

STATE OF NORTH CAROLINA
COUNTY OF EDGECOMBE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 DOJ 02859

MICHAEL THOMAS CANNON,)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA SHERIFFS')
 EDUCATION AND TRAINING)
 STANDARDS COMMISSION,)
)
 Respondent.)
)
 _____)

EXCEPTIONS

The following **Exceptions** to the **Proposal for Decision** prepared by the Honorable Lawrence R. Duke, Administrative Law Judge, and filed in the Office of Administrative Hearings on May 9, 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. The burden of proof paragraph should be deleted and replaced with the Commission's position on burden of proof.

~~There is no statutory allocation of the burden of proof in contested cases heard under Article 3A of the Administrative Procedure Act. In the absence of that direction, the burden of proof is "judicially allocated on considerations of policy, fairness and common sense." 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 37 (4th. Ed. 1993); citing *Peace v. Employment Sec. Comm'n of N. Carolina*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998); *Robert Shawn Gaddis v. North Carolina Sheriffs Education and Training Standards Commission*, 2023 WL 2424080, 22 DOJ 03415.~~

~~While at least one appellate decision in the Chapter 150B, Article 3 context suggests approval of requiring petitioners to prove a negative, no North Carolina appellate court has endorsed the State, in any form, first deciding that a citizen committed a crime and then requiring that citizen to prove that they did not. *Christopher Lee Jackson v. NC Criminal Justice Education and Training Standards Commission*, 2021 WL 2779127, 20 DOJ 04578.~~

~~Thus, when Respondent's agency action is based on its conclusion that a citizen not~~

~~convicted of a crime nonetheless “committed” a crime, the burden of proof is on Respondent to show, by (at least) a preponderance of the evidence, that the person’s actions satisfied all elements of the crime. Christopher Garris v. NC Criminal Justice Education and Training Standards Commission, 2019 WL 2183214, 18 DOJ 04480.~~

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).

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”).

3. The paragraph below should be deleted to reflect the position of the Commission.

~~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 Tribunal makes the following:~~

4. Findings of Fact Nos. 3 and 4 should be amended to more accurately reflect facts of the case and testimony at hearing, and also include relevant dates.
 3. ~~Petitioner applied~~ is an applicant for deputy sheriff for justice officer certification with Respondent through the Greene County Sheriff’s Office. ~~Petitioner was a credible witness.~~
 4. ~~Petitioner had been~~ was previously certified as a law enforcement officer from 1997 to 2002. ~~Petitioner and~~ was employed with the Winterville Police Department from November 18, 1993 to June 19, 1997, the Belhaven Police Department from September 22, 1999 to July 6, 2000, and the Youngsville Police Department from July 5, 2000 to November 15, 2002. (Respondent’s Exhibit 4). Since leaving the Youngsville Police Department in November 2002, Petitioner had been a self-employed commercial and residential painting contractor.
5. Finding of Fact No. 10 should be amended to accurately reflect facts of the case and testimony at hearing.
 10. In reference to Franklin County file number 02CR53286, Det. Russell Ogden, formally of Youngsville Police Department and the charging officer

~~in 02CR53286~~, provided sworn, remote testimony at the hearing. Det. Ogden testified that he had been training Petitioner to be a detective at Youngsville Police Department, noted no problems with Petitioner on the job, ~~and~~ considered Petitioner to be a good ~~police officer who~~ candidate for a promotion within the agency, and recalled Cannon acted professionally while in the performance of his duties as an officer. Det. Ogden testified that he responded on November 13, 2002 to the call reporting a disturbance at Cannon's apartment. Det. Ogden immediately observed visible injuries to Michael Manning's face. At that time, Manning reported to Det. Ogden that he and Petitioner had been excessively drinking and got into a fight. Det. Ogden did not pursue charges as that time, as Manning did not wish to pursue charges against Petitioner and both parties agreed to not fight anymore. After notifying the Chief of Police of the incident, Det. Ogden retrieved Petitioner's duty weapon, badge, identification, and police vehicle keys. Later that day, Det. Ogden responded to another call reporting a disturbance at Petitioner's apartment. At that time, Det. Ogden observed additional injuries to Manning's body consistent with another assault. Manning reported that Petitioner used "police force" on him. Again, Manning did not wish to pursue charges, but Det. Ogden decided to arrest and charge Petitioner for assaulting Manning.

