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06/15/2021 4:41 PM

STATE OF NORTH CAROLINA

COUNTY OF PITT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 DOJ 03914

Robert Joseph Brewington Petitioner, v. NC Criminal Justice Education and Training Standards Commission Respondent.	**PROPOSAL FOR DECISION**

On February 16, 2021, Administrative Law Judge Melissa Owens Lassiter heard this case remotely via Microsoft Teams, pursuant to N.C. Gen. Stat. § 150B-40(e) and Respondent's request for designation of an Administrative Law Judge to preside at an Article 3A contested case hearing.

APPEARANCES

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

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

ISSUE

Does substantial evidence exist to support a proposed three-year suspension of Petitioner's general and specialized instructor certification pursuant to 12 NCAC 09B .0301(e)(5) for demonstrating unprofessional personal conduct in the delivery of Commission-mandated training?

STATUTES AND RULES

N.C. Gen. Stat. § 17-C
12 NCAC 09B .0301(e)(5)
12 NCAC 09B .0301(d)(4)

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of witnesses presented at the hearing, stipulations, documents admitted into evidence, and the entire record in this proceeding as appropriate for consideration, having weighed all evidence and assessed the credibility of the witnesses, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; whether such testimony is consistent with all other believable evidence in the case, and upon assessing the preponderance of the evidence from the record as a whole, the undersigned finds as follows:

Procedural Background

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, and both parties received notice of hearing.

2. Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "the Commission"), is authorized under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9 to certify correctional officers, juvenile justice officers, criminal justice instructors, and criminal justice officers and to revoke, suspend, or deny such certification.

3. Petitioner currently holds a general instructor certification and a specialized law enforcement driving instructor certification issued by the Commission. Petitioner has held those certifications since 2000. He has also served as a driver training instructor since approximately March of 2001, a certified radar instructor since February of 2000, and driving simulator instructor since February of 2000. (Pet. Exh. 1) As of the date of this hearing, Petitioner's specialized law enforcement driver training certification expires September 19, 2023 and his radar instructor certification expires September 17, 2023. (T. p. 121)

4. Petitioner served as a police officer with the City of Greenville for twenty-eight (28) years and with the East Carolina University Police Department for one and one-half (1 ½) years. Petitioner has earned numerous law enforcement certifications including the Advanced Law Enforcement Certificate and several certifications for various driving instruction. (Pet. Exh. 1)

5. On December 2, 2019, Respondent's Deputy Director Michelle Schilling received notification from Pitt Community College BLET School Director, Thomas Forrest, that Petitioner was no longer employed based on allegations of inappropriate behavior. (Resp. Exhs. 3 & 15)

6. By letter dated August 3, 2020, and served on Petitioner via certified mail, Respondent notified Petitioner that its Probable Cause Committee was proposing a three-year suspension of Petitioner's general and specialized instructor certifications, pursuant to 12 NCAC 09B .0301(e)(5), for demonstrating unprofessional personal conduct in the delivery of Commission-mandated training. (Resp. Exh. 16)

2019 BLET Course 137

7. From August 2019 through November 2019, Petitioner, Diane Smock, and Steve Stroud were the instructors of Basic Law Enforcement Training (BLET) Course no. 137 ("Course 137") at Pitt County Community College (PCCC).

8. The conduct at issue in this case involves two allegations of personal misconduct by Petitioner during Course 137. The first allegation is that Petitioner made physical contact with student Lawrence Shaughnessy "by slapping him on the side of the head for spinning tires when taking off" during a driver's training session. (Resp. Exh. 15) The second allegation is that Petitioner leaned into the window of the vehicle student Daniel Ergle was driving and said, "Do you know you're a fucking pussy [hereinafter "the p word"]?" (Resp. Exhs. 8, 15; T. p. 45)

9. From the beginning of Course 137, Petitioner made it clear to the students that spinning tires during driver training would not be tolerated. During a driver's training session in November of 2019, Lawrence Shaughnessy was a student of Petitioner who repeatedly spun tires on the driving range. Petitioner repeatedly advised Mr. Shaughnessy not to spin tires that day. (T. p. 167) After Mr. Shaughnessy spun tires during the serpentine exercise, Petitioner reached into Shaughnessy's vehicle and tapped or popped Mr. Shaughnessy on the back of the head. Petitioner didn't use his whole hand or a closed fist but used his fingers to tap Mr. Shaughnessy's head. (T. p. 168) Mr. Shaughnessy had no reaction but said he would quit spinning tires. (T. pp. 168, 170)

