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| **STATE OF NORTH CAROLINA**<br><br>**COUNTY OF DURHAM** | **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**<br>**23 DOJ 05109** |
| **ALEX ABOUSSLEMAN,**<br><br>**Petitioner,**<br><br>**v.**<br><br>**NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION,**<br><br>**Respondent.** | **EXCEPTIONS** |

The following **Exceptions** to the **Proposal for Decision** prepared by the Honorable Michael C. Byrne, Administrative Law Judge, and filed in the Office of Administrative Hearings on June 24, 2024, are hereby submitted to the North Carolina Sheriffs' Education and Training Standards Commission for consideration in its Final Agency Decision.

1. Counsel has made minor typographical and grammatical changes as necessary to make the proposal appropriate for Final Agency Decision.

   2. Findings of Fact #6 and #7 should be amended as follows to reflect the procedural posture of the case:

   6. Autumn Elder was the alleged victim of an "Assault on a Female" charge against Petitioner. The Administrative Law Judge found 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. The Administrative Law Judge found Sisson was not a credible witness.

2. Findings of Fact #10 should be amended as follows to include an additional fact from the evidence and to remove an unnecessary case citation:

   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. That charge was for hit and run at an ABC Store in Durham County. 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~~
10.

3. Findings of Fact #15 should be amended as follows to include an additional fact supported by the evidence:

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. Petitioner testified that he recalled Elder being a position in the bedroom in which it appeared she was praying.

4. Findings of Fact #22 and #25 should be amended as follows to correctly reflect the facts presented:

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 Wake ~~Durham~~ District Attorney's Office, "upgraded" Petitioner's charge to Assault on a Female. All criminal charges related to the incident were ultimately dismissed.

25.The account provided by Elder and the Petitioner are diverse. Regardless, the evidence is that they were engaged in an altercation in which Petitioner held elder down on the floor and she had photographs depicting her injuries. ~~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 the events is not particularly credible either but is generally more credible that Elders's.~~

5. Findings of Fact #27 should be amended as follows to remove unnecessary language:

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.~~

6. Findings of Fact #33 and #34 should be amended as follows:

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[1] text messages to the group text on that date, including two images of Alison Aboussleman that he took a screen shot of from a video 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." Allison Aboussleman and Rick Sisson testified that they told Petitioner to stop and to only communicate with them about Allison and Alex's son.

7. Findings of Fact #38 should be amended as follows to include facts concerning the number of phone calls and text messages Alison Aboussleman received separate and apart from the group text messages:

38. Of the 28 March 23 messages, only eight by their plain wording are addressed directly to Alison Aboussleman. The balance of messages appears to be directed at Sisson. Alison Aboussleman testified that on the same date, Petitioner called her approximately 25-30 times and texted her individually around 30 times, in addition to the texts he sent the group.

8. Findings of Fact # 40 should be amended as follows to include an additional fact presented in evidence:

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." Alison and Rick Sisson testified they told Petitioner not to communicate with them unless it was about Alison and Alex's son. (Res. Ex. 7).

9. Findings of Fact # 42 should be amended as follows to include an additional

fact presented in evidence:

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." In addition, the warrant alleges Petitioner "unlawfully and willfully did electronically communicate to Alison Aboussleman repeatedly for the purpose of annoying, terrifying, harassing Alison Aboussleman." (Res. Ex. 8)

10. Findings of Fact #49 should be amended as follows to include an additional fact presented in evidence:

49.All criminal charges against Petitioner stemming from the March 23 messages and repeated phone calls to Alison Aboussleman 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.

11. Findings of Fact #51 should be amended as follows to address the procedural posture of the case:

51.The Tribunal found ~~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.

12. Findings of Fact # 53 should be amended as follows to include additional testimony of Petitioner:

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.Petitioner testified that he doesn't think he is "irresponsible" when he drinks and said "I think it's very controllable. I'm responsible when I drink alcohol." T 215-216. Contrary to that assertion, all of the incidents here appear to have occurred when Petitioner was consuming alcohol.

13. Conclusions of Law # 5 should be amended as follows to delete unnecessary terminology:

5.The question presented by this case is whether Petitioner "committed" certain 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.

