

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DOJ 05371

<p>William Donald Britt Petitioner,</p> <p>v.</p> <p>NC Sheriffs Education and Training Standards Commission Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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On February 27, 2020 and March 3, 2020, Administrative Law Judge Melissa Owens Lassiter heard this matter in Raleigh, North Carolina, pursuant to N.C. Gen. Stat. § 150B-4(e), and 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 and Chapter 17E of the North Carolina General Statutes to hear Petitioner's appeal of Respondent's proposed revocation/denial of Petitioner's justice officer certification.

APPEARANCES

For Petitioner: J. Michael McGuinness
The McGuinness Law Firm
Elizabethtown, North Carolina

For Respondent: Ameshia Cooper, Assistant Attorney General
North Carolina Department of Justice
Raleigh, North Carolina

ISSUES

1. Whether Petitioner's justice officer certification should be revoked/denied for committing two Class B Misdemeanor offenses of "Assault by Pointing a Gun" in violation of N.C. Gen. Stat. § 14-34?

2. Whether Petitioner's justice officer certification should be revoked/denied for the commission or conviction of a combination of four or more Class A or B Misdemeanor offenses?

3. Whether Petitioner's justice officer certification should be revoked/denied for failing to maintain the minimum standard required for justice officer certification to possess good moral character?

4. Whether Petitioner's justice officer certification should be revoked/denied for failing to maintain the minimum standards required for justice officer certification to wit: failing to notify Respondent, within five business days, in writing, of a criminal charge? Whether Petitioner's reliance on communications from a representative of the Criminal Justice Commission and Petitioner's confusion over reporting requirements constitutes a "willful failure to report" violation?

RULES AT ISSUE

12 NCAC 10B .0204(d)(1)
12 NCAC 10B .0103(10)(b)
12 NCAC 10B .0204(d)(5)
12 NCAC 10B .0103(10)(a)
12 NCAC 10B .0301(a)(8)
12 NCAC 10B .0204(b)(2)
12 NCAC 10B .0300
12 NCAC 10B .0301(a)(7)(A)

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1-3, 5-8

For Respondent: 1, 2, 3, 4-6, 9-12
7, 8 (by Official Notice)

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:

Background Facts

1. Both parties are properly before this Administrative Law Judge in that jurisdiction and venue are proper, and both parties received proper Notice of Hearing for this contested case.

2. Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B authorizes Respondent to certify sheriffs and to deny, suspend, or revoke such certification.

3. Petitioner is an applicant for deputy sheriff certification through the Bladen County Sheriff's Office. In December 2017, Petitioner began serving with the Bladen County Sheriff's Department. He was promoted to Corporal in January 2019.

4. Petitioner currently serves as a Corporal and Field Training Officer for that department. He has never been disciplined by the Bladen County Sheriff's Office.

5. Respondent previously certified Petitioner as a deputy sheriff through the Columbus County Sheriff's Office from January 7, 2011 to January 27, 2017. He was employed as a Sergeant with that Office at the time of the subject incident on January 16, 2017.

6. Petitioner was previously certified by the Criminal Justice Education and Training Standards Commission through the Tabor City Police Department from October 2000 to April 2002, the Whiteville Police Department from February 2005 to April 2005, and the Chadbourn Police Department from March 2002 to February 2005 and May 2005 to December 2013. T305-306. Petitioner completed his Basic Law Enforcement Training at Southeastern Community College in 2000. T305.

7. Petitioner has served for over 17 years in law enforcement and has no previous discipline against his certification.

Notification of Probable Cause

8. On July 25, 2020, Respondent's Probable Cause Committee notified Petitioner that it had found probable cause exists to:

- a. Revoke Petitioner's justice officer certification, pursuant to 12 NCAC 10B .0204(d)(1), for committing two counts of the Class B misdemeanor offense "Assault by Pointing a Gun" in violation of N.C. Gen. Stat. § 14-34 on January 16, 2017 by:
 - (1) pointing a Glock 42 handgun at Clint Dale Mills without legal justification and
 - (2) placing a personal weapon to the back of Mr. Mills' head while in an off-duty capacity.
- b. Revoke/Deny Petitioner's justice officer certification, pursuant to 12 NCAC 10B .0204(d)(5), for committing or being convicted of a combination of four or more Class A or Class B misdemeanors by:

- (1) being convicted of Simple Assault on January 16, 2017 (Disposition: 09/01/2017 Prayer for Judgment) and
 - (2) committing a second count of Class A Misdemeanor "Simple Assault" in violation of N.C. Gen. Stat. § 14-34 by assaulting and striking Clint Dale Mills on January 16, 2017 and
 - (3) committing the two Class B Misdemeanor offenses of "Assault by Pointing a Gun" at Clint Dale Mills on January 16, 2017.
- c. Revoke/Deny Petitioner's justice officer certification, pursuant to 12 NCAC 10B .0204(b)(2) and 12 NCAC 10B .0301(a)(8), for lack of good moral character required of a justice officer for being convicted of or committing the above-noted criminal offenses and the totality of Petitioner's actions and
 - d. Revoke/Deny Petitioner's justice officer certification, pursuant to 12 NCAC 10B .0204 (b)(2) and 12 NCAC 10B .0301(a)(7), for failing to notify Respondent in writing, within five business days, that on January 16, 2017, he had been charged with two (2) counts of "Assault by Pointing a Gun" and two (2) counts of "Simple Assault."

Resp. Ex. 10.

January 16, 2017 Incident

9. On January 16, 2017, Petitioner was employed as a Sergeant with the Columbus County Sheriffs' Office and lived at 1488 Old Boardman Road in Boardman, North Carolina. Petitioner had parked his assigned police vehicle, a marked Dodge Charger, between the metal carport and his home. Petitioner's home is located approximately 80 feet off Old Boardman Road. See Pet. Ex. 2 (photos of outside of home).

10. Around 8:20 p.m. on January 16, 2017, Petitioner returned to his home after attending a meeting at the Evergreen Fire Department. Petitioner was driving his personal truck. When Petitioner turned off the road, he saw a small white car backed into his driveway and parked adjacent to his home. Petitioner had never seen the car before. The car was positioned very near Petitioner's house. Petitioner's wife and his son were inside their home. Resp. Ex. 4.

11. Petitioner observed a man getting back into the white car, as the dome light was on inside the car. Petitioner did not recognize the man and the man had not been invited to Petitioner's home. The circumstances were very suspicious to Petitioner as the

man's car was positioned in a "ready to flee" position, and Petitioner thought the occupant had been inside Petitioner's home where his wife and son were. Petitioner thought the man may have harmed his family. T313, 315; Resp. Ex. 4.

12. Petitioner approached the man. The man suddenly and rapidly sped out, while spinning tires to accelerate at a high rate of speed. The man shot out across Petitioner's neighbor's yard and onto Old Boardman Road. Resp. Ex. 4.

13. Petitioner began to follow the white vehicle in his personal truck because he wanted to get the man's license tag number and call the tag number in to an on-duty deputy. Deputy Steve Nobles responded to the call. Resp. Ex. 4.

14. Based upon his observations, Petitioner put himself on duty as a Columbus County Deputy Sheriff to assist any on-duty deputy. Petitioner's action was consistent with the practice and custom of police officers to be on duty at any time, 24/7. Petitioner had his personal service weapon, a Glock .380, on him and was trained with that weapon as part of his law enforcement service.

15. It is a common practice in law enforcement that if an off-duty officer sees another officer who needs to be aided or assisted, it is routine and expected that the off-duty officer will step in and help. T110-111. It is also common in law enforcement that law enforcement officers are subject to be called out to duty on a 24/7 basis. T111. At hearing, Lt. Thompson confirmed that it is common knowledge in law enforcement that off-duty officers are supposed to help if needed and are expected to be available on a 24/7 basis. T183.

