

STATE OF NORTH CAROLINA  
COUNTY OF ONSLOW

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
22 DOJ 00667

Monty Devenport II Petitioner,  v.  North Carolina Sheriffs Education and Training Standards Commission Respondent.	<b>PROPOSAL FOR DECISION</b>
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On June 2, 2022, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Jacksonville, North Carolina pursuant to N.C.G.S. § 150B-40(e) and Respondent's request for designation of an Administrative Law Judge to preside at a contested case hearing under Article 3A, Chapter 150B of the North Carolina General Statutes.

### APPEARANCES

For Petitioner: Clifton Hester  
Attorney at Law  
Hester Grady and Hester PLLC  
Elizabethtown, North Carolina

For Respondent: Robert J Pickett  
Assistant Attorney General  
N.C. Department of Justice

### ISSUE

Whether there was sufficient evidence presented at hearing to support a proposed revocation of Petitioner's certification as a justice officer based upon the following grounds:

- (1) The commission of a Class B misdemeanor offense of "Assault on a Female" in violation of N.C.G.S. § 14-33(c)(2) and/or
- (2) Failure to notify the Respondent within five business days that Petitioner was charged on March 30, 2021 with the misdemeanor offense of "Assault on a Female" in violation of 12 NCAC 10B .0301(a)(8)?

**STATUTES AND RULES AT ISSUE**

N.C.G.S. § 150B-40  
N.C.G.S. §§ 14-33(c)(2) and -51.3  
12 NCAC 10B .0204(b)(2) and (d)(1)  
12 NCAC 10B .0205  
12 NCAC 10B .0300 and .0301(a)(8)

**JOINT STIPULATIONS**

1. It is stipulated that the parties are properly before Administrative Law Judge Melissa Owens Lassiter and that the Office of Administrative Hearings has jurisdiction of the parties and of the subject matter. Venue is proper, and the parties have received proper notice of hearing.

2. It is stipulated that Respondent 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 justice officers and to revoke, suspend, or deny such certification under appropriate circumstances, with valid proof of a rule violation.

3. It is stipulated that Petitioner holds a justice officer certification through the Onslow County Sheriff's Office from November 6, 2018 to present. He held a probationary certification from November 6, 2017 to November 6, 2018.

4. It is stipulated that Respondent's Proposed Exhibits 1, 2, 3, 4, 6, 7, 8, 9, and 10 are authentic and admissible.

5. It is stipulated that Respondent was served with the warrant for "Assault on a Female" on March 30, 2021 and that he notified the Division [Respondent] on April 9, 2021.

6. It is stipulated that the charge was dismissed on April 15, 2021.

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner: 1 (by stipulation of parties)  
For Respondent: 1 - 4, 6 - 10 (by stipulation of parties)  
5 (for illustrative purposes only- Borowy testimony)

**WITNESSES**

For Petitioner: Monty Devenport II  
Lt. Lucinda Hernandez Flores, Onslow Cty Sheriff's Office  
Mark Scott

For Respondent: Nicole Borowry (appeared remotely via Webex)  
Alexis Cavanaugh, Onslow County Deputy Sheriff

## FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of witnesses presented at hearing, stipulations by the parties, documents admitted into evidence, having weighed all the evidence and assessed the credibility of the witnesses by the appropriate factors for judging credibility, including but not limited to the demeanor of each witness; any interest, bias or prejudice each witness may have; the opportunity for each witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of each witness is reasonable; whether such testimony is consistent with all other believable evidence in the case, and upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable rules and laws, the undersigned finds as follows:

### Procedural Background

1. By letter dated January 21, 2022, Respondent notified Petitioner that the Commission had found probable cause to revoke his justice officer certification pursuant to 12 NCAC 10B .0204(b)(2) and (d)(1) for two reasons:

(1) While certified as a justice officer, Petitioner committed the Class B misdemeanor offense of "Assault on a Female" in violation of N.C.G.S. § 14-33(c)(2) by unlawfully and willfully assaulting Nicole Borowy, a female person, by restraining her on a bed against her will on September 14, 2020.

(2) Failing to notify Respondent within five business days that he was charged with the misdemeanor offense of "Assault on a Female" in violation of 12 NCAC 10B .0301(a)(7) [sic] (hereinafter, cited as the correct citation of .0301(a)(8)). Petitioner was charged with such offense on March 30, 2021. Respondent became aware of this charge on April 9, 2021 after receiving Petitioner's notification of such charge by e-mail.

