

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DOJ 02985

Thomas Council Petitioner, v. NC Sheriffs Education and Training Standards Commission Respondent.	PROPOSAL FOR DECISION
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THIS MATTER came on for hearing on November 14, 2019 before Administrative Law Judge Donald W. Overby in Fayetteville, North Carolina. This hearing was heard after Respondent requested, pursuant to N.C. Gen. Stat. § 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.
Attorney for Petitioner
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Respondent: Ameshia A. Cooper
Attorney for Respondent
NC Department of Justice
Law Enforcement Liaison Section
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ISSUES

1. Whether Respondent's proposed revocation of Petitioner's justice officer certification for failing to meet or maintain any of the employment or certification standards required by 12 NCAC 10B.0300 was supported by a preponderance of the evidence?
2. Whether Petitioner failed to notify Respondent within five business days of a Class B misdemeanor offense as required by 12 NCAC 10B.0301(a)(7) was supported by a preponderance of the evidence?

APPLICABLE RULES & STATUTES

12 NCAC 10 B .0204 (b)(2)

12 NCAC 10 B .0301 (a)(7)

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.

In making the Findings of Fact, the undersigned Administrative Law Judge has weighed all of the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including, but not limited to, the demeanor of the witness, 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 the case.

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 the Petitioner received by certified mail, the proposed denial letter, mailed by Respondent, the North Carolina Sheriffs' Education and Training Standards Commission (hereinafter "the Commission"), on April 11, 2019.

2. Petitioner was sworn in as an active Cumberland County Deputy Sheriff on September 27, 2012 as confirmed by Respondent's Exhibit #2. Petitioner has been continually employed with the Cumberland County Sheriff's Department since September 27, 2012, and he testified that he is still employed part time in that capacity, and that he is employed driving a truck.

3. Respondent's Exhibit #2 is the Petitioner's F-4 Report of Appointment Form submitted on October 12, 2012 by the Sheriff's representative, Evelyn Whitfield, on behalf of Respondent.

4. On July 15, 2018, while Petitioner was a certified deputy sheriff with the Cumberland County Sheriff's Office, Petitioner was charged with Assault on a Female in violation of N.C. Gen. Stat. § 14-33(c)(2) and Communicating Threats in violation of N.C. Gen. Stat. § 14-277.1 in Cumberland County (File Number 18 CR 59116). The victim/complainant was Lakelli Butler. Petitioner turned himself in and was served with the arrest warrant on July 16, 2018. He was released the same day and appeared in court in Cumberland County for the matter on August 02, 2018 as commanded. (Respondent's Exhibit 1, pages 2 and 3).

5. The charges against Petitioner were dismissed on August 02, 2018. The reason for the dismissal is shown on the face of the criminal warrant and as entered in the Administrative Office of the Courts as "VD PER PW L. BUTLER NOT PRESENT BY 11:00AM. SMTC

DENIED” which is “courthouse shorthand” for “Voluntary Dismissal per prosecuting witness (who is) L. Butler (who was) not present by 11:00 a.m. States’s Motion to Continue Denied.”

6. Petitioner was advised by Sheriff Ennis W. Wright and the sheriff’s legal counsel Ronnie Mitchell to provide Mr. Evelyn Whitfield of the charges since she served as the Sheriff’s authorized representative for the purposes of communicating with Respondent.

7. On July 18, 2018, two days after being served with criminal process, Petitioner provided Ms. Whitfield with all documentation related to his arrest with the understanding that she would notify Respondent. Petitioner relied on his belief that Ms. Whitfield would notify Respondent as she did in all other matters. He did not make any attempt to personally contact Respondent.

8. Petitioner immediately provided Ms. Evelyn Whitfield the certified copy of the dismissals on the same day that the dismissals were entered. Ms. Whitfield informed Petitioner that she would notify Respondent concerning the final disposition.

