

STATE OF NORTH CAROLINA
COUNTY OF STANLY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 DOJ 03453

Joshua Hugh Black Petitioner, v. NC Sheriffs Education and Training Standards Commission Respondent.	PROPOSAL FOR DECISION
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THIS MATTER coming on to be heard and being heard before the undersigned Administrative Law Judge on January 5, 2021 at 9:00 AM, electronically conducted via the Microsoft Teams program, pursuant to N.C. Gen. Stat. § 150B-4(e), and a request for designation of an Administrative Law Judge to preside at a contested case hearing under Article 3A, Chapter 150B of the North Carolina General Statutes and Chapter 17E of the North Carolina General Statutes to hear Petitioner's appeal of Respondent's determination that his application for justice officer certification should be denied.

APPEARANCES

For Petitioner: D. Brandon Christian, Chief Legal Counsel
Union County Sheriff's Office
Monroe, North Carolina

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

WITNESSES AND EVIDENCE

Witnesses: Petitioner Joshua Black
Dep. Director Sirena Jones, N.C. Sheriffs' Standards Commission

Exhibits: For Petitioner: 1
For Respondent: 1-10

Official Notice: N.C. Gen. Stat. § 269.2

ISSUE

Whether Petitioner's application for justice officer certification should be denied for commission of a felony, pursuant to Rule .0204(a)(1) of Chapter 10B of Title 12 of the North Carolina Administrative Code.

RULE AT ISSUE

12 N.C.A.C. 10B .0204(a)(1)

FINDINGS OF FACT

Based upon careful consideration of the exhibits admitted into evidence, the entire record in this proceeding, and the credibility and believability of witness testimony at hearing including the witnesses' credibility, demeanor, any interests, biases or prejudices, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, and whether the testimony of the witnesses are reasonable and consistent with other believable evidence in the case, the undersigned finds as follows:

INTRODUCTION

1. Both parties are properly before this Administrative Law Judge in that jurisdiction and venue are proper, and both parties received proper Notice of Hearing for this contested case.
2. Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B authorizes Respondent to certify sheriffs and to deny, suspend, or revoke such certification.
3. In 2019 Petitioner Black was offered employment by the Union County Sheriff's Office as a Detention Officer, and applied for certification as a justice officer through Respondent North Carolina Sheriffs' Education and Training and Standards Commission.
4. On July 28, 2020 Respondent asserted that it found probable cause to deny Petitioner's application for justice officer certifications. (Respondent Ex. 1.) Respondent asserts that denial is proper based upon Rule .0204(a)(1) of Chapter 10B of Title 12 of the North Carolina Administrative Code, finding probable cause to believe that Petitioner committed a felony. (Id.)
5. Petitioner requested an administrative hearing pursuant to Article 3A of Chapter 150B of the North Carolina General Statutes, asking the Administrative Law Judge to make a proposal for decision to Respondent that Petitioner did not commit a felony offense in violation of Commission rules and a recommendation that the Commission issue a final agency decision that Petitioner did not violate Rule .0204(a)(1) of Chapter 10B of Title 12 of the North Carolina Administrative Code.

FEBRUARY 3, 2014 INCIDENT

6. Petitioner was charged with possessing a weapon on educational property on February 3, 2014.

7. Basic facts of the events of February 3, 2014 surrounding Petitioner's arrest are set forth in the statement of Deputy Yow (Respondent Ex. 3); and Petitioner's statement provided to the Respondent (Respondent Ex. 10).

8. Petitioner's testimony provided more complete information regarding the events of February 3, 2014.

9. The undersigned finds the following facts to be the events of February 2-3, 2014 as relevant to this proceeding:

a. On Sunday February 2, 2014, Petitioner went skeet shooting, and used two shotguns. He drove to the skeet shoot in his personal motor vehicle, a pickup truck.

b. After completing his shooting, which consumed all of the ammunition Petitioner had brought to the skeet shoot, Petitioner placed the two shotguns used in the skeet shoot in his pickup truck.

c. Petitioner then drove his truck to his parents' home, where he stayed on the night of February 2, 2014.

