

STATE OF NORTH CAROLINA
COUNTY OF HALIFAX

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DOJ 05333

<p>Lake Royale Company Police Department Gabriel Anthony Fanara Petitioner,</p> <p>v.</p> <p>North Carolina Department of Justice, Company Police Program Respondent.</p>	<p>FINAL DECISION</p>
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This case came on for hearing on August 24, 2020, in Raleigh, North Carolina before Administrative Law Judge Melissa Owens Lassiter to hear Petitioner's appeal of Respondent's Finding of Probable Cause to revoke Petitioner's Company Police Commission Certification.

APPEARANCES

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

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

ISSUE

Does substantial evidence exist for Respondent to revoke Petitioner's Company Police officer commission for committing prohibited acts as set forth in 12 NCAC 02I .0304(7)?

RULES AND STATUTE AT ISSUE

N.C. Gen. Stat. § 74E
12 NCAC 02I .0212(c)(4)
12 NCAC 02I .0304(7)

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1-6

For Respondent: 1-4, 6-9

FINDINGS OF FACT

Procedural Background

1. By letter dated September 19, 2019, Respondent's Company Police Administrator Randy Munn notified Petitioner of its Finding of Probable Cause to Revoke Petitioner's Company Police Commission Certification based on Petitioner's response to multiple calls for service off the property of Lake Royale Property Owners Association ("LRCP"). (Resp. Ex. 8) Mr. Munn informed Petitioner that:

The Attorney General, or his designee, may revoke, suspend or deny the commission of a company police officer upon a finding that the officer has committed any act prohibited by 12 NCAC 2I .0212(c)(4). The Company Police Administrator finds that you have committed a Prohibited Act as set for in the rules in this Subchapter and in G.S. 74E. According to NCAC 02I .0307(7), company police officer shall not commit the following acts: impeding traffic, stopping motorists or pedestrians, or in any manner or attempt to impose his will upon another person as police authority unless he is on the property specifically described under G.S. 74E-6 or when in immediate and continuous pursuit of any person for an offense which occurred within the property jurisdiction limitations specifically described under G.S. 74E.

Evidence indicates that on December 9, 2018, you self-initiated a call for a disable [sic] vehicle on Baptist Church Road and Sledge Road in Louisburg, on November 6, 2018, you initiated a check-in on a traffic accident on Baptist Church Road and Sledge Road and on March 12, 2019, you responded to a call for a suspicious person on Baptist Church Road and Sledge Road that was dispatched to a Franklin County Sheriff's Office (hereinafter FCSO) deputy and cancelled the deputy. These calls were all off the property of Lake Royale Property Owners Association and in violation of the Company Police Act and Administrative Codes listed above.

(Resp. Ex. 8).

2. Respondent's Finding of Probable Cause contained a typographical error in charging Petitioner with allegedly violating 12 NCAC 02I .0307(7). At hearing, Respondent corrected the proposed rule violation by indicating Petitioner allegedly violated 12 NCAC 02I .0304(7).

3. On September 24, 2019, Petitioner appealed Respondent's Finding of Probable Cause to Revoke his certification/commission by filing a contested case petition with the Office

of Administrative Hearings. Petitioner alleged that Respondent's Finding of Probable Cause was an "unjust and unfounded revocation" of his company police commission/certification. He alleged that Respondent's Finding of Probable Cause otherwise substantially prejudiced his rights and Respondent failed to use proper procedure. (Resp. Ex. 9)

Parties

4. Petitioner has held a valid General Certification (No. 100212397) and is commissioned to serve as a Company Police Officer by the North Carolina Department of Justice since being appointed as a Company Police Officer by Attorney General Josh Stein and Company Police Program Administrator Randy Munn on August 27, 2018. (Resp. Ex. 1).

5. Petitioner served with Lake Royale Company Police until he voluntarily left such department to join the Franklin County Sheriff's Office, where he currently serves as a Deputy Sheriff. Petitioner's background includes service as a professional firefighter, emergency medical responder, and deputy sheriff. He completed his Basic Law Enforcement Training in May 2018.

6. Respondent, Company Police Program, has the authority granted under Chapter 17E 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 commission.

7. Lake Royale Company Police (LRCP) is a certified Company Police agency. LRCP provides private law enforcement services to Lake Royale, a private, gated community in Louisburg, North Carolina, in Franklin County. Petitioner served under the supervision of Chief Vincent Pocaroba. At hearing, Chief Pocaroba opined that Petitioner is a "great" officer.

