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STATE OF NORTH CAROLINA

COUNTY OF BRUNSWICK

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 DOJ 02642

John Galloway Petitioner, v. NC Sheriffs Education and Training Standards Commission Respondent.	**PROPOSAL FOR DECISION**

This case came on for hearing on March 11, 2024, 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: Mikael R. Gross
11510 Auldbury Way
Raleigh, North Carolina 27617

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

WITNESSES

For Petitioner:

None

For Respondent:

Ms. Sirena Jones, Deputy Director
John Galloway, Petitioner

EXHIBITS

Petitioner submitted two (2) exhibits. Petitioner requested the ALJ take judicial notice of the following Rules (Pet. Ex. 1 and 2) under the N.C. Administrative Code: 12 NCAC 10B .0302; 12 NCAC 10B .0307

Respondent's exhibits ("Res. Ex.") 1, 2, 3, 4, 5, 6, 7, 8

RULES AT ISSUE

12 NCAC 10B .0204 (a)(1)
12 NCAC 10B .0205 (1)(a)
12 NCAC 10B .0204 (c)(1) and (2)
12 NCAC 10B .0205 (2)(b) and (c)
12 NCAC 10B .0204 (d)(5)
12 NCAC 10B .0205 (3)(d)
12 NCAC 10B .0302
12 NCAC 10B .0307

ISSUES

Whether Respondent has substantial evidence to support the denial of Petitioner's certification as a Justice Officer for:

1. The commission of a Class B Misdemeanor of "shoplifting/petit larceny" in violation of Virginia Code §18.2-103. (Resp. Ex. 7).

2. Knowingly making a material misrepresentation of any information to the Sheriffs' Education and Training Standards Commission required for certification in violation of 12 NCAC 10B .0204(c)(1) by failing to list the Class B Misdemeanor charge of "shoplifting/petit larceny" on his Form F-3, Personal History Statement. (Resp. Ex. 7).

3. Knowingly and designedly by any means of misrepresentation to the Sheriffs' Education and Training Standards Commission to obtain certification in violation of 12 NCAC 10B .0204(c)(2) by failing to list the Class B Misdemeanor charge of "shoplifting/petit larceny" on his Form F-3, Personal History Statement. (Resp. Ex. 7).

PROCEDURAL HISTORY

i. Petitioner's Motion in *Limine*

Prior to the hearing, Petitioner filed a Motion in Limine, seeking to exclude evidence of certain expunged criminal charges and/or convictions. Those offenses included (1) Take Wild Turkey in Closed Season, N.C. Gen. Stat. § 113-291.1, May 21, 2013, (Class A Misdemeanor); (2) Gun on Educational Property, N.C. Gen. Stat. § 14-269.2(b), January 4, 2011 (Class I Felony); (3) Failure to Return Rental Property, N.C. Gen. Stat. § 14-168.4, April 8, 2013 (Class A

Misdemeanor); and (4) Failure to Return Rental Property, N.C. Gen. Stat. § 14-168.4, June 2, 2016 (Class A Misdemeanor).

Petitioner's conviction of Taking a Wild Turkey in Closed Season in violation of N.C. Gen. Stat. § 113-291.1 was expunged pursuant to N.C. Gen. Stat. § 15A-145.5. Though pursuant to N.C. Gen. Stat. § 17E-12(b), the "Commission may deny, suspend, or revoke a person's certification based solely on that person's *felony* conviction," the statute does not grant the same right to Respondent to deny a certification based upon a misdemeanor expunged under N.C. Gen. Stat. § 15A-145.5.

The remaining three charges subject to the Motion in Limine were that of (1) Gun on Educational Property, N.C. Gen. Stat. § 14-269.2(b), January 4, 2011 (Class I Felony); (2) Failure to Return Rental Property, N.C. Gen. Stat. § 14-168.4, April 8, 2013 (Class A Misdemeanor); and (3) Failure to Return Rental Property, N.C. Gen. Stat. § 14-168.4, June 2, 2016 (Class A Misdemeanor). Each of these charges were dismissed and later expunged pursuant N.C. Gen. Stat. § 15A-146.

Notably, N.C. Gen. Stat. § 15A-146(a3) provides:

> Effect of Expunction. - Except as provided in G.S. 15A-151.5(b)(5), no person as to whom an order has been entered by a court or by operation of law under this section shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of the person's failure to recite or acknowledge any expunged entries concerning apprehension or trial.

