

STATE OF NORTH CAROLINA
COUNTY OF SAMPSON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 DOJ 02640

ISRAEL SOLORZANO BENITEZ,)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA SHERIFFS')
 EDUCATION AND TRAINING)
 STANDARDS COMMISSION,)
)
 Respondent.)
 _____)

EXCEPTIONS

The following **Exceptions** to the **Proposal for Decision** prepared by the Honorable Stacey Bice Bawtinhimer, Administrative Law Judge, and filed in the Office of Administrative Hearings on November 15, 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. Finding of Fact No. 2 should be amended to be consistent with the Commission's position on the applicable law. All remaining paragraphs should be renumbered to reflect proper sequential numbering.
- ~~1~~2. The North Carolina Sheriffs' Education and Training Standards Commission ("Respondent" or the "Commission") has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12, Chapter 10B of the North Carolina Administrative Code, to certify justice officers and to deny, revoke, or suspend such certification with valid proof of a rule violation.

3. Finding of Fact No. 4 should be amended to be consistent with the evidence presented at hearing.

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- 3.4. Based on the information before the Commission's Probable Cause Committee, they found probable cause to deny Petitioner's justice officer certification because:

on or about November 14, 2026, [Petitioner] committed the felony offense "Larceny Remove/Destroy/Deactivate Component," in violation of N.C. General Statute 14-72.11(2), when [Petitioner] unlawfully, willfully, and feloniously did remove an anti-theft device from a Columbia sports jacket in the Belk's Department Store. [Petitioner] attempted to exit the Belk's Department Store with unpurchased items but you were apprehended.

Stip. Ex. 1 (~~emphasis added~~)

4. Finding of Fact No. 4 should be deleted to remove superfluous language.
- ~~4. The Commission did not deny Petitioner's certification because he was convicted of a felony charge; therefore, the only issue before this Tribunal is whether Petitioner cannot be certified as a justice officer in North Carolina because he committed a felony offense.~~
5. Finding of Fact No. 7 should be converted into a footnote for ease of reference.
7. Petitioner was sixteen (16) years old at the time of the offense.¹
- ¹ Had the same facts happened today, because Petitioner was under the age of 18 years, he would have been charged under the Juvenile Code and adjudicated as a delinquent juvenile instead of charged or convicted as an adult.
6. Finding of Fact No. 8 should be added to be consistent with the evidence presented at hearing and remove superfluous language.
8. At the hearing, Petitioner admitted he intended to steal merchandise, including a North Face jacket, by concealing it inside of his clothing and moving towards the exit doors of Belk's Department ("Belk's") store in Wilmington, North Carolina. Petitioner also admitted that he removed an anti-theft device from a jacket and, if he had not been stopped by loss prevention or law enforcement, he would have left the store with the items. The value of the property Petitioner attempted to steal was approximately \$200.00. T pp 35-41. ~~But for the fact he had removed an anti-theft device which elevated the offense to a felony, he would have only committed a~~

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~~misdemeanor offense.~~

7. Finding of Fact No. 9 should be amended to be consistent with the evidence presented at hearing.

9. The Belk's store had multiple cash registers for purchase spread throughout the store ~~however, there was no clearly delineated last point of sale.~~

8. Finding of Fact No. 10 should be revised to be consistent with the evidence presented at trial and to remove superfluous language.

10. ~~Prior to exiting~~ As Petitioner was headed to exit the store, he was intercepted by Belk's loss prevention officer and/or a Wilmington police officer. ~~Petitioner credibly testified that he never left the store due to being stopped by the loss prevention officer or the police.~~

9. Finding of Fact No. 15 should be amended for accuracy/to be consistent with the applicable law.

15. Likewise, because both Class H Felony larceny and Class I attempted Felony larceny classifications are nonviolent felonies these felonies could also be expunged from Petitioner's record pursuant to N.C. Gen. Stat. § 15A-145.4 or N.C. Gen. Stat. § 15A-145.8A.

10. Finding of Fact No. 19 should be amended to remove superfluous language.

19. Sheriffs' Standards Division Field Representative Christopher Batten was assigned to investigate possible Commission rule violations by Petitioner. A summary of Batten's investigation was entered into evidence as Stipulated Ex. 2, pp 12-15. Investigator Batten's testimony ~~and that of Petitioner's were~~ was credible and corroborative.

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11. Finding of Fact No. 20 should be reworded to be consistent with the evidence presented at hearing.

