

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 SOS 05952

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| Tyrell Elliott, Petitioner, v. State of North Carolina Department of the Secretary of State, Respondent. | FINAL DECISION |
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THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on April 1, 2019, in Raleigh, North Carolina. Petitioner initiated this contested case by filing in the Office of Administrative Hearings (OAH) a Petition citing the cause of action against Respondent Department of the Secretary of State. After presentation of testimony and exhibits, the record was left open for the parties' submission of materials, including but not limited to supporting briefs and proposals after receipt of the official transcript. Petitioner and Respondent filed timely proposals and the record was closed on April 29, 2019.

APPEARANCES

For Petitioner: Daniel T. Baker
Ian S. Richardson
BARKER RICHARDSON, PLLC
P.O. Box 95
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For Respondent: Jeremy D. Lindsley
Assistant Attorney General
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ISSUE

Whether Respondent deprived petitioner of property, substantially prejudiced petitioner's rights, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously or failed to act as required by law or rule when it restricted

Petitioner's ability to obtain a renewal of his notary public commission where Respondent found that Petitioner, while a commissioned notary public, engaged in conduct in violation of the North Carolina Notary Public Act and that amounted to official misconduct.

ISSUES SUBMITTED BY PETITIONER

- a. Did Respondent deprive Petitioner of property and/or otherwise substantially prejudice Petitioner's rights and either exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule when Respondent improperly concluded that Tyrell Elliott took an acknowledgment or administered an oath or affirmation without the principal appearing in person before him with the intent to commit fraud.
- b. Did Respondent deprive Petitioner of property and/or otherwise substantially prejudice Petitioner's rights and either exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule when Respondent improperly concluded that Tyrell Elliott engaged in conduct that would call into question his honesty, credibility, truthfulness, and integrity.
- c. Did Respondent deprive Petitioner of property and/or otherwise substantially prejudice Petitioner's rights and either exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule when Respondent improperly concluded that actual monetary harm was suffered by another person.
- d. Did Respondent deprive Petitioner of property and/or otherwise substantially prejudice Petitioner's rights and either exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule when Respondent improperly concluded that Tyrell Elliott acted willfully and with the intent to commit fraud.
- e. Did Respondent deprive Petitioner of property and/or otherwise substantially prejudice Petitioner's rights and either exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule when Respondent improperly concluded that Tyrell Elliott knew or should have known that a document he notarized contained information that is allegedly false or fraudulent.
- f. Did Respondent deprive Petitioner of property and/or otherwise substantially prejudice Petitioner's rights and either exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule when Respondent improperly concluded that Tyrell Elliott knew or should have known that a document he notarized contained a forged signature.

EXHIBITS

For Petitioner: Exhibits A-B were admitted.

For Respondent: Exhibits 1-6 were admitted.

WITNESSES

For Petitioner: Petitioner, Tyrell Elliott

For Respondent: Brandon Wall and Ozie Stallworth

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact by a preponderance of the evidence. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in this case.

FINDINGS OF FACT

1. Respondent, North Carolina Department of the Secretary of State, Notary Enforcement Section is responsible for administering and enforcing the North Carolina Notary Public Act (the “Act”), N.C. Gen. Stat. §§10B-1 *et seq.* The Section handles both licensing of and disciplinary actions involving notaries public. Ozie Stallworth is the Director of the Notary Enforcement Section.
2. Respondent granted Petitioner, Tyrell Elliott, a Notary Public commission on May 6, 2013. Petitioner’s commission expired May 5, 2018.
3. Prior to obtaining his commission, Petitioner took the required notary education class and passed the required written examination.
4. Tyrell Elliott has been involved in no other disciplinary proceedings related to his commission as a Notary Public.

5. On or about February 18, 2016, while holding a valid notary public commission, Petitioner performed two notarial acts in relation to a North Carolina Department of Motor Vehicles Application for a Duplicate Title (Form MVR-4), by taking the acknowledgments of a person, Carrie Lynn Morgan, who, at the time of the notarial acts was not in Petitioner's presence. The notarial certificates on the front and reverse sides of the MVR-4 form state: "I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated: [blank line] (name(s) of principal(s))." The blank lines on each certificate contain the hand-written name "Carrie Lynn Morgan".