(Resp Exh 2)

2. Respondent's listed grounds for revocation of Petitioner's certification was commission of the criminal offense (Class B misdemeanor) of "Assault on a Female." Respondent did not cite a lack of good moral character as a ground for revoking Petitioner's certification.

3. On February 17, 2022, pursuant to N.C.G.S. § 150B-40(e), Respondent filed a request, for designation of an Administrative Law Judge to preside at a contested case hearing under Article 3A, Chapter 150B of the North Carolina General Statutes.

4. The Undersigned hereby Denies Petitioner's Motion to Dismiss, made at the beginning of the contested case hearing.

5. On July 18, 2022, the Undersigned issued an Order for Petitioner to file a proposed Proposal for Decision holding:

(1) There was insufficient evidence presented at hearing to prove Petitioner committed an “Assault on a Female” on September 14, 2020 but that evidence at hearing proved Petitioner acted in self-defense, and

(2) While there was sufficient evidence to show Petitioner failed to notify Respondent of being charged with a Class B Misdemeanor of “Assault on a Female” on September 14, 2020, in violation of 12 NCAC 10B .0301(a)(8), given the evidence at hearing, the Undersigned would recommend Respondent placing Petitioner on probation in lieu of revocation pursuant to 12 NCAC 10B .0205(e).

6. Petitioner filed a proposed Proposal for Decision with the Office of Administrative Hearings on August 1, 2022.

#### Adjudicated Facts

7. Both parties are properly before the Office of Administrative Hearings (OAH) for hearing in that jurisdiction and venue are proper, and both parties received Notice of Hearing.

8. Respondent is authorized by Chapter 17E of the North Carolina General Statutes, and Title 12 of the North Carolina Administrative Code, Subchapter 10B, to certify justice officers and to revoke, deny, or suspend such certification.

9. On November 6, 2017, Petitioner was appointed to serve as a detention officer with the Onslow County Sheriff’s Office and held a probationary certification with Respondent from November 6, 2017 to November 6, 2018. Since November 6, 2018, Petitioner has held a justice officer certification through the Onslow County Sheriff’s Office and continues to hold such certification to the present date. (Resp Exs 9, 10)

10. From September 2017 through March 2021, Nicole Borowy was employed as a detention officer with the Onslow County Sheriff’s Office. She was promoted to Corporal on March 1, 2021.

#### *Assault on a Female Allegation*

11. Nicole Borowy and Petitioner met while working as detention officers at the Onslow County Sheriff’s Office. Between mid to late 2018, Petitioner and Borowy began an on-again, off-again romantic, and sexual relationship. During that time, Petitioner spent the night with Borowy at her apartment.

12. Shortly before midnight on September 13, 2020, Petitioner and Ms. Borowy were in the bedroom at Borowy’s apartment when Petitioner’s cell phone began ringing. Petitioner declined and did not answer the call. Ms. Borowy asked Petitioner who was calling and why was the person calling. Ms. Borowy grabbed Petitioner’s cell phone from

Petitioner and asked Petitioner to unlock his phone so she could see who was calling him. Ms. Borowy threatened to break Petitioner's cell phone.

13. Petitioner attempted to get his phone back from Borowy, but Borowy threw Petitioner's cell phone. Borowy pushed Petitioner and hit him.

14. At hearing, Ms. Borowy alleged that Petitioner then pushed her, threw her down on the bed, grabbed her neck with his hands, and held her down on the bed. She claimed that she struggled to get Petitioner off her and struggled to breathe. Borowy alleged that the loose clasp on Petitioner's watch injured her neck, under the jawline, and that after approximately 10 seconds, Petitioner let go of Borowy, and Borowy asked Petitioner to leave.

15. Around 12:06 am on September 14, 2020, Ms. Borowy texted her coworker, Alexis Cavanaugh, on Facebook messenger. Borowy told Cavanaugh that she and Petitioner had "just got in a fight. And he pushed me and threw me down by my neck." (Pet Ex 1, Resp Ex 5)

16. When Cavanaugh asked Borowy if Petitioner was gone, Borowy replied, "Yea. And I'm going to get cigarettes." (Pet Ex 1) Borowy responded to Cavanaugh's that:

- a. "Nope, I "hit him first."
- b. "No, I threw his phone at h(o)im and pushed him away."
- c. "I'm just a 'psycho bipolar cunt who shouldn't have assaulted someone who's bigger than me if my neck already hurt.'"

