

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.)
_____)

EXCEPTIONS

The following **Exceptions** to the **Proposal for Decision** prepared by the Honorable Michael C. Byrne, Administrative Law Judge, and filed in the Office of Administrative Hearings on August 30, 2023, are hereby submitted to the North Carolina Sheriffs' Education and Training Standards Commission for consideration in its Final Agency Decision.

1. Counsel has made minor typographical and grammatical changes as necessary to make the proposal appropriate for Final Agency Decision.
2. Burden of Proof paragraphs 1 through 3 should be deleted to accurately reflect the burden of proof standard.

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.~~

3. A paragraph on burden of proof should be added to correctly reflect the burden of proof standard.

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).

4. Finding of Fact No. 1 should be revised to accurately reflect the record.
 1. 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.

5. Finding of Fact No. 24 should be revised to accurately reflect the circumstances under which the statements by the victim were made.

~~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.~~

6. Conclusion of Law Nos. 1 and 2 should be revised to reflect the position of the Commission and the procedural posture in current tense.

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.
7. Conclusion of Law No. 13 should be revised to accurately reflect the record.
 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’¹ 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).
8. Conclusion of Law No. 14 should be revised to accurately reflect the proper standard of review of criminal offenses.
 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.”
9. Conclusion of Law No. 15 should be deleted to accurately reflect the current procedural posture for Final Agency Decision. The remaining paragraphs should be renumbered to accurately reflect the proper sequential numbering of paragraphs.
 15. ~~Accordingly, the Tribunal must analyze Petitioner’s actions compared with the elements of the crime.~~

¹ According to the General Statutes, the criminal offense is titled, “Assaults on individuals with a disability; punishments.” N.C.G.S. 14-32.1.

10. Conclusion of Law Nos. 17 and 18 should be deleted to remove unnecessary verbiage.
- ~~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 A 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).~~
11. Conclusions of Law Nos. 20 and 21 should be revised to reflect the current procedural posture of the case and conclusion of the Respondent.
- ~~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.
12. Proposal for Decision should be revised to reflect the final decision of the Commission as follows:

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**.

This the 20th day of November, 2023.

JOSHUA H. STEIN
Attorney General

/s/ J. Joy Strickland
J. Joy Strickland
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001
Telephone: (919) 716-6401
State Bar No.: 25695
COUNSEL TO THE COMMISSION

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing **EXCEPTIONS** 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