

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 SOS 04857

Matthew Wayne Webber Petitioner, v. Department of the Secretary of State Respondent.	FINAL DECISION
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This contested case came on for hearing before Chief Administrative Law Judge Julian Mann, III on February 3, 2020 in Mecklenburg County, Charlotte, North Carolina.

APPEARANCES

For the Petitioner: Jocelyn Davis Singletary, Esq.
Singletary Law Firm, PLLC
4801 East Independence Boulevard, Suite 501
Charlotte, North Carolina 28212

For the Respondent: Jeremy D. Lindsley, Esq.
Assistant Attorney General
North Carolina Department of Justice
114 West Edenton Street
Raleigh, North Carolina 27602

ISSUE

Whether Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or otherwise substantially prejudiced Petitioner's rights when Respondent denied Petitioner's application to be commissioned as a North Carolina Notary Public where Petitioner was convicted in state and federal courts for crimes involving dishonesty or moral turpitude.

JOINT ORDER ON FINAL PRETRIAL CONFERENCE

On February 3, 2020, counsel for Petitioner and Respondent submitted a Joint Order on Final Pretrial Conference which was accepted and entered into the record by the undersigned. The parties agreed as follows:

In addition to other stipulations contained herein, the parties stipulate and agree with respect to the following undisputed facts:

- a. Defendant is an agency of the State of North Carolina and administers Chapter 10B of the General Statutes which govern notaries public
- b. Petitioner applied to become a North Carolina Notary Public on May 30, 2019.
- c. On July 1, 2019, Respondent denied Petitioner's application because Petitioner had been convicted of two counts of indecent liberties with a minor in September 1993 and one federal count of receiving child pornography in January 1996.
- d. Petitioner candidly and truthfully acknowledged these convictions in his original Notary application.
- e. N.C. Gen. Stat. § 10B-5(d) states "the Secretary may deny an application for commission or recommission if any of the following apply to an applicant:... (2) The applicant's conviction or plea of admission, or nolo contendere to a felony or any crime involving dishonesty or moral turpitude."
- f. 18 N.C.A.C. 07B .0201(6) & (7) state that the offenses of child molestation and child pornography are crimes of dishonesty and moral turpitude.
- g. Petitioner was released from Federal supervised release on March 12, 2002.
- h. Petitioner was released from the North Carolina Sex Offender Registry in May 2006.
- i. The provision of N.C. Gen. Stat. § 10B-5(d)(2) barring the commissioning of any applicant who has been released from custody or probation within 10 years of the application does not apply to Petitioner.
- j. 18 N.C.A.C. 07B .0901 states:

When determining whether to deny an application or take disciplinary action against a notary, the Director may consider a variety of factors including:

- (1) Nature, number and severity of any acts, offenses, official misconduct or crimes under consideration;
- (2) Evidence pertaining to the honesty, credibility, truthfulness, and integrity of the applicant or notary public;
- (3) Actual or potential monetary or other harm to the general public, group, individual, or client;

- (4) History of complaints received by the Department;
- (5) Prior disciplinary record or warning from the Department;
- (6) Evidence in mitigation;
- (7) Evidence in aggravation;
- (8) Occupational, vocational, or professional license disciplinary record;
- (9) Evidence of rehabilitation, NOTE: Examples include reference letters and proof of class attendance;
- (10) Criminal record;
- (11) Reports from law enforcement agencies;
- (12) Willfulness
- (13) Negligence;

- k. On November 18, 2019, Respondent filed a Motion for Summary Judgment, contending that there was no genuine issue of material fact and that the Respondent was entitled to judgment as a matter of law.
- l. On December 5, 2019, Administrative Law Judge Selina Malherbe issued an order denying Respondent’s Motion for Summary Judgment.

APPLICABLE STATUTES, RULES AND POLICIES

N.C. Gen. Stat. § 10B
 N.C. Gen. Stat. § 150B
 18 NCAC 07B.0201
 18 NCAC 07B.0901
 27 NCAC 02.1.5(a)
 27 NCAC 02.5.03
 27 NCAC 02.5.05(F)
 27 NCAC 02.7.01

EXHIBITS

The following exhibits, without objection, were admitted into evidence on behalf of Petitioner:

- 1. Certificate of Moral Character from Rev. Dr. Timothy Koch, Esquire;
- 2. Certificate of Moral Character from Rev. Dawn Flynn;
- 3. Certificate of Moral Character from Mr. Earnest Eich, IV;
- 4. Letter from Dr. William Tyson, Ph.D.;
- 5. Letter from Dr. Robert Custrini, Ph.D.;
- 6. Letter from Ms. Ann Navarro, MA, LPC;
- 7. Copy of Affidavit of Rev. Dawn Flynn;
- 8. Copy of Affidavit of Mr. Michael Kendall Warner.

The following exhibits, without objection, were admitted into evidence on behalf of Respondent:

- 1. Petitioner’s Application for Initial Appointment as a North Carolina Notary Public, received by Respondent on June 12, 2019, and all documents submitted therewith, including:

- a) Explanation of Criminal History signed by Petitioner;
 - b) Mecklenburg County Criminal Record Search;
 - c) Certificate of Restoration or Citizenship filed in Mecklenburg County;
 - d) Federal Report and Order Terminating Probation / Supervised Release;
 - e) Letter from Probation Officer Lisa G. Morris to Petitioner re: termination of supervision;
 - f) Certificate of Moral Character of Rev. Timothy K. Koch, Esq., Ph.D.;
 - g) Certificate of Moral Character of Rev. Dawn Flynn;
 - h) Certificate of Moral Character of Earnest Paul Eich, IV.
2. Letter from Tina Dupree, Director Certification and Filing Division, North Carolina Department of the Secretary of State, to Petitioner re: denial of application for commission as notary public.
 3. Excerpts of law, including:
 - a) N.C. Gen. Stat. § 10-B3;
 - b) N.C. Gen. Stat. § 10-B5;
 - c) 18 NCAC 07B.0201;
 - d) 18 NCAC 07B.0901.

