NO. 158PA23 FIFTEENTH DISTRICT

BEFORE THE NORTH CAROLINA SUPREME COURT

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MAURICE DEVALLE	)	
	)	
Petitioner/Appellee	)	
v.	)	From Columbus County
	)	No. 20 CVS 1273
N.C. SHERIFF'S EDUCATION	)	COA 158PA23
AND TRAINING STANDARDS	)	
COMMISSION	)	
	)	
Respondent/Appellant	)	

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NEW BRIEF OF PETITIONER APPELLEE MAURICE DEVALLE

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5. WHETHER THE COURTS BELOW ERRED IN FINDING THAT THE COMMISSION FAILED TO CONDUCT THE REQUIRED INVESTIGATION OF THE ALLEGED CHARGE AND THEREFORE VIOLATED 12 NCAC 10B.0201?

a. WHEN A STATE OCCUPATIONAL LICENSING AGENCY HAS A LEGAL DUTY TO INVESTIGATE PRIOR TO IMPOSING DISCIPLINE, IS THE FAILURE TO INVESTIGATE A VIOLATION OF LEGAL PROCEDURE, ARBITRARINESS OR LEGAL ERROR OR A VIOLATION OF PROCEDURAL OR SUBSTANTIVE DUE PROCESS?

II. STATEMENT OF CASE

This administrative law occupational licensing case arose from the denial of Petitioner Maurice Devalle's application for a law enforcement certification by the N.C. Sheriffs' Education and Training Standards Commission (hereafter the "Commission") as a Columbus County Deputy Sheriff. (R. p. 75) The Commission denied Devalle's application for certification indefinitely based upon its opinion that Devalle lacks good moral character to serve as a Deputy Sheriff based upon conduct in 2016. (R. p 20; 75)

Parties: Petitioner Appellee Maurice Devalle is an applicant for certification by the N.C. Sheriffs' Education and Training Standards Commission, as a Columbus County, North Carolina Deputy Sheriff and School Resource Officer. Devalle was previously certified by the sister Commission, the N.C. Criminal Justice Education and Training Standards Commission. (R. p. 80)

The Respondent is the N.C Sheriffs' Education and Training Standards Commission, a regulatory occupational licensing agency of North Carolina Sheriffs. N.C.G.S. 17E-4. The Commission has limited legal authority to certify deputy sheriffs for service and to impose

discipline upon valid proof of a rule violation. Attorney General Stein explains on his website: "[T]he General Assembly established a separate Sheriffs' Commission with the passage of Chapter 17E. North Carolina is the only one of 50 states that has a separate regulatory body – governed only by Sheriffs – responsible for the employment, training and certification of Sheriffs' personnel." /9https://ncdoj.gov/law-enforcement-training/sheriffs/commission-history-and-scope/

In summary, Administrative Law Judge Melissa Owens Lassiter ruled for Devalle and found him to have good moral character. (R. pp. 28, 44) The Sheriff's Commission declined to adopt Judge Lassiter's proposal and imposed severe discipline of indefinite suspension. (R. pp. 5, 20) Devalle sought Judicial Review, and the Superior Court granted the Petition and reversed the Commission due to multiple Commission errors. (R. pp. 75-87) The Commission appealed to the Court of Appeals, which affirmed the Superior Court. 289 N.C. App. 12, 887 S.E.2d 891 (2023). This Court granted Discretionary Review.

As the Superior Court determined (R. p. 75), this case addresses two primary regulations within law enforcement occupational licensing law including:

1. The admittedly "unusually ambiguous" good moral character rule in 12 NCAC 10B .0301(12), which provides that every justice officer shall:

> "(12) be of good moral character as defined in: In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940); In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); In re Applicants for License 143 N.C. 1, 55 S.E. 635 (1906); and later court decisions."

2. The rule requiring the Commission to conduct an investigation prior to imposing occupational licensing discipline, 12 NCAC 10B.0201(b), provides:

> (b) *Before taking action against an agency, school, or individual for a violation, the Division shall investigate the alleged violation* and, when required by the Director, shall present a report of its findings to the Probable Cause Committee of the Commission." (Emphasis added)

The Superior Court granted Devalle's Petition for Judicial Review pursuant to N.C.G.S. §§ 150B-43, 51 (R. pp. 76-87) and the Court of Appeals affirmed the Superior Court. 289 N.C. App. 12, 887 S.E.2d 891 (2023).

All five Judges found that Devalle has good moral character. This Court granted discretionary review on May 21, 2024. 900 S.E.2d 664.

A. Procedural History & Background

The Court of Appeals included a section in its decision denominated as "BACKGROUND" where it correctly summarized the procedural history of the case. 289 N.C. App. at 14-15. 887 S.E.2d at 893. Maurice Devalle previously served as a sergeant on the N.C. Highway Patrol and was certified by the N.C. Criminal Justice Education and Training Standards Commission. (R. p. 80). Devalle was later hired by Columbus County Sheriff Lewis Hatcher, and subsequently rehired by Columbus County Sheriff Jody Greene. (R. p. 80) The Commission denied Devalle's application for certification, which triggered this case.

This case was heard below in the following sequence: Administrative Law Judge Melissa Owens Lassiter tried the case and found that Devalle was presently a person of good moral character. (R. p. 44) Among other findings and conclusions in Devalle's favor, Judge Lassiter found that:

> "The credible and persuasive testimonies by Sheriff Greene and Principal Johnson demonstrated that Petitioner has restored his character so that he now possesses the good moral character required to continue certification as a deputy sheriff." (R. p. 44; Para. 27).

The case was then heard by the Commission and it overruled Judge Lassiter, concluding that Devalle did not possess good moral character, therefore indefinitely denying his certification. (R. pp. 20-21)

Devalle appealed to the Superior Court through a Petition for Judicial Review. (R. p. 25) A Superior Court has jurisdiction to address a Petition for Judicial Review to reverse a police certification decision pursuant to N.C.G.S. § 150B-51. See *Scroggs v. N.C. Criminal Justice Education and Training Standards Commission*, 101 N.C. App. 699, 400 S.E.2d 742 (1991) (affirming Superior Court granting Petition under G.S. § 150B-51 where the Commission decision was arbitrary for not recognizing recent exemplary service by the officer).

Superior Court Judge James Gregory Bell issued a 13-page Judicial Review Order (R. pp. 75-87), finding that Devalle is *rehabilitated and is presently a person of good moral character*. (R. pp. 83, 86; 2021 WL 11132326) Judge Bell adopted all of the Commission's 81 Findings of Fact (R. p. 80) and then made 17 additional Findings of Fact (Paragraphs 26-43) and 14 Conclusions of Law. (R.pp.83-86)

The Commission appealed to the Court of Appeals. The N.C. Fraternal Order of Police filed an amicus curiae brief. The Court of

Appeals unanimously affirmed the Superior Court's decision. 289 N.C. App. 12, 887 S.E.2d 891 (2023).

B. Judge Lassiter's Trial and Key Findings

The administrative law hearing was held on December 3 and 4, 2019 before Judge Lassiter. On 3 June 2020, Judge Lassiter issued a 19-page Proposal for Decision. (R. pp. 28-46) Judge Lassiter made 70 Findings of Fact and 28 Conclusions of Law including:

> 27. The credible and persuasive testimonies by Sheriff Greene and Principal Johnson demonstrated that Petitioner has restored his character so that he now possesses the good moral character required to continue certification as a deputy sheriff.

Judge Lassiter's Conclusion of Law 24:

> Sheriff Greene and Principal Johnson established that Petitioner has rehabilitated and rebuilt his character, since being fired by the Patrol, and as a deputy sheriff, and as school resource officer and coach at East Columbus High School. For two and a half years, Petitioner's service as a deputy sheriff has been nothing but exemplary both of that service and of Petitioner's character while engaging in that service. Both Sheriff Greene and Principal Johnson, who have supervised and worked with Petitioner since 2017, opined not only was Petitioner of good moral character, but that his absence would actually be harmful to the students of East Columbus High School and to the Sheriff's force, and would make the school less safe. Such testimony was credible, honest, and believable. Even given Petitioner's cross-examination testimony at hearing, the totality of the evidence rebutted the finding by the Probable Cause

> Committee that Petitioner lacks the good moral character required of a justice officer and showed that Petitioner has rehabilitated his character since 2017. (R. p. 43)

Judge Lassiter included a section denominated "Respondent's Investigation." (R. pp. 31-33; 2020 WL 11420701). The evidence and Judge Lassiter's findings reveal that there was *no* independent investigation conducted by the Commission as required. *Id.* An employee of the Commission obtained and reviewed the Highway Patrol's internal affairs file. The investigator then wrote her report by "essentially writing what someone else said in the Patrol's IA report." (R. p. 32; Judge Lassiter's Finding 16, quoting testimony at T. p, 57) The investigator admitted that no one was interviewed in the Commission investigation. (R. p. 32, referring to T. pp, 56-58.) See Judge Lassiter's Findings 10-21, showing the investigative failures. (R. pp. 31-32)

C. The Commission Decision and Key Findings[1]

The Sheriffs' Commission issued a Final Agency Decision on 6 October 2020. (R. pp. 5-22) The Commission found a violation of the

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1 Devalle's position argued *infra.*, is that the combined effect of Commission Finding 81 and Commission Conclusion of Law 24 established that Devalle has present good moral character. The Court of Appeals specifically observed the Commission's Finding 81 and Conclusion 24 in its analysis. 289 N.C. App. at 27; 887 S.E.2d at 900.

offense of failing to discharge duties of office and imposed a five-year denial of certification but suspended that sanction for five years on the condition that Petitioner not violate any law of this state or any federal law or any rules of the Commission. Devalle did not appeal this and has accepted that punishment. However, as to the charge of an alleged lack of good moral character, the Commission found a violation and ordered that Devalle's certification be denied indefinitely. (R. p. 20) However, *the Commission also found*:

> 81. During his case in chief, Petitioner presented significant evidence demonstrating that Petitioner has rehabilitated and rebuilt his career since 2016 and 2017 while working as a school resource officer at East Columbus High School. Such evidence showed that Petitioner has exhibited highly favorable traits, including but not limited to helping, teaching, and serving as positive role models for students at East Columbus High School not only as a school resource officer, but as a coach in two sports. Sheriff Greene and Principal Johnson opined that Petitioner's absence from their respective entities would have a negative impact on their workplaces. The scope and magnitude of Petitioner's character traits, as witnessed by Sheriff Greene and Principal Johnson, qualify as extenuating circumstances which the Respondent should consider in determining whether Petitioner possesses the good moral character required of a justice officer.

Commission Finding 81 (R. p. 18) effectively found that Petitioner has rehabilitated and rebuilt his law enforcement career.

In *Commission Conclusion of Law* 24, (R. p. 19), the Commission concluded:

> Sheriff Greene and Principal Johnson testified that Petitioner has rehabilitated and rebuilt his character since being fired by the Patrol, and as a deputy sheriff, and as school resource officer and coach at East Columbus High School. Greene and Johnson testified that for two and a half years, Petitioner's service as a Deputy Sheriff has been nothing but exemplary both of that service and of Petitioner's character while engaging in that service. Such testimony was credible, honest, and believable.

1. The Commission's Findings as to Investigation

The Commission decision also included a section in its decision denominated as "Respondent's Investigation." (R. pp.7-9.) There is no discernible difference between the Commission's Findings of Fact regarding its own investigation and Judge Lassiter's findings. See R. pp. 31-33, ¶¶ 10-27; R pp 7-9, ¶¶ 10-27. *Both decisions found as a fact that the Respondent agency never conducted an independent investigation* and merely used the N.C. Highway Patrol's internal affairs investigation, interviewing no witnesses with knowledge of Devalle's character either before or after 2016.

D. The Superior Court Judicial Review Order

Devalle's Petition for Judicial Review was heard on 29 October 2021, in the Columbus County Superior Court before the Honorable James Gregory Bell. The Commission filed a Motion to Dismiss and Response to the Petition. (R. pp. 47-94)

The Commission argued that Devalle's Petition (R. pp. 25-27) was not sufficiently specific and detailed. See Respondent's Motion at 10 (R. p. 56). Judge Bell found that the Petition for Judicial Review was adequate and not subject to dismissal. (R. pp.76-78) The Commission did not appeal this issue to this Court., thus it is not before this Court.

Judge Bell identified five primary issues for determination. (R. p. 76) Judge Bell reversed the Commission's order based on multiple errors by the Commission which are summarized *infra.* 2021 WL 11132326; R. pp. 75-87.

E. Decision by the Court of Appeals Below

On 16 May 2023, the Court of Appeals issued its unanimous decision, which affirmed the Superior Court's order reversing the Commission's decision indefinitely suspending Devalle's law enforcement certification. 289 N.C. App. 12, 887 S.E.2d 891 (2023).

III. STATEMENT OF FACTS

The facts of this case are accurately stated in the Findings of Facts by Judge Bell, who incorporated all 81 Findings of Fact by the Commission. (R. pp 80-83) The Commission's Findings appear at R. pp. 6-15. The Commission's Findings substantially track those of Judge Lassiter, including many that were verbatim. As to an especially important finding, *Commission* Finding Fact 81 is verbatim to Judge Lassiter's Finding of Fact 70. (Cf. R p. 15, 39)

In 2016, Sergeant Devalle ran afoul of the Highway Patrol Residency Policy, which required personnel to live within twenty miles of his/her duty station. (R. p. 13) Devalle arranged to have an actual address at 400 Hillside Drive in Johnston County in order to be in compliance with the residence policy. Devalle resided in Southern Wake County. (R. p. 13) This residency policy violation back in 2016 led to further mistakes and problems with reporting and service. Devalle admitted violations of policy and was terminated by the Highway Patrol. Devalle accepted responsibility for the failure to properly discharge duties of office and was given a probationary penalty and did not appeal. (R. p. 20).

Devalle was hired as a Columbus County Deputy Sheriff by the Columbus County Sheriff in 2017. (R. p. 80) Devalle had previously been certified as a police officer by the N.C. Criminal Justice Education and Training Standards Commission when he was employed by the N.C. State Highway Patrol. (R. p. 7) When he became a Deputy Sheriff, he had to apply for certification by the Sheriffs' Commission. (R. p.80) That denial of certification prompted this litigation.

Devalle had successfully served with the Highway Patrol for 19 years (1998-2017) and had earned the rank of Sergeant. (R. p. 7) In all those years up until termination, he only had one warning. (R. pp. 7, 80) However, Devalle was dismissed from the Patrol based on conduct concluded that during the year 2016.

Devalle began service as a Columbus County Deputy Sheriff in 2017. (R. p. 80) Columbus County Sheriff Greene was aware that Devalle had been dismissed from the Highway Patrol and hired Devalle on or around August 2017 as a School Resource Officer ("SRO"). (R. pp. 6; 14). Sheriff Greene testified that "Everybody in the east end of the County

recommended him [Devalle].[2] The principal, school board members, the parents, the students." (R. pp. 80-81) Sheriff Greene testified that Devalle has the good moral character to serve. (R. p. 81) A school board member called the Sheriff and was "constantly bragging on what he's [Devalle has] done . . . ." (R. p. 81)

Sheriff Greene testified that Devalle has performed "above and beyond" and that Devalle is "important" to his agency. (R. p. 81; see also R. p. 14) Given the importance of the school resource officer position. Sheriff Greene has special trust and confidence in Devalle. (T. pp. 32-33) (R. p. 81) If Devalle was unable to serve as a deputy sheriff, it would negatively impact the Sheriff's Office. Based on Devalle's service as a Deputy Sheriff, Sheriff Greene has no hesitation as to Petitioner's truthfulness. (T. p. 38; R. p. 81)

Jeremiah Johnson is the principal at East Columbus High School where Devalle served as the school resource officer and also served as an assistant football coach and track coach. (R. p. 14). Johnson has had the opportunity to watch Devalle perform those duties "every day" that

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[2] The testimony referenced is the evidentiary hearing before Judge Lassiter; The transcript references as "T" are references to that hearing.

school is in session. (T. p. 233) Principal Johnson testified that Devalle was dedicated to the school and the students. "He's almost my right-hand man." He testified that Devalle is "awesome." He is "great." In thirteen years as a principal working with SROs, Devalle is "the best so far." He has a "bond with the kids." Principal Johnson testified that he has "trust and confidence in his judgment." (R. p. 81)

Principal Johnson explained that Devalle has helped to support students with limited resources: "He's bought shoes for kids. He has given them their lunch. He has given them their food." (R. p. 81; see also R. p. 14). When questioned specifically about Devalle's moral character, Principal Johnson testified that he had "no doubt" that Devalle had the character to serve as a school resource officer and stated that he would not have allowed Devalle to serve in that capacity nor in the capacity of an athletic coach if he had any concerns about Devalle's moral character. (R. p. 14, 82).

There is no evidence in the record to refute the testimony of Sheriff Greene or Principal Johnson that, at the time of his application, Devalle possessed good moral character. (R. p. 80). Judge Bell concluded that the

testimony of Sheriff Greene and Principal Johnson demonstrated that Devalle has very good moral character. (R. p. 80)

Judge Bell found that Devalle had been commended for his professionalism by Superior Court Judge Doug Sasser (R. p. 81); and that Mr. Johnson opined that if Devalle was no longer able to serve East Columbus as a school resource officer, the lack of Devalle's presence would make the school less safe. T. pp 236; 247. (R. pp. 81; 82)

Judge Bell also concluded that "The credible and persuasive testimonies by Sheriff Greene and Principal Johnson demonstrated that Petitioner has restored his character so that he now possesses the good moral character required to continue to be certified as a deputy sheriff." (R. p. 81) The Commission in its Finding of Fact 81 (R. p. 15) similarly found that "Petitioner presented significant evidence demonstrating that Petitioner has rehabilitated and rebuilt his career since 2016 and 2017 while working as a school resource officer. . ." (R. p. 15)

The evidence of Devalle's good moral character was summarized by Judge Bell at R. pp. 80-83. Devalle's good moral character traits cover a wide spectrum of favorable traits. *Id.* Devalle was recommended by the Columbus County School Board, the principal, parents, students and

teachers. (R. pp. 80-81) Devalle is a caring and helpful person. (R. p. 81) Devalle was praised for helping needy students. (R. pp. 81-82) The Senior Resident Superior Court Judge commended Devalle for his professionalism. (R. p. 81; T.247)

A. The Commission Also Acknowledged Its Failure to Investigate

The Commission's Final Agency Decision contains Findings of Fact admitting that its investigation of Devalle was based solely on a review and repetition of the Highway Patrol's investigation of activities in 2016. (R. pp. 7-8, Commission Findings of Fact Nos.12-21).

The Commission did not investigate Devalle's good moral character at the time of his application for certification. (R. p. 81) In the argument section of this brief, Devalle argues that these investigative failures demonstrate the Commission committed errors of law and unlawful procedures including:

1. The Commission's own regulation, 12 NCAC 10B .0201, required an independent investigation; and
2. Arbitrariness by failing to assess character based upon Devalle's *present* good moral character required by *Schwere v. Board,* 353 U.S. 232, 246 (1957) and its progeny.

Judge Bell found that the record evidence showed that no one from the Commission ever contacted Principal Johnson regarding Devalle's performance of his duties as a school resource officer, his character, or anything else. (T. p. 238; R. p. 82)

Judge Bell also cited the record evidence indicating that, while four witnesses from the Patrol testified regarding Devalle's dismissal from the Patrol, none of those witnesses possessed any first-hand knowledge regarding Devalle's conduct in terms of truthfulness or conformance with policies while employed as a Deputy Sheriff in Columbus County. (T. pp. 168-169) None of those witnesses opined that Devalle lacked good moral character, either generally, or to serve as a deputy sheriff. (R. p. 83) *The Commission did not present any evidence concerning any conduct involving Devalle that took place more recently than 2016.* (T. p. 57) (R. p. 83)

Judge Bell found that Sheriff Greene and Principal Johnson established that Devalle has rehabilitated and rebuilt his character as a Deputy Sheriff, and as school resource officer and coach at East Columbus High School. (R. p. 84) The Commission similarly found. (R. pp. 7-8) Judge Bell found that for two and a half years, Devalle's service

as a deputy sheriff has been nothing but exemplary both of that service and of Devalle's character while engaging in that service. (R. p. 83) Finding 81 of the *Commission's* findings found virtually the same: "Petitioner presented significant evidence demonstrating that Petitioner has rehabilitated and rebuilt his career since 2016…" (R. p. 15)

IV. STANDARD OF REVIEW

The Court of Appeals below correctly stated and applied the standard of review. 289 N.C. App. at 19; 887 S.E.2d at 896. The Superior Court identified and applied the standard of review from N.C.G.S. 150B-51 and decisional law. (R. p. 75) The issues of law are subject to *de novo* review. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888 (2004). Fact-finding is subject to a whole record review. *Id.*

"Chapter 150B, the Administrative Procedure Act, specifically governs the scope and standard of this Court's review of an administrative agency's final decision." *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 98, 798 S.E.2d 127, 132, *aff'd*, 370 N.C. 386, 808 S.E.2d 142 (2017). *In Russell v. N.C. Dep't of Public Safety,* 872 S.E.2d 821, 826 (2021), the Court explained:

> "[Q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *Id.*
>
> "The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' "

Under the whole record test, the reviewing court "must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Carroll*, 358 N.C. at 659. "Substantial evidence" means "[r]elevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c).

Judge Bell adopted all of the Commission's Findings of Fact. (R. p. 80) Judge Bell necessarily had to make some additional findings because the Commission had failed to make findings necessary to apply the law correctly and make proper conclusions regarding *present* good moral character and rehabilitation. (R. pp. 80-83)

Judge Bell adopted the Commission's Conclusions of Law through 24. (R.p. 83) Judge Bell's Conclusions of Law made clear his application

of *de novo* review on the issues of law. (R. p. 84) "Issues of statutory construction re questions of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

V. SUMMARY OF ARGUMENT

All five judges below correctly found that Maurice Devalle presently has good moral character and is not subject to indefinite suspension of his certification and career destruction. The Court of Appeals and the Superior Court correctly applied this Court's precedent and did not err. At the threshold, Devalle has a fundamental constitutional right to the fruits of his labor and due process protection when being severely punished through an arbitrary and unduly vague occupational licensing rule. These constitutional rights cannot be arbitrarily brushed away by an admittedly ambiguous regulation that is being arbitrarily and discriminatorily applied excluding Devalle from his occupation.

The Commission's decision and its omissions violated multiple prongs of the Administrative Procedure Act including G.S. 150B-51(b)(1)(3)(4)(5) and (6). The Commission erred by failing to decide this case based on the *present* moral character of Devalle, erred by acting arbitrarily in several respects, erred by failing to apply the Commission's

own "severe and clear" good moral character standard, erred by failing to apply the recognized rehabilitation found by the Commission itself, and erred by failing to conduct an investigation as required by its own regulation.

The Supreme Court instructs that good moral character assessment in occupational licensing cases must be at the *present* time of the application. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246 (1957) (pertinent time for the assessment of moral character is "his *present* good moral character." (Emphasis added)

The Commission's good moral character rule is unduly vague, flimsy and arbitrary. The rule's use of referring to an unlimited number of appellate cases – with required legal research and shepardizing to ascertain the meaning of good moral character is insufficient notice to deputies. The Commission has recognized the shortcomings in its rule but has failed to initiate any corrective action. The rule, as applied in this case, is insufficient for valid enforcement action.

The Commission sought to establish a lack of good moral character by relying exclusively upon outdated conduct and ignored Devalle's present very good character. The personnel conduct was back in 2016.

The Commission arbitrarily punished Devalle without investigating or considering Devalle's *present* good moral character as required by 12 NCAC 10B.0201.

The Commission also erred as a matter of law by failing to apply the *rehabilitation* principle from good moral character law. The rehabilitation evidence from Sheriff Greene and Principal Johnson, who were admittedly credible witnesses as the Commission found, was arbitrarily ignored by the Commission. In the trial before Judge Lassiter, the Commission failed to call a single witness opining that Devalle has a lack of good moral character, but rather attempted to bootstrap an occupational licensing case from a personnel case from years earlier without even considering the rehabilitation principle or investigating Devalle's *present* character as required by law. The Commissioner's decision is based upon arbitrariness in several respects.

The Commission misinterpreted and misapplied the good moral character rule in conflict with North Carolina law – and inconsistent with the Commission's own interpretation of good moral character in *Jeff Royall v. N.C. Sheriffs Education and Training Standards Commission*

and its findings in this case. (R. p. 14- 15; *Royall* Final Agency Decision in Appendix)

Finally, Attorney General Stein's brief does not challenge significant portions of the Court of Appeals' holdings and reasoning. The Attorney General's brief asserts positions that inevitably promote more arbitrariness, unbridled discretion and selective enforcement by North Carolina occupational licensing agencies, which undermines North Carolina citizens from pursuing their careers and enjoying the fruits of their labor.

VI. ARGUMENT

A. THE COURT OF APPEALS AND SUPERIOR COURT CORRECTLY APPLIED GOOD MORAL CHARACTER LAW

Like many law enforcement officers, Maurice Devalle has made mistakes and was terminated. But he persevered and was rehired in his lifelong calling. Devalle highly impressed many people in Columbus County with his extraordinary, resumed law enforcement and community service. The students, parents, teachers and others in the community, his Principal, Judge Doug Sasser, three Sheriffs who have employed him, and many others have indicated that he is an honorable

man who has worked hard to carry on and support his community. They want him. Five judges found that Devalle has good moral character.

1. Analysis of the Court of Appeals' Decision

This segment begins with an overview of the key findings by the Court of Appeals below. On 16 May 2023, the Court of Appeals issued its published decision. 289 N.C. App. 12, 887 S.E.2d 891 (2023). The Court affirmed the Superior Court's Order on Judicial Review (2021 WL 11132326) which found that the Commission had erred in indefinitely denying Devalle's law enforcement certification on multiple grounds. The Court of Appeals followed this Court's precedent in *In Re Rogers* 297 N.C. 48, 253 S.E.2d 912 (1979) and *In Re Willis,* 288 N.C. 1, 215 S.E.2d 771 (1975). See 289 N.C. App. at 20, 887 S.E.2d at 897.

In summary, the Court of Appeals made the following points and conclusions in determining that the Superior Court found multiple correct grounds showing that the Commission's order was erroneous and subject to reversal for five separate reasons under the Administrative Procedures Act, G.S. 150B-51(b).

As to the arguments on appeal below, the Court first addressed the Commission's argument that the Petition for Judicial Review should be

dismissed because it was insufficiently specific. 289 N.C. App. at 19-20, 887 S.E.2d at 895-96. The Court concluded that the Petition was sufficiently explicit that it allowed effective judicial review." *Id.* at 289 N.C. App. at 19, 887 S.E.2d at 896. This issue was not raised or briefed in the Commission's New Brief before this Court. Therefore, that issue below was abandoned. waived and is not before this Court.

The Court of Appeals found that the Commission Final Agency decision "was not supported by substantial evidence to establish that Devalle presently lacks good moral character." 289 N.C. App. at 20, 887 S.E.2d at 897. The Administrative Procedure Act forbids findings, conclusions or decisions that are "unsupported by substantial evidence." G.S. 150B-51(b)(5).

The Commission's decision was arbitrary and capricious, which the Court found several times. 289 N.C. App. at 20, 27, 29; 887 S.E.2d at 897, 900, 901. The Administrative Procedure Act forbids findings, conclusions or decisions that are "[a]rbitrary, capricious, or an abuse of discretion." G.S. 150B-51(b)(6). One arbitrariness determination is predicated on several grounds including the Commission's applying a different and heightened good moral character standard to Devalle as

compared with other licensees, the Commission's own Finding 81 and Conclusion of Law 24 showing that Devalle is rehabilitated, and the failure to conduct an independent investigation of Devalle's present character as required by law

The Court of Appeals found that the "Commission did not abide by its own good moral character standard when it denied Mr. Devalle's justice officer certification indefinitely." 289 N.C. App. at 20, 887 S.E.2d at 897. This is one of the bases for the Court's finding of arbitrariness. The Court explained in detail how the Commission has previously interpreted the good moral character rule in a final agency decision in *Royall v. N.C. Sheriffs Education. and Training Standards Commission*, 09 DOJ 5859 (5 January 2001; decision in Appendix to this brief). See 289 N.C. App. at 22-23, 887 S.E.2d at 898.

In *Royall,* the Commission adopted a good moral character standard that the conduct had to be "severe and "clear" to constitute a potential violation. Other tribunals have regularly followed the Commission's adoption of the severe and clear standard. E.g, *Giroux v. N.C. Criminal Justice Education Standards Commission,* 2023 WL 9229513; 23 DOJ 02864; *Steven Boone v. N.C. Sheriffs' Education and*

Training Standards Commission, 2013 WL 8116015, 11 DOJ 0678.; The Commission here clearly did not apply the severe and clear standard to Devalle, thus the Court of Appeals correctly concluded here that "the Commission did not abide by its own good moral character standard when it denied Mr. Devalle's justice officer certification indefinitely." 289 N.C. App. at 20, 887 S.E.2d 897. This failure was arbitrary, as explained by the Court of Appeals: "By failing to apply the same standard to similarly situated individuals, the record in this case is one "which indicates arbitrary, discriminatory or capricious application of the good moral character standard" by the Commission. *In re Willis*, 288 N.C. at 19, 215 S.E.2d 771." 289 N.C. App. at 27; 887 S.E.2d at 901.

The Court of Appeals observed the Commission's prior precedent from *Royall*, in pertinent part as follows.

> 6. While having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear meaning of that term within the [Commission's] rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult.
>
> 7. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character *should be reserved for clear and severe cases of misconduct.*
>
> 8. Generally, isolated instances of conduct are insufficient to

> properly conclude that someone lacks good moral character. ... The incident alleged in this case is insufficient to rise to the required level of proof to establish that Petitioner Royall lacks good moral character. Under *In Re Rogers*, a single instance of conduct amounting to poor judgment, especially where there is no malice or bad faith, would not ordinarily rise to the high level required to reflect a lack of good moral character.
>
> 11. The totality of the facts and circumstances surrounding Petitioner Royall's conduct, in light of his exemplary history of good moral character and professionalism in law enforcement, does not warrant any finding that Petitioner Royall lacks good moral character. The substantial evidence of Petitioner's good moral character is clear and compelling. Sheriff Jack Henderson's description of Petitioner Royall is very telling: "He's the kind of guy, if he's cutting a watermelon, he'll give you the best piece." Therefore, the evidence demonstrates that there is no proper basis for revocation or suspension of Petitioner's law enforcement certification.

After considering the Commission's Decision and reasoning in *Royall*, the Court of Appeals concluded that: "we agree with the trial court these findings and conclusions [in *Royall*] do not conform with the standard the agency adopted in *Royall*. By failing to apply the same standard to similarly situated individuals, the record in this case is one "which indicates arbitrary, discriminatory or capricious application of the good moral character standard" by the Commission. *In re Willis*, 288 N.C. at 19, 215 S.E.2d 771." 289 N.C. App. at 27, 887 S.E.2d at 900.

Attorney General Stein's argument regarding *Royall* is without

merit and misapprehends Devalle's position. See Respondent's Brief at 19-20. A primary point from *Royall* was that Deputy Royall was adjudicated under the clear and severe standard, but Devalle was not. Here, the Commission failed to apply that standard. But the Commission also made compelling findings in Devalle's favor on the relevant points, but ignored them in its conclusion. See Commission Finding of Fact 81 and Commission Conclusions of Law 24 (R. p. 19), but the Commission then arbitrarily flipped the result. Both Devalle and Royall were deputy sheriffs adjudged under the Commission's good moral character rule. The Court of Appeals found that the Commission misinterpreted and misapplied the good moral character rule. 289 N.C. App. at 29, 887 S.E.2d at 901.

The Court of Appeals observed that the Commission's good moral character rule is "vague" and explained that "[s]uch a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial .... *Konigsberg v. State*, 353 U.S. 252, 263, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957)." See 289 N.C. App. at 20, 887 S.E.2d at 897.

The Court of Appeals specially noted the Commission's Finding 81

and its Conclusion of Law 24, quoted *supra.*, and relied upon those. 289 N.C. App. at 27, 887 S.E.2d at 900. After quoting those Commission determinations verbatim, the Court of Appeals reasoned that the Commission's own determinations support Devalle. *Id*

The Commission erred by not "investigating Mr. Devalle's current moral character, [rather] the Commission relied solely on Mr. Devalle's conduct in 2016 ..." 289 N.C. App. at 23, 887 S.E.2d at 899. This failure to investigate is another basis for the findings of arbitrariness, as further argued *infra.* On this point, the Commission acknowledged the key facts demonstrating the lack of an independent investigation. See Commission Findings of Fact 10-22, at R. pp. 7-8.

The Commission erred when it failed to follow its own regulation requiring it to conduct its own investigation and relied solely on the personnel investigation conducted by Devalle's employer in 2016. By failing to fulfill its statutory duty, the Commission violated another prong of the Administrative Procedures Act, G.S. 150b-51(B)(3), which precludes decisions "made upon unlawful procedure." 12 NCAC 10B.0201 provides that:

> (b) Before taking action against an agency, school, or individual for a violation, the Division *shall investigate* the alleged violation and, when required by the Director, shall present a report of its findings to the Probable Cause Committee of the Commission. (Emphasis added)

Instead of conducting a complete investigation as it was required to do, the Commission merely obtained and reviewed the Highway Patrol's internal affairs file from the past. The Commission investigator then wrote her report by "essentially writing what someone else said. . . ." (R. p. 32). No one was interviewed in the Commission investigation. *Id.* The Court of Appeals did not expressly address the failing to investigate violation. Rather it appears to be subsumed in the Court's arbitrariness analysis.