16. It was dark outside, and Petitioner's truck was not equipped with blue lights or a siren that would notify the public that a high-speed car chase was underway. T361.

17. During the pursuit, Petitioner made several phone calls, including one to his wife, at least two to Columbus County Lieutenant Barrett Thompson and one to First Sergeant Steven Nobles. T91, 191, 324-326. Petitioner's wife virtually always answers her phone when Petitioner calls. When Ms. Britt did not answer his call, Petitioner feared the worst, and feared the intruder may have robbed and or killed his family. Petitioner knew that his wife and son were in their home and knew there was no reason known why his wife could not answer his call. Resp. Ex. 4.

18. Petitioner informed Lt. Thompson and Sgt. Nobles that he was pursuing the vehicle and that he believed the driver had broken into his home. T90, 170. Thompson began traveling towards Petitioner's home and was met by the white vehicle at a high rate of speed. T171. He followed the vehicle and observed the driver "was all over the road." T172.

19. The vehicular chase lasted approximately 13 miles including driving through areas where there were numbers of people outside, including the Fire Department and the local Sun-Do Store, a large well-lit convenience store. Resp. Ex. 4. The driver of the

white vehicle broke numerous traffic laws such as speeding up to 100 mph, failing to stop at several stop signs, driving in the opposite lane of traffic, and passing vehicles in curves.

20. The magnitude of the man's flight further caused Petitioner to believe that the man had hurt Petitioner's family. Resp. Ex. 4. Petitioner also drove at speeds of 60, 70, 80, 90 and 100 miles per hour at times during the chase. T327, 361.

21. Petitioner advised Sgt. Nobles where he and the suspect's vehicle were located. This allowed Nobles to effectuate a traffic stop and stop the vehicle on the ramp where Highway 410 exits onto Highway 74. T91, 99. As soon as Nobles turned on his blue lights, the driver of the white vehicle immediately stopped. T363.

22. Petitioner and Sgt. Nobles approached the suspect's vehicle with their guns drawn. Petitioner was not in uniform and was using his personal weapon. Sgt. Nobles had drawn his gun due to his perception of the possible danger of the situation he was confronting. Petitioner has also advised Nobles that he [Ppetitioner] believed the driver of the vehicle may have broken into Petitioner's home and harmed Petitioner's family. T107, 363.

23. The driver of the white vehicle was later determined to be Clint Dale Mills. As Sgt. Nobles and Petitioner approached Mills' car, Nobles commanded Mills to "show us your hands." T108. Mills was leaning over in his vehicle, fumbling around with something in the interior of this car and moving around. Mills did not immediately respond to Sgt. Nobles' request for compliance. T107.

24. Sgt. Nobles and Petitioner performed a two-officer extraction and take-down procedure. The standard police procedure for this type of apprehension was to extract the suspect and place him face down to put handcuffs on the suspect. In a two-officer vehicular extraction, one officer proceeds with attempted handcuffing while the other officer provides cover.

25. Petitioner reached into the open car window, unlocked the driver's car door, and pulled the suspect out of the vehicle. Petitioner and Nobles took Mills down to the ground, beside where Mills had stopped his vehicle. T109. The deputies used minimum physical force to get Mills down as Mills was not being compliant. On the ground, Mills had his hands tucked up underneath his torso, and Petitioner and Nobles could not determine if Mills had a weapon. Mills continuously squirmed his feet, his body, and his torso around. He also turned his head from left to right as he laid face down on the ground. T335-336. Nobles put his gun in his holster and began attempting to handcuff Mills. Petitioner pointed his weapon at the back of Mills' head to provide cover for Sgt. Nobles and himself. T337. Petitioner did not strike Mr. Mills with his pistol.

26. While Nobles and Petitioner were subduing Mills, Lt. Barrett Thompson and Deputy Wesley White arrived on the scene. Both White and Thompson were off-duty. Lt. Thompson observed Sgt. Nobles and Britt:

[E]xecuting a two-officer takedown contact and cover, meaning in my training and experience that one officer has the suspect covered with a firearms while the second officer is cuffing the suspect . . . so one officer is protecting them both at that point in time.

T173. Lt. Thompson described Petitioner's role as "covering the subject." T174. At hearing, Thompson opined that:

Based on my training, you do that [point weapon to the back of head] so you don't risk shooting your partner or anybody else around if it does warrant using deadly force. The closer you are to the subject that you have to use deadly force on, the less chance you have of missing them and shooting an innocent bystander.

T174.

27. The two-officer "contact and cover" procedure is also taught in Basic Law Enforcement Training. T179. Officers are trained to point a weapon as a deterrent and to be ready if the subject pulls a weapon. T179. It is not at all unusual for an officer to be pointing a weapon during a two-officer contact and cover, and Lt. Thompson has seen that frequently in many years of service. T180.

28. At hearing, Nobles initially noted that pointing a gun at the head of a suspect is not typical behavior under these circumstances. T101. However, Sgt. Nobles later explained how the pointing of weapons by law enforcement officers is very common and routine and is a deterrent to subjects from acting irresponsibly. T108.

29. During this time, Petitioner repeatedly shouted at Mills, "What did you do to my family?" Mills was constantly moving his head back and forth, telling them, "I didn't do anything. I didn't do anything." T106. When Mills did not answer Petitioner's questions, Petitioner became more frightened, especially since his wife had not answered his call. Resp. Ex. 4. Petitioner was extremely upset, irate, and frustrated. T340.

30. Sgt. Nobles heard Petitioner repeatedly yell at Mills: "What did you do to my family?" T118. Petitioner yelled in a loud and forceful clear manner. Nobles observed that Mills was in a position to hear the question but Mills never responded. T118-119.

31. Eventually, Sgt. Nobles caught one of Mills' hands and handcuffed him. Petitioner stood up and walked away. T113.

32. Lt. Thompson observed that Petitioner "wasn't his normal character. He appeared to be just out of character." T174-175. Lt. Thompson believed Petitioner was upset, worried, and terrified. T174-175. Sgt. Nobles noted that it was not normal for Petitioner to be like that. T119. Nobles thought Petitioner seemed to be hot but opined that [anger] was understandable under those circumstances. T119.

33. About a minute later, Petitioner walked back towards Mills, and attempted to aggressively place his foot on Mills' shoulder. Petitioner continued yelling at Mills and asking him if he had hurt Petitioner's family. T338. Lt. Thompson was squatted down beside Mills and saw Petitioner "lunged [sic] in with his foot." T175. Lt. Thompson pushed or deflected Petitioner's foot out of the way, but Petitioner's foot still made contact with Mills' lower neck and shoulder area. T101.

34. Petitioner walked in one direction, then walked back in the other direction. Petitioner admitted at hearing, while watching the dash camera footage, that he then leaned over and "grabbed him [Mills] by his shirt collar right here by his shoulder, I picked him up when I was knelt down." T370-371. Petitioner pointed his gun at Mills and screamed at Mills, "Did you hurt my family?" T370-371; Resp. 6. Lt. Thompson and Sgt. Nobles pulled Petitioner away from the suspect. Thompson walked Petitioner away from Mills and down the off-ramp. T175-176. Thompson asked Petitioner for his gun, Petitioner gave Thompson his gun, and Thompson put Petitioner's gun in his back pocket. Lt. Thompson called Petitioner's wife on his cell phone, handed Petitioner the phone, and walked back toward Mills. Resp. Ex. 6.

