FILED
OFFICE OF ADMINISTRATIVE HEARINGS
08/27/2024 2:14 PM

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 DOJ 05109

Alex William Aboussleman Petitioner, v. NC Sheriffs Education and Training Standards Commission Respondent.	**PROPOSAL FOR DECISION**

This contested case was heard before Michael C. Byrne, Administrative Law Judge on June 27, 2024 at the Office of Administrative Hearings in Raleigh, North Carolina following the request of Respondent NC Sheriffs' Education and Training Standards Commission for appointment of an Administrative Law Judge to hear the case of Petitioner Alex William Aboussleman pursuant to N.C.G.S. 150B-40(e).

APPEARANCES

Mr. Daniel Meier
Meier Law Group PLLC
100 E. Parrish St., ste. 300
Durham, NC 2770

Ms. Joy Strickland
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602

EXHIBITS

Respondent's Exhibits 1, 1A, 1B, 2, 8 , 11, 12 , and 13, Ex 3, Ex 4, 5, 7, 9 (barring page 3) 10, 10, 14 and 14A and 14B were admitted

Petitioner's Exhibits 1 and 2 were admitted

WITNESSES

For Respondent:

Melissa Bowman
Alex William Aboussleman (designated adverse)
Officer Cassandra Ferraro
Officer Tyler Ray
Autumn Elder
Rick Sisson
Alison Aboussleman

For Petitioner:
Alex William Aboussleman

ISSUE

Whether Respondent's Probable Cause Committee correctly found probable cause to suspend and/or revoke Petitioner's justice officer certification based on Petitioner's "commission" of crimes and based on Respondent's finding, due to that alleged commission, that Petitioner lacked good moral character.

Based upon the testimony of the witnesses, consideration of all the admitted exhibits, the governing law and rules, and all evidence of record, the Tribunal makes the following:

FINDINGS OF FACT

Parties and Witnesses

1. Petitioner Alex William Aboussleman holds a general certification as a deputy sheriff from Respondent. (Res. Ex. 1). Petitioner's testimony was partially credible and partially not credible.

2. Respondent North Carolina Sheriffs' Education and Training Standards Commission has authority 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 when legally appropriate.

3. Melissa Bowman is an investigator for Respondent. She has been employed for two years and has prior experience as an investigator for other State and local agencies. Bowman was a credible witness.

4. Officer Tyler Ray is an officer with the Durham, NC Police Department. Ray was a credible witness.

5. Officer Cassandra Ferraro is an officer with the Apex, NC Police Department. Ferraro has over ten years of law enforcement experience with the Apex Police Department and other agencies. Ferraro was a credible witness.

6. Autumn Elder was the alleged victim of an "Assault on a Female" charge against Petitioner.[1] Elder was not a credible witness.

7. Rick Sisson is the stepfather of Petitioner's former spouse, Alison Aboussleman. Sisson was the alleged victim of a "Cyberstalking" criminal offense by Petitioner. Sisson was not a credible witness.

8. Alison Aboussleman is the former spouse of Petitioner and was the alleged victim of a "Cyberstalking" and "Harassing Phone Call" criminal offense by Petitioner. Alison Aboussleman was generally a credible witness, though clearly adverse to Petitioner. See State v. Lewis, 365 N.C. 488, 494, 724 S.E.2d 492, 497, 2012 N.C. LEXIS 267, *12, 2012 WL 1242323: "We have long held that evidence of bias is logically relevant to a witness' credibility... ."

Petitioner's Work and Pertinent Personal History

9. Petitioner began work for the Durham County Sheriff's Office as a detention officer and was certified as such by Respondent in 2013. (Res. Ex. 2). In the ensuing years Petitioner served in more advanced positions as a certified deputy sheriff with the same agency (Res. Ex. 1). There is no evidence that prior to the events here Petitioner had discipline or performance issues connected with his work.

10. Petitioner, until the events here, had no criminal history other than minor traffic offenses. There was evidence at the hearing that Petitioner later received a traffic charge, subsequently dismissed. However, that charge occurred after the probable cause determination and there is no evidence it was considered by Respondent's Probable Cause Committee. The Tribunal thus will not consider that charge in this Proposed Decision. "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." In re Duvall, 268 N.C. App. 14, 19, 834 S.E.2d 177, 181, 2019 N.C. App. LEXIS 838, *8, 2019 WL 5206277

11. Petitioner was married to Alison Aboussleman on June 28, 2014, and they have one child from the marriage. (Res. Ex. 10). Identification of the minor child is not necessary to resolve this case. Petitioner and Alison Aboussleman were divorced on November 21, 2021.

12. Following his separation from Alison Aboussleman, Petitioner entered into an on-again/off-again romantic relationship with Elder.

"Assault on a Female" Criminal Charge

13. On April 26, 2022, the Apex, NC Police Department responded to a domestic incident at Elder's residence. Ferraro was the investigating officer. (Res. Ex. 3).

[1] Elder testified that her surname has changed since the events of this case. To avoid confusion, the Tribunal refers to this witness as "Elder."

14. Ferarro and her assisting officers investigated the incident and interviewed all persons present. Of the persons interviewed, only Petitioner and Elder testified at the contested case hearing. The narrative in Ferraro's incident/investigation report (Res. Ex. 3) is a model of clarity, as was Ferraro's testimony at the contested case hearing corroborating her report.

15. Petitioner and Elder told Ferraro widely divergent stories about the origination of the incident. Petitioner said the altercation began when he and Elder were discussing a hypothetical "end of the world" scenario and Elder became upset and physically attacked him. Elder said she was in her bedroom saying a prayer and that Petitioner entered the room and physically attacked her when she was unable to give Petitioner the location of his keys.

16. Petitioner's actions in the incident as noted in Ferraro's report and his testimony at trial were generally, if not completely, consistent. Elder, however, testified at trial that the incident began when Petitioner allegedly showed Elder a video of "how he was going to kill her." This allegation appears nowhere in Ferraro's report, which, as noted, gives a significantly different origin story for the incident on Elder's part.

17. In summary, Petitioner told Ferraro, and so testified at trial, that Elder attacked him. Petitioner also testified that he went to Elder's home that night, bringing along his minor child, to end the relationship. However, that Petitioner came to Elder's home equipped to spend the night there, as he also testified, does not square well with his claims that went there to "end the relationship," and is not credible.

18. Ferraro did not immediately notice any marks, cuts, or bruises on Elder (Res. Ex. 3 and Ferraro testimony). Ferraro "did not see any bruises or marks anywhere on her face. I did see what appeared to be scratch marks on the left side of her face/neck, which could have been from her own nails." (Id.)

19. Per Ferraro's report, both Elder and Petitioner appeared to be intoxicated when the investigating officers arrived at Elder's residence.

20. Elder claimed (as stated in Ferraro's report, and as Elder testified similarly at trial), that Petitioner subjected her to a prolonged and violent physical assault that included punching Elder repeatedly in her face with his fists and with a "Roomba" vacuum. Elder also told officers that Petitioner had attacked her by "putting her in a chokehold and dragging her downstairs," and testified that Petitioner had choked or strangled her during the incident. (Res. Ex. 3).

21. However, when Ferraro interviewed Elder about the alleged choking or strangling in the course of doing a "Lethality Assessment," she told Ferraro, as Ferraro confirmed in her testimony, "[Elder] stated, 'no choking happened tonight.' I asked her again and [Elder] again stated that there was no choking involved in today's incident." (Res. Ex. 3). When questioned about this inconsistency by the Tribunal, Elder claimed she "could not remember" making the statements. This was not credible given the detailed descriptions Elder otherwise provided in her testimony.

22. Ultimately, neither Ferraro nor her fellow officers could determine the primary aggressor. (Res. Ex. 3). The officers decided not to arrest either party. Both Petitioner and Elder were charged with Simple Assault. Subsequently, a person or persons unknown, presumably the Durham District Attorney's Office, "upgraded" Petitioner's charge to Assault on a Female. All criminal charges related to the incident were ultimately dismissed.

