

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 DOJ 04885

DARIEN K. HERBIN,

 Petitioner,

v.

NORTH CAROLINA SHERIFFS'
EDUCATION AND TRAINING
STANDARDS COMMISSION,

 Respondent.

**PROPOSED FINAL AGENCY
DECISION**

THIS MATTER was commenced by a request filed 17 November 2023, with the Director of the Office of Administrative Hearings for the assignment of an Administrative Law Judge. Notice of Contested Case Assignment and Order for Prehearing Statements (23 DOJ 04885) were filed 22 November 2023. The parties received proper Notice of Hearing and the Administrative Hearing was held in High Point, North Carolina on 23 April 2024, before the Honorable Jonathan S. Dills, Administrative Law Judge.

The Petitioner was represented by counsel, Barry K. Henline. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter the Commission or Respondent) was represented by Assistant Attorney General J. Joy Strickland.

On 11 June 2024, Judge Dills filed his Proposal for Decision. On 19 June 2024, counsel to the Commission sent by certified mail a copy of the Proposal for Decision to the Petitioner with a letter explaining Petitioner's rights: (1) to file exceptions or proposed findings of fact; (2) to file written argument; and (3) the right to present oral argument to the Commission.

This matter came before Commission for entry of its **Final Agency Decision** at its regularly scheduled meeting on 19 September 2024.

Having considered all competent evidence and argument and having reviewed the relevant provisions of Chapter 17E of the North Carolina General Statutes and Title 12, Chapter 10B of the North Carolina Administrative Code, the Commission, based upon clear, cogent and convincing evidence, does hereby make the following:

FINDINGS OF FACT¹

¹ The Tribunal need only find facts material to resolution. *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).

1. Respondent (“Commission”) appears in its delegated role of oversight and maintenance of minimum standards for justice officer certification. G.S. 17E-4(a)(6) & 7(c).

2. On 19 July 2010, Petitioner first received probationary certification as a detention officer with the Guilford Sheriff’s Office; full certification followed a year later. (R Ex 2 & 3). There he achieved the rank of Master Corporal. (T p 51).

3. On 14 February 2019, Petitioner was terminated. (T p 78). The Guilford Sheriff’s Office documented this in a Report of Separation (Form F-5) to Respondent, indicating *on-going or substantiated internal investigation*. (R Ex 1A).

4. On 27 January 2020, Petitioner was hired as a detention officer by the Alamance Sheriff’s Office. (R Ex 1 & 3). There he remains, now an armed detention officer, a field training officer, and a first-line supervisor. (R Ex 8).

5. The Guilford Sheriff’s Office *timely* notified the Commission that Petitioner was charged with the common law offense of *going armed to the terror of the people*. (T p 20). The Commission thereafter began an investigation. (T p 22).

6. Commission staff acquired the Incident Report and Internal Affairs file. (T p 22).

7. The Commission ultimately found probable cause to believe that Petitioner’s certification should be revoked for committing a Class B Misdemeanor re the incident described next and sent notice by letter dated 18 October 2023.² (R Ex 6). Petition here timely followed.

The Incident

8. Master Corporal Hayden Bass (“Bass”) testified that he responded to a call for service involving Petitioner and William Herbin (“William”) on 09 January 2019. (T p 35). He prepared the Incident Report (R Ex 5).

9. Bass recalled William saying that his cousin had been chasing him firing a rifle, both in vehicles. (T pp 35-6). Bass described William as “terrified” when they spoke. (T p 38).

10. Bass also spoke to Petitioner at the scene. (T at pp 36-7). Petitioner submitted to an internal interview on 23 January 2019. (R Ex 4). He also summarized his OAH appeal. (R Ex 7). He provided a statement to Respondent dated 03 September 2020. (R Ex 8). Finally, Petitioner testified. (T pp 47-79).

11. From the credible evidence presented, the subject incident happened as follows:³

² Just prior to hearing, counsel for Respondent moved to amend the date of offense in the Notification of Probable Cause letter from 23 January 2019 to 09 January 2019. Without objection, the amendment was allowed.