6. Findings of Fact Nos. 13 and 14 should be amended to provide consistent formatting and clarity, as well as more accurately reflect facts of the case and testimony at hearing.
 13. In reference to Franklin County file number 03CR51161, the accompanying charges of misdemeanor assault on government official/employee and resisting a public officer were dismissed pursuant to the plea to Communicating Threats. (Respondent's Exhibits 6, 30, 31). ~~In reference to Franklin County file number 03CR51161, the following sworn testimony was provided at the hearing:~~
 14. In reference to Franklin County file number 03CR51161, Petitioner provided sworn testimony at the hearing and admitted he was guilty of misdemeanor assault on a government official/employee and resisting a public officer. (T. p. 181:10-18). Petitioner stated he and his girlfriend were involved in a domestic dispute, which led to two law enforcement officers responding to his residence. Petitioner's vehicle was blocking his girlfriend's vehicle in the driveway, preventing her from leaving. Petitioner admitted he was too intoxicated to move his vehicle, and as law enforcement tried to assist in moving the vehicle, Petitioner stated he "resisted a little." (T. p. 166:11). Petitioner admitted that after Sgt. Mitchell had touched his shoulder, Petitioner pushed Sgt. Mitchell into the vehicle, going down to. Petitioner was then pepper sprayed and fell to the ground with the officers.
7. Finding of Fact No. 28 should be amended to more accurately reflect facts of the case and testimony at hearing, and also include relevant dates.

28. In 2021, Petitioner applied to be a school resource officer sworn deputy with the Greene County Sheriff's Office. Petitioner disclosed his past record and was assault charges and impaired driving offense to former Greene County Sheriff Lemmie Smith who stated he was willing to hire Petitioner with the understanding that he would if Petitioner was willing to go back through BLET school.
8. Finding of Fact No. 33 (a-i) should be added to provide relevant facts detailing the omitted charges.
- a. Petitioner failed to divulge he was charged in Franklin County file number 03CR51832 for the July 18, 2003 misdemeanor offense of interfere with utility meter, in violation of N.C. Gen. Stat. § 14-151.1, a Class B Misdemeanor. On October 28, 2003, the case was disposed by way of voluntary dismissal in consideration of restitution paid to the Town of Franklinton. (Respondent's Exhibit 32)
- b. Petitioner failed to divulge he was charged in Franklin County file number 03CR51833 for the July 21, 2003 misdemeanor offense of interfere with utility meter, in violation of N.C. Gen. Stat. § 14-151.1, a Class B Misdemeanor. On October 28, 2003, the case was disposed by way of voluntary dismissal in consideration of restitution paid to the Town of Franklinton. (Respondent's Exhibit 33)
- c. Petitioner failed to divulge he was charged in Franklin County file number 03CR51833 for the July 21, 2003 misdemeanor offense of injury to real property, in violation of N.C. Gen. Stat. § 14-127, a Class B Misdemeanor. On October 28, 2003, the case was disposed by way of voluntary dismissal in consideration of restitution paid to the Town of Franklinton. (Respondent's Exhibit 34)
- d. Petitioner failed to divulge he was charged in Franklin County file number 03CR51161 for the May 11, 2003 misdemeanor offense of communicating threats, in violation of N.C. Gen. Stat. § 14-277.1, a Class B Misdemeanor. On February 9, 2004, Petitioner pleaded guilty to Misdemeanor Communicating Threats, with prayer for judgment continued. (Respondent's Exhibit 6)
- e. Petitioner failed to divulge he was charged in Franklin County file number 03CR53389 for the May 24, 2003 misdemeanor offense of simple worthless check, in violation of N.C. Gen. Stat. § 14-107(D)(1), a Class A Misdemeanor. On January 23, 2004, Petitioner pleaded guilty as charged. Petitioner was ordered to pay court costs and restitution in the amount of \$96.98. (Respondent's Exhibit 7)
- f. Petitioner failed to divulge he was charged in Franklin County file number 04CR51125 for the June 11, 2003 misdemeanor offense of simple worthless check, in violation of N.C. Gen. Stat. § 14-107(D)(1), a Class A

Misdemeanor. On March 24, 2009, Petitioner pleaded guilty as charged. Petitioner was sentenced to 30 days in the custody of the Sheriff. Petitioner's sentence was suspended for a term of 6 months unsupervised probation, on conditions that Petitioner pay court costs, fine, and restitution in the amount of \$308.35. (Respondent's Exhibit 8)

g. Petitioner failed to divulge he was charged in Franklin County file number 03CR51694 for the June 13, 2003 misdemeanor offense of simple worthless check, in violation of N.C. Gen. Stat. § 14-107(D)(1), a Class B Misdemeanor. On August 5, 2003, Petitioner pleaded guilty as charged. Petitioner was ordered to pay court costs and restitution in the amount of \$60.87. (Respondent's Exhibit 9)