23. Ferraro did not find the versions of events told by either Petitioner or Elder to be particularly credible.

24. Like the professionally trained police officers who investigated the incident, the Tribunal cannot determine who was the aggressor in the incident involving Petitioner and Elder.

25. Elder was not a credible witness, primarily due to her changing stories and the near-total lack of physical evidence from what she claimed was a severe and prolonged physical assault with, among other things, a Roomba vacuum. Petitioner's version of events is not particularly credible either, but is generally more credible than Elder's.

26. Elder subsequently obtained a civil "Domestic Violence Protective Order" against Petitioner. (Res. Ex. 6). Petitioner in June 2022 entered into an agreement with Elder to pay certain medical bills claimed by Elder. This agreement stated (among other conditions) that "Neither the negotiation, undertaking, or execution of this Agreement shall constitute an admission of guilt by either party." Id.

27. Petitioner made at least one payment under this agreement and testified that he made a second one. Elder testified that Petitioner refused to pay other bills she submitted. Resolution of the disputed payments of this civil matter is neither necessary for resolution of this case nor appropriate for this Tribunal to determine.

28. The Durham County Sheriff's Office terminated Petitioner's employment on September 26, 2022. (Res. Ex. 1A).

29. In its Report of Separation submitted to Respondent (Res. Ex. 1A), the Durham County Sheriff's Office checked "No" to the question, "Was this separation a result of a criminal investigation or violation of Commission rules?" The Durham County Sheriff's Office checked "Yes" on the same form to the question, "Are you aware of any on-going or substantiated internal investigation regarding this officer in the past 18 months?"

"Harassing Phone Call" and "Cyberstalking" Charges

30. Petitioner, Sisson, his ex-mother in law (who did not testify) and Alison Aboussleman had a "group text" set up. The primary purpose of this group text was parenting-related communications for the child of Petitioner and Allison Aboussleman.

31. The relationship between Petitioner and Sisson was, per the testimony of both men, merely cordial at best.

32. Alison Aboussleman has known Petitioner since 2011. They were married from June 2014 until their divorce in November 2021. Per Alison Aboussleman, her post-divorce relationship with Petitioner was initially cooperative but deteriorated over time.

33. The Tribunal finds as a fact that March 23, 2023, Petitioner sent multiple text messages to the group text (Res. Ex. 7) (the "March 23 messages"). The Tribunal also finds as a fact that Petitioner sent 25-28[2] text messages to the group text on that date, including two images of Alison Aboussleman that she had posted on social media.

34. Respondent's Probable Cause Determination (Res. Ex. 11) states that "Specifically, on or about March 23, 2023, you unlawfully did repeatedly telephone Alison Aboussleman and sent over forty text messages after being told to stop." This statement is unsupported by the evidence. Respondent's Exhibit 7 shows 25-28 text messages, not "over forty". There is nothing evident in the March 23 messages where any recipient "told Petitioner to stop".

35. Many of the March 23 messages were, by the standards of any reasonable person, boorish and insulting. Petitioner admitted at trial that the language he used in the March 23 messages was inappropriate.

36. When Petitioner sent the March 23 messages, he was angry because he believed the recipients were preventing him from seeing his son.

37. The majority of Petitioner's March 23 messages, by their wording, refer to or are directed to Sisson. For example:

    a. 8:34 PM: *I think he will feel especially strong about what a bitch that Rick is.*

    b. 8:45 PM: *Fuck you, Rick. Bitch ass wuss fucktard.*

    c. 8:50 PM: *I'm going to call Dick one more time, right now.*

    d. 8:54 PM: *He won't even answer his phone because he's being such a huge bitch.*[3]

38. Of the 28 March 23 messages, only eight by their plain wording are addressed directly to Alison Aboussleman. The balance of messages appear to be directed at Sisson.

39. In response to inquiries from the Tribunal, Petitioner stated that he "could have" consumed alcohol at the time he sent the March 23 messages. This answer was evasive at best.

---

[2] Respondent's Exhibit 7 makes it difficult to determine if some of the communications are separate messages.

[3] The other messages are much in the same vein and are unnecessary to duplicate in their entirety here. See Hardy v. N.C. Cent. Univ., 2018 N.C. App. LEXIS 794, *9 FN3, 260 N.C. App. 704, 817 S.E.2d 495, 2018 WL 3733622. "Cumulative testimony of a similar nature was given at trial, but we find it repetitive and set out this testimony as illustrative of the whole."

40. At no time in the March 23 messages did any recipient respond and ask Petitioner to stop texting, though Alison Aboussleman early in the March 23 messages replied that she had previously called the police on Petitioner "Because you are harassing me and my family and emotionally abusing our son." (Res. Ex. 7).

41. Alison Aboussleman subsequently made a criminal complaint against Petitioner in reference to the March 23 messages that resulted in Petitioner being charged on March 30, 2023 with the criminal offenses of "Harassing Phone Call" in violation of N.C.G.S. 14-196(a)(3) and "Cyberstalking" in violation of N.C.G.S. 14-196.3 (Res. Ex. 8).

42. The warrant for the Alison Aboussleman charges alleged that on or about March 23, 2023, Petitioner "unlawfully and willfully did telephone Alison Aboussleman repeatedly for the purposes of annoying, harassing [sic] Alison Aboussleman at the called number." Id.

43. Sisson, approximately seven weeks later, also made a criminal complaint against Petitioner in reference to the March 23 messages. This resulted in Petitioner being charged on May 15, 2023 with "Cyberstalking" in violation of N.C.G.S. 14-196.3 (Res Ex. 8).

44. The warrant for the Sisson charges, again issued May 15, 2023, alleged that on or about March 30, 2023 Petitioner "unlawfully and willfully did electronically communicate to Rick Charles Sisson repeatedly for the purposes of abusing Rick Charles Sisson." Id.

45. Following his dismissal from Durham County Sheriff's Office, Petitioner obtained employment with the Person County Sheriff's Office as a bailiff. On May 30, 2023, while working in Person County, Petitioner was called to his captain's office.

46. When Petitioner reported as directed, he was arrested on the "Harassing Phone Call" and "Cyberstalking" charges. Person County deputies took Petitioner to the Durham County line, where Durham County deputies transported Petitoner to the county detention facility (Res. Ex. 8), "Arrest Report."

47. The Person County Sheriff's Office terminated Petitioner's employment after his arrest.

48. Petitioner entered into a consent order (Res. Ex. 10) where he agreed to avoid contact with Sisson and Alison Aboussleman and stay at least 1,000 feet away from them.

49. All criminal charges against Petitioner stemming from the March 23 messages were ultimately dismissed (Res. Ex. 8). The documents note as the reason for dismissal, "Protective Order in place. Victim does not wish to proceed." Id.

50. Sisson could not point to any insulting or harassing texts made to him by Petitioner between the March 23 messages and his May criminal complaint against Petitioner. Sisson did not personally feel threatened or harassed by the March 23 messages. Sisson initiated the May criminal charge against Petitioner because he "Wanted to add a little fuel to the fire for the custody thing" between Petitioner and Alison Aboussleman.

51. The Tribunal finds as a fact that Sisson's criminal complaint against Petitioner made with the intent of initiating a criminal charge to influence the apparent custody disputes between Petitioner and Alison Aboussleman and not out Sisson's legitimate belief that he was the victim of a crime.

Petitioner's Relevant Actions After the Criminal Charges

52. Petitioner is in counseling and attended the "Strong Fathers" programs, "working on myself trying to take care of myself mentally and physically."

53. Petitioner also voluntarily underwent a mental health and alcohol assessment after the charges, but said that he did so because "I knew they were going to ask me to do it." T 121.

Respondent's Investigation of the Criminal Charges

54. Following its receipt of the Durham County Sheriff's Report of Separation, Respondent assigned Bowman to investigate Petitioner's matters. She spoke with the Durham County Sheriff's Office, interviewed Petitioner and the investigating officers on the assault charge, and reviewed the police report for the criminal charge of Assault on a Female.

55. Petitioner timely informed Respondent of the later charges stemming from the March 23 messages. Bowman interviewed Petitioner and the alleged victims about these charges and obtained documentation held by all parties involved.

