

STATE OF NORTH CAROLINA
COUNTY OF VANCE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 DOJ 05183

Brian Kenneth Wayne Petitioner, v. NC Sheriffs Education and Training Standards Commission Respondent.	PROPOSAL FOR DECISION
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This case came on for hearing on January 29, 2019 before Administrative Law Judge Donald W. Overby in Raleigh, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: E. Lee Turner, Jr.
Gallery Park II
4020 Wake Forest Road
Suite 110
Raleigh, NC 27609

Respondent: Marie Hartwell Evitt
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUES

1. Whether Respondent's proposed denial of Petitioner's justice officer certification for failing to meet the minimum standards for justice officer certification based upon his lack of good moral character was supported by a preponderance of the evidence?
2. Whether Respondent's proposed denial of Petitioner's justice officer certification for Commission of the Felony of "Perjury" in violation of common law and N.C. General Statute § 14-209 was supported by a preponderance of the evidence?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 14-209
12 NCAC 10B .0301(a)(8)
12 NCAC 10B .0204(a)(1) and (b)(2)

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge in that jurisdiction and venue are proper, both parties received notice of hearing, and that Petitioner received by mail the proposed denial of Justice Officer's Certification letter mailed by Respondent Sheriffs' Commission on July 10, 2018. (R Ex. 1)

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter referred to as the "Commission" or "Sheriffs' 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 deny, revoke, or suspend such certification.

3. Petitioner is an applicant for justice officer certification with the Vance County Sheriff's Office. Petitioner has been employed by the Vance County Sheriff's Office since August 23, 2016. He was previously certified with the North Carolina State Highway Patrol (hereinafter "NCSHP") through the North Carolina Criminal Justice Education and Training Standards Commission from February 2013 through April 2016.

4. The proposed denial of Petitioner's application for justice officer certification is based on two (2) contentions: first, that Petitioner lacks the good moral character required of a justice officer, thereby failing to meet or maintain the minimum employment standards required of a justice officer; and second, that Petitioner committed the felony offense of "Perjury" in violation of N.C. Gen. Stat. § 14-209.

5. The contentions regarding Petitioner's lack of good moral character and the commission of the offense of Perjury are factually linked. The allegations are that Petitioner arrested a defendant for Driving While Impaired on June 9, 2015 and signed defendant's name to a second chemical rights form DHHS 4081 when she changed her mind about having a witness present and refused to sign. Further, it is alleged that Petitioner did not tell the truth about who signed the form DHHS 4081 when he was providing sworn testimony in the criminal trial of the same defendant, was untruthful with his First Sergeant when asked about his courtroom testimony, and was untruthful in a written statement submitted during an internal investigation of the NCSHP before ultimately admitting he was untruthful on each of these occasions.

6. 12 NCAC 10B .0204(b)(2) states the Sheriffs' Commission shall revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification fails to meet the minimum employment standard of being of good moral character as required by 12 NCAC 10B.0301(a)(8).

7. 12 NCAC 10B .0204(a)(1) states the Sheriff's Commission shall revoke, suspend or deny the certification of a justice officer when the Commission find that the applicant for certification or the certified officer has committed or been convicted of a felony.

8. Petitioner was afforded the opportunity to appear before the Probable Cause Committee, with counsel and witnesses, and present evidence in defense of his application for certification and did so.

9. Petitioner timely responded to the notification that the Committee found Probable Cause to deny his application for certification and properly requested a contested case hearing.

10. On August 8, 2018 Petitioner filed a request for an administrative hearing. The basis of the Petitioner's request was that he had not committed or been convicted of the felony of "perjury" and that the Petitioner did not "lack good moral character".

