

STATE OF NORTH CAROLINA
COUNTY OF JONES

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 DOJ 04152

<p>Lenisha Monique Ward Petitioner,</p> <p>v.</p> <p>NC Sheriffs Education and Training Standards Commission Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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This case came on for hearing on February 18, 2021, before Administrative Law Judge, Stacey Bice Bawtinheimer, in a courtroom equipped to telephonically communicate with multiple parties, physically located in Raleigh, North Carolina. All parties consented to a telephonic hearing. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 17E of the North Carolina General Statutes.

APPEARANCES

Petitioner: Lenisha Monique Ward, *pro se*
165 Robert Ward Lane
Trenton, NC 28585

Respondent: Ameshia A. Cooper
Attorney for Respondent
Department of Justice
Special Prosecutions and Law Enforcement Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Whether Respondent's denial of Petitioner's justice officer certification for producing a positive result for marijuana on a drug screen is supported by a preponderance of the evidence?

RULES AT ISSUE

12 NCAC 10B .0301(a)(6)
12 NCAC 10B .0410
12 NCAC 10B .0204(b)(5)
12 NCAC 10B .0205(2)(g)

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 Administrative Law Judge makes the following **FINDINGS OF FACT**.

In making the **FINDINGS OF FACT**, the undersigned Administrative Law Judge has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including, but not limited to, the demeanor of the witness, any interests, 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.

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by certified mail, the proposed denial letter, mailed by Respondent, the North Carolina Sheriffs' Education and Training Standards Commission (hereinafter "the Commission"), on September 9, 2020. Respondent's Ex. 1.

2. Respondent has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers, including detention officers, and to revoke, suspend, or deny such certification under appropriate circumstances with valid proof of a rule violation.

3. Lenisha Monique Ward ("Petitioner") is an applicant for detention officer certification through the Jones County Sheriff's Office. She was previously certified as a correctional officer by the Criminal Justice Education and Training Standards Commission from July 22, 2019 through June 19, 2020.

4. On July 1, 2020, in furtherance of her application for certification through Respondent, Petitioner submitted to a drug test. The test was positive for marijuana. Respondent's Ex. 3.

5. Matthew Jennette testified on behalf of Respondent. His testimony was credible and included the following:

- a. Jennette is the Chief Operating Officer at Absolute Assurance Drug Testing, LLC. He has been in this role for 7 years. Jennette manages the company's New Bern, North Carolina, and Goldsboro, North Carolina, offices and collects samples for drug testing in-office and on-site.
- b. Jennette is a certified drug test collector and trainer. This certification requires periodic renewal and Jennette's certification is valid and current, having been renewed, most recently, two years ago.
- c. The Jones County Sheriff's Office is one of several law enforcement and government entities that contract with Absolute Assurance to conduct reemployment and routine drug testing.
- d. Absolute Assurance utilizes a uniform process for drug test specimen collection. When a donor comes into the office their personal items are placed into a locker, then they are asked to provide their driver's license/identification, employing agency, and date of birth. Next, the drug test collector completes a chain of custody form which the donor is required to sign and date. The drug test collector then gives the donor specific instructions on how to go about providing a urine sample. This includes how much urine to collect, not to flush the toilet, and to complete the collection within 4 minutes. Once the donor has completed this step, the drug test collector ensures the temperature of the sample is proper and at least 45 milliliters were provided. The drug test collector then separates the sample into two vials, filling Vial A with 30 milliliters and the Vial B with 15 milliliters, and affixes a sticker from the chain of custody form on each vial. The final step requires the donor to initial both vials.
- e. After collecting the sample, Vial A is sent to Quest Diagnostic for testing, and Vial B is kept in the event that further testing is required. If the result is positive, the Medical Review Officer makes contact with the donor, notifies them of the positive result, and the option to have Vial B tested by a different lab.
- f. Jennette collected Petitioner's sample on July 1, 2020, and followed the process detailed above. Petitioner's chain of custody form was entered into evidence as Respondent's Exhibit 2.
- g. Vial A of Petitioner's sample was sent to Quest Diagnostics for testing and the results were received on July 8, 2020. The sample was positive for marijuana. Respondent's Ex. 3.
- h. Jennette testified that upon receipt of the test result, Absolute Assurance's Medical Review Officer, Dr. Martin McGraw, reviewed the results and contacted Petitioner to notify her of the positive result and explain her option to have Vial B tested by a different lab. This is evidenced by the notation at the bottom of Respondent's Exhibit 3.

- i. Jennette was asked whether the consumption of hemp seeds could cause a positive result for marijuana and whether the result could be a “false positive.” His response to both inquires was no. However, Jennette was not tendered by Respondent as an expert witness on this subject and his opinion was not considered definitive.
- j. Jennette testified that marijuana can remain in the system for two or three days when a person does not use frequently or for three to thirty days if the person is a chronic user.