9. Ms. Whitfield forwarded the documentation to Respondent in a communication dated August 8, 2018, 23 days after Petitioner was served with the arrest warrant. (*See* Respondent’s Exhibit #1). Ms. Whitfield’s initials appear beside the typed name of Sheriff Ennis Wright on that document.

10. Petitioner testified that he signed the North Carolina Sheriffs’ Education and Training and Standards Commission Report of Appointment, Form F-4, on September 27, 2012, and made the following acknowledgment:

I also acknowledge that I have a continuing duty to update all information contained in this document. I further understand that I have a continuing duty to notify the Commission of all criminal offenses which I am arrested for or charged with, plead no contest to, plead guilty to, or am found guilty of; and all Domestic Violence Orders (50B) or Civil No Contact Orders (50C) which are issued by a judicial official and which provide an opportunity for both parties to be present. This notice must be in writing within five (5) working days of arrest of charge and within thirty (30) days of the date of disposition of the charge.

(Respondent’s Exhibit 2).

11. Petitioner testified that he completed Basic Law Enforcement Training in May 2012 and acknowledged that he was taught of his obligation to report criminal charges to Respondent, in writing, within 5 business days.

12. On April 11, 2019 Petitioner was notified by certified mail that Respondent had found probable cause to revoke his certification for violations of Rule .0204(b)(2), Chapter 10B of Title 12 of the North Carolina Administrative Code and Rule .0301(a)(7).

13. Petitioner timely filed a request for an administrative hearing on May 8, 2019.

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. To the extent that the Findings of Facts contain Conclusions of Law, or that the Conclusions or Law are Findings of Fact, they should be so considered without regard to the given labels.

3. 12 NCAC 10B .0204(b)(2) states that the Commission shall revoke the certification of a justice officer when the Commission finds that the certified officer fails to maintain any of the employment or certifications standards required by 12 NCAC 10B .0300.

4. Specifically, the North Carolina Administrative Code provides in Rule 12 NCAC 10B .0301 exactly what duty the justice officer has in reporting criminal offenses with which he or she is charge.

5. The Rule is lengthy and is dissected below in order to address with particularity the various parts of the Rule. 12 NCAC 10B .0301(a) states: "Every Justice Officer employed or certified in North Carolina shall:

(7) 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. (Provisions concerning minor traffic offenses is excerpted) The initial notification required must specify the nature of the offense, the date of the offense, and the arresting agency.

6. This portion is straight forward in stating that the justice officer is required to notify the Standards Division within 5 days.

7. The Rule continues with the duty of the justice officer to report by addressing non-criminal process, specifically Domestic Violence Orders and Civil No Contact Orders. The Rule states:

Within five business days, notify the Standards Division of all Domestic Violence Orders (G.S. 50B) and Civil No

Contact Orders (G.S. 50C) that are issued by a judicial official against the justice officer and that provide an opportunity for both parties to be present; within 20 days of the date the case was disposed, notify the appointing department head of the adjudication of these criminal charges, Domestic Violence Orders (G.S. 50B), and Civil No Contact Orders (G.S. 50C).

8. The Rule continues by putting a duty to report on the department head. This provision is not limited to the non-criminal civil domestic processes but returns to all of the justice officers criminal charges as well. This is one long inclusive sentence with subparts separated by semi-colons:

The department head, provided he or she has knowledge of the officer's charges, Domestic Violence Orders (G.S. 50B), and Civil No Contact Orders (G.S. 50C), shall also notify the Division within 30 days of the date the case was disposed, notify the Standards Division of the adjudication of these criminal charges, Domestic Violence Orders (G.S. 50B), and Civil No Contact Orders (G.S. 50C); the required notifications of adjudication shall specify the nature of the offense, the court in which the case was handled, and the date of disposition and shall include a certified copy of the final disposition from the Clerk of Court in the county of adjudication; receipt by the Standards Division of timely notification of the initial offenses charged and of adjudication of those offenses, from either the officer or the department head, shall be sufficient notice for compliance with this Subparagraph (emphasis added).