6. Carrie Lynne Morgan was not a person known to Petitioner on February 18, 2016, and Petitioner admitted that Carrie Lynne Morgan was not present when he performed the above-identified notarial acts.

7. The person who presented the MVR-4 form to Petitioner for notarization, Talia Lechelle Williams (Talia Williams), was a person known to Petitioner and was the sister of Petitioner's girlfriend, Denisha Williams.

8. It appears Talia Williams (and perhaps Denisha Williams) purchased the car identified in the MVR-4 form, a 2003 Honda with VIN 146CM56673A034849, from Carrie Lynn Morgan on or about December 1, 2015. At the time of sale, Carrie Lynn Morgan and Talia Williams appeared together at PNC Bank where Ms. Morgan signed the vehicle title over and gave it to Talia Williams.

9. Neither Denisha Williams nor Talia Williams applied for a new vehicle title using the original assigned titled obtained from Ms. Morgan. Neither Denisha Williams nor Talia Williams applied for a new title in their name(s) until after the execution and notarization of the MVR-4 form on February 18, 2016.

10. In the interim between December 1, 2015, and February 18, 2016, the 2003 Honda vehicle, while being driven by Talia Williams, was involved in a collision with another vehicle on January 17, 2016, in Smithfield, North Carolina. At the time of the collision, the vehicle was still titled to Carrie Lynne Morgan and the North Carolina Division of Motor Vehicles (DMV) still listed Carrie Lynn Morgan as the vehicle's owner. As a result of the collision, Talia Williams was cited for a stop sign violation and for displaying a fictitious registration plate.

11. On or about January 24, 2017, Talia Williams was charged with feloniously altering a vehicle title; failure to apply for a vehicle title; and knowingly making a false statement. On or about May 2, 2017, each of Talia Williams' charges was dismissed by the Harnett County District Attorney's Office.

12. Several months after the collision, Ms. Morgan received notice from the DMV that her drivers' license was being suspended or revoked due to the January 17, 2016 accident. She contacted the DMV and learned that the original title/assignment was never turned in and that title had been re-issued in February 2016 using forms containing her forged signature. She then contacted the DMV's License and Theft Bureau and made a formal complaint.

13. Talia and Denisha Williams asked Tyrell Elliott to notarize an Application for Certificate of Title related to the Honda on or about February 18, 2016. Talia Williams informed Tyrell Elliott that the signature on the Application for Certificate of Title related to the Honda was a legitimate signature of the seller of the Honda.

14. On or about January 24, 2017, Tyrell Elliott was charged with taking an acknowledgment or administering an oath or affirmation without the principal appearing before the notary, a misdemeanor. Without the benefit of Counsel, Tyrell Elliott elected to plead guilty to the January 24, 2017, criminal charge and pay the fine of \$280.00.

15. Inspector B.L. Wall of the License and Theft Bureau conducted an investigation of Ms. Morgan's complaint which included interviews of Ms. Morgan and Petitioner. During the interview of Petitioner, Petitioner admitted to Inspector Wall that Ms. Morgan was not present when he notarized the MVR-4 form bearing Ms. Morgan's signature. Petitioner also informed Inspector Wall that Denisha Williams was his girlfriend.

16. Inspector Wall charged Petitioner with a misdemeanor offense of an acknowledging or administering an oath or affirmation without the principal appearing before the notary in violation of N.C. Gen. Stat. § 10B-60(c)(1) under Harnett County file number 17 CR 50265. Petitioner pleaded guilty to the offense. Respondent had no role in determining whether, and to what degree, Petitioner would be charged with a criminal offense.

17. Ms. Morgan filed a complaint with Respondent's Notary Enforcement Section regarding Petitioner's notarization of the MVR-4 form containing her forged signature. Inspector Wall provided Notary Enforcement officials with a complete copy of his investigative file including his narrative recitation of information he gathered during his investigation of Ms. Morgan's complaint.

