

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.)
_____)

**PROPOSED 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 December 7, 2023.

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

~~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.~~

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).

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 concerning the assault was ~~partially~~ credible ~~and partially not 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 ~~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.

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

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."

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 then 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 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 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~~ 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 ~~are~~ were properly before the Office of Administrative Hearings and there ~~is~~ was no question as to joinder or misjoinder. There was no objection from either party to the

~~Tribunal~~ 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. ~~Despite~~ Petitioner ~~was not being~~ ~~neither~~ charged nor convicted of any violation of N.C.G.S. 14- 32.1. Respondent’s Probable Cause Committee ~~nonetheless~~ 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. ~~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.~~

~~16.15. The Tribunal has found as a fact that Administrative Law Judge~~ 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~~

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.

~~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).~~

~~19.16.~~ 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

~~20.17.~~ 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.

~~21.18.~~ 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.”

~~22.19.~~ 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.

~~23.20.~~ The Tribunal 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 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).

~~24.21.~~ The Tribunal concluded, and Respondent also so 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.

~~25.22.~~ 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.

~~26.23.~~ The ~~Tribunal~~ Administrative Law Judge identifieds 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.

~~27.24.~~ The ~~Tribunal~~ Administrative Law Judge identifieds 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.

~~28.25.~~ The ~~Tribunal~~ Administrative Law Judge makdes no proposal to the Commission regarding 12 N.C.A.C. 10B.0205 regarding imposing a sanction other than revocation of Petitioner’s certification.

PROPOSAL FOR DECISION ORDER

~~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. Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Petitioner’s justice officer certification is hereby REVOKED.~~

IT IS SO ORDERED.

This the _____ day of _____, 2023.

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 **PROPOSED 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 20th day of November, 2023.

JOSHUA H. STEIN
Attorney General

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