disc. rev. denied*, 348 N.C. 506, 510 S.E.2d 665 (1998). ‘Expungement’ means to erase all evidence of the event as if it never occurred.’ 21A Am. Jur.2d *Criminal Law* § 1219 (2008) (citing *State v. C.P.H.*, 707 N.W.2d 699, 705 (Minn.Ct.App.2006)).”

State v. Swann, 197 N.C. App. 221, 224, 676 S.E.2d 654, 657 (2009). Thus, although it has a mandate to revoke an applicant’s certification based on a felony conviction, that mandate is lifted when the conviction has been expunged. As such, the Commission does not *have* to revoke Petitioner’s certification since his conviction was expunged.

8. As to Respondent's assertion that Petitioner's failure to disclose the expunged conviction is sufficient to revoke his certification, Rule .0204(c), Chapter 10B of Title 12 of the North Carolina Administrative Code reads, in pertinent part, that: "The Commission **shall** revoke or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified justice officer:

- (1) "has **knowingly** made a material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Subparagraph also applies to obtaining or attempting to obtain in-service firearms requalification as required by 12 NCAC 10B .2000 and .2100; [or,]
- (2) has **knowingly and designedly** by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Subparagraph also applies to obtaining or attempting to obtain in-service firearms requalification as required by 12 NCAC 10B .2000 and .2100[.]"

12 NCAC 10B .0204(c)(1) and (2) (emphasis added).

9. The uncontradicted evidence before this Tribunal is that Petitioner was told by a judge that he would never have to reveal the 1997 felony conviction after it was expunged. Both statutory and caselaw support that even when asked, a Petitioner cannot be punished or held to have committed perjury for denying or refusing to acknowledge a charge or conviction which has been expunged.

"N.C. Gen. Stat. § 15A-146 has two sections discussing the effect of an expunction, (a) and (a1), which contain the identical provision: 'No person *as to whom such an order has been entered shall be held thereafter* under any provision of any law to be guilty of perjury, **or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.**'"

State v. Swann, 197 N.C. App. 221, 224, 676 S.E.2d 654, 657 (2009) (some emphasis in original, some emphasis added).

10. It is true that Respondent-Commission is an exempt agency which has statutory authority to "gain access to a person's felony conviction records, including those maintained by the Administrative Office of the Courts in its confidential files containing the names of persons granted expunctions." N.C.G.S. § 17E-12(b). *See also* N.C.G.S. § 17E-30. However, Respondent argued that, by the application's language alone which states: "You must include any and all convictions regardless of whether or not the convictions were expunged pursuant to NCGS 15A-

145.4 and 15A-145.5[,]” Petitioner should have known that he was required to disclose the expunged conviction. By a preponderance of the evidence, this Tribunal is unconvinced.

11. Respondent offered no statutory recitation (either to Petitioner or to this Tribunal) upon which it rests to assert that an applicant should somehow know a judge was wrong to tell him he would never be required to disclose the expunged conviction. **None** of Respondent’s paperwork—whether within the application or without—reveals or recites a statute or court order that clarifies to an applicant that Respondent has a right to ask about and to receive an actual answer regarding expunged records. Respondent simply relies on its own demand for such information—when the majority of statutory and caselaw are completely in sync in telling applicants they do **not** have to disclose such information:

“No person as to whom an order has been entered pursuant to subsection (c) of this section shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of that person's failure to recite or acknowledge the arrest, indictment, information, trial, or conviction. This subsection shall not apply to a sentencing hearing when the person has been convicted of a subsequent criminal offense.”

N.C. Gen. Stat. Ann. § 15A-145.5(d). How then can an applicant know that Respondent is exempted from this statutory right?

12. Nevertheless, the Tribunal, from its own research, realizes Respondent’s demand must rely on N.C.G.S. § 15A-145.4(f2): “Persons pursuing certification under the provisions of Article 1 of Chapter 17C or Article 2 of Chapter 17E of the General Statutes, however, shall disclose any and all felony convictions to the certifying Commission regardless of whether or not the felony convictions were expunged pursuant to the provisions of this section.” Thus, this statute plainly gives Respondent the right to demand information pertaining to applicants’ expunged convictions.

13. However, pursuant to 12 NCAC 10B .0204(c)(1), *supra*, Respondent must show that when he failed to disclose the expunged conviction, Petitioner **knowingly made a material misrepresentation** to the Commission, and; pursuant to 12 NCAC 10B .0204(c)(2), *supra*, Respondent must show Petitioner “**knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever**, obtained or attempted to obtain...certification from the Commission.”

14. By failing to recite the statutory exception of GS 15A-145.4(f2) regarding disclosure of expunged records on the application instead of simply expecting an applicant to understand and *know* they must disclose ‘because Respondent says so’, Respondent has failed, by a preponderance of the evidence to show that Petitioner knew he was making a material misrepresentation or that he was knowingly and designedly by either false pretense, fraud, misrepresentation or cheating obtaining or attempting to obtain his certification.

PROPOSAL FOR DECISION

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby recommends that the Commission **REVERSE** its revocation of Petitioner's justice officer certification and grant Petitioner's renewal thereof. This Tribunal does not have the authority to order the Commission to amend the language of its application to reflect the language of N.C.G.S. § 15A-145.4(f2); however, to assist in avoiding this same issue in the future, the Tribunal strongly urges the Commission to do so.

NOTICE AND ORDER

The **North Carolina Sheriffs' Education and Training Standards Commission** 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 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. Moreover, the agency shall also serve a copy of its Final Decision upon each party by one of the methods for service of process under N.C.G.S. § 1A-1, Rule 5(b). A copy shall also be furnished to each party's attorney of record. N.C.G.S. § 150B-42(a).

SO ORDERED. This the 29th day of June, 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 29th day of June, 2022.



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