

STATE OF NORTH CAROLINA  
COUNTY OF ROBESON

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
23 DOJ 04213

TODD THOMAS )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 NORTH CAROLINA SHERIFFS' )  
 EDUCATION AND TRAINING )  
 STANDARDS COMMISSION, )  
 )  
 Respondent. )  
 )  
 \_\_\_\_\_ )

**PROPOSED FINAL AGENCY  
DECISION**

THIS MATTER was commenced by a request filed September 28, 2023, 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 (23 DOJ 04213) were filed October 2, 2023. The parties received proper Notice of Hearing and the Administrative Hearing was held in Fayetteville, North Carolina on January 9, 2024, before the Honorable John C. Evans, Administrative Law Judge.

The Petitioner was represented by counsel, Danny Earl Britt, Jr. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter the Commission or Respondent) was represented by Assistant Attorney General J. Joy Strickland.

On February 15, 2024, Judge Evans filed his Proposal for Decision. On February 20, 2024, 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 June 20, 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:

**FINDINGS OF FACT**

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

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2. The Commission 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 and to revoke, suspend, or deny such certification.

3. On March 27, 2018, the North Carolina Sheriff's Standards Division of the North Carolina Sheriff's Education and Training Standards Commission, (hereinafter "The Commission" or "Respondent") issued a General Certification as Deputy Sherriff to the Petitioner. (Resp. Ex. 3)

4. On December 16, 2022, Petitioner was involved in a vehicle collision with a deer. The Petitioner was transported to UNC Southeastern for a required post-accident drug screen. On January 12, 2023, the Robeson County Human Resources notified the Sherriff's Office that the Petitioner tested positive for codeine and morphine. (Resp. Ex 5 and 6)

5. Through certified mail in a letter dated July 20, 2023, the Commission informed the Petitioner that probable cause exists to believe that his justice officer certification must be summarily suspended. (hereinafter "Probable Cause Letter") The letter stated that the Commission was informed that the Petitioner produced a positive result on a drug screen and that pursuant to 12 NCAC 10B .0204(b)(5) they were required to revoke certification and that in accordance with 12 NCAC 10B .0410, the sanction, in this case the certification revocation, shall be for a period of not less five (5) years. (Resp. Ex 7)

6. The Probable Cause letter further informed the Petitioner that, "...no action to revoke your certification is being taken at this time. Final action on your certification is being deferred to allow you the opportunity to request an administrative hearing to be conducted in this matter." (Resp. Ex. 7)

7. On August 14, 2023, the Petitioner timely appealed and requested an administrative hearing. (Resp. Ex. 8, hereinafter "Appeal Letter")

8. In the Petitioner's Appeal Letter and during the hearing, it was stated that the failed drug screening resulted from the Petitioner having taken prescription medicines, which were not prescribed to him, from his mother's house. The Petitioner explained that upon returning from a cruise, feeling unwell, he resorted to over-the-counter medicine which proved ineffective.

9. The Petitioner testified that to get rid of a cough and COVID-like symptoms, he had taken small doses of the prescription medicines he found in his mother's house for approximately two weeks leading up to an accident that led to the failed drug screening.

10. The Petitioner's mother, Cathy Thomas, testified at the hearing and corroborated the Petitioner's testimony that he had in fact visited his mother's house and asked if there was any medicine in the house and she directed the Petitioner to the medicine cabinet.

11. Petitioner provided pictures of the three (3) prescription medicines he claimed to have taken. According to the labels on each of the three medicines, they were prescribed to the Petitioner's brother Joseph Thomas.

12. At hearing the Respondent tendered the affidavit of Dr. Janet Widerspan. Dr. Widerspan is employed as a physician with the D.R.S., a medical review service and prepared the

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report of the drug screen results.

13. Dr. Widerspan stated, through her affidavit, that two of the medicines, identified in Attachment 2 to her affidavit, “would NOT have caused a positive result for codeine and morphine.” Pet.’s Ex 11, ¶ 8)

14. However, Dr. Widerspan stated that the medicine identified in Attachment 3 of her affidavit was “Virtussin AC with codeine” and “if taken by donor in a relevant time period prior to his drug screen, could have caused a positive result for codeine and morphine.” (Pet.’s Ex 11, ¶ 9)

### CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has had personal and subject matter jurisdiction over this contested case, pursuant to Article 3A, N.C. Gen. Stat. § 150B-40(e), and the parties received proper notice of the hearing in this matter.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

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

4. Respondent, North Carolina Sherriff’s Education and Training Standards Commission, has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code (NCAC), Chapter 10B, to certify justice officers and to revoke, suspend, or deny such certification.

5. The party with the burden of proof in a contested case must establish the facts required by N.C. Gen. Stat. §150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. §150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. §150B-34(a).

6. While N.C. Gen. Stat. § 150B-40 enumerates the powers of the presiding officer, including an Administrative Law Judge in Article 3A cases, such statute does not address which party has the burden of proof in an Article 3A contested case hearing. Neither has the North Carolina Constitution nor the General Assembly addressed the burden of proof in Article 3A cases. However, the Commission has consistently held that Petitioner has the burden of proof in the case at bar as does a petitioner in an Article 3 case. *Overcash v. N.C. Dep’t. of Env’t & Natural Resources*, 179 N.C. App 697, 635 S.E.2d 442 (2006) (stating that “the burden of proof rests on the petitioner challenging an agency decision”).

~~5.7.~~ 12 NCAC 10B .0204(b)(5) states that Respondent shall revoke certification of a

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justice officer for not less than five years when the Commission finds the certified officer has produced a positive result on any drug screen as specified in 12 NCAC 10B .0410 and 12 NCAC 10B .0205(2)(g).

~~6.8.~~ Despite the provision outlined in 12 NCAC 10B .0204(b)(5), in accordance with 12 NCAC 10B .0205(g), the Commission retains the authority to mitigate or suspend sanctions when extenuating circumstances, as revealed during the administrative hearing, justify such action.

~~7.9.~~ At the administrative hearing, extenuating circumstances emerged. The Respondent presented an affidavit from Dr. Widerman, the medical review officer, indicating that one of the three medications purportedly taken by the Petitioner, if taken during the relevant time period could have led to a positive screen for codeine and morphine. The Petitioner confirmed consumption of these medications within the two weeks preceding the drug screening.

~~8.10.~~ It is evident that the Petitioner exercised poor judgment by ingesting prescription medications not prescribed to him and that there was a positive drug test, constituting a breach of 12 NCAC 10B .0410. However, the testimonial evidence, supported by Dr. Widerman's affidavit, suggests it is more probable than not that the positive drug screen stemmed from the medications consumed by the Petitioner.

### **PROPOSAL FOR DECISION ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, it is ~~proposed hereby~~ **ORDERED** that Petitioner's certification be REVOKED FOR (FIVE) 5 YEARS; however, that revocation be suspended and Petitioner be placed on PROBATION for a period of FIVE (5) YEARS due to the extenuating circumstances brought out at the administrative hearing, on the condition that during that period of probation, Petitioner not violate any law (other than infractions) of this state or any other state, any federal laws, or any rules of this Commission.

**IT IS SO ORDERED.**

This the \_\_\_\_\_ day of \_\_\_\_\_, 2024.

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**Jack Smith, Vice Chairman**  
North Carolina Sheriffs' Education and  
Training Standards Commission

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**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 following address:

**Danny Earl Britt, Jr.  
The Britt Law Firm  
216 N. Chestnut Street  
Lumberton, North Carolina 28358**

This the 29<sup>th</sup> day of May, 2024.

JOSHUA H. STEIN  
Attorney General

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