6. Petitioner testified on her own behalf and her credible testimony included the following:

- a. Petitioner’s educational background consists of a high school diploma and an associate’s degree. She is currently enrolled at the University of Mount Olive and studying to receive a bachelor’s degree in health care management.
- b. Petitioner worked at Pamlico Correctional Institute as a correctional officer from July 2019 through June 2020. During that time she was not written up or otherwise disciplined. Petitioner left Pamlico Correctional because it lacked organization and she did not feel safe.
- c. Petitioner began work as a detention officer at the Jones County Jail on July 1, 2020. There were eleven days between Petitioner’s departure from Pamlico Correctional Institute and getting hired by the Jones County Sheriff’s Office. Petitioner testified that she did not know she would be offered a position at the Jones County Jail when she left her previous employment.
- d. Petitioner denied smoking marijuana between June 19, 2020, and July 1, 2020, specifically, and believes that using hemp seeds as a dietary supplement caused her positive marijuana result.
- e. Petitioner recalled speaking with Dr. McGraw, the Medical Review Officer from Absolute Assurance, however, she testified that she was not notified that she could have the sample re-tested, but instead, was told that she needed to contact the Jones County Sheriff’s Office and they would let her know about a re-test option.
- f. Petitioner testified that on July 8, 2020, the Sheriff’s Office sent her to the health department to be tested again. The results of that drug test were negative. Respondent’s Ex. 4.
- g. Petitioner testified that she has a school aged son and her salary is critical to the support and welfare of her family.

7. Although Petitioner bears the burden of proof, neither Party presented scientific evidence dispositive of the effect of hemp seed consumption and marijuana screening results.

8. The Probable Cause Committee had probable cause to deny Petitioner's certification, however mitigating factors merit a reduction or suspension of that denial.

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. To the extent that the Findings of Facts contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

3. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).

4. Petitioner has the burden of proof in the case at bar. *Overcash v. N.C. Dep't. of Env't & Natural Resources*, 172 N.C. App 697, 635 S.E.2d 442 (2006).

5. 12 NCAC 10B .0301 provides that:

(a) Every Justice Officer employed or certified in North Carolina shall:

(6) have produced a negative result on a drug screen administered according to the following specifications...

(C) the drugs whose use shall be tested for shall include cannabis, cocaine, phencyclidine (PCP), opiates and amphetamines or their metabolites...

6. 12 NCAC 10B .0410 provides that:

(a) Each agency that is required to report individuals to the Commission for certification, or that voluntarily reports telecommunicators to the Commission for certification, shall report in writing to the Division all refusals and all positive results of drug screening obtained from applicants or lateral transfers pursuant to 12 NCAC 10B .0301(6) unless the positive result has been explained to the satisfaction of the agency's medical review officer who shall be a licensed physician.

7. 12 NCAC 10B .0204 provides that:

(b) The Commission shall revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or certified officer...

(5) has produced a positive result on any drug screen reported to the Commission as specified in 12 NCAC 10B .0410 or reported to any commission, agency, or board established to certify, pursuant to said commission, agency, or boards' standards, a person as a certified justice officer, corrections officer as defined in 12 NCAC 09G .0102 or a criminal justice officer as defined in 12 NCAC 09A .0103(6) unless the positive result is due to a medically indicated cause...

8. Marijuana is a substance for which justice officers are prohibited from testing positive.

9. Although Petitioner credibly asserted that she consumed hemp seeds as a dietary supplement, no credible evidence was presented by her to prove that her consumption of hemp seeds, in fact, caused the positive drug test result. Additionally, marijuana use is not legal in the state of North Carolina, therefore, Petitioner's positive drug screen is not medically indicated.

10. 12 NCAC 10B .0205 provides that:

When the commission suspends, revokes, or denies the certification of a justice officer, the period of sanction shall be:

(2) not less than five years where the cause of sanction is:

(g) a positive result on a drug screen, or a refusal to submit to drug testing as required by the rules in this Chapter or the rules of the Criminal Justice Education and Training Standards Commission or has refused to submit to an in-service drug screen pursuant to the guidelines set forth in the Drug Screening Implementation Guide as required by the employing agency through which the officer is certified.

The Commission may either reduce or suspend the period of sanction under this item or substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension.

11. A preponderance of the evidence presented at the administrative hearing establishes that Petitioner violated 12 NCAC 10B .0204(b)(5) when she tested positive for marijuana in July 2020.

12. Mitigating circumstances exist for a reduction or suspension of the sanction in this case such as: Petitioner is the sole provider of her family, the possibility exists that hemp seeds could have caused a false positive result, Petitioner has had no disciplinary actions; and despite her initial positive test result Jones County Sheriff's Department sent her to be retested and she tested negative.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is proposed that Petitioner's justice officer certification be **DENIED**, however, in lieu of a denial, Petitioner be **GRANTED** certification subject to a **PROBATIONARY PERIOD OF FIVE (5) YEARS** on the condition that during that period of probation, Petitioner not violate any law (other than infractions) of this state or any other state, any federal laws, or any rules of this Commission or the North Carolina Criminal Justice Education and Training Standards Commission and that Petitioner be subjected to random drug testing.

NOTICE

The agency making the final decision in this contested case 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. N.C.G.S. § 150B-40(e).

The agency that will make the final decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

IT IS SO PROPOSED.

This the 19th day of March, 2021.



Stacey Bice Bawtinheimer
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:

Lenisha Monique Ward
165 Robert Ward Lane
Trenton NC 28585
Petitioner

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

This the 19th day of March, 2021.



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