

STATE OF NORTH CAROLINA  
COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
23 DOJ 05110

Kevin McClendon Edmond Petitioner,  v.  NC Sheriffs Education and Training Standards Commission Respondent.	<b>PROPOSED DECISION</b>
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**THIS MATTER PRESENTS** under authority of the North Carolina Constitution, Art. III, Sec. 11, *accord*, Art. IV, Sec. 3; G.S. 7A-750; and G.S. 150B (“APA”); following hearing on the merits before Administrative Law Judge (“ALJ”) Jonathan S. Dills with the Office of Administrative Hearings (“OAH”); for proposed decision per Art. 3A of the APA. The ALJ sits for the agency to establish facts, apply law, and issue proposal. G.S. 150B-40(e).

**APPEARANCES**

Petitioner:            Donovan John Hylarides  
                                 Wyatt Early Harris Wheeler LLP

Respondent:           J. Joy Strickland, Assistant Attorney General  
                                 Department of Justice

**ISSUES**

Whether Petitioner’s certification should be revoked.

ANSWER: No, it should not.

**FINDINGS** <sup>1</sup>

1.        Petitioner is accused of committing a felony and lacking requisite character in effort to revoke his justice officer certification. (*See* pleadings; Ex 7).

2.        Petitioner has been continuously certified since 2015. He previously worked for the Elizabeth City Police Department, Elizabeth City State University Police, Lee County Sheriff’s Office, and Alamance Community College Police Department. He currently works at the Guilford County Sheriff’s Office. (R Ex 2; Stip 4c).

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<sup>1</sup> 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).

3. Petitioner has held certification as a Guilford County Deputy Sheriff since 17 April 2021. (Stip 4a&b).

4. Petitioner often and routinely worked off-duty assignments. These were managed through a third-party vendor, Extra Duty Solutions. (Stip 4d&e). There is no history of off-duty problems beyond the following two shifts.

5. Petitioner accepted assignment at LT Apparel for 24 February 2023, from 12:00am to 8:00am. Petitioner was paid for this entire 8-hour shift. (Stip 4f).

6. Petitioner accepted assignment at LT Apparel for 25 February 2023, from 12:00am to 8:00am. Petitioner was paid for this entire 8-hour shift. (Stip 4g).

7. Someone reported that Petitioner may not have fully worked those shifts. (T p 42).

8. The Sheriff's Office investigated and confronted. Petitioner was initially confused and in denial. Presented with security video and accusation of superiors, he ultimately conceded what he came to believe the video demonstrated. (Stip 4h; T p 53).

9. Petitioner was significantly punished with three-years of probation, suspension without pay, reassignment, no off-duty, no overtime, no promotion, and reimbursement. (T p 73).

10. Respondent also investigated after receiving an improvident Giglio notice.<sup>2</sup> (T pp 11, 45-49, 116-118; R Ex 3; Stip 4j).

11. Respondent thereafter found probable cause to believe that Petitioner committed the felony of obtaining property by false pretenses, and thereby, lacked good moral character. (R Ex 7).

12. Petitioner was sufficiently notified of proposed revocation. (Stip 3&4k; R Ex 7).

13. Petitioner objected and timely appealed here. (Stip 3&4l; R Ex 8).

14. Melissa Bowman, an investigator with Respondent, testified primarily from the internal investigation documents. (T pp 11, 14-15; R Ex 3).

15. Brooke Mahoub testified for Extra Duty Solutions. She supervised the questioned assignments. She explained the procedures and expectations relative to same. (T pp 21-22, 23).

16. Captain Elizabeth Cox of the Guilford County Sheriff's Office, testified re their internal investigation. (T pp 34-36; R Ex 5).

17. Petitioner was first interviewed on 09 March 2023. In that interview, Petitioner stated, "I have no intentions from stealing time from anybody" and "my intentions is to never steal any time from the county or any of those vendors that I do work." (R Ex 4).

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<sup>2</sup> The Giglio notice was flawed/untrue, but both parties agreed this immaterial to the dispute. (T pp 116-118).