WITNESSES

The following witnesses were called to testify by Petitioner:

Mr. Matthew Wayne Webber, Petitioner
Reverend Dawn Jenifer Flynn
Mr. Michael Kendall Warner

The following witnesses were called to testify by Respondent:

Mr. Ozie Stallworth, Director of the Electronic Notarization and Notary Enforcement Division,
North Carolina Department of the Secretary of State
Ms. Tina Dupree, Director of the Certification and Filing Division, North Carolina Department of
the Secretary of State

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making the findings of fact, the undersigned has weighed all the evidence and has assessed the credibility of each witness by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. To the extent that any portion of the Findings of Fact constitutes mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as a Conclusion of Law. Wherefore, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner is a citizen and resident of Mecklenburg County, North Carolina. Respondent is an agency of the State of North Carolina and as a member of the Council of State, a Department of the State of North Carolina.
2. Pursuant to Chapter 150B of the North Carolina General Statutes, both parties are properly before the Office of Administrative Hearings, in that jurisdiction and venue are proper, both parties received the Notice of Hearing, and Petitioner received the notification of denial of his application for commission as a notary public by letter mailed by Respondent on July 1, 2019. (Exhibit R2)
3. Petitioner presently serves as a paralegal with the Singletary Law Firm, Charlotte, North Carolina. Petitioner applied to be commissioned as a North Carolina Notary Public on or about June 14, 2019. (Exhibits R1, PF) Petitioner has in his current work environment many times observed the work of a notary and believes he can perform those duties. (Tr. p. 29).
4. Respondent, North Carolina Department of the Secretary of State, is responsible for administering and enforcing the North Carolina Notary Public Act (the “Act”), N.C. Gen. Stat. §§ 10B-1 *et seq.* Respondent’s Notary Division exercises jurisdiction over both licensing of and disciplinary actions involving notaries public.
5. N.C. Gen. Stat. § 10B-5(d)(2) provides:
 - d) The Secretary may deny an application for commission or recommission if any of the following apply to an applicant:
 2. The applicant’s conviction or plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude. **In no case may a commission be issued to an applicant within 10 years after release from prison, probation, or parole, whichever is later.** (Emphasis added)
6. When applying for a commission as a notary public, an applicant must indicate if he has been convicted by any court of a felony or misdemeanor crime. If the applicant answers in the affirmative, the applicant must also submit a letter of explanation, a certified criminal background check, judgment and probation release letters, evidence of restoration of citizenship, and other information about the conviction(s). An applicant must also submit three certificates of moral character from individuals who can provide a statement as to why the criminal convictions should not prevent the applicant from being appointed as a notary.

7. Petitioner accurately disclosed in his application for commission as a Notary Public that he had been convicted of the following offenses:
 - a) Twenty-seven years ago, Petitioner was convicted of two counts of taking indecent liberties with a child in September 1993 in Mecklenburg County, North Carolina. Petitioner was placed on probation. Petitioner violated the terms of his probation in October 1994. Petitioner was incarcerated until May 1996.
 - b) Twenty-four years ago, Petitioner pled guilty under a plea agreement and was sentenced in federal court on one count of receiving child pornography in January 1996.
8. Eighteen years ago, Petitioner was released from Federal Probation on March 15, 2002. For eight years, Petitioner has not been subject to the mandatory 10-year statutory prohibition for criminal misconduct, and for eight years has been eligible to be commissioned as a North Carolina Notary Public.
9. With his application, Petitioner submitted a letter of explanation of the criminal convictions, criminal background checks, a letter regarding termination and release from probation, a document granting a restoration of citizenship, and three certificates of moral character. (Exhibit R1).
10. On July 1, 2019, Respondent denied Petitioner's application to be commissioned as a Notary Public. In her correspondence, Tina Dupree, Director of the Certification and Filing Division, recited the following as the grounds for Petitioner's denial:

In the application process, you provided information indicating that you were found guilty of two (2) COUNTS OF INDECENT LIBERTIES WITH CHILD, and you were found guilty of two (2) COUNTS OF (F) SEX OFFENSES. Because you were found guilty of two (2) COUNTS OF INDECENT LIBERTIES WITH CHILD and two (2) COUNTS OF (F) SEX OFFENSES, which are considered crimes of moral turpitude as provided by 18 North Carolina Administrative Code 07B.0201(b)(6)(7), therefore the Department of the Secretary of State is respectfully denying your application to become a Notary Public under N.C. Gen. Stat. §10B-5(d)(2). (Exhibit R2)
11. Petitioner appealed this denial and filed a Contested Case with the North Carolina Office of Administrative Hearing on August 25, 2019, alleging that Respondent erred, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or otherwise substantially prejudiced his rights when it decided to deny his application to be commissioned as a North Carolina Notary Public.