(Pet Ex 1) Ms. Cavanaugh advised Borowy to let law enforcement help with the situation and file a report. Ms. Borowy responded, "It will fuck me over just as much." "I git [sic] him first." (Pet Ex 1)

17. After their argument, Petitioner left Borowy's apartment. However, Petitioner returned to Borowy's apartment after they texted back and forth and mutually agreed to try and work things out. Petitioner spent the night at Borowy's apartment that night (September 14, 2020).

18. Petitioner and Ms. Borowy continued dating in an on-again, off-again manner through October and November of 2020. During that time, Petitioner continued spending the night with Borowy, and continued having verbal arguments with her.

19. On or about October 3 or 4, 2020, Borowy and Petitioner engaged in a verbal argument when Petitioner came to Borowy's home to retrieve his tools. In her testimony at hearing, Borowy alleged that during the argument, Petitioner kicked open her front door and knocked her down after she threw Petitioner's caulk gun at him. Yet later in her testimony, Borowy stated Petitioner didn't push her when he opened the front door, but she fell. Petitioner came inside Borowy's home, and they continued arguing in the living room. Borowy alleged that she didn't report the incident to the police because

Petitioner had “brainwashed” her, and she was afraid Petitioner would tell the police she was unstable and depressed.

20. Borowy and Petitioner ended their relationship on New Year’s Eve of 2021.

21. Around March 16, 2021, Ms. Borowy and Petitioner mutually agreed to meet and talk. At hearing, Borowy described their conversation as a “sad attempt at reconciliation.” Ms. Borowy was going through a tough time and Petitioner “pretended to be her friend.” They did not reconcile.

22. On March 26, 2021, Ms. Borowy notified her Colonel at work about the September 14, 2020 incident with Petitioner and alleged that Petitioner had choked her.

23. On March 30, 2021, Ms. Borowy took out an arrest warrant against Petitioner for choking her with his hands and causing bruises, red marks, and abrasions and/or scratches on her neck with his watch on September 14, 2020. (Resp Ex 4) That day, Petitioner turned himself in immediately after Lt. Flores informed him that Ms. Borowy had taken out an arrest warrant against him.

24. The criminal “Assault on a Female” charge was dismissed without trial, and Petitioner was not convicted on such charge in a court of law.

25. According to Ms. Borowy’s testimony at hearing, she took two screenshots or photos of her neck with her cell phone at 12:05 a.m. on September 14, 2020, while inside her bathroom, and texted them to her coworker Alexis Cavanaugh. (Resp Ex 5). Ms. Borowy claimed that at 1:01 a.m. that morning, she took four screenshots of her neck with her cell phone and texted those photos to Cavanaugh. When Borowy took the screenshots/photos of herself in the bathroom, the vanity lights, consisting of four bulbs, were on. She described how her neck was redder in color in the photos she took at 1:01 a.m. and claimed the photos were an accurate depiction of what her neck looked like at both times.

26. She testified that she did not alter these photos, use a filter, or enhance the color of her neck in those photos. She also claimed she kept those photos on her cell phone since September 14, 2020.

27. Ms. Borowy acknowledged that she didn’t report the September 14, 2020 incident for six and one-half months. She contended she did not do so, because Petitioner had “brainwashed” her and “had convinced her she didn’t have friends and no one at the Command Staff of the [Onslow County] Sheriff’s Department would believe her” after Petitioner showed Borowy’s text messages to them showing she was crazy. She claimed she feared Petitioner would retaliate against her if she reported the incident.

