

NO. COA22-256

THIRTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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MAURICE DEVALLE, )  
Petitioner-Appellee )

From Columbus

v. )

NORTH CAROLINA SHERIFFS' )  
EDUCATION AND TRAINING )  
STANDARDS COMMISSION, )  
Respondent-Appellant )

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RESPONDENT-APPELLANT'S REPLY BRIEF

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## OTHER SOURCES

- Ryan Young and Devon M. Sayers,  
Why Police Forces are Struggling to Recruit and Keep Officers,  
www.cnn.com, (Feb. 3, 2022), [https://www.cnn.com/2022/02/02/  
us/police-departments-struggle-recruit-retain-officers/index.html](https://www.cnn.com/2022/02/02/us/police-departments-struggle-recruit-retain-officers/index.html) ..... 9
- Police Executive Research Forum,  
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(Jun. 11, 2021),  
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RESPONDENT-APPELLANT'S REPLY BRIEF

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## **GROUND FOR FILING THE REPLY BRIEF**

This reply brief is filed pursuant to N.C. R. App. P. 28(h) and is limited to a concise rebuttal of the arguments set forth in Devalle's response brief.

### **ARGUMENT**

#### **I. THE COMMISSION'S INVESTIGATION COMPLIED WITH 12 NCAC 10B .0201(B).**

##### **A. The Commission did not unlawfully delegate its duty to investigate.**

Devalle asserts that the Commission's investigation in this case "amounts to an arbitrary unlawful delegation of its regulatory duty..." and in support of this contention, cites Nanny's Korner Care Ctr. v. N.C. HHS – Div. of Child Dev., 234 N.C. App. 51, 758 S.E.2d 423 (2014). (Devalle's Br. p 39) The statutes that govern DHHS's duties under the circumstances described in Nanny's Korner Care 1) create a specialized unit for the specific purpose of investigating child abuse and neglect, and 2) contain a direct mandate requiring the unit to complete investigations of that nature upon which disciplinary action by the agency must be based. Id. at 60. However, the rule that governs the Commission with regard to investigations of alleged violations of its rules contains no such provisions or specifics. See 12 NCAC 10B .0201(b) (instructing the Commission's administrative arm, the Division, to simply investigate the alleged rule violation before taking action against an agency, school or individual).

The Commission's initial basis for belief that Devalle did not possess the requisite good moral character for certification were the circumstances that led to his termination from the Patrol. (Doc. Ex. 148-150) There is no better source of information pertaining to the circumstances of Devalle's termination than the Patrol's Internal Affairs Investigation which included, among other things, several memoranda detailing the sequence of events and actions at issue, copies of Devalle's weekly reports of daily activity and transcripts of interviews. All of these documents memorialize the facts, which Devalle does not dispute, fairly close in time to their occurrence. (Doc. Ex. 142-147)

B. The Commission had no obligation to seek out witnesses to testify on Devalle's behalf.

Devalle highlights portions of the Superior Court order indicating that no one from the Commission contacted Johnson and that none of the witnesses from the Patrol possessed firsthand knowledge of Devalle's truthfulness or conformance with office policy while employed with the Columbus County Sheriff's Office. (Devalle's Br. p 13) Devalle then states "[t]he Commission did not present any evidence concerning any activities involving Devalle that took place more recently than 2016. Id. But, this is immaterial, as the Commission is under no duty to identify witnesses to testify on Devalle's behalf. Contested hearings involving the Commission are adversarial in nature. See N.C.G.S. §150B-40(a) (requiring that hearings include the opportunity of the parties to

present evidence on issues of fact, examine and cross-examine witnesses, submit rebuttal evidence and present arguments on issues of law and policy). Devalle is better situated to his family, friends, current and former co-workers who might have firsthand knowledge of his current moral character. It is he who chose to only present the testimony of Sheriff Greene and Johnson.

