

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DOJ 06899

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| <p>Gene C Norris II Petitioner,</p> <p>v.</p> <p>North Carolina Department of Justice Criminal Standards Division Respondent.</p> | <p>FINAL DECISION</p> |
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Administrative Law Judge Melissa Owens Lassiter heard this contested case on July 14, 2020 and September 3, 2020 in Raleigh, North Carolina, pursuant to N.C. Gen. Stat. § 150B-23, and Petitioner's contested case petition appealing Respondent's Finding of Probable Cause, Revocation of Petitioner's Company Police Commission Certification.

On July 14, 2020, the parties, counsel, and all witnesses appeared before the Undersigned remotely via Microsoft Teams. Petitioner appeared *Pro Se*. After hearing part of the evidence, the Undersigned granted Petitioner's Motion to Continue to allow Petitioner an opportunity to hire an attorney. On September 3, 2020, the Undersigned conducted the second day of hearing with the parties, and both parties' counsel appearing in-person before the Undersigned. All witnesses testified remotely via Microsoft Teams.

APPEARANCES

For Petitioner: Gene C. Norris, II *Pro Se* (July 14, 2020)
Barry K. Henline, The Law Offices of Barry K. Henline, PLLC,
Wilmington, North Carolina (September 3, 2020)

For Respondent: Jeffrey B. Welty
Special Deputy Attorney General
North Carolina Department of Justice
Special Prosecutions and Law Enforcement Section
Raleigh, North Carolina

ISSUES

1. Whether there is sufficient evidence to support Respondent's decision to revoke Petitioner's Company Police Certification for failure to report a criminal charge within five days as required by 12 NCAC 02I .0202(a)(8)?
2. Whether Respondent should substitute a period of probation in lieu of revocation of Petitioner's company police commission?

RULES AND STATUTES AT ISSUE

12 NCAC 02I .0202(a)(8)
12 NCAC 02I .0212(c)(2)
12 NCAC 02I .0213(a)(6)
N.C. Gen. Stat. Ch. 74E
N.C. Gen. Stat. § 20-166(c)(1)
N.C. Gen. Stat. § 15A-1340.23

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1-4, 6
Exhibit 5 (for illustrative purposes only)

For Respondent: 1, 3, and 5-11

WITNESSES

For Petitioner: Don Nichols, Franklin King, Levarga Brown, John DeVeough, Doug Monroe, Gene C. Norris

For Respondent: Randy Burton, Randy Munn

FINDINGS OF FACT

Parties

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.
2. Respondent Division has the authority granted under Chapter 74E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 02I, to commission company police officers and to revoke, suspend, or deny such certification under appropriate circumstances with valid proof of a rule violation.
3. Petitioner has been commissioned as a Company Police Officer with the New Hanover Regional Medical Center Special Police in Wilmington, North Carolina since

August 6, 2018. Respondent's Ex. 7. In his two years of certification with Respondent, Petitioner has received no prior disciplinary actions.

Finding of Probable Cause to Revoke

4. By letter dated November 12, 2019, Respondent's Administrator notified Petitioner that he had found probable cause to revoke Petitioner's Company Police Officer Commission with New Hanover Regional Medical Center for failing to notify Respondent within 5 days of the date of his arrest for the criminal offense of "Hit and Run" in violation of N.C. Gen. Stat. § 20-166(c)(1). Respondent's Ex. 11. In this letter, Respondent advised:

. . . I regret to inform you that I have found probable cause to revoke your Company Police Officer Commission for New Hanover regional Medical Center Company Police. [emphasis in original]

The Attorney General, or his designee, **may** revoke, suspend, or deny the commission of a company police officer when the Company Police Administrator finds that the commissioned company police officer failed to meet any of the required standards as specified in 12 NCAC 02I .0202. The Company Police Administrator finds that you failed to notify the Company Police Administrator within five days of arrest or charge in violation of NCAC .0202(8). [sic] (Emphasis added).

Respondent's Ex. 11. Respondent explained that such "**REVOCATION WILL BECOME EFFECTIVE 61 DAYS FROM THE DATE OF RECEIPT OF THIS LETTER**" unless Petitioner appealed such action. (emphasis in original).