Our appellate courts have long held that:

> The purpose of the (expungement) statute is to clear the public record of entries so that a person who is entitled to expunction may omit reference to the charges to potential employers and others, and so that a records check for prior arrests and convictions will not disclose the expunged entries. *State v. Jacobs*, 128 N.C. App. 559, 569, 495 S.E.2d 757, 764, disc. rev. denied, 348 N.C. 506, 510 S.E.2d 665 (1998). ***Expungement' means to erase all evidence of the event as if it never occurred.*** 21A Am. Jur.2d Criminal Law § 1219 (2008) (citing State v. C.P.H., 707 N.W.2d 699, 705 (Minn.Ct.App.2006)).

State v. Swann, 197 N.C. App. 221, 224, 676 S.E.2d 654, 657 (2009)(emphasis added).

Even more,

> Virtually all employers, ***licensing agencies***, educational institutions, and military recruiters now require or routinely perform criminal background checks as a condition of employment, licensure, admission, or military service. Computerization of records into easily searchable databases allows immediate and comprehensive reports to be generated. While an individual charged with, but not convicted of, a crime legally retains a clean criminal record and history, ***the stigma of being arrested and charged without being proved to be guilty carries significant impacts on decisions of employment, licensure***, educational opportunities, or military service and denies the applicant the presumption of innocence.

In re Robinson, 172 N.C. App. 272, 279-80, 615 S.E.2d 884, 889 (2005) (dissent--on other grounds)(emphases added).

As prior ALJ's have concluded,

> when those alleged charges are determined to be without probable cause, foundation, or proof, and the charges are dismissed or the defendant is acquitted, "***the effect of such [expungement] order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information***." N.C. Gen. Stat. § 90?96(b) (2003). Expunction allows the petitioner's presumption of innocence to remain and to remove the stigma of unsubstantiated and dismissed charges.

May v. North Carolina Criminal Justice Education and Training Standards Commission, 23 NC OAH Lexis 268, *24-27 (Turrentine, ALJ) (quoting *In re Robinson*, 172 N.C. App. 272, 279-80, 615 S.E.2d 884, 889 (2005) (dissent on other grounds) (emphasis added).

Thus, although the law may require Petitioner (an applicant) to disclose expunged charges to Respondent as part of his application, it does not change the fact that those charges have been *expunged*. Likewise, while Respondent correctly noted that it may access confidential records for certification purposes under N.C. Gen. Stat. § 15A-151(1)(6), nothing in that section or the provisions of Chapter 17E allow the use of the information to deny a certification except for expunctions made under N.C. Gen. Stat. §§ 15A-145.4 and 15A-145.5 for *convictions* of certain non-violent felonies. Petitioner has not been convicted of a non-violent felony. Accordingly, the Tribunal granted Petitioner's Motion in *Limine*.

ii. Petitioner's Summary Judgment Motion

Subsequent to the filing of the Court's order on the Motion in Limine, Petitioner filed a Motion for Summary Judgment. Both parties filed briefs and/or memorandums of law in support of their positions regarding the Motion for Summary Judgment.

Petitioner argued that the Court's granting of the Motion in Limine precluded Respondent from presenting evidence on any offenses except for one misdemeanor larceny offense from the state of Virginia. Therefore, Petitioner argued that Respondent could not prove the alleged rule violations of the commission/conviction of a felony offense or the combination of Class A and B Misdemeanors. In addition, Petitioner argued in his brief that the failure to include the offense from the state of Virginia did not constitute making a material misrepresentation of information on his application materials.

In the Reply to Petitioner's Motion for Summary Judgment, Respondent argued that the motion was not timely made as it was filed after the dispositive motions deadline set by the Court, and that the hearing including testimony from the Petitioner was required in that there was a genuine issue of material fact because the Petitioner's state of mind when he completed his application materials for the knowing aspect of making material misrepresentation was relevant to the determination of this matter. In addition, Respondent cited to the provisions of Chapter 150B-41 which require that Respondent include in its final agency decision consideration of any testimony, exhibits, or offer of proof provided at the hearing. The only opportunity for Respondent to present an offer of proof for inclusion in the record for consideration of the final agency decision would be at the hearing of this matter.