12. On November 18, 2019, Respondent filed a Motion for Summary Judgement in this contested case. Respondent claimed that, “there exist no genuine issues of material fact” and that they were “entitled to judgment as a matter of law.”
13. In this Motion for Summary Judgement, Respondent quoted part of 18 NCAC 07B.0901. Title 18 of the North Carolina Administrative Code addresses Notary Publics, and section 07B.0901 is entitled “Factors Considered in Disciplinary Actions.”
14. The text of 18 NCAC 07B.0901 is as follows:

When determining whether to deny an application or take disciplinary action against a notary, the Director may consider a variety of factors including:

- a) Nature, number and severity of any acts, offenses, official misconduct or crimes under consideration;
- b) Evidence pertaining to the honesty, credibility, truthfulness, and integrity of the applicant or notary public;
- c) Actual or potential monetary or other harm to the general public, group, individual, or client;
- d) History of complaints received by the Department;
- e) Prior disciplinary record or warning from the Department;
- f) Evidence in mitigation;
- g) Evidence in aggravation;
- h) Occupational, vocational, or professional license disciplinary record;
- i) Evidence of rehabilitation. NOTE: Examples include reference letters and proof of class attendance;
- j) Criminal record;
- k) Reports from law enforcement agencies;
- l) Willfulness;
- m) Negligence.

15. On November 30, 2019, Petitioner filed a pleading in Opposition to Respondent’s Motion for Summary Judgement. Relying mostly on 18 NCAC 07B.0901, Petitioner asserted that “genuine issues of material fact” did exist and that the Respondent was not “entitled to judgment as a matter of law.”

16. With his Opposition to Respondent’s Motion for Summary Judgement, Petitioner submitted the following:
 - a) Letter from Dr. William Tyson, Ph.D.;
 - b) Letter from Ms. Ann Navarro, MA, LPC;
 - c) Letter from Dr. Robert Custrini, Ph.D.;
 - d) Affidavit from Reverend Dawn Flynn; and

e) Affidavit for Mr. Michael Kendall Warner.

17. In the certificate of moral character submitted by Rev. Dawn Flynn, Rev. Flynn indicated that she was unaware of Petitioner's criminal convictions. However, Rev. Flynn stated that she checked this box on the form in error and that she was, in fact, aware of Petitioner's criminal history. (Tr. p. 33).

18. Respondent's Motion for Summary Judgement was denied on December 5, 2019.

19. Petitioner has been honest, accurate, and truthful in his initial Notary application dated June 4, 2019.

20. Petitioner submitted the following mitigating factors under 18 NCAC 07B.0901 (6). Specifically, Petitioner noted¹:

- a) The remorse the Petitioner feels for the crimes he committed for his victims and their families. Petitioner acknowledged the harm and injuries that he caused. (Tr. pp 18-21)
- b) Petitioner was 17 years old at the time the first offenses occurred and 19 years old at the time of his last offense;
- c) Over twenty-five years has transpired since the first offense;
- d) Petitioner has not been arrested or convicted of any serious offenses, except one "traffic ticket" since his last arrest;
- e) It has been over 24 years since the last conviction;
- f) It has been over 17 years since the Petitioner was released from Federal Supervised Release;
- g) It has been over 13 years since Petitioner was released from the North Carolina Sex Offender Registry;
- h) Petitioner completed all court mandated treatment and then voluntarily continued to attend specific Sex Offender treatment for more than 16 years.
- i) Petitioner has conscientiously worked to participate in and receive professional counseling "to rehabilitate" himself. (Tr. p. 17)

21. Pursuant to 18 NCAC § 07B.0901, Petitioner submitted evidence of rehabilitation. Specifically, Petitioner offered the following:

¹ All these listed time periods are of November 30, 2019, when the Opposition to Respondent's Motion for Summary Judgement was filed.

- a) Correspondence dated November 13, 2019, from Dr. William Tyson, PhD. Licensed Psychologist, NC #1169 of Blue Ridge Behavior Systems, Inc. of Charlotte, N.C., noting treatment in Sex Offender Recovery Program for 17 years from 1/9/1999 to 6/23/2016. Petitioner's attendance in the treatment program was court ordered from 1/9/1999 until 3/15/2002. Petitioner, thereafter, continued to attend voluntarily for a period of over 14 years until 6/23/2016. Dr. Tyson noted that his treatment...“was coordinated with other providers” and Petitioner's “[a]ttendance was regular and participation more than adequate.” (Exhibit PD) (Tr. p. 13)
 - b) Correspondence dated October 30, 2019, from Ms. Ann Navarro, MA, LPC, of SORT (Sex Offender Relapse Prevention Treatment) noting voluntary attendance (bi-weekly) in the SORT program from August 2, 2016 until July 17, 2018. Ms. Navarro noted: “Attendance, participation and payment for services were excellent.” “Mr. Webber voiced recognition of his offense... and full awareness of the potential consequences should he re-offend.” “At the time he completed group, he was considered to have reached maximum benefit of sex offender treatment...” (Exhibit PE) (Tr. p. 13)
 - c) Correspondence dated November 24, 2019, from Dr. Robert Custrini, PhD, Licensed Psychologist, noting and documenting Petitioner continues presently to seek individual counseling. Dr. Custrini notes: “I have been seeing Mr. Matthew Webber in individual therapy since November of 2015.” Based on my knowledge of Mr. Webber, I am comfortable recommending that he be approved for certification as a notary without any prescribed conditions. Mr. Webber has paid his debt to society and is currently employed as a paralegal. He is a responsible individual. (Exhibit PF) (Tr. p. 15).
 - d) Petitioner, in addition to counseling sessions with Dr. Custrini, sees Dr. Morris McEwen, MD, for psychiatric treatment and medications. (Tr. p. 16)
 - e) At the date of this contested case hearing, Petitioner had taken voluntary rehabilitation through individual counseling and psychiatric treatment for 22 years and voluntary sex offender counseling for 18 years. (Tr. p. 16)
22. Ms. Dupree in her testimony responds that letters from a psychologist would not necessarily lead to the decision that an applicant would be granted a notary commission. (Responding “absolutely not.”) (Tr. pp 92-93).
 23. Petitioner was a long-time member and lay leader at New Life Metropolitan Community Church. Petitioner had served in many leadership roles at New Life MCC and currently serves as Treasurer.
 24. Petitioner has been employed as a paralegal since 2017.
 25. Reverend Flynn and Mr. Warner testified to the Petitioner's Good Moral Character, noting his involvement in his local church for over two decades. Petitioner has held numerous