18. On April 21, 2017, the Notary Enforcement Section sent a letter to Petitioner notifying him of the complaint alleging that he notarized a document containing a forged signature. Petitioner received this notice and responded in a writing dated April 26, 2017 in which Petitioner stated he notarized the buyer's signature (Talia Williams) but did not comment upon the alleged forged signature of the seller, Ms. Morgan, and did not make any mention of the fact that Ms. Morgan was not present when he performed the notarial acts in question.

19. Ozie Stallworth, Director of the Notary Enforcement Section, reviewed Inspector Wall's file and Petitioner's response to the Notary Enforcement Division's letter of April 21, 2017, and determined that sufficient evidence existed to believe that Petitioner 1) took an acknowledgment when Petitioner knew it was false or fraudulent or 2) took an acknowledgment without the principal appearing in person before him with the intent to commit fraud in violation of N.C. Gen. Stat. § 10B-60(d)(1) and (2). The evidence upon which Director Stallworth based his belief included the following:

- a. The relationship between Denisha Williams and petitioner as girlfriend and boyfriend;

- b. Denisha Williams and Talia Williams are sisters;
- c. Petitioner had some occupational experience with buying and selling cars;
- d. The car at issue was involved in an accident before transfer of the title to Denisha or Talia Williams occurred;
- e. The MVR-4 form at issue was dated such that it created the appearance that the title to the car was, in fact, transferred by the prior owner after the date of the accident;
- f. Ms. Morgan was not present when Petitioner notarized the form and, therefore, Petitioner necessarily knew that it was false that Ms. Morgan personally appeared before him and acknowledged to him that she signed the form voluntarily.

20. From these facts, Director Stallworth inferred that Petitioner performed the notarial acts in question knowing that Ms. Morgan's signature was a forgery and with the intent to commit fraud by assisting with creating the appearance that the Williams sisters were not the owners of the car at the time of the accident and were, therefore, not financially responsible for any damages incurred by the driver or passengers of the other car involved in the accident.

21. On July 31, 2018, Director Stallworth entered an administrative order restricting Petitioner's ability to obtain a notary public commission on the grounds that Petitioner had violated N.C. Gen. Stat. § 10B-60(d)(1) and/or (d)(2), that Petitioner's actions amounted to "official misconduct" as defined by N.C. Gen. Stat. § 10B-3(15), and upon the mandate of 18 NCAC 07B .0903(3). The order states that pursuant to N.C. Gen. Stat. § 10B-60(a), the Secretary of State may revoke a notarial commission on any ground for which an application can be denied under § 10B-5(d) which includes acts of official misconduct. The administrative order and an explanatory letter also dated July 31, 2018, were sent to and received by Petitioner.

22. The July 31, 2018 letter suggests that Mr. Elliott would have been guilty of a Class I Felony in so far as he allegedly knew the signature on the above referenced MVR-4 form was false or fraudulent, or that he notarized said document with the intent to commit fraud. The July 31, 2018 letter further suggests that Mr. Elliott knew that the intent of the MVR-4 form was dishonest, or that the information contained therein was false or fraudulent.

23. In determining the sanction to impose against Petitioner, Director Stallworth testified that he considered the factors set forth in 18 NCAC 07B .0901(1) nature, number and severity of any acts or offenses, official misconduct or crimes under consideration, (2) evidence pertaining to the honesty, credibility, truthfulness, and integrity of the applicant or notary public, (3) actual or potential harm monetary or other harm to the general public, group, individual, or client, (11) reports of other law enforcement agencies, (12) willfulness, and (13) negligence. Director Stallworth also considered the provisions of 18 NCAC 07B .0903 which mandates the revocation of a commission if a notary performs a notarial act knowing that the document or information contained in it is false or fraudulent or that the intent of the executed document is dishonest. Director Stallworth also considered the provisions of 18 NCAC 07B .0904 regarding disciplinary actions relating to failure to meet statutory requirements of a complete and lawful notarial act including the failure to require a personal appearance. Director Stallworth further testified that Petitioner's actions were in violation of N.C. Gen. Stat. § 10B-20(c)(1) and § 10B-

60(c)(1) in addition to being in violation of § 10B-60(d)(1) and/or (2).