The Court heard argument on the Motion for Summary Judgment immediately prior to the beginning of the hearing of this matter. The Court determined that the evidence which would be presented for the Motion for Summary Judgment and during the administrative hearing would be duplicative. The parties agreed to present evidence for consideration on the Motion for Summary Judgment and the administrative hearing simultaneously.

Respondent filed an offer of proof containing affidavits and supporting documentation of all the offenses and charges subject to the Tribunal's order on the Motion in *Limine*. Over Petitioner's objection, the Court accepted Respondent's offer of proof.

FINDINGS OF FACT

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.

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. (Joint Stipulation #1)

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. (Joint Stipulation #2)

3. Petitioner John Galloway ("Petitioner") was a credible witness unless otherwise described.

4. Deputy Director Sirena Jones ("Jones") was a credible witness unless otherwise described.

5. Petitioner is an applicant for certification by Respondent North Carolina Sheriff's Education and Training Standards Commission ("Respondent") for employment with the Brunswick County Sheriff's Office in Brunswick County, NC.

6. Petitioner applied for certification for employment with the Brunswick County Sheriff's Office by application ("Petitioner's application") dated May 3, 2021. (Res. Ex. 1 redacted, Respondent's exhibit has no date of receipt showing when the exhibit was received by Respondent).

7. Petitioner was appointed as a deputy sheriff for the Brunswick County Sheriff on May 3, 2021, when he took his Oath of Office as a part-time deputy sheriff and a full-time detention officer. (Resp. Ex. 2).

8. Petitioner was separated as a detention officer in October of 2021 and his application for detention officer is no longer being considered by the Sheriffs' Standards Division. (Resp. Ex. 3). (T.p. 17).

9. Sirena Jones, is the deputy director of the Sheriffs' Education and Training Standards Commission (Sheriffs' Standards Division), has been the deputy director since 2017, and has worked for the North Carolina Department of Justice for 19 years with all of her time in service with the Sheriffs' Standards Division. (T.p. 11).

10. As deputy director, Jones acts as staff liaison to the Commission and assists in the gathering of information and documentation of potential Commission rule violations for presentation to the Commission's Probable Cause Committee. (T.p. 12).

11. Pursuant to her duties, Jones also assigned Petitioner's matter to Field Representative Chris Batton to gather additional information about the facts and circumstances leading to Petitioner being charged with "shoplifting/petit larceny." (T.p. 17).

12. As a result of the investigation into Petitioner's application for appointment and certification, a check of Petitioner's criminal history revealed that Petitioner had failed to list a charge of "shoplifting/ petit larceny" in violation of Virgina Code §18.2-103 on his Form F-3, Personal History Statement. (T.p. 20).

13. The charge of "shoplifting/petit larceny" is listed in the Commission's Class B Misdemeanor Manual. (Resp. Ex. 7).

14. Respondent requested Petitioner explain the nature and details of the charge of shoplifting/petit larceny which occurred in Chesapeake Virginia. (T.p. 22).

15. Petitioner prepared a statement where he explained the circumstances surrounding his charge. Petitioner explained that he entered the store to get a new set of work boots. Petitioner tried on the new boots and placed his old ones in the box on the bench where he was sitting. He then began to walk around to see how the boots felt. While walking around Petitioner was stopped by a store employee and asked to walk out of the exit doors to a small room where he was accused of stealing the shoes. Law enforcement was called, and Petitioner was issued a citation for shoplifting/petit larceny in violation of Virginia Code 18.2-103. (Resp. Ex.'s 4 redacted and 5). (T.p. 22-23).

16. 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, Petitioner states he had been a sworn deputy for one year and five months at the time of this investigation. (Resp. Ex. 6).

17. The statements provided by Petitioner to Respondent were notarized statements but were not affidavits signed under penalty of perjury. (Resp. Ex.'s 5-6).

18. Based on the results of the review of Petitioner's application for Appointment as a deputy sheriff and certification as a Justice Officer, the Respondent notified Petitioner that it was considering denying his application for Justice Officer certification. (T.p. 23).

19. A probable cause hearing was held, and Respondent determined that probable cause existed to deny Petitioner's Justice Officer certification application. (Resp. Ex. 7).