leadership roles within the church and currently serves as the church's treasurer, in charge of the entire church's finances. Reverend Flynn has been a pastor for 23 years and has served as Petitioner's pastor for the past six years. Based upon Reverend Flynn's testimony:

- a) Petitioner is dedicated to his church, a hard worker, faithful servant, trustworthy, honest, knowledgeable, open to learning, a changed person, active in his community, serves on his church's Board of Directors, formerly the church's financial secretary, and currently the church treasurer (Tr. pp. 30-34)
- b) Reverend Flynn certified under oath that Petitioner "possesses the high standards of moral character you would expect from a notary." (Exhibit R1) (Tr. p. 33).

Michael Kendall Warner has known Petitioner as church members for 22 years. Based upon the testimony of Mr. Warner:

Petitioner's a good person, worthy of being a notary public, a member of the Board of Directors, has been financial secretary, now treasurer, and community advocate and volunteer. (Tr. pp. 34-37).

Two additional individuals, the Reverend Timothy R. Koch, Esq., Ph.D and Ernest Paul Eich IV, both certified under oath that Petitioner "possesses the high standards of moral character you would expect from a notary." (Exhibit R1).

26. Following the presentation of the Petitioner's evidence, Respondent moved for a Directed Verdict and this motion was denied.
27. Ozie Stallworth is the Respondent's Director of Notary Enforcement and Electronic Notarization, a position he has held for 11 years, and is primarily responsible for investigating complaints of notary misconduct and violations of notary laws. Mr. Stallworth also may, and has on many occasions, reviewed applications for notary commissions and made decisions whether to grant or deny a commission
28. Based upon the testimony of Mr. Stallworth, the main function of a notary public is to serve as an impartial witness to the execution of legal and other documents that may be placed into the public record. Notaries ensure the integrity of the transactions set forth in the documents by establishing the identity of parties involved so that documents can be trusted.
29. Based upon the testimony of Mr. Stallworth, good moral character and trustworthiness of public officers are bedrock principles for notaries public.

30. Based upon the testimony of Mr. Stallworth, because of the importance of good moral character and trustworthiness, there is a heightened level of concern about and scrutiny of applicants with a criminal history when determining whether it is in the best interests of the State and the public to grant the application.
31. Based upon the testimony of Mr. Stallworth, Petitioner's convictions for child molestation and child pornography caused significant questions about Petitioner's moral character and trustworthiness and serious doubt as to whether granting a commission to Petitioner was in the public's best interest.
32. Tina Dupree has been employed by Respondent for 20 years. She attended Campbell University. She was formerly a director and owner of a child day care center for 12 years. During her tenure with Respondent, she has been responsible for the intake and review of notary applications. In 2006, she was promoted to supervisor of Respondent's customer service unit. In 2011, she was promoted to be the Director of the Certification and Filing Division. (Tr. p. 104, 108)
33. As Director, Ms. Dupree's responsibilities include reviewing applications for notary commissions in which the applicant has indicated he or she has a history of criminal convictions and determining whether to grant or deny the application.
34. Throughout her employment with Respondent, Ms. Dupree has been involved in the notary public commissioning process and is familiar with the North Carolina Notary Act and accompanying North Carolina Administrative Code provisions. She has received training on and is familiar with Respondent's procedures for evaluating applications including those that indicate the applicant has a history of criminal convictions.
35. According to Ms. Dupree's testimony, that when she receives an application that includes a criminal history, she reviews the entire application including any letter of explanation of the criminal history, certified criminal history reports, judgment and release information, and the required certificates of moral character. She also would consider other documents that may be submitted with an application.
36. Ms. Dupree reviewed Petitioner's application in its entirety, including the certified criminal history information, letter of explanation, the restoration of citizenship form, judgment and release information, and certificates of moral character.
37. Ms. Dupree stated that she could not rely on the certificate of moral character of Rev. Dawn Jennifer Flynn because the certificate indicated that the Reverend was not aware of the applicant's criminal history. However, Rev. Flynn, in her testimony, stated she checked the box on the form in error, and she was aware of Petitioner's criminal history. (Tr. p. 33)