14. Conclusions of Law #7-11 should be deleted in their entire as they unnecessary and the remaining paragraphs be renumbered accordingly:

~~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]

15. Conclusions of Law # 12 (originally COL#14) should be deleted in its entire as it is unnecessary:

~~12. 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.~~

16. Conclusions of Law #9 (originally COL# 15) should be amended as follows to remove unnecessary case citations:

9.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."~~

17. The original Conclusions of Law # 17-45 should be deleted in their entirety and the following burden of proof paragraph inserted as the new COL #10 to reflect the Commission's position concerning burden of proof:

10.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. 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"). If a reviewing court places the burden on the Respondent, it has met its burden.

18. Original Conclusions of Law #47-57 should be deleted.

~~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.~~

19. New Conclusions of Law #12 should be added to reflect the conclusion to be drawn from the evidence related to the assault on a female charge:

12.There is substantial evidence in the record that Petitioner committed an assault on a female on Autumn Elder. It is undisputed that the two engaged in a verbal and physical assault during which Petitioner held Elder down on the floor and assaulted her during which pictures were knocked off the wall. While the charges were dismissed by the District Attorney, originally the charges against Elder were dismissed, then the charges against Petitioner were raised from simple assault to assault on a female.

20. The original Conclusions of Law # 58, 61, 65-72 should be deleted in their entirely as they are unnecessary for the issue of determining whether the offense of harassing phone calls was committed:

~~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).~~

~~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).~~

~~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.*~~

21. New Conclusion of Law #13 should be amended as follows to reflect evidence admitted related to the phone calls received by Alison Aboussleman:

13. ~~Unlike in Gilliam and the "Assault on a Female" charge~~ In this case, there is no dispute that Petitioner sent the March 23 message and phone Alison Aboussleman during the same time frame 25-30 times. T p 192.

22. New Conclusion of Law #17 should be amended as follows to remove unnecessary information:

17. 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.~~

23. New Conclusion of Law # 19 should be amended as follows to remove unnecessary information:

19.The Administrative Law Judge found 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).~~

24. Original Conclusions of Law 75-79 should be deleted as they are unnecessary for the resolution of this matter and/or contrary to the evidence presented:

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

~~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.[10]~~

~~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 [1]the sole purpose of harassing the other persons involved.~~

25. Original Conclusions of Law # 84-86, 89, 91 should be deleted as unnecessary to the resolution of this matter and/or contrary to the evidence presented:

~~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 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.[11] 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.~~

~~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~~
>
> ~~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.~~

~~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).~~

26. New Conclusions of Law # 26 should be amended to reflect the conclusion to be drawn from the evidence related to the cyberstalking charge:

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

27. Original Conclusions of Law # 94-96, 98-106 concerning lack of good moral character should be deleted as they are unnecessary and/vor contrary to the evidence presented:

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 1112 (Gray, ALJ) and cases cited therein.

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, Abousslemanthough 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).[14] 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.~~

~~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.~~

28. New Conclusions of Law # 30 should be amended to reflect the conclusion to be drawn from the evidence related to the lack of good moral character:

~~30.This does not constitute approval of Petitioner's conduct.~~ Sending the March 23 text messages, Alison Aboussleman, engaging in a physical argument with Elder, and Petitioner's non candid testimony at hearing constitute lack of good moral character.~~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).[14] 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.~~

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

**ORDER~~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.~~ It is hereby ordered that Petitioner's justice officer certification is **REVOKED** for a period of five years for the commission of the offenses of assault on a female, harassing phone calls and cyberstalking; and indefinitely for lacking the good moral character required of a justice officer and for the commission of four or more Class B misdemeanors.

This the 21st day of October 2024.

JOSHUA H. STEIN
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COUNSEL TO THE COMMISSION

## CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing **EXCEPTIONS** have been duly served upon Petitioner's counsel by mailing a copy to the address below:

**Mr. Daniel Meier**
**Meier Law Group PLLC**
**100 E. Parrish St,. Suite 300**
**Durham, NC 27701**

This the 21st day of October 2024.

JOSHUA H. STEIN
Attorney General

Attorney General

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