28. Ms. Borowy identified pages 1-3 of Respondent’s Exhibit 5 as her text messages to Alexis Cavanaugh on September 14, 2020. She testified that page 4 of Respondent’s Exhibit 5 was a reliable and accurate representation of the screenshot of

Borowy's text message to Cavanaugh, from Borowy's cell phone, on "Sep 14, 2020 12:05 AM." (Resp Ex 5)

29. The photos on pages 1-3 of Respondent's Exhibit 5 appeared on blank pieces of white paper and do not contain any identifying marks showing these photos were taken by Ms. Borowy on September 14, 2020 after her argument with Petitioner.

a. Page 1 of Respondent's Exhibit 5 contained 1 photo and the following statement: "Here are the pictures of my neck and screenshots of me telling my friend right when it happened. 9/14@00:15."

b. Page 2 contained 3 photos of Borowy's neck with the statement "9/14 @01:01 am."

c. Page 3 contained 2 photos of Petitioner's neck and the statement, "As the evening went on, I started noticing the marks getting darker. The round mark under my chin is from his watch. The horizontal lines are obviously from his hand." (Resp Ex 5)

30. Even though Ms. Borowy testified the photos on pages 1-3 of Respondent's Exhibit 5 were taken with her cell phone, there were no marks, dates, or wording on pages 1-3 to sufficiently and reliably prove that (1) such photos were taken by Ms. Borowy on September 14, 2020 after her argument with Petitioner, and that (2) such photos accurately represented any injuries Borowy supposedly suffered on September 14, 2020 which were caused by Petitioner choking her.

31. Alexis Cavanaugh was a coworker of Ms. Borowy and Petitioner at the Onslow County Detention Center. She attended a detention officer certification course with Petitioner. She met Ms. Borowy through work and was friends with Ms. Borowy.

32. Ms. Cavanaugh knew Petitioner and Ms. Borowy argued on and off while dating, but only heard about the bad side of the relationship, i.e., the arguments, from Ms. Borowy.

33. During her text conversation with Ms. Borowy on September 14, 2020, Ms. Cavanaugh did not ask Borowy if Petitioner hit Borowy, and she did not know who started the fight between Borowy and Petitioner. Cavanaugh knew Borowy did not file a report at work about the fight between she and Petitioner.

34. Ms. Cavanaugh had no firsthand knowledge of what happened between Petitioner and Ms. Borowy on September 14, 2020. The only injury she knew about was from the photo of Ms. Borowy's slightly red neck as shown in Petitioner's Exhibit 1. (Pet Ex 1).

35. Ms. Cavanaugh identified Petitioner's Exhibit 1 was a copy of the text message string and a screenshot of Ms. Borowy's neck from their September 14, 2020

conversation. Ms. Cavanaugh acknowledged that this text message string was taken from her cell phone.

36. Ms. Cavanaugh opined that Ms. Borowy's neck was slightly red in the photo in Petitioner's Exhibit 1.

37. The screenshot or photo of Borowy's neck in Petitioner's Exhibit 1 appears to be the same photo depicted on the left side of page 3 of Respondent's Exhibit 5. However, Borowy's neck appears only slightly red in the photo in Petitioner's Exhibit 1.

38. Ms. Borowy's neck appears only slightly red in the photo in Petitioner's Exhibit 1, whereas Ms. Borowy's neck appears noticeably redder and darker in the photo on page 3 of Respondent's Exhibit 5.

39. Between mid-March 2021 and March 30, 2021, Lt. Lucinda Hernandez Flores investigated Ms. Borowy's March 26, 2021 complaint against Petitioner on behalf of the Onslow County Sheriff's Office. Lt. Flores interviewed Ms. Borowy and Petitioner. On March 29, 2021, Lt. Hernandez filed her investigative report advising her superiors of her interviews and investigative conclusions. Lt. Flores determined that Petitioner did not assault Ms. Borowy by strangulation as there was insufficient evidence to prove what caused the marks on Ms. Borowy's neck. Neither did Lt. Flores think there was a sufficient basis for a felony charge against Petitioner.

40. While supervisors are prohibited from fraternizing with subordinates in the Onslow County Sheriff's Office, Lt. Flores did not find Petitioner and Ms. Borowy violated that prohibition. She did find that Ms. Borowy used her rank as Corporal, by texting Petitioner, so that Petitioner would get extra shifts and held that over Petitioner's head since September of 2020. Lt. Flores also concluded that it was possible Ms. Borowy brought assault charges against Petitioner because they did not reconcile in March 2021.