B. NORTH CAROLINA OCCUPATIONAL LICENSING LAW, INCLUDING THE GOOD MORAL CHARACTER RULE, MUST BE INTERPRETED AND APPLIED IN ACCORDANCE WITH CONSTITUTIONAL STANDARDS INCLUDING THE LAW OF LAND, DUE PROCESS, EQUAL PROTECTION AND FRUITS OF LABOR CLAUSES OF THE CONSTITUTIONS

1. The Commission's Application of the Good Moral Character Rule, as Applied Here, Denied Devalle's Constitutional Rights

Multiple dozens of classes of North Carolina workers are now subject to occupational licensing requirements through layers of regulations where similar undefined good moral character rules can shut workers out of their careers and cause economic devastation. In 1960, there were "more than fifty professions and occupations [that] are regulated by statute in North Carolina." *State v. Warren*, 252 N.C. 690, 694, 114 S.E.3d 660, 666 (1960).

The substantial exponential growth of these occupational licensing agencies appears to have produced a corresponding line of cases providing a constitutional check on this growing government power. The multiple state regulatory agencies, including both police Commissions, must be held to constitutional standards and this Court's teachings. This Court has a long history of protecting occupational licensees and

their constitutional rights to earn a living. E.g, *King v. Town of Chapel Hill,* 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) and its antecedents.

Occupational licensing agencies adjudicate perhaps the most important interests that citizens possess: *the right to earn a living*. "Loss of a professional license is more than a monetary loss; it is a loss of a person's livelihood and loss of a reputation." *Johnson v. Bd. of Governors of Registered Dentists of State of Oklahoma*, 1996 Ok. 41, 913 P.2d 1339, 1345 (1996). In *Johnson*, the Court further explained:

> "This Court has consistently recognized 'where it is necessary to procure a license in order to carry on a chosen profession or business, the power to revoke a license, once granted, and thus destroy in a measure the means of livelihood, is penal and therefore should be strictly construed.'" [Omitting citations]

The indefinite suspension of an occupational license is tantamount to the "death penalty" for one's career. Because of the magnitude of this interest as a *fundamental* right under this Court's precedent, law enforcement officers who are administratively charged with alleged certification offenses enjoy traditional constitutional protections.3

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3 In *Aboussleman v. N.C. Sheriffs' Education and Training Standards Commission*, 23 DOJ 05109 (August 27, 2024; in Appendix), Administrative Law Judge Byrne recently issued a proposal for decision in a deputy's certification case where he comprehensively reviewed

This Court has clarified the scope of North Carolina constitutional protection for occupational licensees. As discussed in the leading case of *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949), the right to earn one's livelihood is a fundamental part of the liberty that the Declaration of Rights was intended to affirmatively protect. Relying on these principles, this Court in *King* reaffirmed that the right to earn a living and practice a profession is *fundamental*:

> [T] right to earn a living must be regarded as inalienable. The Court's duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor.

King v. Town of Chapel Hill, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (citations omitted).

In *Locklear v. N.C. Criminal Justice Education and Training Standards Commission*, 2023 WL 2711303; 22 DOJ 02965), a police certification case addressing the good moral character rule,

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arguments and issues regarding the burden of proof. Id. at Conclusions of Law 16 – 45 at pages 11 – 16. Judge Byrne applied precedent in that certification case as it arose as an Article 3A case under the Administrative Procedure Act. Id. at Conclusions of Law 19 and 20. In Article 3A cases, the burden of proof is squarely on Respondent to prove its allegations and substantiate the rule violation. Id. citing numerous other cases where ALJ's have reached this same logical conclusion.

Administrative Law Judge Bawtinhimer summarized the constitutional underpinnings and importance of the constitutional limits on the regulatory power of state occupational licensing agencies in Conclusion of Law 30 and 31 in *Locklear*.

In *State v. Harris,* 216 N.C. 746, 6 S.E.2d 854 (1940), this Court addressed a conviction for the then-existing crime of operating a dry cleaners without a license. *Harris* became a widely followed leading occupational licensing case. The licensing requirement was held unconstitutional in *Harris*. This Court explained:

> "[T]he right to earn a living must be regarded as inalienable. Conceding this, a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life by the erection of educational and moral standards of fitness is legal grotesquery." 6 S.E.2d at 864.

This Court in *Harris* further explained:

> In licensing those who desire to engage in professions or occupations as may be proper subjects of such regulation, the Legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. 16 C.J.S., Constitutional Law, page 373, § 138, and cases cited. 6 S.E. 2d at 860.
>
> Where such a power is left to the unlimited discretion of a board, to be exercised without the guide of legislative standards, the statute is not only discriminatory but must be regarded as an attempted delegation of the legislative

> function offensive both to the State and the Federal Constitution. Yick Wo v. Hopkins, 118 U. S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; [omitting numerous supporting citations]. 6 S.E.2d at 860.

Harris emphasized concerns about the application of laws that drive North Carolinians from a profession:

> There is nothing in government more dangerous to the liberty and rights of the individual than a too ready resort to the police power .... Resort to the police power to exclude persons from an ordinary calling, finding justification only by the existence of a vague public interest, often amounting to no more than a doubtful social convenience, is collectivistic in principle, destructive to the historic values of these guaranties, and contrary to the genius of the people who did all that was humanly possible to secure them in a written constitution .... No good can come to society from a policy which tends to drive its members from the ranks of the independently employed into the ranks of those industrially dependent, and the economic fallacy of such a policy is too obvious for comment. *Id.* at 746, 6 S.E.2d at 865 (citation condensed for brevity).

Harris cautions that barring a person from his or her livelihood is not a task to be taken lightly. These constitutional underpinnings and principles mandate that the Commission's "unusually ambiguous" good moral character rule must be delicately applied only to clear and severe cases of misconduct where there has been no rehabilitation. For a review of state constitutional history regarding the Due Process and Fruits of Labor Clauses, see Orth and Newby, *The North Carolina State*

Constitution (2nd ed. 2013 Oxford Press). This treatise explores the compelling history of North Carolina constitutional law.

2. The Commission's Good Moral Character Rule as Applied Here in Unduly Vague.

The good moral character rule is a slippery slope of ill-defined loose verbiage without definitive standards or criteria.[4] The rule has eluded useful definition and has been described as possessing "shadowy rather than precise bounds." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring).

The text of the Commission's rule contains no elements or standards. This is palpably inadequate to afford adequate notice of the prohibited behaviors. Notice to licensees and clear regulations are constitutionally required.

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4 Commentators and courts have observed the many difficulties and risks presented by the undefined good moral character rule. "There are serious problems with the character requirement as it is currently being administered by states today. The problems with administering the character requirement involve timing issues, the lack of a solid definition of 'good character,' and the lack of an appropriate standard by which to judge an applicant's character." Ratcliff, *The Good Moral Character Requirement: A Proposal for a Uniform National Standard*, 36 Tulsa L. J. 487., 496 (2000).

In *Michael Faison v. N.C. Department of Crime Control*, 2013 WL 10255989, 11 OSP 1108850, Judge Lassiter addressed a vagueness challenge to a Highway Patrol cell phone policy and concisely explained the body of vagueness law, in pertinent part as follows:

> 26. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Treants II* at 458, quoting *City of Mesquite v. Aladdins*, 455 U.S. 283 (1982) and *Grayned v. City of Rockford*, 408 U.S. 104 (1972). A vague regulation "fails to inform those to whom it is directed of its application to them and therefore violates due process of law." *Connally v. General*, 269 U.S. 385, 391 (1926)
>
> 27. In *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), the Supreme Court explained the void for vagueness doctrine:
>
> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.
>
> 28. The North Carolina test for vagueness provides that a provision is "vague if it either: (1) fails to give the person of

> ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law." *State v. Sanford Video & News*, Inc., 146 N.C. App. 554, 556, 553 S.E.2d 217, 218 (2001)(omitting internal quotation marks). A regulation is "unconstitutionally vague if [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Hines*, 122 N.C. App. 545, 551-52, 471 S.E.2d 109, 11

The Commission has had fifteen years since *Royall* to correct its good moral character rule but has failed to do so. The Commission's history reveals that it has modified rules from time to time. However, the Commission has not budged into correcting the acknowledged flaws its good moral character rule. One wonders whether the objective has been for the Commission to retain its current rule as loose as possible which affords the Commission unbridled discretion to decertify deputies at whim when desired. That unbridled discretion has been the hallmark of the "watermelon standard." See *Royall,* 289 N.C. App. at note 6 and accompanying text; 887 S.E.2d at note 6.

The Commission's position here seeks to return unbridled discretion to the Commission to make good moral character determinations at whim – without reasonable notice of prohibited

behavior, without consistency of application, without justification and without principle.

C. THE COURTS BELOW CORRECTLY INTERPRETED THE GOOD MORAL CHARACTER RULE; AND THE COMMISSION'S DECISION CONTAINS ERRORS OF LAW, ARBITRARINESS AND IS BASED ON UNLAWFUL PROCEDURE IN VIOLATION OF G.S.150B-51

There are two regulations in issue in this case, the Commission's good moral character rule (12 NCAC 10B.0301(12) and the rule requiring an agency investigation of the actual charge (12 NCAC 10B.0201). (R. p. 75) These regulations were addressed by Judge Lassiter, the Commission and Judge Bell. The Commission's failure to conduct its own independent investigation into whether Devalle had present good moral character or not violated 12 NCAC 10B .0201 and the failure rendered the decision arbitrary. It was arbitrary because, *inter alia,* it failed to seek evidence of Deville's present good moral character by investigation.

Judge Bell reversed the Commission's Conclusions of Law 25 and 28, as those are inconsistent with the applicable law of good moral character and the evidence found in Finding Fact 81. (R. p. 15)

1. The Court of Appeals Correctly Applied the Principles of Good Moral Character Law

Courts and commentators have long wrestled with good moral character rules and the many resulting associated problems and injustices. E.g., *Konigsberg, supra.*; *In Re Rogers, supra.; Rhode, Moral Character as a Professional Credential.* 94 Yale L.J. 491 (1985) (comprehensive article with 453 footnotes). A number of leading cases provide concepts and principles of good moral character law.

In *Knox v. N.C. Sheriff's Education and Training Standards Commission,* 11 DOJ 04831, 2014 WL 10794970 (November 19, 2014), Administrative Law Judge May provided a thorough explanation of the law of good moral character as applied to deputy sheriffs:

> 4. Moral character is a vague and broad concept. E.g. *Jeffrey Royall v. N.C. Sheriffs' Education and Training Standards Commission*, 09 DOJ 5859; *Jonathan Mims v. North Carolina Sheriff's Education and Training Standards Commission*, 02 DOJ 1263, 2003 WL 22146102 at page 11-12 'Gray, ALJ) and cases cited therein. See *Mims* at page 11.
>
> 5. The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In *Konigsberg v. State*, 353 U.S. 252, 262-63 '1957), the Court explained: The term good moral character ... is by itself ... *unusually ambiguous*. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to

> fit personal views and predilections, *can be a dangerous instrument* for arbitrary and discriminatory denial ... (emphasis added).
>
> 6. Police administrators, officers and others have considerable differences of opinion as to what constitutes good moral character. *Royall* at page 13; *Mims*, *supra*. at page 12 ....

6. While having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear meaning of that term within the Respondent's rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult. *Royall, supra* at page 14; *Mims, supra*. at page 12, Conclusion of Law 4.

7. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct. *Royall, supra* at 14, *Mims, supra*. at page 12 and 13.

Knox relied heavily upon Judge Beecher Gray's brilliant work in *Mims v. N.C. Sheriffs Education and Training Standards Commission,* 2004 WL 22146102, where Judge Gray addressed many of the core concepts. *Knox* is widely followed including its reliance on *Royall. E.g., Campbell v. N.C. Criminal Justice Education and Training Standards Commission,* 2022 WL 290410 (Byrne, ALJ)

2. The Commission Rule and Its Required Shepardizing or Key Citing Demonstrates Its Vagueness and Arbitrariness

The Commission's good moral character rule appears in 12 NCAC 10B.0301(12), and requires:

> "a justice officer to be of good moral character as defined in: In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S. E.2d 854 (1940); In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906); In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); *and later court decisions that cite these cases as authority"* (Emphasis added)

The text of the Commission's rule does not provide a definition, criteria or defined elements. On its face, the rule is devoid of any clear meaning. However, the rule refers Deputy Sheriffs to six appellate cases and "later court decisions" that cite these cases as "authority." Therefore, for a Deputy Sheriff or anyone seeking to apprehend the meaning of the rule, he/she would have to discern all of the principles from the six cited cases *and* then shepardize or key cite and review all of those many additional cases – well over two hundred cases.

As of 12 November 2024, these six cases in the rule are cited by 226 subsequent cases. Therefore, one attempting to understand the

Commission's rule as directed by the Commission would have to shepardize, read and apprehend 226 additional judicial decisions. This approach is totally unfeasible and grossly unreasonable. Deputies are entitled to reasonable notice of what the rule prohibits. The current rule is unclear and is being arbitrarily applied.

In *David v. N.C. Criminal Justice Education and Training Standards Commission*, 2018 WL 2387452, 17 DOJ 06743, Administrative Law Judge Bawtinhimer heard a good moral character case involving a personal relationship. Judge Bawtinhimer focused on the rule's use of the case law to purportedly provide guidance. She demonstrated how the six cited cases were not on point and that police officers are not expected to know and carry out legal research techniques. There, the Judge explained in pertinent part as follows:

> 9. If Petitioner was actually aware of his responsibility to review these cases, he would have found that ***none*** of these cases dealt specifically with the conduct alleged in his case or any law enforcement certification case.
>
> 10. Regardless of the fact that the Rule incorrectly cited *In re Willis*, that case dealt with an applicant's failure to make full disclosure in his application to take the state bar examination. The issues detailed in *In re Dillingham* and *In re Legg* cases pertained to denial of licenses to practice law due to a series of criminal behavior (larceny, forgery,

extortion, and others) and failure to give full disclosure on the bar application of debts, respectively.

11. *In re Application for License* and *State v. Harris* cases pertain, respectively, to the judicial power of the courts to impose requirements on law license applicants and the State's authority to license professional dry cleaners.

12. *State v. Benbow*, the final case cited in the rule, deals with "good character" used as a mitigating factor in the sentencing phase of a murder conviction.

13. <u>None</u> of these cases define "good moral character" in the context of this case.

14. At best, in the 1975 case *In re Willis*, the North Carolina Supreme Court restated the United States Supreme Court's acceptance for the purpose of its decision that "the definition proposed according to counsel for the State of California that 'good moral character' is 'honesty, fairness, and respect for the rights of others and for the laws of the state and nation.'" *In re Willis*, 288 N.C. at 10, 215 S.E. 2d at 776-77, *citing Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed. 2d 819 (1957).

15. However, the United States Supreme Court even considered this definition too broad and found that exclusion of an applicant from the membership in the California state bar violated due process, because this definition of good moral character was "[s]uch a vague qualification, which is easily adapted to fit personal view and predilections, can be a dangerous instrument for arbitrary and discrimination denial of the right to practice law." *Konigsberg v. State Bar of California*, 353 U.S. 272, 262-63, 77 S.Ct. 722, 728, 1 L.Ed. 2d 819, 819 (1957).

16. The Rule also refers to the "*progeny*" of these cases for further definition of good moral character. Law enforcement

> officers may be familiar with some aspects of the law, but they are not attorneys or law clerks. The expectation that law enforcement instructors would have the ability to Sherardize cases to understand how their actions have failed to meet or maintain good moral character is unreasonable.
>
> 17. Had a law enforcement instructor been able to research the "*progeny*" cases, he would have discovered that no other authoritative cases clarified the definition of good moral character.

In *Konigsberg,* the Court described the term "good moral character" as being "unusually ambiguous:"

> The term "good moral character" . . . . by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, *can be a dangerous instrument for arbitrary and discriminatory denial* . . . .

Konigsberg v. State, 353 U.S. 252, 262-63 (1957). (Emphasis added). This Court has followed *Konigsberg* on this specific point also finding the good moral character rule to be "unusually ambiguous." See *In Re Willis,* 288 N.C. at 9-10, 215 S.E.2d at 776.

3. The Good Moral Character Rule May Only Be Enforced in The Most Severe and Clear Cases

The passage below is a well-articulated statement of the law of good moral character stated by the *Commission* itself in *Royall*:

> "Police administrators, officers and others have considerable differences of opinion as to what constitutes good moral character [omitting citations] ...The term good moral character ...is by itself ... is unusually ambiguous.... [quoting *Konigsberg]*
>
> While having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear meaning of that term within the Respondent's rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult ...
>
> Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct ....

Jeffrey Gray Royall v. N.C. Sheriffs' Education and Training Standards Commission (Final Agency Decision of Sheriffs' Commission; 27 January 2011 at 13 – 14.) As the Court of Appeals found, the Commission failed to apply this standard in this case. 289 N.C. App. at 37, 887 S.E.2d at 900.

The leading cases examining the good moral character rule as applied to deputy sheriffs echo the Supreme Court's concerns. [5] In *Knox,*

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5 While this case construes the good moral character rule as it relates to justice officers, the impact of state licensing regulations is broad across the workforce. Many occupations are licensed "and nearly 30 percent of the workforce is covered by licensing laws." Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar*

Judge May explained the more specific concerns about discriminatory and arbitrary treatment:

> [Because of] the lack of clear and consistent meaning of the term" [as applied by the Sheriff's Education and Training Commission, and] "the lack of clear enforcement standards or criteria for application of the rule . . . . any suspension or revocation of an officer's law enforcement certification based on an allegation of lack of good moral character should be reserved for clear and severe cases of misconduct.

Knox, at p 22.

Scores of cases are in accord with the reasoning of the Court of Appeals below. See, e.g. *DeCotis v. N.C. Crim. Justice Educ. & Training Stds. Comm.*, 10 DOJ 07779, 2011 WL 7274519 (Gray, ALJ presiding, R. p. 19) (agreeing that actions against law enforcement officers' certification based on the moral conduct rule should only be taken in the most severe cases); *Mims v. NC Sheriff Educ. & Training Stds. Comm.*, 02 DOJ 1263, 2003 WL 22146102 (Gray, ALJ presiding at pp 9-10) (also concluding that actions against an officer's certification based on the moral conduct rule should only be taken in the most severe cases); *Campbell v. N.C. Criminal Justice Education and Training Standards*

Regulation and Immigration Proceedings, 43 Law and Soc. 1027, 1034 (2018).

Commission, 21 DOJ 03747, 2022 WL 2904160(Byrne, ALJ presiding, pp 10-11).

A recent adjudication of a good moral character charge in a police certification case appears in *Russell v. N.C. Criminal Justice Educ. & Training Standards Commission,* 2022 WL 888026, where Administrative Law Judge Dills address many of the points of good moral character law applicable in this case. See *Marcum v. North Carolina Criminal Justice Education and Training Standards Commission*, 2016 WL 6830998, 15 DOJ 07702 (applying rehabilitation principles). In *Russell*, Judge Dills explained:

> "The term "good moral character" does not include any meaningful standards and its use is likely to be 'inconsistent, idiosyncratic and needlessly intrusive.' Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491 (1985). Because of concerns about the flexibility and vagueness of the good moral character rule, any suspension or denial of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for *obvious and severe cases* of misconduct.

The Commission's application of the moral conduct rule here is erroneous because the Commission has not established that Devalle's conduct is severe, particularly in light of the evidence of rehabilitation, and that his *present* character is good.

4. The Courts Below Correctly Held That Good Moral Character Should Be Assessed at the Time of The Certification Decision So That the Rehabilitation Principle Will Be Correctly Applied.

In *Schware*, the Supreme Court stressed that the pertinent time for the assessment of moral character is the *present*. 353 U.S. at 246. Furthermore, "'A fundamental precept of our system ... is that men can be rehabilitated. 'Rehabilitation' ... is a 'state of mind' and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved 'reformation and regeneration.'" *March v. Committee of Bar Examiners,* 67 Cal.2d 718, 732, 63 Cal. Rptr. 399, 433 P.2d 191 (1967). In *Application of Matthews,* 462 A.2d 165, 176 (N.J. Supreme Court 1983), the Court explained:

> [A] fundamental rule in bar admission cases is that evidence of reform and rehabilitation is relevant to the assessment of an applicant's moral character. Rehabilitation is pertinent because the Court is interested in an applicant's present fitness to practice law. Where evidence convincingly demonstrates reform and rehabilitation, it can overcome the adverse inference of unfitness arising from past misconduct and, if persuasive, present fitness may be found.

Devalle has not only successfully returned to his calling of law enforcement service, but his exemplary service has also extended to far broader community and educational service as well.

5. The Rehabilitation Principle Is a Fundamental Component of Good Moral Character Law That the Court of Appeals Correctly Applied

In *Scroggs v. N.C. Criminal Justice Education and Training Standards Commission*, 101 N.C. App. 699, 400 S.E.2d 742 (1991), the Court addressed an analogous police certification case analyzing a similar conduct regulation where an officer had been involved in illegal drug use. There, the officer had an exemplary record for several years, and the reviewing court held that it was arbitrary for the Commission to not consider the officer's exemplary service. The officer argued that the Commission's action in revoking his certification for five years was arbitrary. The Court of Appeals concluded that the Commission's action was in fact "arbitrary and capricious." Id. at 702, The Court of Appeals affirmed the Superior Court's decision granting relief to the officer. The reasoning of *Scroggs* strongly supports the Court of Appeals' decision here as the Commission committed the same type of error by arbitrarily failing to afford credit to the officer's exemplary service.

Judge Bell similarly concluded that the correct measure of moral character is an assessment of character in the *present*, including whether there has been rehabilitation following past transgressions. (R. p. 85)

"The principle of restoration or rehabilitation of good moral character has been widely recognized." (R. p. 85). Judge Bell cited the following rehabilitation cases: *Marcum v. N.C. Criminal Justice Commission,* 2016 WL 6830998 (Lassiter, ALJ)*; Rodney Bland v. Criminal Justice Education and Training Standards Commission*, 2013 WL 8116063, 12 DOJ 03839 (Overby, ALJ); *Kevin King v. N.C. Sheriffs' Education and Training Standards Commission*, 2012 WL 928115, 11 DOJ 11631 (Overby, ALJ), *Guyton v. N.C. Sheriffs Education and Training Standards Commission*, 2018 WL 6830630 (Overby, ALJ). The Court of Appeals correctly applied the same rehabilitation principles.

6. Administrative Judge Lassiter's Finding Criticizing a Limited Portion of Devalle's Cross Examination in a Single Finding Was Substantially Outweighed by Many Other Good Moral Character Findings and Judge Lassiter's Overall Conclusion That Devalle Has Good Moral Character

Judge Lassiter made extensive Findings of Fact, a total of seventy Findings. Judge Lassiter was very detailed in her Findings of Fact and Conclusions of Law. (R. pp. 28-46) The hearing was held on December 3 – 4, 2019. The scope of the hearing was very broad and encompassed in depth examination about events, facts, scenarios and circumstances three to four years earlier back in 2016. Judge Lassiter Finding Fact 8;

R. p. 31. The witness examination probed into much minutia including "time slips," the Highway Patrol Computerized Dispatch System, the Highway Patrol Policy Manual and many policies therein, Weekly Reports of Daily Activities, questions about specific days and details therein, Judge Lassiter Findings of Fact 17, 27-29. 53; R. pp. 32-34, 36.

The Commission's witness and employee, Ms. Sirena Jones, testified that she "could not recall if she actually reviewed Petitioner's time slips or not." *Id.* Finding 17. Additional Findings of Fact demonstrate how Ms. Jones could not recall or did not know many basic facts when under examination. See, e.g., Judge Lassiter Findings of Fact 18, 21, 22; T. 56-58, 59-61, 65, 67; R. pp. 32-3. Ms. Jones' memory was not excellent. Devalle's memory was also not excellent.

At the hearing, Devalle was examined and cross-examined at length. T.p. 183-233; 242-276. That examination probed all sorts of elaborate details relating back years earlier when the events that occurred in 2016. Devalle admitted that he violated Patrol policy (Judge Lassiter Finding of Fact 49; R. p. 36). Devalle admitted that he violated the Patrol Policy on residency when he lived in Wake County. Judge

Lassiter Finding of Fact 31. Devalle made mistakes. Judge Lassiter Findings of Fact 31, 36, 47-50, 57. (R. pp. 34, 36, 37)

Judge Lassiter's Findings of Fact included some facts that were adverse to Devalle but many facts that strongly supported his good moral character. Under the heading "Good Moral Character," Judge Lassiter found facts at length finding and supporting Devalle's good moral character. See, e.g. Judge Lassiter's Findings of Fact 58 – 68, 70; R. pp. 37-39.

In Finding of Fact 69, Judge Lassiter found that "Petitioner's testimony exhibited a lack of candor and sincerity during cross examination by Respondent's counsel." (R. p. 39) The intense cross examination prompted many objections, including badgering which was sustained. (T.p.190) The Attorney General apologized. (T.p.197) Judge Lassiter found that the "questions were about Petitioner's conduct with the Patrol in 2016." *Id.* However, Judge Lassiter's Finding 69 did not identify what the specific testimony was that Devalle could not recall that caused Judge Lassiter's concern, which precludes any significant analysis. Judge Lassiter criticized a now unknown piece of his testimony. As explained below in *Matter of Moore*, 301 N.C. 634, 272 S.E.2d 826

(1981), the lack of specificity in that finding renders it as inadequate. But Judge Lassiter considered that and still ruled in Devalle's favor. Obviously, Judge Lassiter's concern that prompted the one finding lack of candor on cross examination was not substantial. Judge Lassiter also found:

> 27. The credible and persuasive testimonies by Sheriff Greene and Principal Johnson demonstrated that Petitioner has restored his character so that he now possesses the good moral character required to continue certification as a deputy sheriff. (R. p. 44)

In *Matter of Moore*, 301 N.C. 634, 272 S.E.2d 826 (1981), an attorney seeking reapplication allegedly made "false statements under oath" during a proceeding before the Board of Law Examiners. 301 N.C. at 640, 272 S.E.2d at 830. The Board then cited this as substantive evidence of the applicant's lack of good moral character. But the Board did not specify in its decision which statements it considered to be untruthful. This Court explained that the Board could not satisfy its burden in establishing lack of moral character without having first "setting out with specificity what [those false statements] are and that they have been proved by a greater weight of the evidence." 301 N.C. at 640-47, 272 S.E.2d at 830-834. The evidence here as to candor was not

set out with any specificity at all. This Court's holding and reasoning in *Matter of Moore* is directly applicable here. This Court explained:

> We hold that finding number three fails adequately to resolve this issue and lacks the requisite specificity to permit adequate judicial review of the Board's order. The Board, in finding that Moore made "material false statements under oath," did not indicate which statements it considered to be untruthful. Consequently neither a reviewing court nor the applicant can be certain as to the content or materiality of the false statements referred to. The Board cannot meet its burden of proving specific acts of misconduct without setting out with specificity what they are and that they have been proved by the greater weight of the evidence. The Board in its brief attempts to specify the false statements referred to in the disputed finding. Suffice it to say that the specifications must be contained in the Board's order. Its brief should be directed to whether the specific findings are supported by the evidence and if so whether they along with other findings of misconduct are sufficient to rebut the applicant's prima facie case.

301 N.C. at 640-41; 272 S.E.2d at 831.

The Commission's conclusion that Devalle lacks good moral character conflicts with its own material findings quoted above, particularly Finding 81 and Conclusion 24. Judge Lassiter essentially found that Devalle violated Patrol policy and messed up, but that the evidence demonstrated that he worked very hard to rebuild his career and that he has good moral character. (R. p. 43).

7. Arbitrary Governmental and Occupational Licensing Decisionmaking is Prohibited by G.S. 15b-51(B)(6) and the Doctrine of Substantive Due Process

Arbitrary governmental decision making has been challenged under our Constitutions nearly back to the founding of America. In *Dobrowolska v. Wall*, 138 N.C. App. 1, 13, 530 S.E.2d 590, 599 (2000), the Court reaffirmed state constitutional arbitrariness principles:

> The Due Process Clause was intended to prevent government officials Afrom abusing [their] power, or employing it as an instrument of oppression@. . . . the core of the concept to be protection against arbitrary action. *Hurtado v. California*, 110 U.S. 516, 527 (1884).
>
> We have emphasized time and again that Athe touchstone of due process is protection of the individual against arbitrary action of government,@ *Wolfe v. McDonnell*, 418 U.S. 539, 558 (1974), whether the fault lies in a denial of fundamental procedural fairness, . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, *see, e.g., Daniels v. Williams*, 474 U.S. 327, 331 . . . .

"There is a species of substantive due process, apart from any specific of the Bill of Rights... this is a substantive due process right akin to the "fundamental fairness" concept of procedural due process." *Wilson v. Beebe,* 770 F. 2d 578, 586 (6th Cir. 1985). As explained in *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998), the Court explained:

> "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action:
>
> The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia v. Okely,* 17 U.S. 235, 4 Wheat. 235–244, 4 L.Ed. 559 [(1819)]: 'As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.' " *Hurtado v. California,* 110 U.S. 516, 527, 4 S.Ct., at 117 (1884).
>
> We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974), whether the fault lies in a denial of fundamental procedural fairness, see, *e.g., Fuentes v. Shevin,* 407 U.S. 67, 82, 92 S.Ct. 1983, 1995, 32 L.Ed.2d 556 (1972) (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, *e.g., Daniels v. Williams,* 474 U.S., at 331, 106 S.Ct., at 664 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised)."

In *Bizzell v. Board of Aldermen*, 192 N.C. 348, 135 S.E. 50, 55 (1926), the plaintiff contended that an ordinance was unconstitutional because it vested arbitrary discretion in public officials without prescribing uniform regulations, as in this case. The ordinance provided

that no gasoline filling or storage station should be located, conducted or operated in the City "without first obtaining consent from the board of aldermen. . . ." *Bizzell* held that the ordinance was unconstitutional:

> The ordinances are far-reaching, and the law does not permit the enjoyment of one's property to depend upon the arbitrary or despotic will of officials, however well-meaning, or to restrict the individual's right of property or lawful business without a general or uniform rule applicable to all alike.... Any valid ordinance must come under the time-honored rule of equal rights and not be dependent on arbitrary or despotic will.

Bizzell relied upon an older but compelling case, *State v. Tenant*, 110 N.C. 609, 14 S.E. 387 (1892). *Tenant* involved an indictment for an alleged violation of an ordinance. An ordinance is "unconstitutional and void" where interpretation is subject to the "arbitrary will of the governing authorities" where it "failed to furnish a uniform rule of action." 14 S.E. at 388. The same is true here.

In *In Re Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77 (1970), this Court held that governmental action which failed to "proceed under standards, rules, and regulations, uniformly applicable to all..." was arbitrary and capricious and that "the arbitrary will of the governing authorities. . . is unconstitutional because it fails to furnish a uniform rule of action. . . ." 178 S.E.2d at 80. *Accord Clark v. City of Asheboro*,

136 N.C. App. 114, 119, 524 S.E.2d 46, 50 (1999) (the Council "must also proceed under standards, rules, and regulations, uniformly applicable to all ...").

The Court of Appeals made multiple determinations of arbitrariness. 289 N.C. App. at 20, 27, 29; 887 S.E.2d at 897, 900, 901. The Administrative Procedure Act forbids findings, conclusions or decisions that are "[a]rbitrary, capricious, or an abuse of discretion." G.S. 150B-51(b)(6). This Court in *King v. Town of Chapel Hill,* held that this Court has a duty "to protect fundamental rights [which] includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor." 367 N.C. at 408; 758 S.E..2d at 371 (2014).

One arbitrariness determination is predicated on several grounds including the Commission's applying a different and heightened good moral character standard to Devalle as compared with other licensees, the Commission's own Finding 81 and Conclusion of Law 24 showing that Devalle is rehabilitated, and the failure to conduct an independent investigation of Devalle's present character as required by law

The Court of Appeals found that the "Commission did not abide by its own good moral character standard when it denied Mr. Devalle's

justice officer certification indefinitely." 289 N.C. App. at 20, 887 S.E.2d at 897. This is one of the bases for the Court's finding of arbitrariness. The Court explained in detail how the Commission has previously interpreted the good moral character rule in the final agency decision in *Royall.*

Courts have defined arbitrary and capricious as "willful and unreasonable action without consideration or in disregard of facts or without determining principle." See BLACKS LAW DICTIONARY 96 (5th ed. 1979).[6] For additional definitions of arbitrary and capricious, see *U.S. v.*

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6. *Bruno's, Inc. v. United States*, 624 F.2d 592, 594 (5th Cir. 1980) (arbitrary and capricious means either "unwarranted in law" or "without justification in fact."); *Flower Cab Co. v. Petitte*, 658 F. Supp. 1170, 1179 (N.D. Ill. 1987) (defining arbitrary as a decision reached "without adequate determining principle or was unreasoned."); *U.S. v. Euordif S.A.*, 555 U.S. 305, 322, 129 S.Ct. 878, 890 n.7 (2009) ("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."); *Watts-Hely v. U.S.*, 82 Fed. Cl. 615, 615 (Claims Court, 2008)("the very definition arbitrary and capricious action is decision making that ignores the relevant factors critical to the decision.")