10. Daniel Ergle was another student in Course 137. He is currently an officer with the Greenville Police Department. In November of 2019, Ergle tested for the driver's training portion of Course 137. He failed one driving test, passed another test, and was in the middle of his last driving test. He was a little stressed out. (T. p. 45) If Ergle failed, he would have to retest, and if you fail your retest, you're out of the program. (T. p. 47). Ergle was testing for the precision portion of the driving test, stuck his head out the window, and asked Petitioner and some students to move. (T. p. 171) Petitioner leaned into the window of Ergle's vehicle and said something akin to "Do you know you're being a fucking 'p' word" or "quit being a 'p' word and just drive the car." (T. pp. 45, 171)

11. Diane Smock is a BLET coordinator and instructor at PCCC. All the students knew at the beginning of the class that spinning tires wasn't acceptable. (T. p. 81) She saw Mr. Shaughnessy keep spinning and spinning his tires during his driver training. (T. pp. 80-81) She observed Petitioner remind Shaughnessy not to spin tires. She also saw Petitioner "bop" Mr. Shaughnessy on the side of the head because it appeared Shaughnessy wasn't listening to Petitioner. (T. p. 81) She thought instructors

were not allowed to touch the students. Smock did not think Petitioner intended to cause harm When Petitioner touched Mr. Shaughnessy's head, but did it "more of a get-his-attention kind of thing." (T. pp. 81, 88)

12. Smock was five or six car lengths away from Petitioner when she heard him say the P word to Mr. Ergle. She observed Mr. Ergle continue his driving test but hit a couple of cones, "which he hadn't been hitting before . . . he did appear to be really upset." (T. p. 84) Smock thought that Mr. Ergle's "performance may have been a little better if he wasn't interrupted [by Petitioner] in the middle of it." (T. p. 84)

13. Raymond Bennett is the daytime BLET coordinator for Pitt County Community College. (T. p. 63) Per PCCC's procedure, the students in Course 137 submitted anonymous evaluations of their instructors, including Petitioner. Bennett reviewed the student evaluations of Petitioner and found the student evaluations were not very positive in nature towards Petitioner. (T. p. 63) Some of the students' comments about Petitioner included the following:

7. "He gave off the impression that he did not care to give instructional advice."
8. "If Mr. Brewington does not want to put the effort into teaching students the proper techniques to drive, he should not be an instructor. He acted like he hated his job, interrupting [sic] students while testing, inappropriate [sic] phrases towards students, and constantly rude."
9. "Mr. Brewington was inappropriate and unfair. He does not need to be teaching in this course or any class for that matter."
10. "Brewington's attitude made an otherwise great class not great."
11. "Brewington . . . displayed an attitude toward some students that I felt was unprofessional at times."

(Resp. Exh. 2; T. pp. 68-70)

14. Mr. Bennett spoke to Petitioner about the student evaluations. Petitioner told Bennett he "would refute some of the comments but will agree with the majority of that, that the majority of them were correct." (Resp. Exh. 15; T. p. 72)

15. Bennett brought the student instructor evaluations about Petitioner to the attention of the BLET School Director, Thomas Forrest. The most concerning comments were the inappropriate language directed at one of the students, the touching of a student, however slight, and the fact that "all of the evaluations and statements basically called into question his [Petitioner's] behavior and performance during that class while teaching . . ." (T. pp. 96, 109)

16. Director Forrest required the students of Course 137 to write statements explaining their instructor evaluations. In his November 26, 2019 written statement, Mr. Shaughnessy stated in part:

> During driver's training, Mr. Brewington was very unprofessional. During the serpentine exercise, he slapped me in the side of head for spinning tires when taking off. Later that same day he called Ergle a ["P word"] while he was testing on the precision course
>
> . . .
>
> Overall his [Petitioner's] attitude throughout the duration of the course was horrendous and he made it known he did not want to be there and his instruction reflected that attitude.

(Resp. Exh. 11; T. pp. 21) In Mr. Ergle's November 26, 2019 written statement, Ergle stated in part:

> While was testing for the precision driving portion of drivers training a group of students and Mr. Brewington were standing near the pull in and reversing portions of the course. I asked them to move because I was uncomfortable with them being that close. Mr. Brewington became upset. While I was pulling in and preparing to reverse, Mr. Brewington leaned into the window of my vehicle and said, 'Do you know you're a fucking pussy [hereinafter "the P word"]?'" . . .
>
> Besides the above mentioned incident[,] Mr. Brewington's attitude was very poor. He was routinely unhelpful in instructing and frequently derisive and insulting. It was apparent to me that he was not interested in instructing and did not wish to be there.