24. Petitioner has not admitted to having any knowledge that the Application for Certificate of Title was false, fraudulent or otherwise contained forged information. Mr. Elliott testified that he did not intend to commit fraud when he notarized the MVR-4 form at issue in this matter. He further testified that he did not know that the MVR-4 form at issue in this matter contained information that was false or fraudulent.

25. The Respondent relied to some extent upon the investigation conducted by Inspector Brandon Wall in making its decision with respect to Petitioner. Inspector Wall charged Petitioner with a misdemeanor which he testified was an investigative decision. Though Inspector Wall testified Petitioner could have been charged with a felony, Petitioner was not charged with felonious acts involving fraud or taking an acknowledgment knowing it was false.

26. Director Stallworth testified that the State's Notary laws are designed to establish the validity of important documents so that others can rely upon them in deciding matters of legal, financial, or other significance. He testified that one way in which notaries serve this function is to verify that the person signing a document is who they say they are and that their signature is genuine. Director Stallworth characterized these functions as essential bedrock components of the notary laws.

27. Director Stallworth stated that the taking of an acknowledgement or verification, or administering an oath or affirmation without the principal appearing in person before the notary is among the highest order of violations of the Notary Act because the failure to verify that the person signing a document is who they say they are renders the notarial act unreliable and, therefore, undermines the very purpose of the notary's function.

28. Director Stallworth testified that because the requirement that a principal personally appear before the notary at the time of the notarial act is so fundamental to the function of notaries public and intent of the Notary Act, the failure to require this personal appearance constitutes a violation of the Notary Act of the highest magnitude regardless of whether the notary acted with knowledge of falsity or fraud or with fraudulent intent.

29. Director Stallworth testified that violations of N.C. Gen. Stat. §§ 10B-60(c) and 10B-60(d) would receive the same disciplinary action: revocation of a notary's commission or, in the case of a notary whose commission has expired, restricting the notary from obtaining renewal of his commission.

CONCLUSIONS OF LAW

1. All parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. 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. An ALJ need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute.

2. As a commissioned notary public or applicant for a commission as a notary public, Petitioner was subject to the North Carolina Notary Public Act, N.C. Gen. Stat. §§ 10B-1 et seq. and related sections of Title 18, Chapter 07, Subchapter B of the North Carolina Administrative Code.

3. In the North Carolina Supreme Court case of N.C. Dep't of Env't & Natural Res. v. Carroll, the Court states the following:

As one commentator has noted, these grounds for reversal or modification of an agency's final decision fall into two conceptual categories. Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L.Rev. 1571, 1592 n. 79 (2001) [hereinafter Daye, 79 N.C. L.Rev. 1571]. The first four grounds for reversing or modifying an agency's decision—that the decision was “in violation of constitutional provisions,” “in excess of the statutory authority or jurisdiction of the agency,” “made upon unlawful procedure,” or “affected by other error of law,” N.C.G.S. § 150B-51(b)(1)-(4)—may be characterized as “law-based” inquiries. *Id.* The final two grounds—that the decision was “unsupported by substantial evidence ... in view of the entire record” or “arbitrary or capricious,” N.C.G.S. § 150B-51(b)(5),(6)—may be characterized as “fact-based” inquiries.

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 659, 599 S.E.2d 888, 894, (2004) (Internal Citations and Quotations Omitted)

4. The “whole record” test applies when a petitioner questions whether an agency’s decision was supported by evidence or whether its decision was arbitrary or capricious. Wake Radiology, et al., v. NC DHHS, et al., 09 DHR 3473, 2010 WL 1115709 (N.C.O.A.H., February 22, 2010) citing Britthaven, Inc.v. N.C. Dept. of Human Res., 118 N.C. App. 379, 386, 455 S.E.2d 455, 461 (1995). Under the whole record test, “a court must examine all the record evidence – that which detracts from the agency’s conclusion as well as that which tends to support them – to determine whether there is substantial evidence to justify the agency’s decision. *Id.*, quoting Good Hope Health Sys. v. Dep’t of Health & Human Servs., 189 N.C. App. 534, 543, 659 S.E. 2d 456, 462 (2008) (citation omitted). Substantial evidence is “relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Id.*, quoting N.C. Gen. Stat. § 150B-2(8b). The whole record test merely gives the reviewing court the capability to determine whether the administrative decision has a rational basis in the evidence. *Id.*, citing Carillon Assisted Living, LLC v. N.C. Dept. of Health & Human Srvs., 175 N.C. App. 265, 270, 623 S.E. 2d 629, 633 (2006).