"An agency's decision is arbitrary and capricious if it lacks "fair and careful consideration ... [or] fail[s] to indicate 'any course of reasoning and exercise of judgment.' " *State ex rel. Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980) (holding order requiring insurance organization to submit audited data was arbitrary and capricious where Insurance Commission failed to determine

Carmack, 329 U.S. 230, 243 n.14 (1946). Arbitrary is defined as "without adequate determining principle . . . [or] fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance... decisive but unreasoned..." *Id.*

8. The Commission Erred by Failing to Assess and Apply the Totality of The Evidence and By Failing to Give Deference to The Credibility Determinations of The Administrative Law Judge

In *In Re Estes*, 580 P.2d 977 (Ok. 1978), the Oklahoma Supreme Court reversed an administrative decision denying admission to the bar of a bar applicant on moral character grounds. The Court reasoned that the Board below had failed to assess the applicant at the *present* time and had failed to apply the evidence of rehabilitation. The Court explained that "to ascribe controlling weight to applicant's prior illegal acts and

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availability of data and provide adequate guidelines for compliance with order). In *Cape Medical Transport, Inc. v. North Carolina Dept. of Health and Human Services, Division of Facility Services,* 162 N.C. App. 14, 590 S.E.2d 8 (2004), the Court explained: "An agency's decision is arbitrary and capricious if it lacks "fair and careful consideration ... [or] fail[s] to indicate 'any course of reasoning and exercise of judgment.'"

little or no weight to the abundant evidence of his subsequent rehabilitation and present good moral character is error." *Id.* at 989.

The Commission has committed the same error as the Board did in *In Re Estes*. That is, the Commission ascribed controlling weight to the events of 2016 and gave no weight to the strong evidence of rehabilitation, even while acknowledging that Devalle had presented "credible, honest and believable" evidence demonstrating "exemplary" character in the present. (R. p. 19, Conclusion of Law 24)

First, the Commission came to its conclusion that Devalle did not currently possess good moral character by distorting Judge Lassiter's Findings of Fact/Conclusions of Law. Judge Lassiter found that Petitioner "exhibited a lack of candor and sincerity during cross-examination by Respondent's counsel." (R. p. 39) However, Judge Lassiter concluded in Conclusion 24 that:

> "... Even given Petitioner's cross-examination testimony at hearing, *the totality of the evidence* rebutted the finding of the Probable Cause Committee that Petitioner lacks the good moral character required of a justice officer and showed that Petitioner has rehabilitated his character since 2017." (R. p. 43) (Emphasis added).

Witness credibility is not within the specialized knowledge of an agency. Our appellate courts have made clear that the administrative law judge is the sole judge of credibility.

> In an administrative proceeding, it is the prerogative and duty of [the ALJ], once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness.

N.C. Dep't of Safety v. Ledford, 247 N.C. App. 266, 300, 786 S.E.2d 50, 64 (2014). *Accord State v. Harris*, 252 N.C. App. 94, 107, 798 S.E.2d 127, 137 (2017) ("As the sole fact-finder, the ALJ has both the duty and prerogative to determine the credibility of the witnesses, the weight and sufficiency of their testimony, to draw inferences from the facts, and to sift and appraise conflicting and circumstantial evidence.") Our appellate courts have instructed that "a high degree of deference" is to be accorded to the ALJ's findings when they are supported by substantial evidence in the record. *Id.*

It was error for the Commission to distort Judge Lassiter's credibility determinations and to fail to give deference to her role as the

fact-finder and this conduct amounts to arbitrary and capricious decision making on the part of the Commission. *Overton v. Goldsboro City Bd. of Educ.*, 304 N.C. 312, 322, 283 S.E.2d 495, 501 (1981) (reversing the board's decision as arbitrary and capricious, where it had distorted evidence and ignored relevant evidence); *Thompson v. Wake Cnty Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 543 (1977) (where the Board made findings contrary to those of the impartial reviewers who heard the testimony, the substantiality of the evidence supporting the Board's decision was questioned).

However, in addition to basing its decision upon unlawful procedure, the Commission's conclusions regarding the weight to be given to the evidence amount to arbitrary and capricious decision making. The Commission had no basis for discounting Devalle's evidence of good moral character in the present because it did not collect any evidence from any witness regarding Devalle's present good moral character.

The fact that Sheriff Greene found that Devalle has good moral character should be accorded greater significance, as Judge Lassiter did. "The employing agency of a law enforcement officer is generally in the

best position to observe and determine an officer's individual 'character, competence, and fitness to serve in a law enforcement capacity." *Russell v. N.C. Criminal Justice Education and Training Standards Commission*, 2022 WL 888026, citing *Marcum v. North Carolina Criminal Justice Education and Training Standards Commission*, 2016 WL 6830998, 15 DOJ 07702.

The only witnesses who testified about Devalle's present character were Sheriff Greene and Principal Johnson. Their testimony was undisputed and credited by the Commission. Devalle presented substantial evidence demonstrating that he has rehabilitated and rebuilt his career since 2016.

The evidence also demonstrated that Devalle has exhibited highly favorable character traits, including but not limited to helping, teaching, coaching, and serving as a positive role model for students at East Columbus High School, not only as an SRO, but as a coach in two sports. Sheriff Greene and Principal Johnson testified that Devalle's absence from their respective entities would have a negative impact on their workplaces. (R. p. 84). *Commission* Finding of Fact 81, discussed *supra*,

also demonstrates that Devalle's moral character was rehabilitated and restored.

9. The Commission's Failure to Investigate Violated 12 NCAC 10B .0201 and Demonstrates Arbitrariness and a Violation of Legal Procedure in Violation of G.S. 150B - 51 (b)(3)(4)(6).

The Commission erred when it failed to follow its own regulation requiring it to conduct its own investigation and relied solely on the personnel investigation conducted by Devalle's employer in 2016. 12 NCAC 10B.0201 provides that:

> (b) Before taking action against an agency, school, or individual for a violation, the Division *shall investigate* the alleged violation and, when required by the Director, shall present a report of its findings to the Probable Cause Committee of the Commission. (Emphasis added)

Instead of conducting an actual investigation as required, the Commission only obtained and reviewed the Highway Patrol's internal affairs file. The investigator then wrote her report by "essentially writing what someone else said . . . ." (R.p. 32). No one was interviewed in the Commission investigation. *Id.* By failing to conduct a mandatory required procedure, the Commission violated G.S. 150B-51(b)(3), which precludes any finding, conclusion or decision that is "[m]ade upon unlawful procedures."

The Commission's improper procedure also amounts to an arbitrary unlawful delegation of its regulatory duty to an outside party. The Court of Appeals has previously reversed an agency's decision to do precisely what the Commission has done here. In *Nanny's Korner Care Ctr. v. N.C. HHS - Div. of Child Dev.*, 34 N.C. App. 51, 758 S.E.2d 423 (2014), the Court reversed the agency's decision where that was based upon the investigation and determination made by the local social services department. The Court held that the plain language of the agency's regulation required it to conduct its own investigation and to independently substantiate the determination of abuse.

Likewise, the Commission's decision was properly reversed because it unlawfully delegated its regulatory duty to investigate to the Highway Patrol. This unlawful delegation is especially egregious where the Highway Patrol's frequent defective and incomplete investigations has been a documented part of our jurisprudence. See e.g. *Bulloch v. N.C. Department of Crime Control*, 223 N.C. App. 1, 732 S.E.2d 373 (2012).

10. The Commission's Failure to Investigate Also Violated the *Tully/Accardi Doctrine*

The Commission's failure to comply with its own regulation creates another legal error because an agency is constitutionally required to

comply with its own rules. *Tully v. City of Wilmington,* 370 N.C. 527, 810 S.E.2d 208 (2018). The *Tully* principle is simple and vitally important: *Agencies must comply with their own regulations*. The failure to do so constitutes arbitrariness. *Tully* relied upon *U.S. v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969), which held that:

> "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down."

Prior to *Tully,* courts reaffirmed the fundamental principle that a governmental agency "must follow its own rules . . .," *Poarch v. N.C. Department of Public Safety*, 223 N.C. App. 125, 132, 741 S.E.2d 315, 320 (2012); *Davis v. N.C. Department of Public Safety,* 2021 WL 5049198 (Gray, ALJ). Here, the Commission directly violated its own rule.

Prior to *Tully*, North Carolina has long applied these constitutional principles following *Accardi*. See, e.g. *Humble Oil v. Bd. Of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129 (1974) ("The procedural rules of an administrative agency 'are binding upon the agency which enacts them as well as upon the public. To be valid the action of the agency must conform to its rules which are in effect at the time the action is taken,

particularly those designed to provide procedural safeguards for fundamental rights.' 2 Am. Jur.2d Administrative Law 350 (1962).").

11. The Evidence and Prior Cases Also Reveal Selective Enforcement of its Good Moral Character Rule and Disparate Treatment in Discipline

One of the glaring problems presented as a result of the Commission's good moral character rule without any textual elements or standards is that it has lent itself to both arbitrary and selective enforcement. 297 N.C. at 20, 887 S.E.2d at 897, quoting *Konigsberg*, 353 U.S. at 263. Scores of examples reveal the resulting grossly inconsistent application of the good moral character rule.

This Court recently reaffirmed North Carolina's recognition of the doctrine of selective enforcement within equal protection law. In *Kinsley v. Ace Speedway,* 386 N.C. 418, 904 S.E.2d 720 (2024), this Court addressed a dispute where a business owner was held to state valid North Carolina constitutional claims arising from a COVID emergency executive order by Governor Cooper. Both the Fruits of Labor and Equal Protection claims were unanimously recognized.

In *Evington v. N.C. Criminal Justice Education and Training Standards Commission*, 09 DOJ 3070, 2009 WL 4912691 (Gray, ALJ), a good moral character certification case, Judge Gray cataloged a dozen cases of serious police misconduct in which officers received suspensions or reduced pay but retained both their certifications and their jobs. A recent extensive administrative law decision further recounts and explains some of the examples of horror from *Evington* and others where insignificant or no discipline was imposed. *Joe Locklear v. N.C. Dept. of Public Safety*, 2022 WL 2389874 (Byrne, ALJ).

In *Giroux v. N.C. Criminal Justice Education Standards Commission,* 2023 WL 9229513; 23 DOJ 02864, Judge Byrne followed *Evington* and explained with many more examples of disparate treatment in law enforcement occupational licensing discipline. The vague rule has resulted in ad hoc unprincipled decisionmaking, selective enforcement and disparate treatment in discipline.

The elastic good moral character rule has also been selectively *unenforced* with the result of condoning serious police misconduct. For example, *Gilliam v. N.C. Sheriff's Education and Training Standards Commission,* 22 DOJ 04731 (Commission Final Agency Decision, March

22, 2024; in Appendix), was a serious excessive force case with a shocking conclusion by the Commission. The testimony of multiple eyewitnesses made clear that Petitioner had engaged in an unjustified beating of an inmate, who was disabled person. Commission Finding of Facts 26 – 30. The beating was with a cane, whereby Mr. Jackson was struck multiple times on the head. Commission Finding of Fact 23. The Commission found the Petitioner to be not credible. Commission Finding of Fact 21. The Commission's fact finding demonstrated the unjustified beating. Finding of Facts 26 – 30. Three officers testified that the beating occurred, and the Commission so found. Commission Finding of Fact 30. But the Commission then arbitrarily found "insufficient evidence" without any explanation, despite the multiple eyewitnesses, its own fact finding and the compelling ALJ decision. The result was arbitrarily flipped.

The *principle of uniformity* of applying policy or law equally has been long recognized in North Carolina in different contexts. *E.g., State v. Fowler*, 193 N.C. 290, 136 S.E. 709 (1927) ("The principle of uniformity in the operation of a general law extends to the punishment and denounces as arbitrary and unreasonable the imposition in one county of

any kind of punishment which is different from that which is prescribed under the general law to all who may be guilty of the same offense.").

VI. CONCLUSION

Conclusion of Law 24 in the *Commission* Final Agency Decision sums up this case. The Commission cannot escape from its own Conclusion 24, which along with Commission Finding 81, demonstrates that the Commission's contrary contentions on appeal are without any merit. The Commission's acknowledgement of Devalle's rehabilitation, yet flipping the result anyway, demonstrates arbitrariness and legal error in violation of G.S. 150B-51(B)(1)(4)(6), and there are other violations as explained herein.

Wherefore, the Court of Appeals decision is correct and free of prejudicial error and should therefore be affirmed.

/s/ J. Michael McGuinness
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Counsel for Appellee Devalle

VII. CERTIFICATE OF SERVICE

I hereby certify that I have served this Response Brief on Ms. Joy Strickland, Counsel for the Appellant, N.C. Sheriff's Education and Training Standards Commission, P.O. Box 629, Raleigh, N.C. 27602 via email to jstrickland@ncdoj.gov this first day of December, 2024.

/s/ J. Michael McGuinness
J. Michael McGuinness
The McGuinness Law Firm

X. APPENDIX

ROY COOPER
ATTORNEY GENERAL

State of North Carolina
Department of Justice
PO Box 629
Raleigh, North Carolina
27602

Reply to:
John J. Aldridge, III
Law Enforcement Liaison Section
(919) 716-6725
(919) 716-6760 fax

January 27, 2011

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

J. Michael McGuinness
The McGuinness Law Firm
P.O. Box 952
Elizabethtown, North Carolina 28337

RE: Jeffrey Gray Royall v. North Carolina Sheriffs' Education and Training Standards Commission

Dear Mr. McGuinness:

Enclosed is the FINAL AGENCY DECISION entered by the North Carolina Sheriffs' Education and Training Standards Commission in the above-referenced matter.

Under the Administrative Procedure Act (G.S. Chapter 150B), your client has certain rights.

If your client wishes to seek judicial review of the enclosed FINAL AGENCY DECISION, you must file a petition in Superior Court within 30 days from the day you receive this letter. If you fail to file a petition within the required time of 30 days, your client will waive the right to judicial review of the FINAL AGENCY DECISION.

In filing such a petition, you must comply with all other applicable requirements of North Carolina General Statutes Chapter 150B and other applicable rules of law.

The FINAL AGENCY DECISION is, as its name implies, the Commission's final decision in this matter. If you have any questions concerning this matter, do not hesitate to call me at (919) 716-6725.

Very truly yours,

John J. Aldridge, III
Special Deputy Attorney General
Law Enforcement Liaison Section

JJA/bp

Enclosure
cc: Office of Administrative Hearings
Julia Lohman, Director, Sheriffs' Standards Division
Jeffrey Gray Royall, Petitioner

STATE OF NORTH CAROLINA **COUNTY OF YADKIN** **JEFFREY GRAY ROYALL,** **Petitioner,** **v.** **N.C. SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION,** **Respondent.**	**BEFORE THE NORTH CAROLINA SHERIFFS' EDUCATION & TRAINING STANDARDS COMMISSION** **FINAL AGENCY DECISION**

THIS MATTER was commenced by a request filed on October 23, 2009 in the Office of Administrative Hearings. Notice of Contested Case and Assignment and Order for Prehearing Statements (09 DOJ 5859) were filed on November 4, 2010. The parties received proper notice of hearing, and the administrative hearing was held on April 27, 2010 before the Honorable J. Randall May, Administrative Law Judge.

The Petitioner was represented by J. Michael McGuinness, Esq. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter the Commission or Respondent) was represented by Special Deputy Attorney General John J. Aldridge, III and Assistant Attorney General J. Joy Strickland.

On July 28, 2010, Administrative Law Judge May filed his PROPOSAL FOR DECISION. On August 3, 2010, counsel for the Respondent sent by certified mail a copy of the PROPOSAL FOR DECISION to the Petitioner's attorney with a letter explaining Petitioner's rights: (1) to file exceptions to the PROPOSAL FOR DECISION, (2) to submit proposed findings of fact, (3) to file written argument, and (4) to present oral argument to the Commission. On August 30, 2010, Respondent received Petitioner's EXCEPTIONS AND OBJECTIONS TO PROPOSAL FOR DECISION, WRITTEN ARGUMENT AND LEGAL BRIEF, REQUEST FOR ORAL ARGUMENT and PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION.

This matter came before the Commission for entry of its Final Agency Decision at the Commission's regularly scheduled meeting on December 15, 2010.

Having considered all competent evidence and argument and having reviewed the relevant provisions of Chapter 17E of the North Carolina General Statutes and Title 12, Chapter 10B of the North Carolina Administrative Code, the Commission, based upon clear, cogent and convincing evidence, does hereby make the following:

FINDINGS OF FACT

1. Petitioner Jeffrey Gray Royall earned a general deputy sheriff certification which was issued by the Commission and approved on July 3, 2002. See Petitioner's Exhibit 1.

2. On May 6, 2009, Sheriff Michael Cain of Yadkin County communicated a letter to Special Deputy Attorney General John J. Aldridge, III, whereby Sheriff Cain communicated a complaint about Petitioner Jeffrey Royall which gave rise to this proceeding. The complaint appears in the record as Petitioner's Exhibit 2.

3. In pertinent part, Sheriff Cain's letter of complaint alleged that several law enforcement agencies were working on a large scale undercover drug operation in Yadkin County which gave rise to a "bust" which netted close to two million dollars in cash and eight kilos of cocaine. See Petitioner's Exhibit 2. The complaint alleged that Petitioner posted information about the drug bust on a local website called www.yadkinview.com. In addition to the complaint regarding alleged disclosure of information placed on the website, the complaint by Sheriff Cain alleged that Petitioner previously worked for him as a Patrol Sergeant and that Sheriff Cain received a complaint from a dispatcher alleging that Petitioner engaged in inappropriate conduct towards her. Sheriff Cain alleged in his letter of complaint that he relayed his concerns regarding Petitioner to Sheriff Redmond of Iredell County on May 4, 2009, and that it was his understanding that Petitioner was no longer working for Sheriff Redmond in Iredell County as of May 5, 2009. Sheriff Cain alleged that Petitioner had engaged in "constant bashing and lies about my office policies and lack of experience of my staff. This has been going on for several years now and I feel like it's time for it to stop." See Petitioner's Exhibit 2, at page 2. Sheriff Cain posed a question in his letter of complaint as follows: "How long are we going to allow this person to demean the office of Sheriff?" Petitioner's Exhibit 2 at page 2. Sheriff Cain alleged that Petitioner's action in going public with information about him and his office reflects a lack of good moral character. Petitioner's Exhibit 2 at page 2. Sheriff Cain then requested specific relief including the revocation of Petitioner's certification as a deputy sheriff and "hopefully he can never again be allowed to enforce the laws of North Carolina in any capacity as a deputy or police officer in this state." Petitioner's Exhibit 2 at page 2.

4. In response to the complaint by Sheriff Cain, the Commission undertook an investigation of the allegation and afforded Petitioner an opportunity to submit a written response. Petitioner's written response of September 14, 2009 appears as Petitioner's Exhibit 3, whereby Petitioner responded to the complaint and provided his account of the facts and circumstances. Respondent's investigation was summarized in the report of its investigator, Mike McLaughlin. Petitioner's Exhibit 13.

5. The first witness called was Petitioner Jeffrey Royall. T19 Mr. Royall was born on August 18, 1966 and is 43 years of age. T19 Mr. Royall grew up in Yadkin

County. T20 Mr. Royall is married and has three surviving children. T20 Mr. Royall graduated from Starmount High School in 1984. T21 After concluding high school, he considered pursuing a career in the law enforcement field. T21 Mr. Royall came to believe that law enforcement was his "calling." T21

6. Mr. Royall previously served with the N.C. Department of Correction for approximately three years. T21 He thereafter served in a sales position for about three years. T22 Mr. Royall thereafter undertook training to prepare for a career in law enforcement at Wilkes Community College whereby he enrolled in the Basic Law Enforcement Education Training curriculum in the fall of 1994. T22 Mr. Royall successfully completed that program and graduated. T22 Mr. Royall thereafter became a sworn deputy sheriff in the Yadkin County Sheriff's Office under former Sheriff Jack Henderson. T22 Mr. Royall served for approximately three years under Sheriff Henderson's command. T22 Mr. Royall served for approximately six years with the Yadkin County Sheriff's Department. T23 After Sheriff Henderson left office, Michael Cain became the Sheriff of Yadkin County. T23 After Sheriff Cain became Sheriff, Mr. Royall was promoted to Sergeant. T24 Mr. Royall voluntarily left his employment with Yadkin County Sheriff's Department and went to the Iredell County Sheriff's Department and later to the Forsyth County Sheriff's Department. T25 Mr. Royall served approximately five years with the Forsyth County Sheriff's Department. T25

7. Mr. Royall served in different capacities in law enforcement service for the Sheriff's Department including patrol, detective and narcotics. T25 Mr. Royall performed supervisory work in the domestic violence department. T26 Mr. Royall provided instruction to others in the narcotics field. T26 Mr. Royall later left and accepted a position as a detective sergeant with the Iredell County Sheriff's Department. T26 Mr. Royall's employment with the Iredell County Sheriff's Department ended by termination on May 5, 2009. T28

8. Following his termination of employment by the Iredell County Sheriff, Mr. Royall sought a position with the Cherokee County Sheriff's Department with Sheriff Keith Lovin. T29 Sheriff Lovin conducted a background investigation and Sheriff Lovin was informed about the allegation against Mr. Royall in this case including the underlying facts and circumstances in detail. T30 Sheriff Lovin saw fit to have Mr. Royall sworn in as a member of his Department. T30

9. Prior to the allegation in this case, there has never before been any finding that Petitioner had any type of bad moral character. T29 Petitioner has been consistently certified as a sworn deputy sheriff through the Commission. T29 There has never been any prior disciplinary action against Mr. Royall or his certification by the Commission. T29 Mr. Royall's law enforcement certification with the Commission has always been in good standing. T29

10. The YadkinView is a political blog publishing discussions from most

everything involving local politics including law enforcement, commissioners, the school board and other matters. T30 From time to time, over the last several years, Mr. Royall has posted information onto that site so that it would be publicly available. T30 Mr. Royall has been an active and concerned member of his community. T30 Mr. Royall has been active and occasionally outspoken about public affairs in his community. T31 Mr. Royall had been posting information on the YadkinView site for probably two years prior to this matter. T31 Mr. Royall expressed various personal opinions about public affairs generally. T31 Mr. Royall and others have expressed opinions about the operation of the Yadkin County Sheriff's Department. T31-32 Mr. Royall selected the screen name of "Eagle Eye" for use on this site. T32 There was no policy of the Sheriff's Department that prohibited him from expressing opinions in that form. T32 Mr. Royall posted information on the website suggesting that he might be a candidate for the Sheriff of Yadkin County. T33

11. In April of 2009, Mr. Royall heard some information about a narcotics seizure that occurred in Yadkin County. T33 Mr. Royall was in his office in the Narcotics Unit in Iredell County doing work on the computer. T33 Sergeant Gary Simpson was the first person who provided information to Mr. Royall regarding this drug bust in Yadkin County. T33 Sergeant Simpson is a criminal interdiction highway enforcement agent. T33 Sergeant Simpson was a professional colleague of Mr. Royall and served in the Iredell County Sheriff's Department. T34

12. Sergeant Simpson came into Mr. Royall's office and told him that there had been a vehicle stop in Davie County which netted several hundred thousand dollars and went on to describe the vehicle and a search warrant that was done in Yadkin County where they recovered several hundred thousands of dollars. T34 When Sergeant Simpson told him the information about the narcotics seizure, Sergeant Simpson did not say or indicate anything suggesting that this was any type of open or ongoing investigation. T35

13. Based upon what Sergeant Simpson told Mr. Royall at the time, there was nothing that indicated it was an open investigation. T35 It was indicated that the information came from Travis Broughton, who is a Forsyth ABC Officer and is also a DEA Task Force Officer. T35 Due to the fact that the information was coming from the DEA, Mr. Royall had no reason to believe that it was an open investigation. T35

14. Mr. Royall had other discussions regarding the drug bust with Lieutenant Black of the Iredell County Sheriff's Department. T35 Mr. Royall had worked with and knew Lieutenant Black for several years and very much trusted him and respected his integrity. T36 Lieutenant Black came into Mr. Royall's office and asked him if he heard about the big drug bust in Yadkin County. T36 High Point Police Officer Marty Ferrell, also a DEA Task Force Officer, had told Lieutenant Black about the bust. T36 Mr. Royall told Lieutenant Black that he had just heard from Gary Simpson about the drug bust. T36

15. Lieutenant Black did not say anything to Mr. Royall that in any way indicated that the investigation was open. T36 Because the information came directly from DEA Task Force Officers who were directly involved in the case, if they were freely talking about the case, Mr. Royall knew those cases to be closed. T36-37 Officers do not freely talk about open cases. T37

16. On the following day, Mr. Royall heard Lieutenant Harris of the Iredell County Sheriff's Department speak about this drug bust. T37 Lieutenant Harris was on the speaker phone with Chief Rick Thomas of Forsyth ABC, they were talking about the drug case and the magnitude including the large sum of currency. T37 After that conversation, Lieutenant Harris went to Mr. Royall's office and they discussed what they both already knew about the drug case. T37

17. Petitioner's Exhibit 12 is a chart entitled "The Trail of Information." T38 Mr. Royall explained that in working narcotics cases, officers draw out a diagram whereby they lay out where the information came from, the individuals involved, and how the information developed. T38 Mr. Royall constructed the information prepared in this chart with his knowledge and belief as to the true facts and circumstances regarding this case. T39 The Iredell County Sheriff's Department was not actively involved in the underlying DEA investigation of the drug case. T41

18. With respect to the information provided to Mr. Royall about the subject DEA investigation, there was no part of that which indicated to him that the drug case was or might have still been an open and ongoing case. T41 If there had been any information provided to him causing Mr. Royall to believe that it was still an open and ongoing case, Mr. Royall would have not disclosed that information to anyone. T42

19. A large part of Mr. Royall's eighteen year law enforcement career has been in narcotics investigations. T42 Mr. Royall was well aware that officers do not disseminate confidential information and if he had known that the information was confidential, he would have never disclosed it. T42

20. On the following day, Mr. Royall obtained information regarding the drug bust from another law enforcement officer, SBI Agent Jamie Castle. T42 Mr. Royall considered and relied upon what SBI Agent Castle had told him in connection with the drug bust as a part of his decision to provide information to the YadkinView. T43-44

21. Mr. Royall communicated with Officer Mark Dowell of the Yadkinville Police Department regarding the drug bust. T44 Officer Dowell provided specific information to Mr. Royall about the drug bust in question. T45 Mr. Royall considered and relied upon the information from Officer Dowell as a part of his decision to communicate some information to the YadkinView. T45

22. In light of what Mr. Royall was told by SBI Agent Jamie Castle and Yadkinville Police Officer Mark Dowell, at no point from the initial conversation with Gary

Simpson to the last communication with Mark Dowell, was there any indication to Jeff Royall that the drug bust was an open investigation. T47

23 It was significant to Mr. Royall that there were several law enforcement officers that were openly discussing the investigation. Mr. Royall explained that on a closed case and from his training and experience, officers do not openly talk about a case unless they specifically tell you through specific terms such as "whisper stop" and "wire case" that it is an ongoing case. T47 Mr. Royall explained that in this situation, no one used those terms. T47 In this situation, none of the officers used any term to in any way suggest or infer to Mr. Royall that the drug case was open or ongoing. T47-48

24. The general nature of the information that Mr. Royall provided to the YadkinView was that there was a vehicle stop in Davie County with approximately four hundred thousand dollars, and that a search subsequently took place with a seizure of approximately six hundred thousand dollars. T48

25. The purpose of providing information on this blog was that it was congratulatory of the DEA. T49 Other individuals had also posted information about criminal cases or federal cases on the YadkinView. T49

26. After his communication to the YadkinView, Mr. Royall was contacted by Captain David Ramsey of the Iredell Sheriff's Department and Mr. Royall fully cooperated with Captain Ramsey's inquiry. T50

27. Mr. Royall had a discussion with Agent Wally Serniak of the DEA. T51 Mr. Royall explained to Agent Serniak and laid out a full diagram of how Mr. Royall received the information and where it came from. T52 Agent Serniak asked if the leak came from his office and Mr. Royall explained that it did. T52 During the conversation, Agent Serniak stated that his problem was not with Mr. Royall but that it is "within my own office." T52

28. With respect to the alleged complaint in Petitioner's Exhibit 2 regarding an alleged complaint from a dispatcher to Sheriff Cain, that contention is not true. T55 When that contended incident allegedly occurred some nine years ago, there was no notice to Mr. Royall or any opportunity for him to in any way defend himself from that contention. T55 There was no alleged proof offered at the hearing by the Respondent, or otherwise by Sheriff Michael Cain, that this contention from nine years ago was established or substantiated in any way.

29. During the hearing and as reflected on pages 53-59 of the transcript, Mr. Royall identified his other exhibits, which were admitted.

30. The next witness called was Jack Henderson, a former Sheriff of Yadkin County. T81-81 Sheriff Henderson served as Sheriff of Yadkin County from 1978 to 1998. T82 Sheriff Henderson served as the president of the North Carolina Sheriff's

Association in 1998. T82 Sheriff Henderson served on the Training and Standards Council. T82 Sheriff Henderson served as the co-chairman of the Sheriff's Legislative Committee for eight years and in other capacities. T83

31. Sheriff Henderson has known Mr. Royall since he was in elementary school. T83 Sheriff Henderson went to the same church with Mr. Royall for a while. T83 Mr. Royall grew up in the same neighborhood or community that Sheriff Henderson did. T84 When Mr. Royall applied for a position with the Sheriff's Department, Sheriff Henderson's office did the background investigation on him and checked him out again. T84 Sheriff Henderson did a psychological evaluation on every employee that he had and Mr. Royall "passed that with flying colors." T84

32. Sheriff Henderson explained that Mr. Royall "was an excellent employee... he was always honest, truthful." T85 Jeff Royall would do what you tell him to do. T85 Sheriff Henderson testified that Jeff Royall "is a good person all the way around, a moral person, a good person..." T85-86

33. Sheriff Henderson learned what Mr. Royall's reputation was in the community. T87 Jeff Royall's reputation was good. T87 He was a family man and worked hard. T87 Jeff Royall earned the respect of the community. T88 Jeff Royall earned the respect of his colleagues on the Department and other police agencies, and with court officials. T88 Sheriff Henderson did not impose any discipline on Mr. Royall. T88

34. With regard to work performance and work ethic, Sheriff Henderson described that Jeff Royall "produced a hundred and five percent." T89 Sheriff Henderson testified that Jeff Royall was very proud to be a law enforcement officer. T89 When asked about how he would sum up Jeff Royall's moral character, Sheriff Henderson described: "He's the kind of guy, if he's cutting a watermelon, he'll give you the best piece..." T90

35. Sheriff Henderson also heard about this drug bust in the community about the day after the bust. T90 Sheriff Henderson perceived that the investigation was closed based on what he heard. T91

36. The next witness called was Sergeant Gary Simpson of the Iredell County Sheriff's Department, where he has served over four years. T96 He has over 17 years of law enforcement experience. T96 Sergeant Simpson had previously served in Forsyth County and Jeff Royall was assigned to his squad and he served as Jeff Royall's immediate supervisor. T96 Sergeant Simpson described how everybody on the squad, 16 individuals, went to Jeff and looked for advice. T98 "They looked up to him because he had experience and he was a good officer and he could handle himself well." T98 Sergeant Simpson described that Jeff Royall handled himself in a very professional manner; he was a "fine, outstanding officer." T98 Sergeant Simpson

described Jeff Royall as being "very professional." T98 Sergeant Simpson described how Jeff Royall had always been honest with him. T99

37. Sergeant Simpson stated that Travis Broughton of the ABC Commission in Forsyth County who is also on the DEA Task Force provided him information about the DEA investigation in April, 2009. T99-101 Sergeant Simpson had no reason to disbelieve what Officer Broughton told him and he conveyed that information to Jeff Royall. T102 When Sergeant Simpson communicated the information to Jeff Royall about the DEA investigation, he did not in any way tell him that the information that he was providing was confidential and part of an ongoing investigation. T102 Law enforcement officers from time to time blog and provide information to the public after cases are closed. T107 Sergeant Simpson testified that there was not anything that he knew about Jeff Royall which reflected a lack of moral character. T107

38. The next witness called was Lieutenant Kevin Black of the Iredell County Sheriff's Department. T108 Lieutenant Black has over fifteen years of law enforcement service. T109 Lieutenant Black has worked with Jeff Royall at the Iredell County Sheriff's office. T109 Lieutenant Black explained that "Jeff has an honorable reputation. He has a reputation also of being a hard worker, and I saw that both first hand..." T110 Lieutenant Black explained that Jeff Royal was "very driven" as a narcotics enforcement officer and he that he always had a positive attitude and was a pleasure to work with. T110 Lieutenant Black explained that Jeff Royall had "always exemplified professionalism..." T110 Lieutenant Black further explained that Jeff Royall is "very honest..." T111

39. Lieutenant Black received information on the DEA case in Yadkin County from Marty Ferrell. T111 Lieutenant Black had a discussion with Lieutenant Ferrell and an SBI agent assigned to Iredell County about the DEA investigation, and Lieutenant Black conveyed the essence of that information to Jeff Royall indirectly. T112 The substance of what Lieutenant Ferrell had been saying about the DEA investigation was being communicated around the office at the Iredell Sheriff's office. T113 When Lieutenant Black had his conversation with Jeff Royall about the DEA investigation, he did not indicate to Jeff Royal that the investigation was an open or ongoing investigation. T113

40. The next witness called was Lieutenant Clarence Harris Jr. T119 Mr. Harris is a Lieutenant in the Narcotics Division with the Iredell County Sheriff's Department, where he has served for approximately 16 years. T119 Lieutenant Harris has known Jeff Royall for approximately 10 years or more. T120 Lieutenant Harris served as Jeff Royall's direct supervisor. T120