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20. Petitioner's Probable Cause Hearing was held on March 23, 2023. Based on ~~his~~ Batten's investigation report and attached documentation, as well as the Petitioner's statements, the Probable Cause Committee found probable cause to ~~recommend denial of~~ deny Petitioner's deputy sheriff's certification ~~on March 3, 2023. Subsequently, on March 23, 2023, a~~

~~Probable Cause Hearing was held and Petitioner's certification was denied.~~

12. Finding of Fact No. 21 should be reworded for ease of reference.

21. ~~After the probable cause hearing~~ On April 11, 2023, after the Probable Cause Hearing, Petitioner filed a Petition to Expunge his criminal record. The Honorable District Court Judge Sandra Ray granted his Petition on April 17, 2023 and her Order of Expunction was faxed the same day to Shena Evans at the Sheriffs' Training Division. Stip. Ex. 3. Based on the documentary evidence, Ms. Evans did not forward the expunction documentation to Sirena Jones until May 10, 2023. *Id.*

13. Finding of Fact No. 22 should be moved under Conclusions of Law to be consistent with the Commission's style. All remaining paragraphs should be renumbered to reflect proper sequential numbering of paragraphs.

~~22. However, at the time of the Probable Cause Hearing, Petitioner had not expunged his criminal record.² Based on the information before it at the time, the findings of the Probable Cause Committee were not arbitrary or capricious.~~

~~² Even if Petitioner had expunged his criminal record before applying for certification, he was still required to disclose it, which he did. Notably, Petitioner's certification was not being denied on the grounds he lacks good moral character for nondisclosure.~~

14. Finding of Fact No. 28 should be removed because it is inconsistent with Commission precedent and it is located in the wrong section of the document.

~~28. Due to Petitioner's exemplary work history, the intervening expunction, and the subsequent June 23, 2023 amendment of N.C. Gen. Stat. § 17E-12(b), the Commission's decision should be reversed, and Petitioner should be granted his justice officer certification.~~

15. Conclusion of Law No. 11 should be revised to be consistent with the applicable law.

11. However, an attempted felony is still a felony. It is undisputed that Petitioner committed *attempted* felony Larceny From a Merchant. The only distinction between an actual larceny versus an attempted larceny is that an attempted felony is punishable under the next lower felony classification. N.C. Gen. Stat. § 14-2.5. As such, Petitioner's Class H Felony commission

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merely drops to a Class I Felony. Therefore, under Rule .0204(a), Petitioner still “committed” a felony, albeit a lower-class felony, which could subject him to sanctions by is a violation of the Commission’s rules.

16. Conclusion of Law No. 12 should be deleted to remove superfluous language. All remaining paragraphs should be renumbered to reflect proper sequential numbering of paragraphs.

~~12. But, there is yet another twist in this case—the expunction of Petitioner’s record and the intervening amendment of N.C. Gen. Stat. § 17E-12(b).~~

17. Conclusion of Law No. 12 should be amended to remove superfluous language.

~~13-12. Petitioner’s misdemeanor conviction was expunged pursuant to N.C. Gen. Stat. § 15A-145.8A. Similarly, had Petitioner been convicted of a Class H or I Felony, those felonies also could have been expunged because Petitioner was under 18 years of age at the time he committed them.~~

18. Conclusion of Law No. 14 should be deleted to remove superfluous language.

~~14. Class H and I Felonies are eligible for expunction under the same rules as Petitioner’s misdemeanor conviction. The requirements are that the offense must be committed prior to December 1, 2019 while the person was less than 18 years of age, but at least 16 years of age. Moreover, any active sentence, periods of probation, and post release supervision ordered for the offense must have been completed; and there are no outstanding orders for restitution or civil judgments. N.C. Gen. Stat. § 15A-145.8A(d). It is undisputed that Petitioner committed the Class I Felony in 2015 (before 2019) while he was over 16 but not yet 18 years of age and fulfilled all the requirements of his sentence. Additionally, since that time, Petitioner has not committed or been convicted of any other crime.~~

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19. Conclusion of Law No. 13 should be removed because it is inconsistent with the applicable law.