(Resp. Exh. 8, T. p. 45)

17. On November 27, 2019, School Director Thomas Forrest informed Petitioner that PCCC would no longer utilize his services as an Instructor or Coordinator due to student evaluations that revealed concerns about his performance during driver's training. (Resp. Exh. 1)

Contested Case Hearing

18. Petitioner admitted to "tapping" Shaughnessy "on the back of his head to get his attention about quit [sic] spinning tires." (T. p. 168) He also admitted to saying "the P word" to Ergle while Ergle was being tested on the driving course. However, he did not mean anything with the word, other than meaning "[Q]uit being a wimp . . . and just drive the car." (T. pp. 171, 172)

19. Petitioner explained that it is a common practice to use some profanity as the instructors are preparing the students for law enforcement. (T. p. 173) As to touching students in training, in driver's training, "you see it all the time." (T. p. 173-74)

20. Mr. Shaughnessy confirmed that Petitioner's behavior was unprofessional at times and that the students "didn't get the best instruction Brewington had to offer." (T. p. 24) Shaughnessy testified that he did not write the statement for Mr. Bennett of his own free will and volition. (T. p. 31) In contrast to his written statement to PCCC, Shaughnessy credibly testified at hearing that Petitioner did not slap him but gave him a light touch or tap on the back of the head; there was no force involved. (T. pp. 26-27) Mr. Shaughnessy claimed the tap did not bother him but seemed kind of playful. He didn't really think anything of it all but was just trying to get his attention. (T. pp. 26-27) Shaughnessy did not think that Petitioner's conduct was way out of line or out of order. (T. p. 38)

21. Mr. Shaughnessy did not make or file any complaint regarding Petitioner's conduct. (T. p. 30) Only after he was instructed to write a statement about Petitioner's conduct did Mr. Shaughnessy write a statement.

22. Mr. Shaughnessy heard Petitioner tell Ergle to "quit being a P word and drive the car." (T. pp. 27-28) Mr. Shaughnessy and the other students laughed when they heard the comment. The students who heard the comment were males. (T. p. 28)

23. Mr. Shaughnessy was not surprised or shocked by Petitioner's use of the P word term as other instructors also used profanity and profanity is expected in the law enforcement education environment. (T. pp. 28-30) Petitioner's conduct was "mild compared to what I [Shaughnessy] heard and personally experienced growing up as a high school athlete . . . ." (T. pp. 36-37)

24. Mr. Shaughnessy thought Petitioner acted in good faith in his instruction; he seemed to be a good man and has teaching abilities. (T. p. 31)

25. At Petitioner's request, Mr. Shaughnessy sent an email to Petitioner, on November 20, 2020, describing the driving training incident between himself and Petitioner. In that email, Mr. Shaughnessy described being "lightly tapped on the back of the head." (Pet. Exh. 4, T. pp. 34-35, 39) In his November 20, 2020 email to Petitioner, Mr. Shaughnessy acknowledged that "[w]ithout the pressure from the higher ups in the BLET program itself, I wouldn't have thought twice about either incident." (Pet. Exh. 4)

26. At hearing, Mr. Ergle thought that "up until driver's training, Mr. Brewington had been fairly nice." (T. p. 43) However, "once we began driver's training . . . we were all miserable. It was cold, raining." (T. p. 43) Ergle contended that Petitioner at times was "very grumpy, very terse, short." (T. p. 44) Mr. Ergle thought Petitioner treated students unprofessionally during the driving course.

27. Ergle thought Petitioner used the "p" word loud enough for other students and instructors to hear. Petitioner had never spoken to Ergle that way. He was frazzled and shocked and Petitioner's behavior and language affected his performance. (T. p. 46)

28. As a police officer, Ergle has heard a lot of cursing of various types. (T. pp. 52-53, 56). However, having Petitioner, as his instructor, address him using "the P word" in front of fellow students and instructors while Ergle was in the middle of retesting was detrimental to his instruction. Ergle also heard Petitioner make fun of students that struggled. (T. 51) Ergle also described the very bad weather and the split schedule as being very frustrating. (T. p. 54)

29. BLET students sign a waiver at PCCC wherein they agree that they will be exposing themselves to "subjects, topics, scenarios and practical exercises that will involve sensitive topics . . ." (Pet. Exh. 3) By signing this waiver, students indicate they "understand it is necessary to be exposed to sensitive topics that may be offensive in order to train in as 'real-to-life' as possible . . ." (Pet. Exh. 3)

30. Though students are trained in scenario situations to endure bad language, student Ergle was not in a "training scenario" when Petitioner used the "p" word towards Mr. Ergle.