56. Bowman prepared a report of her investigation and presented it to Respondent's Probable Cause Committee.

57. Bowman performed her investigative duties in this case in a professional and ethical fashion.

58. Respondent's Probable Cause Committee found that Petitioner "committed" the Class B misdemeanor of "Assault on a Female" and two counts of "Cyberstalking" and one count of "Harassing Phone Calls." Respondent's Probable Cause Commission also found that Petitioner lacked good moral character as a result of these incidents (Res. Ex. 11).

59. Respondent's Exhibit 11 also alleges that Petitioner's conduct with Elder and the March 23 messages "results in a combination of misdemeanors" permitting revocation of Petitioner's certification under 12 NCAC 10B .0204 (d)(3). "The Commission may revoke, suspend or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of: ... (3) four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(17)(b) as Class B misdemeanors regardless of the date of commission or conviction... ."

Based on these Findings of Fact, the Tribunal makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this contested case pursuant to N.C.G.S. 150B, Article 3A, following a request from Respondent under N.C.G.S. 150B-40(e) for an Administrative Law Judge to hear this contested case. In such cases the Tribunal sits in place of the agency and has the authority of the presiding officer in a contested case under Article 3A. The Tribunal makes a proposal for decision, which contains findings of fact and conclusions of law. Respondent makes the final agency decision. N.C.G.S. 150B-42.

2. The parties are properly before the Tribunal, in that jurisdiction and venue are proper, and both parties received Notice of Hearing.

3. It is not necessary for the Tribunal to make findings on every fact presented at the hearing, but rather those which are material for resolution of the present dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, (1993), affirmed, 335 N.C. 234, 436 S.E.2d 588 (1993).

4. To the extent the Findings of Fact contain Conclusions of Law, or vice versa, they should be so considered without regard to the given labels. Matter of V.M., 273 N.C. App. 294, 848 S.E.2d 530 (2020).

5. The question presented by this case is whether Petitioner "committed" criminal offenses for which he was never convicted of or pleaded guilty to in a court of law, and whether he presently possesses the good moral character required of law enforcement officers in North Carolina.

6. This case involves a proposal to revoke an occupational license or certification. It thus affects the substantive rights of the Petitioner, and he is entitled to both notice and an opportunity to be heard. Scroggs v. N. Carolina Criminal Justice Educ. & Training Standards Comm'n, 101 N.C. App. 699, 701, 400 S.E.2d 742, 744 (1991).

Respondent's Authority Under N.C.G.S. 17E

7. The North Carolina legislature, in creating the North Carolina Sheriffs' Education and Training Standards Commission in N.C.G.S. 17E-3, stated, "The General Assembly finds and declares that the office of sheriff, the office of deputy sheriff and the other officers and employees of the sheriff of a county are unique among all of the law-enforcement officers of North Carolina. ... The offices of sheriff and deputy sheriff are therefore of special concern to the public health, safety, welfare, and morals of the people of the State. The training and educational needs of such officers therefore require particularized and differential treatment from those of the criminal justice officers certified under Article 1 of Chapter 17C of the General Statutes." N.C.G.S. 17E-1 (condensed).

8. In N.C.G.S. 17E-4, "Powers and Duties of the Commission," the General Assembly authorizes Respondent to make enforceable "rules and regulations" and "certification procedures" regarding such officers in a number of areas. N.C.G.S. 17E-4(3) authorizes Respondent to

"certify, pursuant to standards that it may establish for the purpose, persons as qualified under the provisions of this Chapter who may be employed at entry level as officers."

9. N.C.G.S. 17E-7, "Required standards," directs and authorizes Respondent to set certain standards for appointment of justice officers, and "may fix other requirements, by rule and regulations, for the employment and retention of justice officers… ." Id. at (c).

10. Respondent's authority to impose standards for certification of justice officers is recognized by our Supreme Court. Britt v. N. Carolina Sheriffs' Educ. & Training Standards Comm'n, 348 N.C. 573, 501 S.E.2d 75 (1998).

11. However, as recently affirmed by the Court of Appeals, Respondent may not perform its certification or revocation role in a manner that is arbitrary and capricious. Devalle v. N. Carolina Sheriffs' Educ. & Training Standards Comm'n, No. COA22-256, 2023 WL 3470876 (N.C. Ct. App. May 16, 2023). This includes Respondent's operation and interpretation of its own rules and standards. Id.[4]

"Commission" of a Criminal Offense

12. Petitioner was not convicted of any criminal offense at issue in a court of law. Thus, it is necessary to show that Petitioner "committed" the criminal offenses.

13. "Commission" as it pertains to criminal offenses means a finding by the North Carolina Sheriffs' Education and Training Standards Commission or an administrative body, pursuant to the provisions of N.C.G.S. 150B, that a person performed the acts necessary to satisfy the elements of a specified criminal offense. 12 N.C. Admin. Code 10B.0103(16); see also 12 NCAC 10B .0307

14. The Administrative Code defines "conviction" and "commission" of a crime separately. Becker v. N. Carolina Crim. Just. Educ. & Training Standards Comm'n, 238 N.C. App. 362, 768 S.E.2d 200 (2014) (unpublished). In addition, the Court of Appeals has held that Respondent "may revoke a correctional officer's certification if it finds that the officer committed a misdemeanor, regardless of whether he was criminally convicted of that charge." Becker, citing Mullins v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 125 N.C. App. 339, 348, 481 S.E.2d 297, 302 (1997). Though these cases involved the North Carolina Criminal Justice Education and Training Standards Commission, that body and Respondent serve similar roles and the Tribunal presumes them to have equal regulatory authority.

15. In determining whether a person "committed" a crime, Respondent does not "attempt to interpret North Carolina's criminal code," but instead must "**use pre-established elements of behavior** which together constitute [a criminal] act. **The Commission relies on the elements of each offense, as specified by the Legislature and the courts.**" Mullins at 347, 302 (emphasis supplied). See State v. Eastman, 113 N.C. App. 347, 351, 438 S.E.2d 460, 462 (1994): "The State failed to show any instance where the defendant [a state employee at the Governor Morehead School] could exercise sovereign power at any time in the course of his employment."

[4] Devalle is under review by the Supreme Court but as of now (August 2024) remains good law.

Burden of Proof: the Inapplicability of Overcash and Article 3 to Article 3A Cases

16. The burden of proof for cases under Article 3 of the Administrative Procedure Act, N.C.G.S. 150B, is allocated by statute. See N.C.G.S. 150B-25.1. There is no statutory allocation of the burden of proof in administrative actions arising out of Article 3A of the APA.

17. The General Assembly has made clear that Article 3 and Article 3A of the APA are separate entities. Statutes in the former do not apply to the latter:

> **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.**

N.C.G.S. 150B-40(e) (emphasis supplied).

18. "Statutory interpretation properly begins with an examination of the plain words of the statute." Correll v. Div. of Soc. Servs., 332 N.C. 141, 144, 418 S.E.2d 232 (1992). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." Belmont Ass'n v. Farwig, 381 N.C. 306, 310, 2022-NCSC-64, P16, 873 S.E.2d 486, 489, 2022 N.C. LEXIS 582, *8. The "plain and definite meaning" of the words above is that Article 3A, not Article 3, applies to cases brought under Article 3A.

19. There is no question that this case was brought under Article 3A. On December 6, 2023, Respondent requested, "**pursuant to N.C.G.S. §150B-40(e),**" the "designation of an Administrative Law Judge to preside at the hearing of a contested case **under Article 3A**, Chapter 150B of the North Carolina General Statutes." Petition, December 6, 2023 (emphasis supplied).

20. This being so, by the clear and unambiguous language of N.C.G.S. 150B-40(e), the provisions of Article 3 do not apply to this case – as specifically found by our Court of Appeals: "As an occupational licensing agency, hearings before the Board of Dental Examiners are thus governed by Article 3A of the NCAPA." Homoly v. State Bd. of Dental Examiners, 121 N.C. App. 695, 697, 468 S.E.2d 481, 482 (1996). In 2011, the Court of Appeals, citing Homoly, held: "We find it important to note the provisions of Article 3 **do not apply to cases governed by Article 3A**." Burgess v. N.C. Crim. Justice Educ. & Training Stds. Comm'n, 2011 N.C. App. LEXIS 1856, *14, 2011 WL 3570107.[5](emphasis supplied).

