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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF SAMPSON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 DOJ 02640

Israel Solorzano Benitez Petitioner, v. NC Sheriffs Education and Training Standards Commission Respondent.	**PROPOSAL FOR DECISION**

This matter was heard October 9, 2023 before the Honorable, Stacey Bice Bawtinhimer, Administrative Law Judge, in Fayetteville, North Carolina pursuant to the North Carolina Sheriffs' Education and Training Standards Commission's application for an administrative law judge to hear this case. N.C. Gen. Stat. § 150B-40(e).

APPEARANCES

For Petitioner: Barry K. Henline
The Law Offices of Barry K. Henline, PLLC
Post Office Box 15862
Wilmington, North Carolina 28408

For Respondent: Ameshia Cooper Chester
Special Deputy Attorney General North Carolina
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Special Prosecutions and Law Enforcement Section
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ISSUE

Whether Respondent's denial of Petitioner's justice officer certification for commission of the felony offense of Larceny/Remove/Deactivate Component, in violation of N.C. Gen. Stat. § 14-72.11, against Belk's Department Store, is supported by a preponderance of the evidence?

WITNESSES

For Petitioner:	Petitioner, Israel Benitez Captain Will Thurston, Duplin County Sheriff's Department Lieutenant Mike Maready, Duplin County Sheriff's Department Sargeant Daniel Hyde, Duplin County Sheriff's Department Corporal Tyler Humphries, Duplin County Sheriff's Department
For Respondent:	Serena Jones, Deputy Director North Carolina Sheriffs' Education and Training Standards Commission Christopher "Chris" Lee Batten, Investigator (retired)

EXHIBITS

Respondent's exhibits 1 - 4, were admitted into evidence by stipulation as Stipulated Exhibits ("Stip. Ex."). These exhibits are:

1	May 8, 2023 Probable Cause Notification Letter
2	March 3, 2023 Probable Cause Memorandum and Attachments
3	May 10, 2023 Email from S. Evans to S. Jones RE: Benitez Expunctions
4	Petitioner's Request for an Administrative Hearing Dated May 11, 2023

APPLICABLE STATUTES AND REGULATIONS

12 N.C.A.C. 10B .0204(a)(1) and 12 N.C.A.C. 10B .0205(1)(a)
N.C. Gen. Stat § 14-72.11; N.C. Gen. Stat § 14-72; N.C. Gen. Stat § 15A-145.4(f);
N.C. Gen. Stat § 15A-1458A(d); N.C. Gen. Stat § 17E-12(b).

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 Undersigned makes the following Proposed Findings of Fact and Conclusions of Law. In making the Proposed Findings of Fact, the Undersigned has weighed all of the evidence and assessed the credibility of the witnesses. The Undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have. Further, the Undersigned has carefully considered the opportunity of the witness 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. After careful consideration of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following:

PROPOSED FINDINGS OF FACT

1. Israel Solorzano Benitez ("Petitioner") is an applicant for deputy sheriff certification through the Duplin County Sheriff's Office. He has not previously held certification through Respondent or the North Carolina Criminal Justice Education and Training Standards Commission. Stipulated Ex. 2.

1. 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.

2. On May 8, 2023, Petitioner received by certified mail, the proposed denial letter, mailed by the Commission.

3. Based on the information before the Commission, 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. 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. It is undisputed that on November 14, 2016, Petitioner was arrested and charged with felony "Larceny From a Merchant" under N.C. Gen. Stat § 14-72.11(2) and misdemeanor larceny under N.C. Gen. Stat § 14-72 (A).

6. Petitioner was arrested based on two charges that he:

1. "unlawfully, willfully and feloniously did REMOVE ANTI THEFT DEVICE FROM A COLUMBIA SPORT JACKET;" and,
2. "unlawfully and willfully did steal, take away a BLACK NORTHFACE JACKET, A GUY HARVEY T-SHIRT, AND NIKE SHORTS., the personal property of BELK, such property having a value of $200.00."

Stip. Ex. 2, Attachment 2 p 6 (capitalization in original)

7. Petitioner was sixteen (16) years old at the time of the offense. 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.

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. 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 misdemeanor offense.

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.

10. Prior to exiting 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.

11. Based on the credible facts from both Petitioner's testimony and Investigator Batten's report, Petitioner did not commit Larceny from a Merchant because he never actually carried away Belk's property, one of the four essential elements of larceny. Instead, Petitioner committed "attempted" Larceny From a Merchant. This distinction, however, does not avail Petitioner relief from allegedly committing a felony.

12. Because he was intercepted before leaving the store, Petitioner did not commit felony larceny, a Class H felony. Instead, Petitioner committed **attempted** felony larceny which is a Class I felony.

13. After his attempted larceny, on December 15, 2016, Petitioner pled guilty to misdemeanor larceny and was ordered imprisonment for a term of 45 days. The felony charge filed against Petitioner was dismissed and the State did not proceed on that count. His 45-day sentence was suspended, and Petitioner was placed on unsupervised probation for 24 months. *Id.* p 7. In addition, Petitioner paid $110.00 in attorney fees and was ordered to complete 36 hours of community service during the first 90 days of his probationary period. *Id.*

14. Petitioner completed all the requirements of his sentence within his probationary period. Because this was his first offense and he completed his sentence, this charge was eligible for expungement and the conviction for misdemeanor larceny was expunged.

15. Likewise, because both Class H Felony larceny and Class I 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.

16. As an adult, Petitioner became interested in law enforcement and applied for justice officer certification pursuant to an employment application with the Duplin County Sheriff's Department.