31. Instructor Smock does not believe instructors should be calling students names, especially in testing situations when instructors are not allowed to talk to students. (T. pp. 91, 158-159)

Extenuating Circumstances

32. The educational instruction during the week of the November 11, 2019 training included very long days, often more than 12 hours. (T. pp. 168-69). Monday, November 11, 2019, consisted of 12 hours of classroom instruction, and Tuesday's (November 12, 2019) driving training lasted from 7:00 AM until 6:00 PM. Wednesday's (November 13, 2019) instruction lasted from 8:15 AM until 6:00 PM and driving training from 11:00 PM until 4:00 AM. Thursday's (November 14, 2019) instruction lasted from 9:00 AM until 4:00 PM, and then driving training from 11:00 PM until 4:00 AM. (T. p. 169) Petitioner put in 51.75 hours of instruction in four days which led to a lack of sleep (T. p. 169). There were "horrifying weather conditions involving bitter cold, pouring rain, and raining off and on." (T. pp. 38, 169). "Everybody was soaking wet and miserable being out there . . ." (T. p. 169)

33. Petitioner experienced extenuating circumstances that affected his behavior and instruction during Course 137. Petitioner's father died in 2019, and Petitioner made several trips back and forth to Missouri to settle his dad's estate. Petitioner's 27-year-old daughter had a very serious medical condition, during that time, for which she was taken to UNC Hospital for emergency surgery. (T. pp. 175-176) In addition, preparation for Course 137 required an extensive commitment of long work hours by Petitioner, and the instruction included late nights and early mornings. (T. p. 76)

Petitioner believed that the totality of the circumstances dealing with his dad's death, his daughter's illness, coupled with the adverse weather conditions and long hours of training contributed to his actions during Course 137. (T. pp. 176-77)

34. Mr. Bennett was familiar with these extenuating circumstances confronting Petitioner Brewington. (T. pp. 74-75) Mr. Bennett believed those factors were a contributing factor to Petitioner's behaviors at issue in this case. (T. p. 75)

Mitigating Circumstances

35. Petitioner has been certified by the Commission as an instructor for over twenty-one years. (T. pp. 154-55) Petitioner has never received any discipline against his certification or his teaching certification by Respondent Criminal Justice Education and Training Standards Commission. (T. p. 155)

36. Petitioner has taught 28 BLET classes at Pitt County Community College and the complaints in this case are the only complaints Petitioner has ever received. He has taught hundreds and hundreds of people in radar.

37. Mr. Bennett was familiar with Petitioner's evaluations historically. Over the years, those evaluations demonstrated that Petitioner had been a very good instructor for the college. (T. p. 74) For many years, a lot of students have shown respect and appreciation for Petitioner's teaching performance and conduct. (T. p. 74) Mr. Bennett thought Petitioner was a qualified instructor and was well motivated in his educational missions. (T. p. 74) Petitioner generally had a "good, professional relationship with his students" and his teaching colleagues as well. (T. p. 74)

38. Mr. Bennett was of the opinion that Petitioner is a good, qualified instructor and that the suspension of the teaching certification was inappropriate. (T. pp. 76-77)

39. Ms. Smock has been teaching with Petitioner for several years. She believed that taking Petitioner's certification is harsh. Ms. Smock observed that Petitioner is "a good instructor" and that under the circumstances with his personal issues, it was a tough time. (T. p. 90) She believes that these two incidents were uncharacteristic of him.

40. Ms. Smock believed that Petitioner should not lose his teaching certification.

41. PCCC School Director Thomas Forrest thought that Petitioner has been a good and qualified instructor for Pitt County Community College. (T. p. 110). Mr. Forrest noted that Petitioner had completed years of dedicated service to both the college and its customers and has been a "dedicated and good instructor." (T. p. 111)

42. Despite Petitioner's behavior, Ergle felt "that losing his [Petitioner's] certification to teach is excessive." (T. p. 60)

Character Witnesses and Corroboration

43. Katherine Johnson is a lieutenant with the Bridgton Police Department. (T. p. 133) Lt. Johnson is a former student of Petitioner and also teaches with Petitioner. (T. p. 134). She described Petitioner as a "great instructor" who is "extremely professional." (T. p. 135) Lt. Johnson credibly testified that Petitioner was a very respected teacher, and she has never heard of any complaints about him. (T. pp. 136-37) She credibly testified that the use of profanity by law enforcement instructors is "commonplace." (T. p. 137) She also credibly testified how in law enforcement instruction, touching, or tapping someone is something that she has done as an instructor. (T. p. 138).