h. Petitioner failed to divulge he was charged in Franklin County file number 03CR52388 for the August 15, 2003 misdemeanor offense of worthless check closed account, in violation of N.C. Gen. Stat. § 14-107(D)(4), a Class B Misdemeanor. On February 9, 2004, Petitioner pleaded guilty as charged. Petitioner was sentenced to 45 days in the custody of the Sheriff. Petitioner's sentence was suspended for a term of 12 months unsupervised probation, on conditions that Petitioner pay court costs, fine, and restitution in the amount of \$135.00. (Respondent's Exhibit 10)

i. Petitioner failed to divulge he was charged in Franklin County file number 04CR51678 for the April 23, 2004 misdemeanor offense of simple worthless check, in violation of N.C. Gen. Stat. § 14-107(D)(1), a Class B Misdemeanor. On March 24, 2009, Petitioner pleaded guilty as charged. Petitioner's sentence was consolidated for one judgment (Respondent's Exhibit 11) with Franklin County file number 04CR51125. (Respondent's Exhibit 8)

9. Finding of Fact No. 34 should be amended to more accurately reflect facts of the case and testimony at hearing.

34. After it was discovered that the Petitioner had not disclosed certain charges on his Personal History Form F-3, Respondent requested a statement from the Petitioner explaining the omission. Petitioner explained in writing to Respondent on July 18, 2022, that the Franklin County these charges had been dismissed, were therefore not listed on the criminal history report he had obtained, and "because the charges were dismissed," he did were therefore not included on Petitioner's Form F-3. (Respondent's Exhibit 40).

10. Finding of Fact No. 35 should be amended to more accurately reflect the facts of the case and testimony at hearing.

35. Petitioner credibly testified that there was no intent to mislead the Greene County Sheriff's Office or Respondent about this criminal record history, and Respondent did not establish this intent. but Petitioner did admit to remembering some of the charges while completing the Personal History

Form F-3, but that he “just did not put them up there” because they were not on the criminal history report. (T. p. 136).

11. Conclusion of Law No. 17 should be deleted because burden of proof already addressed.
- ~~17. Petitioner has the burden of proof in this Chapter 150B, Article 3A contested case, except in those instances where Respondent’s action is based on its conclusion that Petitioner, while not convicted of a crime, nonetheless “committed” a crime. Where Respondent has based its action on Petitioner having “committed” a crime, the burden of proof is on Respondent to show, by (at least) a preponderance of the evidence, that Petitioner’s actions satisfied all elements of the crime. *Garris*, 2019 WL 2183214, 18 DOJ 04480.~~
12. Conclusions of Law Nos. 19-21 should be amended/deleted to accurately reflect the allegations at issue, the facts of the case, and testimony at hearing, as well as provide necessary detail.
19. ~~The preponderance of the evidence presented at the hearing supports a finding that Petitioner disclosed the November 2002 Simple Assault charge on Michael Manning brought by the Youngsville Police Department but that he was not guilty by reason of self defense. The preponderance of the evidence presented at the hearing supports a finding that Petitioner committed the misdemeanor offense of simple assault, in violation of N.C. Gen. Stat. § 14-33(A), a Class A Misdemeanor, in Franklin County file number 02CR53286. (Respondent’s Exhibit 39).~~
20. The preponderance of the evidence at the hearing fails to support a finding that Petitioner committed the offense of making a threatening phone call as alleged by Eric Dorsey in December 2002 in Franklin County file number 02CR53432 for the December 5, 2002 misdemeanor offense of threatening phone call, in violation of N.C. Gen. Stat. § 14-196(a)(2), a Class B Misdemeanor.
21. ~~The preponderance of the evidence presented at the hearing supports a finding that Petitioner disclosed the May 2003 Assault on Government Official charge by the Franklinton Police Department.~~
13. Conclusion of Law No. 22 should be amended to accurately reflect the allegations at issue, the facts of the case and testimony at hearing, as well as provide necessary detail.
22. ~~Although the Assault charge was dismissed in exchange for pleading guilty to Communicating Threats, the~~ The preponderance of the evidence supports a finding that Petitioner committed the offenses of was convicted in Franklin County file number 03CR51161 of misdemeanor communicating threats, in violation of N.C. Gen. Stat. § 14-277.1, a Class A Misdemeanor.

Further, the preponderance of the evidence presented at the hearing supports a finding that Petitioner also committed the offenses of assault on a police officer government official/employee of N.C. Gen. Stat § 14-33(c)(4) and resisting arrest a public officer, in violation of N.C. Gen. Stat. § 14-223, both of which are Class B Misdemeanors. (Respondent’s Exhibit 39).

