

STATE OF NORTH CAROLINA
COUNTY OF PERSON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 DOJ 02059

Matthew Scott Craft Petitioner, v. North Carolina Sheriffs Education and Training Standards Commission Respondent.	PROPOSAL FOR DECISION
---	------------------------------

PROPOSAL FOR DECISION

On October 6, 2022, Administrative Law Judge John C. Evans heard this matter, pursuant to N.C. Gen. Stat. § 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 and Chapter 17E of the North Carolina General Statutes to hear Petitioner's appeal of Respondent's proposed revocation of Petitioner's justice officer certification.

APPEARANCES

For Petitioner: Brian Michael Aus, Attorney at Law
P.O. Box 1345
Durham, NC 27702

For Respondent: Robert J. Pickett, Assistant Attorney General
Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUES

1. Whether there was sufficient evidence presented at hearing to support Respondent's proposed revocation of Petitioner's certification as a justice officer under 12 NCAC 10B .0204(d)(1) based on the grounds that Petitioner committed a Class B misdemeanor offense of "Assault on a Female" in violation of N.C. Gen. Stat. § 14-33(c)(2)?

2. Whether there was sufficient evidence presented at hearing to support Respondent's proposed revocation of Petitioner's justice officer certification under 12 NCAC 10B .0204(b)(2) for failing to be of good moral character as required under 12 NCAC 10B .0301(a)(8)?

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. § 14-33
12 NCAC 10B .0204(b)(2) and (d)(1)
12 NCAC 10B .0301(a)(8)

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None
For Respondent: 1-4, 6, 8-9, and 11

WITNESSES

For Petitioner: Matthew Craft, Petitioner; Michael Andrews, Former Durham County Sheriff; Jason Wilborn, Chief Deputy of the Person County Sheriff's Office [now Sheriff]; Steve Haire.

For Respondent: Kelsey Pepper, former Durham County Deputy Sheriff; Melinda Hester, Durham County Deputy Sheriff.

PROCEDURAL BACKGROUND

By letter dated May 5, 2022, Respondent notified Petitioner that there was probable cause to revoke his justice officer certification for the following two reasons:

- (a) While certified as a justice officer, Petitioner committed the Class B misdemeanor offense of "Assault on a Female" in violation of N.C. Gen. Stat. § 14-33(c)(2).
- (b) Petitioner "no longer possess[ed] the good moral character required by all justice officers" as required under 12 NCAC 10B .0301(a)(8).

(Resp. Ex. 2). On May 27, 2022, pursuant to N.C. Gen. Stat. § 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.

FINDINGS OF FACT

Based upon careful consideration of the exhibits admitted into evidence, the entire record in this proceeding, and the credibility and believability of witness testimony at hearing including the witnesses' credibility, demeanor, any interests, biases or prejudices, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, and whether the testimony of the witnesses are reasonable and consistent with other believable evidence in the case, the undersigned finds as follows:

Factual Stipulations by the Parties

1. In anticipation of the hearing, the parties submitted joint stipulations of fact and stipulations of authenticity and admissibility of Respondent's Exhibits 1 through 4, 6, and 9:
2. 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. Petitioner held certification as a corrections officer through the North Carolina Criminal Justice Education and Training Standards Commission from March 1, 2004, through February 1, 2007. Petitioner held probationary certification as a justice officer through Respondent from October 27, 2004, to May 13, 2005, through the Person County Sheriff's Office as a detention officer. Petitioner was granted probationary justice officer certification on January 19, 2015, and general certification a year later by Respondent as a deputy with the Durham County Sheriff's Office. He separated from the Durham County Sheriff's Office on February 10, 2020. He was appointed as a deputy with the Person County Sheriff's Office on December 21, 2020.
4. Respondent's Proposed Exhibits 1 through 4, 6 and 9 are authentic and admissible.