44. Perry Harris is the Law Enforcement Training Director for Beaufort Community College. (T. p. 140) Mr. Harris is also a former staff member of Respondent Criminal Justice Education and Training Standards Commission. (Pet. Exh. 2). Petitioner has worked under Harris' supervision. (T. p. 141) Harris credibly testified that Petitioner has been respected by his students and gets along well with all the students and all the instructors. (T. p. 143) "He has always been forthcoming and honest with me." (T. p. 144)

45. Mr. Harris acknowledged that law enforcement instructors use profanity "to get students to become comfortable in hearing it where they're not shocked, awestruck or taken aback, that they can still perform their jobs is part of being an instructor." (T. p. 144) In addition, law enforcement instructors physically touch students from time to time to get the student's attention and for other purposes. (T. p. 145) For example, as a driver instructor, Mr. Harris has a pet peeve with students who drive by sticking their hand inside the steering wheel or across the top of the wheel and block the air bag with their arm. Mr. Harris will warn the student the first couple of times, "Don't stick your hand inside" of the steering wheel. If the student does it a third time, Harris will pop the back of the student's knuckles with a rolled-up paper or pop his/her wrist just like Harris' second-grade teacher used to pop his knuckles with a ruler to stop him from drumming the desk. (T. pp. 146-47)

46. Ms. Darlene Hall has served as the Director of Law Enforcement Training at Wilson Community College for ten years. (T. p. 185) Ms. Hall is a retired police officer who has served as Petitioner's supervisor. (T. p. 186) Ms. Hall credibly testified that Petitioner is a good instructor at Wilson Community College. Petitioner gets along well with the students, the students respect him, he is approachable, and she has never had a complaint on him. (T. p. 187) Ms. Hall confirmed that profanity in law enforcement instruction is used to "dramatize the situation or the information that they're trying to get across" and to prepare students to do their jobs effectively by exposing them to language that's heard when they're working. (T. pp. 188-189)

47. Petitioner and his supporting witnesses were credible and believable.

Affidavits and Letters of Support

48. Numerous affidavits and letters of support were provided to the Commission when this matter was initially reviewed by the Commission's Probable Cause Committee. (Pet. Exh. 2)

a. Those statements included statements from various students (Gillium, Head, Baker, Farrar, and Reynolds) and professional colleagues (Lt. Raby, Boyle, Wayne Coats) and Training Program Directors (Darlene Hall and Sandra McKibbin).

b. A review and analysis of these ten statements reflects very favorably on Petitioner including his overall character and his conduct as a law enforcement instructor. Petitioner's long-term record as a law enforcement instructor demonstrates that Petitioner has been a very capable and caring instructor who worked very hard and strived to carry out and promote very professional law enforcement education. (Pet. Exhs. 2, affidavits of Makaila Gillium, Deputy James Head, Deputy James Baker, Officer Chelsea Farrar, Deputy Neil Reynolds, Lieutenant Scott Raby, William Boyle, Wayne Coats, Darlene Hall and Sandra McKibbin; 5) He is "a valuable asset to Craven Community college and law enforcement Officers across the eastern Region of N.C." (Pet. Exh. 2)

49. Petitioner has earned a number of awards and commendations for community and law enforcement service including for outstanding law enforcement service. (Pet. Exh. 1)

50. Petitioner's conduct was not detrimental to instruction or education. Petitioner's conduct was not demeaning or disruptive to instruction.

51. In the overall context used, the one word used was not sufficiently severe to constitute unprofessional conduct.

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 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).

3. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. *Green v. Green,* 284 S.E.2d 171,174, 54 N.C. App. 571, 575 (1981); *In re Custody of Stancil*, 179 S.E.2d 844,847, 10 N.C. App. 545, 549 (1971).

4. Respondent North Carolina Criminal Justice Education and Training Standards 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 valid proof of a rule violation.