d. On February 3, 2014, Petitioner drove his truck to his girlfriend's home.

e. While there, Petitioner's mother requested that Petitioner drive to Piedmont High School in Union County, North Carolina to pick up his brothers from the school.

f. Approximately 30 minutes after receiving the phone call from his mother, Petitioner drove his truck from his girlfriend's house to Piedmont High School.

g. Once in the school parking lot, Petitioner's brothers entered his vehicle, and Petitioner attempted to depart from the school property.

h. As Petitioner pulled away toward the exit from the school parking lot, Petitioner was stopped by a Union County Sheriff's Deputy, who had observed a camo patterned gun case sticking part of the way out of the rear window of Petitioner's truck.

i. The Deputy ultimately determined that Petitioner possessed two shotguns in his truck, one in the camo patterned case, the other suspended in a "sling" type holder which was hanging from the rear of the driver's seat.

j. These two firearms were the ones that had been used in the skeet shooting on the previous day, which Petitioner had not removed from his truck after the skeet shoot.

k. After the deputy seized both firearms, Petitioner was released to take his brothers home.

10. Petitioner testified that he told the deputy who stopped him in the parking lot of the school that he did not knowingly take firearms onto school property.

11. Petitioner's statement to the deputy is not recorded in the Deputy's police report (Resp. Ex. 3) however, the Exhibit does not contain any statements attributed to the Petitioner at all. Petitioner's statement to the Commission (Resp. Ex. 10) clearly states that he accidentally and unknowingly left the firearms in his truck when he went to Piedmont High School.

12. The next day, February 4, 2014, Petitioner turned himself in after learning a warrant for his arrest had issued.

SUPERIOR COURT PROCEEDINGS

13. Petitioner's criminal charges were ultimately resolved in the Superior Court of Union County through a deferred prosecution agreement.

14. On September 29, 2014, Petitioner entered into an agreement with the State of North Carolina to defer prosecution. Petitioner complied with the deferred prosecution agreement and the State dismissed all charges stemming from Petitioner's arrest on March 28, 2015. (Respondent Ex. 4, 5, 6, 7, 8, and 9.)

15. Upon examination of the Union County Superior Court filings related to Petitioner's case, Respondent's Exhibits 4 through 9, several ambiguities are clearly apparent on the face of the documents:

a. Resp. Ex. 4 is a Motion and Application for Deferred Prosecution, which is signed by the Petitioner, his attorney at the time, and an Assistant District Attorney. It captions Petitioner's charge as "F GUN ETC ON EDUC PROP" [sic].

b. Resp. Ex. 5 is an Admission, and is signed by the Petitioner and his attorney at the time. The admission lists Petitioner's offense as "(M) GUN ETC ON EDUC PROP" [sic]. The handwritten section of this document states only "I took a gun onto the property of Piedmont High School. It was in my vehicle when I went to pick up my brother(s)." [sic].

c. Resp. Ex. 6 is a contract between the State and Petitioner regarding his requirements to successfully defer prosecution of his offense. Resp. Ex. 6 captions Petitioner's offense as "(M) GUN ETC ON EDUC PROP" [sic].

d. Resp. Ex. 7 is an Order of the Superior Court of Union County placing Petitioner on supervised probation pursuant to an agreement to defer prosecution. This document captions Petitioner's Offense as "F GUN ETC ON EDUC PROP" [sic].

e. Resp. Ex. 8 is a dismissal signed by an Assistant District Attorney taking a dismissal of Petitioner's criminal charges, with leave to reinstate if the Petitioner failed to complete the deferred prosecution agreement. The Petitioner's criminal charge is captioned on this document as "(M) GUN ETC ON EDUC PROP" [sic].

16. Upon inquiry of the undersigned, Counsel for both Parties agreed that the "F" and "M" in the caption of Respondent's Exhibits 4 through 8 mean "Felony" and "Misdemeanor", respectively.

17. Respondent's Exhibit 9 is a final dismissal of all charges in Union County File No. 14CRS 50520, signed by an Assistant District Attorney on March 28, 2015. This document, however, does not specifically describe any of Petitioner's charged offenses, specifically states "a voluntary dismissal of all charges included in the original Order" and incorrectly reflects that Petitioner received a conditional discharge under N.C. Gen. Stat. § 90-96, and not a deferred prosecution.