41. Major Mark Scott is the Chief of Detectives for the Onslow County Sheriff's Department. After the Arrest Warrant was issued against Petitioner on March 30, 2021, Major Scott investigated the criminal assault charge for the Sheriff's Department. Major Scott interviewed Petitioner. Major Scott determined that Petitioner's separate statements to Lt. Flores and to Major Scott, about the September 14, 2020 incident with Ms. Borowy, were consistent and found no basis for the "Assault on a Female" charge. As a result, the Onslow County Sheriff's Department took no further action against Petitioner based on Borowy's assault allegation. (Resp Exs 6 and 7)

42. On April 9, 2021, Petitioner sent an email to Respondent and reported that he had been charged with an "Assault on a Female" on March 30, 2021. Petitioner advised Respondent that another officer had accused him of choking her on September 14, 2020. He explained that the first time he heard about the choking allegation was on November 3, 2020 when the female involved (Ms. Borowy) "used it as a threat in a verbal argument." Petitioner further indicated that since that time, Borowy used the choking allegation as a threat during their verbal arguments. The matter "came to a head about a week before the charges were filed" because Petitioner had refused to come and cuddle



with Ms. Borowy and had told Ms. Borowy he was interested in someone else and was no longer willing to “go down that road.” (Resp Ex 8)

43. Petitioner’s testimony at the contested case hearing regarding the September 14, 2020 incident between he and Ms. Borowy was consistent with both his statement to Lt. Flores, his statement to Major Scott, and his statement to the Respondent Commission.

a. In all three statements, Petitioner denied choking Ms. Borowy.

b. Petitioner consistently explained that Ms. Borowy initiated the September 14, 2020 fight after he would not unlock his cell phone so she could see who was calling him. Ms. Borowy threw Petitioner’s cell phone, pushed him, and started hitting him. Ms. Borowy acknowledged at hearing that Petitioner’s description of how the September 14, 2020 incident began.

c. In all three of his statements, Petitioner consistently explained that he grabbed Borowy’s wrists to stop her from hitting him and crossed Borowy’s arms in an “X” pattern. He then put her on the bed, told her he was going to let go, and asked her not to hit him. After Borowy agree, Petitioner let go of Borowy, grabbed his phone, and stood a distance away from Borowy. They continued to argue until Petitioner left the apartment.

d. After texting back and forth with Borowy, Petitioner returned to Borowy’s apartment to work things out, about an hour later, and spent the night with Borowy. Later in September 2020, Petitioner helped Borowy move into another house. Petitioner spent the night with Borowy at that house no more than ten times.

e. On October 3, 2020, Petitioner left Borowy’s residence after an argument with Borowy about dinner. After that, Petitioner and Borowy continued talking and began dating again throughout October and November of 2020. Their on-again, off-again relationship continued until New Year’s Eve, when they stopped dating and talking. (Resp Ex 7, Petitioner’s testimony)

44. Petitioner’s reaction to Borowy’s assault on him on September 14, 2020, to grab Borowy’s wrists and restrain her, was reasonable and made in self-defense to protect Borowy from hurting either herself or him.

45. There was insufficient evidence presented at hearing to show Petitioner made an overt act or attempt to exert force or violence on Ms. Borowy to do immediate physical injury to her on September 14, 2020.

46. There was also insufficient evidence produced at hearing proving Ms. Borowy was placed in fear of immediate bodily harm of Petitioner on September 14, 2020. In fact, the evidence showed otherwise.

- a. After the altercation on September 14, 2020, Ms. Borowy allowed Petitioner to return to her apartment and stay with her. She also continued to date Petitioner for approximately 3 months thereafter.
- b. Petitioner's hearing testimony, his statements to Lt. Flores and to Major Scott all consistently showed that in mid-March 2021, Ms. Borowy allowed Petitioner in her home, to comfort her, and to cuddle with her for three consecutive days. Petitioner's statements showed that Ms. Borowy was not opposed to having sex with him. (Resp Exs 6, 7)
- c. Two weeks later, on March 30, 2021, in retaliation for not reconciling with her, Ms. Borowy filed an allegation of assault against Petitioner with her employer and swore out an arrest warrant against Petitioner for the criminal offense of "Assault on a Female." (Resp Exs 4, 6, 7, Petitioner's hearing testimony)
- d. Based on those facts, the undersigned finds Ms. Borowy's allegation of assault against Petitioner was not credible.

#### *Failure to Notify Allegation*

47. Petitioner knew that he was required by Respondent's rule to notify Respondent that he had been charged with a criminal charge within five working days of being charged of such an offense.