18. Petitioner was last interviewed on 20 April 2023, during which he was shown portions of the security video from LT Apparel. (R Ex 4).

19. The video was unavailable at hearing. Testimony about it was mostly hearsay.

20. At hearing, Petitioner agreed that he did not complete the subject shifts. He was nervous and confused but did his best to concede what his superiors concluded from the video. (T p 53).

21. There are two competing interpretations of this case following Petitioner's testimony: a) He intended to lie and steal, arguably bolstered by incongruity between his testimony of concession and memory; or b) He balanced respect for his superior's judgment against memory, which interpretation was supported by his credibility, history, and tendencies. The Undersigned finds in line with the latter.

22. The Tribunal determines that Petitioner is culpable, but only for inadvertence due to inattention and exhaustion. Specifically, there was no intent to deceive. (T pp 53,73, 77-8).

23. The Undersigned agrees with Petitioner that these missteps are out of character for him and expects he can and will do better moving forward. (T pp 55, 73).

24. The credible evidence does not support a determination that Petitioner committed the offense accused or that (relatedly) Petitioner lacks good moral character. *See* Conclusions No. 8 & 20, incorporated here by reference.

25. Petitioner presented documents of accommodation and appreciation for exceptional work. Petitioner was the 2021 rookie of the year. (T pp 84-86; R Ex 9).

26. The Sheriff's Office prefers Petitioner stay and redeem himself. The undersigned concurs with Sheriff Rogers who was directly involved and meted sufficient consequences. (T pp 108, 112).

### CONCLUSIONS OF LAW<sup>3</sup>

1. Respondent has authority of establishment, oversight, and maintenance of *minimum* standards for criminal justice officer certification. G.S. 17E-4 & 4.1; 12 NCAC 10B .0301.

2. Respondent is authorized to certify law enforcement officers and to revoke, suspend, or deny certification in proper circumstances. 12 NCAC 10B .0204 (*cf.* Stip 2).

3. Though Art. 3A of the APA is silent regarding the applicable standard of evidence, it is undisputedly by preponderance. *In re Rogers*, 297 N.C. 48, 59, 253 S.E.2d 912, 919 (1979).

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<sup>3</sup> 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).

4. 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; *Graves v. Commission*, 2022 NC OAH LEXIS 374 (new applicant). For further reference, see *Canty v. Commission*, 2014 NC OAH LEXIS 127. These analyses are incorporated by reference.

5. Regardless, to any extent the burden was Petitioner's, he carried it; to any extent it was Respondent's, it failed. *Harris v. Mangum*, 183 N.C. 235, 239-40, 11 S.E. 177, 179 (1922) (summarizing the interplay of burden, participant roles, and a decision by preponderance of the probative evidence regardless of who successfully introduced it or when).

#### **Felony Allegedly Committed, Not Convicted**

6. 12 NCAC 10B .0204(a)(1) requires revocation if Petitioner is determined to have committed or been convicted of a felony. 12 NCAC 10B .0205(1)(a) requires that such revocation be permanent.<sup>4</sup>

7. G.S. 14-100 (emphasis added) provides:

(a) If any person shall *knowingly and designedly* by means of any kind of false pretense whatsoever, ... obtain or attempt to obtain from any person<sup>5</sup> within the state any money ... or other thing of value with *intent* to cheat or defraud ..., such person shall be guilty of a felony....

(b) Evidence of nonfulfillment of a contract obligation *standing alone* shall not establish the essential element of *intent* to defraud.

8. There is insufficient evidence to establish the requisite *mens rea*. Indeed, the credible evidence of the case affirmatively disproved intent *to wit* by design. *See Harris, supra*.

#### **Moral Character**

9. Every criminal justice officer shall *be* of good moral character, as defined by caselaw. 12 NCAC 10B .0301(12). At issue is Petitioner's current character. *Id.*

10. 12 NCAC 10B .0204(b)(2) requires revocation, denial, or suspension when a justice officer fails to meet or maintain minimum standards to include good moral character.