Article 3 vs. Article 3A

5. From its inception, the North Carolina Administrative Procedure Act ("APA"), N.C. Gen. Stat. § 150B, has contained two separate and distinct sets of administrative hearings provisions. Each article contains separate provisions governing all aspects of the administrative hearings to which they apply. *Homoly v. N. Carolina State Bd. of Dental Examiners,* 121 N.C. App. 695, 697, 468 S.E.2d 481, 483 (1996). The manner in which a contested case is commenced and conducted varies depending on which set of provisions applies. Although many similarities exist between Article 3 and 3A, they are decidedly different. The distinction between the two is important and must be acknowledged.

6. Article 3, titled "Administrative Hearings" is a general provision which applies to and governs administrative hearings conducted by the Office of Administrative Hearings (OAH) and heard by an administrative law judge (ALJ). Article 3A of the APA, titled "Other Administrative Hearings," governs hearings involving those agencies specifically listed in N.C. Gen. Stat. § 150B-38(a).

7. Article 3 and Article 3A both contain provisions which are the same or very similar, such as provisions governing venue, conduct of hearing, depositions and discovery, evidence, and designation and power of ALJ or presiding officer. *Homoly v. N. Carolina State Bd. of Dental Examiners,* 121 N.C. App. 695, 696, 468 S.E.2d 481, 482 (1996).

8. A critical distinction between Article 3 and Article 3A contested cases is that in Article 3 cases, the agency has already taken an action that is adverse to the interests of the petitioner and the petitioner thus files the contested case petition. In Article 3A contested cases, the agency is proposing to take an action and the agency decision will be made after, and will be based upon the Article 3A contested case hearing. This distinction is even more significant now that OAH has final decision-making authority in Article 3 cases.

9. "It is a well-established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] sections which are general in their application." *Utilities Comm. v. Electric Membership*

Corp., 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citing *Utilities Comm. v. Coach Co.,* 236 N.C. 583, 73 S.E.2d 562 (1952)). Thus, the contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely, *Homoly*, 121 N.C. App. at 699, 468 S.E.2d at 484, and any attempt to use the standards of Article 3 within an Article 3A proceeding is without merit.

10. 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 applies to the OAH for designation of an ALJ. Thus, in Article 3A cases, OAH, through an ALJ, sits and presides over the Article 3A hearing in the place of the agency, and makes a "proposal for decision" back to the agency. N.C. Gen. Stat. § 150B-40. In such a 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).

11. Throughout the APA's history, the General Assembly has had the ability to change this process, making one type of procedure for both Article 3 and Article 3A cases, but it has not. If the legislature had intended Article 3 provisions to apply to and be read into Article 3A, 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*, 121 N.C. App. at 698, 468 S.E.2d at 483. Thus, clearly, the legislature intended each article to fully govern the administrative hearings to which each applies without overlap. *Id*.

12. Based on the foregoing, hearings conducted by Respondent are governed exclusively by the specific provisions of Article 3A, rather than the general provisions of Article 3 of the NC APA. *Homoly*, 121 N.C. App. at 699, 468 S.E.2d at 484.

Burden of Proof

13. N.C. Gen. Stat. § 150B-38(h) provides that "[e]very agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article." The "Article" referred to is "Article 3A."

14. Respondent's 12 NCAC 09A .0207, titled "Administrative Hearing Procedures," provides:

> Administrative hearings in contested cases conducted by the Commission or an Administrative Law Judge as authorized in G.S. 150B-40(e) shall be governed by:
>
> (1) procedures set out in Article 3A of G.S. 150B.

12 NCAC 09A .0207(a). 12 NCAC 09A .0207(a) then says that the "rules establishing procedures for contested case . . . contained in Title 26, Chapter 3 of the North Carolina Administrative Code are hereby incorporated by reference." However, many of the rules contained within Title 26, Chapter 3 of the North Carolina Administrative Code are not

consistent with Article 3A but are in line with Article 3 hearings. To the degree that the rules are inconsistent with N.C. Gen. Stat. § 150B, Article 3A, those rules shall not apply to hearings conducted under Article 3A. The dictates of the statute, N.C. Gen. Stat. § 150B, are paramount and shall control.

15. 12 NCAC 09A .0207 also attempts to convey the powers and duties given to the Administrative Law Judges in Title 26, Chapter 3 of the North Carolina Administrative Code to the conduct of an Article 3A hearing. However, the powers of the presiding officer in an Article 3A hearing are enumerated in N.C. Gen. Stat. § 150B-40. The provisions within the statute are paramount and, therefore, 12 NCAC 09A .0207(c) is void as applied to an Article 3A hearing.