35. After speaking with his wife on Thompson's phone, Petitioner walked back toward the area where Mills was located. He continued yelling at Mills about his family and was still extremely upset. Thompson restrained Petitioner, walked Petitioner away from Mills and helped Petitioner calm down. T175-176; Resp. Ex. 6.

36. Lt. Thompson has known Petitioner for thirty years or more. T169. Thompson believed that, "Once he [Petitioner] calms down, he's the normal Donald that I've known forever." T176-177.

37. Larry Williamson, a retired law enforcement officer, was travelling home on January 16, 2017 when he saw blue lights and people that he knew at the subject stop. T280. Mr. Williamson observed Petitioner and another person trying to subdue a subject. T282.

38. After stopping at the scene, Mr. Williamson observed a male [Clint Mills] face down "squirming around. His head was slinging back and forth. When I first walked up, he had his hands underneath him," between his waist and his chest. T283, 285-286. Mills' hands were locked under him. T286. Mills "was making some slurs. He was slurring rambling . . . he had his hands underneath him . . . Nobles was trying to subdue him." T283. When a subject is being subdued and has his hands under him, that is a serious risk for a police officer. T285. He observed Sgt. Noble trying to subdue Mills and trying to get Mills' hands from underneath him. T289.

39. Williamson was standing three feet or closer to the suspect and the officers. T289. He saw Petitioner fairly close to Mills, pointing his gun at the back of Mills' head. T293. He also heard Petitioner repeatedly ask Mills, "What did you do to my family?" Mills never responded. T289-290. Williamson didn't recall Petitioner making contact with the gun to Mills' head. T293. Williamson saw Petitioner move from where he initially was,

and move his foot, not like a kick like “you were going to punt a football or something like that. It was like to place the foot on.” T287-288. However, Mr. Williamson observed that Petitioner’s foot never made contact with Mills because Officer Thompson, who was kneeling beside the suspect, deflected Petitioner’s foot. T288-289.

40. On January 16, 2017, Clint Dale Mills received traffic citations for his actions, and was transported to the Columbus County Detention Center where he was served with an outstanding warrant for “Assault on a Female.” Pet. Ex. 1.

41. Petitioner was charged with two counts of “Assault by Pointing a Gun” in violation of N.C. Gen. Stat. § 14-34, and two counts of “Simple Assault” in violation of N.C. Gen. Stat. § 14-33 based on the allegation that he kicked Clint Dale Mills on January 16, 2017. T375. Ultimately, Petitioner pled “No Contest” to one count of “Simple Assault,” received a Prayer for Judgment and paid a fine and/or costs of court in the amount of \$230.00. T375. The remaining charges against Petitioner were dismissed. Resp. Ex. 12, T375, 384.

Columbus County Sheriff Internal Affairs Investigation

42. On January 17, 2017, Clint Dale Mills filed a complaint of excessive force against Petitioner with the Columbus County Sheriff’s Office based upon the January 16, 2017 incident. Chief Lewis L. Hatcher assigned Lieutenant Jeremy Barber to conduct an Internal Affairs investigation into Mills’ complaint. T201-202, 219-220; Resp. Ex. 1, Resp. Ex. 2. Lt. Barber took photographs of Mills, reviewed Sgt. Nobles’ dash camera footage and conducted interviews pursuant to the Internal Affairs investigation. T203-204.

43. On the morning of January 17, 2017, Sheriff Hatcher visited the jail and had Mills placed in a cell that allowed Sheriff Hatcher to see Mills without Mills knowing that Sheriff Hatcher was there. T222. Sheriff Hatcher observed a bruise on Mills’ forehead and a bruise behind Mills’ ear. T223. Mills did not appear to be impaired. T230. Sheriff Hatcher also watched Nobles’ dash camera footage and was troubled by many of the things he saw. T220-221. Those things included Petitioner’s irate demeanor, the way Petitioner was flashing his gun around, the way that Thompson had to restrain Petitioner, the fact that Nobles had to attempt to pull Petitioner back and the way Petitioner came in toward Mills and made a kicking motion. T220-221.

44. As a result of the Internal Affairs investigation, Sheriff Hatcher sustained the allegations of Excessive Use of Force, Assault by Pointing a Gun and Simple Assault. Resp. Ex. 1 at 10. Sheriff Hatcher reviewed the findings of the Internal Affairs investigation with Petitioner. Petitioner resigned from the Columbus County Sheriff’s Office. T234.

45. As a result of Petitioner’s actions on January 16, 2017, Mills filed a civil suit against Sheriff Hatcher, as head of Columbus County Sheriff’s Office, alleging use of excessive force. T226. The insurance company settled the suit with a \$15,000.00 payout to Mills. T227, Resp. Ex. 4 at 4.

46. When Sheriff Hatcher employed Petitioner, there were no other disciplinary issues. However, Sheriff Hatcher would not rehire Petitioner based on Hatcher's opinion that "some actions . . . were taken that shouldn't have been taken." T228. Even three years after the incident in question occurred, Hatcher opined that Petitioner could not be an employee of his again. T228.

47. Over Petitioner's objections, the Undersigned admitted into evidence Respondent's Exhibit 6, the dash camera footage from Sgt. Nobles' patrol vehicle of the January 16, 2017 incident. T93. At hearing, Sgt. Nobles authenticated the video. Respondent's Exhibit 6 clearly showed that Petitioner was extremely upset, mad and agitated. It showed the aggressive manner with which Petitioner stepped in and towards Clint Mills while Mills laid on the ground handcuffed. That video also demonstrated how Petitioner, shortly thereafter, walked back toward Mills, leaned over, and grabbed Mills' shirt and pointed his pistol at Mills while yelling at Mills, "What did you do to my family?" Resp. Ex. 6, T370-371. Lt. Thompson and Sgt. Nobles pushed Petitioner back and walked him away from Mills. T175, Resp. Ex. 6.

48. Nevertheless, the dash camera footage does not completely or accurately establish what occurred during the traffic stop on January 16, 2017. Resp. Ex. 6. Sgt. Nobles opined, and the Undersigned finds, that the vehicle camera video did not capture all, but only some of what was going on close to the ground with Mills on January 16, 2017. T111. The bottom of the footage was noticeably cut off. *Id.* Sgt. Nobles explained that these types of videos, *i.e.* dash camera video, do not portray the whole event because it only provides the perspective from the angle of the camera. T111-112. In addition, little to no sound of the traffic stop is audible on the video.

49. According to Sgt. Nobles, officers are trained that subjects will sometimes have weapons in their waistband or front pockets. T113. When a subject is squirming around and moving around, that is an obstruction to the officer's task in trying to safeguard everyone's safety. T113. He explained that using a foot to control a squirming subject is common. T114. Petitioner acknowledged that he had used his foot before in police operations. T339. Use of the foot is permitted and consistent with training. T339.

50. Clint Mills had some scrapes or abrasions on his forehead/face and behind his ear, and a small circular knot on the midline of Mills' forehead. Resp. Ex. 4. Larry Williamson observed Mills had a "small abrasion on his forehead" while Mills laid face down on the ground, slinging his head back and forth. T284, 289, Williamson observed these abrasions before Petitioner had any contact with Mills. T284-285.

51. Lt. Thompson never saw Petitioner punch, hit, or strike Mills or attempt to do so. T178. He never saw Petitioner kick Mills in the face or in the head. T179. Sgt. Nobles opined that Petitioner did not kick Mills in the head or in the face. T114. Sgt. Nobles was right there and would have seen it. T115. However, Sgt. Nobles believed Petitioner's foot came into contact with Mills' lower neck and shoulder area. T101.