Adjudicated Facts

5. Petitioner worked as an animal control officer with the Durham County Sheriff's Office. His partner was Kelsey Pepper ("Pepper"). They had a normal working relationship and Pepper felt comfortable with Petitioner.
6. Melinda Hester ("Hester") worked in the animal control services office with Petitioner and Pepper. Hester had a normal working relationship with Petitioner.
7. From October 21 to 24, 2018, these three deputies (Petitioner, Pepper, and Hester), along with another Durham County Sheriff's Office deputy (the "Fourth Deputy"), went to a work conference at Carolina Beach, North Carolina.
8. Pepper and Hester were roommates, while Petitioner was roommates with the Fourth Deputy.
9. At this conference, many attendees engaged in drinking alcohol and various social activities. Pepper described Petitioner's behavior at the conference as very social.
10. On the first evening of the conference, Petitioner repeatedly urged Pepper to go skinny dipping. After first declining, at Petitioner's insistence, Pepper left her hotel room and went downstairs to the beach area, where she remained fully clothed. Petitioner and Pepper were splashing around in the water when the Petitioner, who also remained fully clothed, picked Pepper up over his shoulder and threw her in the water. Pepper alleged that Petitioner had smacked her buttocks. Petitioner stated that if he did touch Pepper inappropriately, it was not intentional and was part of picking her up.
11. Immediately following this event, Pepper exited the beach area and returned to the hotel.

12. On the second evening of the conference, Petitioner and several other conference attendees went to a convenience store after dinner and purchased more alcohol. Thereafter, they drank on the hotel patio. Petitioner engaged in heaving drinking and does not recall any events of that evening beyond going to the convenience store and drinking on the hotel patio.

13. Around midnight, Pepper and Hester had retired to their hotel room. Petitioner knocked on the door and indicated that he had been locked out of his room and complained of the Fourth Deputy's snoring. Pepper told Petitioner to go knock on his door or to get another key from the hotel. Petitioner did not leave Pepper and Hester's room at that time.

14. Hester fell asleep. Pepper fell asleep while Petitioner was sitting on the edge of her bed.

15. Pepper awoke to Petitioner being in her bed. Pepper was faced away from Petitioner and one of Petitioner's hands was up Pepper's shirt on her waist and the other on her back. Petitioner had his clothes on.

16. Pepper immediately turned over and pushed Petitioner away and Petitioner attempted to pull Pepper towards him. Pepper repeatedly told Petitioner to take his hands off her and to leave. Petitioner, after being told several times, acquiesced, and left the room.

17. Hester remained asleep in the room during this entire time. It was not until the next day during the conference that Pepper told Hester that she had to "put Craft out of the room last night. He got really grabby. And I had to make him leave the room." (T. p. 60).

18. The following morning, Petitioner stated that he woke up with a hangover and did not remember much from the prior evening and did not remember how he got to his room.

19. Petitioner was late arriving to the conference in the morning and testified he had a hangover. He sat next to Pepper. Pepper and Petitioner passed several notes to each other during the conference. In those notes, Petitioner asked Pepper what happened the previous night, to which Pepper informed Petitioner of his actions. Petitioner acted surprised and immediately and repeatedly apologized. Petitioner described his reaction at being told of his behavior as horrified.

20. Pepper did not report the events of that evening to her superiors at that time because she was a new employee and was concerned about being viewed as a whistleblower.

21. Following the conference, Pepper and Petitioner continued to work together. Petitioner committed to being "the best partner that he [could] be" because he had a lot to "make up for." (T. p. 34). Pepper believed that Petitioner "was working harder as a partner" after the incident. (T. p. 35).

22. In December 2019, approximately 13 months after the conference, Pepper reported the incident to her superiors. Pepper had two reasons for ultimately reporting the incident. First, she stated that her then-boyfriend urged her to report the incident and that her failure to report the incident was causing friction in her relationship with her boyfriend. Second, Pepper testified to several events that concerned her. These events included:

(a) Pepper recalled Petitioner making a comment about a how a female deputy eats a hot dog. Petitioner recalled the conversation that occurred in the squad room, but his recollection was that there were several people present and he did not make that comment.