14. Conclusion of Law No. 23 (a-k) should be added to accurately reflect the allegations at issue, the facts of the case and testimony at hearing, as well as provide necessary detail.

- a. Class A Conviction: Pitt Co. 05CR52024 Simple Worthless Check
- b. Class B Conviction: Pitt Co. 05CR60670 Simple Worthless Check
- c. Class B Conviction: Pitt Co. 05CR60671 Simple Worthless Check
- d. Class B Conviction: Pitt Co. 05CR60672 Simple Worthless Check
- e. Class B Conviction: Pitt Co. 05CR60669 Simple Worthless Check
- f. Class A Conviction: Franklin Co. 03CR53389 Simple Worthless Check
- g. Class A Conviction: Franklin Co. 04CR51125 Simple Worthless Check
- h. Class B Conviction: Franklin Co. 03CR51694 Simple Worthless Check
- i. Class A Conviction: Wake Co. 06CR90390 Simple Worthless Check
- j. Class B Conviction: Franklin Co. 03CR52388 Worthless Check-- Closed Account
- k. Class B Conviction: Franklin Co. 03CR51678 Simple Worthless Check

15. Conclusion of Law No. 25 should be amended to accurately reflect the allegations at issue, the facts of the case and testimony at hearing, as well as provide necessary detail.

25. The preponderance of the competent evidence presented at the hearing does not support a finding that Petitioner’s omission of the nine Franklin County charges, that were dismissed and did not appear on his criminal records check, constitutes a “material misrepresentation” as defined by 12 NCAC 10B-0205(2)(b). knowingly made a material misrepresentation of required information and/or intentionally and designedly misrepresented to obtain certification, by failing to divulge the following charges.

- a. Franklin Co. 03CR51832 Interfere w/ Utility Meter
- b. Franklin Co. 03CR51833 Interfere w/ Utility Meter
- c. Franklin Co. 03CR51833 Injury to Real Property

- d. Franklin Co. 03CR51161 Communicating Threats
- e. Franklin Co. 03CR53389 Simple Worthless Check
- f. Franklin Co. 04CR51125 Simple Worthless Check
- g. Franklin Co. 03CR51694 Simple Worthless Check
- h. Franklin Co. 03CR52388 Worthless Check – Closed Account
- i. Franklin Co. 03CR51678 Simple Worthless Check

16. Conclusions of Law Nos. 27 and 28 should be deleted as finding unsupported by the record.

~~27. The undersigned Administrative Law Judge has carefully weighed the nature of the criminal offenses, the dates of the offenses, Petitioner’s age and circumstances at the time of the offenses, Petitioner’s restitution, Petitioner’s employment record and lifestyle for the last 20 years, and the character references presented in support of Petitioner’s application.~~

~~28. Accordingly, the undersigned finds that the preponderance of the evidence presented at the hearing demonstrates sufficient extenuating circumstances to warrant the granting of Petitioner’s application with a period of probation.~~

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

PROPOSAL FOR DECISION ORDER

~~NOW, THEREFORE, bBased upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned Administrative Law Judge recommends it is hereby **ORDERED** that Petitioner's justice officer certification ~~be is~~ **DENIED** for an indefinite period for convictions or commissions of a combination of Class A and Class B misdemeanors; and denied for a period of five years for material misrepresentation concerning Petitioner’s omission of offense from a Commission form that is require for justice officer certification. Alternatively, it is proposed that a period of probation in lieu of Petitioner’s justice officer certification, if extenuating circumstances warrant such a reduction or suspension. however, that period of denial be **SUSPENDED** for a period of ONE year and the certification be **GRANTED** on the condition that Petitioner not violate any law (other than infractions) of this state or any other state, any federal laws, or any rules of this Commission or the North Carolina Criminal Justice Education and Training Standards Commission.~~

This the 23rd day of August, 2024.

JOSHUA H. STEIN
Attorney General

/s/ Haley A. Cooper
Haley A. Cooper
Assistant Attorney General

N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001
Telephone: (910) 926-6015
State Bar No.: 47662
COUNSEL TO THE COMMISSION

CERTIFICATE OF SERVICE

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

**Robert O. Crawford, III
4242 Six Forks Road, Suite 1550
Raleigh, North Carolina 27609**

This the 23rd day of August, 2024.

JOSHUA H. STEIN
Attorney General

Attorney General

/s/ Haley A. Cooper _____
Haley A. Cooper
Assistant Attorney General
ATTORNEY FOR THE COMMISSION