52. Sgt. Nobles identified Petitioner's boot at hearing and used it to illustrate the size and condition of the boot. When asked if it appeared that Mills himself caused the scrape on his head by moving his face back and forth as he laid face down on the ground, Nobles indicated that was "very possible." T116. Sgt. Nobles also opined that had Petitioner kicked Mills in the head with his boot, Nobles would have expected major facial and or other injuries, but there were none.

53. At hearing, Petitioner adamantly denied that he did not kick Mills in the head like he's been charged. "I did not do it. Period." T381. Petitioner conceded that, "And if it was anything, it [his boot] brushed the back of his shoulder and I never made full contact with--with Mills, period." T338.

54. Petitioner acknowledged that he did not feel sorry for Mr. Mills. The dangerous nature of Mr. Mills' actions caused the subject encounter. Petitioner explained simply:

[I]f Mills would have rolled down his window at my house, and said, 'Sir, I'm at the wrong house. I was lost. I'm leaving,' none of this would a [sic] ever took place, ma'am. Mills brought this on himself that night.

T380.

55. Yet, Petitioner also took responsibility for his emotional state on January 16, 2017 and being upset, irate, fearful. He did not try to hide it. T379-381. While he agreed he had not displayed any remorse for how he acted that night, he does feels remorse. T 378. Petitioner explained that, "the man was at my home with my family. That's the difference . . . You can't explain how I felt. . . Nobody can." T380. He elaborated that if he had been called to your house and was dealing with that your family, "you would a [sic] never see this part of Donald Britt." T379-380. Based upon the traumatic and extenuating circumstances occurring on January 16, 2017, Petitioner's belief that Mr. Mills had harmed his family was justifiable and reasonable.

56. Respondent's Exhibit 2 was admitted into evidence for the limited purpose of showing Respondent received such exhibit, but not for the truth of the matter asserted therein. Mills did not testify at hearing and his purported statement in Respondent's Exhibit 2 is hearsay and is not given any weight in this hearing. In addition, Mills' contentions therein are not credible or believable in light of the substantial countervailing evidence including the testimony of Petitioner, Lt. Thompson, Sgt. Nobles, Deputy White, Captain Faulk and Larry Williamson and Respondent's Exhibit 2 (photos).

Forensic Evaluation

57. Dr. Moira Artigues is a medical doctor and board-certified forensic psychiatrist who conducted a forensic psychiatric evaluation of Petitioner regarding the events of January 16, 2017 in February of 2020. T124. Dr. Artigues completed and received her M.D. degree from the Medical University of South Carolina, and her four-

year residency in Psychiatry at Duke University School of Medicine. *Id.* Dr. Artigues won awards at both Duke Medical Center and at the College of Charleston.

58. From July 1998 to July 1999, Dr. Artigues served as an outpatient psychiatrist and completed a fellowship in Forensic Psychiatry at Duke from July 1999 to July 2000. *Id.* She served as a staff psychiatrist at other institutions and as an instructor at Duke University School of Medicine. Dr. Artigues has served as a psychiatrist in private practice from 2000 to present. Dr. Artigues has research experience, has been active in professional associations, has published articles in two medical journals, and made numerous professional presentations. *Id.* Dr. Artigues' extensive qualifications and experience in both general and forensic psychiatry, as reflected in her testimony, is also summarized in her resume. Pet. Ex. 5, Forensic Psychiatric Report at 4-6.

59. Dr. Artigues has been licensed as a physician since 1996 and has practiced since then. T127. Dr. Artigues also undertakes consultation on legal matters including law enforcement cases, homicide cases, and other matters. T127. Dr. Artigues is board certified in both General Psychiatry and Forensic Psychiatry. T128. Dr. Artigues has been qualified as an expert witness over 250 times and testified as an expert witness for United States attorneys in federal criminal cases and at the Office of Administrative Hearings. T129, 131.

60. Dr. Artigues conferred with Petitioner in connection with her forensic psychiatric evaluation of this case, discussing in detail what occurred with Clint Dale Mills. T132, 134. Dr. Artigues is familiar with brain anatomy and brought a model brain to illustrate her testimony. T132. The Undersigned qualified Dr. Artigues to testify as an expert in this contested case.

61. Dr. Artigues explained how trauma proceeds including with the sympathetic nervous system. T142. She described how the process of trauma can cause our sympathetic nervous system to override everything else resulting in losing one's ability to be rational. T142.

62. Dr. Artigues also expounded the functioning of the amygdala within the brain. T149. She described how if one gets upset enough, the "fight or flight" phenomenon can overpower one's ability to reason. T149. Our behavioral controls as a human being are diminished if we get very upset. T149. One can become detached from reality. T150. If one gets upset enough and our sympathetic nervous system becomes sufficiently engaged, then that emotional state can overwhelm the rational impulse. T1512. If one gets a little bit upset, one can still think rationally. If one gets more upset, one's ability to think rationally diminishes. T152. She opined that when one gets really, really upset, one can become detached from reality. T152.

63. She opined that Petitioner experienced multiple fears on January 16, 2017. T143. Those fears began when Petitioner made his initial observations at his home that night. T143. Petitioner reported to Dr. Artigues:

I tried to call my wife. My first thought was my family. It rings and rings and goes to voice mail. Not knowing if my family was dead or what. My heart stopped. I was terrified. I was scared. Nothing like that had ever happened to me.

T144.

64. Petitioner reported to Dr. Artigues that he was not trained to deal with a situation occurring at his home and it was the worst thing that ever happened to Petitioner. T145. Dr. Artigues found it very significant that this matter occurred at Petitioner's home and explained the significance of a physical encounter at one's home with a trespasser. *Id.*

65. Dr. Artigues explained the concepts of fear, rage, and confusion in the context of what Petitioner was experiencing on January 16, 2017. T153. She noted that "rage is a normal response when you think your family may have been victimized." T153. According to Dr. Artigues, Petitioner's fears were understandable and the fears that Petitioner was experiencing impacted his behaviors. T153, 155. Mills' continuing course of actions including, but not limited to his refusal to respond to Petitioner's questions whether Mills had harmed Petitioner's family, caused Petitioner to become angry, traumatized, and fearful. T155.

66. Further, Petitioner's fears kept escalating as time went on and his ability to think rationally was impaired. T155. This resulted in the anger displayed during the subduing of Mr. Mills. Dr. Artigues opined that Petitioner's mental status was consistent with the science of the effects of emotions on cognition, judgment, and behavior. T160. The fact that Petitioner's family was involved in this situation made it more terror provoking, confusing, rage-inducing, and traumatic. T163, 165; Pet. Ex. 5.

67. Dr. Artigues' expert report analyzed the impact of the sequence of events that Petitioner was experiencing from Mills' continuing conduct. Pet. Ex. 5. Based upon her consultation with Petitioner, Dr. Artigues concluded that Petitioner was put in fear, rage, and confusion almost to the point of disassociating, by the actions of Clint Dale Mills on January 16, 2017. T141. Petitioner was getting into a "traumatized state." She opined that Petitioner nearly disassociated, meaning he nearly lost contact with reality for a second. *Id.*

68. In Dr. Artigues' opinion, but for the behaviors of Clint Mills, Petitioner would not have acted with anger and confusion at the arrest scene. She opined in her report that Petitioner's responses and resultant behaviors "were within the known paradigms of human reactions to traumatic events" and were "an expectable outcome of these effects on the brain." Pet. Ex. 5, p. 6.

69. The Undersigned finds that the expert opinions of Dr. Moira Artigues, both in her expert report and in her testimony, are credible, believable and are helpful to an

understanding of the course of events on January 16, 2017, including the behaviors of Clint Dale Mills that impacted the behaviors of Petitioner.