## **II. THE COMMISSON PROPERLY APPLIED 12 NCAC 10B .0301(A)(9) TO DEVALLE'S CASE**

The case at bar does not challenge the constitutionality of the Commission's rule which requires every officer certified in North Carolina to be of good moral character. The issue is whether the Superior Court erred in granting Devalle's PJR. (Comm'n's Br. p 1)

### **A. The Commission considered the appropriate timeframe in evaluating Devalle's moral character.**

Devall asserts that "[t]he Commission erred by failing to decide this case based on [his] *present* moral character..." (Devall's Br. p 16) In support of this contention, Devalle relies upon Schware v. Bd. of Bar Exam'rs of New Mexico, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) and In re Estes, 1978 OK 62, 580 P.2d 977 (1978). To begin, these are out-of-state cases and therefore are not binding precedent here. In any event, in reversing the Board's decision not to license Schware, the court found "[t]here was nothing in the record which suggested that [he] has engaged in any conduct during the past *15 years* which reflects adversely on his character." Schware, 353 U.S. at 239, 77 S. Ct. at 756,



1 L. Ed. 2d 802 (emphasis added). And in Estes, the court said “[a]n examination of the transcript ... reveals no blemish on applicant’s record in the *six years* since his indictment,” and reversed the Board’s decision not to license Estes. Estes, 580 P.2d at 978 (emphasis added). By contrast, in this case, a mere four months after being terminated from the Patrol for substantiated untruthfulness, neglect of duty and insubordination in violation of the Patrol’s policies in April of 2017, Devalle applied for certification with the Commission in August 2017.

More importantly, the Supreme Court of North Carolina has addressed this issue. See e.g., In re Elkins, 308 N.C. 317, 302 S.E.2d 215 (1983) (upholding the Board of Law Examiners’ decision to deny admission to an applicant based, in part, on conduct that resulted in misdemeanor convictions five years prior to the submission of the applicant’s application) and In re Burke, 368 N.C. 226, 775 S.E.2d 815 (2015) (affirming the Board of Law Examiner’s denial of admission to the bar for, among other reasons, conduct that resulted in criminal charges between 6 and 27 years prior to the applicant’s application). There is no question that it is appropriate for a certifying body to consider an applicant’s demonstrated character over a significant period of years leading up to his application when making a determination as to the status of his moral character.

B. The nature of Devalle's conduct is the kind of severe conduct that warrants denial of certification pursuant to 12 NCAC 10B .0301(a)(9).

Devalle asserts that "[t]he Commission's application of the moral conduct rule is erroneous because the Commission has not established that [his] case is a severe case..." (Devalle's Br. p 27) Devalle's response brief is devoid of any discussion of the conduct and actions that are the basis for the denial of his certification. See generally, Devalle's Br. pp 9-14. This is likely because any explanation would highlight the severity of his actions while employed with the Patrol.

As the Commission laid out in its opening brief, Devalle's actions while employed with the Patrol indicated serious deficiencies in his ability to tell the truth. He was untruthful with the Patrol about, among other things, his place of residence, being at his prescribed duty station and the number of hours he worked. (Comm'n's Br. pp 3-6) This resulted in him being paid for time he had not worked and the citizens of Wayne County, North Carolina, being without a supervising highway patrolman. (Comm'n's Br. p 6) Then, at Devalle's OAH hearing, he demonstrated a lack of candor by feigning confusion and lack of memory while being questioned by the Commission's counsel. (Comm'n's Br. pp 7-8)

Devalle's actions must be viewed in the context of the nature of his duties and employment. Law enforcement officers are charged with protecting and

serving their communities. In the event that criminal charges result from an officer's investigation, the administration of justice requires his truthful testimony at trial. Because of this, Devalle's lack of candor is the source of substantial concern. Devalle's lack of moral character in this case is clear and severe.

C. The Commission is not bound by the conclusion within the ALJ's proposed decision.

Devalle argues that the Commission distorted the ALJ's credibility determination and failed to give it deference and this amounted to error. (Devalle's Br. pp 37-38) In support of this contention, Devalle cites two cases involving the North Carolina Department of Public Safety (DPS). (Devalle's Br. p 37) However, in administrative hearings for contested cases involving DPS, the ALJ makes the final decision. N.C.G.S. §150B-34. These cases are not analogous to the case at bar.

The General Assembly has entrusted to the Commission the authority to certify officers and promulgate rules and regulations to facilitate doing so. N.C.G.S. §17E-4(a)(1), (3). Administrative hearings in contested cases conducted by the Commission, or an ALJ on its behalf, are governed by the procedures set out in Article 3A of Chapter 150B on the North Carolina General Statutes. 12 NCAC 10B .0105(a)(1). Pursuant to Article 3A, the ALJ "sits in place of the agency" and must make a *proposal* for decision for the

Commission's consideration. N.C.G.S. §150B-40(e) (emphasis added). But ultimately, the Commission, not the ALJ, makes the final decision regarding the applicant's certification. Id.