38. Ms. Dupree considered various factors set forth in 18 NCAC 07B .0901, including the nature, number and seriousness of Petitioner’s criminal offenses and other aggravating and mitigating evidence. The record is devoid of any detailed testimony of how Ms. Dupree considered and weighed each applicable factor.
39. As aggravating factors, Ms. Dupree considered that the offenses involved abuse of children. She also considered the fact that Petitioner was convicted of child pornography a few years after he was convicted of child molestation which indicated that Petitioner was a repeat offender.
40. As mitigating factors, Ms. Dupree considered the restoration of citizenship form, certificates of moral character, and the amount of time between the criminal offenses and Petitioner’s application.
41. Ms. Dupree considered the nature of Petitioner’s crimes and the amount of time between their commission as an aggravating factors pursuant to 18 NCAC 07B.0901 (g).
42. According to Ms. Dupree’s testimony that before denying Petitioner’s application, she conducted a fair and careful examination of Petitioner’s application and the materials and documents submitted with the application.
43. Ms. Dupree considered the offenses of child molestation and child pornography to be more serious than other criminal offenses due to the elements of deceit and violation of trust, especially of children.
44. Ms. Dupree had not previously considered an application in which the applicant disclosed crimes involving child molestation or child pornography.
45. Respondent’s Motion for a Directed Verdict was denied.

To the extent that any of the following Conclusions of Law is a Finding of Fact, it shall be so considered in spite of its designation as a Conclusion of Law. **BASED UPON** the foregoing Findings of Facts, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the subject matter and the parties herein pursuant to Article 3 of Chapter 150B and Chapter 10B of the North Carolina General Statutes.
2. N.C. Gen. Stat. §150B-25.1(a) establishes... “the petitioner in a contested case has the burden of proving the facts alleged in the petition by a preponderance of the evidence.”

3. Respondent is the State agency in North Carolina responsible for enforcing the rules that govern individuals holding a Notary Public Commission. Under the North Carolina Notary Public Act, N.C. Gen. Stat. § 10B-1 *et. seq.*, Respondent has the authority and responsibility to administer, regulate, grant, or deny applications, and otherwise enforce the laws and rules pertaining to commissioning and discipline of Notaries Public in this State.
4. The purpose of the Notary Public Act is to promote, serve, and protect the public interest, and to prevent fraud and forgery. N.C. Gen. Stat. § 10B-2.
5. Notaries public are public officers. *NationsBank v. Parker*, 140 N.C. App. 106, 109, 140 S.E.2d 597, 599 (2000); N.C. Gen. Stat. § 10B-3(13).
6. N.C. Gen. Stat. § 10B-5(d)(2) states:
The Secretary *may* deny an application for commission or recommission if any of the following apply to an applicant:
 2. The applicant's conviction or plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude. In no case may a commission be issued to an applicant within 10 years after release from prison, probation, or parole, whichever is later. (emphasis added)
7. In using the word "may," the General Assembly made the Secretary's decision whether to grant a commission as a North Carolina Notary Public to someone convicted of a felony or any crime involving dishonesty or moral turpitude one of discretion, due to the fact that the applicant has been released from prison, probation, or parole for a period of over 10 years. However, that determination must be based upon the weighing of FACTORS CONSIDERED [when] determining whether to deny an application subject to the burden of proof and by the greater weight of the evidence. (18 NCAC 07B.0901).
8. Petitioner was convicted of two counts of taking indecent liberties with a child and one count of receiving child pornography (federal court). Petitioner was released from Federal Supervised Release more than 10 years prior to his application to be commissioned as a Notary Public. Therefore, the seriousness of these convictions is a given but is not a mandatory lifelong prohibition. Whether or not these crimes are a lifelong prohibition is a determination that must be based upon the weighing of factors by the greater weight of the evidence.
9. 18 NCAC 07B.0901 list a variety of factors the Secretary (or her designee) should consider when deciding whether to deny an application or take disciplinary action against a notary.
10. Petitioner urges consideration of three sections of 18 NCAC 07B.0901 as supportive of his efforts to be commissioned as a Notary Public. These sections are (b) (evidence pertaining

to the honesty, credibility, truthfulness, and integrity of the applicant or notary public), (f) (evidence in mitigation) and (i) (evidence of rehabilitation).

11. The Notary Act defines “moral turpitude” as “conduct contrary to expected standards of honesty, morality, or integrity.” N.C. Gen. Stat. § 10B-3(9).
12. Child molestation and child pornography are crimes involving dishonesty and moral turpitude. *Dobson v. Harris*, 352 N.C. 77, 79, 530 S.E.2d 829, 833 (2000); 18 NCAC 07B .0201(b)(6) & (7).
13. Petitioner was convicted of felony offenses.
14. According to the inclusion and interpretation by Respondent in 18 NCAC 07B .0201(b)(6) & (7), Petitioner was deemed to have been convicted of crimes involving dishonesty and moral turpitude. An important phrase “not limited to” is omitted in 18 NCAC 07B.0201(b)(6). Thus, in part, with this omission, and Respondent’s promulgation of a long list of crimes triggers consideration of the rule of interpretation in a).
 - a) *Expressio Unis Est Exclusio Alterius* (Latin: the expression of one thing is the exclusion of the other). This maxim of interpretation, according to Respondent’s extensive list of crimes contained in this rule, implies that all crimes that are not listed are excluded. This rule is purportedly a list of the state felony, federal felony, and misdemeanor crimes that a notary applicant must list that are related to dishonesty *and* moral turpitude. An applicant is thus, by implication, instructed that a conviction of a crime not included in this list can be omitted under this category. This list contains 37 subsections without statutory citation or reference to common law crimes. (At least one entry is not a crime but enforceable only by a court of competent jurisdiction by way of a show cause order and contempt.)
 - b) This list purports to be a list of crimes of dishonesty *and* (conjunctive) moral turpitude. N.C. Gen. Stat. § 10B-5(d)(2) requires the applicant to list “any crime involving dishonesty *or* (disjunctive) moral turpitude.” The list purports to combine all crimes that are both crimes of dishonesty and moral turpitude, given the plain meaning of “and” as a conjunctive.
 - c) Notably lacking from this list is any mention of the state crime of first degree murder, second degree murder, voluntary manslaughter and involuntary manslaughter (*UNC School of Government Pattern Criminal Jury Instructions*) (Query: Is Murder in the First Degree lacking because it is not dishonest or a crime that does evidence the lack of moral turpitude?) The rationale for the exclusion of murder (in all forms) is neither explained nor evident.
 - d) Likewise, notably lacking from this list are federal murder crimes (18 U.S.C.§1111). (*see Pattern Jury Instructions for Federal Crimes, District of*