41. Lieutenant Harris testified that Jeff Royall "always had a good reputation." T121 Lieutenant Harris described Jeff Royall as having "hard working abilities in law enforcement." And that he was "very thorough." T121 Lieutenant Harris described Jeff

Royall as being "a great undercover officer." T121 Lieutenant Harris described Jeff Royall as being one who "treated people very well. I never seen him talk down to anyone. No complaints." T122 Lieutenant Harris considered Jeff Royall to be an asset to his Department and his unit in particular. T122 Lieutenant Harris described Jeff Royall as being "very honest." T122

42. In April, 2009, Lieutenant Harris became aware of a seizure of large amounts of currency and possible drugs; it was vague information. T123 The person who provided Lieutenant Harris the information was someone in his department. T123 Jeff Royall was in a position to hear the communication about the investigation to Lieutenant Harris, and there was no reference to the matter as being a "wire case." T123-124 There was no indication that the information that he heard was confidential. T124 The term "wire cases" and "whisper stop" are indications that the information is to be held strictly confidential. T124

43. The next witness called was Darlene Crater. T130 Ms. Crater has known Jeff Royall for twenty five years. T131 Ms. Crater worked with Jeff Royall for a period of time in the Sheriff's Department. T132 Ms. Crater described Jeff Royall as being "a very hard worker." T132 Ms. Crater testified that Jeff Royall has "excellent character." T132

44. Ms. Crater testified that Jeff Royall was very in tune with his children and was very involved in activities. T133 Jeff Royall is an active member of his community. T133 Ms. Crater testified: "I've never heard anyone say anything negative about Jeff. He has a good reputation, and honest reputation, a hard worker, easy to approach and talk to." T133

45. The next witness called was Darryl Bottoms, who served as the Chief of Police of the Pilot Mountain Police Department. T135 Chief Bottoms has served with Pilot Mountain Police Department since 1992 and has served in law enforcement since 1988. T135 Chief Bottoms was aware of Jeff Royall's work in the law enforcement community. T136 Chief Bottoms described Jeff Royall as being "always an honest guy, a heartfelt guy. I trust him." T136 Chief Bottoms has heard favorable comments from his officers about Jeff Royall. T136 In his dealings with Chief Bottoms, Jeff Royall has always exhibited honesty and integrity. T137

46. The next witness called was Barbara Fox. T140 Ms. Fox has known Jeff Royall for about nine years. T141 Ms. Fox has never heard anything but positive things about Jeff Royall. T141 Ms. Fox has found Jeff Royall to be very much honest and trustworthy. T141

47. The next witness called was Scott Moncus, a Trooper with the North Carolina Highway Patrol, who has served with the Patrol since 1995. T143 Trooper Moncus started in law enforcement with Jeff Royall in 1995 with the Yadkin County

Sheriff's Department. T143 Trooper Moncus testified that Jeff Royall has the "utmost integrity." T144 Trooper Moncus further testified that Jeff Royall knew how to handle the people. T144 Trooper Moncus testified that there are a lot of sworn officers that look at Jeff Royall "as a role model." T145 Trooper Moncus testified that Jeff Royall has "upstanding" moral character. T145

48. The next witness called was Diane Konopka. T147 Ms. Konopka is the Deputy Director with the Sheriff's Standards Division. T148 The complaint that was communicated to the Training & Standards Commission came from Sheriff Cain of Yadkin County, and there was no other law enforcement officer or agency that made any type of similar complaint regarding Mr. Royall. T153

49. The memorandum prepared by the Commission's investigator, Mike McLaughlin, was a single page memorandum. Petitioner's Exhibit 13. T154

50. After the communication of his complaint, Ms. Konopka believed that Sheriff Cain had called her office. T156 Ms. Konopka recalled Sheriff Cain calling and requesting some type of certification documents in connection with Mr. Royall. T157 Whatever it was that Sheriff Cain was requesting was not released to him because Mr. Royall was not certified through Yadkin County at that time. T158 It is not routine protocol for a Sheriff of a particular county to being making inquiry about someone certified through another Sheriff. T159

51. The next witness called was Walter Serniak, the resident agent of the DEA in Greensboro, where he has been stationed in North Carolina for almost three years. T162

52. When asked about whether a screen name on a blog with the name Eagle Eye, if it came to his attention in April and May of 2009, Agent Serniak testified that he was not sure how it came to his attention but that there was "some chatter in the office about, you know some information being leaked to the press to the public..." T163

53. Jeff Royall was not a part of the DEA Task Force involving the particular investigation resulting in the subject drug bust. T177 The only authorized persons to have information relating to that investigation would have been the DEA agents and others associated with the Task Force. T177 Agent Serniak testified that there was no formal investigation to determine who within DEA provided the information which ultimately was provided to Jeff Royall. T180 Agent Serniak was unaware as to how the information got to Mr. Royall. T182 As a result of the information about the investigation being provided, nobody was terminated from the Task Force. T182-183

54. Petitioner's Exhibit 13 was marked for identification, which was the report of Investigator McLaughlin of the Commission when he interviewed Agent Serniak. T187 From examining Investigator McLaughlin's report, it was somewhat consistent

with his feelings back at the time on August 18. T188 As reflected in Investigator McLaughlin's report, the disclosure of information "did not jeopardize the investigation in any way" and Agent Serniak acknowledged that was absolutely true. T189

55. Investigator McLaughlin reported that he spoke to Agent Serniak of the DEA on August 18, 2009. In pertinent part, Investigator McLaughlin's report indicated: "I asked him [Agent Serniak] if this had jeopardized his investigation or the officers' investigation, or if any of the information posted compromised the investigation. He stated no to all parts of the questions and said that officers' lives were not in jeopardy and it did not jeopardize the criminal investigation in any way." Petitioner's Exhibit 13, which was admitted into evidence. T215

56. The next witness called was David Ramsey, a Captain with the Iredell County Sheriff's Department. T197 On May 1, 2009, a blog entry came to his attention through Jeff Eddins, an Assistant Special Agent in charge of the Hickory SBI office. T199 Captain Ramsey conferred with Jeff Royall and asked him about the blog entry and he acknowledged that it was his. T201 Captain Ramsey testified that Jeff Royall did not know that it was an ongoing investigation. T201

57. Captain Ramsey found Jeff Royall to be a hard working and dedicated law enforcement officer. T207-208 Captain Ramsey found Jeff Royall to be respected by colleagues and respected in the police and judicial communities. T208 Jeff Royall was consistently a good worker for Captain Ramsey. T208 Captain Ramsey found Jeff Royall to be an honest and trustworthy person. T209

58. Other exhibits were offered in support of Petitioner that provided relevant evidence to whether Jeffrey Royall is a person of good moral character. Petitioner's Exhibit 5 is a letter a prepared by the Honorable Jeanie Reavis Houston, a District Judge of the Twenty Third Judicial District. Judge Houston explained that she grew up in the same small community and went to school together with Jeff Royall. Judge Houston observed that "Jeff is a great father." She explained: "he continues to be a good father to his three children, attends all their activities, encourages them in school, and is there for them if they need him. This says a lot for Jeff's character as a father and a man in general." Judge Houston further explained: "I believe my lifelong friendship with Jeff and his family makes me a good person to assess Jeff's character. Jeff is intelligent, capable, dedicated and a personable man. In my dealings with Jeff, both personally and professional, I have always found him to be honest, confident, compassionate and mature. He has an excellent rapport with people of all ages. Jeff Royall would be a valuable asset to any law enforcement organization."

59. Petitioner's Exhibit 6 is a statement executed by Chief Darryl Bottoms of the Pilot Mountain Police Department about Jeff Royall. Chief Bottoms reported that "Jeff has always displayed a high degree of integrity, responsibility, and ambition. He is definitely a leader rather than a follower. In addition to his excellent accomplishments,

he has proven his leadership ability. He is also most dependable team player. His good judgement and mature outlook ensure a logical and practical approach to his endeavors."

60. Petitioner's Exhibit 7 is a letter from Trooper Scott Moncus to the Training & Standards Commission. Trooper Moncus reports that he has observed Jeff Royall perform at the highest levels of his duties and that he has shown integrity and pride in his position with law enforcement, his friends and with his community.

61. Petitioner's Exhibit 8 is a letter from Monty Hutchens of the Lincoln County Sheriff's office. Detective Hutchens reports that he has worked in two Sheriff's offices over the past 24 years. Detective Hutchens reports how Jeff Royall has always been fair with him, has a deep pride in being a law enforcement officer, and that Detective Hutchens has never questioned his character or work ethic.

62. Petitioner's Exhibit 9 is a statement of Barbara Fox. Ms. Fox reports: "I have two grown daughters and no sons. If I had a son, I would want him to be like Jeff. Jeff is a very truthful person..."

63. The totality of the evidence demonstrated that Petitioner Jeffrey Royall acted in good faith when he communicated about the subject drug bust in Yadkin County in April, 2009. Petitioner Royall had heard about this drug bust from several law enforcement officers and believed the case was closed. Under the particular facts and circumstances, Petitioner Royall reasonably believed that his communications were proper and that the underlying criminal case was not open.

64. There was no credible evidence that Petitioner Royall's communications were intended to cause any harm, and there was no harm caused to the investigation or anyone. The underlying criminal investigation was not obstructed or harmed by Petitioner's communications.

65. Petitioner Jeffrey Royall has been fully cooperative and forthcoming about his underlying conduct which gave rise to this case. Mr. Royall did not knowingly disclose any confidential information. Mr. Royall's conduct, as demonstrated by the totality of all credible evidence, does not constitute evidence showing any lack of good moral character.

66. The evidence demonstrates that Petitioner Jeffrey Royall possesses favorable character traits of honesty, trustworthiness, integrity, professionalism, dedication to the law enforcement profession, being a hard worker with good work ethic, highly productive, fair to others, a "role model" for others, a good father, and respected by his community including the law enforcement and judicial communities. See T85-90, 98-99, 107, 110-111, 121-122, 133, 136-137, 141, and 143-145. These character traits were established by the virtually undisputed testimony of Retired Sheriff Jack Henderson, Chief Darryl Bottoms, Sergeant Gary Simpson, Lieutenant Kevin Black,

Lieutenant Clarence Harris, Trooper Scott Moncus, Ms. Barbara Fox, and Ms. Darlene Crater. Other character evidence appears in the record by written statement including that of the Honorable Jeanie Reavis Houston. Petitioner's Exhibit 5.

67. The totality of the credible evidence demonstrates that Petitioner Jeffrey Royall is a person and law enforcement officer of good moral character.

CONCLUSIONS OF LAW

1. Both parties are properly before this Administrative Law Judge. Jurisdiction and venue are proper and both parties received proper notice of the hearing.

2. The North Carolina Sheriff's Education and Training Standards Commission (hereafter the 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.

3. 12 NCAC 10B.0301(a)(8) requires that justice officers certified in North Carolina shall be of good moral character.

4. There is no factual or legal basis to conclude that Petitioner Jeffrey Royall lacks good moral character. The totality of the evidence demonstrates that Petitioner Jeffrey Royall is a person of good moral character and has been a dedicated professional law enforcement officer in North Carolina for many years. Petitioner is morally fit to continue to serve as a law enforcement officer in North Carolina. Petitioner Jeffrey Royall has good moral character as required by 12 NCAC 10B .0301(d)(8).

5. Moral character is a vague and broad concept. E.g. *Jonathan Mims v. North Carolina Sheriff's Education and Training Standards Commission*, 02 DOJ 1263, 2003 WL 22146102 at page 11 - 12 (Gray, ALJ) and cases cited therein.[1] Police administrators, officers and others have considerable differences of opinion as to what constitutes good moral character. *Mims, supra.* at page 12, Conclusion of Law 12. In

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1. See *Mims* at page 11. The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In *Konigsberg v. State*, 353 U.S. 252, 262-63 (1957), the Court explained:

> The term good moral character...is by itself...*unusually ambiguous*. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, *can be a dangerous instrument* for arbitrary and discriminatory denial....(emphasis added).

Mims, the Respondent Commission offered the testimony of someone who claimed to be knowledgeable regarding moral character; he testified that there are six components to good moral character of law enforcement officers: trustworthiness, respect, responsibility, fairness, citizenship and being a caring individual. *Mims*, page 7 at Finding of Fact 48. Applying those criteria here, the evidence demonstrates that Petitioner Jeffrey Royall met each of those criteria and other moral character components which demonstrated his good moral character.

6. While having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear meaning of that term within the Respondent's rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult. *Mims, supra.* at page 12, Conclusion of Law 4.[2]

7. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct. *Mims, supra.* at page 12 and 13.

8. Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. See *In Re Rogers*, 297 N.C. 48, 58 (1979) ("whether a person is of good moral character is seldom subject to proof by reference to one or two incidents."); *Daniel Brannon Gray v. N.C. Sheriffs Education and Training Standards Commission*, 09 DOJ 4364 (March 15, 2010; May, ALJ). The incident alleged in this case is insufficient to rise to the required level of proof to establish that Petitioner Royall lacks good moral character. Under *In Re Rogers*, a single instance of conduct amounting to poor judgment, especially where there is no malice or bad faith, would not ordinarily rise to the high level required to reflect a lack of good moral character.

9. In *Daniel Brannon Gray v. N.C. Sheriffs Education and Training Standards Commission*, 09 DOJ 4364 (March 15, 2010; May, ALJ), the good moral character rule was interpreted. "Good moral character has been defined as 'honesty, fairness and respect for the rights of others and for the laws of state and nation.'" *Gray*, at page 18,

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2. Cases reaffirm fundamental requirements that there must be uniform rules for consistent application to everyone including law enforcement officers. See, e.g., *Mims,* citing *Toomer v. Garrett*, 574 S.E.2d 76 (N.C. App. 2002)(government agencies may not engage in disparate treatment or arbitrariness in treating law enforcement officers; constitutional claims stated); *Village of Willowbrook v. Olech*, 120 S.Ct. 1073, 1074 (2000)(requiring that government conduct be non-arbitrary); *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000). See *Reno v. Bossier Parrish School Board*, 120 S. Ct. 866 (2000) (explaining how imposition of good moral character requirement for voting impermissible).

Conclusion of Law 5, citing *In Re Willis*, 299 N.C. 1, 10 (1975). *Gray* further explained that "[g]enerally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. However, if especially egregious, even a single incident could suffice to find that an individual lacks good moral character in places [sic] of clear and especially severe misconduct," citing *In Re Rogers*, 297 N.C. 48, 59 (1979). Here, there is clearly no severe, egregious or clear misconduct warranting any finding of a lack of good moral character.

10. Police officers and others make occasional honest mistakes and sometimes exercise poor judgment. For example, in *Andreas Dietrich v. N.C. Highway Patrol*, 2001 WL 34055881, 00 OSP 1039 (August 13, 2001, Gray, ALJ), Administrative Law Judge Gray addressed a case involving very poor communications by a state trooper characterizing state officials harshly. There, Judge Gray reviewed free expression concerns concluded that the there was no just cause for formal disciplinary action. Judge Gray reasoned that: "Troopers, like other public employees and officials, will occasionally say things that they should probably not say. Ideally, it is desired that law enforcement officers be near perfect; however, that is not a realistic standard." *Dietrich, supra.*, page 13 at Conclusion of Law 12. In this case, the sole charge of insufficient good moral character does not fit the facts and evidence. At worst, Petitioner Royall had an honest mistaken understanding, which is insufficient to establish a lack of good moral character.

11. The totality of the facts and circumstances surrounding Petitioner Royall's conduct, in light of his exemplary history of good moral character and professionalism in law enforcement, does not warrant any finding that Petitioner Royall lacks good moral character. The substantial evidence of Petitioner's good moral character is clear and compelling. Sheriff Jack Henderson's description of Petitioner Royall is very telling: "He's the kind of guy, if he's cutting a watermelon, he'll give you the best piece..." T90 Therefore, the evidence demonstrates that there is no proper basis for revocation or suspension of Petitioner's law enforcement certification.

12. As to another prong of the complaint against Petitioner Royall, Petitioner's expression regarding Sheriff Cain was constitutionally protected and may not be considered as any basis for a finding of a lack of good moral character. Numerous cases stand for the proposition that law enforcement officers enjoy the constitutional right to free expression.[3] The expression of Petitioner Royall regarding Sheriff Cain is

3. In *Rankin v. McPherson,* 483 U.S. 378 (1987) and other cases, the Supreme Court has strongly protected the rights to free expression by deputy sheriffs and police officers. See *Dietrich v. N.C. Highway Patrol,* 2001 WL 34055881, 00 OSP 1039 (August 13, 2001; Gray, ALJ)(addressing free expression rights of police officers); *Lindquist v. N.C. Highway Patrol,* 98 OSP 0170 (Gray, ALJ)(addressing expression rights of police officers); *Edwards v. City of Goldsboro,* 178 F. 3d 231 (4th Cir. 1999)(addressing expression rights of police officers under First Amendment).

protected because, *inter alia*, it involved an area of expression that courts have historically held protected: the right to criticize law enforcement and public officials regarding policies, practices and conduct.[4]

13. The totality of the facts and circumstances surrounding Petitioner Royall's conduct, in light of his otherwise exemplary history of good moral character and professionalism in law enforcement, do not warrant or justify revoking or suspending Petitioner's law enforcement certification. There has been no violation of Respondent's good moral character rule.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent finds that there has been no rule violation and that there is no legitimate basis to revoke or suspend Petitioner's law enforcement certification.

This the 5th day of January, 2011.

Acting Chairman

4. E.g., *Worrell v. Sheriff Morris Bedsole*, 1997 WL 153830 (4th Cir. 1997)(N.C. Deputy Sheriff's speech about a Sheriff's actions and inactions regarding police equipment protected; *Brewington v. Bedsole*, 1993 WL 819885 (E.D.N.C. 1993)(expression by N.C. Deputy Sheriff criticizing other police agency management officials held constitutionally protected; partial summary judgement for officer); *Howell v. Town of Carolina Beach, N.C.*, 106 N.C. App. 410, 417 S.E.2d 277 (N.C. App. 1992)(police officer expression about conduct of public officials regarding police equipment held protected), and cases in note 3, *supra*.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing FINAL AGENCY DECISION was this day served upon the following by depositing a copy of same in the United States Mail, certified mail, return receipt requested, addressed as follows:

Jeffrey Gray Royall
3528 Arnold Road
Hamptonville, North Carolina 27020

J. Michael McGuinness
The McGuinness Law Firm
P.O. Box 952
Elizabethtown, North Carolina 28337

The undersigned also certifies that a copy of the foregoing FINAL AGENCY DECISION was this day served upon the following by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, North Carolina 27699-6714

Julia Lohman, Director
N.C. Department of Justice
Sheriffs' Standards Division
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This the 27 day of January, 2011.

ROY COOPER
Attorney General

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North Carolina Department of Justice
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State Bar No.: 10779
COUNSEL TO THE COMMISSION

2023 WL 9229513 (N.C.O.A.H.)

Office of Administrative Hearings

State of North Carolina

County of Alamance

Michael **Giroux**, Petitioner
v.
NC Criminal Justice Education and Training Standards Commission, Respondent

Docket Number 23 DOJ 02864
Decision Date: December 4, 2023

PROPOSAL FOR DECISION
This contested case was heard by Michael C. Byrne, Administrative Law Judge on November 13, 2023, in Raleigh, North Carolina, following the request of Respondent North Carolina Criminal Justice Education and Training Standards Commission ("Respondent") for appointment of an Administrative Law Judge to hear the case of Petitioner Michael **Giroux** ("Petitioner") pursuant to N.C.G.S. 150B-140(e).

APPEARANCES
Mr. Nicholas Dowgul
Ms. Raina M. Coposky
North State Law Firm
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Attorneys for Petitioner
Ms. Kristen Mallett
Assistant Attorney General
North Carolina Department of Justice
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Raleigh, NC 27602
Attorneys for Respondent

WITNESSES

For Respondent:

Mr. Kevin Wallace

Mr. Chris Smith

For Petitioner:

Mr. Michael **Giroux**

Mr. Mark Brown

Dr. Aarti Kapur

ISSUE

Whether Respondent correctly found probable cause to take adverse action against Petitioner's law enforcement officer certification for lacking the good moral character necessary to hold a law enforcement officer certification in North Carolina.

BURDEN OF PROOF

1. This contested case is conducted pursuant to Article 3A of the Administrative Procedure Act, N.C.G.S. Chapter 150B. There is no statutory allocation of the burden of proof in a contested case heard under Article 3A.

2. In the absence of constitutional or statutory direction, the burden of proof is allocated on considerations of "policy, fairness and common sense." Peace v. Employment Sec. Comm'n of N. Carolina, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998). Applying Peace, Respondent bears the burden of proof in cases where it seeks to remove a previously granted certification on lack of good moral character grounds. Nathan Alexander Caudill v. NC Sheriffs Education and Training Standards Commission, 2022 WL 473555, 21 DOJ 01689.

3. Respondent thus bears the burden of proof to establish that Petitioner is lacking the good moral character necessary to hold a law enforcement officer certification in North Carolina.

STIPULATIONS

The parties stipulated:
1. It is stipulated that the parties are properly before Administrative Law Judge Michael C. Byrne and that the Office of Administrative Hearings has jurisdiction of the parties and of the subject matter.

2. It is stipulated that Respondent has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9, to certify criminal justice officers, and to revoke, suspend, or deny such certification under appropriate circumstances, with proof of a rule violation.

3. It is stipulated that Petitioner has been a certified general instructor, specialized driving instructor, specialized firearms instructor and certified criminal justice officer with the Burlington Police Department. The corresponding dates of certification for Petitioner are as follows:
Law Enforcement Certification: Probationary Certification issued 12/30/2011 and General Certification issued 12/30/2012.

General Instructor Certificate issued 08/04/2018.

Specialized Firearms Instructor Certificate issued 11/19/2021. Specialized Driver Instructor Certificate issued 02/13/2021.

4. It is stipulated that the contested issue in this matter is:
Whether Respondent's proposed revocation/suspension of Petitioner's criminal justice officer certification for failing to meet the minimum standards for law enforcement and proposed revocation/suspension of Petitioner's general and specialized instructor certificates are supported by a preponderance of the evidence?

5. It is stipulated that the following Administrative Rules are at issue: 12 NCAC 09A .0204 (b)(2)
12 NCAC 09B .0101(3)(2021)

12 NCAC 09A .0205 (c)(2)

12 NCAC 09B .0301 (e)(9)

12 NCAC 09B .0301 (f) (1) and (2)

6. It is stipulated that the following Respondent's Proposed Exhibits are authentic and admissible:
Exhibit #1 Report of Appointment submitted by the Burlington Police Department for Petitioner. Dated December 22, 2011

Exhibit #2 Probationary Certificate for Petitioner dated December 30, 2011

Exhibit #3 General Certificate for Petitioner dated December 30, 2012

Exhibit #4 Officer's (Petitioner) Complete History

Exhibit #5 Petitioner's Firearms Instructor Certificate dated February 13, 2020

Exhibit #6 Petitioner's General Instructor Certificate dated August 04, 2018

Exhibit #7 Petitioner's Driving Instructor Certificate dated November 19, 2021

Exhibit #8 Report of Separation from the Burlington Police Department signed and dated on July 22, 2022. Including the attachment to the Report of Separation completed by Petitioner.

Exhibit #9 Petitioner's Statement addressed to Kevin Wallace dated October 18, 2022

Exhibit #10 Probable Cause Notification Letter dated October 18, 2022

Exhibit #11 Petitioner's Request for Administrative Hearing dated June 2, 2023

7. It is stipulated that Petitioner engaged in sexual activity with an adult female on one occasion on the premises of a facility operated by the City of Burlington or the Burlington Police Department after work hours. This female was a member of the Burlington Police Department at the time of the incident but was not supervised by Petitioner or vice versa.

8. It is stipulated that Petitioner engaged in sexual activity with an adult female, other than the female identified in paragraph 7 above, on two occasions on the premises of a facility operated by the City of Burlington or the Burlington Police Department. This female was a member of the Burlington Police Department and was supervised by Petitioner at the time of the incidents.

9. It is stipulated that the following Petitioner's Proposed Exhibits are authentic and admissible and affidavits of the below affiants did not have full knowledge of the incidents before the Commission in this case:
Exhibit #2 Dr. Elizabeth Goryunova Affidavit - Department Chair and Associate Prof. at USM

Exhibit #3 Dr. Tara Coste Affidavit - Professor at USM

Exhibit #4 Pamela Makhoul Affidavit - Exec. Dir. of Humane Society of Alamance County

Exhibit #5 Kedrick King Affidavit - Assistant Chief of Elon PD Exhibit #7 Morgan Baker Affidavit - Neighbor

Exhibit #11 Transcript PHD Exhibit #12 CIT Award

Exhibit #13 Training History Report

Exhibit #14 Certification Transcript Elon Fire/Rescue

10. The Tribunal accepts all of these stipulations with the exception of:
a. Stipulations 4 and 5; identification of the applicable legal issue and applicable law and rule is solely the function of the Tribunal. N.C.G.S. 150B-40.

b. Portions of Stipulation 8, as the portion of the stipulation that states the female involved "was supervised by Petitioner" is not supported by the evidence. Rather, the female involved was of inferior rank to Petitioner but worked on another shift and Petitioner was not her regular supervisor.

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 Tribunal makes the following Findings of Fact. In making these Findings, the Tribunal weighed all the evidence and assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including without limitation the demeanor of each witness, any interests, bias, or prejudice of the witness, his or her opportunity 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

Parties and Witnesses

1. Respondent NC Criminal Justice Education and Training Standards Commission is an occupational licensing agency subject to Article 3A of N.C.G.S. Chapter 150B.

2. Kevin Wallace is an Investigator for Respondent with ten years of service. Prior to that he worked for 30 years with Corrections and ended as an Assistant Administrator. Wallace investigated Respondent's allegations against Petitioner. Unless otherwise stated, Wallace was a credible witness.

3. Petitioner Michael Giroux is a citizen and resident of North Carolina and holds the certifications listed above. Unless otherwise stated Petitioner was a credible witness.

4. Chris Smith works for the Burlington Police Department and has 27.5 years of experience with the department. He has been Assistant Police Chief since July of this year. He has held various officer positions over the years. Smith conducted an internal investigation of Petitioner after the department received an anonymous letter regarding Petitioner's conduct. Unless otherwise stated, Smith was a credible witness.

5. Mark Brown is a retired 30-year veteran of the North Carolina Highway Patrol who operates "Motor Mark I," a driving school. Brown employs Petitioner at the school and finds him a person of good quality. However, Brown only had a "little bit of knowledge" of Petitioner's conduct at issue in this case. Unless otherwise stated, Brown was a credible witness.

6. Dr. Aarti Kapur is a physician who is board certified in psychology and neurology. She primarily works as an outpatient psychiatrist and has inpatient privileges at Burlington Moses Cone Hospital. Petitioner started as a patient of Kapur's in 2022 and she has treated him since that time. Unless otherwise stated, Kapur was a credible witness.

Petitioner's Work History

7. Petitioner now works for the "National Safety Council" as a program manager for defensive driving and workzone safety programs. He has worked there for 14 months.

8. From 2011-2022 Petitioner worked for the Burlington Police Department. He started as a cadet and was promoted to Police Office 1 and 2 and Master Police Officer. He later became a sergeant with various responsibilities, including training.

9. Petitioner received multiple promotions and, until the events at issue here, received no disciplinary action over his more than ten years of employment with the Burlington Police Department. He received positive performance reviews from his superiors (Pet. Ex. 9).

10. Petitioner received these certifications from Respondent:
Law Enforcement Certification: Probationary Certification issued 12/30/2011 and General Certification issued 12/30/2012.

General Instructor Certificate issued 08/04/2018.

Specialized Firearms Instructor Certificate issued 11/19/2021. Specialized Driver Instructor Certificate issued 02/13/2021.

11. Petitioner served approximately one year as a Patrol Sergeant. He later became a sergeant over training, supervising two training officers. He trained other officers for several years. He went to a specialized training school to learn this process and then trained officers before transferring to Criminal Investigations.

12. Petitioner was a supervisor with the Burlington Police Department for approximately four years before being fired due to the conduct at issue in this case.

The Incidents At Issue

13. This case stems from Respondent's determination, through its Probable Cause Committee, that Petitioner lacks the good moral character required of law enforcement officers in North Carolina due to Petitioner having consensual sexual contact with two consenting female members of the Burlington Police Department on premises owned or controlled by the Burlington Police Department between 2018 and 2021 (Res. Ex. 10).

14. Petitioner had one act of consensual sexual intercourse with "Officer A"[1] in the equipment room of the Burlington Police Department, to which Petitioner had the key. Officer A did not testify in this case. This incident took place in the evening after Petitioner had finished his work for the night. Petitioner was married at the time of this incident and remains so.

15. Petitioner and Officer A were of equal rank. Petitioner testified that at the time the consensual act was initiated while neither officer was on duty or in uniform, though Petitioner seems to have been less certain on the former point when Smith investigated the matter prior to Petitioner's dismissal.

16. Both Wallace (for Respondent) and Smith (for the Burlington Police Department) found no evidence in their respective investigations that Petitioner's act of sexual intercourse with Officer A was anything other than an act between two consenting adults. There was also no evidence to the contrary at the contested case hearing.

17. Petitioner had a brief consensual sexual relationship with Officer A outside the police department for about two months (intermittently) in 2019. However, this was not cited by Respondent as evidence of lack of good moral character. Further, "An officer has a right to a private life free from intrusion unless it interferes with his work performance or the efficiency of the government service." Swope v. Bratton, 541 F. Supp. 99, 108, 1982 U.S. Dist. LEXIS 12644, *20.

18. Petitioner had a second sexual relationship with "Officer B" in 2020. Officer B did not testify in this case.

19. Officer B was inferior in rank to Petitioner. However, Petitioner was supervisor over a different shift than Officer B's, though Petitioner occasionally shared supervisory duties over Officer B's shift with the supervising lieutenant in charge. There was no evidence that Petitioner used his rank to in any way pressure Officer B to engage in the sexual encounters.

20. Petitioner had two sexual encounters with Officer B. One encounter took place in Petitioner's office at the Burlington Police Department. The second took place in a "substation" of the Burlington Police Department that constituted one half of a duplex. Petitioner testified without contradiction that both of these events occurred "after hours" and not while either officer was on duty or should have been otherwise serving the public.

21. As with Officer A, both Wallace and Smith found no evidence in their respective investigations that Petitioner's sexual intercourse with Officer B was anything other than acts between two consenting adults. There was also no evidence to the contrary at the contested case hearing.

22. Other than the two incidents, Petitioner had a relationship outside the police department with Officer B for "about three months total" ending in January 2021.

23. Though Petitioner testified without contradiction that there was a "culture of promiscuity" within the Burlington Police Department at the time, Petitioner was candid in that the conduct he engaged in by having sexual intercourse with Officers A and B, on premises owned or controlled by the Burlington Police Department was both inappropriate and disrespectful.

24. The incidents came to the attention of the Burlington Police Department via an anonymous letter. Smith investigated the matter for the department. Petitioner did not deny the relationships and, per Smith, was fully cooperative with the internal investigation. Petitioner's conduct resulted in his dismissal.

25. Petitioner fully cooperated with Wallace's subsequent investigation. Petitioner did not deny that he engaged in the sexual encounters. As with Smith, Wallace found no evidence that any sexual activity in which Petitioner engaged was either non-consensual or influenced by Petitioner's rank.

26. There was no evidence presented at the contested case hearing that Petitioner's sexual encounters with Officers A and B interfered with his work performance or the efficiency of the Burlington Police Department. There was likewise no evidence that the sexual encounters came to the attention of the public.

Petitioner's Remedial Measures and Subsequent Character History

27. Petitioner was and remains remorseful about the sexual encounters with Officers A and B and said, "I wish I could take back my actions."

28. At the time of the sexual encounters, Petitioner did not have coping mechanisms to deal with the stress of the job. For example, Petitioner saw a young suspect shoot himself when Petitioner tried to serve a warrant on him; the suspect pulled a gun on Petitioner and then shot himself in the head. There was no support from investigators in the department after that incident, though the department had some EAP resources available.

29. Petitioner started as Kapur's patient in 2022, presenting with recurring depression and anxiety.

30. Petitioner has been "100 percent compliant" with treatment recommendations and medications. He has made significant improvement within the past several months on various issues. (Kapur Testimony). Kapur testified without objection that she believes Petitioner currently holds good moral character and would feel safe and comfortable with him being a police officer.

31. Petitioner does community service, including for the Humane Society of Alamance County, where he took care of and fostered several dogs including two he and his wife ultimately adopted. The stipulated affidavit of Pamela Makhoul, Executive Director of the Humane Society of Alamance County, praises both Petitioner's current moral character and his services to the Society (Pet. Ex. 4).

32. Petitioner also has volunteered with a local fire department for over 15 years and has EMT certification. He has responded to over 300 calls this year alone. The stipulated affidavit of Fire Department Training Captain Jacob Flint (Pet. Ex. 6) praises both Petitioner's current moral character and his services to the fire department.

33. The stipulated affidavit of Mr. Kedrick King, Assistant Chief of the Elon Police Department (Pet. Ex. 5) praises Petitioner's current moral character and describes several acts of assistance Petitioner provided to that officer.

34. Petitioner is enrolled in a program of Ph D. in leadership development from the University of Southern Maine. He has a 4.0 grade point average. His dissertation is on stress threats to law enforcement. Petitioner hopes to reduce law enforcement suicides through his Ph D. work and study. Petitioner presented a stipulated affidavit from one of his professors (Pet. Ex. 2) that is highly complimentary of Petitioner's performance as a graduate student and of his character.