21. Despite these rulings, Respondent's Final Agency Decisions continue to insist that a burden of proof derived under Article 3, specifically Overcash v. N.C. Dep't of Env't & Natural Res., 179 N.C. App. 697, 699, 635 S.E.2d 442, 444 (2006), applies to cases brought under Article 3A. Repeatedly, OAH issues Proposals for Decisions stressing the dearth of authority for this

[5] Burgess was unpublished, but Homoly, cited for the specific premise of the non-applicability of Article 3 to Article 3A, was published.

premise.[6] Repeatedly, Respondent's final decisions simply "cross out" this language and replace it with rote declarations placing the burden of proof on petitioners, citing Overcash and Article 3.

22. While it is true that the unpublished (and never subsequently cited) Burgess opinion states that Respondent does not have to explain its reasons for rejecting an OAH decision, (Id. at *14), the Tribunal respectfully points out that simply "crossing out" a legal issue does not make that legal issue go away, nor will it keep that issue from arising again on both the OAH and appellate levels.

23. To cite one recent "cross out" example, in Fallon Coffer v. NC Sheriffs Education and Training Standards Commission, 2023 NC OAH LEXIS 159, 22 DOJ 04730, Respondent's counsel simply "crossed out" the Tribunal's assignment of the burden of proof under an Article 3A analysis, proposing its replacement with this:

> 7. **Conclusions of Law Nos. 5 and 6 should be added to align with Respondent's position on burden of proof.**
>
> 5. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative lase judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).
>
> 6. Petitioner has the burden of proof in the case at bar. Overcash v. N.C. Dep't of Env't & Natural Resources, 172 N.C. App 697, 635 S.E. 2d 442 (2006).

24. This language duly appeared in both Respondent's Final Agency Decision issued September 28, 2023. While as noted N.C.G.S. 150-40 and two appellate decisions unambiguously states that Article 3 does not govern cases under Article 3A, Respondent's Final Agency Decision in Coffer substituted for the Tribunal's Article 3A analysis:

    a. **N.C.G.S. 150B-23(a)**, which is in **Article 3**.

    b. **N.C.G.S. 150B-29** ("Rules of Evidence") which is in **Article 3** –Article 3A has its own evidence statute, N.C.G.S. 150B-41("Evidence; stipulations; official notice") applicable to Article 3A cases.

    c. **N.C.G.S. 150B-34**, which is not only in **Article 3**, but is in direct contradiction to Article 3A, as it refers to the Administrative Law Judge making a "final decision" in the case (As opposed to N.C.G.S. 150B-40 in Article 3A: "The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law." N.C.G.S. 150B-40(e)).

---

[6] See, e.g., Donovan Barnes v. NC Sheriffs Education and Training Standards Commission, 2020 NC OAH LEXIS 46, *8, 19 DOJ 04315 ("The issue of burden of proof has previously been raised with this ALJ in Article 3A hearings, and this ALJ has consistently held that Respondent has the burden of proof, not merely the burden of going forward."); William Donald Britt v. NC Sheriffs Education and Training Standards Commission, 2020 NC OAH LEXIS 427, *40, 19 DOJ 05371; Robert Erick Jordan v. NC Sheriffs Education and Training, Standards Commission, 2021 NC OAH LEXIS 88, *12, 20 DOJ 03449; Junior Thompson v. NC Sheriffs Education and Training Standards Commission, 2023 NC OAH LEXIS 333, *7, 23 DOJ 02641.

25. Thus, Respondent substituted in the Coffer Final Agency Decision three statutes, (a) all from Article 3, (b) none of which apply to Article 3A cases, (c) one of which has a separate Article 3A statute on the same issue, and (d) another which directly contradicts Article 3A.

26. Overcash originated in OAH more than 20 years ago as Ronald Gold Overcash v. N.C. Department of Environment and Natural Resources, Division of Waste Management, 2003 NC OAH LEXIS 36, 00 EHR 0662/0732/0733,/0835, (April 4, 2003). The issue in Overcash, as stated in the Administrative Law Judge's decision,[7] was:

> Whether Petitioner **has met his burden of proof** by establishing that Respondent acted erroneously or otherwise violated **N.C. Gen. Stat. § 150B-23** when Respondent assessed against Petitioner **four (4) civil penalties and investigative costs** in the total amounts of: (1) $ 15,980.64 (UST 99-082FT); (2) $ 26,942.88 (UST 01-079FT); (3) $ 38,978.37 1 (UST 02-011P); and (4) $ 43,978.37 (UST 02-007P) for violations of underground storage tank statutes and regulations?

Overcash, Id. (emphasis supplied).

27. Thus, Overcash from its inception was under Article 3, not Article 3A, of the APA. N.C.G.S. 150B-23, the primary Article 3 statute discussed in Overcash, on both the OAH and appellate levels, specifically differentiates contested cases filed under Article 3 and Article 3A of the APA: "(a) A contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the Office of Administrative Hearings and, **except as provided in Article 3A of this Chapter**, shall be conducted by that Office ... ." N.C.G.S. 150B-23(a). (emphasis supplied). See also N.C.G.S. 150B-40(e).

28. On the appellate level, the Overcash opinion discusses only Article 3 statutes. Overcash at 704, 447 (2006). The two cases on which Overcash relies for the burden of proof question, Britthaven[8] and Holly Ridge,[9] were brought under Article 3. Holly Ridge was reversed by the Supreme Court on the grounds that it misinterpreted the law of intervention under N.C.G.S. 150B-23(d) – which is in Article 3.[10] Intervention in Article 3A cases is controlled by N.C.G.S. 150B-38(f).[11]

29. And, while Holly Ridge states that "our caselaw holds that unless a statute provides otherwise, petitioner has the burden of proof in OAH contested cases," the case cited for this premise – page 328 of Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507 S.E.2d 272 (1998) – says no such

---

[7] Another difference between Article 3 and Article 3A is that in the former, the ALJ makes a Final Decision. In Article 3A, the decision is a "Proposal for Decision." At the time Overcash was heard in OAH, Article 3 cases were still decided by a form of recommended or proposed decisions. This further demonstrates the divergence between Article 3 and Article 3A decisions in the more than two decades since Overcash was decided.

[8] Britthaven, Inc. v. N.C. Dep't of Human Res., 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 disc. review denied, 341 N.C. 418, 461 S.E.2d 754 (1995).

[9] Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 176 N.C. App. 594, 627 S.E.2d 326 (2006).

[10] Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 532, 648 S.E.2d 830, 832 (2007).

[11] "(f) Any person may petition to become a party by filing with the agency or hearing officer a motion to intervene in the manner provided by G.S. 1A-1, Rule 24. In addition, any person interested in a contested case **under this Article** may intervene and participate to the extent deemed appropriate by the agency hearing officer." (emphasis supplied).

thing. The statute cited in Holly Ridge for this premise – N.C.G.S. 150B-23(a) – is, once again, in Article 3. Further, in its decision reversing Holly Ridge, the Supreme Court did not endorse that opinion's allocation of the burden of proof.

30. In House of Raeford Farms, Inc. v. N.C. Dep't of Env't & Natural Res., 242 N.C. App. 294, 774 S.E.2d 911, (2015), the Court of Appeals cited both Overcash and the same Article 3 statutes cited in Overcash to place the burden of proof on a petitioner challenging an environmental penalty. Id. at 303, 918 (2015). Nowhere in Raeford Farms did the Court of Appeals discuss either occupational licensing agencies, such as Respondent here, or Article 3A generally.