Failure to Notify

70. On January 27, 2017, Petitioner resigned from the Columbus County Sheriff's Office.

71. On or about February 2017, the Columbus County District Attorney's Office charged Petitioner with Simple Assault (17CR050508) and Assault by Pointing a Gun based upon the January 16, 2017 incident.

72. Petitioner called Richard Squires of the Criminal Justice Education and Training Standards Commission and notified Mr. Squires of the above-referenced criminal charges. Petitioner advised Mr. Squires that he wanted to apply for an auxiliary position at Chadbourn Police Department and asked if he could still apply with pending charges. Petitioner also asked Mr. Squires if he needed to do anything else or notify anyone else. T345; Pet. Ex. 8, p. 2. Based upon Squires' statement to Petitioner that notifying him was sufficient, Petitioner did not notify Respondent of his pending criminal charges. T345.

73. Petitioner completed a Form F3, submitted it to the Chadbourn Police, who submitted such Form to the Criminal Justice Education and Training Standards Commission. Petitioner did not believe that he had to report the subject criminal charges to the Sheriffs' Commission.

74. In August 2017, after learning he had also been charged with the additional charges of misdemeanor Assault and Assault by Pointing a Gun from the January 16, 2017 incident, Petitioner notified Richard Squires of the Criminal Justice Education and Training Standards Commission of these additional criminal charges. T346-348; Resp. Ex. 9; Pet. Ex. 8, p. 2. Petitioner talked with Mr. Squires again and per Mr. Squires' instruction, Petitioner emailed Mr. Squires regarding the additional criminal charges. T347, 348; Pet. Ex. 8, p. 2. Petitioner's Exhibit 8 confirmed Petitioner's reporting of the charges to the Criminal Justice Education and Training Standards Commission after Petitioner spoke to Mr. Squires a second time. T347.

75. The Probable Cause Committee of the Criminal Justice Education and Training Standards Commission held a probable cause hearing based on the January 16, 2017 incident. The Committee found probable cause for an administrative rule violation and offered to resolve the matter with a reprimand. Petitioner accepted the offered reprimand and that matter was resolved.

76. Petitioner did not notify Respondent Commission of the January 16, 2017 charges against him. Respondent became aware that Petitioner had been charged when it received a Report of Separation from the Columbus County Sheriff's Office indicating that Petitioner had been separated for cause based on a Commission rule violation. T56-57.

77. In his March 29, 2018 letter to Respondent, Petitioner stated that he was unaware that he needed to notify Respondent of the above-referenced criminal charges as he was not employed as a sworn law enforcement officer at that time. T348, Pet. Ex. 8. At hearing, Petitioner acknowledged that he now knows that he should have notified Respondent of the above criminal charges. T348.

Character Witnesses on Good Moral Character

78. Darrell Rogers, Andrew Powell, and Bobby Faulk testified at the contested case hearing regarding Petitioner's character. Darrell Rogers is a First Sergeant with the Columbus County Sheriff's Department, with twenty years of experience. T244. He has known Petitioner for over thirty (30) years and is Petitioner's next-door neighbor. T244, 245, 251. Sgt. Rogers opined that Petitioner has "very good moral character," and is a very good father. T247. Sgt. Rogers observed that Petitioner has been "very professional" as a police officer and has a reputation for honesty, integrity, and trustworthiness. T248-249. Petitioner has a very good work ethic, is a hard worker, and a good supervisor. *Id.* Petitioner earned the respect of his subordinates and is a caring person. *Id.*

79. Rogers did not think that Petitioner's behavior on January 16, 2017 was improper because the matter dealt with his family. T232. However, Rogers agreed that every time an officer responds to an incident, he or she is interacting with someone's family. T232.

80. Captain Andrew Powell of the Bladen County Sheriff's Department has over thirty-three years (33) of law enforcement service, fourteen (14) of those years with the Bladen County Sheriff's Department. T258. Capt. Powell spoke on behalf of Sheriff James McVicker at this hearing. T260. Petitioner serves directly under Captain Powell's chain of command. T260. Petitioner earned rank in the Bladen Sheriff's Department, becoming a corporal and then appointed as Field Training Officer. T261. Capt. Powell described Petitioner as "one of our top training officers." T264. Petitioner has earned the respect of supervisors and Sheriff McVicker. T260-261.

81. Captain Powell believed that Petitioner has good moral character; "he's a good guy. I know he's very family oriented." T262.

82. Captain Powell observed the dash camera video of January 16, 2017 at hearing. Resp. Ex. 6. He noted how upset Petitioner was in the video. Powell opined that he would have reacted the same way as Petitioner if he [Powell] had actually observed and thought the subject had broken into his house, off-duty or not. T268-269. He noted that "it happens a lot," in law enforcement, "where officers have to sort of control other officers in certain incidents." T268-269.

83. The only thing that Capt. Powell saw in the video that he was concerned about was when Petitioner walked up to Mills, and it appeared as if Petitioner was going to kick Mills. T268-269. Capt. Powell did not see Petitioner make contact because

Petitioner was pushed back. *Id.* Based upon his experience, Powell indicated that Petitioner's "stomping motion in the direction of the apprehended person" would be appropriate "in the event that the subject was struggling to the point" the officers could not get the suspect handcuffed. T271, 272. When Petitioner made the stomping motion, the other officers surrounding the suspect were basically holding Mr. Mills down. From what Capt. Powell could see on the video, Petitioner was stopped before he got to Mills. T271-272.

84. Based on his training, Captain Powell opined that it is permissible in law enforcement to use a foot to help subdue a struggling subject. T273.

85. Captain Bobby Faulk is a Uniform Division Commander of the Columbus County Sheriff's Department. He has known Petitioner for approximately twenty (20) years. T274-275. Capt. Faulk has observed the behaviors of Petitioner. He described Petitioner as "a very effective law enforcement officer, well-respected by his peers, well-respected by his subordinates, and respected by the command staff . . . he was very professional." T276. Petitioner is of "good moral character." *Id.*

86. Bladen County Chief Deputy Larry Guyton has known Petitioner for over ten (10) years. Guyton described Petitioner as an "excellent officer who has worked hard to achieve the respect of his fellow officers" and a good supervisor. Pet. Ex. 6. Petitioner was very forthcoming to Chief Guyton why he left the Columbus County Sheriff's Office. Guyton believed Petitioner's explanation regarding why Petitioner unintentionally failed to report his January 16, 2017 arrest to Respondent. T342-344; Pet. Ex. 6.

87. Master Sgt. Darrell Rogers of the Columbus County Sheriff's Office was Petitioner's supervisor at the time of the Clint Mills incident. Sgt. Rogers opined that Petitioner was a highly effective deputy, very respected supervisor, very professional in carrying out his duties, and enjoyed a very good reputation for truthfulness and honesty. Pet. Ex. 7.

88. The testimony of Lt. Barrett Thompson, Sgt. Darrell Rogers, Deputy Wesley White, Andrew Powell, Bobby Faulk, and Larry Williamson was credible, believable, and helpful to an understanding of what occurred on January 16, 2017.

89. Except for the isolated incident on January 16, 2017, Petitioner has exhibited that he is a person of good moral character.

90. The Undersigned finds as fact that on January 16, 2017, Petitioner put himself on duty as a Columbus County Deputy Sheriff in response to Clint Mills' actions at Petitioner's home and thereafter through Mills' apprehension. Beginning with the actions that occurred at Petitioner's home that evening, Petitioner experienced a sequence of events, instigated by Mills, which caused Petitioner to be in substantial fear for the well-being of his wife Beth and their son Hunter. The failure of his wife to answer her cell phone in response to Petitioner's phone call understandably exacerbated Petitioner's fears. As the sequence of events unfolded, Petitioner understandably

became increasingly traumatized, culminating when Mills repeatedly refused to respond to Petitioner's questions regarding whether Petitioner's family had been harmed. T155.