17. Petitioner was admitted to basic law enforcement training and successfully completed the program.

18. Since December 16, 2021, Petitioner has been employed with the Duplin County Sheriff's Department (the "Department"). Stip. Ex. 2, p 4; T p 38.

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 credible and corroborative.

20. Based on his investigation report and documentation, the Probable Cause Committee found probable cause to recommend denial of 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.

21. After the probable cause hearing on April 11, 2023, 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.*

22. However, at the time of the Probable Cause Hearing, Petitioner had not expunged his criminal record.[1] Based on the information before it at the time, the findings of the Probable Cause Committee were not arbitrary or capricious.

23. In the meanwhile, the Commission notified Petitioner on May 8, 2023, that based on the information available to the Commission from the Probable Cause Hearing, the Commission decided that it had probable cause to deny Petitioner's justice officer certification. Stip. Ex. 1.

24. On May 11, 2023, Petitioner timely requested a contested case hearing before the Office of Administrative Hearings. Stip. Ex. 4.

25. Pursuant to Petitioner's request, on June 2, 2023, the Commission made application for an administrative hearing which was held on October 9, 2023.

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[1] 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.

26. Another significant intervening event occurred after the Commission's decision, the expunction of Petitioner's criminal record, and Petitioner's request for a contested case hearing. N.C. Gen. Stat. § 17E-12(b) was amended with an effective date of June 23, 2023. This amendment made it discretionary, not mandatory, for the Commission to deny, revoke or suspend the certification of a justice officer for a felony offense.

27. Petitioner has worked during his tenure with the Duplin County Sheriff's Department without issue. Four Deputy Sheriffs from the Department, including his supervising Captain, testified at the hearing about Petitioner's good work ethic and his character of truthfulness and honesty. Universally, they stated that Petitioner is an "exemplary employee," does a "fantastic job," "is ready and willing to work anytime needed," and "couldn't ask for a better officer." T pp 42-51. Moreover, in addition to the testimonies of the four deputies, both the Duplin County Sheriff and the Chief Deputy Sheriff attended the hearing in support of Petitioner.

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.

PROPOSED CONCLUSIONS OF LAW

Based on the Proposed Findings of Fact the Undersigned makes these Proposed Conclusions of Law:

1. The Parties stipulated that they are properly before the Undersigned Administrative Law Judge in that the Office of Administrative Hearings is the proper venue and has subject matter and personal jurisdiction over the Parties, and both Parties received proper notice of hearing.

2. To the extent that the Proposed Findings of Fact contain conclusions of law, or that the Proposed Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

3. The applicable rule is Rule .0204(a), Chapter 10B of Title 12 of the North Carolina Administrative Code which reads, in pertinent part, that: "The 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 a felony…".

4. Petitioner has not been convicted of a felony; he was convicted of misdemeanor larceny. Therefore, Petitioner can only be sanctioned for the **commission** of a felony.

5. "Larceny From a Merchant" becomes a Class H felony under certain circumstances. Two of which are relevant to this case. They are: 1. taking property valued at more than two hundred dollars ($200.00) and using an exit door to exit the premises; and 2. taking property of any value with the removal of an antishoplifting [anti-theft] device to prevent the activation of any antishoplifting or inventory control device. N.C. Gen. Stat § 14-72.11.

6. Mere removal of a antishoplifting device is not sufficient to charge a person with Larceny From a Merchant. All elements of larceny must be proven including the removal of the anti-theft device to show the commission of this felonious act.

7. "The essential elements of larceny are that [the] defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Justice*, 723 S.E.2d 798, (2012) citing *State v. Coats,* 74 N.C. App. 110, 112, 327 S.E.2d 298, 300 (1985) (citation omitted).

8. To be sufficient, "[a]n indictment under section 14–72.11(2) must allege the four elements of larceny and also removal of an antishoplifting or inventory control device." *Id*, at 801.

9. In discussing the indictment of the defendant in *Justice*, our Court of Appeals held "the indictment is also fatally flawed in that it alleges only an *attempted* rather than a *completed* larceny." *Id*, at 801.

10. Petitioner credibly asserted, and no credible evidence to the contrary was admitted, that the act at issue, occurred within the interior of the store, inside the last point of sale, and thereby demonstrated there was no *completed* larceny from a merchant but rather *attempted* larceny.

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 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 the Commission.

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).

13. 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.

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.

15. 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.

16. 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)[2] (amended eff. February 1, 2023).

17. Rules are designed to implement or interpret an enactment of the General Assembly. N.C. Gen Stat. § 150B-2(8a).

18. 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 discretion in deciding whether to grant Petitioner's certification for commission of a felony or even conviction of a felony.

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).

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[2] Rule .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.

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. 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 no action against Petitioner's justice officer certification.

PROPOSAL FOR DECISION

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.

NOTICE AND ORDER

The North Carolina Sheriffs' Education and Training Standards Commission will make the Final Decision in this contested case. As the Final Decision maker, that agency 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 pursuant to N.C. Gen. Stat. § 150B-40(e).

IT IS HEREBY ORDERED that the agency shall serve a copy of its Final Decision in this case on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6700. Moreover, the agency shall also serve a copy of its Final Decision upon each party by one of the methods for service of process under N.C. Gen. Stat. § 1A-1, Rule 5(b). A copy shall also be furnished to each party's attorney of record. N.C. Gen. Stat. § 150B-42(a).

IT IS SO ORDERED.

This the 15th day of November, 2023.

Stacey Bice Bawtinhimer
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 15th day of November, 2023.

Lisa J. Garner

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