11. Credible testimony at the contested case hearing showed that:

- a. Petitioner, during his employment with the NCSHP, was stationed with Troop A1 in Dare County and on duty on June 9, 2015.
- b. On or about June 9, 2015, Petitioner was dispatched to a single vehicle collision. During the course of the investigation, he formed the opinion that the driver of the vehicle, Ann Taylor (hereinafter "Taylor"), was sufficiently impaired and charged her with Driving While Impaired.
- c. Petitioner read Taylor the Chemical Breath Test Rights on form DHHS 4081. (R Ex. 3) She signed that form and told Petitioner she wanted a witness to be present for her breath test. Because of Taylor's request for a witness, Petitioner was required to wait thirty (30) minutes before administering the test.
- d. During the wait, but before thirty (30) minutes passed, Taylor changed her mind and decided she did not want a witness. Petitioner filled out a second form DHHS 4081 and asked Taylor to sign. (R Ex. 3) She refused. According to Petitioner, he asked if he could sign the form for her and Taylor consented. Petitioner signed Taylor's name to the form. (R Ex. 4) Taylor submitted a breath sample at 9:33 p.m.
- e. As part of his duties, Petitioner's sergeant reviewed weekly reports of each trooper. When Sergeant Jeffrey Wilson (hereinafter "Wilson") reviewed Petitioner's paperwork, he noted Taylor's rights were read to her at 9:14 p.m. and she asked for a witness. However, her breath sample was submitted at 9:33p.m., prior to the thirty (30) minute waiting period required when a defendant requests a witness. Sgt. Wilson did not receive the second form DHHS 4081 from Petitioner.

- f. As a result, Sgt. Wilson instructed Petitioner to contact the District Attorney's office and let them know that the results of Taylor's chemical breath test would not be admissible because of Petitioner's paperwork error. Sgt. Wilson told Petitioner he believed that the prosecution would be successful based on other evidence, even without the chemical analysis. Petitioner still did not tell Sgt. Wilson about the second form DHHS 4081 at this point. Petitioner did not contact the District Attorney's Office as instructed.
- g. Prior to trial, the District Attorney's office became aware that two DHHS 4081 forms existed and contacted Petitioner to discuss the two chemical breath test forms included in the file. Petitioner gave the same explanation of the two forms as stated before – that Taylor signed the first and he signed the second on her behalf. The District Attorney's Office explained that he should not have signed Taylor's name, and because of that error, they would not be submitting the chemical analysis as evidence at trial.
- h. On or about January 13, 2016, the District Attorney's Office called Taylor's case for trial. Petitioner was sworn in and testified in the case.
- i. The District Attorney decided to not proceed with any testimony or evidence that was concerning the breath analysis or the chemical rights forms. Therefore, the multiple chemical rights forms were not introduced during the State's case in chief and were not material to the Defendant Taylor's prosecution. The two chemical rights forms were not the subject of direct examination.
- j. Petitioner faced vigorous cross-examination about the two DHHS 4081 forms. During the cross examination, Petitioner untruthfully testified that Taylor signed the second form and that he would never sign a form for a defendant, when in fact he signed for Taylor. (R Ex. 6, p. 182) The court found Taylor guilty. Taylor's case was appealed and ultimately dismissed in Superior Court.
- k. After the trial, the discrepancy in Petitioner's testimony and the fact that it varied from what Petitioner said during his discussions with the District Attorney's Office was brought to the attention of First Sergeant W. A. Crane, Jr. (hereinafter "Crane")
- l. On or about January 14, 2016, Petitioner was questioned by First Sgt. Crane. Initially, Petitioner stated that Taylor signed both forms. Petitioner admitted during this contested case hearing that he knew he was being untruthful with Crane, but did not go back and tell Crane the truth.
- m. An internal affairs investigation of Petitioner was initiated. Lieutenant Paul Clark (hereinafter "Clark") was primarily responsible for the internal affairs investigation. (R. Ex. 6) Clark interviewed multiple witnesses as part of the investigation and all gave statements consistent with the facts contained herein.