South Carolina (2019 online Edition). The rationale for the exclusion of murder is neither explained nor evident.

- e) There are approximately 2,200 statutory and common law crimes in North Carolina. (*North Carolina Sentencing and Policy Advisory Commission*.)
- f) There are approximately 4,450 federal crimes (2008).
(See: <https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes> (2008))
- g) The list is further devoid of any attempt to explain why the listed crimes are both crimes of dishonesty and moral turpitude with no reference to *mens rea*, *actus rea*, *malum in se*, and *malum prohibitum*, or other explanation. The exclusion of the state and federal crimes of murder, along with the exclusion of thousands of other state and federal crimes, creates an ambiguous and unclear rule that Respondent relies on to classify Petitioner's crimes as dishonest and lacking moral turpitude. There is no measure as to whether Petitioner, 25 years later, remains *per se*, lacking in honesty and moral turpitude for the crimes he committed. Respondent's ambiguous rule, in its totality, reveals nothing about the rationale for the crimes that are listed in light of the myriad of crimes that are excluded.

The foregoing supports the conclusion that 18 NCAC 07B.0201(b) is unclear and ambiguous to persons making application to be a notary public. Respondent promulgates a limited list of crimes and these crimes are purportedly both crimes of dishonesty and simultaneously crimes of moral turpitude. One must conclude that other state and federal crimes which are not on the list are construed as either dishonest or lacking moral turpitude but not both. The plain reading leads to the absurd conclusion that all the crimes on the list are the exclusive listing of the crimes that are both "crimes of dishonesty and moral turpitude" due to the misplaced conjunction "and." To create a disjunctive list, the rule should separately and completely list crimes of dishonesty and separately and completely list crimes of moral turpitude as required by N.C. Gen. Stat. §10B-5(d)(2).

- 15. Neither the Notary Public Act nor the Administrative Code contains any provision relating to or limiting the age of criminal violations required to be disclosed in an application. Likewise, there is no provision limiting the Secretary's consideration of criminal violations when determining whether to grant or deny the application based on the age of the violations.
- 16. Regarding evidence pertaining to honesty, credibility, truthfulness, and integrity Petitioner has been honest and truthful about his criminal past.
- 17. Two members from Petitioner's church, including his minister, submitted affidavits in his support and testified on his behalf at the contested case hearing. Petitioner has held numerous leadership roles within the church and currently serves as the church's treasurer, in charge of the entire church's finances. Petitioner's service to his church, including his

current position as treasurer, demonstrates his honesty, credibility, truthfulness, and integrity.

18. 18 NCAC 07B.0901 is quoted as follows:

SECTION .900 – ENFORCEMENT AND DISCIPLINARY ACTION

18 NCAC 07B.0901 FACTORS CONSIDERED IN DISCIPLINARY ACTION

When determining whether to deny an application or take disciplinary action against a notary, the Director may consider a variety of factors including:

- (1) Nature, number and severity of any acts, offenses, official misconduct or crimes under consideration;
 - (2) Evidence pertaining to the honesty, credibility, truthfulness, and integrity of the applicant or notary public;
 - (3) Actual or potential monetary or other harm to the general public, group, individual, or client;
 - (4) History of complaints received by the Department;
 - (5) Prior disciplinary record or warning from the Department;
 - (6) Evidence of mitigation;
 - (7) Evidence in aggravation;
 - (8) Occupational, vocational, or professional license disciplinary record;
 - (9) Evidence of rehabilitation. NOTE: Examples include reference letters and proof of class attendance;
 - (10) Criminal record;
 - (11) Reports from law enforcement agencies;
 - (12) Willfulness;
 - (13) Negligence.
-
- (1) Petitioner committed three egregious felony offenses and after the first conviction, reoffended shortly thereafter.
 - (2) Unobjected testimonial and documentary evidence attested to Petitioner’s current honesty, credibility, truthfulness and integrity;
 - (3) None
 - (4) None
 - (5) None
 - (6) Substantial evidence in mitigation;
 - (7) Minimal evidence in aggravation;
 - (8) None
 - (9) Unobjected and substantial evidence of rehabilitation by testimony and letters of reference in individual and group participation;
 - (10) (See #1)
 - (11) Reports are limited to reports from the original felonies but no reports pertaining to any new or different crimes.