31. Mere months[12] after the Raeford Farms ruling, the General Assembly amended Article 3– but **not** Article 3A – as follows:

> *SECTION 1.2.(a)* ***Article 3 of Chapter 150B*** *of the General Statutes is amended by adding a new section to read:*
> *"Section 150B-25.1.*
> ***Burden of proof.***
>
> *(a) Except as otherwise provided by law or by this section, the petitioner in a contested case has the burden of proving the facts alleged in the petition by a preponderance of the evidence.*
> *(b) In a contested case involving* ***the imposition of civil fines or penalties*** *by a State agency for violation of the law,* ***the burden of showing by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed rests with the State agency.***
> *(c) The burden of showing by a preponderance of the evidence that a career State employee subject to Chapter 126 of the General Statutes was discharged, suspended, or demoted for just cause rests with the agency employer. "*

2015 N.C. ALS 286, 2015 N.C. Sess. Laws 286, 2015 N.C. Ch. 286, 2015 N.C. HB 765 (codified at N.C.G.S. 150B-25.1). (emphasis supplied).

32. This 2015 amendment is important for a number of reasons. First, the General Assembly amended only Article 3, not Article 3A, to impose a statutory burden of proof. It could have chosen to amend Article 3A in a similar fashion, but did not. "If the Legislature desired to establish a public policy entitling county [or city] employees to the protection of G.S., Chap. 126, it could have done so." Conran v. New Bern Police Dep't, 122 N.C. App. 116, 468 S.E.2d 258 (1996) citing Walter v. Vance County, 90 N.C. App. 636, 641, 369 S.E.2d 631, 634 (1988).

33. The General Assembly's choice to allocate a statutory burden of proof in Article 3, but not in Article 3A, leads to the conclusion that the General Assembly did not find it appropriate to allocate a set burden of proof for cases under Article 3A.

---

[12] The timing of the amendment suggests that the Raeford Farms ruling motivated the subsequent statutory change.

34. Second, the 2015 amendment means that the burden of proof imposed in Overcash and Raeford Farms is superseded by statute: N.C.G.S. 150B-25.1 places the burden of proof in all cases of fines and civil penalties not on the petitioner, but on the State agency by "clear and convincing" evidence. Id. at (b). This standard is "greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." In re W.K., 376 N.C. 269, 277, 852 S.E.2d 83 (2020).

35. Third, the General Assembly's selection of an enhanced burden of proof in N.C.G.S. 150B-25.1 demonstrates awareness that some agency actions – fines and civil penalties – require both that the burden of proof be on the State and that the State's burden of proof should be higher than the "preponderance of the evidence" standard usually applied in civil matters.

36. Moreover, the General Assembly has applied a heightened burden in cases, such as termination of parental rights, where important constitutional rights are implicated by the state action involved. In re B.L.H., 376 N.C. 118, 124, 852 S.E.2d 91, 96 (2020); see also N.C.G.S. 7B-1109(f). The situation in this case involves the even more serious claim that a citizen, though never convicted of such, committed a criminal offense.

37. Fourth and thusly: if the General Assembly found it appropriate to put a heightened "clear and convincing" burden of proof on State agencies seeking to impose a fine or civil penalty, how then can the now-superseded Overcash ruling provide Respondent its asserted authority to place the burden of proof on petitioners in cases involving the far more serious allegation that a petitioner committed a crime? Simply put, it cannot and does not.

38. Thus, rejection of the Overcash burden of proof in Article 3A cases stems not from "OAH decisions," but rather is compelled by both statutory language and appellate direction of the most clear and unambiguous kind.

39. In summary, Overcash provides neither Respondent nor OAH authority to impose the burden of proof on Petitioner, because:

    a. Overcash involves only **Article 3** of the APA.
    b. N.C.G.S. 150B-40, both by plain reading and the holdings in Homoly and Burgess, makes clear that the statutes in **Article 3A**, not Article 3, control cases brought under Article 3A.
    c. Plain reading of N.C.G.S. 150B-23 also excludes contested cases brought under Article 3A.
    d. The General Assembly amended Article 3 to allocate a statutory burden of proof, but did not so amend Article 3A.
    e. The burden of proof established in Overcash has been statutorily repealed and placed on the State by "clear and convincing evidence."
    f. The General Assembly's placement of a "clear and convincing evidence" burden of proof on the State in certain Article 3 cases demonstrates legislative intent that an agency must prove its case when significant public rights – such as fines, monetary penalties, and termination of parental rights – are at issue, and "commission of a crime" falls readily within those significant public rights.

The Burden of Proof is Properly Placed on Respondent

40. Having determined that Overcash provides no authority for imposition of the burden of proof in this case, the Tribunal now turns to (a) what is the correct analysis of the burden of proof, and (b) how, under that analysis, it is properly allocated. To do so, the Tribunal employs Peace v. Employment Sec. Comm'n, 349 N.C. 315, 317, 507 S.E.2d 272, 275, 1998 N.C. LEXIS 728, *1, 14 I.E.R. Cas. (BNA) 1080.

41. Peace itself arose under Article 3 of the APA. And, like Overcash, Peace's holding that the burden of proof in a "just cause" case was abrogated by N.C.G.S. 150B-25.1. See N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 666, 599 S.E.2d 888, 899 (2004). However, unlike Overcash, which relies solely on Article 3, Peace contains a broad discussion of due process under the Constitution of North Carolina and, with respect to the burden of proof, concludes as a matter of general application:

> In the absence of state constitutional or statutory direction, the appropriate burden of proof must be "judicially allocated on considerations of policy, fairness and common sense." 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 37 (4th ed. 1993).

42. It is a general legal principle that the burden is on the party asserting a claim to show the existence of that claim. Robinson v. Univ. of N.C. Health Care Sys., 242 N.C. App. 614, 621, 775 S.E.2d 898, 903, 2015 N.C. App. LEXIS 701, *12. Here, Respondent claims that (a) Petitioner committed multiple crimes, without evidence of a conviction, and (b) that because of these alleged crimes, Petitioner now lacks the good moral character, previously possessed, required of law enforcement officers in North Carolina.

43. While at least one appellate decision in the 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. Jones v. All American Life Ins. Co., 68 N.C. App. 582, 585, 316 S.E.2d 122, 125, 1984 N.C. App. LEXIS 3414, *9, affirmed, 312 N.C. 725, 727, 325 S.E.2d 237, 238, 1985 N.C. LEXIS 1501 (burden of proof in civil action under Slayer Statute is preponderance of the evidence); accord, Osman v. Osman, 285 Va. 384, 390-391, 737 S.E.2d 876, 879, 2013 Va. LEXIS 26, *8, 2013 WL 718753.

44. Simplified, placing the burden of proof on a citizen to show he did not commit a crime is neither fair nor demonstrates common sense. Peace. "As a general rule in this jurisdiction, the party who substantively asserts the affirmative of an issue bears the burden of proof on it. King v. Bass, 273 N.C. 353, 160 S.E. 2d 97 (1968); 2 Stansbury's North Carolina Evidence § 208 (Brandis rev. 1973). **The rationale for this rule lies in the inherent difficulty of proving the negative of any proposition.**" In re Rogers, 297 N.C. 48, 59, 253 S.E.2d 912, 919, 1979 N.C. LEXIS 1131, *23-24 (internal citation omitted) (emphasis supplied).

45. Thus, when Respondent's proposed 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 citizen's actions satisfied all elements of the crime. In re B.L.H., 376 N.C. 118, 124, 852 S.E.2d 91, 96 (2020). The same is true for the alleged change in Petitioner's moral character: Respondent alleges a change in status, and the burden is properly placed on Respondent to prove that change. In re Rogers.

"Assault on a Female" Charge

46. The elements of the crime of assault on a female are: an assault upon a female person by a male person who is at least eighteen years old at the time of the charged offense. State v. Wortham, 318 N.C. 669, 669, 351 S.E.2d 294, 295, 1987 N.C. LEXIS 1741.

47. The Tribunal seeks guidance from Respondent's Final Agency Decisions when appropriate. Thus, when resolving an allegation of criminal activity involving conflicting stories, the Tribunal is assisted by Respondent's recent Final Agency Decision in Nathaniel Corthia Gilliam v. NC Sheriffs Education and Training Standards Commission, 22 DOJ 04731.