35. There was no evidence presented at the contested case hearing of any acts by Petitioner subsequent to his termination that reflect poorly on Petitioner's moral character. All evidence presented was to the contrary.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this contested case pursuant to N.C.G.S. 150B, Article 3A, following a request from Respondent under N.C.G.S. 150B- 40(e) for an Administrative Law Judge to hear this contested case.

2. In Article 3A cases the Tribunal sits in place of the agency and has the authority of the presiding officer in a contested case under Article 3A. The Tribunal makes a proposal for decision, which contains findings of fact and conclusions of law. Respondent makes the final agency decision.

3. All parties are properly before the Office of Administrative Hearings and there is no question as to joinder or misjoinder. There was no objection from either party to the Tribunal hearing this contested case.

4. This case involves a proposal to revoke an occupational license or certification. It thus affects the substantive rights of the Petitioner, and he is entitled to both notice and an opportunity to be heard. Scroggs v. N. Carolina Criminal Justice Educ. & Training Standards Comm'n, 101 N.C. App. 699, 701, 400 S.E.2d 742, 744 (1991). Notice was duly provided to all parties by the Office of Administrative Hearings.

5. To the extent that the Findings of Fact contain Conclusions of Law, and vice versa, they should be considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946).

6. A court, or in this case an administrative Tribunal, need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the resolution of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

7. Respondent has authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify law enforcement officers, including denying, revoking or suspending such certification under appropriate circumstances.

8. A core requirement for certification as a justice officer is that the applicant "be of good moral character as defined in" several appellate cases. The first of those, In re Willis, 288 N.C. 1, 215 S.E. 2d 771 appeal dismissed 423 U.S. 976 (1975), describes "good moral character" as "honesty, fairness, and respect for the rights of others and for the laws of the state and nation." Id. at 10, 776-7. Good moral character is considered a minimum employment standard and, as such, the lack of it authorizes revocation or suspension of an officer's certification. William Robert Casey v. North Carolina Sheriffs' Education and Training Standards Commission, 2012 NC OAH LEXIS 5011, 11 DOJ 11632.

9. This case involves an allegation of lack of good moral character based on sexual encounters between consenting adults,

albeit on property owned or controlled by Petitioner's then-employer, a law enforcement agency. While not binding on the Tribunal, prior decisions of both OAH and Respondent have generally declined to bar persons from the profession of law enforcement on the basis of consensual sexual conduct between consenting adults.

10. In Paul Brian Evington v. North Carolina Criminal Justice Education and Training Standard Commission, 2009 NC OAH LEXIS 180, 09 DOJ 3070, Respondent proposed to deny certification on good moral character grounds to a former deputy who, while on duty, "picked up" a female and took her back to the office, where she performed oral sex on him. The ALJ proposed that Respondent grant certification, which Respondent did in a Final Agency Decision dated April 16, 2010.

11. In Evington, former Administrative Law Judge Beecher Gray provided a detailed history of troopers disciplined by the North Carolina Highway Patrol for engaging in sexual behavior, including on-duty. As found by Judge Gray: "An extensive review of disciplinary matters against members of the North Carolina Highway Patrol show that while these troopers were disciplined by the Highway Patrol for sexual misconduct, Respondent took no punitive action against these law enforcement officers[2] with respect to their certification." These included:
Trooper "A" engaged in willful sexual misconduct against a female prosecutor and a female attorney. The misconduct included physical contact, unsolicited social visits, and solicitation to improperly reduce speeding charges. The female prosecutor victim felt "threatened" by Trooper A because of his repeated harassment. The Highway Patrol disciplined Trooper A in the form of a two (2) day suspension. Respondent took no action against his certification.

Trooper "B" had a sexual affair. The affair was facilitated by Trooper B's multiple use of the Highway Patrol's computers. Trooper B had a prior disciplinary history with the Highway Patrol prior to this incident. The Highway Patrol disciplined Trooper B in the form of a demotion. Respondent took no action against his certification.

Trooper "C" engaged in sexual activities while on duty, which endangered children because he left his loaded service weapon in the vehicle following the sexual activities. Trooper C's sexual activities included multiple women. The Highway Patrol disciplined Trooper C in the form of a five

(5) day suspension. Respondent took no action against his certification.

Trooper "D" had an affair with the wife of a subordinate who served under his command. The affair occurred while Trooper D was on duty, in uniform, and operating a marked Patrol car. Trooper D would meet the woman and engage in personal conversations not related to Patrol business. Trooper D regularly utilized Patrol time, facilities, and equipment to engage in the affair. Trooper D admitted the affair took him away from his duties. Trooper D placed multiple calls to the female; met her in his marked Patrol car; called her from the Internal Affairs' office; and rented a hotel room to engage in sex with her. Trooper D violated the Patrol's policy of circumventing the chain of command by going directly to the Colonel to discuss the matter. The Highway Patrol disciplined Trooper D in the form of a demotion and transfer. Respondent took no action against his certification.

Trooper "E" exposed his penis to a female while she exposed her breasts as they were kissing, all while Trooper E was on duty. On another occasion, a second female occupied his Patrol car for other than Patrol business. Trooper E was ordered not to discuss the matters which E violated by telephoning witnesses. The Colonel acknowledged E's actions arguably interfered with an Internal Affairs investigation. The Highway Patrol disciplined Trooper E in the form of a three (3) day suspension. Respondent took no action against his certification.

Trooper "F" continued an extramarital affair after the Patrol ordered him to stop, whereby he defied the Patrol's order and was insubordinate. Trooper F also violated another order from the Patrol when he inappropriately contacted witnesses. The Highway Patrol disciplined Trooper F in the form of a 5% reduction in pay. Respondent took no action against his certification.

Trooper "G" engaged in an extramarital affair, which was not his first affair (a prior one occurred in 1992). The Highway Patrol disciplined Trooper G in the form of a three (3) day suspension. Respondent took no action against his certification.

12. More recent decisions are consistent. In Luke Thomas Marcum v. North Carolina Criminal Justice Education And Training Standards Commission, 2016 NC OAH LEXIS 151, 15 DOJ 07702, petitioner had consensual sexual relations with a woman at her apartment, petitioner's home, or at other locations while Petitioner was on duty. Id. at 6. Petitioner also engaged in sexual relations with this woman in Petitioner's patrol car, and on the hood of Petitioner's patrol car. The petitioner also had sex with the woman at the Wilson Community College training academy. The relationship lasted approximately five years. OAH proposed that that Respondent suspend Petitioner's law enforcement certification for one year, but suspend such suspension, and place Petitioner on probation. In its Final Decision however, Respondent granted Petitioner's certification with no restrictions. Final Agency Decision, June 5, 2017.

13. In Joshua Orion David v. NC Criminal Justice Education and Training Standards Commission, 2018 NC OAH LEXIS 490, 17 DOJ 06743, Petitioner, a BLET instructor, engaged in separate consensual sexual relationships with two female cadets, each over 21 years of age, while they were students. The ALJ wrote:
Society's standards for "good moral character" [have] shifted from one generation to another. At one time, sexual relations outside of marriage was scandalous; now casual, consensual sex on a first "date" is permissible. While this attitude was disconcerting to the Undersigned, the participants appeared comfortable and nonchalant regarding this behavior. ... **The grounds for revocation of an officer's law enforcement certification based on this Rule should be based on clear and severe misconduct, not arbitrary moral standards**.

Id. at 21-22.

The ALJ found no grounds to revoke the petitioner's certification for lack of good moral character.[3]
14. In Travis Garrett James v. NC Criminal Justice Education and Training Standards Commission, 2019 NC OAH LEXIS 16, 18 DOJ 0448, the petitioner engaged in consensual sex one time, while in uniform and on duty, in a public place near his patrol car. While holding that the petitioner "showed a disregard for the profession of law enforcement and for the public" that was "evidence of a lack of the good moral character required of a law enforcement officer," id. at 13, the ALJ recommended no action on his certification. Respondent affirmed this holding in a Final Agency Decision issued February 21, 2019.

15. Contested cases where ALJs have found lack of good moral character for conduct involving sexual matters included additional aggravating factors:
Caleb Dean Costner v. NC Sheriffs Education and Training Standards Commission, 2022 NC OAH LEXIS 272, 21 DOJ 03745 (Petitioner sexually harassed multiple colleagues and made false statements in internal investigations of his conduct).

Jeffrey Laine Guyton v. NC Sheriffs Education and Training Standards Commission, 2018 NC OAH LEXIS 324, 18 DOJ 00592 (Petitioner repeatedly sexually harassed a crime victim, mishandled evidence for prurient purposes, and bothered the victim in her workplace);

Abraham Jeremiah McMillion v. NC Criminal Justice Education and Training Standards Commission, 2021 NC OAH LEXIS 216, 20 DOJ 04576 (Petitioner repeatedly had sexual relations in his office, misused his State-issued phone to send obscene photographs, and lied to his superiors in the internal investigation of his conduct).

Donald Earl Schwab, v. North Carolina Sheriff's Education and Training Standards Commission, 2015 NC OAH LEXIS 74, 14 DOJ 8347 (Petitioner had a protracted sexual relationship with a victim's sister during a murder prosecution, was repeatedly and intentionally untruthful, deceptive, and misleading to the District Attorney on the matter, and willfully violated his duty to disclose potentially exculpatory evidence).[4]

William Elmore Burwell Jr. v. North Carolina Criminal Justice Education and Training Standards Commission, 2016 NC OAH LEXIS 8, 15 DOJ 04849 (Petitioner engaged in repeated sexual acts with a confidential informant, used his undercover department vehicle to meet the informant, paid the informant with department money, and never disclosed the relationship to superiors or the district attorney's office).

16. In at least one case where OAH found that suspension of certification for lack of good moral character was warranted, Respondent issued a Final Agency Decision allowing the person to remain certified. In Matthew Kevin Jean v. NC Criminal Justice Education and Training Standards Commission, 2020 NC OAH LEXIS 97, 19 DOJ 04083:

Petitioner's own admissions show that he did not possess the good character required of every justice officer when he admitted that from on or about March 2018 until on or about December 2018, Petitioner actively engaged in a sexual relationship with [a woman] while on duty for the Hope Mills Police Department. Petitioner admits that he engaged in sexual touching with [the woman] while on duty and that he used a work-issued iPhone to engage in sexually explicit communication with [the woman]. **To make matters worse, Petitioner continued his relationship with [the woman] after she became the subject of a felony investigation by the Hope Mills Police Department. Petitioner's conduct was not isolated but rather continuous over a period of many months. He compounded his conduct by lying to his wife about the reason for his resignation for more than one year. Petitioner did not admit his improper behavior until his wife confronted him**. Petitioner did not acknowledge his improper behavior to his employer, the Hope Mills Police Department, until they began an internal investigation into his conduct with [the woman].

Id. at 14-15 (emphasis supplied).

17. The ALJ proposed that Respondent indefinitely suspend the officer's certification for lack of good moral character. Respondent, in a Final Agency Decision issued January 14, 2021, found that "As indicated in the Final Agency Decision, Mr. Jean's criminal justice officer certification is **INDEFINITELY SUSPENDED** for lack of good moral character. However, the indefinite suspension is **SUSPENDED** based on Petitioner's rehabilitation of his good moral character." (emphasis in original).

The Evidence Does Not Establish Petitioner's Lack of Good Moral Character

18. Moral character is a vague and broad concept. Jeffrey Royall v. N.C. Sheriffs' Education and Training Standards Commission, 09 DOJ 5859; Jonathan Mims v. North Carolina Sheriff's Education and Training Standards Commission, 02 DOJ 1263, 2003 WL 22146102 at page 11-12 (Gray, ALJ) and cases cited therein.

19. The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In Konigsberg v. State, 353 U.S. 252, 262-63 (1957), the Court explained:

The term good moral character ... is by itself ... **unusually ambiguous**. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, **can be a dangerous instrument** for arbitrary and discriminatory denial ... (emphasis supplied).

20. Citing Konigsberg, the Court of Appeals of North Carolina recently affirmed the same principle in Devalle v. N.C. Sheriffs' Educ. & Training Stds. Comm'n, 289 N.C. App. 12, 21, 887 S.E.2d 891, 897, 2023 N.C. App. LEXIS 270, *15. Moreover, Devalle cautioned that "By failing to apply the same standard to similarly situated individuals, the record in this case is one 'which indicates arbitrary, discriminatory, or capricious application of the good moral character standard' by the Commission." Id. at 25.

21. The Tribunal concludes as a matter of law that finding lack of good moral character on the basis of the acts described here would indeed be, as in Devalle, "failing to apply the same standard to similarly situated individuals," as the Tribunal finds no prior case where lack of good moral character was established by isolated sexual encounters between consenting adults, even on police department property, that failed to involve additional aggravating factors - and several cases standing for the contrary.

22. Further, "While having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear

meaning of that term within the Respondent's rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult." Royall at 14; Mims at 12.

23. Most importantly here, "**[I]solated instances of conduct are insufficient to properly conclude that someone lacks good moral character.**" See Royall, supra.; In Re Rogers, 297 N.C. 48, 58 (1979) ("**whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.**"); In re Willis, 288 N.C. 1, 13, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975) (quoting In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924)); Devalle at *14. (emphasis supplied).

24. Due to concerns about the flexibility and vagueness of the good moral character rule, any denial, suspension, or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct. Mims, supra. at page 12 and 13. Thus, while Petitioner's actions in engaging in sexual intercourse with Officers A and B on premises owned or controlled by his police employer were not acts of good character, they fail to establish lack of good moral character generally.

25. Royall, Rogers, and Dillingham are cited in Respondent's rule on good moral character, which requires that all persons having or seeking certification:
(12) be of good moral character as defined in:: In re Willis, 288 N.C. 1, 215 S.E. 2d 771 appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E. 2d 854 (1940); In re Legg, 325 N.C. 658, 386 S.E. 2d 174 (1989); in re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906); In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); State v. Benbow, 309 N.C. 538, 308 S.E. 2d 647 (1983); and later court decisions.

12 N.C.A.C. 9B.0101(12).

26. As stated, "later court decisions" do not support finding a lack of good moral character in this case. Nor do the cases cited in 12 N.C.A.C. 9B.0101(12) itself:
In re Willis involved an applicant to practice law. It said of good moral character: "The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However, the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer." Id. at 10, 776. In re Willis described good moral character as "honesty, fairness, and respect for the rights of others and for the laws of the state and nation." Id. at 10, 776-77.

The Willis applicant made repeated deceptive statements regarding his criminal record and his dismissal from the military, and had unsatisfied court judgments against him. Id. at 9, 775. These "misrepresentations and evasive or misleading responses" [were] "inconsistent with the truthfulness and candor required of a practicing attorney." Id. at 18, 781. In re Willis thus featured a general history of disreputable conduct in various contexts. Petitioner's history is one of very creditable service and conduct marred by isolated acts of conduct Petitioner concedes was inappropriate.

State v. Benbow addresses the moral character of a criminal defendant for purposes of sentencing. Most notably, it states: "Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." Id. at 538, 653.

In re Legg involved an applicant to the North Carolina bar who omitted substantial information in his application and showed a "pattern of carelessness, neglect, and inattention to detail" while engaged in law practice elsewhere. The Board of Law Examiners found Legg "morally unfit to practice law in the State of North Carolina because of his failure to settle all accounts left owing from his law practice, his willful conversion of funds owed to a private investigator ... and his neglect to return legal papers to a client after a written request for such papers." Id. at 658, 179.

The Supreme Court stated, "The findings taken singly may not be sufficient to disqualify the applicant from the practice of law in North Carolina. See In re Rogers, 297 N.C. 48, 58, 253 S.E.2d 912, 918 (1979) ('Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents')." However, when the findings are viewed in the

aggregate, **they reveal a systemic pattern of carelessness, neglect, inattention to detail and lack of candor that permeates the applicant's character** and could seriously undermine public confidence and the integrity of the courts." Id. at 673-674, 183 (emphasis supplied). This "systemic pattern" of misconduct "permeating" the character is substantially different from Petitioner's actions at issue.

In re Rogers, as noted, holds that "whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." Id. at 58, 918. In re Rogers also emphasized that "character ... encompasses both a person's past behavior and the opinion of members of his community arising from it." Id. Here, it is not disputed that prior to the incidents at issue, Petitioner had a creditable career. The only "opinion of members of [Petitioner's] community" introduced into evidence was favorable to Petitioner.

In re Dillingham featured a bar aspirant whose application drew "a formal protest by prominent members of the Asheville bar." Id. at 162, 131. The protest revealed that the applicant committed "a series of acts ... in the years 1919, 1920, and 1921, amounting in many instances to violations of the criminal law, including obtaining goods by false pretense, larceny, or conspiracy to commit it, forgery, extortion, and others; all of them involving moral turpitude and showing him now utterly unworthy of the honorable and important position to which he aspires." Id. This does not describe Petitioner.

[I]n re Applicants for License construes a 1905 statute on admission to the practice of law. It held, "under the law, as it now stands, Revisal 1905, ch. 5, an applicant for license who, on his examination, shall satisfy the Court of his competent knowledge of the law, is entitled to receive his license, and that **an investigation into his general moral character is no longer required or permitted**." In re Applicants for License, 143 N.C. 1, 2, 55 S.E. 635, 635, 1906 N.C. LEXIS 309, *1 (emphasis supplied).

State v. Harris involved a conviction for the then-existing crime of operating a dry cleaners without a license. The licensing requirement was held unconstitutional. "The Legislature may, through appropriate laws, protect the public against incapacity, fraud, and oppression where, from the nature of the business or occupation or the manner of its conduct, the natural consequence may be injurious to the public welfare." Id. at 746, 861. On the other hand, "[T]he right to earn a living must be regarded as inalienable. Conceding this, a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life by the erection of educational and moral standards of fitness is legal grotesquery." Id. at 746, 863.

27. Harris emphasized concerns about the application of laws that drive North Carolinians from a profession:
There is nothing in government more dangerous to the liberty and rights of the individual than a too ready resort to the police power. ... Resort to the police power to exclude persons from an ordinary calling, finding justification only by the existence of a vague public interest, often amounting to no more than a doubtful social convenience, is collectivistic in principle, destructive to the historic values of these guaranties, and contrary to the genius of the people who did all that was humanly possible to secure them in a written constitution. ... No good can come to society from a policy which tends to drive its members from the ranks of the independently employed into the ranks of those industrially dependent, and the economic fallacy of such a policy is too obvious for comment.

Id. at 746, 865 (citation condensed for brevity).

28. Thus, while Harris holds that some occupations - and law enforcement is among them - are subject to regulation and requirements of character, Harris also cautions that use of that authority to bar a person from his or her livelihood is not a task to be taken lightly. "Loss of a professional license is more than a monetary loss; it is a loss of a person's livelihood and loss of a reputation." Johnson v. Bd. of Governors of Registered Dentists of State of Okl., 1996 OK 41, 913 P.2d 1339, 1345 (1996). It is also not to be taken based on isolated conduct contrary to a commendable history as a law enforcement officer. Daniel June Campbell v. NC Criminal Justice Education and Training Standards Commission, 2022 NC OAH LEXIS 307, 21 DOJ 03747 (Petitioner purchased real property from a seller whom he then learned was incompetent, but refused to undo the transaction until he faced both criminal charges and a civil action).[6]

29. Additionally, none of the cases in 12 N.C.A.C. 9B.0101(12) support, or discuss, barring persons from a profession based

upon isolated acts of sexual conduct between consenting adults. Indeed, "engaging in consensual sex between adults is a liberty interest protected by substantive due process in the Fourteenth Amendment." Glenn v. Bachand, 2007 U.S. Dist. LEXIS 19851, *14, 2007 WL 865488, citing Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

30. "Police officers are possessed of and entitled to enjoy the same Constitutional rights and privileges that all other persons in the United States possess and enjoy." Smith v. Price, 446 F. Supp. 828 (M.D.Ga.1977), rev'd on other grounds, 616 F.2d 1371 (5th Cir.). "The Constitution affords a right of privacy," Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), and a right of association with other persons for a variety of purposes. NAACP v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). This is the case even though "police officers have the same rights and privileges as all other citizens, the zone of privacy for public officers is smaller. Privacy rights of police officers must be balanced with the legitimate interests of police departments in maintaining discipline and achieving effective law enforcement." Glenn v. Bachand, 2007 U.S. Dist. LEXIS 19851, *14, 2007 WL 865488.

31. "An officer has a right to a private life free from intrusion unless it interferes with his work performance or the efficiency of the governmental service." Swope v. Bratton, 541 F. Supp. 99, 108, 1982 U.S. Dist. LEXIS 12644, *20. "It has also been held that the off duty-private sexual conduct of public employees is protected by the constitutional right of privacy." Briggs v. North Muskegon Police Dep't, 563 F. Supp. 585, 588, 1983 U.S. Dist. LEXIS 17171, *8, 1 I.E.R. Cas. (BNA) 195; citing Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979).

32. Thus: Respondent has the right and obligation to ensure that police are of good moral character. Sometimes, this involves examination of an officer's off-duty conduct. If an officer lives in a home where he or she knows there is drug dealing or other felonious activities, yet ignores it, that is grounds to question that officer's character: as In re Willis states, "good moral character" includes "honesty, fairness, and **respect for** the rights of others and for **the laws of the state and nation**." (emphasis supplied). Turning a blind eye to serious criminal activity, even off-duty, fails to show such respect.

33. However, sexual intercourse between two consenting adults, outside of the obvious exception of prostitution, is not illegal. Licensing agencies seeking to bar persons from professions based on such conduct, standing alone, risk straying from their laudable role of ensuring good moral character into the role of "morality police." Alinejad v. Islamic Republic of Iran, 2023 U.S. Dist. LEXIS 125650, *3, 2023 WL 4684929.

34. The Tribunal concludes as a matter of law that the facts of this case do not establish a lack of good moral character on the part of the Petitioner.

35. Even if they had, Petitioner's conduct since his inappropriate actions remedied any defects his character may have had when he committed them. "Character, said Mr. Erskine in the trial of Thomas Hardy for high treason, 'is the slow-spreading influence of opinion arising from the deportment of a man in society, as a man's deportment, good or bad, necessarily produces one circle without another and so extends itself till it unites in one general opinion.' Even more is this true when the restoration of character, as here, is the subject of consideration. It is then a matter of time and growth." In re Farmer, 191 N.C. 235, 238, 131 S.E. 661, 663, 1926 N.C. LEXIS 50, *7-8. With time, Petitioner has clearly grown.

PROPOSAL FOR DECISION

The Tribunal proposes that Respondent take no action against Petitioner's certification(s).

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 Criminal Justice Education and Training Standards Commission.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. 150B-42(a).

SO ORDERED.

This the 4th day of December, 2023.

Michael C. Byrne
Administrative Law Judge

Footnotes

1 The Tribunal does not find identification of either officer by name necessary to resolve this case. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

2 The names of the troopers appear in the original decision. The Tribunal concludes that identification of those troopers by name in this Proposed Decision is not necessary to resolve this case.

3 OAH was not provided a copy of the Final Agency Decision in this case.

4 "Victims should be confident that police officers are striving to bring perpetrators to justice and are not exploiting crime victims. A criminal investigator permitted to have sexual relations with crime victims could use his authority to sexually exploit those victims." Sylvester v. Fogley, 465 F.3d 851, 859, 2006 U.S. App. LEXIS 25750, *23, 153 Lab. Cas. (CCH) P60,302, 25 I.E.R. Cas. (BNA) 225.

5 Legg, too, thus stands for the premise that one or two incidents generally fail to establish lack of good moral character.

6 Affirmed by Final Agency Decision issued August 29, 2022.

2023 WL 9229513 (N.C.O.A.H.)

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STATE OF NORTH CAROLINA

COUNTY OF MARTIN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 DOJ 04731

Nathaniel Corthia Gilliam Petitioner, v. NC Sheriffs Education and Training Standards Commission Respondent.	**PROPOSAL FOR DECISION**

This contested case was heard by Michael C. Byrne, Administrative Law Judge, on July 18, 2023 at the Town Hall in Ayden, NC following the request of Respondent NC Sheriffs Education and Training Standards Commission ("Respondent" or "Commission") for appointment of an Administrative Law Judge to hear the case of Nathaniel Corthia Gilliam ("Petitioner") pursuant to N.C.G.S. 150B-40(e).

APPEARANCES

Mr. Jamal M Summey
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Attorney for Petitioner

Ms. Kirstin Greene
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602

ISSUE

Whether Respondent's proposed revocation of Petitioner's justice officer certification for commission of the criminal offense of "Assault Individual w/ Disability" in violation of N.C.G.S. 14-32.1 is supported by a preponderance of the evidence.

WITNESSES

For Petitioner: Joy Cherry-Pike
Terrance Whitehurst

For Respondent: Joseph Jackson
Lashanti Jones
Henry Jackson
Nathaniel Gilliam
Candace Walters, SBI Special Agent
Sirena Jones, Respondent's Deputy Director

EXHIBITS

Admitted for Petitioner: None

Admitted for Respondent: 1-8; 11 and 13

BURDEN OF PROOF

1. There is no statutory allocation of the burden of proof in contested cases heard under Article 3A of the Administrative Procedure Act. In the absence of that direction, the burden of proof is "judicially allocated on considerations of policy, fairness and common sense." 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 37 (4th. Ed. 1993); citing Peace v. Employment Sec. Comm'n of N. Carolina, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998); Robert Shawn Gaddis v. North Carolina Sheriffs Education and Training Standards Commission, 2023 WL 2424080, 22 DOJ 03415.

2. While at least one appellate decision in the Chapter 150B, Article 3 context suggests approval of requiring petitioners to prove a negative, no North Carolina appellate court has endorsed the State, in any form, first deciding that a citizen committed a crime and then requiring that citizen to prove that they did not. Christopher Lee Jackson v. NC Criminal Justice Education and Training Standards Commission, 2021 WL 2779127, 20 DOJ 04578.

3. Thus, when Respondent's proposed agency action is based on its conclusion that a citizen not convicted of a crime nonetheless "committed" a crime, the burden of proof is on Respondent to show, by (at least) a preponderance of the evidence, that the person's actions satisfied all elements of the crime. Christopher Garris v. NC Criminal Justice Education And Training Standards Commission, 2019 WL 2183214, 18 DOJ 04480.

Based upon the testimony of the witnesses, consideration of all the admitted exhibits, the governing law and rules, and all admissible evidence of record, the Tribunal makes these:

FINDINGS OF FACT

Parties and Witnesses

1. Respondent North Carolina Sheriffs' Education and Training Standards Commission ("Respondent" or "Commission") has authority granted by N.C.G.S. Chapter 17E 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(s) violation.

2. Petitioner Nathaniel Corthia Gilliam has been a certified detention officer through the Bertie-Martin Regional Jail since September 19, 1996. Petitioner has no prior disciplinary action or sanctions from Respondent. This contested case results from incidents involving Petitioner's actions while on duty as a detention officer at the Bertie-Martin Regional Jail on June 27, 2019 (the "Incident"). Petitioner was not a generally credible witness except as otherwise stated.

3. Joseph Jackson ("Jackson") is a resident of Robbinsville, NC. Jackson is a Vietnam veteran. Jackson, (based on his testimony, the testimony of other witnesses, and the Tribunal's observations), suffers from visible physical disabilities and walks with the aid of a cane. Jackson claims to have suffered his disabilities and injuries resulting from military service in the Vietnam War, though this cannot be verified.

4. Jackson was in custody at the Bertie-Martin Regional Jail on June 27, 2019 after being arrested and taken into custody for making alleged terroristic threats against the Veteran's Administration, against whom Jackson maintains unspecified grievances.

5. The Incident giving rise to this case was Petitioner's alleged assault on Jackson while Jackson was under Petitioner's custody, supervision, and control as an inmate at the Bertie-Martin Regional Jail on June 27, 2019. Jackson's testimony was partially credible and partially not credible.

6. Candace Walters is a Special Agent of the North Carolina State Bureau of Investigation. Along with another SBI agent, who did not testify, Walters investigated the Incident and prepared a report on the matter. Walters was a credible witness unless otherwise stated.

7. Sirena Jones, Respondent's Deputy Director, investigated the Incident for Respondent and prepared a memorandum for Respondent's Probable Cause Committee. Jones did not personally witness the Incident. Jones was a credible witness unless otherwise stated.

8. Joy Cherry-Pike is a licensed nurse who was on duty at the Bertie-Martin Regional Jail on the date of the Incident. She was present in the area of, but did not personally observe, the

Incident. Cherry-Pike conducted a brief medical assessment of Petitioner shortly after the Incident. Cherry-Pike was a credible witness unless otherwise stated.

9. Lashanti Jones is a detention officer at the Bertie-Martin Regional Jail and was on duty there the date of the Incident, which she observed. Jones was interviewed by the SBI regarding the Incident and her statements were memorialized on video. Jones' testimony was partially not credible and, particularly as corroborated by her video testimony, partially credible. Jones was clearly reluctant to testify, to the point where the Tribunal was compelled to inform Jones of the Tribunal's contempt referral powers conferred by N.C.G.S. 150B-33.

10. Henry Jackson is a former detention officer at the Bertie-Martin Regional Jail and was on duty there the date of the Incident, which he observed. Shortly after the Incident, Jackson's employment was terminated on (allegedly) unrelated grounds by Terrance Whitehurst, the Administrator of the jail. To avoid confusion with the inmate Jackson, Henry Jackson is referred to as "Officer Jackson."

11. Terrance Whitehurst is the Administrator of the Bertie-Martin Regional Jail. Whitehurst was not present for the Incident.

Video Statements Admitted Solely for Impeachment Purposes

12. The Tribunal admitted for impeachment purposes only specific portions of the video interview, taken and maintained by the SBI, of Antonio Gatling. Gatling was a detention officer at the Bertie-Martin Regional Jail and was on duty there the date of the Incident. Gatling did not testify, his video interview was not sworn testimony and his statements on the video interview are generally inadmissible hearsay unless allowed by statute or an applicable exception. N.C. R. Evid. 802.[1]

13. The specific portions of the video interview admitted were (a) Gatling's statement, based on his personal observations at the time of the Incident, that Jackson was cursing while in a holding cell at the jail, which Jackson denies and is admitted for impeaching that testimony, and (b) Gatling's statement, also based on his personal observations at the time of the Incident, that Petitioner entered the holding cell where Petitioner was confined, took Jackson's cane (present in the cell), and struck Jackson with the cane on the top of Jackson's head. This latter evidence was admitted for the specific purpose of impeaching Petitioner's testimony that he did not strike Jackson in any manner. It is noted that this latter Gatling testimony is corroborative of non-hearsay sworn testimony from two other certified law enforcement officers that Petitioner struck Jackson with Jackson's cane.

14. Neither party raised an objection to admission of the two Gatling statements on this basis and for this limited purpose.

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[1] Though N.C.G.S. 150B-41 permits use of hearsay in the Office of Administrative Hearings under specific circumstances, the same statute provides, "the rules of evidence as applied in the trial division of the General Court of Justice shall be followed."

Joint Stipulations

15. Petitioner and Respondent stipulated, both by filings and on the record:

a. The parties are properly before Administrative Law Judge Michael C. Byrne and that the Office of Administrative Hearings has jurisdiction of the parties and of the subject matter.

b. 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.

c. Petitioner has been a certified detention officer through the Bertie-Martin Regional Jail since September 19, 1996 and he has not previously held certification with Respondent or the North Carolina Criminal Justice Education and Training Standards Commission.

d. The contested issue in this matter is: Whether Respondent's revocation of Petitioner's justice officer certification for commission of the Class B Misdemeanor offense of "Assault Individual w/ Disability" in violation of N.C.G.S. § 14-2.1(f) is supported by a preponderance of the evidence?

e. Assault on Individuals with a Disability in violation of N.C.G.S. 32.1(f) is classified as a Class B misdemeanor, pursuant to Respondent's Class B Misdemeanor Manual, which is incorporated by reference in its rules.

f. Petitioner was charged with Simple Assault, in violation of N.C.G.S. 14-33(A), on February 6, 2020.

g. Petitioner has not been found guilty of any crime in relation to the allegations in this matter and all criminal matters have been disposed of.

h. Rule .0204(d)(1), Chapter 10B of Title 12 of the North Carolina Administrative Code states: "(d) The Commission may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant or the certified officer has committed or been convicted of: (1) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of appointment."

i. Petitioner was appointed as a Bertie-Martin Regional Jail Detention Officer June 27, 2019.

j. Respondent's Proposed Exhibits 1 (Officer's Complete History); 2 (Probable Cause Notification Letter); 3 (Petitioner's Request for Administrative Hearing); and 5 (Statement of Nathaniel Gilliam) are authentic and admissible.

The Incident

16. Jackson was arrested on June 29, 2019 at approximately 9:30 PM. He was transported and arrived at the Bertie-Martin Regional Jail at around 10:30 PM. He was placed in a holding cell to the left of the jail's lobby or booking area. The other jail cells are down a hallway to the right of the booking area (Cherry-Pike testimony). While in the holding cell, Jackson was permitted to retain his walking cane.

17. Jackson claimed to be in physical pain while in the holding cell and repeatedly asked for medical attention.

18. Petitioner testified that Jackson's conduct which included cursing and swearing, was so loud and disruptive that it was disrupting the entire jail, including other inmates, who were asking why Jackson was getting tased. Petitioner claims that addressing this "disruptive" conduct was the reason he chose to enter the holding cell where Jackson was detained. He was accompanied by Officers Jackson, Jones, and Gatling, at Petitioner's direction and instruction.

19. While there is evidence that Jackson was cursing (Gatling impeachment testimony), the remainder of Petitioner's testimony about Jackson's conduct is not credible. However, Petitioner said nothing about other inmates being disrupted in his written statement (Res. Ex. 5), nor did any other law enforcement witnesses present who testified at the contested case hearing.