(b) Pepper also recalled an incident when she returned to the office wearing shorts after working out at the gym. Pepper testified that when she entered the office, Petitioner made a noise “like woo” and pulled out his phone and either pretended to take pictures or took pictures. (T. p. 36). Petitioner denies having taken any pictures.

23. On January 24, 2020, Petitioner was placed on administrative leave by the Durham County Sheriff’s Office.

24. On February 10, 2020, Petitioner resigned from the Durham County Sheriff’s Office. (Resp. Ex. 4).

25. Petitioner is currently employed by the Person County Sheriff’s Office.

26. Jason Wilborn, Chief Deputy of the Person County Sheriff’s Office (Chief Deputy at the time of his testimony and current Sheriff), opined that the Petitioner is a good officer and his lieutenant, Petitioner’s immediate supervisor, considers Petitioner to be a reliable, honest worker. Chief Deputy Wilborn would be willing to retain Petition as a Person County Deputy if Petitioner kept his certification.

27. Mike Andrews, former Person County Sheriff through December 2018, felt Petitioner was a good representative for the men and women in the office in which he was working. Sheriff Andrews knew of no reports or incidents of any kind involving Petitioner.

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. Gen. Stat. § 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*, 54 N.C. App. 571, 575, 284 S.E.2d 171, 174 (1981); *In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (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 (NCAC), 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. Gen. Stat. § 150B, the undersigned Administrative Law Judge presides over the hearing in place of Respondent and

makes a “proposal for decision” to the agency. N.C. Gen. Stat. § 150B-40(e). Respondent makes the final agency decision.

6. N.C. Gen. Stat. § 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. Gen. Stat. § 150B-40(e) provides a clear distinction between cases under Article 3 and under Article 3A cases. *See Homoly v. N. Carolina State Bd. of Dental Exam’rs*, 121 N.C. App. 695, 698, 468 S.E.2d 481, 484 (1996) (“[T]he contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely.”).

8. 12 NCAC 10B .0204(d) provides: “(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(b) 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 charged with or convicted of an “Assault on a Female” offense. Therefore, the proposed disciplinary action turns on whether Petitioner committed the criminal offense at issue.

11. In a situation where 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. *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998) (“The North Carolina courts have generally allocated the burden of proof in any dispute on the party attempting to show the existence of a claim or cause of action . . .”). While our appellate courts in the N.C. Gen. Stat. § 150B, Article 3 context have at times required petitioners in cases under the Administrative Procedure Act to prove a negative, *see Overcash v. N. Carolina Dep’t of Env’tl. & Nat. Res., Div. of Waste Mgmt.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2006) (citations omitted); *Peace*, 349 N.C. at 328, 507 S.E.2d at 281 (citations omitted), 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. The elements of assault on a female are (1) an assault, (2) upon a female person, (3) by a male person (4) who is at least eighteen years old. N.C. Gen. Stat. § 14-33(c)(2) (1986); *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988). Pepper 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."

13. "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) (quoting *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)).

14. The preponderance of the evidence does not support that Petitioner engaged in an "overt act or attempt . . . *with force and violence*, to do some *immediate physical injury* to the person of another." *Id.* (emphasis added). The physical contact did not involve any force or violence and no physical harm occurred. This matter thus presents not as an assault, but rather as a boorish and inexcusable act.

15. Accordingly, the legal definition of "assault," which is required for a conviction of the offense of Assault on a Female, is not met in this case. The undersigned thus finds that a preponderance of the evidence does not support the Commission's conclusion that Petitioner "committed" the Class B misdemeanor offense of "Assault on a Female."

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

Good Moral Character

17. 12 NCAC 10B .0301(a)(8)¹ states, "Every Justice Officer employed or certified in North Carolina shall . . . be of good moral character."

18. 12 NCAC 10B .0204(b)(2) states, "The Commission shall revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer . . . fails to meet or maintain any of the employment or certification standards required by 12 NCAC 10B .0300."