³ Disparities in the evidence are noted, particularly re testimony and the Interview (R Ex 4). The undersigned appropriately weighed all the evidence considering the passage of time, primacy/recency, nerves, reasonableness, and other issues of credibility, to make these determinations. *Zero mala fides* were found. For transparency the undersigned cites to significantly discrepant evidence that was compared in the effort to find consistency/continuity/congruence. A mostly relevant summary of the incident appears in Petitioner’s Request for Administrative Hearing (R Ex 7).

- a) Petitioner's cousin William initiated a drop by visit. (T pp 35-7) (R Ex 4 p 1). William had a history of theft and drug use. (T p 63) (R Ex p 5). Petitioner provided him with prior assistance and support, and cautiously believed William would not steal from him. (T p 49) (R Ex 4 pp 4, 5 & 6).
- b) After some casual interaction, Petitioner went to the garage to straighten behind contractors working there earlier. (T p 49) (R Ex p 2). Petitioner noticed William wandering in the house and to and from his vehicle. (T p 48-9). He noticed a "bulge in his hoodie." (R Ex 4 p 2; *cf.* T p 49). In sum, William was acting suspiciously. Before long, he left. *Id.*
- c) While William was there and continuing thereafter, Petitioner checked to see if anything was taken. (R Ex 4 p 1-2). He soon determined that a collectible pair of Nike Jordans was missing. *Id.* The shoes were worth at least \$1000. (T p 74).
- d) Timing and circumstances indicate William took the shoes. It was not the contractors. The "shoes [were] sitting by the door" after they finished and left. (R Ex 4 p 2; *cf.* p 5).
- e) Petitioner was angry. (T pp 70, 72). He grabbed a rifle and went looking for William. (R Ex 4 p 2). He headed towards a known drug area. (R Ex 4 pp 2-3). Driving there, he saw William approaching. (R Ex 4 p 3). Up to 25 minutes had passed since William had left the house. (*Cf.* R Ex 4, p 9 to T p 64). Petitioner flashed his lights and activated his horn; William pulled slightly right and stopped; Petitioner angled left to a stop beside him. (*Cf.* T pp 54-8 to R Ex 4 pp 6-9).
- f) Petitioner asked and William denied taking the shoes (T p 36); Petitioner displayed his weapon and racked a round, attempting to intimidate. (T pp 70-1). William sped off and Petitioner fired into the air, executed a U-turn, and pursued. (T p 57). In pursuit, Petitioner discharged more rounds (T pp 67-9) (R Ex 4 p 11). He tried reaching William, eventually calmed himself and put down the gun, called 911, and attempted to flag down a deputy (T pp 35-7, 50) (R Ex 4 pp 3, 14).
- g) William ran out of gas and pulled over. (T pp 50, 62, 64). Deputies continued to arrive, conducted interviews, and unproductively searched for the shoes. (T pp 35-7, 39, 65).
- h) At no point did Petitioner point his gun at William or intend to harm him. (T pp 37, 44- 5, R Ex 4 p 11-2).⁴

12. Petitioner exercised poor judgement and engaged in dangerous conduct. (T p 75). Fortunately, the shooting occurred in a rural area, mainly farms/fields, and no one was around. (T pp 43, 62-3, 75-6) (R Ex 4 p 13).

13. Petitioner was offered and accepted deferred prosecution conditioned upon

⁴ As an assault charge seemed inapplicable, the eventual charge presented after added effort/collaboration. (T p 37).

successful completion of a firearms safety course. Petitioner finished the course, and his charge was dismissed 31 October 2019. (P Ex 1), (T p 64).

14. William has since acknowledged the theft, referencing his drug issues; he and Petitioner have made some amends. (T p 66). William preferred to let this incident go. (T p 37).

15. To his credit, Petitioner did not contest the underlying misdemeanor; rather, he seeks Commission discretion in light of mitigating factors. (T p 11).