5. While Respondent informed Petitioner it was proposing revocation of Petitioner's company police commission, Respondent also referred to the possible sanction against Petitioner's commission as a denial to wit: "If you disagree with my finding to **deny** your company police commission . . . Should you have any questions concerning the proposed **denial** of your company police commission." (Respondent's Ex. 11) (Emphasis added).

6. On December 15, 2019, Petitioner filed a contested case petition appealing Respondent's November 12, 2019 finding and asserting the following:

I had no intent to deceive or hide the charge made against me with [T]raining and [S]tandards. 2. All my immediate supervisors within my agency made aware of my charge right away and within five days. 3. Unaware it was my responsibility to notify Company Police Administrator within five days. 4. None of my supervisors made me aware it was my responsibility to notify Training and Standards within five days. 5. Once instructed by my Chief Doug Monroe to notify Company Police Administration, Randy Munn, I did so right away and without hesitation.

(Petition)

June 15, 2019 Incident

7. On June 15, 2019, Petitioner was off duty. He and co-worker, Corporal (then Officer) John DeVeagh, attended the Blueberry Festival in Burgaw, North Carolina, in the middle of the day and then went to the Front Street Brewery in Wilmington, North Carolina in the afternoon. Later in the evening, they met other friends at the Ogden Taproom in Wilmington, where they spent several hours. Around 11:00 p.m., several members of the group, including Petitioner, decided to go to the Liberty Tavern in Wilmington. Petitioner had consumed alcoholic beverages throughout the day and evening, but there was insufficient evidence to determine the precise extent of his alcohol consumption. See Respondent's Ex. 1. There is no evidence that Petitioner was under the influence of alcohol.

8. Petitioner drove his vehicle, a Chevy Tahoe, to the Liberty Tavern. As Petitioner slowed down to turn into the Liberty Tavern parking lot, another vehicle struck him from behind. The driver of the other vehicle was Sheila Rolfe, who also works at the New Hanover Regional Medical Center. Ms. Rolfe had spent time with Petitioner and others at the Ogden Taproom earlier that evening.

9. Ms. Rolfe and Petitioner pulled their own vehicles into a parking lot. There was visible damage to both vehicles. Petitioner's vehicle was drivable. Petitioner did not believe the damage to his vehicle was more than \$1,000.00. Respondent's Exhibit 5. Corporal DeVeagh recognized that there may have been more than \$1,000.00 in damage to Petitioner's vehicle by itself.

10. Petitioner was very upset and angry about the damage to his vehicle. Respondent's Ex. 5. Petitioner and Ms. Rolfe agreed to exchange insurance information to address the matter the following day. Petitioner left the scene and drove himself home.

11. 10-15 minutes later, New Hanover County Sheriff's Deputies arrived on the scene. Corporal DeVeagh informed the deputies that Ms. Rolfe had rear-ended a co-worker (Petitioner) who was not present at that time, and that Rolfe and Petitioner had agreed to settle the matter tomorrow when Rolfe's husband returned home from a trip.

12. Shortly thereafter, Trooper J.R. Pierce of the North Carolina State Highway Patrol arrived at the scene. He asked Corporal DeVeagh who had been driving the other vehicle involved in the accident. Corporal DeVeagh indicated that it was Petitioner. Corporal DeVeagh advised Trooper Pierce that Rolfe and Petitioner had agreed to settle things the next day and that Petitioner left because he was upset about being rear-ended. Corporal DeVeagh called Petitioner and handed the telephone to Trooper Pierce. Trooper Pierce asked Petitioner to return to the Liberty Tavern, but Petitioner declined to do so. Trooper Pierce believed that Petitioner left the scene attempting to avoid being charged with a DWI, but Petitioner denied that. Trooper Pierce arrested Ms. Rolfe for driving while impaired.