5. North Carolina law presumes that an agency properly performed its duties, in good faith and in accordance with the law. *Id.* (citations omitted). The presumption is rebutted only by a showing that the Agency was arbitrary or capricious in its decision-making. *Id.* (citations omitted).

6. Decisions of administrative agencies “may be reversed as arbitrary or capricious only if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and

careful consideration or fail to indicate any course of reasoning in the exercise of judgment.” Id., quoting ACT-UP Triangle v. Comm’n for Health Servs., 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (internal citation and quotation marks omitted).

7. “North Carolina law gives great deference to an agency’s interpretation of a law it administers” and a reviewing court should defer to the agency’s interpretation so long as the interpretation is reasonable and based on permissible construction of the statute. Id. (citations omitted).

8. The petitioner in a contested case has the burden of proving the facts alleged in the petition by a preponderance of the evidence. N.C Gen. Stat. § 150B-25.1(a).

9. Petitioner has the burden to show, by a preponderance of the evidence, in at least one of the following ways, that Respondent’s decision to restrict his notary commission was 1) not based upon substantial evidence or evidence a reasonable mind might accept as adequate to support a conclusion; 2) was made in bad faith; 3) was made with a lack of fair and careful consideration; or 4) made without any indication of the use of any course of reasoning in the exercise of judgment.

10. In its order of July 31, 2018, Respondent found that Petitioner “notarized the forged signature of the principal on the document, which is a violation of North Carolina General Statute Chapter 10B-60(d)(1)(2) and 18 North Carolina Administrative Code 07B .0904(b)(7), 07B .0901(1)(2)(3)(11)(12)(13) and 07B .0903(3).”

11. N.C. Gen. Stat. § 10B-60(d)(1) and (2) provide:

- (d) A notary shall be guilty of a Class I felony if the notary does any of the following:
 - (1) Takes an acknowledgment or a verification or a proof, or administers an oath or affirmation if the notary knows it is false or fraudulent.
 - (2) Takes an acknowledgment or administers an oath or affirmation without the principal appearing in person before the notary if the notary does so with the intent to commit fraud.

12. By the plain language of §10B-60, subsections (d)(1) and (d)(2) constitute distinct criminal offenses.

13. The notarial acts at issue herein are considered “acknowledgments” under the Act.

14. The Act defines an “acknowledgement” as a notarial act in which a notary certifies that at a single time and place all of the following occurred:

- a. An individual appeared in person before the notary and presented a record.
- b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.

- c. The individual did either of the following:
 - i. Indicated to the notary that the signature on the record was the individual's signature.
 - ii. Signed the record while in the physical presence of the notary while being personally observed signing the record by the notary. N.C. Gen. Stat. § 10B-3(1).

15. In the case of an acknowledgment, the Act defines a "principal" as the individual whose identity and due execution of a record is being certified by the notary. N.C. Gen. Stat. § 10B-3(18)(a).

16. In this matter, the principal in relation to the MVR-4 form was Carrie Lynn Morgan.

17. N.C. Gen. Stat. § 10B-20(c)(1) states that a notary shall not perform a notarial action if the principal is not in the notary's presence at the time the notarial act is performed.

18. The Act defines "personal appearance" and "appear in person before a notary" as an individual and a notary being in close physical proximity to one another so that they may freely see and communicate with one another and exchange records back and forth during the notarization process. N.C. Gen. Stat. § 10B-3(16).