- n. Petitioner admitted making two written statements during the internal affairs investigation. (R. Ex. 7, Q22-Q23) On February 2, 2016, Petitioner wrote a “member’s statement” to the NCSHP, in which he was untruthful by denying that he signed the second form. Petitioner admits that he stated to internal affairs that Taylor signed both DHHS 4081 forms. (R. Ex. 7, Q22)
- o. On February 8, 2016, Petitioner submitted a second “members statement” where he admitted to signing the second form with Ms. Taylor’s permission. In the second statement he was truthful admitting he signed the second DHHS 4081 form. (R. Ex. 7, Q23)
- p. It was not until the internal investigation that Petitioner admitted he signed Taylor’s name to the second DHHS 4081 form and admitted that he was untruthful, under oath in his courtroom testimony when he stated that Taylor signed her own name to the form.
- q. Petitioner felt like once he was untruthful under oath, it was too late. He contends that he became flustered and confused by the rigorous cross-examination by defense counsel.
- r. Petitioner admitted that as a witness at trial, you never know what to expect in a cross-examination, but that a witness should always tell the truth. Petitioner testified that an unnamed judge previously told him that filling out a second form DHHS 4081 was permissible in these circumstances. The judge never told him to lie about filling out the form. And, the judge did not instruct him to sign a defendant’s name to the form.
- s. Petitioner’s contentions beg the rhetorical question that if he thought he was performing his duties correctly, and perhaps even as sanctioned by a sitting judge, then why lie about it! It is an age-old maxim that it is much easier to tell the truth than to tell a lie.
- t. Petitioner stated that in patrol school he was taught lying was an offense for which a trooper could be fired. Petitioner testified he knew he was supposed to tell the truth during his sworn testimony.
- u. Petitioner also stated that in patrol school he took a one-week long intoxilyzer school. During that class, scenarios were covered regarding filling out paperwork for the intoxilyzer. At no point did he receive instruction on filling out a second DHHS 4081.
- v. Assistant District Attorney Zac Beasley was interviewed as part of the Internal Affairs investigation. He was the prosecutor in the Taylor DWI case. Mr. Beasley stated that he has tried previous cases in court with Petitioner being the State’s principal witness. Mr. Beasley stated he has not previously had any reason to doubt Petitioner’s testimony or credibility. (Respondent’s Exhibit 6, page 176)

However, Mr. Beasley stated that he now questions Petitioner's credibility and that it would be problematic to rely on Petitioner's testimony in future cases. (Respondent's Exhibit 6, page 177)

- w. Petitioner resigned from the NCSHP on April 16, 2016.
- x. Sgt. Jeffrey Wilson testified before this hearing that he was Petitioner's Field Training Officer and had then become Petitioner's immediate supervisor during Petitioner's tenure with the NCSHP.
- y. Sgt. Wilson testified that he had no major issues with Petitioner during or after training and never experienced any type of misconduct during his supervision except for this situation.
- z. Sgt. Wilson also testified that the fact pattern described by Petitioner with Ann Taylor was not one that was specifically addressed during Intoxilyzer Training at the Patrol School.
 - aa. However, Sgt. Wilson testified as Petitioner's field training officer, Petitioner would have witnessed multiple driving while impaired traffic stops and witnessed DHHS 4081 forms being filled out. Wilson testified there should never be two DHHS 4081 forms filled out for a defendant. In Taylor's scenario, Petitioner would have been trained that once Taylor asked for a witness, Petitioner should have waited the full thirty (30) minute observation period before administering the breath test whether or not she changed her mind about having a witness present.
 - bb. Wilson testified that he believed truthfulness is a character trait that law enforcement officers should possess and that being found to be untruthful could lead to an officer being Giglio impaired.
 - cc. Clark also testified that he believed truthfulness is a character trait that law enforcement officers should possess and that being found to be untruthful could lead to an officer being Giglio impaired. He further agreed that law enforcement is held to a higher standard of honesty and truthfulness.
 - dd. Sheriff Curtis Brame testified on behalf of Petitioner. Brame was with the Vance County Sheriff's Office for thirty-three (33) years before becoming Sheriff. The previous Sheriff, Sheriff White, formerly of the North Carolina State Highway Patrol was responsible for hiring Petitioner.
 - ee. Sheriff Brame stated that he had evaluated Petitioner and his performance and had no reason to doubt his credibility or truthfulness.
 - ff. Sheriff Brame of Vance County acknowledged that he understands Petitioner admitted being untruthful to a superior and providing false testimony under oath.