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~~15-13. Regardless of any expunction, Petitioner would still have been required to disclose to the Commission of an expunged felony conviction. N.C. Gen. Stat. § 15A-145.4(f3). But the Commission would not have been able to use the expunged conviction to deny Petitioner’s certification because the General Assembly removed the Commission’s discretion when it amended N.C. Gen. Stat. § 17E-12(b), the Commission’s enabling authority.~~

20. Conclusion of Law No. 14 should be amended for minor stylistic modification.

~~16.14. The Commission asserts that Rule .0204(a) requires them to deny Petitioner's certification. The Rule does states that: "[t]he Commission shall revoke 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 felony...". 12 NCAC 10B .0204(A)(1)³ (amended eff. February 1, 2023).~~

³Rule .0204's last amendment, effective February 1, 2023, corrected a citation in subsection (b)(5). Otherwise, subsection (a)(1) has been the same since at least 2005 which was the earliest archived version available for reviewing in LexisNexis.

21. Conclusion of Law No. 16 should be amended because it is inconsistent with he Commission's position on the applicable law and modified for ease of reading.

~~18.16. Since at least 2021, Rule .0204(a) has improperly implemented N.C. Gen. Stat. § 17E-12(b) which reads in pertinent part that: "[t]he Commission may deny, suspend, or revoke a person's certification based solely on that person's felony conviction, whether or not that conviction was expunged." N.C. Gen Stat. § 17E-12(b) (2021). Therefore, based on statutory authority current at the time of its decision, the Commission does have has discretion in deciding whether to grant Petitioner's certification for commission of a felony or even conviction of a felony.~~

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22. Conclusions of Law Nos. 19 through 22 should be deleted to remove superfluous language and it is inconsistent with Commission's position on the applicable law.

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~~19. In this case, Rule .0204(a) exceeds and, in fact, conflicts with the statutory authority afforded the Commission through N.C. Gen. Stat. § 17E-12(b). Contrary to Commission's Rule .0204(a) mandatory language of shall, the General Assembly enacted N.C. Gen. Stat. § 17E-12(b) which states that the Commission may deny a person's certification based solely on that person's felony conviction, whether or not that conviction was expunged." N.C. Gen. Stat. § 17E-12(b) (2021) (emphasis added).~~

~~20. This year, the General Assembly intentionally withdrew the Commission's discretion to deny, suspend or revoke a person's certification for convictions expunged under N.C. Gen. Stat. § 15A-145.4 or G.S. 15A-145.8A. This amendment became effective June 23, 2023. An amendment of a statute operates from the enactment leaving in force the portions which are not~~

altered. *Nichols v. Board of Councilmen*, 125 N.C. 13, 34 S.E. 71 (1899).

21. ~~As of June 23, 2023, the Commissions “may deny a person’s certification based solely on that person’s felony conviction, whether or not that conviction was expunged, unless the conviction was expunged pursuant to N.C. Gen. Stat. § 15A-145.4 or N.C. Gen. Stat. § 15A-145.8A.” N.C. Gen. Stat. § 17E-12(b) (2023) (emphasis added).~~
22. ~~Now for two specific categories of expunged felony records, the General Assembly prohibits the Commission from denying certification. These two categories involve offenses committed by persons over 16 but under 18 years of age who committed nonviolent felonies and completed statutory requirements or completed their sentencing. Compare N.C. Gen. Stat. § 15A-145.4 to N.C. Gen. Stat. § 15A-145.8A. This change was enacted to prevent juvenile indiscretions from being used to deny certification for otherwise qualified applicants like Petitioner.~~
23. Conclusion of Law No. 17 should be amended to remove superfluous language.
- ~~23.17. The Commission has discretion to grant or deny Petitioner’s justice officer’s certification for not just committing a felony but for actual conviction of a felony. Based on the Commission’s current discretionary authority, the totality of the circumstances, and Petitioner’s exemplary service, the Commission should take may consider taking no action against Petitioner’s justice officer certification.~~
24. Conclusion of Law No. 18 should be added to comply with the applicable law.
- ~~18. The findings of the Probable Cause Committee were not arbitrary or capricious.~~
25. Proposal for Decision should be revised to reflect the final decision of the Commission as follows:

PROPOSAL FOR DECISION ORDER

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby respectfully recommends that the Commission ~~REVERSE~~ its intended revocation of Petitioner’s justice officer certification is **DENIED**.

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This the 29th day of May, 2024.

JOSHUA H. STEIN
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/s/ Ameshia Cooper Chester
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CERTIFICATE OF SERVICE

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

**Barry Keith Henline
The Law Offices of Barry K. Henline, PLLC
Post Office Box 15862
Wilmington, North Carolina 28408**

This the 29th day of May, 2024.

JOSHUA H. STEIN
Attorney General

/s/ Ameshia Cooper Chester _____
Ameshia Cooper Chester
Special Deputy Attorney General
ATTORNEY FOR THE COMMISSION

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