48. The evidence at hearing proved that on April 9, 2021, Petitioner notified Respondent that he had been charged with an "Assault on a Female." Such notice was untimely and in violation of 12 NCAC 10B .0301(a)(8) as Petitioner notified Respondent 10 days after being served with the "Assault of a Female" charge. Nonetheless, during those ten days, at least two of the intervening days were "weekend days" and at least one day was an Easter Holiday as recognized by the State of North Carolina.

49. There was no evidence presented at hearing that Petitioner's late notification was done to intentionally deceive Respondent. Neither did Petitioner's late notification negatively delay, impact, or cause difficulty for Respondent in investigating the matter at issue in this contested case.

#### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case, pursuant to Article 3A, N.C.G.S. § 150B-40(e), and the parties received proper notice of the hearing 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. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

3. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. *Green v. Green*, 284 S.E.2d 171,174, 54 N.C.App. 571, 575 (1981); *In re Custody of Stancil*, 179 S.E.2d 844,847, 10 N.C.App. 545, 549 (1971).

4. Respondent, North Carolina Sheriffs Education and Training Standards 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 justice officers and to revoke, suspend, or deny such certification.

5. Since this contested case is heard under Article 3A, N.C.G.S. § 150B, the undersigned Administrative Law Judge presides over the hearing in place of the Respondent and makes a “proposal for decision” to the agency. N.C.G.S. § 150B-40. The Respondent makes the final agency decision.

6. N.C.G.S. § 150B-40(e) provides:

The provisions of this Article 3A, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings. The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have the authority of the presiding officer in a contested case under this Article.

7. The plain, ordinary language of N.C.G.S. § 150B-40(e) provides a clear distinction between cases under Article 3 and under Article 3A cases.

8. 12 NCAC 10B .0204 provides in pertinent part:

(d) The Commission may revoke, suspend, 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:

(1) A crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor which occurred after the date of appointment.

9. 12 NCAC 10B .0204 provides:

(b) The Commission shall revoke, deny, or suspend the certification of a justice officer when the Commission find that the applicant for certification or the certified officer:

(2) fails to meet or maintain any of the employment or certification standards required by 12 NCAC 10B .0300.

### *Assault on a Female*

10. In this case, Petitioner was not “convicted” of an “Assault on a Female” offense. Therefore, the proposed denial depends solely upon whether Petitioner “committed” the criminal offense at issue.

11. In a situation where the Respondent alleges that a citizen not convicted of a crime nonetheless “committed” it, the burden of proof is properly on Respondent to show, by sufficient evidence, that the person in question committed the crime. While our appellate courts in the N.C.G.S. § 150B, Article 3 context have at times required petitioners in cases under the Administrative Procedure Act to prove a negative, no appellate court in North Carolina has approved the State, in whatever form, first deciding that a citizen committed a crime and then requiring that citizen to prove that he did not.

12. N.C.G.S. § 14-33(c)(2) states:

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

(2) Assaults a female, he is being a male person at least 18 years of age.

13. The elements of “Assault on a Female” offense are (1) an assault, (2) upon a female person, (3) by a male person (4) who is at least eighteen years old. N.C.G.S. § 14-33(b)(2) (1986); State v. Herring, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988). Petitioner’s spouse is a female person. Petitioner is a male person who is at least 18 years of age. The question, then, is whether Petitioner’s conduct constituted an “assault.”

14. “The legal definition of an assault in the crime of assault on a female is ‘an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm’.” State v. Wortham, 318 N.C. 669, 671, 351 S.E.2d 294, 296 (1987), citing State v. Jeffries, 57 N.C.App. 416, 291 S.E.2d 859, disc. rev. denied, and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

15. An “Assault on a Female” may be proven by finding either an assault on or a battery of the victim. State v. West, 146 N.C. App. 741, 554 S.E.2d 837 (2001).

16. In order to constitute the offense of “Assault on a Female,” it is not necessary that the defendant have the present intent and ability to carry out the threat or menace, but it is sufficient if, under the circumstances, the character of the threat is such as to cause the victim to go where she would not otherwise have gone or leave a place

where she had a right to be. State v. Allen, 245 N.C. 185, 95 S.E.2d 526 (1956); State v. McIver, 231 N.C. 313, 56 S.E.2d 604, 12 A.L.R.2d 967 (1949); State v. Sutton, 228 N.C. 534, 46 S.E.2d 310 (1948).

17. N.C.G.S. § 14-51.3. Use of force in defense of person; relief from criminal or civil liability.

(a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

(2) Under the circumstances permitted pursuant to G.S. 14-51.2.