11. 12 NCAC 10B .0205(3)(b) requires that such revocation, denial, or suspension continue indefinitely, or for "so long as the stated deficiency, infraction, or impairment" persists.

12. The purpose is not to punish a candidate but to protect the public and preserve integrity. *In re Legg*, 325 N.C. 658, 673, 386 S.E.2d 174, 182 (1989).

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<sup>4</sup> There is question of whether the Commission has authority to permanently revoke certification based solely upon commission. *Cf.* G.S. 17E (mentioning only convictions); 12 NCAC 10B .204(a)(1) (adding commission); & the fundamental/constitutional right of citizens to the "fruits of their own labor...." Address is unnecessary for decision.

<sup>5</sup> Any "person" encompasses bodies politic and/or business entities. G.S. 14-100(c).

13. The term good moral character is unusually ambiguous. *Konigsberg v. State*, 353 U.S. 252, 262-63 (1957).

14. Due to concerns about flexibility and vagueness, certification restriction based on moral turpitude must be judiciously applied. *In re Willis*, 288 N.C. 1, 15, 215 S.E.2d 771, 780 (1975), *appeal dismissed*, 423 U.S. 976 (1975).

15. Acts of moral turpitude are described to involve "baseness, vileness, or depravity." *Dew v. State ex rel. N.C. Dep't of Motor Vehicles*, 127 N.C. App. 309, 311, 488 S.E.2d 836, 837 (1997) (internal quotations and citation omitted).

16. It may be defined as "[c]onduct that is contrary to justice, honesty, or morality." Black's Law Dictionary, 1101 (9th ed. 2009); *cf. and contrast, In re Willis, supra* at 10, 215 S.E.2d at 775-77 (1975) ("honesty, fairness, and respect for the rights of others and for the law...").

17. Isolated instances are seldom sufficient. *See In Re Rogers*, 297 N.C. 48, 58, 253 S.E.2d 912, 918 (1979).

18. Only severe conduct may serve as a basis for moral turpitude. *Devalle v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 289 N.C. App. 12, 28, 887 S.E.2d 891, 901 (2023).

19. In absence of mandate, we resort to "policy, fairness and common sense." *Peace v. Employment Sec. Comm'n of N. Carolina*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998). Judiciousness and a standard of obvious and severe transgression, in this sense, are akin.

20. There is insufficient evidence of moral turpitude. Indeed, the totality of credible evidence demonstrates current, good moral character. *See Harris, supra*.

#### **Miscellaneous**

21. Hearsay is subject to discount or disregard. 26 NCAC 03 .0122; NCRE, Rule 803; *cf.* 26 NCAC 03 .0122(3) (referenced evidence must be available for consideration).

22. The ALJ determines credibility. *Brithaven of Morganton v. DHR*, 118 N.C. App. 379, 388, 455 S.E.2d 455, 462-3, *disc. rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).

23. "[D]eciding which permissible inference to draw from evidentiary circumstances is as much within the fact finder's province as is deciding which of two contradictory witnesses to believe." *Halloway v. Tyson Foods, Inc.*, 193 N.C. App. 542,548, 668 S.E.2d 72, 76 (2008).

24. The determinations of the undersigned are based upon a preponderance of the credible evidence, after full hearing and significant deliberation.

25. Substantial evidence justifies adoption of the following proposal. G.S. 150B-42.

#### **PROPOSAL**

**BASED ON** the foregoing, Petitioner's certification should NOT be **REVOKED**.

**NOTICE**

The agency captioned and addressed herein will make the final decision in this contested case. G.S. 150B-38 *et seq.* (Art.3A).

The parties must be given opportunity in advance “to file exceptions and proposed findings of fact and to present oral and written arguments to the agency.” G.S. 150B-40(e).

The agency or its counsel will timely file a copy of the final decision referencing the case number specified herein with the Office of Administrative Hearings.

**ORDERED** 09 September 2024.



The Honorable Jonathan S. Dills  
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 by electronic service as defined in 26 NCAC 03 .0501(4) and/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 which thereafter places the foregoing document into an official depository of the U.S. Postal Service, as follows:

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This the 9th day of September, 2024.



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