20. Petitioner was sent a Notification of Probable Cause to Deny Justice Officer Certification by letter dated May 8, 2024. The letter was received by Petitioner. (Resp. Ex.'s 7-8).

21. The basis for the denial was that Petitioner[1]:

a. Committed a Class B Misdemeanor of "shoplifting/petit larceny" in violation of Virginia Code §18.2-103. (Resp. Ex. 7).

b. Knowingly made a material misrepresentation of any information to the Sheriffs' Education and Training Standards Commission required for certification in violation of 12 NCAC 10B .0204(c)(1) by failing to list the Class B Misdemeanor charge of "shoplifting/petit larceny" on his Form F-3, Personal History Statement. (Resp. Ex. 7).

c. Knowingly and designedly made by any means of misrepresentation to the Sheriffs' Education and Training Standards Commission to obtain certification by failing to list the Class B Misdemeanor charge of "shoplifting/petit larceny" on his Form F-3, Personal History Statement. (Resp. Ex. 7).

22. Petitioner timely filed a request for contested case with Respondent by letter dated May 17, 2024. (Resp. Ex. 8).

23. Respondent entered an exhibit that shows Petitioner was charged on November 18, 2015, with a violation of Virginia Code § 18.2-103, "shoplifting/petit larceny" which is classified as a Class B Misdemeanor under the guidelines the Respondent. (Resp. Ex. 4 redacted).

24. Respondent offered no evidence during the hearing through documentary or testimonial evidence that petitioner had committed the offense of "shoplifting/petit larceny."

25. There were no witnesses called that could verify any action taken by Petitioner on that day was in violation of the cited Virginia Code. There were no affidavits offered based on unavailability of witnesses that attest to Petitioner's violation of the cited Virginia Code.

26. During direct examination of Petitioner by Respondent, Petitioner acknowledged that he had been charged with violating Virginia Code §18.2-103 but denied that he had shoplifted or stolen any property form the merchant. (T.pp. 42-45). (Resp. Ex. 4 redacted).

27. Petitioner testified that he wore the shoes for approximately 45 seconds, was about two to three isles over from the shoe section, had not concealed the boots, had not switched prices on the boots, and had not passed the last point of sale where the boots could be purchased. (T.pp. 42-45) (Resp. Ex. 5).

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[1] The remaining basis cited in Respondents letter of Notification of Probable Cause to Deny Justice Officer Certification are subject to the Tribunals Order on Petitioner's Motion in Limine, as discussed above.

28. Petitioner was escorted past the last point of sale by the loss prevention employee. Petitioner offered no resistance, did not try to run, and waited for police to arrive. (T.pp. 42-45) (Resp. Ex.'s 4 redacted and 5).

29. On January 29, 2016, the court dismissed the charge against petitioner citing that no witness or police officer showed up to prosecute the matter. (Resp. Ex.'s 4 redacted and 5).

30. This charge occurred more than five (5) years prior to Petitioners application for Appointment and Justice Officer certification which is dated May 3, 2021. (Resp. Ex.'s 1- 4 redacted).

31. 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, would be insufficient to deny applicant's appointment and certification. (T.pp. 25-26).

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

i. Knowingly making a material misrepresentation of any information to the Sheriffs' Education and Training Standards Commission required for certification in violation of 12 NCAC 10B .0204(c)(1) by failing to list the Class B Misdemeanor charge of "shoplifting/petit larceny" on his Form F-3, Personal History Statement.

34. The provisions of this rule require that this Tribunal determine two things in order to determine whether Petitioner violated the rule of knowingly making a material misrepresentation of information to Respondent regarding information required for certification, specifically, not listing the "shoplifting/petit larceny" charge in his applications materials, particularly his Form F-3, Personal History Statement. (See 12 NCAC 10B .0204(c)(1)).

35. The first prong would be to determine if Petitioner ***knowingly*** failed to list the charge of "shoplifting/petit larceny" on his Form F-3 personal history statement.

36. The second prong would be to determine if failing to list the "shoplifting/petit larceny" was a ***material misrepresentation*** of information required by Respondent for certification.

a. "Knowingly."

37. Petitioner timely prepared an explanation of the charge when requested to do so by Respondent's staff. (Resp. Ex. 5)

38. Petitioner stated in his explanation to Respondent that the charge had "escaped [his] memory" and that "[he] never intended to conceal or omit any of [his] criminal background by any

means." (Resp. Ex. 5).