48. In Gilliam, Respondent's Probable Cause Committee found probable cause that the Petitioner, a senior jail officer, "committed the Class B misdemeanor offense of 'Assault Individual w/Disability' in violation of N.C.G.S. 14-32.(f). Specifically, on or about June 27, 2019, while working as a detention officer at the Bertie Regional Jail, you unlawfully and willfully did assault Joe Jackson, an individual with impaired mobility from a leg injury, by hitting him about the head with his walking cane." The Tribunal heard the case on July 18, 2023.

49. Three certified officers present in the cell at the time of the incident either stated to the SBI (memorialized on video and admitted into evidence) or testified credibly under oath that Gilliam, without cause or justification, struck Jackson on the head with Jackson's cane while Jackson was confined in the Bertie-Martin Regional Jail. No officer present testified to the contrary. Jackson, though not credible on other issues, testified credibly that Gilliam assaulted him. Jackson's status as a disabled person was readily apparent.

50. Gilliam testified that Jackson's conduct, which included cursing and swearing, was so loud and aggressive that it was disrupting the entire jail, including other inmates. Gilliam claimed that addressing this "disruptive" conduct was the reason he entered the holding cell where Jackson was detained. He denied striking Jackson.

51. However, Gilliam had said nothing about other inmates being disrupted in his written statement, nor had any other law enforcement witnesses who testified at the contested case hearing. Also, Gilliam's story was refuted by his own witness, the jail nurse, who was in the area for the entire incident and heard nothing unusual from Jackson's cell. The jail nurse testified credibly that if Jackson's conduct was sufficiently loud and disruptive to agitate the other inmates, who were in separate cells down a hallway on the other side of the jail's booking area, she would have noticed that. She did not, and she heard nothing unusual.

52. The Tribunal found that Gilliam was not a credible witness. The Tribunal concluded as a matter of law that Gilliam, while certified and serving on duty as a detention officer, satisfied the elements of and thus "committed" the criminal offense of 'Assault Individual w/Disability'. The Tribunal found no mitigating circumstances other than lack of evidence of physical injury to Jackson. The Tribunal proposed that Respondent affirm its proposed action (revocation) against Gilliam's law enforcement certification.

53. In its Final Decision, issued March 27, 2024, Respondent agreed that the three certified officers who witnessed the incident testified credibly that Gilliam struck Jackson with his cane, as did Jackson himself, and that Gilliam's testimony to the contrary was not credible. Respondent agreed that Jackson's status as a disabled person was readily apparent. Respondent noted the Tribunal's conclusion that Gilliam committed the assault on Jackson and cited no evidence or argument contrary to that conclusion of law.

54. However, Respondent's Final Decision was: "Based on these Findings of Fact and Conclusions of Law, there was insufficient evidence that Petitioner committed the misdemeanor offense as alleged, and it is hereby ordered that Petitioner's justice officer certification is **NOT REVOKED**." Final Decision, March 27, 2024 (emphasis in original).

55. Thus, the testimony of three certified law enforcement officers, plus that of the victim, coupled with Gilliam's own lack of credibility, was "insufficient evidence" to Respondent that Gilliam committed the criminal offense at issue.

56. Applying Gilliam's guidance to the "Assault on a Female" charge here, no law enforcement officer (other than Petitioner) witnessed the alleged assault. Petitioner and Elder, who was not a credible witness due to her changing stories and the lack of physical evidence for her claims, told widely differing stories. Responding law enforcement personnel, who conducted a thorough and professional investigation, were unable to identify the aggressor.

57. Under such facts, the Tribunal has no difficulty concluding as a matter of law that there is insufficient evidence to show that Petitioner committed the criminal offense of "Assault on a Female" as alleged by Respondent's Probable Cause Committee. Gilliam, see also State v. Murphy, 225 N.C. 115, 116, 33 S.E.2d 588, 590, 1945 N.C. LEXIS 268.

14-196 "Harassing Phone Calls" Charge

58. N.C.G.S. 140-196 criminalizes conduct in multiple subsections. Section (a)(1) of N.C.G.S. 14-196 was found to be unconstitutionally overbroad by the Federal courts. Radford v. Webb, 446 F. Supp. 608, 1978 U.S. Dist. LEXIS 19476 (W.D.N.C. 1978), aff'd, 596 F.2d 1205, 1979 U.S. App. LEXIS 15156 (4th Cir. 1979).

59. Unlike in Gilliam and the "Assault on a Female" charge in this case, there is no dispute that Petitioner sent the March 23 messages.

60. "The essential elements of a G.S. 14-196(a)(3) violation are (1) repeatedly telephoning another person, (2) with the intent or purpose of abusing, annoying, threatening, terrifying, harassing or

embarrassing any person at the called number." State v. Camp, 59 N.C. App. 38, 42, 295 S.E.2d 766, 768, 1982 N.C. App. LEXIS 2859, *8; review denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 216 (1982).

61. Camp also held that section (a)(3) of N.C.G.S. 14-96 was constitutional in that the statute punished conduct – calling for the purposes of harassment, annoyance, etc., etc. – and the statute "adequately warns of the activity it prohibits." Id. at 43, 769 (1982).

62. The actual contents of the statements attributed to the defendant are relevant to show whether the intent of the telephone calls was to abuse, annoy, threaten, terrify, harass or embarrass the victims of the calls. State v. Boone, 79 N.C. App. 746, 747, 340 S.E.2d 527, 528, 1986 N.C. App. LEXIS 2115, *4

63. Boone also construed the statute's use of "repeatedly" in terms of making the telephone calls concerned:

> The statute prescribes making such calls "repeatedly." Unless the contrary appears, it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted. Transportation Service v. County of Robeson, 283 N.C. 494, 196 S.E. 2d 770 (1973). Repeatedly is the adverbial form of the term repeated meaning "renewed or recurring again and again." Webster's Seventh New Collegiate Dictionary. **The term repeatedly does not ordinarily connote a recurrence within a twenty-four hour period.**

Boone at 749, 340 529, 1986 (1986) (emphasis supplied).

64. In this case, all the text messages introduced into evidence occurred within the same 24-hour period or March 23, 2023, barring one text on March 24th and two on March 29th. (Res. Ex. 7). The warrant, however, gives the date of offense as March 23, 2023. The factual narrative in the warrant states: "On or about the date of offense shown in the county named above the defendant unlawfully and willfully did telephone Alison Aboussleman repeatedly for the purposes of annoying, harassing Alison Aboussleman at the called number." (Res. Ex. 8). Thus, from the plain language of the warrant, the criminal charge is solely for conduct on March 23, 2023.

65. Another issue is the wording of 14-196(a)(3) itself: "To **telephone** another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number" (emphasis supplied). There is no reference to text messages anywhere in the statute.

66. The definitional portion of 14-196 does not discuss text messages, either: "For purposes of this section, the term 'telephonic communications' shall include communications made or received by way of a telephone answering machine or recorder, telefacsimile machine, or computer modem." N.C.G.S. 14-196(b).

67. Criminal statutes must be strictly construed. State v. Ross, 272 N.C. 67, 157 S.E. 2d 712 (1967); State v. Brown, 264 N.C. 191, 141 S.E. 2d 311 (1965). This does not mean that a criminal statute should be construed stintingly or narrowly. "It means that the scope of a penal statute may not be extended by implication beyond the meaning of its language so as to include offenses not clearly described." State v. Hart, 287 N.C. 76, 80, 213 S.E.2d 291, 295, 1975 N.C. LEXIS 1068, *9. Texting is "clearly described" neither in the statute nor in its definitional section.

68. "When a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, State v. Humphries, 210 N.C. 406, 186 S.E. 473 (1936), and the courts will interpret the language to give effect to the legislative intent." Ikerd v. R.R., 209 N.C. 270, 183 S.E. 402 (1936).

69. On the one hand, the General Assembly's intent in enacting 14-196 seems clear: criminalizing certain uses of a telephone, in this case to annoy or harass another person. On the other, statutory construction is used when a statute is ambiguous. N.C.G.S. 14-196 is not ambiguous, in that makes no reference to text messages and its definition of "telephonic communications" fails to reference them either. "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties." In Re Banks, quoting Boyce Motor Lines v. United States, 342 U.S. 337, 96 L.Ed. 367, 72 S.Ct. 329 (1952).