Brame does not believe anyone in the Vance County District Attorney's Office is aware of the admissions of Petitioner. Brame did agree that in an effort to be transparent, he would contact the District Attorney's office about this incident if his Major has not already done so. He believes Petitioner made a bad judgment call and he chooses to continue to employ Petitioner.

gg. Finally, in verified Responses to Respondent's First Set of Interrogatories and Requests for Admission, Petitioner admitted to signing the second form DHHS 4081 for Taylor. (R Ex. 7, Q8-Q10) Petitioner admitted to giving different versions of the facts surrounding who signed the second DHHS 4081 form to Crane, under oath, and then during the internal investigation by the NCSHP. (R Ex. 7, Q15-Q23)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice in the matter. 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.

2. In this contested case, subject to Article 3A of the Administrative Procedure Act, the party bearing the burden of proof must establish the facts supporting a decision with evidence admissible pursuant to N.C. Gen. Stat. § 150B-41.

3. Pursuant to 12 NCAC 10B .0204(a)(1), 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."

4. "Perjury" is a statutory offense found in N.C. Gen. Stat. § 14-209. The statute states in its entirety:

If any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the State, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be punished as a Class F felon.

N.C. Gen. Stat. § 14-209.

5. The North Carolina Court of Appeals, in State v. Linney, 138 N.C. App. 169, 531 S.E.2d 245 (2000), articulated the elements of perjury as "1) a false statement under oath, 2) made knowingly, willfully and designedly, 3) made in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, and 4) made as to some

matter material to the issue or point in question”. Linney, 138 N.C. App. at 174, 531 S.E.2d at 251 (internal citation omitted).

6. There is no question that Petitioner made a false statement under oath. The statements were made knowingly, willfully, and designedly. The statements were in a trial before a court of competent jurisdiction. The question before this tribunal is whether the statements were material.

7. The Court of Appeals has further articulated the point of materiality in State v. Basden, 110 N.C. App. 449, 454, 429 S.E.2d 740, 743 (1993). In Basden, the Court states that “[t]he false statement must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact. The question of the materiality of the alleged false testimony is in its nature a question of law for the court rather than of fact for the jury” Basden, 110 N.C. App. at 454, 429 S.E.2d at 743 (internal citation omitted).

8. The untruthful statements at issue in this contested case hearing were made concerning who signed a second DWI rights form in the intoxilyzer room prior to the administration of the breath test. No evidence had been offered by the State in the prosecution concerning the rights form nor anything about what had happened in the intoxilyzer room. The “materiality” was to the administration of the breath test and the signing of the form, which was not before the judge. The false statements have to be so connected to the fact at issue (i.e., the administration of the intoxilyzer and rights form, that it proved or disproved such facts, which were not at issue). In the DWI trial, the trial judge found the defendant guilty based upon sufficient evidence of DWI without any evidence about the breath test results.

9. The rigorous cross-examination was an attempt to question Petitioner’s credibility. The credibility of every person who testifies under oath before a judge or jury is weighed by the finder of fact.

10. A preponderance of the competent and substantial evidence presented at the contested case hearing does not support the conclusion that Petitioner committed the offense of “Perjury” in violation of N.C. Gen. Stat. § 14-209.

11. The Commission pursuant to 12 NCAC 10B .0204(b)(2) shall revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification fails to meet the minimum employment standard of being of good moral character as required by 12 NCAC 10B .0301(a)(8).

12. 12 NCAC 10B .0301(a)(8) states:

(a) Every justice officer employed or certified in North Carolina shall:

...

(8) be of good moral character.

12 NCAC 10B .0301(a)(8).

13. 12 NCAC 10B .0205(3)(b) provides:

When the Commission suspends, revokes, or denies the certification of a justice officer, the period of sanction shall be:

(3) for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is:

...

(b) failure to meet or maintain the minimum standards of employment or certification.

12 NCAC 10B .0205(3)(b).

14. 12 NCAC 10B .0301(a)(8) states:

Every Justice Officer employed or certified in North Carolina shall be of good moral character as defined in: In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed, 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940); In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906); In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); and their progeny.

