

STATE OF NORTH CAROLINA
COUNTY OF COLUMBUS

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 DOJ 02641

JUNIOR THOMPSON,)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA SHERIFFS')
 EDUCATION AND TRAINING)
 STANDARDS COMMISSION,)
)
 Respondent.)
)
 _____)

EXCEPTIONS

The following **Exceptions** to the **Proposal for Decision** prepared by the Honorable Samuel K. Morris, Administrative Law Judge, and filed in the Office of Administrative Hearings on December 4, 2024, 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. Conclusion of Law No. 4 should be deleted to reflect the Commission's position regarding the burden of proof. All remaining paragraphs should be renumbered to reflect proper sequential numbering of paragraphs.
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.~~
3. Conclusion of Law No. 4 should be amended to reflect the Commission's position regarding the burden of proof.
- 5.4. 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

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Stat. § 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). Should a reviewing court hold that the burden of proof in this case was on the Respondent, the Respondent met its burden.

4. Conclusion of Law No. 5 should be amended to reflect the Commission's position on the burden of proof.

~~6.5.~~ 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.~~

5. Conclusions of Law Nos. 7 - 29 should be deleted to reflect the Commission's position regarding the burden of proof. All remaining paragraphs should be renumbered to reflect proper sequential numbering of paragraphs.

~~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,~~

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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,~~

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~~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.~~
- ~~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).~~

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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 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~~

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~~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.~~

6. Conclusion of Law No. 10 should be revised to reflect that the tribunal is OAH.

10. Although Petitioner testified credibly and was remorseful for his actions over twenty years ago, ~~this~~ the Tribunal Administrative Law Judge concluded that the Administrative Office of the Courts is not a court of equity—it and must follow the law as it is written.

7. Proposal for Decision should be revised to reflect the final decision of the Commission as follows:

PROPOSAL FOR DECISION ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ~~proposed~~ **ORDERED** 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.

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This the 29th day of May, 2024.

JOSHUA H. STEIN
Attorney General

/s/ J. Joy Strickland
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BY SHERIFFS STANDARDS

CERTIFICATE OF SERVICE

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

**Junior Thompson
131 Mill Pond Road, Lot 218
Whiteville, North Carolina 28472**

This the 29th day of May, 2024.

JOSHUA H. STEIN
Attorney General

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

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