20. Most pertinently, video evidence from Respondent shows that Cherry-Pike was present in the booking area directly adjacent to the holding cell at the time Petitioner, Officer Jackson, and Jones went to visit the holding cell. Cherry-Pike heard nothing unusual or disruptive coming from Jackson's cell, and testified credibly that if Jackson's conduct was sufficiently loud and disruptive to disrupt the other inmates, who were in separate cells down a hallway on the other side of the booking area, she would have noticed that. She heard nothing unusual.

21. Based on the totality of this evidence, the Tribunal finds as a fact that Petitioner's testimony regarding the reasons he entered the holding cell is not credible.

22. Jackson testified that Petitioner entered the holding cell and said to him, "[Racial slur], you ain't running nothing in this jail; I'll bust your head open to the white meat." At this point Petitioner, per Jackson, had grabbed Jackson's walking cane.

23. Jackson testified that Petitioner than took Jackson's cane and struck Jackson multiple times on the head.

24. Portions of Jackson's testimony were not credible. For instance, Jackson claimed that he still had wounds on his head at the time of the hearing, in 2023, from being struck by

Petitioner in 2019. Jackson also appeared to be under some level of mental agitation during the hearing, including uttering spontaneous remarks such as, "Oh, Lord" or "Lord have mercy" while on the witness stand.

25. However, Jackson described the circumstances of being struck by Petitioner multiple times during his testimony, and, each time, did so consistently.

26. Jones, who is still employed with the jail and who was clearly reluctant to testify, initially claimed she remembered nothing about the Incident. This testimony was not credible. However, Jones admitted under oath that video footage of her being interviewed by the SBI, in which Jones stated that Petitioner "popped" Jackson on the head multiple times with the cane, was genuine. Jones stated in her interview that she was "shocked" by Petitioner's actions.

27. Officer Jackson testified credibly and unequivocally that Petitioner struck Jackson multiple times on the head with Jackson's cane. He also testified, like Jackson, that Petitioner threatened Jackson that he would "Bust your head to the white meat."

28. Officer Jackson subsequently took Jackson for medical assessment by Pike-Cherry, who ascertained no injuries to Jackson. Officer Jackson heard Jackson tell Pike-Cherry that Petitioner had struck Jackson on the head with the cane.

29. Gatling also stated to the SBI that Petitioner hit Jackson on the head with Jackson's cane (video evidence admitted solely for impeachment).

30. Thus, all three certified officers present in the holding cell at the time of the Incident either stated to the SBI or testified under oath that Petitioner hit Jackson on the head with Jackson's cane at the time Jackson was confined as a detainee or prisoner in the Bertie-Martin Regional Jail.

31. There is no evidence that during the Incident Jackson was trying to escape, was a threat to anyone, or was attempting to destroy jail property.

32. Petitioner testified under oath that he did not strike Jackson with his cane. This testimony is not credible. Three certified officers testified or stated the contrary, as did Jackson himself. While Jackson's own testimony may not be sufficiently credible to carry Respondent's burden of proof, that testimony along with the testimony of two certified officers, as corroborated by a third, is more than sufficient to do so.

33. The Tribunal thus finds as a fact that Petitioner, while a certified detention officer, on duty and in uniform, struck an inmate on the head with a cane, with no custodial reason or justification for doing so.

34. The Tribunal also finds as a fact that Jackson's status as a disabled person was readily apparent to a reasonable observer on the date of the Incident, due to Jackson using a cane to walk. While there was testimony from Petitioner that Jackson was subsequently able to

walk without his cane to a transfer vehicle, no witness testified that Jackson was not physically disabled, at least to some extent, on the date of the Incident. While not determinative, as it was four years after the Incident, the Tribunal observed Jackson in court. Jackson's physical disabilities were obvious.

35. The Tribunal thus finds as a fact that Petitioner knew or had reasonable grounds to know Jackson was a disabled person at the time Petitioner struck Jackson with the cane.

36. Petitioner was charged with Simple Assault on Jackson and was found not guilty at trial.

37. Both Jackson (the inmate) and Jackson (the officer) retained the same legal counsel to assert claims against the Bertie-Martin Regional Jail. Per Officer Jackson, those claims are "in limbo" for unspecified reasons. However, Petitioner's suggestion at the hearing that either or both Jacksons were collaborating in hopes of financial gain are not credible, considering that two other certified officers present related the same conduct on the part of Petitioner.

38. Whitehurst, which he did not witness the Incident, testified positively about Petitioner's general conduct as a detention officer while employed at the Bertie-Martin Regional Jail.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this contested case pursuant to N.C.G.S. 150B, Article 3A, following a request from Respondent under N.C.G.S. 150B-40(e) for an Administrative Law Judge to hear this contested case. In such cases the Tribunal sits in place of the agency and has the authority of the presiding officer in a contested case under Article 3A. The Tribunal makes a proposal for decision, which contains findings of fact and conclusions of law. Respondent makes the final agency decision. N.C.G.S. 150B-42.

2. All parties are properly before the Office of Administrative Hearings and there is no question as to joinder or misjoinder. There was no objection from either party to the Tribunal hearing this contested case.

3. This case involves a proposal to revoke an occupational license or certification. It thus affects the substantive rights of the Petitioner, and he is entitled to both notice and opportunity to be heard. Scroggs v. N. Carolina Criminal Justice Educ. & Training Standards Comm'n, 101 N.C. App. 699, 701, 400 S.E.2d 742, 744 (1991). Notice was duly provided to all parties by the Office of Administrative Hearings.

4. To the extent that the Findings of Fact contain Conclusions of Law, and vice versa, they should be so considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946).

5. A court, or in this case an administrative Tribunal, need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the

resolution of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

6. Respondent has authority granted by Chapter 17E of the General Statutes and the Administrative Code to certify sheriffs and to revoke, suspend, or deny such certification under appropriate circumstances with valid proof of a rule violation. Joint Stip. 2.

7. Respondent may revoke, suspend or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of: (1) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of appointment. 12 N.C.A.C. 10B.0204.

8. "Class A" and "Class B" misdemeanors are both defined, for this case, by Respondent's definition in 12 N.C.A.C. 10B.0103.

9. Respondent may reduce or suspend the periods of sanction where revocation, denial, or suspension of certification is based upon a finding of a violation of 12 NCAC 10B .0204(d) 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." 12 N.C.A.C. 10B.0205.

10. The Administrative Code defines "conviction" and "commission" of a crime, for purposes of Respondent's activities, separately. Becker v. N. Carolina Crim. Just. Educ. & Training Standards Comm'n, 238 N.C. App. 362, 768 S.E.2d 200 (2014) (unpublished). The Court of Appeals has held, at least in one case, that Respondent "may revoke a correctional officer's certification if it finds that the officer committed a misdemeanor, regardless whether he was criminally convicted of that charge." Becker, citing Mullins v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 125 N.C. App. 339, 348, 481 S.E.2d 297, 302 (1997).

11. Petitioner was never "convicted" of (nor charged with) a violation of N.C.G.S. 14-32.1. Petitioner was charged and tried for the criminal offense of "Simple Assault" in violation of N.C.G.S. 14-33. Petitioner was found "Not Guilty." Petitioner was not "convicted" of any crime in connection with the facts of this contested case.

12. "Commission of an offense" means "a finding by Respondent or an equivalent regulating body from another state that a person performed the acts necessary to satisfy the elements of a specified criminal offense." 12 N.C.A.C. 9A.0103(5) (emphasis supplied).

13. Despite Petitioner being neither charged nor convicted of any violation of N.C.G.S. 14-32.1, Respondent's Probable Cause Committee nonetheless found that Petitioner "committed the Class B misdemeanor offense of 'Assault Individual w/Disability'[2] in

[2] According to the General Statutes, the criminal offense is titled, "Assaults on individuals with a disability; punishments." N.C.G.S. 14-32.1.

violation of N.C.G.S. 14-32.(f). Specifically, on or about June 27, 2019, while working as a detention officer at the Bertie Regional Jail, you unlawfully and willfully did assault Joe Jackson, an individual with impaired mobility from a leg injury, by hitting him about the head with his walking cane." (Res. Ex. 2; Probable Cause Notification).

14. In determining whether a person "committed" a crime, Respondent does not "**attempt to interpret** North Carolina's criminal code," but instead must "use pre-established elements of behavior which together constitute an offensive act. Respondent **relies on the elements of each offense, as specified by the Legislature and the courts.**" Mullins at 347, 302 (emphasis supplied). Therefore, in this case, each element of N.C.G.S. 14-32.1 must be established. See State v. Eastman, 113 N.C. App. 347, 351, 438 S.E.2d 460, 462 (1994): "The State failed to show any instance where the defendant [a state employee at the Governor Morehead School] could exercise sovereign power at any time in the course of his employment."

15. Accordingly, the Tribunal must analyze Petitioner's actions compared with the elements of the crime.

16. The Tribunal has found as a fact that Petitioner, while on-duty as a detention officer in the Bertie Regional Jail on June 27, 2019, entered the holding cell where Inmate Jackson was placed and struck Jackson with Jackson's cane one or more times in the area of Jackson's head. At the time Petitioner took this action, there was no legitimate custodial basis for it such as self-defense, prevention of escape, or avoidance of damage or destruction to jail/public property.

17. N.C.G.S. 14-32.1(f) states, "Any person who commits a simple assault or battery upon an individual with a disability is guilty of a Class A1 misdemeanor." However, both Respondent's probable cause notification (Res. Ex. 2) and the parties' stipulations identify the criminal offense as a **Class B misdemeanor**, and Respondent's Probable Cause Committee found probable cause that Petitioner committed a **Class B misdemeanor**. (Id.)

18. The Tribunal resolves this dilemma, albeit imperfectly, by analyzing whether Petitioner's conduct satisfies the elements of at least a Class B misdemeanor. Due process requires that the Tribunal review only the conduct of which Petitioner received notice from Respondent. Scroggs v. N. Carolina Criminal Justice Educ. & Training Standards Comm'n, 101 N.C. App. 699, 701, 400 S.E.2d 742, 744 (1991).

19. Assault is a statutory offense, but the statute contains no definition of the crime. N.C.G.S. 14-33(a) (2007). Assault is governed by common law. State v. Roberts, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). Our Supreme Court has generally defined assault as: (1) an overt act or an attempt, or the unequivocal appearance of an attempt, (2) with force and violence, (3) to do some immediate physical injury to the person of another, (4) which would put a person of reasonable firmness in fear of immediate bodily harm. Id. (citations omitted). Emphasis is placed on the intent or state of mind of the accused. Id. Case law has also created another rule known as the "show of violence rule," which places the emphasis

on the reasonable apprehension of the person assailed. State v. Corbett, 196 N.C. App. 508, 511, 675 S.E.2d 150, 152-153, 2009 N.C. App. LEXIS 404, *6-7

20. The N.C.P.I. Crim. 208.41 includes jury instructions for simple assault. Within these instructions is a footnote that defines assault as follows: "Provided there is a battery involved, choose the most appropriate definition of assault as follows: (An assault is an intentional application of force, however slight, directly or indirectly, to the body of another person without that person's consent.) (An assault is an intentional, offensive touching of another person without that person's consent.)" State v. Harry Junior Ford, 2023 N.C. App. LEXIS 372, *6, 2023 WL 4346026. Actual physical injury is not required for the commission of an assault. In re L.D.G., 2022-NCCOA-808, P7, 2022 N.C. App. LEXIS 804, *5, 286 N.C. App. 775, 879 S.E.2d 904, 2022 WL 17420049.

21. Under N.C.G.S. 14-32.1, an "individual with a disability" is an individual who has one or more of the following that would substantially impair the ability to defend oneself: "(1) A physical or mental disability, such as a decreased use of arms or legs, blindness, deafness, intellectual disability, or mental illness. (2) An infirmity."

22. While N.C.G.S. 14- 32.1 "does not specifically require that defendant know his victim is [disabled]," it is also the case that "in order to convict an individual under N.C. Gen. Stat. § 14-32.1(e), the jury must find that defendant knew or had reasonable grounds to know the victim was a [disabled] person." State v. Collins, 221 N.C. App. 604, 612, 727 S.E.2d 922, 927, 2012 N.C. App. LEXIS 882, *15-16, 2012 WL 2891046.

23. The Tribunal concludes as a matter of law that Petitioner knew or had reasonable grounds to know that Jackson was a disabled person at the time Petitioner struck Jackson with the cane. See State v. Singletary, 163 N.C. App. 449, 594 S.E.2d 64, 2004 N.C. App. LEXIS 509, cert. denied, 359 N.C. 196, 608 S.E.2d 65, 2004 N.C. LEXIS 1285 (2004) (victim wearing a hearing aid on the evening that she was assaulted by defendant).

24. The Tribunal concludes as a matter of law that on June 27, 2019, Petitioner, while certified and serving on duty as a detention officer, satisfied the elements of and thus "committed" the criminal offense of assault on a person with a disability, in violation of N.C.G.S. 14-32.1.

25. Respondent may either reduce or suspend the periods of sanction where revocation, denial, or suspension of certification is based upon a finding of a violation of 12 NCAC 10B .0204(d) or substitute a period of probation in lieu of revocation, suspension, or denial following an administrative hearing. "when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension." 12 N.C.A.C. 10B.0205.

26. The Tribunal identifies no extenuating circumstances brought out at the administrative hearing regarding the Incident itself, other than Jackson suffering no discernable physical injury from being assaulted by Petitioner.

27. The Tribunal identifies no extenuating circumstances brought out at the administrative hearing regarding Petitioner generally other than a lack of evidence that Petitioner engaged in similar conduct while serving as a certified officer.

28. The Tribunal makes no proposal to the Commission regarding 12 N.C.A.C. 10B.0205.

PROPOSAL FOR DECISION

The Tribunal proposes that Respondent **AFFIRM** the decision of its Probable Cause Committee regarding Petitioner's certification. The Tribunal makes no proposal to the Commission regarding extenuating circumstances under 12 N.C.A.C. 10B.0205.

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.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. 150B-42(a).

SO ORDERED.

This the 30th day of August, 2023.

Michael C. Byrne
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:

Jamal M Summey
Webb Webb & Summey PA
PO Drawer 389
Scotland Neck NC 27874
Attorney For Petitioner

Benjamin Zellinger
North Carolina Department of Justice
bzellinger@ncdoj.gov (served electronically on August 30, 2023)
Attorney For Respondent

Kirstin Greene
North Carolina Department of Justice
kgreene@ncdoj.gov (served electronically on August 30, 2023)
Attorney For Respondent

This the 31st day of August, 2023.

Lisa J. Garner

Lisa J Garner
Law Clerk
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850

Filed Mar 28, 2024 10:40 AM Office of Administrative Hearings

JOSH STEIN
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE
PO BOX 629
RALEIGH, NORTH CAROLINA 27602

Reply to:
Special Prosecutions/Law Enforcement Section
(919) 716-6725

March 27, 2024

Certified Mail Return Receipt Requested
Article No. 9589 0710 5270 0386 8631 04
Sonny S. Haynes
Womble Bond Dickinson
One West Fourth Street
Winston-Salem, North Carolina 27101

RE: FINAL AGENCY DECISION

Dear Ms. Haynes:

Enclosed is the **Final Agency Decision** entered by the North Carolina Sheriffs' Education and Training Standards Commission. As indicated in the Final Agency Decision, Mr. Gilliam's justice officer certification is **NOT REVOKED**.

Under the Administrative Procedures Act (G. S. Chapter 150B), your client has the right to seek judicial review of the enclosed Final Agency Decision. If your client wishes to seek judicial review of the enclosed Final Agency Decision, a petition to do so must be filed in Superior Court within 30 days from the date you were served a written copy of the enclosed Final Agency Decision. Failure to file a petition within the required 30 days will waive your client's right to judicial review of this Final Agency Decision. In filing such a petition, your client must comply with all other applicable requirements of North Carolina General Statutes Chapter 150B and other applicable rules of law.

This Final Agency Decision is the Commission's final decision. If you have any questions concerning this matter, contact our office at (919) 716-6401.

Sincerely,

J. Joy Strickland
Assistant Attorney General

JJS/ajt
cc: Office of Administrative Hearings
Richard Squires, Director, NC Criminal Justice/Sheriffs' Standards Division

STATE OF NORTH CAROLINA COUNTY OF MARTIN	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 22 DOJ 04731
NATHANIEL CORTHIA GILLIAM, Petitioner, v. NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, Respondent.	FINAL AGENCY DECISION

THIS MATTER was commenced by a request filed December 12, 2022, with the Director of the Office of Administrative Hearings for the assignment of an Administrative Law Judge. Notice of Contested Case Assignment and Order for Prehearing Statements (22 DOJ 04730) were filed December 13, 2022. The parties received proper Notice of Hearing and the Administrative Hearing was held in Ayden, North Carolina on July 18, 2023, before the Honorable Michael C. Byrne, Administrative Law Judge.

The Petitioner was represented by counsel, Jamal M. Summey. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter the Commission or Respondent) was represented by Assistant Attorney General Kirstin J. Greene.

On August 30, 2023, Judge Byrne filed his Proposal for Decision. On September 6, 2023, counsel to the Commission sent by certified mail a copy of the Proposal for Decision to the Petitioner with a letter explaining Petitioner's rights: (1) to file exceptions or proposed findings of fact; (2) to file written argument; and (3) the right to present oral argument to the Commission.

This matter came before Commission for entry of its **Final Agency Decision** at its regularly scheduled meeting on March 21, 2024.

Having considered all competent evidence and argument and having reviewed the relevant provisions of Chapter 17E of the North Carolina General Statutes and Title 12, Chapter 10B of the North Carolina Administrative Code, the Commission, based upon clear, cogent and convincing evidence, does hereby make the following:

BURDEN OF PROOF

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). 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).

FINDINGS OF FACT

Parties and Witnesses

1. Respondent North Carolina Sheriffs' Education and Training Standards Commission ("Respondent" or "Commission") has authority granted by N.C.G.S. Chapter 17E 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(s) violation.

2. Petitioner Nathaniel Corthia Gilliam has been a certified detention officer through the Bertie-Martin Regional Jail since September 19, 1996. Petitioner has no prior disciplinary action or sanctions from Respondent. This contested case results from incidents involving Petitioner's actions while on duty as a detention officer at the Bertie-Martin Regional Jail on June 27, 2019 (the "Incident"). Petitioner was not a generally credible witness except as otherwise stated.

3. Joseph Jackson ("Jackson") is a resident of Robbinsville, NC. Jackson is a Vietnam veteran. Jackson, (based on his testimony, the testimony of other witnesses, and the Tribunal's observations), suffers from visible physical disabilities and walks with the aid of a cane. Jackson claims to have suffered his disabilities and injuries resulting from military service in the Vietnam War, though this cannot be verified.

4. Jackson was in custody at the Bertie-Martin Regional Jail on June 27, 2019 after being arrested and taken into custody for making alleged terroristic threats against the Veteran's Administration, against whom Jackson maintains unspecified grievances.

5. The Incident giving rise to this case was Petitioner's alleged assault on Jackson while Jackson was under Petitioner's custody, supervision, and control as an inmate at the Bertie-Martin Regional Jail on June 27, 2019. Jackson's testimony concerning the assault was credible and corroborated by other credible witnesses.

6. Candace Walters is a Special Agent of the North Carolina State Bureau of Investigation. Along with another SBI agent, who did not testify, Walters investigated the Incident and prepared a report on the matter. Walters was a credible witness unless otherwise stated.

7. Sirena Jones, Respondent's Deputy Director, investigated the Incident for Respondent and prepared a memorandum for Respondent's Probable Cause Committee. Jones did not personally witness the Incident. Jones was a credible witness.

8. Joy Cherry-Pike is a licensed nurse who was on duty at the Bertie-Martin Regional Jail on the date of the Incident. She was present in the area of, but did not personally observe, the Incident. Cherry-Pike conducted a brief medical assessment of Petitioner shortly after the Incident. Cherry-Pike was a credible witness.

9. Lashanti Jones is a detention officer at the Bertie-Martin Regional Jail and was on duty there the date of the Incident, which she observed. Jones was interviewed by the SBI regarding the Incident and her statements were memorialized on video. Jones' testimony was partially not credible and, particularly as corroborated by her video testimony, partially credible. Jones was clearly reluctant to testify, to the point where the Tribunal was compelled to inform Jones of the Tribunal's contempt referral powers conferred by N.C.G.S. 150B-33.

10. Henry Jackson is a former detention officer at the Bertie-Martin Regional Jail and was on duty there the date of the Incident, which he observed. Shortly after the Incident, Jackson's employment was terminated on (allegedly) unrelated grounds by Terrance Whitehurst, the Administrator of the jail. To avoid confusion with the inmate Jackson, Henry Jackson is referred to as "Officer Jackson."

11. Terrance Whitehurst is the Administrator of the Bertie-Martin Regional Jail. Whitehurst was not present for the Incident.

Video Statements Admitted Solely for Impeachment Purposes

12. The Tribunal admitted for impeachment purposes only specific portions of the video interview, taken and maintained by the SBI, of Antonio Gatling. Gatling was a detention officer at the Bertie-Martin Regional Jail and was on duty there the date of the Incident. Gatling did not testify, his video interview was not sworn testimony and his statements on the video interview are generally inadmissible hearsay unless allowed by statute or an applicable exception. N.C. R. Evid. 802.[1]

13. The specific portions of the video interview admitted were (a) Gatling's statement, based on his personal observations at the time of the Incident, that Jackson was cursing while in a holding cell at the jail, which Jackson denies and is admitted for impeaching that testimony, and (b) Gatling's statement, also based on his personal observations at the time of the Incident, that Petitioner entered the holding cell where Petitioner was confined, took Jackson's cane (present in the cell), and struck Jackson with the cane on the top of Jackson's head. This latter evidence was admitted for the specific purpose of impeaching Petitioner's testimony that he did not strike Jackson in any manner. It is noted that this latter Gatling testimony is corroborative of non-hearsay sworn testimony from two other certified law enforcement officers that Petitioner struck Jackson with Jackson's cane.

14. Neither party raised an objection to admission of the two Gatling statements on this basis and for this limited purpose.

Joint Stipulations

[1] Though N.C.G.S. 150B-41 permits use of hearsay in the Office of Administrative Hearings under specific circumstances, the same statute provides, "the rules of evidence as applied in the trial division of the General Court of Justice shall be followed."

15. Petitioner and Respondent stipulated, both by filings and on the record:

a. The parties are properly before Administrative Law Judge Michael C. Byrne and that the Office of Administrative Hearings has jurisdiction of the parties and of the subject matter.

b. 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.

c. Petitioner has been a certified detention officer through the Bertie-Martin Regional Jail since September 19, 1996 and he has not previously held certification with Respondent or the North Carolina Criminal Justice Education and Training Standards Commission.

d. The contested issue in this matter is: Whether Respondent's revocation of Petitioner's justice officer certification for commission of the Class B Misdemeanor offense of "Assault Individual w/ Disability" in violation of N.C.G.S. § 14-2.1(f) is supported by a preponderance of the evidence?

e. Assault on Individuals with a Disability in violation of N.C.G.S. 32.1(f) is classified as a Class B misdemeanor, pursuant to Respondent's Class B Misdemeanor Manual, which is incorporated by reference in its rules.

f. Petitioner was charged with Simple Assault, in violation of N.C.G.S. 14-33(A), on February 6, 2020.

g. Petitioner has not been found guilty of any crime in relation to the allegations in this matter and all criminal matters have been disposed of.

h. Rule .0204(d)(1), Chapter 10B of Title 12 of the North Carolina Administrative Code states: "(d) The Commission may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant or the certified officer has committed or been convicted of: (1) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of appointment."

i. Petitioner was appointed as a Bertie-Martin Regional Jail Detention Officer June 27, 2019.

j. Respondent's Proposed Exhibits 1 (Officer's Complete History); 2 (Probable Cause Notification Letter); 3 (Petitioner's Request for Administrative Hearing); and 5 (Statement of Nathaniel Gilliam) are authentic and admissible.

The Incident

16. Jackson was arrested on June 29, 2019 at approximately 9:30 PM. He was transported and arrived at the Bertie-Martin Regional Jail at around 10:30 PM. He was placed in a holding cell to the left of the jail's lobby or booking area. The other jail cells are down a hallway to the right of the booking area (Cherry-Pike testimony). While in the holding cell, Jackson was permitted to retain his walking cane.

17. Jackson claimed to be in physical pain while in the holding cell and repeatedly asked for medical attention.

18. Petitioner testified that Jackson's conduct which included cursing and swearing, was so loud and disruptive that it was disrupting the entire jail, including other inmates, who were asking why Jackson was getting tased. Petitioner claims that addressing this "disruptive" conduct was the reason he chose to enter the holding cell where Jackson was detained. He was accompanied by Officers Jackson, Jones, and Gatling, at Petitioner's direction and instruction.

19. While there is evidence that Jackson was cursing (Gatling impeachment testimony), the remainder of Petitioner's testimony about Jackson's conduct is not credible. However, Petitioner said nothing about other inmates being disrupted in his written statement (Res. Ex. 5), nor did any other law enforcement witnesses present who testified at the contested case hearing.

20. Most pertinently, video evidence from Respondent shows that Cherry-Pike was present in the booking area directly adjacent to the holding cell at the time Petitioner, Officer Jackson, and Jones went to visit the holding cell. Cherry-Pike heard nothing unusual or disruptive coming from Jackson's cell, and testified credibly that if Jackson's conduct was sufficiently loud and disruptive to disrupt the other inmates, who were in separate cells down a hallway on the other side of the booking area, she would have noticed that. She heard nothing unusual.

21. Based on the totality of this evidence, the Tribunal finds as a fact that Petitioner's testimony regarding the reasons he entered the holding cell is not credible.

22. Jackson testified that Petitioner entered the holding cell and said to him, "[Racial slur], you ain't running nothing in this jail; I'll bust your head open to the white meat." At this point Petitioner, per Jackson, had grabbed Jackson's walking cane.

23. Jackson testified that Petitioner than took Jackson's cane and struck Jackson multiple times on the head.

24. Jackson claimed that he still had wounds on his head at the time of the hearing, in 2023, from being struck by Petitioner in 2019. Jackson also appeared to be under some level of mental agitation during the hearing, including uttering spontaneous remarks such as, "Oh, Lord" or "Lord have mercy" while on the witness stand during cross examination.

25. However, Jackson described the circumstances of being struck by Petitioner multiple times during his testimony, and, each time, did so consistently.

26. Jones, who is still employed with the jail and who was clearly reluctant to testify, initially claimed she remembered nothing about the Incident. This testimony was not credible. However, Jones admitted under oath that video footage of her being interviewed by the SBI, in which Jones stated that Petitioner "popped" Jackson on the head multiple times with the cane, was genuine. Jones stated in her interview that she was "shocked" by Petitioner's actions.

27. Officer Jackson testified credibly and unequivocally that Petitioner struck Jackson multiple times on the head with Jackson's cane. He also testified, like Jackson, that Petitioner threatened Jackson that he would "Bust your head to the white meat."

28. Officer Jackson subsequently took Jackson for medical assessment by Pike-Cherry, who ascertained no injuries to Jackson. Officer Jackson heard Jackson tell Pike-Cherry that Petitioner had struck Jackson on the head with the cane.

29. Gatling also stated to the SBI that Petitioner hit Jackson on the head with Jackson's cane (video evidence admitted solely for impeachment).

30. Thus, all three certified officers present in the holding cell at the time of the Incident either stated to the SBI or testified under oath that Petitioner hit Jackson on the head with Jackson's cane at the time Jackson was confined as a detainee or prisoner in the Bertie- Martin Regional Jail.

31. There is no evidence that during the Incident Jackson was trying to escape, was a threat to anyone, or was attempting to destroy jail property.

32. Petitioner testified under oath that he did not strike Jackson with his cane. This testimony is not credible. Three certified officers testified or stated the contrary, as did Jackson himself. While Jackson's own testimony may not be sufficiently credible to carry Respondent's burden of proof, that testimony along with the testimony of two certified officers, as corroborated by a third, is more than sufficient to do so.

33. The Tribunal thus found as a fact that Petitioner, while a certified detention officer, on duty and in uniform, struck an inmate on the head with a cane, with no custodial reason or justification for doing so.

34. The Tribunal also found as a fact that Jackson's status as a disabled person was readily apparent to a reasonable observer on the date of the Incident, due to Jackson using a cane to walk. While there was testimony from Petitioner that Jackson was subsequently able to walk without his cane to a transfer vehicle, no witness testified that Jackson was not physically disabled, at least to some extent, on the date of the Incident. While not determinative, as it was four years after the Incident, the Tribunal observed Jackson in court. Jackson's physical disabilities were obvious.

35. The Tribunal thus found as a fact that Petitioner knew or had reasonable grounds to know Jackson was a disabled person at the time Petitioner struck Jackson with the cane.

36. Petitioner was charged with Simple Assault on Jackson and was found not guilty at trial.

37. Both Jackson (the inmate) and Jackson (the officer) retained the same legal counsel to assert claims against the Bertie-Martin Regional Jail. Per Officer Jackson, those claims are "in limbo" for unspecified reasons. However, Petitioner's suggestion at the hearing that either or both Jacksons were collaborating in hopes of financial gain are not credible, considering that two other certified officers present related the same conduct on the part of Petitioner.

38. Whitehurst, which he did not witness the Incident, testified positively about Petitioner's general conduct as a detention officer while employed at the Bertie-Martin Regional Jail.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings had jurisdiction over this contested case pursuant to N.C.G.S. 150B, Article 3A, following a request from Respondent under N.C.G.S. 150B-40(e) for an Administrative Law Judge to hear this contested case. In such cases the Tribunal sits in place of the agency and has the authority of the presiding officer in a contested case under Article 3A. The Tribunal makes a proposal for decision, which contains findings of fact and conclusions of law. Respondent makes the final agency decision. N.C.G.S. 150B-42.

2. All parties were properly before the Office of Administrative Hearings and there was no question as to joinder or misjoinder. There was no objection from either party to the assigned Administrative Law Judge hearing this contested case.

3. This case involves a proposal to revoke an occupational license or certification. It thus affects the substantive rights of the Petitioner, and he is entitled to both notice and opportunity to be heard. Scroggs v. N. Carolina Criminal Justice Educ. & Training Standards Comm'n, 101 N.C. App. 699, 701, 400 S.E.2d 742, 744 (1991). Notice was duly provided to all parties by the Office of Administrative Hearings.

4. To the extent that the Findings of Fact contain Conclusions of Law, and vice versa, they should be so considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946).

5. A court, or in this case an administrative Tribunal, need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the resolution of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611,612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

6. Respondent has authority granted by Chapter 17E of the General Statutes and the Administrative Code to certify sheriffs and to revoke, suspend, or deny such certification under appropriate circumstances with valid proof of a rule violation. Joint Stip. 2.

7. Respondent may revoke, suspend or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of: (1) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of appointment. 12 N.C.A.C. 10B.0204.

8. "Class A" and "Class B" misdemeanors are both defined, for this case, by Respondent's definition in 12 N.C.A.C. 10B.0103.

9. Respondent may reduce or suspend the periods of sanction where revocation, denial, or suspension of certification is based upon a finding of a violation of 12 NCAC 10B .0204(d) 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." 12 N.C.A.C. 10B.0205.

10. The Administrative Code defines "conviction" and "commission" of a crime, for purposes of Respondent's activities, separately. Becker v. N. Carolina Crim. Just. Educ. & Training Standards Comm'n, 238 N.C. App. 362, 768 S.E.2d 200 (2014) (unpublished). The Court of Appeals has held, at least in one case, that Respondent "may revoke a correctional officer's certification if it finds that the officer committed a misdemeanor, regardless whether he was criminally convicted of that charge." Becker, citing Mullins v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 125 N.C. App. 339, 348, 481 S.E.2d 297, 302 (1997).

11. Petitioner was never "convicted" of (nor charged with) a violation of N.C.G.S. 14-32.1. Petitioner was charged and tried for the criminal offense of "Simple Assault" in violation of N.C.G.S. 14-33. Petitioner was found "Not Guilty." Petitioner was not "convicted" of any crime in connection with the facts of this contested case.

12. "Commission of an offense" means "a finding by Respondent or an equivalent regulating body from another state that a person performed the acts **necessary to satisfy the elements** of a specified criminal offense." 12 N.C.A.C. 9A.0103(5) (emphasis supplied).

13. Petitioner was not charged or convicted of any violation of N.C.G.S. 14- 32.1. Respondent's Probable Cause Committee considered and found that Petitioner "committed the Class B misdemeanor offense of 'Assault Individual w/Disability'[2] in violation of N.C.G.S. 14-32.(f). Specifically, on or about June 27, 2019, while working as a detention officer at the Bertie Regional Jail, you unlawfully and willfully did assault Joe Jackson, an individual with impaired mobility from a leg injury, by hitting him about the head with his walking cane." (Res. Ex. 2; Probable Cause Notification).

14. In determining whether a person "committed" a crime, Respondent reviews and considers the elements of a given offense.

15. The ALJ found that Petitioner, while on-duty as a detention officer in the Bertie Regional Jail on June 27, 2019, entered the holding cell where Inmate Jackson was placed and struck Jackson with Jackson's cane one or more times in the area of Jackson's head. At the time Petitioner took this action, there was no legitimate custodial basis for it such as self-defense, prevention of escape, or avoidance of damage or destruction to jail/public property.

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[2] According to the General Statutes, the criminal offense is titled, "Assaults on individuals with a disability; punishments." N.C.G.S. 14-32.1.