16. Historically, in Article 3A hearings, a license or certification is considered "property or rights" such that entitle the applicant or holder to a contested case hearing pursuant to Article 3A. When a license or certification is at issue, whoever is trying to take that license or certificate away has the burden of proof.

17. In *Peace v. Employment Sec. Comm'n of N. Carolina*, the North Carolina State Supreme Court recognized that neither the North Carolina Constitution nor the North Carolina General Assembly had specifically addressed the proper allocation of the burden of proof in "just cause" termination cases. The Court in *Peace* stated:

> 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.*

Peace v. Employment Sec. Comm'n of N. Carolina, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998). (Since *Peace*, the legislature has allocated the burden of proof in just cause termination, demotion, or suspension cases to the employer State agency. N.C. Gen. Stat. § 126-34.02(d))

18. Although *Peace* was an Article 3 case, the discussion of burden of proof is instructive in this instant case as similar to the burden of proof issue in *Peace,* neither the North Carolina Constitution nor the General Assembly has addressed the burden of proof in Article 3A cases.

19. Furthermore, N.C. Gen. Stat. § 150B-40 provides that the "hearings shall be conducted in a fair and impartial manner" and that the presiding officer, including the ALJ, may "regulate the course of the hearings." That statutory provision allows the presiding officer to dictate who has the burden of proof. Therefore, applying the statutory law along with "considerations of policy, fairness and common sense," and the statutory

authority to regulate the course of hearing, the Undersigned determines that Respondent should bear the burden of proof in an Article 3A action where Respondent proposes to take some action against a license/certificate holder or application based upon its investigation into that individual.

Analysis

20. 12 NCAC 09B .0301 states in part:

(e) The Commission shall deny, suspend, or revoke an instructor's certification when the Commission finds that the person:

. . .

(5) has demonstrated “unprofessional personal” conduct in the delivery of Commission approved or mandated training. For the purposes of this Subparagraph, unprofessional personal conduct is identified as:

. . .

(D) conduct that is detrimental to instruction in the Commission's mandated courses. Conduct is "detrimental to instruction" if the conduct is demeaning or disruptive to the learning environment;

21. 12 NCAC 09B .0301 provides in pertinent part:

(d) If a person certified as an instructor by the Commission is found to have knowingly and willfully violated any provision or requirement of the rules in this Subchapter, the Commission shall take action to correct the violation and to ensure that the violation does not recur, including:

(1) issuing an oral warning and request for compliance;
(2) issuing a written warning and request for compliance;
(3) issuing an official written reprimand;
(4) suspending the individual's certification for a specified period of time or until acceptable corrective action is taken by the individual; and
(5) revoking the individual's certification.

22. There is no published or known interpretation of 12 NCAC 09B .0301(e)(5) and the terms therein. Therefore, the undersigned relies upon the plain ordinary meaning of the text of the regulation, the context of the terms therein, a common-sense interpretation of the operative terms, and the overall purpose and applicability of the regulation in the law enforcement instructional and/or educational environment.

23. The substantial evidence in the record demonstrated that the law enforcement educational environment is expected to replicate the real world of expected conditions that officers must be conditioned to encounter when they begin actual law enforcement service. (Shaughnessy at T. pp. 28-29; Ergle at T. p. 57) Police officers are exposed to many types of challenging conduct from arrestees, suspects, witnesses and others. This includes physical touching and various types of verbal abuse.

24. Pitt County Community College has recognized these points in its waiver form which requires students to acknowledge that law enforcement education students "will be exposed to subjects, topics, scenarios and practical exercises that will involve sensitive topics that may be, but not exclusive to, include: race, gender, sex, violence, discrimination, political, and religious topics." (Pet. Exh. 3) This contemplates that law enforcement students must agree to be exposed to profanity including extreme profanity.

25. Law enforcement and other agencies periodically encounter alleged "bad language" disputes. Workplace bad language, if sufficiently severe and substantial, can result in an occupational licensing sanction. However, sanctions are reserved for serious, substantial and severe violations. Punishing for the choice of language can begin to run afoul of punishing for speech, thus it is an area where regulation must be deferential. Another case in the specific law enforcement context, as in this case, is *Chafin v. Waters*, 684 F.2d 833 (5th Cir. 1982). In that case, a law enforcement officer referred to a work colleague in the most vulgar, profane and derisive terms. The Court found that Chafin's referring to his colleague as a "son of a bitch, a bastard, as sorry as they come and nothing but a backstabbing son of a bitch" was protected. Accord *Flanagan v. Munter*, 890 F.2d 1557 (10th Cir. 1989) (discipline of police officer not justified because some found his expression offensive); *Berger v. Battaglia*, 779 F.2d at 997 (4th Cir. 1985) (discipline of police officer not justified even where his speech conduct was grossly offensive to a large segment of the community).

