

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 DOJ 01745

<p>Xzabein LaNique Carter Petitioner,</p> <p>v.</p> <p>NC Criminal Justice Education and Training Standards Commission Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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On August 25, 2020, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina, pursuant to N.C. Gen. Stat. § 150B-40(e), and Respondent's requested designation of an Administrative Law Judge to preside at a contested case hearing in this matter under Article 3A, Chapter 17C of the North Carolina General Statutes.

APPEARANCES

For Petitioner: Xzabein LaNique Carter, *Pro Se*
Raleigh, North Carolina

For Respondent: Brenda Rivera
Assistant Attorney General
North Carolina Department of Justice
Special Prosecutions and Law Enforcement Section
Raleigh, North Carolina

ISSUE

Did Respondent have substantial evidence to support the proposed suspension of Petitioner's certification as a correctional officer for not less than three years based upon the commission of the DAC misdemeanor of Assault on a Female in violation of N.C. Gen. Stat. § 14-33(c)(2)?

RULES AND STATUTES AT ISSUE

12 NCAC 09G .0102(10)(d); 12 NCAC 09G .0504(b)(3)
12 NCAC 09G .0504(c); 12 NCAC 09G .0505(b)(1)
N.C. Gen. Stat. § 14-33(c)(2)
N.C. Gen. Stat. § 17C-10

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent: 1 - 13

FINDINGS OF FACT

Procedural Background

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, and both parties received notice of hearing.

2. The North Carolina Criminal Justice Education and Training Standards Commission (hereinafter the "Commission) has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify correctional officers, juvenile justice officers, criminal justice instructors, and criminal justice officers and to revoke, suspend, or deny such certification.

3. On January 26, 2016, Respondent awarded certification to Petitioner as a correctional officer with the Division of Adult Correction (hereinafter "DAC") and Juvenile Justice. (Resp. Exs. 10 & 11)

4. At all times relevant to this matter, Petitioner was employed as a correctional officer at Central Prison in Raleigh, North Carolina.

5. On July 31, 2018, Respondent received a Report of Arrest from DAC that Petitioner had been charged with misdemeanor Assault on a Female on July 20, 2018. (Resp. Ex. 9) The Magistrate's Order alleged that Petitioner "unlawfully and willfully did assault Jasmice Shenqeka Thompson . . . by striking her in the face and pushing her from behind causing injury . . . (See p. 4)." (Resp. Ex. 11).

6. By memorandum dated January 28, 2020, Respondent's Probable Cause Committee notified Petitioner that it was considering suspension of Petitioner's correctional officer certification for commission of the DAC misdemeanor - Assault On A Female on July 20, 2018 and would review such proposal on February 19, 2020. (Resp. Ex. 11).

7. Petitioner appeared before the Probable Cause Committee on February 19, 2020 with counsel and presented evidence in defense of maintaining his certification.

8. On February 27, 2020, Respondent's Probable Cause Committee notified Petitioner of its finding that probable cause existed to suspend Petitioner's certification for committing the DAC misdemeanor - Assault on a Female on July 20, 2018. (Resp. Ex. 12).

9. Petitioner timely responded to the notification that the Probable Cause Committee had found probable cause to suspend his certification and properly requested a contested case hearing. (Resp. Ex. 13).

10. On April 17, 2020, pursuant to Petitioner's appeal request, Respondent filed its request for designation of an Administrative Law Judge to hear this matter at an Article 3A contested case hearing with this Tribunal.

July 20, 2018 Incident

11. Petitioner and Jasmice Thompson dated for five or six months until May of 2018. Nonetheless, Petitioner and Ms. Thompson still talked regularly after they stopped dating.

12. Around midnight on July 20, 2018, Petitioner and Ms. Thompson were talking via Snapchat. Ms. Thompson was at her home in Greensboro, North Carolina while Petitioner was at his home in Raleigh, North Carolina. Petitioner invited Ms. Thompson to come over to his apartment.