39. Petitioner further explained during his direct examination by Respondent that he had a copy of his criminal history which he had obtained from the Brunswick County Clerk of Superior Court that reflected his other charges and he relied on that report to include everything he needed to list on his Form F-3 Personal History Statement with regard to prior criminal charges. During Petitioner's testimony, he again stated that the charge "escaped his memory." (T.pp. 51-53).

40. Respondent tried to show that Petitioner intentionally left the charge off the forms required by Respondent for certification because Petitioner was apparently scheduled to appear in court on two separate occasions, December 18, 2015, and January 29, 2016. Petitioner testified that he had only gone to court one time, and it was on the day the charge was dismissed by the Judge because no witness or officer showed up to prosecute the matter. (Resp. Ex. 4 redacted). (T.pp. 48-51).

41. There was no evidence entered that contradicted Petitioner's contention that he only went to court once and that was on the day the criminal charge was dismissed by the judge because no witness or officer had appeared to prosecute the case.

42. Petitioner also explained how during the application process with the Brunswick County Sheriff's Office he had "a large amount of paperwork" including multiple forms to complete, some of which were for the Sheriff's Office and Brunswick County, and others were for Respondent. (T.p. 36).

43. When deputy director Jones was asked what evidence, if any, the Respondent had to show that Petitioner "knowingly" made a material misrepresentation, she answered that it was the fact that Petitioner had submitted the Form F-3 Personal History Statement without having listed the charge of "shoplifting/petit larceny." (T.pp. 29-30.)

44. Deputy director Jones also stated that she did not know about Petitioner's intent. Jones also admitted that intent is important in enforcing the rule and that the Commission would have to show that Petitioner knowingly failed to include the information related to the criminal charge from Virginia. (T.pp. 29-30). (See 12 NCAC 10B .0204(c)(1)).

45. Although not defined in Respondent's rule, North Carolina Court's have defined the term "Knowingly" as "'1. having knowledge or understanding 2. shrewd; clever 3. implying shrewd understanding or possession of a secret or inside information 4. deliberate; intentional." *N.C. Farm Bureau Mut. Ins. Co. v. Lanier Law Grp., P.A.*, 277 N.C. App. 605, 613, 861 S.E.2d 565 (2021); *see also Burgess v. N. Carolina Criminal Justice Educ. & Training Standards Comm'n*, NO. COA10-1456 (N.C. App. Aug 16, 2011) (unpublished) (noting that where, *inter alia*, evidence submitted to the tribunal demonstrated that the petitioner omitted charges he had listed two weeks prior on a separate application, the evidence supported a finding of knowingly making a material misrepresentation).

46. Based on the testimony of both deputy director Jones and Petitioner, there is no

evidence that Petitioner had knowledge or understanding that he was making a material misrepresentation on his application materials to the Respondent. Moreover, there is no evidence that Petitioner acted in a shrewd or clever manner, that Petitioner was in possession of secret or inside information, or that Petitioner acted in a deliberate or intentional manner.

b. "Material Misrepresentation"

47. The Respondent's rules also do not define a "material misrepresentation."

48. "A misrepresentation or omission is 'material' if, had it been known to the party, it would have influenced the party's judgment or decision to act." *Latta v. Rainey*, 202 N.C. App. 587, 599, 689 S.E.2d 898, 909 (2010) (citation omitted).

49. Deputy director Jones conceded that, pursuant to 12 NCAC 10B .0204 (d)(2) that Petitioners failure to list the charge of "shoplifting/petit larceny" was not material because the charge fell outside of the five (5) year limitation of the Respondent's ability to suspend, revoke, or deny an applicant's certification as a Justice Officer. (See paragraphs 34 and 35 above.) (Also see 12 NCAC 10B .0204 (d)(2)).

50. Based on Respondent's own rules, the definition of a "material misrepresentation" as recited above, and the testimony by deputy director Jones that the Petitioner's charge of "shoplifting/petit larceny" occurred over five years prior to his application and therefore Respondent would not be able to take any action to suspend, revoke, or deny Petitioner's Justice Officer certification there is no evidence that petitioner made a material misrepresentation in his application for certification with Respondent. (See 12 NCAC 10B .0204 (d)(2)). (T.p. 26).

ii. Knowingly and designedly made by any means of misrepresentation to the Sheriffs' Education and Training Standards Commission to obtain certification in violation of 12 NCAC 10B .0204(c)(2) by failing to list the Class B Misdemeanor charge of "shoplifting/petit larceny" on his Form F-3, Personal History Statement. (Resp. Ex. 7).