12 NCAC 10B .0301(a)(8).

15. The term good moral character “by itself, is unusually ambiguous.” In Re Willis, 288 N.C. 1, 10, 215 S.E.2d 771, 776-77 (1975). Good moral character is defined as “honesty, fairness, and respect for the rights of others and for the laws of the state and nations.” Id.

16. Pursuant to 12 NCAC 10B.0204(b)(2) and 12 NCAC 10B.0205(3)(b) the Commission shall indefinitely deny certification to an applicant when the Commission finds that applicant lacks the good moral character required of a justice officer and that deficiency or impairment continues to exist.

17. Petitioner’s actions demonstrated that he did not possess the good moral character required of every justice officer when he arrested a defendant for Driving While Impaired and signed defendant’s name to a second chemical rights form. The credible evidence demonstrates that Petitioner knew that he should not have signed the second form when the defendant changed her mind about having a witness present and refused to sign. He did not provide the second rights form to his Sergeant, although he did turn in the second copy to the court system. He did not contact the District Attorney’s office as directed by his superior concerning the second rights form. Petitioner did not tell the truth about who signed the form when he was providing sworn testimony

in the criminal trial of that same defendant. Petitioner was untruthful with his First Sergeant when asked about his courtroom testimony and Petitioner was untruthful in his first written statement submitted during an internal affairs investigation by the NCSHP. Ultimately, he did admit he was untruthful on each of these occasions during the internal affairs investigation.

18. Substantial evidence exists to find that Petitioner currently lacks the good moral character required of every justice officer.

19. The Supreme Court of North Carolina observed in 1924, which is still good law:

“Character,” said Mr. Erskine in the trial of Thomas Hardy for high treason, “is the slow spreading influence of opinion arising from the deportment of a man in society, as a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion.” Even more is this true when the effort is a restoration of a character which has been deservedly forfeited. It then is a question of time and growth.

In re Dillingham, 188 N.C. 162, 124 S.E. 130, 132 (1924).

20. There is no evidence that Petitioner had lied under oath previously and that he had an adequate work history with the Highway Patrol. He has continued in law enforcement by working in the Sheriff's Department. The Sheriff of Vance County, his current employer, heard the evidence but states that he would continue to employ the Petitioner. The acts of untruthfulness at issue herein appear to be the only blemish on Petitioner's record in law enforcement.

21. Pursuant to 12 NCAC 10B.0205(3), the Commission may substitute a period of probation in lieu of denial when extenuating circumstances are found in an administrative hearing. There are circumstances which warrant assessing a definite period of suspension as opposed to an indefinite period. As described by Mr. Erskine above, the restoration of one's good moral character once “deservedly forfeited” is a matter of time and growth.

22. The undersigned has weighed and balanced Petitioner's positive history of commendable law enforcement against his conduct of untruthfulness.

23. The Agency has the burden of proof in Article 3A contested case hearing. In this contested case, the Agency has met its burden of proof.

24. The preponderance of the competent and substantial evidence exists to support the conclusion that Petitioner fails to meet the standards set out in 12 NCAC 10B.0301(a)(8) that every justice officer employed or certified in North Carolina shall be of good moral character.

25. The findings of the Probable Cause Committee of Respondent based upon the allegations of lack of good moral character are supported by substantial evidence and are not arbitrary and capricious. The findings of the Probable Cause Committee of Respondent based upon

the allegations of commission of a felony are not supported by substantial evidence but are not arbitrary and capricious.

PROPOSAL FOR DECISION

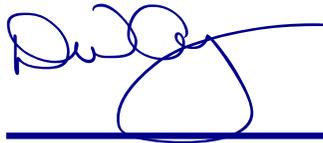
Based on the foregoing Findings of Fact and Conclusions of Law, it is proposed that Respondent **DENY** Petitioner's justice officer certification for a period of **ONE YEAR** based upon a lack of good moral character required of a justice officer.

NOTICE

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).

The undersigned hereby orders that agency to 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.

SO ORDERED, this the 22nd day of April, 2019.



Donald W Overby
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 22nd day of April, 2019.



Jerrod Godwin
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