13. Ms. Thompson got dressed and drove to Raleigh. She arrived at Petitioner's apartment at approximately 3:00 a.m. Petitioner and Thompson talked in Petitioner's bedroom until Petitioner started arguing with Ms. Thompson about her talking to other men. (Resp. Exs. 3 & 4) Petitioner insisted on going through Ms. Thompson's phone, but she refused. Petitioner snatched the phone from Thompson to look at Thompson's recent calls. After Ms. Thompson unlocked her phone, Petitioner called Gary Calero, a correctional officer ("CO") with whom Ms. Thompson had been talking lately. Petitioner became extremely upset while speaking to CO Calero. Ms. Thompson grabbed her belongings to leave, but Petitioner stood in front of the bedroom door preventing her from leaving. When Ms. Thompson approached the door to leave, Petitioner grabbed Thompson by the bag that was on her back, slammed her on the bed, and began choking her and pushing her on the bed with two hands between her neck and chest.

14. Eventually, Petitioner let Ms. Thompson up and told her to leave. Petitioner then followed Thompson out of the apartment. Once outside of the apartment, Petitioner pushed Ms. Thompson. As Ms. Thompson ran down the stairs, Petitioner punched her on the right side of the head.

15. Ms. Thompson ran toward her car to get away from Petitioner. As Ms. Thompson was trying to open her car door, Petitioner tackled her to the ground and began punching her on the right side of her face, knocking off Thompson's glasses. Ms. Thompson screamed for help and heard someone yelling at Petitioner to get off her.

16. When Ms. Thompson got up from the ground, she ran around her car and got away from Petitioner. After running back and forth, Ms. Thompson got into her car, locked the doors, and turned the car on. When Thompson began to pull out from the parking space, Petitioner began running next to the car holding onto the fender until he

fell. Ms. Thompson then pulled back into the parking space. Petitioner damaged the car's side mirror and the fender.

17. Around 5:00 a.m. on July 20, 2018, Raleigh Police Officers Steven Somarriba and Officer Weinheimer responded to an anonymous disturbance call at the Parkwood Village Apartments, 1603 Gorman Street, Raleigh, North Carolina where Petitioner lived. Officer Somarriba arrived first. He saw Petitioner standing next to the driver's door and Ms. Thompson crying in the car. (Resp. Exs. 3 & 4).

18. Officer Somarriba obtained a statement from Ms. Thompson. Officer Somarriba observed injuries on Ms. Thompson's left kneecap and elbows, and slight swelling on her face. (Resp. Ex. 5) Ms. Thompson told Officer Somarriba that Petitioner had punched her on the side of the face and pushed her from behind, making her fall to the ground. Officer Somarriba arrested Petitioner for Assault on a Female. (Resp. Ex. 5).

19. The Magistrate's Order (Wake County case number 18CR213332) alleged that on July 20, 2018, Petitioner "unlawfully and willfully did assault Jasmice Shenqeka Thompson, a female person, by striking her in the face and pushing her from behind causing injury." (Resp. Ex. 6).

20. On October 30, 2018, Ms. Thompson and Officer Somarriba testified in a Wake County District Court trial. Wake County District Court Judge Margaret Phillips Eagles found Petitioner guilty of Assault on a Female and sentenced Petitioner to 75 days in custody. Judge Eagles suspended the sentence for 18 months of supervised probation and ordered Petitioner to pay restitution for the damages to Ms. Thompson's car.

21. Petitioner appealed the judgment to Superior Court. After several continuances in Superior Court, on October 2, 2019, the prosecutor dismissed the case stating, "[v]ictim not present but subpoenaed for Superior Court. Contact attempted multiples times; victim difficult to get in contact with." (Resp. Ex. 6).

22. Ms. Thompson did not appear for the Superior Court trial because she had a flat tire on the way to court. She emailed the prosecutor that day to tell him she was going to be late. However, the prosecutor informed her that he would not be able to keep the trial and judge waiting and that the case would be dismissed. (Resp. Ex. 4).