51. Based on the preceding paragraphs, this Tribunal can find no evidence to support that Petitioner "knowingly" made a misrepresentation whether it was material or not.

52. The Respondent's rules do not define the term "designedly." Black's Law dictionary defines "design" as "1. Plan or scheme; 2. Purpose or intention combined with a plan." (Black's Law Dictionary 560 (11th ed. 2019)). "Designedly" is an adverb the modifies the verb "design," and thus means, in essence, to do something in a planned or intended way.

53. The testimonial evidence shows that Petitioner failed to list the charge of "shoplifting/petit larceny" on his Form F-3 Personal History Statement for Respondent. However, testimony and the exhibit provided by Respondent show that when Petitioner was questioned about the failure to list the charge on his F-3, Petitioner was honest and forthright about the circumstances and prepared a written statement to explain the charge. (Resp. Ex. 5). (T.pp. 51-52).

54. Additionally, Petitioner testified that he had requested his criminal history form the Clerk of Superior Court in Brunswick County and he listed all of the relevant charges on his Form F-3 Personal History Statement believing that the criminal history contained all of his charges. (T.p. 52).

55. There was no evidence presented to this tribunal that Petitioner acted with a plan to deliberately misrepresent his criminal charge of "shoplifting/petit larceny" for the purposes of being certified as a Justice Officer by Respondent.

56. From the facts of the case, it appears Petitioner made a mistake by failing to list the charge of shoplifting/petit larceny from Virginia on his Form F-3, Personal History Statement. Anyone can make a mistake of this nature. When the failure to list the charge was brought to Petitioner's attention, Petitioner prepared a statement describing the event as he recalled it. Petitioner was not alleged by Respondent to have been untruthful, and based on the evidence presented at the hearing, Petitioner did not lie about the incident or attempt to avoid explaining the charge.

57. It is important to note that Respondent did not allege that petitioner lacked good moral character to be certified as a Justice Officer by Respondent.

CONCLUSIONS OF LAW

1. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law below are findings of fact, they should be so considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611,612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

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 justice officers and to revoke, suspend, or deny such certification.

3. Since this contested case is heard under Article 3A, N.C. Gen. Stat. § 150B, the undersigned Administrative Law Judge presides over the hearing in place of the Respondent and makes a "proposal for decision" to the agency. N.C.G.S. § 150B-40. The Respondent makes the final agency decision.

4. N.C.G.S. § 150B-40(e) provides:

> The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings. The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have

> the authority of the presiding officer in a contested case under this Article.

N.C.G.S. § 150B-40(e).

5. That a distinction exists between Article 3 and Article 3A cases is made clear in N.C.G.S § 150B-40: "The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings."

6. In this case, Petitioner was not "convicted" of the crime cited by Respondent. Therefore, the proposed denial, which is supported solely by the allegation regarding the criminal offense at issue, depends on whether Petitioner "committed" the criminal offense at issue.

7. In a situation where the Respondent alleges that a citizen not convicted of a crime nonetheless "committed" it, the burden of proof is properly on Respondent to show, by (at least) a preponderance of the evidence, that the person in question committed the crime. *Christopher Garris V. NC Criminal Justice Education And Training Standards Commission,* 2019 WL 2183214, 18 DOJ 04480. While our appellate courts in the Article 3 context have at times required petitioners in cases under the Administrative Procedure Act to prove a negative, no appellate court in North Carolina has approved the State, in whatever form, first deciding that a citizen committed a crime and then requiring that citizen to prove that he did not.

8. Respondent's rule in 12 NCAC 10B .0204(d)(2) states that a crime or unlawful act as defined in 12 NCAC 10B .0103(17)(b) as a Class B misdemeanor must occur within a five (5) year period prior to the date of appointment. The rule also states that the Commission may revoke, suspend, or deny a certification for Justice Office if the Commission finds that Petitioner has been convicted of or committed the alleged unlawful act.