Prior to reaching its Final Agency Decision, the Commission reviewed the ALJ's proposed decision, the written exceptions submitted by Devalle's counsel and the Commission's counsel and heard oral presentations from Devalle's counsel as well as its own counsel, as required by N.C. Gen. Stat. §150B-40(e). As the Commission articulated in its opening brief, the Commission committed no error in denying Devalle's certification and the Superior Court erred in reversing that decision.

D. Devalle's evidence at the hearing failed to prove he possessed the requisite good moral character for certification by the Commission.

"[T]he initial burden of showing good character rests with the applicant." In re Gordon, 352 N.C. 349, 353, 531 S.E.2d 795 (2000) (quoting In re Legg, 325 N.C. 658, 636, 386 S.E.2d 174, 180 (1987)). One would imagine, if Devalle's character was truly rehabilitated, he would have presented a number of colleagues, neighbors and friends to attest to it. Instead, Devalle tendered himself and his supervisors, Sheriff Greene and Johnson. See T1 p. 3 and T2 p. 284. Sheriff Greene testified that Devalle did a fine job for him and he knew Devalle had been fired from the Patrol, but did not pursue knowledge of the cause of the termination. (T1 pp. 30-31, 35-36) Johnson testified that Devalle

had not committed an act that caused him to doubt Devalle's trustworthiness. (T1 p. 235) It is sorely evident from Sheriff Greene and Johnson's testimonies that their county has little resources and they heavily rely upon Devalle in order to meet the demands of their respective roles without regard for Devalle's character outside of the school setting. See T1 pp. 34, 235-236.

It is no secret that recruiting and retaining law enforcement personnel, is a challenge. See Ryan Young and Devon M. Sayers, Why Police Forces are Struggling to Recruit and Keep Officers, [www.cnn.com](http://www.cnn.com), (Feb. 3, 2022), <https://www.cnn.com/2022/02/02/us/police-departments-struggle-recruit-retain-officers/index.html> and Police Executive Research Forum, Survey on Workforce Trends, June 2021, [www.policeforum.org](http://www.policeforum.org), (Jun. 11, 2021), <https://www.policeforum.org/workforcesurveyjune2021>. But that challenge does not override the Commission's duty to ensure those it certifies are fit for the role.

Next, Devalle's own testimony indicates that his character has not been rehabilitated. See Comm'n's Br. pp 29-30. "Misrepresentations and evasive or misleading responses, which could obstruct full investigation into the moral character of a bar applicant, are inconsistent with the truthfulness and candor required of a practicing attorney." In re Elkins, 308 N.C. 317, 327 (quoting In re Willis, 288 N.C. 1, 18, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 46 L.Ed. 2d 300, (1975)). Candor to the certifying body has long been an element

of the good moral character analysis. See e.g., In re Burke, 368 N.C. 226, 775 S.E.2d 815 (2015) (affirming the Board of Law Examiner's denial of admission to the bar for, among other reasons, lack of candor) and In re Elkins, 308 N.C. 317, 302S.E.2d 215 (1983) (upholding the Board of Law Examiners' decision to deny admission to an applicant based, in part, on lack of candor). Just as evasive and misleading responses are inconsistent with the truthfulness and candor required of a practicing attorney, so, too, is it inconsistent with the truthfulness and candor required of a law enforcement officer.

### CONCLUSION

For the foregoing reasons and authorities, the Commission herein and in its opening brief, respectfully requests that this Court reverse the decision below and remand with instructions that the Superior Court affirm the Commission's Final Agency Decision.

Electronically submitted this the 12<sup>th</sup> day of September, 2022.

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**CERTIFICATE OF COMPLIANCE WITH RULE 28 (j)(2)**

Undersigned counsel certifies that the Respondent-Appellant's reply brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 3,750 words as indicated by Word, the program used to prepare the brief.

Electronically submitted this the 12<sup>th</sup> day of September, 2022.

Electronically Submitted  
Ameshia Cooper Chester  
Special Deputy Attorney General

### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing Respondent-Appellant's reply brief upon Defendant via e-mail to his below-listed attorney pursuant to N.C. R. App. P. 26(c), which allows service of a document by e-mail if it has been electronically filed with a North Carolina appellate court:

J. Michael McGuinness  
jmichael@mcguinnesslaw.com

Electronically submitted this the 12<sup>th</sup> day of September, 2022.

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