

STATE OF NORTH CAROLINA
COUNTY OF COLUMBUS

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 DOJ 02641

<p>Junior Thompson Petitioner,</p> <p>v.</p> <p>NC Sheriffs Education and Training Standards Commission Respondent.</p>	<p>PROPOSAL FOR DECISION</p>
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This case came on for hearing on October 19, 2023, before Administrative Law Judge Samuel K. Morris in Jacksonville, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 17E of the North Carolina General Statutes.

APPEARANCES

Petitioner: Junior Thompson, *pro se*
131 Mill Pond Road, Lot 218
Whiteville, North Carolina 28472

Respondent: J. Joy Strickland
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

WITNESSES

Petitioner: None

Respondent: Sirena Jones, Respondent's Deputy Director
Chiffon Vereen, former spouse of Petitioner
Petitioner Junior Thompson

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EXHIBITS

Petitioner: None
Respondent: 1-5, 7-10, Judicial Notice of 6

ISSUES

Whether Respondent’s proposed denial of Petitioner’s justice officer certification for the commission of the Felony of Bigamy in violation of N.C.G.S §14-183 was supported by a preponderance of the evidence?

RULES AT ISSUE

12 NCAC 10B .0204(a)(1)
12 NCAC 10B .0205(1)(a)

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 Administrative Law Judge makes the following FINDINGS OF FACT.

In making the FINDINGS OF FACT, the undersigned Administrative Law Judge has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, 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.

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by certified mail, the proposed denial letter, mailed by Respondent, the North Carolina Sheriffs’ Education and Training Standards Commission (hereinafter "The Commission"), on May 8, 2023. (Respondent’s Exhibit #2)

2. Respondent, North Carolina Sheriffs’ 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, Chapter 10B, to certify sheriffs and to revoke, suspend, or deny such certification under appropriate circumstances with valid proof of a rule violation.

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3. Petitioner is currently seeking certification through the North Carolina Sheriffs' Education and Training Standards Commission. (Respondent's Exhibit #8)

4. The Commission's proposed denial of Petitioner's certification is based on the contention that Petitioner committed the Felony Offense of Bigamy in violation of N.C.G.S §14-183 and 12 NCAC 10B .0204(a)(1). Written notification of the finding of probable cause was provided to Petitioner in a certified letter dated May 8, 2023. (Respondent's Exhibit #2)

5. Petitioner first applied for certification with the Respondent, NC Sheriffs' Education and Training Standards Division on March 23, 2020, for a detention officer position with the Columbus County Sheriff's Office. Petitioner had previously been awarded certification by the North Carolina Criminal Justice Education and Training Standards Division on June 3, 2019, for a position with the Division of Adult Correction. (Respondent's Exhibit #5)

6. Petitioner completed Form F-3, Personal History Statement as part of his application for certification with the Respondent. Petitioner's signature was notarized on the Form F-3 on or about February 20, 2020. (Respondent's Exhibit # 9)

7. In response to question #44 on the Form F-3, Personal History Statement, which asks: Have you ever been arrested by a law enforcement officer or otherwise charged with a criminal offense? (As used in this question, the term "charged" includes being issued a citation or criminal summons.), Petitioner responded:

Bigamy charge

Bladen County

2/10/98

Case has been destroyed or purged from system as of 5/10/2019 capt. has a copy of this file.

(Respondent's Exhibit #9)

8. In addition to the submission of the Form F-3, the Columbus County Sheriff's Office submitted a Report of Appointment, Form F-4, to the Respondent on or about March 23, 2020. Included with the Form F-4 was a handwritten statement dated March 20, 2020, signed, and completed by Petitioner. In the statement Petitioner stated, in part, the following about the bigamy charge:

I was marry to a lady . . . we was separated but not divorced for about three months. And during that time I met another lady and we end up getting married. The first lady found out and filed charges against me. [sic]

(Respondent's Exhibit #7)

9. Petitioner provided a document from the Bladen County Clerk of Court regarding Bladen County File Number 98 CRS 002608 in the name of Junior Thompson indicating that the file had been destroyed pursuant to the record retention disposition schedule. However, the Bladen County Clerk's Office provided a certified copy of a "screen shot" of Bladen County File Number

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98 CRS 002608 showing Petitioner, Junior Thompson was charged and indicted for the Felony Offense of Bigamy in violation of N.C.G.S. § 14-183 for the offense date of February 10, 1998. The warrant charging Petitioner was served on April 23, 1998, and the case was dismissed on January 12, 1998. (Respondent's Exhibits #3-4)