Alleged Violations

8. In May and July of 2019, Randy Munn, Company Police Administrator, received a letter from Sheriff Kent Winstead from the Franklin County Sheriff's Office (FCSO) requesting an investigation into the practices of Lake Royale Company Police of responding to calls outside of the agency's territorial jurisdiction. Sheriff Winstead indicated that his office spoke with Chief Pocaroba about LCRP officers responding outside their territorial jurisdiction on two separate occasions with no results. (Resp. Exs. 2 & 3) Sheriff Winstead requested that Respondent stop Lake Royale Police from responding to their calls for service "unless a mutual aid agreement was established and they are requested in accordance to law." (Pet. Ex. 2)

9. Petitioner was not named in these complaint letters as one of the officers who responded to calls outside the LCRP jurisdiction. (Pet. Ex. 2 and 3)

November 6, 2018

10. On November 6, 2018, Petitioner was driving back to Lake Royale from court when he heard radio traffic indicating there was a domestic call on Valarie Drive and an auto accident

involving a head-on collision on Baptist Church and Sledge Roads. Petitioner heard the Franklin County Sheriff's Sergeant on duty (B-10) ask for assistance from Lake Royale Company Police.

11. The Sergeant (B-10) communicated that they did not have any other law enforcement officers en route to the domestic call and that they would appreciate it if Petitioner would appear. (Pet. Ex. 1 - Call for Service Reports and the Call Log Record for November 6, 2018).

12. Petitioner arrived at the scene of the domestic call. Petitioner made observations at the scene but took no actions. Soon thereafter, two Franklin County deputy sheriffs arrived at the scene. Petitioner turned over information to the deputy sheriffs and they conducted the investigation. Petitioner left to return to Lake Royale. Petitioner did not initiate any enforcement action at that scene or use any law enforcement authority.

13. While traveling down Baptist Church Road, Petitioner came upon an automobile accident. The accident was a few feet from the Lake Royale property line. Petitioner stopped at that scene and spoke to a deputy sheriff directing traffic. Petitioner was asked to go to Lake Royale and direct traffic leaving Lake Royale away from the accident. Petitioner then drove to the entrance to Lake Royale and diverted traffic away from the accident, which promoted safety. Petitioner did not initiate any enforcement action on this occasion. The directing of traffic did not impede the traffic.

December 9, 2018

14. On December 9, 2018, there was heavy snow and ice on the roads in the subject area. (Pet. Ex. 2: 2a Call for Service Report, 2b - Call Log Record, 2c - National Weather Service record, all for December 9, 2018). (Pet. Ex. 2c - National Weather Service Report for December 9, 2018).

15. Petitioner was returning to Lake Royale from Bunn and noticed a stalled car in the middle of the road in a sharp curve. The location was about a half mile from Lake Royale. Two other vehicles approaching nearly struck the stalled car. The roadway was covered with heavy snow and ice. Deputy Sheriffs were busy assisting other stranded motorists throughout the county. Petitioner tried to assist the stalled motorist by pushing the car but was unsuccessful.

16. Due to the inclement weather and apparent danger from the location of the stalled car, Petitioner had no other reasonable recourse but to assist the motorist in an attempt to minimize the risks. With the assistance from the other motorist, Petitioner was able to safely remove both cars off the roadway. Petitioner did not utilize any law enforcement authority and did not take any enforcement action in this matter involving the stalled car.

March 12, 2019

17. On March 12, 2019, Petitioner heard a dispatch call involving a suspicious person on Baptist Church Road and Sledge Road. Shortly thereafter, Petitioner was driving back to Lake Royale from Bunn, North Carolina when he observed the apparent suspicious person walking on Baptist Church Road. (Pet. Ex. 3 - Call for Service Report for March 12, 2019).

18. Petitioner pulled over and inquired of the person as to what he was doing. The person responded by saying that his car had broken down on Baptist Church Road, that he was walking home, and that he lived at Lake Royale. Petitioner gave the person a ride back to Lake Royale, where he lived. Petitioner did not utilize any law enforcement authority and did not take any enforcement action in this stranded person matter. Petitioner did not utilize an investigative detention of the stranded motorist and did not stop the individual; rather, he made a simple inquiry.

Analysis

19. The matters at issue involved Petitioner performing certain acts outside the physical boundaries of Lake Royale on three different dates. However, the real issue appears to be whether those limited acts, described below, are "prohibited law enforcement acts" such as impeding traffic, stopping motorists or pedestrians, or in any manner imposing or attempting to impose his will upon another person as police authority as per 12 NCAC 02I .0304(7).

20. In construing 12 NCAC 02I .0304(7), it appears reasonable to take into consideration the totality of the facts and circumstances surrounding the matters at issue including whether the act in issue was requested by another police officer needing assistance and whether there was any actual or potential danger that existed that warranted the limited act in issue.