9. The last clause specifically speaks to the "initial charges" and is inclusive of the non-criminal process. Of necessity, it relates back to the original charges of which the judicial officer is required to report, or it has no reference at all, and is mere surplusage. It must be assumed that the Commission, having gone through the sometimes lengthy and cumbersome process to have this rule properly promulgated, intended every word.

10. Petitioner's notification to the Sheriff's representative on both occasions satisfied the requirements set forth in 12 NCAC 10B .0301(a)(7). Therefore, given the totality of the evidence presented at the administrative hearing, Petitioner's conduct did not constitute a violation of the rules in question.

BURDEN OF PROOF

11. Respondent contends that the burden of proof belongs to the Petitioner citing *Overcash v. N.C. Dep't. of Env't & Natural Resources*, 172 N.C. App. 697, 635 S.E.2d 442 (2006).

12. Respondent relies particularly on *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App 697, 635 S.E.2d 442, *rev. denied*, 361 N.C. 220, 642 S.E.2d 445 (2007) for the premise that the Petitioner bears the burden of proof. *Overcash* is one in a series of cases which have ruled on the burden of proof in cases in Chapter 150B, Article 3, including particularly *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 455 S.E.2d 455, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995); and *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 176 N.C. App. 594, 627 S.E.2d 326 (2006).

13. These cases decide the issue of burden of proof according to Article 3 of Chapter 150B of the North Carolina General Statutes—not on Article 3A. This instant case is brought pursuant to Article 3A.

14. From its inception, the North Carolina Administrative Procedures Act, N.C. Gen. Stat. Chapter § 150B, has contained two separate and distinct sets of administrative hearings provisions. The manner in which a contested case is commenced and conducted varies depending on which set of provisions applies. Article 3A of the Act governs, among other things, occupational licensing agencies, including Respondent herein. See John Aycock McLendon, Jr., *Contested Case Hearings Under the North Carolina Administrative Procedure Act: 1985 Rewrite Contains Dual System of Administrative Adjudication*, 64 N.C. L. Rev. 852, 857-58 (1986).

15. In the thirty-plus years since it became effective on January 1, 1986, the APA has contained these two separate and distinct provisions for administrative hearings. Although many similarities exist, they are decidedly different. Throughout the APA's history, the General Assembly has had the ability to change this process, making one type of procedure for all agencies, but has not. Therefore, the distinction between the two is important and must be acknowledged.

16. Article 3 of the NC APA applies to administrative hearings conducted by OAH before an administrative law judge, while Article 3A applies to “other administrative hearings” which are conducted by state agencies enumerated in § 150B-38(a). Both Article 3 and Article 3A independently contain separate provisions governing all aspects of the administrative hearings to which they apply. *Homoly v. N. Carolina State Bd. of Dental Examiners*, 121 N.C. App. 695, 697, 468 S.E.2d 481, 483 (1996).

17. Unlike Article 3, Article 3A does not require that a petition be filed to commence a contested case. Article 3A simply provides in N.C. Gen. Stat. 150B-38(b) that “prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing.” In Article 3A, the agency initiates the process, not a petitioner. Generally, in Article 3A cases, the petitioner does not file any responsive pleadings at all, which is quite different from Article 3 cases. See *McLendon*, 64 N.C. L. Rev. 852, 859-60 (1986). The Administrative Law Judge when assigned may require both parties to file prehearing statements.

18. A critical distinction between Article 3 and Article 3A contested cases is that in Article 3 cases, the agency has already taken an action that is averse to the interests of the petitioner and the petitioner thus files the contested case petition as provided by statute. In Article 3A contested cases, the agency is proposing to take an action and the agency decision will be made based upon the Article 3A contested case hearing. In Article 3A cases, the agency decision has not

yet been made.