10. Chiffon Vereen testified at the administrative hearing. Ms. Vereen testified that she was married to Petitioner for slightly less than one year and for a period they lived in South Carolina. Ms. Vereen identified her marriage certificate which indicated that she and Petitioner were married on December 31, 1996. She testified that they separated on December 24, 1997, and prior to their divorce she was notified by Petitioner's sister that he had remarried. Ms. Vereen then contacted law enforcement officials in Bladen County to report the bigamy offense. (Respondent's Exhibit #10, page 1)

11. Ms. Vereen had previously been provided with a copy of the indictment charging Petitioner with Bigamy. The indictment provides that in Bladen County File Number 98 CRS 2608, Junior Thompson was indicted for Bigamy in violation of N.C.G.S. § 14-183 for an offense occurring on or about February 14, 1998 when "the defendant named above unlawfully, willfully and feloniously did marry Gloria Marie White while still being married to Chiffon Vereen Thompson, who was living at the time, against the form of statute in such case made and provided and against the peace and dignity of the State. (Respondent's Exhibit #3, page 2)

12. Petitioner's marriage certificate to Gloria Marie White indicates that they married on February 14, 1998. (Respondent's Exhibit # 10, page 3)

13. Ms. Vereen stated that she filed for divorce from Petitioner in South Carolina in 1998 but the divorce was never finalized. (Respondent's Exhibit #10, page 2)

14. Ms. Vereen further testified that she did not pursue divorce proceedings in North Carolina because of the expense and Petitioner filed for divorce in September of 1998. (Respondent's Exhibit #10, page 4)

15. Petitioner testified at the administrative hearing. He testified that he worked at the Tabor Correctional Institute for about a year and a half and then joined the Columbus County Sheriff's Office. He could not remember the dates of his marriage or divorces but agreed that he married his second wife prior to being divorced from Chiffon Vereen. He indicated that he did not file for divorce in North Carolina until after he was charged with bigamy. He indicated that an attorney assisted him with filing for the divorce. Petitioner was credible and remorseful, stating that he took full responsibility for what he did and apologized to Ms. Vereen.

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. To the

extent that the findings of Facts contain Conclusions of Law, or that the Conclusions or Law are Findings of Fact, they should be so considered without regard to the given labels.

3. 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).

4. Respondent contends that the burden of proof belongs to the Petitioner. The issue of burden of proof has previously been raised with this ALJ in Article 3A hearings, and this ALJ has consistently held that the Respondent has the burden of proof, not merely the burden of going forward. Now is a good time to revisit and restate that position.

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. N.C. Gen. Stat. § 150B-40 provides that “hearings shall be conducted in a fair and impartial manner” and that the presiding officer, including the ALJ, may “regulate the course of the hearings.” That statutory provision allows the presiding officer to dictate who has the burden of proof. In this very case, the Respondent put on its evidence first and did so without any question of who had the burden of proof.

7. Respondent cites *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App 697, 635 S.E.2d 442, rev. denied 361 N.C. 220, 642 S.E.2d 445 (2007) for support of the premise that the Petitioner bears the burden of proof. *Overcash* is one in a series of cases which have ruled on the burden of proof in cases arising under Chapter 150B, Article 3, including particularly *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 455 S.E.2d 455, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995); and *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 176 N.C. App. 594, 627 S.E.2d 326 (2006).

8. All of these cases decide the issue of burden of proof according to Article 3 of Chapter 150B of the North Carolina General Statutes—not on Article 3A. This case is an Article 3A case.

9. From its inception, the North Carolina Administrative Procedure Act (“APA”), Chapter 150B of the North Carolina General Statutes contained two separate and distinct sets of administrative hearings provisions. Throughout the APA’s history, the General Assembly has had the ability to change this process, making one type of procedure for all agencies, but has not. Therefore, the distinction between the two is important and must be acknowledged.

10. The manner in which a contested case is commenced and conducted varies depending on whether Article 3 or Article 3A applies. Although many similarities exist between the two sets of administrative hearings provisions, they are decidedly different. Article 3A of the APA governs, among other things, occupational licensing agencies, including Respondent herein.

See John Aycock McLendon, Jr., *Contested Case Hearings Under the North Carolina Administrative Procedure Act: 1985 Rewrite Contains Dual System of Administrative Adjudication*, 64 N.C. L. Rev. 852, 857-58 (1986).