23. The Office of Special Investigations (OSI) of the Department of Public Safety, Petitioner's employer, initiated an internal investigation of the assault incident. OSI Investigator, George Cooper, submitted his investigative report to supervisors on August 13, 2018. (Resp. Ex. 7)

24. Investigator Cooper found Ms. Thompson and Officer Somarriba to be credible and consistent in their statements that Petitioner assaulted Ms. Thompson. In contrast, Investigator Cooper thought that Petitioner's statements were not credible and were inconsistent.

a. First, Petitioner told Investigator Cooper that he did not invite Ms. Thompson over to his apartment. However, snapshots of Ms. Thompson's phone chats with Petitioner showed that Petitioner did invite her to come to his apartment on July 20, 2018.

b. Second, Petitioner provided two written statements to his employer concerning the assault allegations. On a statement dated July 20, 2018, Petitioner indicated that Ms. Thompson drove off with the car door open, hitting him with the door "causing several injuries to my hand, right hip and knee." (Resp. Ex. 1). In contrast, in his July 27, 2018 statement, Petitioner stated that Ms. Thompson injured his left hand when "Thompson pulled the [bedroom] door causing a small cut between [his] thumb and index finger" and that Ms. Thompson "put[s] the car in drive and hits me with the door."

25. On February 14, 2019, Petitioner received a letter from Central Prison's Deputy Warden, Stephen Waddell, informing Petitioner that he was suspended from employment without pay for three days based on Petitioner's unacceptable personal conduct on July 20, 2018 as noted in Cooper's internal investigation. (Resp. Ex. 8).

26. Respondent's Kevin Wallace investigated the possible rule violations by Petitioner at issue here and prepared a memorandum of his investigation for Respondent's Probable Cause Committee. Wallace's investigation was based upon the (1) Report of Arrest from DOC, (2) the disposition of the criminal Assault on a Female charge in Wake County District Court and Superior Court, (3) Raleigh Police Department's Report from Officers Somarriba and Weinheimer, (4) Ms. Thompson's written statement, (5) Petitioner's written statements, (6) Investigator Cooper's investigative report, and (7) the decision by Petitioner's employer to suspend Petitioner for three days without pay for engaging in unacceptable personal conduct with Ms. Thompson on July 20, 2018. (Resp. Ex. 11)

27. In his written statements to his employer, and at this hearing, Petitioner denied striking or pushing Ms. Thompson to the ground or causing her any harm. Instead, he alleged that Ms. Thompson assaulted him. Petitioner asserted that Ms. Thompson injured his hand with the bedroom door as she was leaving his bedroom and struck his hand, right hip, and knee with her vehicle door when she drove away from Petitioner on July 20, 2018. At hearing, Petitioner used photos he took on July 20, 2018 to illustrate his injuries. However, in his July 20, 2018 statement, Petitioner did not mention that his hand was hurt in the bedroom, but stated that Thompson injured his hand, along with his right hip and knee when she hit him with her car. (Resp. Ex. 1) In his July 27, 2018 second statement to Respondent, Petitioner stated that Ms. Thompson caused a small cut between his thumb and index finger on his left hand when she pulled the bedroom door. (Resp. Ex. 2)

28. While parts of Ms. Thompson's testimony at hearing were inconsistent with her prior written statements to Mr. Cooper and Respondent, those inconsistencies were

insignificant and did not affect the credibility of her overall testimony. Thompson credibly testified that she had scratches and scrapes on her knees and elbows, that the right side of her face was swollen for a week, and that Petitioner was the one who caused those injuries.

29. Based upon their observations and interview of Ms. Thompson on July 20, 2018, Officer Weinheimer's interview of Petitioner on the scene, and Ms. Thompson's injuries, Officers Somarriba and Weinheimer concluded that Petitioner was the primary aggressor on July 20, 2018.

30. At hearing, Investigator Cooper opined that though Petitioner denied assaulting Ms. Thompson, Petitioner's statements did not agree with other evidence Cooper collected. Mr. Cooper received screenshots of the outgoing calls from Thompson's cell phone to Correctional Officer Calero on July 20, 2018. Petitioner told Investigator Cooper that he did not invite Ms. Thompson over to his apartment, but snapshots from Ms. Thompson's cell phone showed that Petitioner did invite Thompson to his apartment on July 20, 2018. Based upon Cooper's interviews of the Raleigh Police Officers, of Correctional Officer Calero, and of Ms. Thompson, Investigator Cooper concluded that Petitioner committed an Assault on a Female, Ms. Thompson, on July 20, 2018.