- (12) (Stipulation Joint Order on Final Pretrial Conference)
- (13) None

19. The following evidence goes to mitigation:

- 1) Petitioner is remorseful for the crimes he committed, for his victims and their families;
 - 2) Petitioner at the time the first offenses occurred was 17 years old and 19 years old at the time of his last offense;
 - 3) The amount of time since these offenses occurred has been over 25 years;
 - 4) Petitioner has not been arrested or convicted of any other offenses, except one minor traffic infraction, since his last felony arrest;
 - 5) Petitioner's last conviction was over 24 years ago;
 - 6) Petitioner was released from Federal Supervised Release over 18 years ago;
 - 7) Petitioner's citizenship rights were restored over 18 years ago;
 - 8) Petitioner was released from the Sex Offender Registry in May of 2006, over 14 years ago;
 - 9) Petitioner completed all court mandated treatment and then voluntarily continued to attend specific Sex Offender treatment and related psychological treatment for more than 16 years;
 - 10) Petitioner at the time of hearing was approximately 45 years old;
 - 11) The crimes committed by Petitioner were all but inhumane and of an egregious sexual nature. There is no evidence, however, that the commission of these crimes over 25 years ago today, constitutes a prohibition to the performance of the statutory duties of a notary public;
 - 12) Petitioner has not been charged with or convicted of any felonious or non-traffic misdemeanor crimes since the original offenses.
20. As a paralegal ("nonlawyer assistant"), Petitioner and his supervising attorney are subject to a high degree of regulation and oversight under the rules of "Professional Conduct" and "Guidelines For Use of Paralegals in Rendering Legal Services" promulgated and published by the North Carolina State Bar. The applicable rules, comments and interpretations apply to all paralegals whether or not certified and are quoted as follows:

A. 27 NCAC 02 RULE 5.03 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a principal, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable

efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(Conclusion): Petitioner, as a paralegal in the Singletary Law Firm, by managerial supervision must be held to the same high standards of ethical conduct as a licensed attorney.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(Conclusion): The supervising lawyer must hold Petitioner to the same high standards of ethical conduct as a licensed attorney.

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a principal or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

(Conclusion): These mandatory requirements provide an added layer of oversight of one like the Petitioner who is both a notary and paralegal, above and beyond, that of one who is a notary but who is not also a paralegal.

B. 27 NCAC 02 RULE 5.05 (F) UNAUTHORIZED PRACTICE OF LAW

(f) A lawyer shall not assist another person in the unauthorized practice of law.

(Conclusion): This prohibition, too, is an added layer of oversight to ensure compliance with one of Respondent's major prohibitions concerning the practice of law. G.S. 10B-5(d)(7) requires Respondent to monitor the State Bar's findings if an "applicant has engaged in the unauthorized practice of law."

Comment [13] "Paragraph (d) does not prohibit a lawyer from employing the services of a paraprofessional and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. **See Rule 5.3**

(Conclusion): Petitioner, under supervision, may actually perform the complex professional work of a lawyer under the same high standards of ethical conduct as a licensed attorney.

C. 27 NCAC 02 Rule 7.01 does not prohibit a lawyer from including the name of a paralegal on firm letterhead or any other forms of communication including advertising, provided the paralegal's title is clearly indicated.

(Conclusion): Petitioner's name can actually be included on the letterhead of the Singletary Law Firm or another law firm where he might be employed as a paralegal.

D. 27 NCAC 02 Rule 1.5(a) does not prohibit a lawyer from billing a paralegal's time at the prevailing market rate and included in a fee application to a court or for work traditionally performed by a lawyer provided the fee is not excessive.

(Conclusion): Petitioner services for legal work performed under supervision can be separately billed, requiring the Petitioner's honesty in maintaining accurate records of his billable hours.

E. 27 NCAC 02, Rule 5.03 does not prohibit the delegation of management of a trust account to a paralegal.

(Conclusion): Given Petitioner's significant church related responsibilities as a financial officer and treasurer, Petitioner can also be potentially delegated responsibility for managing the law firm's trust account, subject to potential audit by the State Bar, to ensure the Petitioner performs this task at the highest ethical standards of conduct.

F. Pursuant to Comment 10 of the State Bar's Guidelines of Paralegals in Rendering Legal Services, the following is quoted:

(10) A lawyer who employs a paralegal should facilitate the paralegal's continuing self-improvement by encouraging and supporting the paralegal's participation in professionalism, continuing education, and *pro bono publico* activities and encouraging certification by the North Carolina State Bar's Board of Paralegal Certification or other reputable program.

(Conclusion): This comment includes providing Petitioner with opportunities for ethical and legal continuing education, and *pro bono* community activities, not otherwise required of a notary.

21. Regarding evidence of rehabilitation, the undersigned notes 18 NCAC 07B.0901 (i) specifically addresses reference letters and proof of class attendance. As acknowledged by the US Supreme Court "[d]oubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character." *Smith v. Doe*, 538 U.S. 84, 104, 123 S. Ct. 1140, 1153 (2003); citing *Hawker v New York*, 170 U.S. 189, 197, 18 S. Ct. 573, 576 (1898).

22. Ann Navarro (SORT), TMA, LPC is a Licensed Professional Counselor with a minimum professional education requirement of a Master's Degree or Doctoral Degree in Mental Health Counseling and must pass a N.C. credentialing exam. Petitioner's past criminal conduct evidences conduct that is medically treatable by licensed professionals to avoid relapse. Petitioner successfully completed this professional treatment.