21. The police radio communications involving the incidents appear as Petitioner's Exhibit 4 and Respondent's Exhibit 5. The communications contained on those three recordings do not establish the completion of any prohibited law enforcement acts.

22. On the three occasions, Petitioner did not impede any traffic, did not stop anyone, did not conduct any search, did not issue any citations for charges, and did not perform any functions that are exclusive law enforcement functions.

23. On the three occasions, Petitioner never used his vehicular blue light or siren; he never used any police weapon or police tool. Petitioner never subjected anyone to any law enforcement commands or authority. Petitioner did not use any criminal procedure such as a search or seizure, lineup, investigative detention or other official police action or procedure.

24. Appearing at a scene on November 6, 2018 as requested by a Deputy Sheriff but not taking law enforcement actions there did not result in performing any prohibited law enforcement act.

25. Directing traffic as Petitioner was asked to do by a Franklin County Deputy Sheriff on December 9, 2018 is not an exclusive law enforcement function but is rather something that ordinary citizens do from time to time.

26. Assisting a stranded motorist by pushing a stalled automobile out of the road as Petitioner did on December 9, 2018 is not an exclusive law enforcement function but is rather something that ordinary citizens do from time to time at accident scenes.

27. Inquiring of a pedestrian beside the road and offering that person a ride home nearby, as Petitioner did on March 12, 2019, is not an exclusive law enforcement function but is rather something that ordinary citizens do from time to time at accident scenes. Citizens often perform these kinds of favors for other citizens.

28. In the three matters in issue, Petitioner Fanara did not assert any law enforcement authority and did not initiate any law enforcement actions.

29. At hearing, Company Police Administrator Munn acknowledged that Petitioner Fanara is straightforward, honest, and that there was no ill intention in Petitioner's actions.

30. In each of the three matters, the basis for inquiry and motivation of Petitioner Fanara appears honorable, reasonable, and understandable. Much of Petitioner's limited actions can be fairly characterized as that of a Good Samaritan.

31. At hearing, Major Jarrett Umstead of the Franklin County Sheriff's Office conceded that Petitioner Fanara is doing exceptionally well in his service as a Franklin County Deputy Sheriff.

CONCLUSIONS OF LAW

1. Both parties are properly before this Administrative Law Judge as jurisdiction and venue are proper, and both parties received Notice of Hearing. 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. The Administrative Law Judge shall decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a).

4. Chapter 74E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 02I, authorizes Respondent to certify company police agencies and officers, and to revoke, suspend, or deny such commission.

5. N.C. Gen. Stat. § 74E-4 authorizes the Attorney General with the power to revoke, deny, or suspend a company police officer for failing to meet the requirements or comply with Chapter 74E or a ruled adopted under Chapter 74E.

6. 12 NCAC 02I .0304(7) provides:

In addition to the prohibited acts set forth elsewhere in the rules in this Subchapter and in G.S. Chapter 74E, a company police officer shall not commit the following acts:

(7) impeding traffic, stopping motorists or pedestrians, or in any manner imposing or attempting to impose his will upon another person as police authority unless:

(a) he is on the property specifically described under G.S. 74E-6; or

(b) when in immediate and continuous pursuit of any person for an offense which occurred within the property jurisdiction limitations specifically described under G.S. 74E-6;

7. A preponderance of the evidence at hearing showed that Petitioner Fanara did not impede traffic, stop any motorist or pedestrian, or in any manner attempt to impose his authority as a law enforcement officer upon anyone.

8. The conduct and actions at issue are not prohibited law enforcement actions under the statute and regulation, and Petitioner did not violate the subject statute or regulation.

9. There are no aggravating factors or circumstances. Petitioner acted under a reasonable and good faith belief that the limited actions that he engaged in were not prohibited law enforcement actions, and that he was either asked to assist or acted in a way of no more than an ordinary citizen would act to assist a fellow citizen.

10. There is no legitimate or necessary basis to revoke or suspend Petitioner's company police commission. The preponderance of the evidence proved that Respondent lacked probable cause to revoke Petitioner's application for commission pursuant to 12 NCAC 2I .0212(c)(4).

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby **REVERSES** Respondent's initial Finding of Probable Cause to revoke Petitioner's company police commission and finds that Petitioner retain his commission as a company police officer.

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 8th 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:

Joseph Michael McGuinness
McGuinness Law Firm
jmichael@mcguinnesslaw.com
Attorney For Petitioner

Ameshia Cooper
North Carolina Department of Justice
acooper@ncdoj.gov
Attorney For Respondent

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

This the 8th 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