19. In Article 3A cases, when the agency requests an ALJ to preside, then the ALJ is to sit and preside over the hearing in the place of the agency and makes a “proposal for decision” back to the agency. N.C. Gen. Stat. § 150B-40. At the time of the initiation of the process the agency has not yet made a final decision which would be the springboard for commencing a contested case under Article 3. This distinction is even more significant now that OAH has authority for final decision making in Article 3 cases.

20. That a distinction exists between Article 3 and Article 3A cases is made clear in N.C. Gen. Stat. § 150B-40: “The provisions of this Article, 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.” (Emphasis added).

21. Any attempt to use the standards of Article 3 within an Article 3A proceeding is without merit.

22. Both Article 3 and Article 3A contain provisions which are the same or very similar, such as provisions governing venue, conduct of hearing, depositions and discovery, evidence, and designation and powers of the ALJ or presiding officer. *Homoly v. N. Carolina State Bd. of Dental Examiners*, 121 N.C. App. 695, 696, 468 S.E.2d 481, 482 (1996).

23. There are also distinctions between the two. For example, Article 3 provides for mediated settlement conferences while Article 3A does not. Article 3A provides a party who has been served with a notice of hearing the opportunity to file a written response with the agency prior to hearing, while Article 3 does not provide parties with a similar opportunity. In Article 3 proceedings the Petitioner is required to have exhausted administrative remedies through the agency prior to filing a contested case petition. Such is not the case in Article 3A cases. If Article 3 applied to hearings before agencies listed in Article 3A, these and other provisions would conflict. *Homoly*, 121 N.C. App. at 698, 468 S.E.2d at 483.

24. N.C. Gen. Stat. § 150B-40(e) provides that “[w]hen a majority of an agency is unable or elects not to hear a contested case,” the agency is to apply to the OAH for designation of an ALJ. In such case, “[t]he provisions of [Article 3A], rather than the provisions of Article 3, shall govern a contested case” N.C. Gen. Stat. § 150B-40(e). If the legislature had intended Article 3 to apply to Article 3A hearings and procedure, it would not have been necessary to include specific language that Article 3A provisions rather than Article 3 provisions apply when an Article 3A agency requests an ALJ to conduct an agency hearing. *Id.* Clearly, the legislature intended each article to fully govern the administrative hearings to which each applies without overlap. *Id.*

25. Article 3, a general provision, applies to all administrative agency hearings not covered by Article 3A. Those agencies covered under Article 3A are specifically listed in N.C. Gen. Stat. § 150B-38(a). “It is a well-established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] sections which are general in their application.” *Utilities Comm. v. Electric Membership Corp.*, 275 N.C.

250, 260, 166 S.E.2d 663, 670 (1969) (citing *Utilities Comm. v. Coach Co.*, 236 N.C. 583, 73 S.E.2d 562). In this case, hearings conducted by Respondent are governed exclusively by the specific provisions of Article 3A, rather than the general provisions of Article 3 of the NC APA. *Homoly*, 121 N.C. App. at 699, 468 S.E.2d at 484.

26. Thus, the contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely. *Id.* (See also *Opinion of Attorney General to Mr. Phillip T. Fisher, Executive Director of Real Estate Commission*, 57 N.C.A.G. 85 (1987) in which the Attorney General of North Carolina specifically counseled that § 150B-23(a), a provision in Article 3, did not apply to agencies governed by Article 3A).

27. N.C. Gen. Stat. § 150B-38(h) provides that “[e]very agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.” The article which is referred to is Article 3A.

28. Respondent’s rule for the administrative hearings is found at 12 NCAC 10B .0105. That rule specifically states that an administrative hearing in contested cases “shall be governed by procedures set out in Article 3A of G.S. 150B.” (Emphasis added).

29. Rule 12 NCAC 010B .0105 goes on to say that the “rules establishing procedures for contested cases . . . contained in Title 26, Chapter 3 of the North Carolina Administrative Code are hereby incorporated by reference.” Many of the rules contained within Title 26, Chapter 3 of the NCAC are not consistent with Article 3A but are in line with Article 3 hearings. To the degree that the rules are inconsistent with N.C. Gen. Stat. § 150B Article 3A, and specifically in N.C. Gen. Stat. § 150B-40(e), those rules shall not apply to hearings conducted under Article 3A. The dictates of the statute are paramount and shall control.