19. The term good moral character "by itself, is unusually ambiguous," *Konigsberg v. State*, 353 U.S. 252, 262-63 (1957); however, it has been defined as "honesty, fairness, and respect for the rights of others and for the law of the state and nation." *In re Willis*, 288 N.C. 1, 10, 215 S.E.2d 771, 775-77 (1975).

20. "Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." *In re Rogers*, 297 N.C. 48, 58, 253 S.E.2d 912, 918 (1979) (explaining that character encompasses both a person's past behavior and the opinion of his community arising from it).

¹ In 2019, at the time of Pepper's complaint, the requirement that justice officers be of good moral character was contained in 12 NCAC 10B .0301(a)(8). 12 NCAC 10B .0301(a) has since been modified such that the good moral character requirement is contained in Subsection (a)(9) in the version of the rule effective January 1, 2022.

21. Consistent with the U.S. Supreme Court, Respondent has previously held that moral character is a vague and broad concept. It is recognized that police administrators, police officers, and others have considerable differences of opinion as to what constitutes good moral character. The fact that there is a lack of clear and consistent meaning of the phrase, and a lack of consistent enforcement makes the determination of “good moral character” problematic.
22. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer’s law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct.
23. The evidence shows that Petitioner enjoyed a good reputation as a deputy sheriff prior to and after the October 2018 incident involving Pepper.
24. Petitioner’s conduct with Pepper was irresponsible, unprofessional, and highly inappropriate and demonstrated he lacked good judgement.
25. Petitioner’s remorse for his actions at the conference is adjudged by the undersigned to be genuine as evidenced by his credibility at the hearing, his express and repeated apology immediately, and his subsequent actions.
26. The evidence presented by Respondent to support the Commission’s conclusion that Petitioner lacks “good moral character” was limited to the conference incident, discussed above, and several minor incidents or comments for which there was conflicting testimony.
27. Petitioner’s former Sheriff and current Chief Deputy Sheriff both know Petitioner to be a good deputy. Given the unique relationship between a Sheriff and his deputies and the public’s understanding that the deputies are a reputational extension of the Sheriff, the undersigned takes particular interest in their opinion of Petitioner. Their testimony supports the finding that the Petitioner currently has the moral character required of a justice officer. The undersigned takes note that Petitioner’s current Chief Deputy, with full knowledge of the events giving rise to this action, maintains his willingness to retain Petitioner as a deputy.
28. The undersigned has weighed and balanced Petitioner’s history of employment; the testimony of Pepper and Petitioner, both whom the undersigned found to be credible; and the statements made by Petitioner’s character witnesses, and finds that, notwithstanding the underlying conduct at the conference that was inappropriate, unprofessional, and disappointing, the totality of the evidence is insufficient to find a present lack of good moral character.
29. Petitioner presently has good moral character as required by 12 NCAC 10B .0301(a)(8) to continue to serve.
30. The findings of Respondent are not supported by substantial evidence but are not arbitrary and capricious.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby proposed that the North Carolina Sheriffs’ Education and Training Standards Commission find that Petitioner did not commit the crime of “Assault on a Female,” and accordingly, there is no cause to act under 12 NCAC 10B .0204. Moreover, the undersigned recommends that the Commission

reverse its findings that Petitioner lacked good moral character and therefore retain his justice officer certification.

NOTICE OF APPEAL

The North Carolina Sheriffs' 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. Gen. Stat. § 150B-40(e).

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C. Gen. Stat. § 150B-42(a).

IT IS SO ORDERED.

This the 15th day of December, 2022.



John C. Evans
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:

Brian Michael Aus
Brian Aus Attorney at Law
brianauslaw@gmail.com
Attorney For Petitioner

Robert J Pickett
NC Department of Justice
rpickett@ncdoj.gov
Attorney For Respondent
Electronically Served on December 15, 2022.

This the 16th day of December, 2022.



Christine E. Cline
Law Clerk
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 919-431-3000