(b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties. (2011-268, s. 1.)

18. In this case, there was insufficient evidence produced at hearing to prove Petitioner committed a misdemeanor "Assault on a Female" on September 14, 2020 as there was no evidence proving Petitioner committed a willful, overt act required to commit an assault. Rather, the evidence proved that Petitioner's actions were for the protection of himself, to prevent injury to himself from actions taken by the alleged victim, Ms. Borowy, and to protect Ms. Borowy from injuring herself. Moreover, the evidence did not support any showing that Ms. Borowy had any reasonable apprehension of immediate bodily harm.

19. "One without fault in provoking or continuing an assault is privileged to use such force as is reasonably necessary to protect himself from bodily harm or offensive physical contact." State v. Grant, 57 N.C. App. 589, 291 S.E.2d 913, citing State v. Anderson, 230 N.C. 54, 51 S.E.2d 895 (1949).

20. In short, the evidence in this case cannot and does not support a finding that Petitioner committed the Class B Misdemeanor offense of "Assault on a Female" on Nicole Borowy on September 14, 2020.

21. For the foregoing reasons, Respondent lacked probable cause to revoke Petitioner's certification pursuant to 12 NCAC 10B .0204(b) for committing the Class B Misdemeanor offense of "Assault on a Female" on September 14, 2020 in violation of N.C.G.S. § 14-33(c)(2).

*Failure to Notify*

22. 12 NCAC 10B .0301(a)(8) requires:

(a) Every Justice Officer employed or certified in North Carolina shall:

(8) make the following notifications: (A) within five business days, notify the Standards Division and the appointing department head in writing of all criminal offenses with which the officer is charged. This shall include all criminal offenses except minor traffic offenses. A minor traffic offense means any offense under G.S. 20 or similar laws of other jurisdictions; except those Chapter 20 offenses defined as either a Class A or B Misdemeanor in 12 NCAC 10B .0103(10). The initial notification required must specify the nature of the offense, the date of offense, and the arresting agency . . .

23. However, pursuant to 12 NCAC 10B .0205(2), Respondent Commission has:

[T]he discretion to impose a lesser sanction than revocation, including a verbal and/or written warning, probationary certification, or suspension. The Commission may either reduce or suspend the periods of sanction under this Item or substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension

24. Petitioner knew that he was required by Respondent's rule to notify Respondent of a criminal charge within five working days of being charged of such an offense.

25. The evidence presented at hearing established that Petitioner violated 12 NCAC 10B .0301(a)(8) when he failed to notify Respondent, within five business days of

March 30, 2021, that he was charged with the misdemeanor offense of "Assault on a Female." However, Petitioner notified Respondent on April 9, 2021, that he was charged on March 30, 2021, with the misdemeanor offense of "Assault on a Female." That notification occurred during a period in which "Good Friday" has been recognized by the State of North Carolina as an Easter Holiday.

26. There was no evidence presented at hearing that Petitioner's late notification was done to intentionally deceive Respondent. Neither did Petitioner's late notification negatively delay, impact, or cause difficulty for Respondent in investigating the matter at issue in this contested case.

27. Given the evidence at hearing, the undersigned recommends Respondent place Petitioner on a period of probation, in lieu of revocation, pursuant to 12 NCAC 10B .0205(2) for violating 12 NCAC 10B .0301(a)(8).

### PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that Respondent find that Petitioner:

(1) Did not commit an "Assault on a Female" on September 14, 2020. As a result, there was no cause to revoke Petitioner's certification for that reason.

(2) Violated 12 NCAC 10B .0301(a)(8) when he failed to notify Respondent within five business days of March 30, 2021, that he was charged with the misdemeanor offense of "Assault on a Female." Thus, there was cause to revoke Petitioner's certification for violating 12 NCAC 10B .0301(a)(8). However, given the circumstances noted above, and pursuant to 12 NCAC 10B .0205(2), the undersigned recommends Respondent place Petitioner on probation for 1 year in lieu of revoking Petitioner's certification.

### NOTICE OF APPEAL

The North Carolina Criminal Justice Education and Training Standards Commission will make the Final Decision in this contested case and 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).

**SO ORDERED**, this the 6th day of September, 2022.



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Melissa Owens Lassiter  
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 6th day of September, 2022.



Daniel Chunko  
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