16. Assault is a statutory offense, but the statute contains no definition of the crime. N.C.G.S. 14-33(a) (2007). Assault is governed by common law. State v. Roberts, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). Our Supreme Court has generally defined assault as: (1) an overt act or an attempt, or the unequivocal appearance of an attempt, (2) with force and violence, (3) to do some immediate physical injury to the person of another, (4) which would put a person of reasonable firmness in fear of immediate bodily harm. Id. (citations omitted). Emphasis is placed on the intent or state of mind of the accused. Id. Case law has also created another rule known as the "show of violence rule," which places the emphasis on the reasonable apprehension of the person assailed. State v. Corbett, 196 N.C. App. 508, 511, 675 S.E.2d 150, 152-153, 2009 N.C. App. LEXIS 404, *6-7

17. The N.C.P.I. Crim. 208.41 includes jury instructions for simple assault. Within these instructions is a footnote that defines assault as follows: "Provided there is a battery involved, choose the most appropriate definition of assault as follows: (An assault is an intentional application of force, however slight, directly or indirectly, to the body of another person without that person's consent.) (An assault is an intentional, offensive touching of another person without that person's consent.)" State v. Harry Junior Ford, 2023 N.C. App. LEXIS 372, *6, 2023 WL 4346026. Actual physical injury is not required for the commission of an assault. In re L.D.G., 2022-NCCOA-808, P7, 2022 N.C. App. LEXIS 804, *5, 286 N.C. App. 775, 879 S.E.2d 904, 2022 WL 17420049.

18. Under N.C.G.S. 14-32.1, an "individual with a disability" is an individual who has one or more of the following that would substantially impair the ability to defend oneself: "(1) A physical or mental disability, such as a decreased use of arms or legs, blindness, deafness, intellectual disability, or mental illness. (2) An infirmity."

19. While N.C.G.S. 14- 32.1 "does not specifically require that defendant know his victim is [disabled]," it is also the case that "in order to convict an individual under N.C. Gen. Stat. § 14-32.1(e), the jury must find that defendant knew or had reasonable grounds to know the victim was a [disabled] person." State v. Collins, 221 N.C. App. 604, 612, 727 S.E.2d 922, 927, 2012 N.C. App. LEXIS 882, *15-16, 2012 WL 2891046.

20. The ALJ concluded, and Respondent also so concludes as a matter of law that Petitioner knew or had reasonable grounds to know that Jackson was a disabled person at the time of the incident. See State v. Singletary, 163 N.C. App. 449, 594 S.E.2d 64, 2004 N.C. App. LEXIS 509, cert. denied, 359 N.C. 196, 608 S.E.2d 65, 2004 N.C. LEXIS 1285 (2004) (victim wearing a hearing aid on the evening that she was assaulted by defendant).

21. The ALJ concluded as a matter of law that on June 27, 2019, Petitioner, while certified and serving on duty as a detention officer, satisfied the elements of and thus "committed" the criminal offense of assault on a person with a disability, in violation of N.C.G.S. 14- 32.1.

22. Respondent may either reduce or suspend the periods of sanction where revocation, denial, or suspension of certification is based upon a finding of a violation of 12 NCAC 10B.0204(d) or substitute a period of probation in lieu of revocation, suspension, or denial following an administrative hearing. "when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension." 12 N.C.A.C. 10B.0205.

administrative hearing warrant such a reduction or suspension." 12 N.C.A.C. 10B.0205.

23. The Administrative Law Judge identified no extenuating circumstances brought out at the administrative hearing regarding the Incident itself, other than Jackson suffering no discernable physical injury from being assaulted by Petitioner.

24. The Administrative Law Judge identified no extenuating circumstances brought out at the administrative hearing regarding Petitioner generally other than a lack of evidence that Petitioner engaged in similar conduct while serving as a certified officer.

25. The Administrative Law Judge made no proposal to the Commission regarding 12 N.C.A.C. 10B.0205 regarding imposing a sanction other than revocation of Petitioner's certification.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, there was insufficient evidence that Petitioner committed the misdemeanor offense as alleged, and it is hereby **ORDERED** that Petitioner's justice officer certification is **NOT REVOKED.**

IT IS SO ORDERED.

This the 22nd day of March, 2024.

Jack Smith, Vice Chairman
NC Sheriffs' Education Training and Standards Commission

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing **FINAL AGENCY DECISION** has been duly served upon **Petitioner's counsel** by mailing a copy to the address below:

Sonny S. Haynes
Womble Bond Dickinson
One West Fourth Street
Winston-Salem, NC 27101

This the 27th day of March, 2024.

JOSHUA H. STEIN
Attorney General

/s/ J. Joy Strickland
J. Joy Strickland
Assistant Attorney General
ATTORNEY FOR THE COMMISSION

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
08/27/2024 2:14 PM

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 DOJ 05109

Alex William Aboussleman Petitioner, v. NC Sheriffs Education and Training Standards Commission Respondent.	**PROPOSAL FOR DECISION**

This contested case was heard before Michael C. Byrne, Administrative Law Judge on June 27, 2024 at the Office of Administrative Hearings in Raleigh, North Carolina following the request of Respondent NC Sheriffs' Education and Training Standards Commission for appointment of an Administrative Law Judge to hear the case of Petitioner Alex William Aboussleman pursuant to N.C.G.S. 150B-40(e).

APPEARANCES

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North Carolina Department of Justice
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EXHIBITS

Respondent's Exhibits 1, 1A, 1B, 2, 8 , 11, 12 , and 13, Ex 3, Ex 4, 5, 7, 9 (barring page 3) 10, 10, 14 and 14A and 14B were admitted

Petitioner's Exhibits 1 and 2 were admitted

WITNESSES

For Respondent:

Melissa Bowman
Alex William Aboussleman (designated adverse)
Officer Cassandra Ferraro
Officer Tyler Ray
Autumn Elder
Rick Sisson
Alison Aboussleman

For Petitioner:
Alex William Aboussleman

ISSUE

Whether Respondent's Probable Cause Committee correctly found probable cause to suspend and/or revoke Petitioner's justice officer certification based on Petitioner's "commission" of crimes and based on Respondent's finding, due to that alleged commission, that Petitioner lacked good moral character.

Based upon the testimony of the witnesses, consideration of all the admitted exhibits, the governing law and rules, and all evidence of record, the Tribunal makes the following:

FINDINGS OF FACT

Parties and Witnesses

1. Petitioner Alex William Aboussleman holds a general certification as a deputy sheriff from Respondent. (Res. Ex. 1). Petitioner's testimony was partially credible and partially not credible.

2. Respondent North Carolina Sheriffs' Education and Training Standards Commission has 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 revoke, suspend, or deny such certification when legally appropriate.

3. Melissa Bowman is an investigator for Respondent. She has been employed for two years and has prior experience as an investigator for other State and local agencies. Bowman was a credible witness.

4. Officer Tyler Ray is an officer with the Durham, NC Police Department. Ray was a credible witness.

5. Officer Cassandra Ferraro is an officer with the Apex, NC Police Department. Ferraro has over ten years of law enforcement experience with the Apex Police Department and other agencies. Ferraro was a credible witness.

6. Autumn Elder was the alleged victim of an "Assault on a Female" charge against Petitioner.[1] Elder was not a credible witness.

7. Rick Sisson is the stepfather of Petitioner's former spouse, Alison Aboussleman. Sisson was the alleged victim of a "Cyberstalking" criminal offense by Petitioner. Sisson was not a credible witness.

8. Alison Aboussleman is the former spouse of Petitioner and was the alleged victim of a "Cyberstalking" and "Harassing Phone Call" criminal offense by Petitioner. Alison Aboussleman was generally a credible witness, though clearly adverse to Petitioner. See State v. Lewis, 365 N.C. 488, 494, 724 S.E.2d 492, 497, 2012 N.C. LEXIS 267, *12, 2012 WL 1242323: "We have long held that evidence of bias is logically relevant to a witness' credibility… ."

Petitioner's Work and Pertinent Personal History

9. Petitioner began work for the Durham County Sheriff's Office as a detention officer and was certified as such by Respondent in 2013. (Res. Ex. 2). In the ensuing years Petitioner served in more advanced positions as a certified deputy sheriff with the same agency (Res. Ex. 1). There is no evidence that prior to the events here Petitioner had discipline or performance issues connected with his work.

10. Petitioner, until the events here, had no criminal history other than minor traffic offenses. There was evidence at the hearing that Petitioner later received a traffic charge, subsequently dismissed. However, that charge occurred after the probable cause determination and there is no evidence it was considered by Respondent's Probable Cause Committee. The Tribunal thus will not consider that charge in this Proposed Decision. "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." In re Duvall, 268 N.C. App. 14, 19, 834 S.E.2d 177, 181, 2019 N.C. App. LEXIS 838, *8, 2019 WL 5206277

11. Petitioner was married to Alison Aboussleman on June 28, 2014, and they have one child from the marriage. (Res. Ex. 10). Identification of the minor child is not necessary to resolve this case. Petitioner and Alison Aboussleman were divorced on November 21, 2021.

12. Following his separation from Alison Aboussleman, Petitioner entered into an on-again/off-again romantic relationship with Elder.

"Assault on a Female" Criminal Charge

13. On April 26, 2022, the Apex, NC Police Department responded to a domestic incident at Elder's residence. Ferraro was the investigating officer. (Res. Ex. 3).

[1] Elder testified that her surname has changed since the events of this case. To avoid confusion, the Tribunal refers to this witness as "Elder."

14. Ferarro and her assisting officers investigated the incident and interviewed all persons present. Of the persons interviewed, only Petitioner and Elder testified at the contested case hearing. The narrative in Ferraro's incident/investigation report (Res. Ex. 3) is a model of clarity, as was Ferraro's testimony at the contested case hearing corroborating her report.

15. Petitioner and Elder told Ferraro widely divergent stories about the origination of the incident. Petitioner said the altercation began when he and Elder were discussing a hypothetical "end of the world" scenario and Elder became upset and physically attacked him. Elder said she was in her bedroom saying a prayer and that Petitioner entered the room and physically attacked her when she was unable to give Petitioner the location of his keys.

16. Petitioner's actions in the incident as noted in Ferraro's report and his testimony at trial were generally, if not completely, consistent. Elder, however, testified at trial that the incident began when Petitioner allegedly showed Elder a video of "how he was going to kill her." This allegation appears nowhere in Ferraro's report, which, as noted, gives a significantly different origin story for the incident on Elder's part.

17. In summary, Petitioner told Ferraro, and so testified at trial, that Elder attacked him. Petitioner also testified that he went to Elder's home that night, bringing along his minor child, to end the relationship. However, that Petitioner came to Elder's home equipped to spend the night there, as he also testified, does not square well with his claims that went there to "end the relationship," and is not credible.

18. Ferraro did not immediately notice any marks, cuts, or bruises on Elder (Res. Ex. 3 and Ferraro testimony). Ferraro "did not see any bruises or marks anywhere on her face. I did see what appeared to be scratch marks on the left side of her face/neck, which could have been from her own nails." (Id.)

19. Per Ferraro's report, both Elder and Petitioner appeared to be intoxicated when the investigating officers arrived at Elder's residence.

20. Elder claimed (as stated in Ferraro's report, and as Elder testified similarly at trial), that Petitioner subjected her to a prolonged and violent physical assault that included punching Elder repeatedly in her face with his fists and with a "Roomba" vacuum. Elder also told officers that Petitioner had attacked her by "putting her in a chokehold and dragging her downstairs," and testified that Petitioner had choked or strangled her during the incident. (Res. Ex. 3).

21. However, when Ferraro interviewed Elder about the alleged choking or strangling in the course of doing a "Lethality Assessment," she told Ferraro, as Ferraro confirmed in her testimony, "[Elder] stated, 'no choking happened tonight.' I asked her again and [Elder] again stated that there was no choking involved in today's incident." (Res. Ex. 3). When questioned about this inconsistency by the Tribunal, Elder claimed she "could not remember" making the statements. This was not credible given the detailed descriptions Elder otherwise provided in her testimony.

22. Ultimately, neither Ferraro nor her fellow officers could determine the primary aggressor. (Res. Ex. 3). The officers decided not to arrest either party. Both Petitioner and Elder were charged with Simple Assault. Subsequently, a person or persons unknown, presumably the Durham District Attorney's Office, "upgraded" Petitioner's charge to Assault on a Female. All criminal charges related to the incident were ultimately dismissed.

23. Ferraro did not find the versions of events told by either Petitioner or Elder to be particularly credible.

24. Like the professionally trained police officers who investigated the incident, the Tribunal cannot determine who was the aggressor in the incident involving Petitioner and Elder.

25. Elder was not a credible witness, primarily due to her changing stories and the near-total lack of physical evidence from what she claimed was a severe and prolonged physical assault with, among other things, a Roomba vacuum. Petitioner's version of events is not particularly credible either, but is generally more credible than Elder's.

26. Elder subsequently obtained a civil "Domestic Violence Protective Order" against Petitioner. (Res. Ex. 6). Petitioner in June 2022 entered into an agreement with Elder to pay certain medical bills claimed by Elder. This agreement stated (among other conditions) that "Neither the negotiation, undertaking, or execution of this Agreement shall constitute an admission of guilt by either party." Id.

27. Petitioner made at least one payment under this agreement and testified that he made a second one. Elder testified that Petitioner refused to pay other bills she submitted. Resolution of the disputed payments of this civil matter is neither necessary for resolution of this case nor appropriate for this Tribunal to determine.

28. The Durham County Sheriff's Office terminated Petitioner's employment on September 26, 2022. (Res. Ex. 1A).

29. In its Report of Separation submitted to Respondent (Res. Ex. 1A), the Durham County Sheriff's Office checked "No" to the question, "Was this separation a result of a criminal investigation or violation of Commission rules?" The Durham County Sheriff's Office checked "Yes" on the same form to the question, "Are you aware of any on-going or substantiated internal investigation regarding this officer in the past 18 months?"

"Harassing Phone Call" and "Cyberstalking" Charges

30. Petitioner, Sisson, his ex-mother in law (who did not testify) and Alison Aboussleman had a "group text" set up. The primary purpose of this group text was parenting-related communications for the child of Petitioner and Allison Aboussleman.

31. The relationship between Petitioner and Sisson was, per the testimony of both men, merely cordial at best.

32. Alison Aboussleman has known Petitioner since 2011. They were married from June 2014 until their divorce in November 2021. Per Alison Aboussleman, her post-divorce relationship with Petitioner was initially cooperative but deteriorated over time.

33. The Tribunal finds as a fact that March 23, 2023, Petitioner sent multiple text messages to the group text (Res. Ex. 7) (the "March 23 messages"). The Tribunal also finds as a fact that Petitioner sent 25-28[2] text messages to the group text on that date, including two images of Alison Aboussleman that she had posted on social media.

34. Respondent's Probable Cause Determination (Res. Ex. 11) states that "Specifically, on or about March 23, 2023, you unlawfully did repeatedly telephone Alison Aboussleman and sent over forty text messages after being told to stop." This statement is unsupported by the evidence. Respondent's Exhibit 7 shows 25-28 text messages, not "over forty". There is nothing evident in the March 23 messages where any recipient "told Petitioner to stop".

35. Many of the March 23 messages were, by the standards of any reasonable person, boorish and insulting. Petitioner admitted at trial that the language he used in the March 23 messages was inappropriate.

36. When Petitioner sent the March 23 messages, he was angry because he believed the recipients were preventing him from seeing his son.

37. The majority of Petitioner's March 23 messages, by their wording, refer to or are directed to Sisson. For example:

    a. 8:34 PM: *I think he will feel especially strong about what a bitch that Rick is.*

    b. 8:45 PM: *Fuck you, Rick. Bitch ass wuss fucktard.*

    c. 8:50 PM: *I'm going to call Dick one more time, right now.*

    d. 8:54 PM: *He won't even answer his phone because he's being such a huge bitch.*[3]

38. Of the 28 March 23 messages, only eight by their plain wording are addressed directly to Alison Aboussleman. The balance of messages appear to be directed at Sisson.

39. In response to inquiries from the Tribunal, Petitioner stated that he "could have" consumed alcohol at the time he sent the March 23 messages. This answer was evasive at best.

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[2] Respondent's Exhibit 7 makes it difficult to determine if some of the communications are separate messages.

[3] The other messages are much in the same vein and are unnecessary to duplicate in their entirety here. See Hardy v. N.C. Cent. Univ., 2018 N.C. App. LEXIS 794, *9 FN3, 260 N.C. App. 704, 817 S.E.2d 495, 2018 WL 3733622. "Cumulative testimony of a similar nature was given at trial, but we find it repetitive and set out this testimony as illustrative of the whole."

40. At no time in the March 23 messages did any recipient respond and ask Petitioner to stop texting, though Alison Aboussleman early in the March 23 messages replied that she had previously called the police on Petitioner "Because you are harassing me and my family and emotionally abusing our son." (Res. Ex. 7).

41. Alison Aboussleman subsequently made a criminal complaint against Petitioner in reference to the March 23 messages that resulted in Petitioner being charged on March 30, 2023 with the criminal offenses of "Harassing Phone Call" in violation of N.C.G.S. 14-196(a)(3) and "Cyberstalking" in violation of N.C.G.S. 14-196.3 (Res. Ex. 8).

42. The warrant for the Alison Aboussleman charges alleged that on or about March 23, 2023, Petitioner "unlawfully and willfully did telephone Alison Aboussleman repeatedly for the purposes of annoying, harassing [sic] Alison Aboussleman at the called number." Id.

43. Sisson, approximately seven weeks later, also made a criminal complaint against Petitioner in reference to the March 23 messages. This resulted in Petitioner being charged on May 15, 2023 with "Cyberstalking" in violation of N.C.G.S. 14-196.3 (Res Ex. 8).

44. The warrant for the Sisson charges, again issued May 15, 2023, alleged that on or about March 30, 2023 Petitioner "unlawfully and willfully did electronically communicate to Rick Charles Sisson repeatedly for the purposes of abusing Rick Charles Sisson." Id.

45. Following his dismissal from Durham County Sheriff's Office, Petitioner obtained employment with the Person County Sheriff's Office as a bailiff. On May 30, 2023, while working in Person County, Petitioner was called to his captain's office.

46. When Petitioner reported as directed, he was arrested on the "Harassing Phone Call" and "Cyberstalking" charges. Person County deputies took Petitioner to the Durham County line, where Durham County deputies transported Petitoner to the county detention facility (Res. Ex. 8), "Arrest Report."

47. The Person County Sheriff's Office terminated Petitioner's employment after his arrest.

48. Petitioner entered into a consent order (Res. Ex. 10) where he agreed to avoid contact with Sisson and Alison Aboussleman and stay at least 1,000 feet away from them.

49. All criminal charges against Petitioner stemming from the March 23 messages were ultimately dismissed (Res. Ex. 8). The documents note as the reason for dismissal, "Protective Order in place. Victim does not wish to proceed." Id.

50. Sisson could not point to any insulting or harassing texts made to him by Petitioner between the March 23 messages and his May criminal complaint against Petitioner. Sisson did not personally feel threatened or harassed by the March 23 messages. Sisson initiated the May criminal charge against Petitioner because he "Wanted to add a little fuel to the fire for the custody thing" between Petitioner and Alison Aboussleman.

51. The Tribunal finds as a fact that Sisson's criminal complaint against Petitioner made with the intent of initiating a criminal charge to influence the apparent custody disputes between Petitioner and Alison Aboussleman and not out Sisson's legitimate belief that he was the victim of a crime.

Petitioner's Relevant Actions After the Criminal Charges

52. Petitioner is in counseling and attended the "Strong Fathers" programs, "working on myself trying to take care of myself mentally and physically."

53. Petitioner also voluntarily underwent a mental health and alcohol assessment after the charges, but said that he did so because "I knew they were going to ask me to do it." T 121.

Respondent's Investigation of the Criminal Charges

54. Following its receipt of the Durham County Sheriff's Report of Separation, Respondent assigned Bowman to investigate Petitioner's matters. She spoke with the Durham County Sheriff's Office, interviewed Petitioner and the investigating officers on the assault charge, and reviewed the police report for the criminal charge of Assault on a Female.

55. Petitioner timely informed Respondent of the later charges stemming from the March 23 messages. Bowman interviewed Petitioner and the alleged victims about these charges and obtained documentation held by all parties involved.

56. Bowman prepared a report of her investigation and presented it to Respondent's Probable Cause Committee.

57. Bowman performed her investigative duties in this case in a professional and ethical fashion.

58. Respondent's Probable Cause Committee found that Petitioner "committed" the Class B misdemeanor of "Assault on a Female" and two counts of "Cyberstalking" and one count of "Harassing Phone Calls." Respondent's Probable Cause Commission also found that Petitioner lacked good moral character as a result of these incidents (Res. Ex. 11).

59. Respondent's Exhibit 11 also alleges that Petitioner's conduct with Elder and the March 23 messages "results in a combination of misdemeanors" permitting revocation of Petitioner's certification under 12 NCAC 10B .0204 (d)(3). "The Commission may revoke, suspend or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of: ... (3) four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(17)(b) as Class B misdemeanors regardless of the date of commission or conviction... ."

Based on these Findings of Fact, the Tribunal makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this contested case pursuant to N.C.G.S. 150B, Article 3A, following a request from Respondent under N.C.G.S. 150B-40(e) for an Administrative Law Judge to hear this contested case. In such cases the Tribunal sits in place of the agency and has the authority of the presiding officer in a contested case under Article 3A. The Tribunal makes a proposal for decision, which contains findings of fact and conclusions of law. Respondent makes the final agency decision. N.C.G.S. 150B-42.

2. The parties are properly before the Tribunal, in that jurisdiction and venue are proper, and both parties received Notice of Hearing.

3. It is not necessary for the Tribunal to make findings on every fact presented at the hearing, but rather those which are material for resolution of the present dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, (1993), affirmed, 335 N.C. 234, 436 S.E.2d 588 (1993).

4. To the extent the Findings of Fact contain Conclusions of Law, or vice versa, they should be so considered without regard to the given labels. Matter of V.M., 273 N.C. App. 294, 848 S.E.2d 530 (2020).

5. The question presented by this case is whether Petitioner "committed" criminal offenses for which he was never convicted of or pleaded guilty to in a court of law, and whether he presently possesses the good moral character required of law enforcement officers in North Carolina.

6. This case involves a proposal to revoke an occupational license or certification. It thus affects the substantive rights of the Petitioner, and he is entitled to both notice and an opportunity to be heard. Scroggs v. N. Carolina Criminal Justice Educ. & Training Standards Comm'n, 101 N.C. App. 699, 701, 400 S.E.2d 742, 744 (1991).

Respondent's Authority Under N.C.G.S. 17E

7. The North Carolina legislature, in creating the North Carolina Sheriffs' Education and Training Standards Commission in N.C.G.S. 17E-3, stated, "The General Assembly finds and declares that the office of sheriff, the office of deputy sheriff and the other officers and employees of the sheriff of a county are unique among all of the law-enforcement officers of North Carolina. ... The offices of sheriff and deputy sheriff are therefore of special concern to the public health, safety, welfare, and morals of the people of the State. The training and educational needs of such officers therefore require particularized and differential treatment from those of the criminal justice officers certified under Article 1 of Chapter 17C of the General Statutes." N.C.G.S. 17E-1 (condensed).

8. In N.C.G.S. 17E-4, "Powers and Duties of the Commission," the General Assembly authorizes Respondent to make enforceable "rules and regulations" and "certification procedures" regarding such officers in a number of areas. N.C.G.S. 17E-4(3) authorizes Respondent to

"certify, pursuant to standards that it may establish for the purpose, persons as qualified under the provisions of this Chapter who may be employed at entry level as officers."

9. N.C.G.S. 17E-7, "Required standards," directs and authorizes Respondent to set certain standards for appointment of justice officers, and "may fix other requirements, by rule and regulations, for the employment and retention of justice officers... ." Id. at (c).

10. Respondent's authority to impose standards for certification of justice officers is recognized by our Supreme Court. Britt v. N. Carolina Sheriffs' Educ. & Training Standards Comm'n, 348 N.C. 573, 501 S.E.2d 75 (1998).

11. However, as recently affirmed by the Court of Appeals, Respondent may not perform its certification or revocation role in a manner that is arbitrary and capricious. Devalle v. N. Carolina Sheriffs' Educ. & Training Standards Comm'n, No. COA22-256, 2023 WL 3470876 (N.C. Ct. App. May 16, 2023). This includes Respondent's operation and interpretation of its own rules and standards. Id.[4]

"Commission" of a Criminal Offense

12. Petitioner was not convicted of any criminal offense at issue in a court of law. Thus, it is necessary to show that Petitioner "committed" the criminal offenses.

13. "Commission" as it pertains to criminal offenses means a finding by the North Carolina Sheriffs' Education and Training Standards Commission or an administrative body, pursuant to the provisions of N.C.G.S. 150B, that a person performed the acts necessary to satisfy the elements of a specified criminal offense. 12 N.C. Admin. Code 10B.0103(16); see also 12 NCAC 10B .0307

14. The Administrative Code defines "conviction" and "commission" of a crime separately. Becker v. N. Carolina Crim. Just. Educ. & Training Standards Comm'n, 238 N.C. App. 362, 768 S.E.2d 200 (2014) (unpublished). In addition, the Court of Appeals has held that Respondent "may revoke a correctional officer's certification if it finds that the officer committed a misdemeanor, regardless of whether he was criminally convicted of that charge." Becker, citing Mullins v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 125 N.C. App. 339, 348, 481 S.E.2d 297, 302 (1997). Though these cases involved the North Carolina Criminal Justice Education and Training Standards Commission, that body and Respondent serve similar roles and the Tribunal presumes them to have equal regulatory authority.

15. In determining whether a person "committed" a crime, Respondent does not "attempt to interpret North Carolina's criminal code," but instead must "**use pre-established elements of behavior** which together constitute [a criminal] act. **The Commission relies on the elements of each offense, as specified by the Legislature and the courts.**" Mullins at 347, 302 (emphasis supplied). See State v. Eastman, 113 N.C. App. 347, 351, 438 S.E.2d 460, 462 (1994): "The State failed to show any instance where the defendant [a state employee at the Governor Morehead School] could exercise sovereign power at any time in the course of his employment."

[4] Devalle is under review by the Supreme Court but as of now (August 2024) remains good law.

Burden of Proof: the Inapplicability of Overcash and Article 3 to Article 3A Cases

16. The burden of proof for cases under Article 3 of the Administrative Procedure Act, N.C.G.S. 150B, is allocated by statute. See N.C.G.S. 150B-25.1. There is no statutory allocation of the burden of proof in administrative actions arising out of Article 3A of the APA.

17. The General Assembly has made clear that Article 3 and Article 3A of the APA are separate entities. Statutes in the former do not apply to the latter:

> **The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.**

N.C.G.S. 150B-40(e) (emphasis supplied).

18. "Statutory interpretation properly begins with an examination of the plain words of the statute." Correll v. Div. of Soc. Servs., 332 N.C. 141, 144, 418 S.E.2d 232 (1992). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." Belmont Ass'n v. Farwig, 381 N.C. 306, 310, 2022-NCSC-64, P16, 873 S.E.2d 486, 489, 2022 N.C. LEXIS 582, *8. The "plain and definite meaning" of the words above is that Article 3A, not Article 3, applies to cases brought under Article 3A.

19. There is no question that this case was brought under Article 3A. On December 6, 2023, Respondent requested, "**pursuant to N.C.G.S. §150B-40(e),**" the "designation of an Administrative Law Judge to preside at the hearing of a contested case **under Article 3A**, Chapter 150B of the North Carolina General Statutes." Petition, December 6, 2023 (emphasis supplied).

20. This being so, by the clear and unambiguous language of N.C.G.S. 150B-40(e), the provisions of Article 3 do not apply to this case – as specifically found by our Court of Appeals: "As an occupational licensing agency, hearings before the Board of Dental Examiners are thus governed by Article 3A of the NCAPA." Homoly v. State Bd. of Dental Examiners, 121 N.C. App. 695, 697, 468 S.E.2d 481, 482 (1996). In 2011, the Court of Appeals, citing Homoly, held: "We find it important to note the provisions of Article 3 **do not apply to cases governed by Article 3A.**" Burgess v. N.C. Crim. Justice Educ. & Training Stds. Comm'n, 2011 N.C. App. LEXIS 1856, *14, 2011 WL 3570107.[5](emphasis supplied).

21. Despite these rulings, Respondent's Final Agency Decisions continue to insist that a burden of proof derived under Article 3, specifically Overcash v. N.C. Dep't of Env't & Natural Res., 179 N.C. App. 697, 699, 635 S.E.2d 442, 444 (2006), applies to cases brought under Article 3A. Repeatedly, OAH issues Proposals for Decisions stressing the dearth of authority for this

[5] Burgess was unpublished, but Homoly, cited for the specific premise of the non-applicability of Article 3 to Article 3A, was published.

premise.[6] Repeatedly, Respondent's final decisions simply "cross out" this language and replace it with rote declarations placing the burden of proof on petitioners, citing Overcash and Article 3.

22. While it is true that the unpublished (and never subsequently cited) Burgess opinion states that Respondent does not have to explain its reasons for rejecting an OAH decision, (Id. at *14), the Tribunal respectfully points out that simply "crossing out" a legal issue does not make that legal issue go away, nor will it keep that issue from arising again on both the OAH and appellate levels.

23. To cite one recent "cross out" example, in Fallon Coffer v. NC Sheriffs Education and Training Standards Commission, 2023 NC OAH LEXIS 159, 22 DOJ 04730, Respondent's counsel simply "crossed out" the Tribunal's assignment of the burden of proof under an Article 3A analysis, proposing its replacement with this:

> 7. **Conclusions of Law Nos. 5 and 6 should be added to align with Respondent's position on burden of proof.**
>
> 5. 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 lase judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).
>
> 6. 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).

24. This language duly appeared in both Respondent's Final Agency Decision issued September 28, 2023. While as noted N.C.G.S. 150-40 and two appellate decisions unambiguously states that Article 3 does not govern cases under Article 3A, Respondent's Final Agency Decision in Coffer substituted for the Tribunal's Article 3A analysis:

    a. **N.C.G.S. 150B-23(a)**, which is in **Article 3**.

    b. **N.C.G.S. 150B-29** ("Rules of Evidence") which is in **Article 3** –Article 3A has its own evidence statute, N.C.G.S. 150B-41("Evidence; stipulations; official notice") applicable to Article 3A cases.

    c. **N.C.G.S. 150B-34**, which is not only in **Article 3**, but is in direct contradiction to Article 3A, as it refers to the Administrative Law Judge making a "final decision" in the case (As opposed to N.C.G.S. 150B-40 in Article 3A: "The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law." N.C.G.S. 150B-40(e)).

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[6] See, e.g., Donovan Barnes v. NC Sheriffs Education and Training Standards Commission, 2020 NC OAH LEXIS 46, *8, 19 DOJ 04315 ("The issue of burden of proof has previously been raised with this ALJ in Article 3A hearings, and this ALJ has consistently held that Respondent has the burden of proof, not merely the burden of going forward."); William Donald Britt v. NC Sheriffs Education and Training Standards Commission, 2020 NC OAH LEXIS 427, *40, 19 DOJ 05371; Robert Erick Jordan v. NC Sheriffs Education and Training, Standards Commission, 2021 NC OAH LEXIS 88, *12, 20 DOJ 03449; Junior Thompson v. NC Sheriffs Education and Training Standards Commission, 2023 NC OAH LEXIS 333, *7, 23 DOJ 02641.

25. Thus, Respondent substituted in the Coffer Final Agency Decision three statutes, (a) all from Article 3, (b) none of which apply to Article 3A cases, (c) one of which has a separate Article 3A statute on the same issue, and (d) another which directly contradicts Article 3A.

26. Overcash originated in OAH more than 20 years ago as Ronald Gold Overcash v. N.C. Department of Environment and Natural Resources, Division of Waste Management, 2003 NC OAH LEXIS 36, 00 EHR 0662/0732/0733,/0835, (April 4, 2003). The issue in Overcash, as stated in the Administrative Law Judge's decision,[7] was:

> Whether Petitioner **has met his burden of proof** by establishing that Respondent acted erroneously or otherwise violated **N.C. Gen. Stat. § 150B-23** when Respondent assessed against Petitioner **four (4) civil penalties and investigative costs** in the total amounts of: (1) $ 15,980.64 (UST 99-082FT); (2) $ 26,942.88 (UST 01-079FT); (3) $ 38,978.37 1 (UST 02-011P); and (4) $ 43,978.37 (UST 02-007P) for violations of underground storage tank statutes and regulations?

Overcash, Id. (emphasis supplied).

27. Thus, Overcash from its inception was under Article 3, not Article 3A, of the APA. N.C.G.S. 150B-23, the primary Article 3 statute discussed in Overcash, on both the OAH and appellate levels, specifically differentiates contested cases filed under Article 3 and Article 3A of the APA: "(a) A contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the Office of Administrative Hearings and, **except as provided in Article 3A of this Chapter**, shall be conducted by that Office ... ." N.C.G.S. 150B-23(a). (emphasis supplied). See also N.C.G.S. 150B-40(e).