13. Around 1:00 p.m., the next day, June 16, 2019, Mr. and Mrs. Rolfe came to Petitioner's home and exchanged insurance information. Around 4:30 p.m. that day, Trooper Pierce arrived at Petitioner's home. Pierce obtained a written statement from Petitioner and photographed the damage to Petitioner's vehicle. Respondent's Ex. 5. Trooper Pierce issued Petitioner a citation and charged him with "Hit and Run" in violation of N.C. Gen. Stat. § 20-166(c)(1) for failing to provide his name, address, license information and license plate number to Ms. Rolfe at the accident scene the night before. Respondent's Ex. 3.

14. Later, on June 16, 2019, Petitioner notified Corporal DeVeagh about the "Hit and Run" charge. Corporal DeVeagh immediately notified Sgt. Frank King, Petitioner's supervisor at the time.

15. Within 24 hours of being charged with the "Hit and Run" offense, Petitioner notified Sgt. Frank King of the charge. Petitioner explained to King what happened on June 15, 2019, the scheduled court date for the case, and of his concerns about the auto incident. Sgt. King informed Captain Nichols and Chief Monroe of Petitioner's charge.

16. Approximately 25 days later, around mid-July 2019, Randy Burton, an Investigator with the New Hanover Regional Medical Center Company Police, attended a [Criminal Justice] Training and Standards training session and learned about the 5-day reporting requirement at issue in this matter. Investigator Burton telephoned Chief Munroe and reminded him about that reporting requirement.

17. Company Police Administrator Randy Munn recalls that Chief Monroe told him that he did not learn of the charge until July 19, 2019. However, at hearing, Chief Monroe indicated on June 15, 2019, a Highway Patrol Sergeant on the scene of Petitioner's accident called him and apprised him of the matter.

18. Regardless of when Chief Monroe learned of Petitioner's "Hit and Run" charge, Chief Monroe first contacted Company Police Administrator Randy Munn about Petitioner's criminal charge on July 19, 2019, over a month after Petitioner was charged. Mr. Munn advised Chief Monroe that Petitioner was required to report any criminal charges to Mr. Munn within five days. Immediately thereafter, Chief Monroe called and advised Petitioner of the 5-day reporting requirement. Immediately after talking with Chief Monroe that same day, Petitioner called Administrator Munn and reported his "Hit and Run" charge.

19. On or about July 22, 2019, Chief Monroe asked Capt. Don Nichols to conduct an internal investigation into the June 15, 2019 matter. Capt. Nichols assigned Investigator Randy Burton to the investigation. Investigator Burton obtained written statements from Officer Smith, New Hanover County Deputies Perry and May, and Petitioner. Respondent's Ex. 10. He also interviewed Corp. DeVeagh and Trooper Pierce and reviewed Pierce's audio and video recordings related to the incident. Even though Petitioner was instructed to provide a comprehensive statement about the events leading up to the accident, including information about the amount of alcohol he had

consumed before driving, his initial statement to Investigator Burton did not disclose that he had been drinking at all. When asked directly about whether he had been drinking, Petitioner admitted that he had. Petitioner also stated that he did not think the damage to his vehicle was more than \$1,000.00, even though Investigator Burton later determined that the damage to Petitioner's vehicle exceeded \$2,000.00.

20. On September 9, 2019, Investigator Burton submitted his report to Chief Monroe, and concluded that Petitioner was not candid in his initial written statement in the internal affairs investigation. Burton also concluded that Petitioner knew or should have known that leaving the scene of the accident was a violation of N.C. Gen. Stat. § 20-166, and that Petitioner failed to notify the Company Police Administrator of his criminal charge in a timely fashion.

21. On September 26, 2019, the "Hit and Run" criminal charge was voluntarily dismissed by the State.

22. New Hanover Regional Medical Center Police Captain Don Nichols has worked in civilian law enforcement for 30 years. Captain Nichols knew that the Criminal Standards Division had a reporting requirement but did not know that the reporting requirement was as short as five days. Had he known, Nichols would have taken the steps necessary to report the criminal charge on behalf of Petitioner to ensure compliance. At hearing, Captain Nichols acknowledged that Petitioner had the responsibility of reporting the criminal charge he received in June 2019 to the North Carolina Department of Justice Criminal Standards Division.

23. Captain Nichols described Petitioner as very professional, extremely nice, and as possessing a high level of integrity. He opined at hearing that Petitioner "truly deserves his badge."