91. Based upon those specific circumstances, Petitioner acted in good faith to assist Sgt. Nobles in the apprehension and arrest of Mills including when Petitioner pointed his pistol at Mills as part of that arrest. Petitioner's actions in doing so were consistent with the common and routine practice in law enforcement that off-duty officers are expected to help another officer who needs to be aided or assisted and are expected to be available on a 24/7 basis. Therefore, Petitioner did not commit an Assault by Pointing a Gun against Clint Dale Mills when he pointed his gun at suspect Mills in assisting Sgt. Nobles in apprehending and securing Mills at the traffic stop.

92. Nonetheless, the substantial evidence established that Petitioner committed an Assault by Pointing a Gun on January 16, 2017 when he grabbed the shirt of Clint Dale Mills, lifted him off the ground, and pointed his pistol at Mills while Mills was lying on the ground, subdued, and handcuffed. T370-371; Resp. Ex. 6.

93. The substantial evidence at hearing also proved that Petitioner committed a Simple Assault when he forcibly and aggressively lunged in toward Clint Dale Mills with his foot and made contact with Mills' lower neck and shoulder area.

CONCLUSIONS OF LAW

1. The parties are properly before this Administrative Law Judge. Jurisdiction and venue are proper and both parties received proper notice of the hearing. 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.

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereafter the Commission) has certain authority 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 suspend, revoke, or deny certification under appropriate circumstances with substantial proof of a rule violation.

3. In its July 25, 2019 letter, Respondent informed Petitioner that the Commission had found probable cause existed to "revoke/deny" Petitioner's justice officer certification. The letter is captioned as "Notice of Probable Cause to Revoke/Deny Justice Officer Certification" and the text throughout the letter uses the alternative "revoke/deny" language as Respondent's proposed action on Petitioner's certification.

Burden of Proof

4. 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 Office of Administrative Hearings ("OAH") for designation of an Administrative Law Judge ("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).

5. In Article 3A cases, OAH, through an ALJ, sits in place of and presides 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.

6. When an agency initiates the administrative process, the agency has not yet made a final decision which is the springboard for commencing a contested case under Article 3. If the legislature had intended Article 3 to apply to Article 3A hearings and procedure, it would not have been necessary to include language that Article 3A provisions, rather than Article 3 provisions, apply when an Article 3A agency requests an ALJ to conduct an agency hearing. *Homoly v. N. Carolina State Bd. of Dental Examiners*, 121 N.C. App. 695, 698-99, 468 S.E.2d 481 (1996). This distinction is even more significant now that OAH has final decision-making authority in Article 3 cases.

7. 12 NCAC 10B .0105(a) explicitly provides that an administrative hearing in contested cases “shall be governed by procedures set out in Article 3A of G.S. 150B.” 12 NCAC 10B .0105(b) attempts to give the powers and duties given to Administrative Law Judges in Title 26, Chapter 3 of the NCAC to the conduct of an Article 3A hearing. However, the powers of the presiding officer enumerated in N.C. Gen. Stat. § 150B-40 are paramount and control over any alleged powers enumerated in 12 NCAC 09B .0105(b) is void. As such, 12 NCAC 09B .0105(b) is void as applied in an Article 3A contested case hearing.

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

9. Neither the North Carolina Constitution nor the General Assembly has addressed the burden of proof in Article 3A cases. Applying the statutory law along with “considerations of policy, fairness and common sense,” the Undersigned determines that Respondent should bear the burden of proof in an action where Respondent proposes to

take some action against a license/certificate holder or application based upon its investigation into that individual.

Commission of Two Class B Misdemeanor Offenses of Assault by Pointing a Gun and Commission of Simple Assault

10. 12 NCAC 10B .0103(10)(b)(i) states that a Class B Misdemeanor is an act committed or omitted in violation of any common law, duly enacted ordinance, or criminal statute of this state which is classified as a Class B Misdemeanor as set forth in the “Class B Misdemeanor Manual” as published by the North Carolina Department of Justice and shall automatically include any later amendments and editions of the incorporated material as provided in G.S. 150B-21.6.

11. 12 NCAC 10B .0204(d)(1) states that 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 a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of appointment.

12. The substantial evidence in this case proved that it is a common practice and routine expectation in law enforcement for an off-duty officer to aid and assist another officer who needs to such assistance. It is also common in law enforcement that law enforcement officers are subject to be called out to duty on a 24/7 basis. In fact, N.C. Gen. Stat. § 20-114(b) states:

It shall be the duty of all sheriffs, police officers, **deputy sheriffs**, deputy police officers, and all other **officers within the State to cooperate with and render all assistance in their power to the officers herein provided for**, and nothing in this Article shall be construed as relieving said sheriffs, police officers, deputy sheriffs, deputy police officers, and other officers of the duties imposed on them by this Chapter. (emphasis added).

13. On January 16, 2017, Petitioner put himself on duty as a Columbus County Deputy Sheriff and assisted and participated in a police operation to apprehend and subdue Clint Dale Mills. Therefore, Petitioner was cloaked with the privileges and protections provided by law to law enforcement officers. See, e.g., *State v. Gaines*, 322 N.C. 461, 421 S.E.2d 569 (1992) (“A police officer when on or off duty is still an officer and a policeman having authority, if not the duty to exercise functions pertaining to his office in appropriate circumstances, without regard to departmental rules relating to hours.”); *State v. Lightner*, 108 N.C. App. 349 (1992); Cf. N.C. Gen. Stat. § 160A-285. See also N.C. Gen. Stat. § 20-114(b); *Revene v. Charles*, 882 F.2d 870 (4th Cir. 1989) (off-duty police officer may act under color of authority).

Assault by Pointing a Gun

14. North Carolina General Statute § 14-34 states “[i]f any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor.” Resp. Ex. 7.

15. The elements of Assault by Pointing a Gun, in violation of N.C. Gen. Stat. § 14-34, are satisfied when a person: (1) intentionally, (2) points a gun, (3) at another. Jessica Smith, *North Carolina Crimes: A Guidebook on the Elements of Crime*, (7th Edition 2012), p. 126.

16. 12 NCAC 10B .0103(10)(a)(i) states that a Class A Misdemeanor is an act committed or omitted in violation of any common law, duly enacted ordinance, or criminal statute of this state which is not classified as a Class B Misdemeanor pursuant to Sub-item (10)(b) of 12 NCAC 10B .0103.

17. 12 NCAC 10B .0204(d)(5) states that the commission may revoke, suspend, or deny the certification of a Justice Officer who has committed or been convicted of any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as Class A misdemeanors or defined in 12 NCAC 10B .0103(10)(b) as Class B misdemeanors regardless of the date of commission or conviction. The period of denial for a violation of Rule .0204(d)(5) is indefinite. 12 NCAC 10B .0205(3)(d).

18. The drawing and pointing of a weapon are in fact a known and trained law enforcement safety precaution. Scores of cases demonstrate the recognized authority for officers to draw and point their weapons, which is not excessive force. See, e.g., *Foote v. Dunagan*, 33 F.3d 445, 448 (4th Cir. 1994); *Hart v. Benton*, 654 Fed. Appx. (9th Cir. 2016); *Strickland v. Township*, 710 F.3d 350, 363 (6th Cir. 2013); *Jackson v. Sauls*, 200 F.3d 1156 (11th Cir. 2000); *Edwards v. Giles*, 51 F.3d 155 (8th Cir. 1995); *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989); *Williams v. City*, 524 F.3d 826, 828 (7th Cir. 2008).