26. After considering the totality of all admissible evidence, the undersigned concludes the evidence presented in this hearing was insufficient to demonstrate that Petitioner's use of the P word constituted physical or verbal abuse or constituted "unprofessional conduct." Petitioner's use of the P word was not said in a malicious or harmful way. It is the type of term that police officers can be expected to hear in the course of their duties. There was some evidence Mr. Ergle hit a couple of cones he hadn't hit before after Petitioner used the P word, and Ms. Smock thought Ergle "appeared really upset." However, such evidence is insufficient to prove Petitioner's language was detrimental to instruction. Even if Petitioner's comment upset Mr. Ergle and affected Ergle's performance, the effect was minimal. There was not any proven injury to Mr. Ergle as he passed the precision driving test, and no injury to any other students in that the students who heard the comment laughed. The bad language was a single term used just once, was not used offensively in any significant way, and as in *Dietrich* and other cases cited above, does not rise to the high level required for it to be deemed unprofessional conduct in violation of 12 NCAC 09B.0301(e)(5).

27. The substantial evidence at hearing showed that all students knew that spinning tires on the driving course was prohibited. However, Shaughnessy repeatedly spun his tires when taking off. After giving Shaughnessy two verbal warnings, Petitioner lightly tapped or popped student Shaughnessy on the head to get the student's attention. The testimony of Shaughnessy and his email to Petitioner, as set forth in Petitioner's Exhibit 4, demonstrate that the tapping caused no harm and was not for an improper purpose.

28. Law enforcement instruction is delivered by instructors with various teaching styles and attitudes. The substantial evidence at hearing established that other driving instructors have flicked or popped driving students on the knuckles to correct a student. Wilson Community College's Law Enforcement Training Director Hall will touch or tap a student during law enforcement instruction (T. p. 138). Beaufort Community College's Law Enforcement Training Director Pat Harris will pop the back of the student's knuckles with a rolled-up paper or pop his/her wrist just like Harris' second-grade teacher used to pop his knuckles with a ruler to stop him from drumming the desk. (T. pp. 146-47)

29. Based on the evidence presented at hearing, Petitioner's conduct in popping Shaughnessy on the head to get his attention did not constitute unprofessional personal conduct in violation of 12 NCAC 09B.0301(e)(5).

30. There was insufficient evidence presented at hearing to support a proposed three-year suspension of Petitioner's general and specialized instructor certification pursuant to 12 NCAC 09B .0301(e)(5) for demonstrating unprofessional personal conduct in the delivery of Commission-mandated training.

31. Should the Commission determine Petitioner's conduct did violate 12 NCAC 09B.0301(e)(5), the substantial evidence in mitigation at hearing militates against any formal discipline against Petitioner. Excessively long hours in this law enforcement training, compounded with very bad weather, made the delivery of the instruction very challenging. Petitioner had also recently experienced the death of his father and a serious illness of a daughter. These combined circumstances warrant a higher degree of frustration. Both student Daniel Ergle and Instructor Smock did not believe that Petitioner should lose his teaching certification over the subject incidents.

32. Petitioner's long career in law enforcement and his long career in law enforcement education strongly militate in his favor. Petitioner's overall long-term record is exemplary. There were no aggravating circumstances present in this case.

33. The undersigned has weighed and balanced Petitioner's long-term positive history of commendable law enforcement instruction service against the isolated conduct present here. The evidence at hearing and the above Findings of Fact and Conclusions of Law support the Commission to take no action against Petitioner's general and specialized instructor's certifications under the circumstances of this case. Should the Commission determine Petitioner's conduct did violate 12 NCAC 09B .0301(e)(5), the

undersigned recommends the Commission issue a written warning to the Petitioner given the circumstances and evidence of this case.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned proposes that the North Carolina Criminal Justice Education and Training Standards Commission not suspend Petitioner's teaching certification. Should the Commission determine Petitioner's conduct did violate 12 NCAC 09B.0301(e)(5), the undersigned recommends the Commission issue an informal written warning to the Petitioner given the circumstances and evidence of this case.

NOTICE

The **North Carolina Criminal Justice 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.

This the 15th day of June, 2021.

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:

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This the 15th day of June, 2021.

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