70. Perhaps for the reasons above, the Tribunal finds no North Carolina appellate case affirming, or addressing, a criminal conviction under N.C.G.S. 14-196(a)(3) for text messages alone. Perhaps the statute, last amended in 2000, has simply not kept up with the times. Either way, "statutory construction" that criminalizes conduct not listed in either the statute or in its definitional section is less statutory construction than statutory amendment – a step the Tribunal declines to take.

71. Thus, the Tribunal concludes as a matter of law that text messages, standing alone, are not criminalized in 14-196.

72. Even if the statute did apply to text messages, there is insufficient evidence to show that Petitioner sent the March 23 messages **for the purpose of** abusing, annoying, threatening, terrifying, harassing or embarrassing Alison Aboussleman. Petitioner testified his motivation was anger that the recipients were, in his view, wrongfully preventing him from seeing his son and concealing his son's location. T 104; see also T 118: "They would not give me a straight answer where my son was." As Petitioner testified:

> THE TRIBUNAL: *Pardon me, sir. I'm looking at all these text messages. Were you drunk when you sent these things or mad or mad and drunk?*
>
> THE WITNESS: *I was very mad they were taking my -- they took my son on his days with me and then not telling me where he was.*
>
> THE TRIBUNAL: *So these are rage texts?*
>
> THE WITNESS: *Yes. I was very emotional at the time.*

T 96.

73. However, after considerable prompting from the Tribunal, T 121, Petitioner also admitted that his purpose in texting somewhat salacious photos that Alison Aboussleman had posted on social media was to embarrass Alison Aboussleman by sending those photos to her parents. Id.

74. That noted, while it is certain that Petitioner used boorish and offensive (to a reasonable person) methods to express his anger over the custody/visitation issue, the Tribunal does not believe that the General Assembly intended 14-196 to criminalize or weaponize interfamilial arguments, such as custody disputes, at least in the absence of conduct reasonably placing a person in fear. See Stancill v. Stancill, 241 N.C. App. 529, 542, 773 S.E.2d 890, 898 (2015) (defendant's conduct in texting plaintiff continuously over two month period reasonably placed her in fear of bodily harm and tormented, terrorized, and terrorized plaintiff).

75. That the parties were mutually aware of a custody dispute was confirmed by Sisson, who sought criminal charges against Petitioner because:

> Quite honestly, **to add a little fuel to the fire for the custody thing** because **I didn't think Alex would ever sign anything without more pressure on him to do something**, quote [sic] honestly.

T 188-189 (emphasis supplied).

76. As the Court of Appeals said in the context of "extreme and outrageous" conduct sounding in tort:

> [L]iability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion. . . .

Chidnese v. Chidnese, 210 N.C. App. 299, 316, 708 S.E.2d 725, 738 (2011).

77. Thus, assuming in the hypothetical that Petitioner's text messages are subject to the "Harassing Phone Calls" law, the Tribunal concludes as a matter of law that there is insufficient evidence that Petitioner "committed" the criminal offense of "Harassing Phone Calls" in the March 23 messages.

78. "For the purpose of" implies the lack of any other reason or purpose for the communication. Here, Petitioner had a legitimate reason to be in communication with the parties concerned – indeed, by

setting up and participating in the group text, they had mutually agreed to it. Petitioner simply expressed that communication in a churlish – but not criminal – fashion:

> Both misdemeanor offenses of 'Harassing Phone Calls' or 'Cyber-stalking' have a common element of Mens Rea. In this case, a preponderance of the evidence showed that Petitioner did not telephone his wife nor send her text messages "for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing" her. Instead, the preponderance of evidence showed that Petitioner phoned or texted his wife from April 25, 2013 through May 13, 2013, because he loved her, and wanted for them to get back together as man and wife, and resume their marriage.

William Buchanan Burgess v. North Carolina Sheriff's Training and Standards Commission, NC OAH LEXIS 123, *13, 14 DOJ 00527.[13]

79. While no one would confuse Petitioner's March 23 messages with Burgess' statements of love and reconciliation, it is equally clear that they were not made for the sole purpose of harassing the other persons involved.

Cyberstalking

80. N.C.G.S. 14-196.3 makes it unlawful to "Electronically mail or electronically communicate to another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing, or embarrassing any person." Id. at (2).

81. Subsection (e) of the statute contains an important carveout, however: " This section does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views **or to provide lawful information to others**. This section shall not be construed to impair any constitutionally protected activity, including speech, protest, or assembly" (emphasis supplied).

82. Unlike N.C.G.S. 14-96, there is no doubt that text messages are included in communications subject to N.C.G.S. 14-196.3. The latter defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by a wire, radio, computer, electromagnetic, photoelectric, or photo-optical system."

83. This "broad definition," see State v. Bernard, 236 N.C. App. 134, 148, 762 S.E.2d 514, 523 (2014) clearly encompasses text messages sent by phone. State v. Milton, 2021 N.C. App. LEXIS 249, *2, 2021-NCCOA-258, 858 S.E.2d 149 (over the course of three days defendant sent 120 text message to victim despite her requests to stop contacting her).

84. Appellate decisions on actual cyberstalking convictions tend to show conduct different from a series of churlish texts, on a single day, while the mutually known recipients are in a custody dispute. For example: defendant, after being told by law enforcement to stop, sent repeated "threatening, harassing, bizarre, disturbing, offensive, and representative of violence" emails to various university employees and students, and "registered" them (against their will) to receive

[13] The conduct in Burgess spanned multiple days and weeks.

the emails. State v. Fuller, 2021-NCCOA-641, P5, 2021 N.C. App. LEXIS 640, *3, 280 N.C. App. 370, 865 S.E.2d 372 (unpublished); see also State v. Milton, above.

85. The majority of North Carolina's reported decisions on "Cyberstalking" are not criminal cases, but are either ancillary to civil actions or involved "commission of a crime" allegations by the North Carolina Sheriffs Education and Training Standards Commission – the same agency as in this case.[14] Charges by this agency that a law enforcement officer "committed" the crime of cyberstalking, in fact, account for four of the five reported OAH decisions on the issue.

86. Moreover, the same mens rea problem is present with "Cyberstalking" as with "Harassing Phone Calls," as the communication must be made "**for the purpose of** abusing, annoying, threatening, terrifying, harassing, or embarrassing any person." N.C.G.S. 14-196.3(2) (emphasis supplied). Petitioner, again a boorish manner, was expressing anger over the recipients' perceived refusal to let Petitioner see his son. This was not a case of a stranger harassing a stranger or a spurned suitor hounding a love interest for unrequited affection.

87. Sisson's initiation of Cyberstalking charges against Petitioner occurred weeks after the fact (with no evidence of intervening conduct) and was clearly not motivated by Sissons' feelings of victimization. Again in his own words, Sisson sought criminal charges against Petitioner because:

> Quite honestly, **to add a little fuel to the fire for the custody thing** because **I didn't think Alex would ever sign anything without more pressure on him to do something**, quote [sic] honestly.

T 188-189 (emphasis supplied).

88. The Tribunal concludes as a matter of law that Sisson's initiation of criminal charges against Petitioner was not made out of Sisson's good faith belief that he was the victim of a crime, but rather to influence the parties' custody dispute by "pressuring" Petitioner. See generally, Martin v. Parker, 150 N.C. App. 179, 180, 563 S.E.2d 216, 217, 2002 N.C. App. LEXIS 366. In short, Sisson employed the criminal justice system to gain an advantage in a civil case, as a result of which Petitioner was publicly arrested, transported in custody, jailed, and lost his job.