19. The North Carolina Supreme Court has explained that “[p]olice officers have a duty to apprehend lawbreakers.” *Parish v. Hill*, 350 N.C. 231, 513 S.E.2d 547, 550 (N.C. 1999); see *State v. McMahan*, 103 N.C. 379, 9 S.E. 489 (1889). “Police must pursue crime and constrain violence, even if the undertaking itself causes violence from time to time.” *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994).

20. Numerous cases have demonstrated that there are special rules of law that apply to police conduct disputes involving use of force. See, e.g., *Knox v. N.C. Criminal Justice Education and Training Standards Commission*, 2014 WL 10794970. *Knox* provides an excellent review of those principles. See Conclusions 23-30.

21. The central issue in an alleged police misconduct dispute is whether an objectively reasonable officer *could have reasonably believed* that the action taken was appropriate under the circumstances. See N.C. Gen. Stat. 15A-401(d) and the interpreting decisional law. See, e.g., *Turner v. City of Greenville*, 197 N.C. App. 562, 677

S.E.2d 480 (2009) (justification for police conduct depends upon based what the officer “reasonably believes . . .”); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (could have believed standard); *Prior v. Pruett*, 550 S.E.2d 166, 168 (N.C. App. 2001) (“could have believed” standard); *Pittman v. Nelms*, 87 F.3d 116, 120 (4th Cir. 1996) (could have believed standard).

22. Courts now routinely apply the “could have believed” standard in police conduct disputes. In *Hunter v. Bryant*, 502 U.S. 224, 227 (1991), the United States Supreme Court adopted the “could have believed” standard, which absolves the officer of liability if a reasonable officer could have believed [the conduct in issue] to be lawful” Our Court of Appeals explained that North Carolina law regarding use of force provides:

An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest . . . the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appear to him at the time of the arrest.

State v. Anderson, 40 N.C. App. 318, 321, 253 S.E.2d 248 (1979). An officer “has discretion to determine the amount of force required under the circumstances as they appear to him at the time he acted.” *Todd v Creech*, 23 N.C. App. 537, 209 S.E.2d 293, (1974); see *Myrick v. Cooley*, 91 N.C. App. 209, 371 S.E.2d 492 (1988).

23. North Carolina common law recognizes that “an officer is presumed to be acting lawfully while in the exercise of his official duties.” *State v. Anderson*, 253 S.E. 2d 48, 52 (N.C. App. 1979).

24. The Supreme Court of North Carolina has held that it is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging the validity of public officials’ actions to overcome this presumption by competent and substantial evidence. *Leete v. Cty. of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995).

25. The reasonableness of arrest and force decisions are predicated upon what the officer on the scene perceived. See, e.g., *Graham v. Connor*, 490 U.S. 386, 395 (1989), which explained: “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”

26. In *Saucier v. Katz*, 533 U.S. 194, 205 (2001), the United States Supreme Court reaffirmed the doctrine of *mistaken beliefs* as an insulating defense. As *Saucier* explained:

[P]olice officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation, the reasonableness of the officer’s belief as to the appropriate level of force should be judged from that on-scene perspective. We set out a test that cautioned against the “20/20 vision of hindsight: in favor of deference to the judgment of reasonable officers on the scene.

If an officer reasonably, but mistakenly believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.

27. The evaluation of use of force and arrest decisions involve an *objective* standard. *Scott v. Harris*, 550 U.S. 372, 381 (2007) (“The question we need to answer is whether Scott’s actions were objectively reasonable.”); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”).

28. Substantial evidence in the record established that the drawing and pointing of weapons by police officers are an approved technique and a common practice among law enforcement in order to assist other officers in making an arrest and in deterring subjects from escalating or continuing inappropriate behaviors.

29. On January 16, 2017, both Sgt. Nobles and Petitioner pointed their weapons at Mills during the apprehension and subduing of Mills as a part of their legitimate law enforcement functions in an ongoing police operation. Sgt. Nobles and Petitioner reasonably believed that the minimum force employed was necessary. Petitioner had a reasonable basis and good faith belief that it was appropriate to assist Sgt. Nobles in the apprehension and subduing of Mills. There was legal and factual justification for the pointing of their weapons at Mills. Petitioner pointed his service pistol at Mills in order to provide cover for Sgt. Nobles while Nobles was attempting to subdue Mills during an attempted handcuffing.

30. Substantial and credible evidence including the testimony of Petitioner, Lt. Thompson, Sgt. Nobles, Deputy White, and Larry Williams all demonstrated that Petitioner did not commit an Assault by Pointing a Gun against Mr. Mills in assisting Sgt. Nobles apprehend Mills, including when Petitioner pointed his pistol at the back of Mills’ head. Petitioner properly exercised the force-related discretion afforded to him by N.C. Gen. Stat. 15A-401(d) and N.C. Gen. Stat. § 20-114(b) and was legally entitled as a Deputy Sheriff to point his pistol at Mr. Mills. Such force-related discretion was also reasonable and appropriate.

31. Nonetheless, Petitioner admitted at hearing that he grabbed Mr. Mills by the shirt collar and lifted him off the ground. Sgt. Nobles’ dash camera footage corroborated that admission, in addition to showing that Petitioner pointed his pistol at Mills when he

grabbed Mills' Shirt. There was no legitimate, law enforcement reason for Petitioner to grab Mills by the shirt collar and point his gun at Mills. Mills was subdued and handcuffed, and other law enforcement professionals were on scene to ensure officer safety. Based on that evidence, Petitioner committed an Assault by Pointing a Gun at Clint Dale Mills on January 16, 2017.

Simple Assault

32. The offense of Simple Assault, in violation of N.C. Gen. Stat. § 14-33, is classified as a Class A Misdemeanor pursuant to 12 NCAC 10B .0103(10)(a) and the North Carolina Department of Justice Class B Misdemeanor Manual, 2016 Comprehensive Edition. The period of denial for a violation of Rule .0204(d)(1) is not less than five years. 12 NCAC 10B .0205(2)(a).

33. The elements of Simple Assault, in violation of N.C. Gen. Stat. §14-33 are satisfied when a person: (1) commits an assault (2) on another. Jessica Smith, *North Carolina Crimes: A Guidebook on the Elements of Crime*, (7th Edition, 2012), p. 112.

34. Assault is defined by common law. An assault occurs when (1) the defendant shows an apparent ability to inflict injury (even if there is no actual ability); (2) the act is such that a reasonable person would fear harm from it; and (3) the act causes the victim to do something the victim would not have done or to not do something he or she would have done, such as leaving a place or taking a different route. *State v. Roberts*, 270 N.C. 655, 658 (1967).

35. Sgt. Nobles' dash cam footage and testimony from other officers on the scene on January 16, 2017 showed that Petitioner and Sgt. Nobles performed a two-person extraction, common in law enforcement, to remove Clint Dale Mills from his car. Sgt. Nobles' dash cam video and testimony at hearing demonstrated that Petitioner lunged toward Mills with his foot. While there was no evidence proving that Petitioner kicked Mills in the head, substantial evidence established that Petitioner lunged in towards Clint Dale Mills with his foot and made contact with Mills' shoulder and lower neck area. Mills was unarmed, handcuffed, lying face down on the ground, and surrounded by other law enforcement to assist in effectuating Mills' arrest. Under those circumstances, Petitioner committed a Simple Assault on Mr. Mills.