30. Rule 12 NCAC 010B .0105 also attempts to draft the powers and duties given to the Administrative Law Judges in Title 26, Chapter 3 of the NCAC to the conduct of an Article 3A hearing. The powers of the presiding officer are enumerated in N. C. Gen. Stat. § 150B-40. The provisions within the statute are paramount.

31. In *Peace v. Employment Sec. Comm’n of N. Carolina*, the North Carolina State Supreme Court addressed the burden of proof. Although *Peace* is an Article 3 case, the discussion of burden of proof is instructive in this instant case. The Supreme Court notes that at the time this decision was rendered that neither the North Carolina Constitution nor the North Carolina General Assembly has specifically addressed the proper allocation of the burden of proof in “just cause” termination cases. That was rectified in 2015 with the enactment of N.C. Gen. Stat. § 150B-25.1, which speaks to burden of proof in Article 3 cases.

32. This instant case is not a “just cause” case or Article 3 case, but as articulated in *Peace*, neither the Constitution nor the General Assembly has addressed the burden of proof in Article 3A cases.

33. *Peace* states:

In the absence of state constitutional or statutory direction, the appropriate burden of proof must be “judicially allocated on considerations of policy, fairness and common sense.” 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 37 (4th ed.1993). Two general rules guide the allocation of the burden of proof outside the criminal context: (1) the burden rests on the party who asserts the affirmative, in substance rather than form; and (2) the burden rests on the party with peculiar knowledge of the facts and circumstances. *Id.*

Peace v. Employment Sec. Comm’n of N. Carolina, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998).

34. Applying these general principles to this contested case, with “considerations of policy, fairness and common sense,” the Respondent should bear the burden of proof in an action in which the Respondent has investigated a license/certificate holder or applicant and based on that investigation wants to take some action against that license/certification. The Respondent is asserting the violation by the Petitioner and therefore is in command of the peculiar facts and circumstances upon which it bases that decision. It is the Respondent who asserts the affirmative in substance.

35. Historically, in Article 3A hearings, a license or certification is considered “property or rights” such that entitle the applicant or holder to a contested case hearing pursuant to Article 3A. When a license or certification is at issue, whoever is trying to take that license or certificate away has the burden of proof.

36. N.C. Gen. Stat. § 150B-40 provides that the “hearings shall be conducted in a fair and impartial manner” and that the presiding officer, including the ALJ, may “regulate the course of the hearings.” That statutory provision allows the presiding officer to dictate who has the burden of proof. The issue of burden of proof has previously been raised with this ALJ in Article 3A hearings, and when questioned with whom the burden of proof lies, the Respondent has always assumed the burden of proof, not merely the burden of going forward.

37. In this instant contested case Respondent has the burden of proof. There is no disagreement between the parties as to the facts and thus no genuine issue to any of the pertinent facts. The issues center on interpretation of the applicable rules.

PROPOSAL FOR DECISION

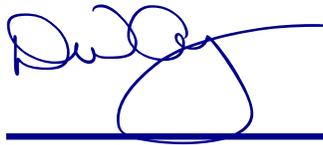
Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends the Respondent take no action to revoke, suspend or deny the Petitioner’s certification based on his failure to timely notify Respondent after being charged with a Class B Misdemeanor. Petitioner did timely notify Respondent as required by 12 NCAC 10B.0301(a)(7).

NOTICE AND ORDER

The **North Carolina Sheriffs' Education and Training Standards Commission** is the agency that will make the Final Decision in this 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 fact and to present oral and written arguments to the agency pursuant to N.C. General Statute § 150B-40(e).

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

SO ORDERED, this the 6th day of January, 2020.



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 6th day of January, 2020.



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