The Administrative Law Judge Recommended that the Commission consider the following factors in Mitigation:

16. Mitigating factors include without limitation:
- a) Petitioner's otherwise successful, unblemished, and *ongoing*⁵ 13 plus years in law enforcement.
 - b) His prior 8 years of service in the United States Air Force.
 - c) The emotional circumstances involved *to wit* familial betrayal, a violation of trust, valued personality, theft, and his home.
 - d) The unusual charge brought, deferred, and yet which forms the basis of this case.
 - e) The at least facial flaws in the elements of the underlying charge.
 - f) His compliance with the deferred prosecution agreement, to include completion of a firearms safety class.
 - g) His admissions, recalcitrance, and (albeit flawed) attempts to accept responsibility.
 - h) His vehemence that nothing like this will ever happen again.
 - i) His non-contest of the underlying misdemeanor.
 - j) All that Petitioner has weathered to include termination, demotion, charges, and this matter hanging over him for too many years.

CONCLUSIONS OF LAW⁶

1. Respondent is authorized to certify this member of law enforcement and to revoke, suspend, or deny certification in proper circumstances. G.S. 17E; 10 NCAC 10B.

2. Though Article 3A of the APA is silent re the applicable standard of evidence, it

⁵ We are 4 plus years post incident. *Cf. Scroggs v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 101 N.C. App. 699, 701, 400 S.E.2d 742, 744 (1991) (untenable delay invokes arbitrary and capriciousness).

⁶ To the extent Findings contain Conclusions or vice versa, they should be appropriately considered regardless of labeling. *Charlotte v. Heath*, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946).

is undisputedly by preponderance. *In re Rogers*, 297 N.C. 48, 59, 253 S.E.2d 912, 919 (1979).

3. As the Tribunal has repeatedly concluded, the State generally bears the burden of proof when it proposes to restrict certification. *See, Russell v. Commission*, 2022 NC OAH LEXIS 55; *cf., Graves v. Commission*, 2022 NC OAH LEXIS 374 (new applicant); *see also, Canty v. Commission*, 2014 NC OAH LEXIS 127. These analyses are incorporated by reference.

4. ~~The Administrative Law Judge found that~~ Respondent met its burden ~~here~~ as a preponderance of evidence supports that on 09 January 2019, Petitioner committed the misdemeanor offense of going armed to the terror of the people. *State v. Lancaster*, 385 N.C. 459, 895 S.E.2d 337, 2023 N.C. LEXIS 948.⁷

5. 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”).

~~5-6.~~ Petitioner did therefore violate 12 NCAC 10B .0204(d)(1) and is subject to revocation. *Cf.*, 12 NCAC 10B .0103(10)(b)(i), 12 NCAC 10B .0205(2)(a), *and* (R Ex 9).

~~6-7.~~ Notwithstanding, the Administrative Law Judge recommended that the Commission consider exercising its ~~has~~ discretion. 12 NCAC 10B .0205(2).

~~7. There is substantial evidence justifying the following proposal. G.S. 150B-42.~~

PROPOSAL FOR DECISION ORDER

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** ~~that Respondent should~~ Petitioner’s justice officer certification is REVOKED for a period of FIVE (5) YEARS. ~~issue reprimand and prescribe a three-year period of probation beginning from final decision, conditioned upon the immediate enrollment of Petitioner into an Anger Management Certification Course, acceptable to the General Court of Justice in or around Guilford, Alamance or Wake County, and the successful completion of at least 24 hours of same within a reasonable time not to exceed 3 months.~~

IT IS SO ORDERED.

⁷ Essential elements of the misdemeanor alleged, include that the weapon armed be “unusual” and that a “purpose to terrorize people” existed. *Lancaster* at 468, 895 S.E.2d at 343. Though the writer notes the facially flawed application of these elements to the case *sub judice*, clearly our highest state court had no problem determining any pistol or rifle *unusual*, and *purpose* inferable. *Lancaster* supports that terrifying one person in public with a common rifle (like here) can lawfully infer a purpose to terrorize *people*. *Id.* at 468-9, 895 S.E.2d at 343.

This the _____ day of _____, 2024.

Chairman
North Carolina Sheriffs' Education and
Training Standards Commission

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing **PROPOSED FINAL AGENCY DECISION** has been duly served upon the **Petitioner's counsel** by mailing a copy to the address below:

**Barry K. Henline
PO Box 15862
Wilmington, NC 28408**

This the 23rd day of August, 2024.

JOSHUA H. STEIN
Attorney General

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