36. On September 1, 2017, Petitioner pled "No Contest" to one count of Simple Assault on Clint Dale Mills in violation of N.C. Gen. Stat. § 14-33 where the criminal summons for such case indicated that Petitioner "kicked Mills in the head after he was handcuffed." The Court ordered a Prayer for Judgment Continued upon payment of fines and court costs.

37. Pursuant to 12 NCAC 10B .0205(3)(d), the period of sanction for commission of a Simple Assault is "an indefinite period, but continuing as long as the stated deficiency, infraction or impairment continues to exist." However, Respondent Commission may either reduce or suspend the periods of sanction or substitute a

probationary period in lieu of revocation, suspension or denial after an administrative hearing “when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension.

38. Substantial evidence at hearing showed that on January 16, 2017, Clint Dale Mills’ continuing course of actions including, but not limited to, spinning out of Petitioner’s driveway, driving at high rate of speed for 13 miles, and refusing to respond to Petitioner’s questions whether Mills had harmed Petitioner’s family, caused Petitioner to become angry, traumatized and fearful. In Dr. Artigues’ opinion, Petitioner was in such a traumatized state that he was nearly at the point of disassociating himself from reality. Other officers at the traffic stop noticed Petitioner “wasn’t his normal character. He appeared to be just out of character.”

39. Petitioner clearly used poor judgment during the January 16, 2017 incident involving Clint Dale Mills, especially for someone with 17 years of law enforcement experience. However, the extenuating and traumatic circumstances existing that night warrant a lesser sanction than denial or revocation of Petitioner’s certification.

Good Moral Character

40. 12 NCAC 10B .0301(a)(8) requires that every justice officer certified in North Carolina shall be of good moral character.

41. 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 meet or maintain any of the minimum employment standards required by 12 NCAC 10B .0300.

42. The United States Supreme Court has described the term “good moral character” as being “unusually ambiguous.” In *Konigsberg v. State*, 353 U.S. 252, 262-63 (1957), the Court explained:

instrument for arbitrary and discriminatory the term good moral character . . . is by itself . . . unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous denial . . .

(Emphasis added).

43. The term good moral character “by itself, is unusually ambiguous,” 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).

44. “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).

45. “Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. However, if especially egregious, even a single incident could suffice to find that an individual lacks good moral character in places of clear and especially severe misconduct.” *Id.* at 59, 253 S.E.2d at 920 (emphasis added).

46. The North Carolina Supreme Court recognized in *In re Legg*, 325 N.C. 658, 673, 386 S.E.2d 174, 182 (1989), that “fundamental attributes of good moral character include the maturity and professional discipline necessary to accept responsibility and perfect the actions required” to carry out professional responsibilities properly. That Court noted that the purpose of withholding certifications is not to punish the candidate but to protect the public and preserve the integrity of the profession subject to licensure. *Id.*

47. Applying those criteria here, the evidence demonstrates that Petitioner met each of those criteria and other moral character components which demonstrated Britt’s good moral character. The totality of the evidence demonstrates that Petitioner Donald Britt is a person of very good moral character. This conclusion is predicated upon the findings of fact herein including the fact that Petitioner has made valuable contributions to his community from his longtime service as a law enforcement officer and he has also served as a firefighter. Petitioner has earned a reputation as a person and a law enforcement officer of very good moral character.

48. The only evidence regarding a lack of good moral character was the isolated incident occurring on January 16, 2017 when Petitioner used poor judgment but was under extremely emotional pressure given the circumstances. Since that incident, Petitioner has demonstrated his good moral character by his resumed service to his community in the Bladen County Sheriff’s Department, where he has been promoted and serves as a Field Training Officer.

49. The conduct alleged in this case is insufficient to rise to the required level of proof to establish that Petitioner lacks good moral character. Under *In Re Rogers*, an instance of conduct amounting to poor judgment, especially where there is no malice or bad faith, would not ordinarily rise to the high level required to reflect a lack of good moral character.

50. The totality of the facts and circumstances surrounding Petitioner’s conduct, in light of his exemplary history of good moral character and professionalism in law enforcement, does not warrant a finding that Petitioner lacks good moral character. The substantial evidence of Petitioner’s very good moral character is clear and compelling and demonstrates that there is no proper basis for revocation or denial of Petitioner’s law enforcement certification for that reason.

Commission or Conviction of a Combination of Four or More Class A Or Class B
Misdemeanor Offenses

51. 12 NCAC 10B .0204(d)(5) states that the commission may revoke, suspend, or deny the certification of a Justice Officer who has committed or been convicted of any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as Class A misdemeanors or defined in 12 NCAC 10B .0103(10)(b) as Class B misdemeanors regardless of the date of commission or conviction.

52. Respondent failed to prove Petitioner had committed or been convicted of a combination of four or more crimes or unlawful acts as defined in 12 NCAC 10B .0103.

Failure to Maintain Minimum Standards, Not Notifying Respondent, In Writing,
Within Five Business Days, of a Criminal Charge

53. 12 NCAC 10B .0301(a)(7) states that every justice officer certified in North Carolina shall, within five business days, notify the Standards Division and the appointing department heard in writing of all criminal offenses with which the officer is charged. The period of denial for a violation of Rule .0301(a)(7) is not less than 5 years. 12 NCAC 10B .0205(2)(e).

54. 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 meet or maintain any of the minimum employment standards required by 12 NCAC 10B .0300. The period of denial for a violation of Rule .0301(a)(7) is not less than 5 years. 12 NCAC 10B .0205(2)(e).

55. Substantial evidence presented at the administrative hearing establishes that Petitioner failed to notify the Commission of his criminal charges within five business days and, therefore, failed to maintain the minimum employment standard set out in 12 NCAC 10B .0300.

56. The Commission may either reduce or suspend the periods of sanction or substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing when extenuating circumstances are presented at the administrative hearing that warrant such a reduction or suspension.

57. Petitioner reasonably, though incorrectly, relied on Richard Squires' statement that he did not need to take any other action regarding his pending charges after Petitioner notified Mr. Squires of his pending criminal charges. While Respondent's proposed denial of Petitioner's justice officer certification is supported by substantial evidence, these circumstances justify a lesser sanction.

58. Based upon the mitigating circumstances presented at hearing, the undersigned recommends Respondent impose a lesser sanction than revocation/denial

of Petitioner's justice officer certification for committing one count of Simple Assault and one count of Assault by Pointing at Gun at Clint Mills on January 16, 2017.

59. The mitigating circumstances in this case include Petitioner's 17 years in law enforcement without any prior disciplinary actions against his certification, Petitioner's acknowledgment and taking responsibility for his poor judgment, and the strong letters of support by Chief Deputy Larry Guyton and Master Sergeant Darrell Rogers. Since being employed with the Bladen County Sheriff's Office, Petitioner has become one of their top training officers. Additionally, the testimony by Lt. Barrett Thompson, Sgt. Darrell Rogers, Deputy Wesley White, Andrew Powell, Bobby Faulk, and Larry Williamson regarding Petitioner's good work ethic, professionalism, and how Petitioner is well respected by his law enforcement peers and supervisors warrant a lesser sanction be imposed against Petitioner's certification. One isolated instance should not define a 17-year law enforcement career with no prior disciplinary actions under these extenuating circumstances.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned proposes that Respondent **ISSUE** a formal written reprimand to Petitioner and **SUSPEND** Petitioner's justice officer certification for one year, with such suspension being suspended, provided: Petitioner attend a mandatory Crisis Intervention Training for law enforcement officials, and remain in compliance with all federal and state laws, including Respondent's rules.

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.

This the 22nd day of September, 2020.



Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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Attorney For Respondent

This the 22nd day of September, 2020.



Jerrod Godwin
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