89. Additionally, in 2017, OAH found that Respondent, by its own standards, improperly alleged that a petitioner committed a "Class B Misdemeanor" when it found probable cause for a Cyberstalking charge:

> According to the Commission's Class B Misdemeanor Manual,[15] a misdemeanor with punishment of more than 6 months but less than 2 years is a Class B misdemeanor. N.C.G.S. 14-196.3; see also, 12

[14] Jarvis James v. North Carolina Sheriffs Education and Training Standards Commission, 2022 N.C. ENV LEXIS 71, 22 DOJ 00665; David Scott Sutton Jr. v. NC Criminal Justice Education and Training Standards Commission, 2020 NC OAH LEXIS 433, 20 DOJ 00742; Christon Michael Martin v. NC Sheriffs Education and Training Standards Commission, 2017 NC OAH LEXIS 69, 17 DOJ 03120; George Tracy Brogden v. North Carolina Sheriffs' Education and Training Standards Commission, 2016 NC OAH LEXIS 68, 15 DOJ 08607; William Buchanan Burgess v. North Carolina Sheriff's Training and Standards Commission, NC OAH LEXIS 123, 14 DOJ 00527.

[15] See Res. Ex. 13.

> NCAC 10B .0103(10)(b)(iii). ... Even if Petitioner had been notified of this reason for the Five-Year Denial, Cyberstalking is not a Class B misdemeanor. According to N.C.G.S. § 14-196.3(d), Cyberstalking is a Class 2 misdemeanor which has a maximum punishment of 60 days. N.C.G.S. § 15A-1340.23(c).[16]

Christon Michael Martin v. NC Sheriffs Education and Training Standards Commission, 2017 NC OAH LEXIS 69, 17 DOJ 03120.[17]

90. The Tribunal concludes as a matter of law that there is insufficient evidence to conclude that with the March 23 messages Petitioner committed the criminal offense of "Cyberstalking." State v. Murphy, 225 N.C. 115, 116, 33 S.E.2d 588, 590, 1945 N.C. LEXIS 268.

91. The Tribunal also concludes as a matter of law, that, based on the above, Petitioner did not commit the alleged "combination of misdemeanors" cited in Respondent's Probable Cause Committee letter that supposedly justify revocation of Petitioner's certification under 12 NCAC 10B .0204(d)(3).

Lack of Good Moral Character

92. A core requirement for certification as a justice officer is that the applicant "be of good moral character as defined in" several appellate cases. See 12 NCAC 10B .0301(12). The first of those, In re Willis, 288 N.C. 1, 215 S.E. 2d 771 appeal dismissed, 423 U.S. 976 (1975), describes "good moral character" as "honesty, fairness, and respect for the rights of others and for the laws of the state and nation." Id. at 10, 776-7.

93. Good moral character is considered a minimum employment standard and, as such, the lack of it authorizes revocation or suspension of an officer's certification. William Robert Casey v. North Carolina Sheriffs' Education and Training Standards Commission, 2012 NC OAH LEXIS 5011, 11 DOJ 11632.

94. As the Tribunal has concluded as a matter of law that Petitioner did not commit any of the criminal offenses alleged, the remaining issue is whether Petitioner's proven conduct demonstrates a current lack of good moral character.

95. In conducting that analysis in this case, it is important to note that three of the four of Petitioner's "crimes" stemmed from the same act – the March 23 text messages – on the same day.

96. Moral character is a vague and broad concept. Jeffrey Royall v. N.C. Sheriffs Education and Training Standards Commission, 09 DOJ 5859; Jonathan Mims v. North Carolina Sheriffs Education and Training Standards Commission, 02 DOJ 1263, 2003 WL 22146102 at page 11-12 (Gray, ALJ) and cases cited therein.

---

[16] Despite this, "Cyberstalking" is currently listed in Respondent's "Misdemeanor Manual" as a "Class B" misdemeanor (Res. Ex. 13).

[17] In its Final Agency Decision in Martin (December 22, 2017), Respondent found that there was "no legally held evidence" supporting the allegation that Martin committed the criminal offense of Cyberstalking.

97. The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In Konigsberg v. State, 353 U.S. 252, 262-63 (1957), the Court explained:

> The term good moral character . . . is by itself . . . unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial . . . (emphasis supplied).

98. For better or worse, society's standards for "good moral character" have shifted from one generation to another. Joshua Orion David v. NC Criminal Justice Education and Training Standards Commission, 2018 NC OAH LEXIS 490, 17 DOJ 06743. In the not-too-distant past, Petitioner's March 23 messages would be genuinely shocking. Today, in an age of Facebook, Twitter/X, and other social media, with their routine vulgarity and profanity, Petitioner's March 23 messages are more churlish and immature, indeed juvenile, than shocking.

99. Police officers, like other people, sometimes exercise poor judgment. "Troopers, like other public employees and officials, will occasionally say things that they should probably not say. Ideally, it is desired that law enforcement officers be near perfect; however, that is not a realistic standard." Andreas Dietrich v. N.C. Highway Patrol, 2001 WL 34055881, 00 OSP 1039.

100. This does not constitute approval of Petitioner's conduct. Sending the March 23 text messages, though not a criminal act, was not an act of good moral character. Daniel June Campbell v. NC Criminal Justice Education and Training Standards Commission, 2022 NC OAH LEXIS 307, 21 DOJ 03747 (Petitioner's refusal to undo real estate transaction with seller he learned to be incompetent was not an act of good moral character).[18] In general terms, Petitioner's proven conduct in this case, and some of his testimony, lead the Tribunal to question Petitioner's judgment, candor, and maturity.

101. That, however, is not the ultimate issue. Nor is the issue whether a hypothetical sheriff should employ Petitioner. The person best suited to determine whether a sheriff's office employee should serve is not the Tribunal or Respondent but the county sheriff, who is answerable for that employee's acts. Michael Douglas Wise v. NC Sheriffs Education and Training Standards Commission, 2021 NC OAH LEXIS 7, 20 DOJ 03444; William Scherr v. NC Sheriffs Education and Training Standards Commission, 2020 NC OAH LEXIS 490, 20 DOJ 01662.

102. The ultimate issue, rather, is whether the evidence shows that Petitioner presently lacks the good moral character – minimum standard – to serve as a deputy sheriff in North Carolina.

---

[18] Affirmed by Respondent's Final Decision dated September 2, 2022.

103. Due to concerns about the flexibility and vagueness of the good moral character rule, any denial, suspension, or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character is reserved for **clear and severe** cases of misconduct. Thus, "Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." In re Willis, 288 N.C. 1, 13, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975) (quoting In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924). This principle is well-established and has been repeatedly affirmed. In re Legg, 337 N.C. 628, 634, 447 S.E.2d 353, 356, 1994 N.C. LEXIS 494, *9.

104. The proven conduct of Petitioner contrary to good moral character, based on Respondent's allegations, is solely the March 23 messages. While suggesting poor judgment and immaturity, the March 23 messages are not "clear and severe" misconduct proving lack of good moral character. Also, occurring as they did on a single day, and being contrary to Petitioner's substantial history of prior good character as a law enforcement officer, they are an "isolated incident," also insufficient to establish lack of good moral character. In re Rogers, 297 N.C. 48, 253 S.E.2d 912, 1979 N.C. LEXIS 1131.

105. The Tribunal concludes as a matter of law that the evidence does not support the conclusion that Petitioner lacks good moral character. Campbell; see also Michael Giroux v. NC Criminal Justice Education and Training Standards Commission, 2023 NC OAH LEXIS 337, 23 DOJ 02864.

106. The Tribunal recommends that Respondent caution Petitioner that further incidents of the kind at issue here, if proven committed, will likely lead to action on his law enforcement certification.

PROPOSAL FOR DECISION

The Tribunal respectfully proposes that no action be taken against Petitioner's certification, but that Petitioner be cautioned that further incidents of the kind at issue here, if proven, will likely lead to action on his law enforcement certification.

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).

SO ORDERED.

This the 27th day of August, 2024.

Michael C. Byrne
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:

Daniel Allen Meier
Meier Law Group PLLC
daniel@meierlegal.com
Attorney For Petitioner

J. Joy Strickland
NC Department of Justice
jstrickland@ncdoj.gov
Attorney For Respondent

This the 27th day of August, 2024.

Julie B. Eddins

Julie B. Eddins
Paralegal
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850