24. New Hanover Regional Medical Center Police Sgt. Frank King was unaware of the 5-day reporting requirement. He did not know whose responsibility it was to report the "Hit and Run" charge to Respondent, but knew a charged officer was required to report a charge to his/her supervisor and that the supervisor would report the charge to Respondent. He learned through this case that Petitioner was also required to report a charge to Respondent. Sgt. King described Petitioner as a good officer with a great attitude.

25. New Hanover Regional Medical Center Police Sergeant LeVarga Brown was Petitioner's immediate supervisor in June of 2019 but was on vacation on June 15, 2019. Petitioner advised Brown that he had notified Corp. DeVeough and Sgt. King about the criminal charge. Sgt. Brown opined that he believed Petitioner would have reported the criminal charge to Respondent if he had known he was required to do so. Sgt. Brown described Petitioner as "awesome," on time, never complains, and would help anyone. Brown had no concerns about Petitioner's truthfulness or character.

26. Corporal John DeVeagh has been employed with the New Hanover Regional Medical Center Police for eleven (11) years. At hearing, Corp. DeVeagh opined that Petitioner would have reported the criminal charge to the North Carolina Department of Justice, Criminal Standards Division if he had known he was required to do so. He was surprised that Petitioner was charged with a "Hit and Run" offense on June 15, 2019. Corp. DeVeagh questioned Trooper Pierce at the accident scene because Petitioner and Ms. Rolfe had exchanged information and indicated they would resolve the matter the next day. DeVeagh opined that Petitioner is an outstanding officer and has impeccable de-escalating skills. Corp. DeVeagh has absolutely no concerns about Petitioner's integrity or honesty.

27. All the New Hanover Regional Medical Center's Special Police officers who testified at the hearing admitted that they had not advised Petitioner that he was required to notify the Company Police Administrator of his criminal charge before the June 2019 incident. As the Chief Training Officer for the New Hanover Regional Medical Center Police, Captain Nichols confirmed that Petitioner received no training about the 5 days reporting requirement nor was there any specific discussion as to any time frame reporting requirements. After this case arose before Respondent, the New Hanover Regional Medical Center Police specifically added the 5-day reporting requirement to its 2020 police training.

28. Petitioner and each of those officers acknowledged that it was Petitioner's responsibility to know the rules governing company police officers.

29. In April 2019, Chief Monroe was hired as the Chief of Police for the New Hanover Regional Medical Center Special Police. There was no evidence that before June 15, 2019, Chief Monroe directed Petitioner to report any charges against him to Respondent. The preponderance of the evidence established the first person who told Petitioner of his 5-day reporting obligation appears to have been Chief Monroe on July 19, 2019.

30. Chief Monroe opined that Petitioner is one of his best officers, is very compassionate and personable. Monroe has no issue with Petitioner's honesty or integrity. He also was unaware that Petitioner tried to conceal his criminal charge. On cross-examination, Chief Monroe explained that he had instructed Sgt. Levarga Brown to have Petitioner write a statement to indicate details of his actions the night he was charged with the criminal charge, and to include details of how much alcohol Petitioner had drank during the day on June 15, 2019. Yet, Mr. Monroe acknowledged that he never directly gave Petitioner an order to provide a detailed statement to include the amount of alcohol he had consumed that night.

31. Petitioner admitted at hearing that he was required to report his "Hit and Run" charge to the North Carolina Department of Justice Criminal Standards Division, within 5 days, pursuant to 12 NCAC 02I .0202(a)(8). He also accepted responsibility for knowing the rules of his profession as a company police officer. Petitioner committed a technical violation of 12 NCAC 02I .0202(a)(8).

32. Petitioner was believable at hearing when he indicated he was not aware that he was required to notify the Company Police Administrator of his "Hit and Run" charge.

33. There was no evidence proving that Petitioner acted intentionally or with deception when he failed to report his "Hit and Run" charge to Respondent within five days of being charged. The day Petitioner learned of the 5-day reporting requirement, he notified Administrator Munn of his criminal charge.