11. Both Article 3 and Article 3A independently contain separate provisions governing all aspects of the administrative hearings to which they apply. *Homoly v. N. Carolina State Bd. of Dental Examiners*, 121 N.C. App. 695, 697, 468 S.E.2d 481, 483 (1996). Article 3 of the APA applies to administrative hearings conducted by OAH before an administrative law judge, while Article 3A applies to “other administrative hearings” which are conducted by state agencies enumerated in § 150B-38(a). In Article 3A cases, when the agency requests an ALJ to preside, the ALJ is to sit and preside over the hearing in the place of the agency and makes a “proposal for decision” to send back to the agency. N.C. Gen. Stat. § 150B-40.

12. N.C. Gen. Stat. § 150B-40(e) provides that “[w]hen a majority of an agency is unable or elects not to hear a contested case,” the agency is to apply to the OAH for designation of an ALJ. In such case, “[t]he provisions of [Article 3A], rather than the provisions of Article 3, shall govern a contested case . . .” N.C. Gen. Stat. § 150B-40(e) (emphasis added). Section 150B-40 makes perfectly clear that a distinction exists between Article 3 and Article 3A cases. Any attempt to use the standards of Article 3 within an Article 3A proceeding is without merit. Any attempt to use the standards of Article 3 within an Article 3A proceeding would circumvent the very specific statutory dictates of the General Assembly.

13. If the legislature had intended Article 3 to apply to Article 3A hearings and procedure, it would have been unnecessary to include language that Article 3A provisions rather than Article 3 provisions apply when an Article 3A agency requests an ALJ to conduct an agency hearing. *Homoly*, 121 N.C. App. at 698-99. Clearly, the legislature intended each article to fully govern the administrative hearings to which each applies without overlap. *Id.*

14. A critical distinction between Article 3 and Article 3A contested cases is that in Article 3 cases, the agency has already taken an action that is averse to the interests of the petitioner and thus the petitioner files the contested case petition as provided by statute. In Article 3A contested cases, the agency is proposing to take an action and the agency initiates the process, not the aggrieved person. At the time of the initiation of the contested case process in Article 3A cases, the agency decision has not yet been made, which would be the springboard for commencing a contested case under Article 3. The agency decision will be made based upon the Article 3A contested case. See McLendon, 64 N.C. L. Rev. 852, 859-60 (1986). This distinction is even more significant now that OAH has final decision-making authority in Article 3 cases.

15. Article 3 and Article 3A both contain provisions which are the same or very similar, such as provisions governing venue, conduct of hearing, depositions and discovery, evidence, and designation and powers of the ALJ or presiding officer. *Homoly*, 121 N.C. App. at 696, 468 S.E.2d at 482.

16. There are also distinct differences between the two. If Article 3 applied to hearings before agencies listed in Article 3A, many provisions would conflict. *Homoly*, 121 N.C. App. at 698-99.

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17. Article 3, a general provision, applies to all administrative agency hearings not covered by Article 3A. Those agencies covered under Article 3A are specifically listed in N.C. Gen. Stat. § 150B-38(a). “It is a well-established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] sections which are general in their application.” *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citing *Utilities Comm. v. Coach Co.*, 236 N.C. 583, 73 S.E.2d 562). In this case, hearings conducted by Respondent are governed by the specific provisions of Article 3A, rather than the more general provisions of Article 3 of the APA. *Homoly*, 121 N.C. App. at 698-99.

18. Thus, the contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely. *Id.*; see also Opinion of Attorney General to Mr. Phillip T. Fisher, Executive Director of Real Estate Commission, 57 N.C.A.G. 85 (1987) (wherein the Attorney General of North Carolina specifically counseled that N.C. Gen. Stat. § 150B-23(a), a provision in Article 3, did not apply to agencies governed by Article 3A).

19. N.C. Gen. Stat. § 150B-38(h) provides that “[e]very agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.” The article to which the statute is referring to is Article 3A.

20. Respondent’s rules for administrative hearings is found at 12 NCAC 10B .0105. That rule specifically states that an administrative hearing in contested cases “shall be governed by procedures set out in Article 3A of G.S. 150B.” 12 NCAC 10B .0105 (emphases added).

21. Rule 12 NCAC 10B .0105 goes on to say that “[t]he rules establishing procedures for contested cases . . . as contained in Title 26, Chapter 3 of the North Carolina Administrative Code are hereby incorporated by reference.” Many of the rules contained within Title 26, Chapter 3 of the NCAC are not consistent with Article 3A but are in line with Article 3 hearings. To the degree that the rules are inconsistent with N.C. Gen. Stat. § 150B Article 3A, those rules shall not apply to hearings conducted under Article 3A. The dictates of the statute are paramount and shall control.