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 of Law are Findings of Fact, they should be so considered without regard to the given labels.

3. The North Carolina Criminal Justice Education and Training Standards Commission (hereinafter the "Commission") has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify correctional officers, juvenile justice officers, criminal justice instructors, and criminal justice officers and to revoke, suspend, or deny such certification.

4. On February 27, 2020, Respondent's Probable Cause Committee notified Petitioner that it had found probable cause to believe that Petitioner committed the "DAC Misdemeanor" offense of Assault on a Female on July 20, 2018, in violation of N.C. Gen. Stat. § 14-33(c)(2), when Petitioner "unlawfully and willfully did assault Jasmice Shenqeka Thompson by striking her in the face and pushing her from behind causing injury." Resp. Ex. 12.

Burden of Proof

5. 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).

6. 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.

7. 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.

8. 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.

9. 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 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 Court in *Peace* stated:

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.

10. 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 DAC Misdemeanor – Assault on a Female

11. 12 NCAC 09G .0504(b)(3) states that “[t]he Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer: . . . has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification.”

12. 12 NCAC 09G .0102(10)(d) classifies Assault on a Female under N.C. Gen. Stat. § 14-33(c)(2) as a “DAC Misdemeanor” offense.

13. N.C. Gen. Stat. § 14-33(c)(2) states:

Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

(2) Assaults a female, he being a male person at least 18 years of age.

14. Pursuant to 12 NCAC 09G .0505(b)(1), when the Commission suspends or denies the certification of a correctional officer, the period of sanction shall be not less than three years for the commission or conviction of a DAC misdemeanor.

15. On July 20, 2018, Petitioner committed the offense of Assault on a Female in violation of N.C. Gen. Stat. § 14-33(c)(2) against Ms. Thompson when he struck her on the face and tackled her to the ground. That offense is a DAC misdemeanor as defined in 12 NCAC 09G .0102(10)(d).

16. Conviction of an offense is not required for the Undersigned to consider whether Petitioner committed an offense. In this case, the Undersigned determines there is sufficient evidence to support Respondent’s decision to suspend Petitioner’s correctional officer certification for not less than three years pursuant to 12 NCAC 09G .0505(b)(1).

17. The substantial evidence produced at hearing proved that Petitioner committed the DAC misdemeanor Assault on a Female on July 20, 2018. Ms. Thompson consistently advised Officer Somarriba, Investigator Cooper, and this Tribunal that she

was injured on July 20, 2018 and that Petitioner was the person who caused her injuries. In addition, the Honorable Judge Margaret Phillips Eagles from Wake County District Court found Petitioner guilty of Assault on a Female beyond a reasonable doubt based in part on the testimony of Ms. Thompson and Officer Somarriba. Officer Somarriba and Investigator Cooper provided credible testimony about Ms. Thompson's statements to them during their investigation.

18. At hearing, Petitioner failed to present substantial evidence that he did not commit the DAC misdemeanor of Assault on a Female on July 20, 2018. Although Petitioner denied all the allegations against him, his testimony and prior statements were not credible and were inconsistent.

19. The findings of Respondent's Probable Cause Committee were supported by the competent and substantial evidence and were not arbitrary and capricious.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby proposes that Respondent Commission **SUSPEND** Petitioner's correctional officer certification for a period of not less than three years pursuant to 12 NCAC 09G .0505(b)(1).

NOTICE

The **North Carolina Criminal Justice 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 3rd day of November, 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:

Xzrabein Carter
x.carter0960@gmail.com
Petitioner

Brenda Rivera
NC Department of Justice
brivera@ncdoj.gov
Attorney For Respondent

This the 3rd day of November, 2020.



Jerrod Godwin
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