19. Plaintiff admitted to the DMV investigator, during his testimony, and in answers to Respondent's discovery requests, that Carrie Lynn Morgan did not personally appear before him when he performed the notarial acts of acknowledgment on February 18, 2016. Therefore, Petitioner performed the notarial acts at issue in violation of N.C. Gen. Stat. § 10B-20(c)(1).

20. N.C. Gen. Stat. § 10B-60(c)(1) makes it a misdemeanor criminal offense for a notary to take an acknowledgment without the principal appearing in person before him. Petitioner admitted to a violation of this provision in the Harnett County criminal matter.

21. N.C. Gen. Stat. § 10B-60(d)(1) and (2) make it a felony for a notary to take an acknowledgment knowing it is false or fraudulent or to take an acknowledgment without the principal appearing in person before the notary if the notary does so with the intent to commit fraud. In the first instance, it is a felony offense to take an acknowledgment knowing it is false regardless of whether the principal personally appears before the notary or not. In the second instance, the offense occurs when the principal is absent and when the notary intended to commit fraud.

22. Intent is often difficult to prove by direct evidence. However, intent may also be proven by circumstantial evidence from which intent may be inferred. State v. Nettles, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175-76 (2005) (citation omitted).

23. In the first instance of § 10B-60(d), sufficient evidence was presented from which a reasonable person could conclude that Petitioner knew the acknowledgments he performed on February 18, 2016, were false or fraudulent. Petitioner admitted that Ms. Morgan was not present when he notarized the document. Therefore, Petitioner knew that the notarial certificate stating

that Ms. Morgan was, in fact, present at the time of the notarial act, was false.

24. In the second instance of § 10B-60(d), sufficient evidence was presented, from which a reasonable person could conclude that Petitioner took the acknowledgments on February 18, 2016, without Ms. Morgan personally appearing before him and to infer that Petitioner acted with the intent to commit fraud. Ms. Morgan's absence is beyond question and his intent to commit fraud may be inferred from the evidence of 1) the close personal relationship between Denisha Williams and Petitioner and the familial relationship between Denisha Williams and Talia Williams and 2) the MVR-4 form was executed in a manner suggesting that title to the vehicle transferred to Talia and/or Denisha Williams after the vehicle was involved in the January 17, 2016 accident.

25. Since there existed a reasonable basis for Respondent to believe that Petitioner violated the provisions of § 10B-60(d)(1) and/or (2), the court next examines whether Respondent had the authority to restrict Petitioner from receiving a notary commission and whether it properly exercised that authority.

26. Since Respondent reasonably determined that Petitioner violated N.C. Gen. Stat. § 10B-60(d)(1) and/or (2), had Petitioner's commission been current at the time of imposition of discipline, the provisions of 18 NCAC 07B .0903 would mandate the Director to revoke Petitioner's commission.

27. 18 NCAC 07B .0903 requires the Director to revoke a notary commission if the notary performs a notarial act knowing that the document or information contained in it is false or fraudulent, or that the intent of the executed document is dishonest. The section identifies certain "acts of fraud or dishonesty" including forgery and fraud. Had Petitioner's commission been current when Respondent issued its order, the Director would have been required to revoke Petitioner's commission under this section.

28. N.C. Gen. Stat. § 10B-60(a) states that "the Secretary may issue a warning to a notary or restrict, suspend or revoke a notarial commission for a violation of this Chapter and on any ground for which an application for a commission may be denied under this Chapter."

29. Additionally, 18 NCAC 07B .0904, authorizes the Director to take disciplinary action against a notary for certain offenses and states in pertinent part:

- (a) The Director may take disciplinary action against a notary for an offense relating to failure to meet the statutory requirements for a notarial act.
- (b) Offenses relating to failure to meet the statutory requirements for a complete and lawful notarial act include:

.....

- (7) Failure to require personal appearance.

30. 18 NCAC 07B .0901 sets forth a non-exhaustive list of factors the Director may consider when determining whether to take disciplinary action. Among others, these facts include:

- (1) Nature, number and severity of the acts, offenses, official misconduct or crimes under consideration;
- (2) Evidence pertaining to the honesty, credibility, truthfulness, and integrity of the applicant or notary public;
- (3) Actual or potential monetary or other harm to the general public, group, individual, or client;
- (11) Reports from law enforcement agencies;
- (12) Willfulness;
- (13) Negligence.

