

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 DOJ 02642

JOHN GALLOWAY,)
)
 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 June 28, 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 Procedural History was updated to remove unnecessary information.
3. Finding of Facts Paragraphs 3-4 were removed as unnecessary.
4. Finding of Fact Paragraph 16 (PFAD 16) was edited as contrary to evidence included in the offer of proof.

14. Petitioner also provided a closing statement to the Commission regarding his desire to remain a law enforcement officer. ~~While~~ Petitioner does admit that his history is not what one would expect of one becoming a law enforcement officer; ~~at no point in the statement does Petitioner admit to the commission or conviction of any criminal act that would impair his ability to be certified as a Justice Officer with the Respondent. Even in his statement, but~~ Petitioner states he had been a sworn deputy for one year and five months at the time of this investigation. (Resp. Ex. 6).

5. Findings of Fact Paragraph 23 (PFAD 21) was edited to reflect a factual determination.

6. The following Finding of Fact Paragraphs were added to include additional facts presented at the hearing of this matter. These paragraphs will be Numbers 23-24.

In his statement submitted to Respondent about this issue, Petitioner provided the following details about the Virginia petit larceny charge, in pertinent part:

I entered a Walmart located in Chesapeake Virginia to buy a pair of work boots. . . Upon entering the store, I went to the shoe section and picked out a pair of boots, tried them on and placed my old boots in the box. I then got up, placed the box on the bench that I was sitting on to try on the new boots and proceeded to walk around to see if I liked them. As I approached the front of the store, a gentleman approached me and instructed me to come with him, so I followed him past the registers and through the exit doors to a small room inside the foyer of the store. He informed me that a secret shopper had seen me place my old boots in the box and set the box down, indicating to him that I was attempting to steal the new boots. I informed him that I was making \$1200 to \$2000 a week and that I did not need to, nor did I intend to steal anything. I then pulled cash out of my wallet and showed him that I had enough money to buy multiple pairs of the boots. To the best of my recollection, the cost of the boots was approximately \$35. I told him that I liked them and was going to buy them, and he responded with something along the lines of we're past that now.

He then proceeded to call 911 and have police respond. Upon the officer's arrival, he was told that I was attempting to exit the store with the new boots. I then told him the same thing about my income and proceeded to show the officer the cash that I had just showed the store employee. The store employee advised the officer he did not want the money, he just wanted the boots back. The officer then told me that I was going to be charged with misdemeanor larceny and went out to his patrol car to get the paperwork together. When the officer re-entered the store, he handed me a copy of the paperwork and told me when to be in court.

While I was filling out my F-3 form, this charge must have escaped my memory, or I would have put it down as well as the rest of the items on my background. I did not intend to conceal any of the criminal background by any means. I apologize for any inconvenience this may have caused.

That statement was dated July 24, 2021, and signed before a notary. (Respondent's Exhibit #5)

During his testimony, when asked about the size of the Walmart store and the distance between the shoe department and the front of the store where Petitioner was charged with larceny, Petitioner provided the following:

Q. Was it the size of most Walmart stores? I mean, they're pretty large, right?

A. Yeah, a regular. (T. p. 43)

Q. And when you put your boots inside the empty box that the new shoes came out of, did you pick that box up with you and take it with you as you were walking?

A. No, I left them sitting there.

Q. And why did you do that?

A. I always have. I've never carried a box around with me while I was trying out other shoes. I would always leave them sitting there, and then come back to them if I liked them. Pick them up, and you know go pay period and at that point, I would leave the new shoes on my feet and take the box up, and scan it with my old shoes in them, and pay, and go about my business. (T p 44)

Q. How long did you walk around the store?

A. It wasn't very long. I mean however long it took to get from the back to the front straight line you know, like I said maybe two or three aisles. So I don't know, from start to finish, maybe 45 seconds, if that.

Q. (From the Court) So approximately how many feet would it have been from where the shoe department is to the front of the store?

A. Maybe seventy-five-ish. (T. p. 44)

7. Finding of Facts Paragraphs 31-32 (PFAD 29-30) were amended to reflect the testimony of Deputy Director Jones and to address the additional information and rules impacted by the evidence submitted in the offer of proof.

29. During cross examination of deputy director Jones, Jones admitted that the charge of "shoplifting/petit larceny," a Class B misdemeanor which occurred more than five years prior to Petitioner's application for appointment and certification, standing alone would be insufficient to deny applicant's appointment and certification. (T.pp. 25-26).

30. While deputy director Jones agreed that the charge of "shoplifting/petit larceny" would not have been considered, standing alone as far as commission of the offense, the Commission would look at it as a material misrepresentation. (T.p. 26-27).

8. New Finding of Fact Paragraphs 31 -32 were added to address the offer of proof that was offered by Respondent's Counsel and accepted by the Court.

31. Through an offer of proof, Respondent presented documents and affidavits of witnesses who had been subpoenaed to testify in the hearing of this matter. These witnesses were precluded from testifying due to the judge's granting of Petitioner's Motion in *Limine*.