34. At hearing, Company Police Administrator Munn testified that he had no authority to offer another sanction against Petitioner's company police commission other than revocation. (Munn testimony) Yet, nowhere in the November 12, 2019 Finding of Probable Cause did Respondent refer to or cite any North Carolina statute or administrative rule which authorized or required such revocation. Instead, the November 12, 2019 letter stated that Respondent "may revoke, suspend, or deny" a company police officer's commission for failing to meet the 5-day reporting standard.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case, and the parties received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011)

2. The party with the burden of proof in a contested case must establish the facts required by N.C. Gen. Stat. § 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a).

3. Respondent has the authority under Chapter 74E of the North Carolina General Statutes ("The Company Police Act") and Title 12 of the North Carolina Administrative Code, Chapter 2I, to commission company police officers and to revoke, suspend or deny such certification. N.C. Gen. Stat. 74E-4.

Issue 1 - Violation of 5-day Reporting Requirement

4. 12 NCAC 02I .0202(a)(8) provides that every company police officer must:

notify the Company Police Administrator in writing of all criminal offenses . . . the officer is arrested for or charged with This includes all criminal offenses except minor traffic infraction offenses and specifically includes any offense of Driving Under the Influence (DUI) or Driving While Impaired (DWI). A minor traffic offense is defined, for purposes of this Subparagraph as an offense where the maximum punishment

allowable is 60 days or less. The notifications required for an arrest or charge must specify the nature of the offense and date of arrest or charge. Further notifications required must specify the nature of the offense, the court in which the case was handled and the date of the conviction or adjudication. All notifications must be received by the Company Police Administrator within five days of the date of the arrest or charge and case disposition. . . . (Emphasis added).

5. An offense of "Hit and Run," in violation of N.C. Gen. Stat. § 20-166(c)(1), occurs when a driver leaves the scene of an accident even though he or she "knows or reasonably should know that the vehicle which the driver is operating is involved in a crash which results . . . [o]nly in damage to property." This offense is a Class 1 misdemeanor and carries a maximum punishment allowable by law of 120 days of incarceration. N.C. Gen. Stat. § 15A-1340.23. Therefore, under 12 NCAC 021 .0202(a)(8), a "Hit and Run" is not a "minor traffic offense," and Petitioner was required to notify the Company Police Administrator within five days of being charged with "Hit and Run" on June 16, 2019.

6. The preponderance of the evidence showed that Petitioner violated 12 NCAC 021 .0202(a)(8) when he failed to notify the Company Police Administrator within five days of being criminally charged with a "Hit and Run" offense. Petitioner notified Respondent's Administrator that he was charged with a "Hit and Run" offense 32 days after he charged with such offense.

7. Respondent's finding that Petitioner failed to notify the Company Police Administrator within five days of being charged with "Hit and Run" was therefore supported by substantial evidence and was not arbitrary or capricious.

Issue 2 - Appropriate Sanction

8. While it is clear that Petitioner technically violated 12 NCAC 021 .0202(a)(8), it is just as unclear whether Respondent acted properly in finding that Petitioner's company police commission should be revoked for that violation and in addition, whether Respondent was required to revoke Petitioner's company police commission for such violation.

9. Respondent's Administrator Munn testified at hearing that he was required to revoke Petitioner's commission for the subject violation. But, nowhere in Respondent's November 12, 2019 letter did Respondent identify or reference what administrative rule or North Carolina General Statute required Respondent to revoke Petitioner's company police commission for failing to notify Respondent within 5 days of being charged of a "Hit and Run" offense. In fact, in Respondent's November 12, 2019 Finding of Probable Cause letter, Administrator Munn advised Petitioner that Respondent "**may** revoke, suspend, or deny the commission of a company police officer when the Company Police Administrator finds the commissioned company police officer failed to meet any of the

required standards as specified in 12 NCAC 02I.0202." (Emphasis added). Respondent's Ex. 11.

10. Respondent's authority to impose sanctions emanates from N.C. Gen. Stat. § 74E-4 which provides:

The Attorney General has the following powers in addition to those conferred elsewhere in this Chapter:

(5) To deny, suspend, or revoke a certification as a company police agency or a commission as a company police officer for failure to meet the requirements of or comply with this Chapter or a rule adopted under this Chapter, in accordance with Article 3 of Chapter 150B of the General Statutes.