9. Accordingly, the Tribunal finds that a preponderance of the evidence does not support the Commission's conclusion that Petitioner "committed" the Class B misdemeanor offense of "shoplifting/petit larceny" in violation of Virginia Code § 18.2-103.

10. The record reflects that no witness or police officer appeared in court to prosecute the matter, and the charge was dismissed. Even so, the Commission put on no witnesses to the alleged "shoplifting/petit larceny" and did not establish by preponderance of the evidence that Petitioner had concealed any merchandise, changed prices on any merchandise, or that Petitioner had passed the last point of sale without paying for any merchandise.

11. 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.

12. Respondent failed to establish that Petitioner had knowledge or understanding that he was making a material misrepresentation. Particularly since the offense occurred more than five (5) years prior to Petitioner's application for appointment as a Justice Officer and Respondent

could not, by its own rule, deny Petitioner's certification on that allegation alone.

13. As noted above, "[a] misrepresentation or omission is 'material' if, had it been known to the party, it would have influenced the party's judgment or decision to act.' *Latta v. Rainey*, 202 N.C. App. 587, 599, 689 S.E.2d 898, 909 (2010) (citation omitted).

14. Respondent failed to establish that Petitioner intentionally failed to report the charge of "shoplifting/petit larceny" to deceive Respondent into issuing Petitioner's Justice Officer certification. Because the alleged violations of 12 NCAC 10B .0204(c)(1) and 12 NCAC 10B .0204(c)(2) require that Petitioner "knowingly" made a misrepresentation, whether material or not, Respondent would have had to establish by preponderance of the evidence that Petitioner had knowledge or understanding that he was making a material misrepresentation or a misrepresentation to the Respondent to deliberately or purposely induce the issuance of a Justice Office certification to Petitioner.

15. The term "knowingly" is not defined in the Respondent's rule and applying the plain meaning of the term is appropriate in this matter. "'Knowingly' is defined as '1. having knowledge or understanding 2. shrewd; clever 3. implying shrewd understanding or possession of a secret or inside information 4. deliberate; intentional." *N.C. Farm Bureau Mut. Ins. Co.* 277 NC App. at 613.

16. Rule 12 NCAC 10B .0204(c)(2), in addition to the element "knowingly," requires that Petitioner make a misrepresentation designedly. As noted above, designedly is an adverb and modifies "design" which means to do something with a plan, purposely and intentionally.

17. There was no evidence that Petitioner acted with a plan or purposely and intentionally made a misrepresentation to obtain certification as a Justice Officer. The evidence in this contested case merely establishes that Petitioner listed all of the information on his criminal history from the Brunswick County Clerk of Superior Court but mistakenly failed to list the single charge of "shoplifting/petit larceny," which had occurred over five years ago and had been dismissed. Even so, when brought to his attention Petitioner prepared a statement regarding the charge and provided it to Respondent without reservation and in a timely manner.

18. To go a step further, the Respondent's rules do not define misrepresentation or material misrepresentation. While material misrepresentation has been defined by the N.C. Court of Appeals, *see e.g., Latta v. Rainey*, 202 N.C. App. 587, 599, 689 S.E.2d 898, 909 (2010), the term misrepresentation is defined in Black's Law Dictionary as "the act or instance of making a false or misleading assertion about something, usually with the intent to deceive.) (Black's Law Dictionary 1198 (11th ed. 2019).

19. Respondent provided no evidence that any action taken by Petitioner regarding his failure to report the charge of "shoplifting/petit larceny" was done with the intent to deceive or with a plan or purpose to induce issuance of a Justice Officer certification. The only assertion made by Respondent was that the failure to list the charge was a material misrepresentation because it was not listed on the Petitioner's Form F-3, Personal History Statement, without regard to the rule of Respondent which states the failure to list the charge it is not material due to the time which had

passed prior to Petitioner's application for appointment as a Justice Officer. (See 12 NCAC 10B .0204 (d)(2)).

20. Given the absence of additional allegations (appropriately supported by admissible evidence) such as a lack of good moral character on the part of the Petitioner, the Tribunal must find that there are no grounds to deny the Petitioner certification as a Justice Officer.

PROPOSAL FOR DECISION

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**.

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).

IT IS SO ORDERED.

This the 28th day of June, 2024.

Samuel K Morris
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 28th day of June, 2024.

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