23. Dr. Robert J. Custrini, Ph.D., and Dr. William M. Tyson, Ph.D., as licensed Psychologists, must have earned a Ph.D. in Psychology and be licensed by the State of North Carolina. Both Dr. Custrini and Tyson's therapeutic professional treatments with Petitioner as their patient ended successfully and positively. This indicates Petitioner's past criminal conduct is treatable (as may be distinguished from other criminal misconduct) and is subject to a successful therapeutic regimen, resulting in remission.
24. Mr. Ozie Stallworth and Ms. Tina Dupree testified on behalf of the Respondent. Pursuant to 18 NCAC 07B .0901, Ms. Dupree was the Secretary's delegate (but without an express written delegation) who reviewed and denied Petitioner's initial application to become a Notary Public.
25. Ms. Tina Dupree considered the nature of Petitioner's crimes and the small amount of time between their commission as aggravating factors pursuant to 18 NCAC as 07B.0901 (g). These were major factors that Respondent considered as aggravating factors.
26. Petitioner has demonstrated qualities worthy of the appointment as a Notary Public, despite his devastating 26-year-old criminal convictions. At the time that Petitioner committed these egregious felonies, Petitioner clearly lacked moral turpitude as defined in G.S. 10B-3(g). Petitioner engaged in [c]onduct contrary to expected standards of ...morality..." But the unrefuted evidence and by its greater weight demonstrates that Petitioner has proven, particularly as to the "evidence of rehabilitation," [18NCAC 07B.090(9)] that he currently possesses the moral turpitude to satisfy the requirements as defined in G.S. 10B-3(g). Ms. Dupree's scant testimony regarding these licensed professionals' assertions and conclusions does not overbear their professional credentials and years of academic training that underlies their professional assertions and conclusions.
27. The duties that are or may be performed by a Notary Public (Notary) are extensively set out in Chapter 10B of the North Carolina General Statutes. This record does not explain how Petitioner's convictions apply currently after 25 years that prevents the performance of these statutory duties or now disqualifies the Petitioner. Respondent in its case in chief did not offer sufficient and adequate testimony to explain the connection between the offenses and why 25 years later those offenses disqualify the Petitioner who has carried his burden of proof establishing his rehabilitation. [see generally, *State v. Harris* 216 N.C. 746, 6 S.E.2d 854 (1940)]
28. Petitioner established by the greater weight of the evidence that Respondent, in failing to address how Respondent weighed, other than conclusionary and cursory testimony, all the relevant factors listed in 18 NCAC 07B.090, did in fact err, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or otherwise substantially prejudiced Petitioner's rights when Respondent denied Petitioner's application to be commissioned as

a North Carolina Notary Public in view of the substantial amount of Petitioner's evidence to the contrary.

29. Petitioner carried his burden of proof by the greater weight of the evidence that Respondent erred in failing to grant his application to become a Notary Public based upon his prior criminal convictions of over 25 years ago.

DECISION AND ORDER

Respondent's decision to deny Petitioner's application for a commission as a Notary Public should be, and is hereby, **REVERSED** and Petitioner's Petition for relief should be, and is hereby, **AFFIRMED**. Respondent must accept Petitioner's application to be commissioned as a Notary Public. However, if Petitioner is commissioned, Respondent may exercise its authority to place "restrictions" on Petitioner pursuant to N. C. Gen. Stat. §10B(6)(4), N.C. Gen. Stat. § 10B-10(c), N.C. Gen. Stat. §10B-54, (applies to resignations), N.C. Gen. Stat. § 10B-60(a)(h) (*et al*). Respondent should enter the following restrictions:

1. Petitioner must meet all requirements to be commissioned as a notary the same as all other applicants and, if commissioned, thereafter, not violate any standards of notarial misconduct as established by Chapter 10B of the North Carolina General Statutes or 18 NCAC 07B *et seq* of the North Carolina Administrative Code.
2. Petitioner, if commissioned, shall not for a period of 5 years thereafter be convicted of any state or federal felony.
3. Petitioner, if commissioned, shall for a period of 5 years thereafter maintain employment as a paralegal under the supervision of a licensed N.C. attorney and the supervising attorney shall not, thereafter, be held to violate any supervisory rules of the N.C. State Bar as to the supervision of Petitioner as a paralegal due to the fault or misconduct of the Petitioner as a paralegal.
4. Petitioner, if commissioned, shall for a period of 5 years thereafter perform all notarial services under the supervision of a licensed attorney and Petitioner's notarial services shall be restricted to Petitioner's duties within the scope of his duties as a paralegal under the supervising attorney and within the scope and practice of the supervising attorney's practice of law.
5. Petitioner shall keep a journal of his notarial acts and make the journal of notary acts available to Respondent upon request which shall contain the following information:
 - A. The date of the notarial act;
 - B. The type of notarial act;
 - C. The name of the principal as defined in N.C. Gen. Stat. § 10B-3(18) and
 - D. A description of the satisfactory evidence of identity provided.
6. Petitioner, if commissioned, for a period of 5 years thereafter shall continue his regular therapy sessions under a licensed professional, psychiatrist, psychologist, or other licensed therapist.

7. The restrictions imposed above may be amended, modified, or added to in whole or in part based upon the agreement and consent of both Petitioner and Respondent.
8. The restrictions imposed above may be deleted in whole or in part based upon the agreement and consent of both Petitioner and Respondent.
9. If Respondent finds that Petitioner has not complied with the restrictions itemized above, or as amended, modified, added or deleted by consent, Respondent may take the appropriate action to revoke or suspend, including summary suspension, of the Petitioner's restricted commission.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 12th day of November, 2020.

A handwritten signature in black ink, appearing to read "Julian Mann III", is written over a solid horizontal line.

Julian Mann III
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

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

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This the 12th day of November, 2020.



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