11. Based upon that statutory authority, Respondent has adopted two rules addressing the types of sanctions Respondent will impose for specific violations of subchapter 12 NCAC 2I. First, 12 NCAC 02I .2012, titled "Suspension, Revocation or Denial of Officer," requires that:

(c) A company police commission **shall be revoked or denied** upon a finding that:

. . . (2) the officer fails to meet any of the required standards as specified in 12 NCAC 02I .0202 . . . (Emphasis added)

Since Petitioner's failure to notify violation is a required minimum standard under 12 NCAC 2I .0202(a)(8), 12 NCAC 02I .02012(c)(2) would require Respondent to revoke Petitioner's company police commission for violating the 5-day reporting requirement in 12 NCAC 2I .0202(a)(8).

12. However, 12 NCAC 02I .0213(a), titled "Period of Suspension, Revocation or Denial," authorizes Respondent to modify its sanctions against a company police commission as follows:

(a) When the Attorney General, or his designee, suspends or denies the commission of a company police officer, the period of sanction shall not be less than three years. However, the Attorney General, or his designee, **may either** reduce or suspend the period of sanction under 12 NCAC 2I .0212(b) **or substitute a period of probation in lieu of suspension of a commission following an administrative hearing, where the cause of sanction is:**

. . . **(6) failure to make either of the notifications as required by 12 NCAC 2I .0202(8).** (Emphasis added).¹

13. In this case, the crucial determination is whether Respondent may apply 12 NCAC 2I .0213(a)(6) to Petitioner's case and thus, substitute a probationary period in lieu of the revocation sanction required by 12 NCAC 2I. 0212(c)(2).

14. We apply the rules of statutory construction when interpreting a statute, ordinance, or administrative code. *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979). Fundamentally, “[w]hatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted.” *Swaney v. Steel Co.*, 259 N.C. 531, 542, 131, S.E.2d 601, 609 (1963) (citation omitted).

15. A statute that is clear and unambiguous must be construed using its plain language. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). A statute must be construed to give effect to all of its provisions so as not to render any provision useless or redundant. *Porsch Builders, Inc. v. City of Winston-Salem*, 276 S.E.2d 443, 447 (N.C. 1981). It is presumed that the General Assembly intended each portion of the statute to be given full effect and did not intend any provision to be mere surplusage. *Id.* (numerous citations omitted.)

16. Statutes *in pari materia*, although in apparent conflict or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each other so as to give force and effect to each; but if there is an irreconcilable conflict, the latest enactment will control, or will be regarded as an exception to, or qualification of, the prior statute. 82 C.J.S. *Statutes* § 368; *State Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E.2d 22 (1967); *State ex rel. Utilities Commission v. Union Electric Membership Corp.*, 3 N.C.App. 309, 164 S.E.2d 889 (1968).

17. The purpose of North Carolina General Statute Chapter 74E is:

[T]o ensure a minimum level of integrity, proficiency, and competence among company police agencies and company police officers. To achieve this purpose, the General Assembly finds that a Company Police Program needs to be established.

18. In applying the rules of statutory construction to these two administrative rules, it is presumed that the General Assembly intended each portion of the administrative rules created, pursuant to Chapter 74E, will be given full effect and did not intend any part of the rules to be considered mere surplusage. Since the failure to notify violation from 12 NCAC 2I .0202(a)(8) was specifically included in 12 NCAC 2I .0213(a)(6), such inclusion shows the legislature's intent to give Respondent the discretionary authority to impose a lesser sanction, *i.e.* substitute a probationary period, in lieu of revocation when an officer violates 12 NCAC 2I .0202(a)(8).

¹ While 12 NCAC 2I .0213(a)(6) references 12 NCAC 2I .0202(8), no such rule exists. Reading the entire subchapter 12 NCAC 2I. clarifies that such reference is actually a reference to 12 NCAC 2I. 0202(a)(8).