18. Respondent did not offer witness testimony or submit an indictment or any other charging document to substantiate the nature of Petitioner's criminal charge as a felony or misdemeanor.

19. Respondent did not offer witness testimony to substantiate the nature of Petitioner's criminal charge as a felony or misdemeanor.

20. Petitioner was represented by Counsel in the criminal proceedings in Superior Court and guided by Counsel before signing these documents.

ANALYSIS OF THE EVIDENCE

21. Respondent did produce an Administrative Office of the Courts ("AOC") printout containing reference to Petitioner's charge as being a felony in violation of N.C. Gen. Stat. § 14-269.2(b). (Resp. Ex. 2) This Exhibit is insufficient to establish the nature of the charges lodged against the Petitioner particularly in light of the ambiguities in the record.

22. The undersigned particularly finds the gross ambiguities in the records of the Superior Court of Union County preclude any findings adverse to Petitioner based upon Respondent's Exhibits 2-9.

23. Therefore, the undersigned finds that the records from the Union County Superior Court, as produced by the Respondent as Resp. Ex. 2-9, are insufficient as a matter of law to establish by a preponderance of the evidence that Petitioner committed any crime.

24. The Police Report produced by Respondent as Resp. Ex. 3 has the letter "M" next to the description of the investigated crime, which is listed as "Possess Weapon on School Property" (Resp. Ex. 3, p. 1), which is usually associated with a designation of an offense as a misdemeanor.

25. Petitioner's "Admission" of responsibility to his charge (Resp. Ex. 5) does not discuss whether he knowingly took a firearm onto the campus of Piedmont High School, it merely admits that the firearm was taken onto the property.

26. Further the "Admission" (Resp. Ex. 5) is captioned as an admission to "(M) GUN ETC ON EDUC PROP" [sic], apparently, a misdemeanor.

27. Respondent's witness, Dep. Director Jones, testified that the Probable Cause Committee of the Commission were presented with Respondent's Exhibits 1-10 for their consideration.

28. At most, Respondent's evidence raises a mere suspicion or conjecture that Petitioner committed a felony offense.

29. The only evidence in the record offered to rebut Petitioner's testimony that he did not knowingly take the weapons to the school are Respondent's Exhibits 4 through 8.

30. Respondent made three arguments to rebut Petitioner's testimony that he did not knowingly take the weapons to the school: (1) that Petitioner's denial of knowledge is not recorded in the police report; (2) that it is unlikely Petitioner did not notice a gun case partially sticking out of an open window on a warm February day; and (3) that Petitioner did not produce documentation of the accidental nature of bringing the weapon to the school property until after his Sheriffs' Standards investigation began.

31. Even if there was evidence in the record to support these arguments, they are insufficient to raise more than a mere suspicion or conjecture that Petitioner committed the felony offense of knowingly possessing a firearm on school property.

a. As to Respondent's argument that Petitioner's denial is not recorded in the police report, the undersigned finds that the full narrative in the police report is only approximately one-half page long and contains very few details regarding the overall incident. The undersigned notes that while three deputies interacted with Petitioner at the school, only one, Deputy Yow, actually recorded a narrative of the events. Accordingly, the undersigned does not find the absence of Petitioner's statement regarding the inadvertent nature of his actions from the police report to carry any weight.

b. As to Respondent's argument that Petitioner would not have failed to notice one of the gun cases partially extending out of the rear truck window, the undersigned does not find this argument persuasive. The undisputed testimony is that February 3, 2014 was an unusually warm day. The undisputed testimony is that Petitioner drove his truck from his parents' home to his girlfriend's home prior to his trip to the school. There is no evidence in the record to suggest at what time Petitioner's window was opened to permit the gun case to extend out of it. There is no evidence from which to infer that the gun case partially extending out of the rear window would have caused the Petitioner to know that he had a firearm in his vehicle at the time he drove into the parking lot at Piedmont High School on February 3, 2014.