22. The powers of the presiding officer, including an ALJ in Article 3A cases, are enumerated in N.C. Gen. Stat. § 150B-40, which is within Article 3A. Thus, the statute itself states what the ALJ may do while presiding over an Article 3A case.

23. Even if the powers and duties given to the Administrative Law Judges in Title 26, Chapter 3 of the NCAC as to the conduct of an Article 3A hearing are incorporated by reference by the rule, there is nothing within the statutes or rules which addresses the burden of proof.

24. In *Peace v. Employment Sec. Comm'n of N. Carolina*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998), the North Carolina State Supreme Court addressed the burden of proof. Although *Peace* is an Article 3 case, the discussion of burden of proof is instructive in this case. The North Carolina Supreme Court notes that, at the time this decision was rendered, neither the North Carolina Constitution nor the North Carolina General Assembly has specifically addressed the

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proper allocation of the burden of proof in “just cause” termination cases. That was rectified in 2015 with the enactment of N.C. Gen. Stat. § 150B-25.1, which speaks to burden of proof in Article 3 cases.

25. As articulated in *Peace*, neither the Constitution nor the General Assembly has addressed the burden of proof in Article 3A cases. In that absence of direction, the Court notes that the burden of proof appropriately should be “judicially allocated on considerations of policy, fairness and common sense.” (internal cite omitted). *Peace*, 349 N.C. at 328

26. *Peace* articulated two general rules for allocation of the burden of proof outside the criminal process. One is that the burden of proof rests on the party who asserts the affirmative, in substance rather than form. Secondly, the burden rests on the party with peculiar knowledge of the facts and circumstances. *Peace* at 328

27. Applying these general principles to this contested case, with “considerations of policy, fairness and common sense,” the Respondent should bear the burden of proof in an action in which the Respondent has investigated a license/ certificate holder or applicant and, based on that investigation, wants to take some action against that license/ certification. The Agency has the particular information upon which the process is initiated although the Petitioner may have received a general statement about what is at issue. The Respondent is asserting the violation by the Petitioner and therefore is in command of the peculiar facts and circumstances upon which it bases the issue. It is the Respondent who asserts the affirmative in substance. To put the burden on the license or certificate holder is tantamount to requiring a criminal defendant to prove that he did not commit a criminal act—a notion repugnant to considerations of fairness and commonsense.

28. Historically, in Article 3A hearings, a license or certification is considered “property or rights,” which entitles the applicant or holder to a contested case hearing pursuant to Article 3A. When a license or certification is at issue, whoever is trying to take that license or certificate away generally has the burden of proof.

29. In sum, the Agency has the burden of proof in Article 3A contested case hearings. In this contested case, the Agency has met its burden of proof.

30. The uncontroverted evidence at the hearing supports the finding of the Respondent that Petitioner committed the Felony offense of Bigamy in violation of N.C.G.S § 14-183 on or about February 14, 1998, the date of his marriage to Gloria White.

31. 12 NCAC 10B .0204 provides that:

(a) 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:

(1) a felony

32. N.C.G.S. § 14-183 provides:

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If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be punished as a Class I felon.

33. 12 NCAC 10B .0205 provides that:

When the Commission suspends, revokes, or denies the certification of a justice officer, the period of sanction shall be:

(1) Permanent where the cause of sanction is:

(a) commission or conviction of a felony.

34. Although Petitioner testified credibly and was remorseful for his actions over twenty years ago, this Tribunal is not a court of equity—it must follow the law as it is written.

35. The preponderance of the evidence produced during this contested case hearing demonstrates that Petitioner committed the Felony Offense of bigamy in violation of N.C.G.S. § 14-183.

36. The finding of the Respondent's Probable Cause Committee was not arbitrary or capricious.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby proposed that Petitioner's justice officer certification is **DENIED permanently pursuant to 12 NCAC 10B .0204(a)(1) and 12 NCAC 10B .0205(1)(a)** due to him committing the Felony offense of Bigamy in violation of N.C.G.S § 14-183.

NOTICE

The agency making the final decision in this contested case 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. N.C.G.S. § 150B-40(e).

The agency that will make the final decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. § 150B-42(a).

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IT IS SO ORDERED.

This the 4th day of December, 2023.

A handwritten signature in black ink, appearing to read "Samuel K Morris", written over a solid horizontal line.

Samuel K Morris
Administrative Law Judge

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BY SHERIFF'S STANDARDS

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 4th day of December, 2023.



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BY: SHERIFF'S STANDARDS