31. The Notary Act contains no mandate that certain disciplinary actions be applied to certain violations of its provisions. Instead, by the plain language of § 10B-60(a), decisions regarding disciplinary matters are left to the Respondent's discretion.

32. Respondent gave due consideration to the provisions of 18 NCAC 07B .0901, 18 NCAC 07B .0903 and 18 NCAC 07B .0904 prior to imposing discipline upon Petitioner.

33. Director Stallworth identified a notary's failure to require the personal appearance of a principal in the performance of a notarial act as a fundamental violation of the Act and among the most serious of violations as it undermines the very purpose of the notarial function. The Undersigned finds no evidence that this interpretation of the Act is unreasonable and, therefore, defers to Respondent's characterization of the violation of this duty.

34. Petitioner has failed to produce sufficient evidence to meet its burden to show by a preponderance of the evidence that Respondent's decision to restrict his appointment as a notary public was not based on relevant evidence that a reasonable mind might accept as adequate to support its conclusion. Nor has Petitioner otherwise sufficiently shown that Respondent's decision has no rational basis in the evidence.

35. Likewise, Petitioner has failed to show by a preponderance of the evidence that Respondent's decision was arbitrary or capricious in that it was made in bad faith or lacking fair and careful consideration, or that the agency failed to indicate any course of reasoning in the exercise of its judgment. Petitioner has also failed to show that Respondent exceeded its authority, failed to use proper procedure, failed to act as required by law or rule or otherwise acted erroneously.

36. Even if its belief that Petitioner's actions constitute violations of N.C. Gen. Stat. § 10B-60(d)(1) and/or (2) was erroneous, Respondent would have nevertheless imposed the same discipline for violation of N.C. Gen. Stat. § 10B-60(c)(1), the criminal offense to which Petitioner pleaded guilty in Harnett County. Therefore, any such error was harmless.

37. Respondent provided adequate notice of its decision to restrict Petitioner's notary commission, and the grounds therefore, in its order dated July 31, 2018. The order referenced the date of the alleged violation and included statutory and other references to the sections of the Notary Act and Administrative code upon which Respondent based its action. In addition to referencing N.C. Gen. Stat. §§ 10B-60(d)(1) and (2) as grounds for its action, the order stated that

the Secretary may also take disciplinary action on “any ground for which an application could be denied under § 10B-5(d)” including “official misconduct.”

38. Respondent’s order of July 31, 2018, also found that Petitioner’s conduct constituted “official misconduct within the meaning of N.C. Gen. Stat. § 10B-3(15) which defines “official misconduct” as:

- (a) A notary’s performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization.
- (b) A notary’s performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest.

39. Petitioner’s conviction for violating N.C. Gen. Stat. § 10B-60(c)(1) constitutes sufficient independent grounds supporting Respondent’s action herein because such violation constitutes “official misconduct” as defined by N.C. Gen. Stat. § 10B-3(15).

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following Final Decision.

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge of the Agency as required under N.C. Gen. Stat. § 150B-34.

The Undersigned holds that Petitioner failed to carry his burden of proof by a greater weight of the evidence that the Respondent erred in its restriction of Petitioner’s ability to obtain a notary public commission. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side. The weight of Petitioner’s evidence does not overbear in that degree required by law the weight of evidence of Respondent to the ultimate issues. As such Respondent’s order of July 31, 2018, restricting Petitioner obtaining a notary public commission is **AFFIRMED**.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the decision resides, or in the case of a person residing outside the State, the county

where the contested case which resulted in the Final Decision was filed. The appealing party must file the petition within 30 days after being served with a copy of the Administrative Law Judge's Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. This Final Decision was served on the parties as indicated on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 7th day of June, 2019.

A handwritten signature in blue ink that reads "Augustus B. Elkins II". The signature is written in a cursive style and is positioned above a solid blue horizontal line.

Augustus B Elkins II
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 7th day of June, 2019.



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