c. Respondent's argument that Petitioner did not assert that he did not knowingly possess the weapons until he was under investigation by the Commission fails for the same reason its first argument fails, namely that there is no weight to the lack of statements from the Petitioner in the police report given the paucity of detail in the law enforcement records. Further, Respondent has offered and the undersigned has found no reason why Petitioner would have needed to refer to the events of February 3, 2014 between the completion of his deferred prosecution agreement and the beginning of his Sheriffs' Standards investigation approximately four and one-half years later. Petitioner's alleged silence on this issue between 2015 and 2020 does not sway the undersigned's determination that the evidence is insufficient to support a finding that Petitioner knowingly possessed the weapons on school property on February 3, 2014.

d. Assuming, *arguendo*, even if there was evidence in the record to support Respondent's arguments, these arguments are not sufficient to persuade the undersigned that Petitioner's testimony that he did not knowingly possess the weapons on school property should be discounted.

32. The undersigned finds Petitioner's testimony to be truthful and credible, and consistent with the evidence presented.

33. Accordingly, the undersigned finds as fact that Petitioner did **not** knowingly take a firearm onto the property of Piedmont High School on February 3, 2014.

CONCLUSIONS OF LAW

1. The parties are properly before this Administrative Law Judge. Jurisdiction and venue are proper and both parties received proper notice of the hearing. To the extent that the Findings of Facts contain Conclusions of Law, or that the Conclusions or Law are Findings of Fact, they should be so considered without regard to the given labels.

2. The North Carolina Sheriffs' Education and Training Standards Commission ("Commission") has certain authority under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B to certify justice officers and to suspend, revoke, or deny certification under appropriate circumstances with substantial proof of a rule violation.

3. The Commission's Notice of Probable Cause specifies its belief that Petitioner committed the felony of possessing a firearm on educational property on February 3, 2014 in violation of N.C. Gen. Stat. § 14-269.2(b), and that a result of this felony offense, Petitioner's justice officer certification should be denied.

BURDEN OF PROOF

4. N.C. Gen. Stat. § 150B-40(e) provides that "[w]hen a majority of an agency is unable or elects not to hear a contested case," the agency is to apply to the Office of Administrative

Hearings (“OAH”) for designation of an Administrative Law Judge (“ALJ”). In such case, “[t]he provisions of [Article 3A], rather than the provisions of Article 3, shall govern a contested case . . .” N.C. Gen. Stat. § 150B-40(e).

5. In Article 3A cases, OAH, through an ALJ, sits in place of and presides over the hearing in the place of the agency, and makes a “proposal for decision” back to the agency. N.C. Gen. Stat. § 150B-40.

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

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

8. In *Peace v. Employment Sec. Comm’n of N. Carolina*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998), the North Carolina State Supreme Court addressed the burden of proof. Although *Peace* is an Article 3 case, the discussion of burden of proof is instructive in this instant case. *Peace* states:

In the absence of state constitutional or statutory direction, the appropriate burden of proof must be “judicially allocated on considerations of policy, fairness and common sense.” 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 37 (4th ed.1993). Two general rules guide the allocation of the burden of proof outside the criminal context: (1) the burden rests on the party who asserts the affirmative, in substance rather than form; and (2) the burden rests on the party with peculiar knowledge of the facts and circumstances.

Id.

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

10. The burden of proof is the preponderance of the evidence standard. *See* N.C. Gen. Stat. §§ 150B-23(a);-29(a); and -34(a). Accordingly, the Commission must prove that it is more likely than not that Petitioner committed a felony offense to lawfully deny Petitioner's application for justice officer certification.

11. Nevertheless, as explained below, even if the burden were on the Petitioner, the undersigned finds that the Petitioner's evidence also proves that he did not violate any Commission rule.

MENS REA – POSSESSION OF A WEAPON ON EDUCATIONAL PROPERTY

12. The elements of a violation under N.C. Gen. Stat. § 169.2(b) are that a person unlawfully:

- a. Knowingly;
- b. possess or carry, whether openly or concealed;
- c. any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school.