19. A fundamental rule of construction is that when a literal construction of the statute or regulation would contravene its manifest purpose, the reason and purpose will be given effect and the strict letter disregarded. *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978).

20. 12 NCAC 2I .0213(a) allows Respondent to substitute a probationary period "in lieu of **suspension** of a [company police] commission," not **revocation** of a commission, for violating 12 NCAC 2I .0202(a)(8). Under 12 NCAC 2I .0212(c)(2), Respondent "shall revoke" a commission when the officer fails to meet the 5-day notification standard in 12 NCAC 2I .0202(a)(8). If one applies a literal interpretation of these subject rules, Respondent could never exercise its discretion in 12 NCAC 2I .0213(a)(6), because 12 NCAC 2I .0212(c)(2) requires a **revocation** of an officer's commission for failing to meet the 5 day notification standard in 12 NCAC 2I .0202(a)(8). Such an interpretation would render the inclusion of the failure to notify violation in 12 NCAC 2I .0213(a)(6) as mere surplusage and useless verbiage.

21. Reading 12 NCAC 2I .0212 and 12 NCAC 2I .0213 together and giving each portion of the rules full effect, a reasonable interpretation and application of 12 NCAC 2I .0213(a)(6) authorizes Respondent to exercise its discretion to substitute a probationary period, in lieu of a revocation of a commission, where the cause of the sanction is "failure to make either of the notifications as required by 12 NCAC 2I .0202(a)(8).

22. In this case, a preponderance of the evidence proved several mitigating factors exist to justify Respondent's substitution of a probationary period in lieu of a revocation of Petitioner's company police commission for failing to notify Administrator Munn of his "Hit and Run" charge within five days of being charged. First, substantial evidence at hearing established that Petitioner's violation of the 5-day reporting requirement was not done intentionally, with deceit, or done to hinder any investigation, but was based upon Petitioner's own lack of knowledge of the 5-day reporting requirement. Second, Petitioner complied with 12 NCAC 2I .0202(a)(8) by advising his supervisors that he was criminally charged with a "Hit and Run" offense within 24 hours of being charged of that offense.

23. Third, a preponderance of the evidence at hearing proved that many of Petitioner's supervisors were either unaware of the short time frame (5 days) to report any criminal charges against them to Respondent or were unaware of the reporting requirement at all. In addition, Petitioner was not trained by New Hanover Regional Center Special Police on the 5-day reporting requirement. Fourth, the day Chief Monroe advised Petitioner of the 5-day reporting requirement, Petitioner reported the "Hit and Run" charge against him to Respondent's Administrator Munn. Petitioner's notification to Munn occurred just 32 days after he was charged. Fifth, the State dismissed the criminal "Hit and Run" charge against Petitioner.

24. Lastly, Petitioner has an excellent reputation among his coworkers and has the full support of his supervisors who wish to retain Petitioner as a New Hanover Regional Medical Center Special Police officer.

25. Under 12 NCAC 21 .0212(c)(2), Respondent's proposed revocation of Petitioner's company police officer commission officer certification is supported by substantial evidence. However, pursuant to 12 NCAC 21 .0213(a)(6), Respondent should substitute a 12-month probationary period against Petitioner's company police commission in lieu of a revocation. During the probationary period, Petitioner shall not violate any federal or state law and shall remain in compliance with the rules established by Respondent. At the end of this probationary period, Petitioner's certification shall remain in full force and effect provided he is in compliance with the rules established by the Respondent.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's finding of probable cause to revoke Petitioner's company police officer commission is **UPHELD**. However, pursuant to 12 NCAC 02I .0213(a), and the substantial evidence in mitigation presented at hearing, Respondent shall place Petitioner on a twelve month **PROBATIONARY PERIOD**, in lieu of a revocation, as long as Petitioner does not further violate any of Respondent's statutes and regulations.

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.

This the 1st day of December, 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:

Gene C Norris II
104 Whitman Avenue
Castle Hayne NC 28429
Petitioner

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

Jeffrey B Welty
NC Department of Justice
jwelty@ncdoj.gov
Attorney For Respondent

This the 1st day of December, 2020.



Jerrod Godwin
Administrative Law Judge Assistant
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 919-431-3000