28. On the appellate level, the Overcash opinion discusses only Article 3 statutes. Overcash at 704, 447 (2006). The two cases on which Overcash relies for the burden of proof question, Britthaven[8] and Holly Ridge,[9] were brought under Article 3. Holly Ridge was reversed by the Supreme Court on the grounds that it misinterpreted the law of intervention under N.C.G.S. 150B-23(d) – which is in Article 3.[10] Intervention in Article 3A cases is controlled by N.C.G.S. 150B-38(f).[11]

29. And, while Holly Ridge states that "our caselaw holds that unless a statute provides otherwise, petitioner has the burden of proof in OAH contested cases," the case cited for this premise – page 328 of Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507 S.E.2d 272 (1998) – says no such

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[7] Another difference between Article 3 and Article 3A is that in the former, the ALJ makes a Final Decision. In Article 3A, the decision is a "Proposal for Decision." At the time Overcash was heard in OAH, Article 3 cases were still decided by a form of recommended or proposed decisions. This further demonstrates the divergence between Article 3 and Article 3A decisions in the more than two decades since Overcash was decided.

[8] Britthaven, Inc. v. N.C. Dep't of Human Res., 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 disc. review denied, 341 N.C. 418, 461 S.E.2d 754 (1995).

[9] Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 176 N.C. App. 594, 627 S.E.2d 326 (2006).

[10] Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 532, 648 S.E.2d 830, 832 (2007).

[11] "(f) Any person may petition to become a party by filing with the agency or hearing officer a motion to intervene in the manner provided by G.S. 1A-1, Rule 24. In addition, any person interested in a contested case **under this Article** may intervene and participate to the extent deemed appropriate by the agency hearing officer." (emphasis supplied).

thing. The statute cited in Holly Ridge for this premise – N.C.G.S. 150B-23(a) – is, once again, in Article 3. Further, in its decision reversing Holly Ridge, the Supreme Court did not endorse that opinion's allocation of the burden of proof.

30. In House of Raeford Farms, Inc. v. N.C. Dep't of Env't & Natural Res., 242 N.C. App. 294, 774 S.E.2d 911, (2015), the Court of Appeals cited both Overcash and the same Article 3 statutes cited in Overcash to place the burden of proof on a petitioner challenging an environmental penalty. Id. at 303, 918 (2015). Nowhere in Raeford Farms did the Court of Appeals discuss either occupational licensing agencies, such as Respondent here, or Article 3A generally.

31. Mere months[12] after the Raeford Farms ruling, the General Assembly amended Article 3– but **not** Article 3A – as follows:

> *SECTION 1.2.(a)* ***Article 3 of Chapter 150B*** *of the General Statutes is amended by adding a new section to read:*
> *"Section 150B-25.1.*
> ***Burden of proof.***
>
> *(a) Except as otherwise provided by law or by this section, the petitioner in a contested case has the burden of proving the facts alleged in the petition by a preponderance of the evidence.*
> *(b) In a contested case involving* ***the imposition of civil fines or penalties*** *by a State agency for violation of the law,* ***the burden of showing by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed rests with the State agency.***
> *(c) The burden of showing by a preponderance of the evidence that a career State employee subject to Chapter 126 of the General Statutes was discharged, suspended, or demoted for just cause rests with the agency employer. "*

2015 N.C. ALS 286, 2015 N.C. Sess. Laws 286, 2015 N.C. Ch. 286, 2015 N.C. HB 765 (codified at N.C.G.S. 150B-25.1). (emphasis supplied).

32. This 2015 amendment is important for a number of reasons. First, the General Assembly amended only Article 3, not Article 3A, to impose a statutory burden of proof. It could have chosen to amend Article 3A in a similar fashion, but did not. "If the Legislature desired to establish a public policy entitling county [or city] employees to the protection of G.S., Chap. 126, it could have done so." Conran v. New Bern Police Dep't, 122 N.C. App. 116, 468 S.E.2d 258 (1996) citing Walter v. Vance County, 90 N.C. App. 636, 641, 369 S.E.2d 631, 634 (1988).

33. The General Assembly's choice to allocate a statutory burden of proof in Article 3, but not in Article 3A, leads to the conclusion that the General Assembly did not find it appropriate to allocate a set burden of proof for cases under Article 3A.

[12] The timing of the amendment suggests that the Raeford Farms ruling motivated the subsequent statutory change.

34. Second, the 2015 amendment means that the burden of proof imposed in Overcash and Raeford Farms is superseded by statute: N.C.G.S. 150B-25.1 places the burden of proof in all cases of fines and civil penalties not on the petitioner, but on the State agency by "clear and convincing" evidence. Id. at (b). This standard is "greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." In re W.K., 376 N.C. 269, 277, 852 S.E.2d 83 (2020).

35. Third, the General Assembly's selection of an enhanced burden of proof in N.C.G.S. 150B-25.1 demonstrates awareness that some agency actions – fines and civil penalties – require both that the burden of proof be on the State and that the State's burden of proof should be higher than the "preponderance of the evidence" standard usually applied in civil matters.

36. Moreover, the General Assembly has applied a heightened burden in cases, such as termination of parental rights, where important constitutional rights are implicated by the state action involved. In re B.L.H., 376 N.C. 118, 124, 852 S.E.2d 91, 96 (2020); see also N.C.G.S. 7B-1109(f). The situation in this case involves the even more serious claim that a citizen, though never convicted of such, committed a criminal offense.

37. Fourth and thusly: if the General Assembly found it appropriate to put a heightened "clear and convincing" burden of proof on State agencies seeking to impose a fine or civil penalty, how then can the now-superseded Overcash ruling provide Respondent its asserted authority to place the burden of proof on petitioners in cases involving the far more serious allegation that a petitioner committed a crime? Simply put, it cannot and does not.

38. Thus, rejection of the Overcash burden of proof in Article 3A cases stems not from "OAH decisions," but rather is compelled by both statutory language and appellate direction of the most clear and unambiguous kind.

39. In summary, Overcash provides neither Respondent nor OAH authority to impose the burden of proof on Petitioner, because:

    a. Overcash involves only **Article 3** of the APA.
    b. N.C.G.S. 150B-40, both by plain reading and the holdings in Homoly and Burgess, makes clear that the statutes in **Article 3A**, not Article 3, control cases brought under Article 3A.
    c. Plain reading of N.C.G.S. 150B-23 also excludes contested cases brought under Article 3A.
    d. The General Assembly amended Article 3 to allocate a statutory burden of proof, but did not so amend Article 3A.
    e. The burden of proof established in Overcash has been statutorily repealed and placed on the State by "clear and convincing evidence."
    f. The General Assembly's placement of a "clear and convincing evidence" burden of proof on the State in certain Article 3 cases demonstrates legislative intent that an agency must prove its case when significant public rights – such as fines, monetary penalties, and termination of parental rights – are at issue, and "commission of a crime" falls readily within those significant public rights.

The Burden of Proof is Properly Placed on Respondent

40. Having determined that Overcash provides no authority for imposition of the burden of proof in this case, the Tribunal now turns to (a) what is the correct analysis of the burden of proof, and (b) how, under that analysis, it is properly allocated. To do so, the Tribunal employs Peace v. Employment Sec. Comm'n, 349 N.C. 315, 317, 507 S.E.2d 272, 275, 1998 N.C. LEXIS 728, *1, 14 I.E.R. Cas. (BNA) 1080.

41. Peace itself arose under Article 3 of the APA. And, like Overcash, Peace's holding that the burden of proof in a "just cause" case was abrogated by N.C.G.S. 150B-25.1. See N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 666, 599 S.E.2d 888, 899 (2004). However, unlike Overcash, which relies solely on Article 3, Peace contains a broad discussion of due process under the Constitution of North Carolina and, with respect to the burden of proof, concludes as a matter of general application:

> 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).

42. It is a general legal principle that the burden is on the party asserting a claim to show the existence of that claim. Robinson v. Univ. of N.C. Health Care Sys., 242 N.C. App. 614, 621, 775 S.E.2d 898, 903, 2015 N.C. App. LEXIS 701, *12. Here, Respondent claims that (a) Petitioner committed multiple crimes, without evidence of a conviction, and (b) that because of these alleged crimes, Petitioner now lacks the good moral character, previously possessed, required of law enforcement officers in North Carolina.

43. While at least one appellate decision in the Article 3 context suggests approval of requiring petitioners to prove a negative, no North Carolina appellate court has endorsed the State, in any form, first deciding that a citizen committed a crime and then requiring that citizen to prove that they did not. Jones v. All American Life Ins. Co., 68 N.C. App. 582, 585, 316 S.E.2d 122, 125, 1984 N.C. App. LEXIS 3414, *9, affirmed, 312 N.C. 725, 727, 325 S.E.2d 237, 238, 1985 N.C. LEXIS 1501 (burden of proof in civil action under Slayer Statute is preponderance of the evidence); accord, Osman v. Osman, 285 Va. 384, 390-391, 737 S.E.2d 876, 879, 2013 Va. LEXIS 26, *8, 2013 WL 718753.

44. Simplified, placing the burden of proof on a citizen to show he did not commit a crime is neither fair nor demonstrates common sense. Peace. "As a general rule in this jurisdiction, the party who substantively asserts the affirmative of an issue bears the burden of proof on it. King v. Bass, 273 N.C. 353, 160 S.E. 2d 97 (1968); 2 Stansbury's North Carolina Evidence § 208 (Brandis rev. 1973). **The rationale for this rule lies in the inherent difficulty of proving the negative of any proposition.**" In re Rogers, 297 N.C. 48, 59, 253 S.E.2d 912, 919, 1979 N.C. LEXIS 1131, *23-24 (internal citation omitted) (emphasis supplied).

45. Thus, when Respondent's proposed agency action is based on its conclusion that a citizen not convicted of a crime nonetheless "committed" a crime, the burden of proof is on Respondent to show, by (at least) a preponderance of the evidence, that the citizen's actions satisfied all elements of the crime. In re B.L.H., 376 N.C. 118, 124, 852 S.E.2d 91, 96 (2020). The same is true for the alleged change in Petitioner's moral character: Respondent alleges a change in status, and the burden is properly placed on Respondent to prove that change. In re Rogers.

"Assault on a Female" Charge

46. The elements of the crime of assault on a female are: an assault upon a female person by a male person who is at least eighteen years old at the time of the charged offense. State v. Wortham, 318 N.C. 669, 669, 351 S.E.2d 294, 295, 1987 N.C. LEXIS 1741.

47. The Tribunal seeks guidance from Respondent's Final Agency Decisions when appropriate. Thus, when resolving an allegation of criminal activity involving conflicting stories, the Tribunal is assisted by Respondent's recent Final Agency Decision in Nathaniel Corthia Gilliam v. NC Sheriffs Education and Training Standards Commission, 22 DOJ 04731.

48. In Gilliam, Respondent's Probable Cause Committee found probable cause that the Petitioner, a senior jail officer, "committed the Class B misdemeanor offense of 'Assault Individual w/Disability' in violation of N.C.G.S. 14-32.(f). Specifically, on or about June 27, 2019, while working as a detention officer at the Bertie Regional Jail, you unlawfully and willfully did assault Joe Jackson, an individual with impaired mobility from a leg injury, by hitting him about the head with his walking cane." The Tribunal heard the case on July 18, 2023.

49. Three certified officers present in the cell at the time of the incident either stated to the SBI (memorialized on video and admitted into evidence) or testified credibly under oath that Gilliam, without cause or justification, struck Jackson on the head with Jackson's cane while Jackson was confined in the Bertie-Martin Regional Jail. No officer present testified to the contrary. Jackson, though not credible on other issues, testified credibly that Gilliam assaulted him. Jackson's status as a disabled person was readily apparent.

50. Gilliam testified that Jackson's conduct, which included cursing and swearing, was so loud and aggressive that it was disrupting the entire jail, including other inmates. Gilliam claimed that addressing this "disruptive" conduct was the reason he entered the holding cell where Jackson was detained. He denied striking Jackson.

51. However, Gilliam had said nothing about other inmates being disrupted in his written statement, nor had any other law enforcement witnesses who testified at the contested case hearing. Also, Gilliam's story was refuted by his own witness, the jail nurse, who was in the area for the entire incident and heard nothing unusual from Jackson's cell. The jail nurse testified credibly that if Jackson's conduct was sufficiently loud and disruptive to agitate the other inmates, who were in separate cells down a hallway on the other side of the jail's booking area, she would have noticed that. She did not, and she heard nothing unusual.

52. The Tribunal found that Gilliam was not a credible witness. The Tribunal concluded as a matter of law that Gilliam, while certified and serving on duty as a detention officer, satisfied the elements of and thus "committed" the criminal offense of 'Assault Individual w/Disability'. The Tribunal found no mitigating circumstances other than lack of evidence of physical injury to Jackson. The Tribunal proposed that Respondent affirm its proposed action (revocation) against Gilliam's law enforcement certification.

53. In its Final Decision, issued March 27, 2024, Respondent agreed that the three certified officers who witnessed the incident testified credibly that Gilliam struck Jackson with his cane, as did Jackson himself, and that Gilliam's testimony to the contrary was not credible. Respondent agreed that Jackson's status as a disabled person was readily apparent. Respondent noted the Tribunal's conclusion that Gilliam committed the assault on Jackson and cited no evidence or argument contrary to that conclusion of law.

54. However, Respondent's Final Decision was: "Based on these Findings of Fact and Conclusions of Law, there was insufficient evidence that Petitioner committed the misdemeanor offense as alleged, and it is hereby ordered that Petitioner's justice officer certification is **NOT REVOKED**." Final Decision, March 27, 2024 (emphasis in original).

55. Thus, the testimony of three certified law enforcement officers, plus that of the victim, coupled with Gilliam's own lack of credibility, was "insufficient evidence" to Respondent that Gilliam committed the criminal offense at issue.

56. Applying Gilliam's guidance to the "Assault on a Female" charge here, no law enforcement officer (other than Petitioner) witnessed the alleged assault. Petitioner and Elder, who was not a credible witness due to her changing stories and the lack of physical evidence for her claims, told widely differing stories. Responding law enforcement personnel, who conducted a thorough and professional investigation, were unable to identify the aggressor.

57. Under such facts, the Tribunal has no difficulty concluding as a matter of law that there is insufficient evidence to show that Petitioner committed the criminal offense of "Assault on a Female" as alleged by Respondent's Probable Cause Committee. Gilliam, see also State v. Murphy, 225 N.C. 115, 116, 33 S.E.2d 588, 590, 1945 N.C. LEXIS 268.

14-196 "Harassing Phone Calls" Charge

58. N.C.G.S. 140-196 criminalizes conduct in multiple subsections. Section (a)(1) of N.C.G.S. 14-196 was found to be unconstitutionally overbroad by the Federal courts. Radford v. Webb, 446 F. Supp. 608, 1978 U.S. Dist. LEXIS 19476 (W.D.N.C. 1978), aff'd, 596 F.2d 1205, 1979 U.S. App. LEXIS 15156 (4th Cir. 1979).

59. Unlike in Gilliam and the "Assault on a Female" charge in this case, there is no dispute that Petitioner sent the March 23 messages.

60. "The essential elements of a G.S. 14-196(a)(3) violation are (1) repeatedly telephoning another person, (2) with the intent or purpose of abusing, annoying, threatening, terrifying, harassing or

embarrassing any person at the called number." State v. Camp, 59 N.C. App. 38, 42, 295 S.E.2d 766, 768, 1982 N.C. App. LEXIS 2859, *8; review denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 216 (1982).

61. Camp also held that section (a)(3) of N.C.G.S. 14-96 was constitutional in that the statute punished conduct – calling for the purposes of harassment, annoyance, etc., etc. – and the statute "adequately warns of the activity it prohibits." Id. at 43, 769 (1982).

62. The actual contents of the statements attributed to the defendant are relevant to show whether the intent of the telephone calls was to abuse, annoy, threaten, terrify, harass or embarrass the victims of the calls. State v. Boone, 79 N.C. App. 746, 747, 340 S.E.2d 527, 528, 1986 N.C. App. LEXIS 2115, *4

63. Boone also construed the statute's use of "repeatedly" in terms of making the telephone calls concerned:

> The statute prescribes making such calls "repeatedly." Unless the contrary appears, it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted. Transportation Service v. County of Robeson, 283 N.C. 494, 196 S.E. 2d 770 (1973). Repeatedly is the adverbial form of the term repeated meaning "renewed or recurring again and again." Webster's Seventh New Collegiate Dictionary. **The term repeatedly does not ordinarily connote a recurrence within a twenty-four hour period.**

Boone at 749, 340 529, 1986 (1986) (emphasis supplied).

64. In this case, all the text messages introduced into evidence occurred within the same 24-hour period or March 23, 2023, barring one text on March 24th and two on March 29th. (Res. Ex. 7). The warrant, however, gives the date of offense as March 23, 2023. The factual narrative in the warrant states: "On or about the date of offense shown in the county named above the defendant unlawfully and willfully did telephone Alison Aboussleman repeatedly for the purposes of annoying, harassing Alison Aboussleman at the called number." (Res. Ex. 8). Thus, from the plain language of the warrant, the criminal charge is solely for conduct on March 23, 2023.

65. Another issue is the wording of 14-196(a)(3) itself: "To **telephone** another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number" (emphasis supplied). There is no reference to text messages anywhere in the statute.

66. The definitional portion of 14-196 does not discuss text messages, either: "For purposes of this section, the term 'telephonic communications' shall include communications made or received by way of a telephone answering machine or recorder, telefacsimile machine, or computer modem." N.C.G.S. 14-196(b).

67. Criminal statutes must be strictly construed. State v. Ross, 272 N.C. 67, 157 S.E. 2d 712 (1967); State v. Brown, 264 N.C. 191, 141 S.E. 2d 311 (1965). This does not mean that a criminal statute should be construed stintingly or narrowly. "It means that the scope of a penal statute may not be extended by implication beyond the meaning of its language so as to include offenses not clearly described." State v. Hart, 287 N.C. 76, 80, 213 S.E.2d 291, 295, 1975 N.C. LEXIS 1068, *9. Texting is "clearly described" neither in the statute nor in its definitional section.

68. "When a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, State v. Humphries, 210 N.C. 406, 186 S.E. 473 (1936), and the courts will interpret the language to give effect to the legislative intent." Ikerd v. R.R., 209 N.C. 270, 183 S.E. 402 (1936).

69. On the one hand, the General Assembly's intent in enacting 14-196 seems clear: criminalizing certain uses of a telephone, in this case to annoy or harass another person. On the other, statutory construction is used when a statute is ambiguous. N.C.G.S. 14-196 is not ambiguous, in that makes no reference to text messages and its definition of "telephonic communications" fails to reference them either. "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties." In Re Banks, quoting Boyce Motor Lines v. United States, 342 U.S. 337, 96 L.Ed. 367, 72 S.Ct. 329 (1952).

70. Perhaps for the reasons above, the Tribunal finds no North Carolina appellate case affirming, or addressing, a criminal conviction under N.C.G.S. 14-196(a)(3) for text messages alone. Perhaps the statute, last amended in 2000, has simply not kept up with the times. Either way, "statutory construction" that criminalizes conduct not listed in either the statute or in its definitional section is less statutory construction than statutory amendment – a step the Tribunal declines to take.

71. Thus, the Tribunal concludes as a matter of law that text messages, standing alone, are not criminalized in 14-196.

72. Even if the statute did apply to text messages, there is insufficient evidence to show that Petitioner sent the March 23 messages **for the purpose of** abusing, annoying, threatening, terrifying, harassing or embarrassing Alison Aboussleman. Petitioner testified his motivation was anger that the recipients were, in his view, wrongfully preventing him from seeing his son and concealing his son's location. T 104; see also T 118: "They would not give me a straight answer where my son was." As Petitioner testified:

> THE TRIBUNAL: *Pardon me, sir. I'm looking at all these text messages. Were you drunk when you sent these things or mad or mad and drunk?*
>
> THE WITNESS: *I was very mad they were taking my -- they took my son on his days with me and then not telling me where he was.*
>
> THE TRIBUNAL: *So these are rage texts?*
>
> THE WITNESS: *Yes. I was very emotional at the time.*

T 96.

73. However, after considerable prompting from the Tribunal, T 121, Petitioner also admitted that his purpose in texting somewhat salacious photos that Alison Aboussleman had posted on social media was to embarrass Alison Aboussleman by sending those photos to her parents. Id.

74. That noted, while it is certain that Petitioner used boorish and offensive (to a reasonable person) methods to express his anger over the custody/visitation issue, the Tribunal does not believe that the General Assembly intended 14-196 to criminalize or weaponize interfamilial arguments, such as custody disputes, at least in the absence of conduct reasonably placing a person in fear. See Stancill v. Stancill, 241 N.C. App. 529, 542, 773 S.E.2d 890, 898 (2015) (defendant's conduct in texting plaintiff continuously over two month period reasonably placed her in fear of bodily harm and tormented, terrorized, and terrorized plaintiff).

75. That the parties were mutually aware of a custody dispute was confirmed by Sisson, who sought criminal charges against Petitioner because:

> Quite honestly, **to add a little fuel to the fire for the custody thing** because **I didn't think Alex would ever sign anything without more pressure on him to do something**, quote [sic] honestly.

T 188-189 (emphasis supplied).

76. As the Court of Appeals said in the context of "extreme and outrageous" conduct sounding in tort:

> [L]iability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion. . . .

Chidnese v. Chidnese, 210 N.C. App. 299, 316, 708 S.E.2d 725, 738 (2011).

77. Thus, assuming in the hypothetical that Petitioner's text messages are subject to the "Harassing Phone Calls" law, the Tribunal concludes as a matter of law that there is insufficient evidence that Petitioner "committed" the criminal offense of "Harassing Phone Calls" in the March 23 messages.

78. "For the purpose of" implies the lack of any other reason or purpose for the communication. Here, Petitioner had a legitimate reason to be in communication with the parties concerned – indeed, by

setting up and participating in the group text, they had mutually agreed to it. Petitioner simply expressed that communication in a churlish – but not criminal – fashion:

> Both misdemeanor offenses of 'Harassing Phone Calls' or 'Cyber-stalking' have a common element of Mens Rea. In this case, a preponderance of the evidence showed that Petitioner did not telephone his wife nor send her text messages "for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing" her. Instead, the preponderance of evidence showed that Petitioner phoned or texted his wife from April 25, 2013 through May 13, 2013, because he loved her, and wanted for them to get back together as man and wife, and resume their marriage.

William Buchanan Burgess v. North Carolina Sheriff's Training and Standards Commission, NC OAH LEXIS 123, *13, 14 DOJ 00527.[13]

79. While no one would confuse Petitioner's March 23 messages with Burgess' statements of love and reconciliation, it is equally clear that they were not made for the sole purpose of harassing the other persons involved.

Cyberstalking

80. N.C.G.S. 14-196.3 makes it unlawful to "Electronically mail or electronically communicate to another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing, or embarrassing any person." Id. at (2).

81. Subsection (e) of the statute contains an important carveout, however: " This section does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views **or to provide lawful information to others**. This section shall not be construed to impair any constitutionally protected activity, including speech, protest, or assembly" (emphasis supplied).

82. Unlike N.C.G.S. 14-96, there is no doubt that text messages are included in communications subject to N.C.G.S. 14-196.3. The latter defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by a wire, radio, computer, electromagnetic, photoelectric, or photo-optical system."

83. This "broad definition," see State v. Bernard, 236 N.C. App. 134, 148, 762 S.E.2d 514, 523 (2014) clearly encompasses text messages sent by phone. State v. Milton, 2021 N.C. App. LEXIS 249, *2, 2021-NCCOA-258, 858 S.E.2d 149 (over the course of three days defendant sent 120 text message to victim despite her requests to stop contacting her).

84. Appellate decisions on actual cyberstalking convictions tend to show conduct different from a series of churlish texts, on a single day, while the mutually known recipients are in a custody dispute. For example: defendant, after being told by law enforcement to stop, sent repeated "threatening, harassing, bizarre, disturbing, offensive, and representative of violence" emails to various university employees and students, and "registered" them (against their will) to receive

[13] The conduct in Burgess spanned multiple days and weeks.

the emails. State v. Fuller, 2021-NCCOA-641, P5, 2021 N.C. App. LEXIS 640, *3, 280 N.C. App. 370, 865 S.E.2d 372 (unpublished); see also State v. Milton, above.

85. The majority of North Carolina's reported decisions on "Cyberstalking" are not criminal cases, but are either ancillary to civil actions or involved "commission of a crime" allegations by the North Carolina Sheriffs Education and Training Standards Commission – the same agency as in this case.[14] Charges by this agency that a law enforcement officer "committed" the crime of cyberstalking, in fact, account for four of the five reported OAH decisions on the issue.

86. Moreover, the same mens rea problem is present with "Cyberstalking" as with "Harassing Phone Calls," as the communication must be made "**for the purpose of** abusing, annoying, threatening, terrifying, harassing, or embarrassing any person." N.C.G.S. 14-196.3(2) (emphasis supplied). Petitioner, again a boorish manner, was expressing anger over the recipients' perceived refusal to let Petitioner see his son. This was not a case of a stranger harassing a stranger or a spurned suitor hounding a love interest for unrequited affection.

87. Sisson's initiation of Cyberstalking charges against Petitioner occurred weeks after the fact (with no evidence of intervening conduct) and was clearly not motivated by Sissons' feelings of victimization. Again in his own words, Sisson sought criminal charges against Petitioner because:

> Quite honestly, **to add a little fuel to the fire for the custody thing** because **I didn't think Alex would ever sign anything without more pressure on him to do something**, quote [sic] honestly.

T 188-189 (emphasis supplied).

88. The Tribunal concludes as a matter of law that Sisson's initiation of criminal charges against Petitioner was not made out of Sisson's good faith belief that he was the victim of a crime, but rather to influence the parties' custody dispute by "pressuring" Petitioner. See generally, Martin v. Parker, 150 N.C. App. 179, 180, 563 S.E.2d 216, 217, 2002 N.C. App. LEXIS 366. In short, Sisson employed the criminal justice system to gain an advantage in a civil case, as a result of which Petitioner was publicly arrested, transported in custody, jailed, and lost his job.

89. Additionally, in 2017, OAH found that Respondent, by its own standards, improperly alleged that a petitioner committed a "Class B Misdemeanor" when it found probable cause for a Cyberstalking charge:

> According to the Commission's Class B Misdemeanor Manual,[15] a misdemeanor with punishment of more than 6 months but less than 2 years is a Class B misdemeanor. N.C.G.S. 14-196.3; see also, 12

[14] Jarvis James v. North Carolina Sheriffs Education and Training Standards Commission, 2022 N.C. ENV LEXIS 71, 22 DOJ 00665; David Scott Sutton Jr. v. NC Criminal Justice Education and Training Standards Commission, 2020 NC OAH LEXIS 433, 20 DOJ 00742; Christon Michael Martin v. NC Sheriffs Education and Training Standards Commission, 2017 NC OAH LEXIS 69, 17 DOJ 03120; George Tracy Brogden v. North Carolina Sheriffs' Education and Training Standards Commission, 2016 NC OAH LEXIS 68, 15 DOJ 08607; William Buchanan Burgess v. North Carolina Sheriff's Training and Standards Commission, NC OAH LEXIS 123, 14 DOJ 00527.

[15] See Res. Ex. 13.

> NCAC 10B .0103(10)(b)(iii). ... Even if Petitioner had been notified of this reason for the Five-Year Denial, Cyberstalking is not a Class B misdemeanor. According to N.C.G.S. § 14-196.3(d), Cyberstalking is a Class 2 misdemeanor which has a maximum punishment of 60 days. N.C.G.S. § 15A-1340.23(c).[16]
>
> Christon Michael Martin v. NC Sheriffs Education and Training Standards Commission, 2017 NC OAH LEXIS 69, 17 DOJ 03120.[17]

90. The Tribunal concludes as a matter of law that there is insufficient evidence to conclude that with the March 23 messages Petitioner committed the criminal offense of "Cyberstalking." State v. Murphy, 225 N.C. 115, 116, 33 S.E.2d 588, 590, 1945 N.C. LEXIS 268.

91. The Tribunal also concludes as a matter of law, that, based on the above, Petitioner did not commit the alleged "combination of misdemeanors" cited in Respondent's Probable Cause Committee letter that supposedly justify revocation of Petitioner's certification under 12 NCAC 10B .0204(d)(3).

Lack of Good Moral Character

92. A core requirement for certification as a justice officer is that the applicant "be of good moral character as defined in" several appellate cases. See 12 NCAC 10B .0301(12). The first of those, In re Willis, 288 N.C. 1, 215 S.E. 2d 771 appeal dismissed, 423 U.S. 976 (1975), describes "good moral character" as "honesty, fairness, and respect for the rights of others and for the laws of the state and nation." Id. at 10, 776-7.

93. Good moral character is considered a minimum employment standard and, as such, the lack of it authorizes revocation or suspension of an officer's certification. William Robert Casey v. North Carolina Sheriffs' Education and Training Standards Commission, 2012 NC OAH LEXIS 5011, 11 DOJ 11632.

94. As the Tribunal has concluded as a matter of law that Petitioner did not commit any of the criminal offenses alleged, the remaining issue is whether Petitioner's proven conduct demonstrates a current lack of good moral character.

95. In conducting that analysis in this case, it is important to note that three of the four of Petitioner's "crimes" stemmed from the same act – the March 23 text messages – on the same day.

96. Moral character is a vague and broad concept. Jeffrey Royall v. N.C. Sheriffs Education and Training Standards Commission, 09 DOJ 5859; Jonathan Mims v. North Carolina Sheriffs Education and Training Standards Commission, 02 DOJ 1263, 2003 WL 22146102 at page 11-12 (Gray, ALJ) and cases cited therein.

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[16] Despite this, "Cyberstalking" is currently listed in Respondent's "Misdemeanor Manual" as a "Class B" misdemeanor (Res. Ex. 13).

[17] In its Final Agency Decision in Martin (December 22, 2017), Respondent found that there was "no legally held evidence" supporting the allegation that Martin committed the criminal offense of Cyberstalking.

97. The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In Konigsberg v. State, 353 U.S. 252, 262-63 (1957), the Court explained:

> The term good moral character . . . is by itself . . . unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial . . . (emphasis supplied).

98. For better or worse, society's standards for "good moral character" have shifted from one generation to another. Joshua Orion David v. NC Criminal Justice Education and Training Standards Commission, 2018 NC OAH LEXIS 490, 17 DOJ 06743. In the not-too-distant past, Petitioner's March 23 messages would be genuinely shocking. Today, in an age of Facebook, Twitter/X, and other social media, with their routine vulgarity and profanity, Petitioner's March 23 messages are more churlish and immature, indeed juvenile, than shocking.

99. Police officers, like other people, sometimes exercise poor judgment. "Troopers, like other public employees and officials, will occasionally say things that they should probably not say. Ideally, it is desired that law enforcement officers be near perfect; however, that is not a realistic standard." Andreas Dietrich v. N.C. Highway Patrol, 2001 WL 34055881, 00 OSP 1039.

100. This does not constitute approval of Petitioner's conduct. Sending the March 23 text messages, though not a criminal act, was not an act of good moral character. Daniel June Campbell v. NC Criminal Justice Education and Training Standards Commission, 2022 NC OAH LEXIS 307, 21 DOJ 03747 (Petitioner's refusal to undo real estate transaction with seller he learned to be incompetent was not an act of good moral character).[18] In general terms, Petitioner's proven conduct in this case, and some of his testimony, lead the Tribunal to question Petitioner's judgment, candor, and maturity.

101. That, however, is not the ultimate issue. Nor is the issue whether a hypothetical sheriff should employ Petitioner. The person best suited to determine whether a sheriff's office employee should serve is not the Tribunal or Respondent but the county sheriff, who is answerable for that employee's acts. Michael Douglas Wise v. NC Sheriffs Education and Training Standards Commission, 2021 NC OAH LEXIS 7, 20 DOJ 03444; William Scherr v. NC Sheriffs Education and Training Standards Commission, 2020 NC OAH LEXIS 490, 20 DOJ 01662.

102. The ultimate issue, rather, is whether the evidence shows that Petitioner presently lacks the good moral character – minimum standard – to serve as a deputy sheriff in North Carolina.

[18] Affirmed by Respondent's Final Decision dated September 2, 2022.

103. Due to concerns about the flexibility and vagueness of the good moral character rule, any denial, suspension, or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character is reserved for **clear and severe** cases of misconduct. Thus, "Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." In re Willis, 288 N.C. 1, 13, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975) (quoting In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924). This principle is well-established and has been repeatedly affirmed. In re Legg, 337 N.C. 628, 634, 447 S.E.2d 353, 356, 1994 N.C. LEXIS 494, *9.

104. The proven conduct of Petitioner contrary to good moral character, based on Respondent's allegations, is solely the March 23 messages. While suggesting poor judgment and immaturity, the March 23 messages are not "clear and severe" misconduct proving lack of good moral character. Also, occurring as they did on a single day, and being contrary to Petitioner's substantial history of prior good character as a law enforcement officer, they are an "isolated incident," also insufficient to establish lack of good moral character. In re Rogers, 297 N.C. 48, 253 S.E.2d 912, 1979 N.C. LEXIS 1131.

105. The Tribunal concludes as a matter of law that the evidence does not support the conclusion that Petitioner lacks good moral character. Campbell; see also Michael Giroux v. NC Criminal Justice Education and Training Standards Commission, 2023 NC OAH LEXIS 337, 23 DOJ 02864.

106. The Tribunal recommends that Respondent caution Petitioner that further incidents of the kind at issue here, if proven committed, will likely lead to action on his law enforcement certification.

PROPOSAL FOR DECISION

The Tribunal respectfully proposes that no action be taken against Petitioner's certification, but that Petitioner be cautioned that further incidents of the kind at issue here, if proven, will likely lead to action on his law enforcement certification.

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.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. 150B-42(a).

SO ORDERED.

This the 27th day of August, 2024.

Michael C. Byrne
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 27th day of August, 2024.

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