13. The requirement that a violation of this statute be done knowingly was added by our General Assembly in 2011. *See State v. French*, 2020 N.C. App. LEXIS 683, *8-9, 849 S.E.2d 360, 2020 WL 5904106 (N.C. Ct. App. October 6, 2020)

The General Assembly is capable of imposing a specific intent, like that of willfulness, in codifying a crime and has done so in several instances. In *State v. Haskins*, this Court declined to read a criminal intent requirement into the statutory crime of possession of a weapon on educational property because the plain language of the statute included no reference to a *mens rea* element. 160 N.C. App. 349, 352, 585 S.E.2d 766, 767 (2003), superseded by statute as recognized in *State v. Huckelba*, 240 N.C. App. 544, 559-62, 771 S.E.2d 809, 821-23 (2015). Following that decision, the General Assembly added a specific intent element by amending N.C. Gen. Stat. § 14-269.2(b) to include the word "knowingly." Act of June 17, 2011, S.L. 2011-268, § 4, N.C. Sess. Laws 1002, 1003-04 (codified as amended at N.C. Gen. Stat. § 14-269.2(b) (2019)). This Court then acknowledged the amendment and recognized the added *mens rea* requirement. *Huckelba*, 240 N.C. App. at 550-52, 771 S.E.2d at 816, *rev'd on other grounds*, 368 N.C. 569, 780 S.E.2d 750 (2015).

14. Because the felony alleged by the Commission contains a *mens rea* element requiring the wrongful conduct be done knowingly, the undersigned's determination that Petitioner did not knowingly take a firearm onto the property of Piedmont High School on February 3, 2014 establishes as a matter of law that Petitioner did not commit the offense.

15. Further, the undersigned finds that, upon weighing the evidence, because the Petitioner did not knowingly take a firearm onto the property of Piedmont High School on

February 3, 2014, Petitioner's evidence satisfies by the preponderance of the evidence standard that he did not commit a felony offense.

PETITIONER'S ADDITIONAL ARGUMENTS

1. In addition to his arguments that he did not commit a felony offense, Petitioner has further adduced evidence that he paid his attorney to obtain an expunction of all records of Petitioner's arrest in 2015 after he completed the deferred prosecution agreement.

2. Petitioner further offers evidence that his attorney failed to seek an expunction and Petitioner did not become aware that his charges were not expunged until 2020.

3. A petition to expunge all record of the Petitioner's arrest, charges, and prosecution under N.C. Gen. Stat. § 15A-146 was filed with the Union County Clerk of Superior Court on August 6, 2020. Pet. Ex. 1 was admitted to prove that the petition for an expunction was filed.

4. Petitioner argues that he is eligible for an expunction of his charges under N.C. Gen. Stat. § 15A-146, that the Superior Court is obligated to grant the petition because the Commission knows that he has no disqualifying convictions in his background, and that his lawyer's failure to timely obtain the expunction prevented him from being able to take advantage of the protections enshrined in N.C. Gen. Stat. §§ 15A-151; -153 for persons who have had charges expunged.

5. The undersigned finds it unnecessary to reach Petitioner's arguments concerning the inevitable expunction of his charges and whatever effect such an expunction would have on Petitioner's certification in light of its findings that the Petitioner did not commit a felony in violation of Rule .0204(a)(1) of Chapter 10B of Title 12 of the North Carolina Administrative Code, and accordingly, the Court declines to reach these arguments.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact, Conclusions of Law, the undersigned proposes that the North Carolina Sheriffs' Education, Training, and Standards Commission render a final agency decision finding that Petitioner is **NOT** in violation of Rule .0204(a)(1) of Chapter 10B of Title 12 of the North Carolina Administrative Code, and accordingly it is proposed that the North Carolina Sheriffs' Education, Training, and Standards Commission **GRANT** Petitioner's application for justice officer certification.

NOTICE

The North Carolina Sheriffs' Education and Training Standards Commission will make the Final Decision in this contested case. As the Final Decision maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

The undersigned hereby orders that agency to serve a copy of its Final Decision in this case on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6700.

IT IS SO ORDERED.

This the 2nd day of February, 2021.



Selina Malherbe
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 2nd day of February, 2021.



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