32. The affidavits and documents contained in the offer of proof submitted and

accepted by the court, show that Petitioner was convicted or committed the following offenses:

May 21, 2013 in Brunswick County File # 2012 CR 003895 Convicted of Taking Wild Turkey in Closed Season in violation of N.C.G.S. § 113-291.1;

April 8, 2013 Commission of Fail to Return Rental Property in violation of N.C.G.S. § 14-168.4 at Aaron's Rental;

June 2, 2016 Commission of Fail to Return Rental Property in violation of N.C.G.S. § 14-168.4 at Rent-A-Center; and

January 4, 2011 Commission of Gun on Educational Property in violation of N.C.G.S. § 14-269.2 at West Brunswick High School. (Respondent's Exhibit 9)

9. Finding of Fact Paragraphs 40-4, 44-47, 50-52, 55-57 were removed as contrary to the evidence in the hearing of this matter or unnecessary.
10. New Conclusion of Law 4 was added to reflect the Commission's position on the burden of proof as follows:
 4. 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").
11. Conclusions of Law 3-7 were removed as unnecessary or contrary to the Commission's position regarding the burden of proof.
12. Conclusion of Law 12 -19 were removed and replaced with the following Conclusions of Law to accurately reflect conclusions that can be drawn from the evidence in the record.

7. Petitioner committed the misdemeanor offense of petit larceny in the state of Virginia in violation of Virginia Code 18.1-103. Petitioner tried on a new pair of boots in the store after placing his old boots inside the new box. Petitioner left his old boots in the box and began walking around the store. He walked towards the front of the Walmart store, which is very large. Petitioner's explanation that he was simply trying out the boots was not credible in light of the other evidence presented.

8. Petitioner also committed the offense of Gun on Educational Property in violation of N.C.G.S. § 14-269.2 at West Brunswick High School on January 24, 2011.

9. 12 NCAC 10B .0204(c)(1) and (c)(2) provide, in pertinent part, the Commission may revoke, deny, or suspend the certification of a justice officer

when the Commission advised that the applicant for certification or certified justice officer has knowingly made a material misrepresentation of any information required for certification or accreditation from the Commission . . . or has knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission . . .

10. 12 NCAC 10B .0205(2)(c) and (d) provides, in pertinent part, that when the Commission suspends, revokes or denies the certification of a justice officer, the period of sanction shall be not less than five years where the cause of sanction is material misrepresentation of any information required for certification or accreditation from the Commission ...

11. The trial Tribunal found that Respondent's conclusion that Petitioner knowingly made a material misrepresentation to Respondent by failing to list the Class B misdemeanor offense of "shoplifting/petit larceny" is unsupported by the evidence. However, there is substantial evidence in the record to show Petitioner knowingly made a material misrepresentation of information required for certification.

12. Petitioner's' explanation and testimony that he simply forgot the misdemeanor larceny charged from the state of Virginia is not credible in light of all the evidence presented. Both Petitioner's statement and testimony provided great detail about the incident in the state of Virginia. Petitioner was detained by the store employee and interacted with a law enforcement officer who clearly informed Petitioner he was being charged with a criminal offence of larceny. Petitioner had more than one court date prior to his charge being dismissed. Petitioner's failure to include this offense which is the one offense that had not previously been expunged constituted knowingly making a material misrepresentation of information required for certification.

13. Based upon the foregoing findings of fact and conclusions of law, the Administrative Law Judge denied Petitioner's Motion for Summary Judgment as MOOT.

14. The Administrative Law Judge erroneously granted Petitioner's Motion in *Limine*. The probable cause committee and this body are allowed under current law to consider expunged offenses and have done so properly in this case. Therefore, in addition to the above findings of fact and conclusions of law, we find that based on the evidence included in the offer of proof, that Petitioner had committed or been convicted of a combination of four or more crimes classified as class A or B misdemeanors and committed the offense of possession of a weapon on educational property.

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

~~Based upon the foregoing findings of fact and conclusions of law, Petitioner's Motion for Summary Judgment taken under advisement is hereby DENIED AS MOOT, and it is hereby proposed that the North Carolina Sheriffs' Education and Training Standards Commission find that Petitioner did not commit the crime of "shoplifting/petit larceny, knowingly make a material misrepresentation in his application for certification, nor did he make a knowing and designed misrepresentation to the Commission for issuance of a Justice Officer certification and therefore there is no cause to deny Petitioner's certification. It is proposed that Petitioner's Justice Officer certification be GRANTED.~~

ORDER

WHEREFORE, Petitioner's certification is GRANTED and Petitioner be placed on a three year period of probation due to the length of time that has elapsed since the date of the offenses, Petitioner's age at the time of the offenses.

This the 27th day of August, 2024.

JOSHUA H. STEIN
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/s/ J. Joy Strickland
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COUNSEL TO THE COMMISSION

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:

**Mikael R. Gross
11510 Auldbury Way
Raleigh, North Carolina 27617**

This the 27th day of August, 2024.

JOSHUA H. STEIN
Attorney General

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