

STATE OF NORTH CAROLINA
COUNTY OF CLEVELAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
24 DOJ 00705

TIMOTHY KIMBRELL,)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA SHERIFFS')
 EDUCATION AND TRAINING)
 STANDARDS COMMISSION,)
)
 Respondent.)
)

EXCEPTIONS

The following **Exceptions** to the **Proposal for Decision** prepared by the Honorable Jonathan S. Dills, Administrative Law Judge, and filed in the Office of Administrative Hearings on November 7, 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. Finding of Fact Paragraph # 6 should be edited as follows to accurately reflect the evidence presented.

6. FCPD provided deputies with MiFi® devices for portable, work-related internet access. They were subject to check out, ~~however, there was minimum stricture and oversight.~~ (T pp 29-30; 98-101).
3. Finding of Fact Paragraph # 17 should be edited as follows to accurately reflect the evidence presented.

17. Mitigating factors, to any extent relevant, include:
 - a. Seven years in Law Enforcement (T pp 112-114).;
 - b. An otherwise, relatively unblemished career (T p 146);
 - c. ~~Petitioner's admissions and accountability (Eg. T pp 142);~~
 - d. ~~Financial and familial pressures (T p 126);~~
 - e. c. Support from the Sheriff of Rutherford County (T pp 105-109);

~~f.d. Support from other leadership at RCSO (T pp 90-92); and
g. That this was ultimately an internal, employment issue.~~

4. Findings of Fact Paragraphs 18-19 should be deleted as they are contrary to the substantial evidence presented.

~~18. This was an isolated incident of poor judgment.~~

~~19. These circumstances certainly do not justify revocation.~~

5. Conclusions of Law Paragraphs 3-4 should be updated to correctly reflect the Commission's position on the burden of proof:

~~3. As the Tribunal has repeatedly concluded, the State generally bears the burden of proof when it proposes to restrict certification. See, Russell v. Commission, 2022 NC OAH LEXIS 55; cf., Graves v. Commission, 2022 NC OAH LEXIS 374 (new applicant); see also, Canty v. Commission, 2014 NC OAH LEXIS 127. These analyses are incorporated by reference. The party with the burden of proof in a contested case must establish the facts required by N.C. Gen. Stat. §150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. §150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. §150B-34(a).~~

~~4. Regardless, to any extent the burden was Petitioner's, he carried it; to any extent it was Respondent's, it failed. Harris v. Mangum, 183 N.C. 235, 239-40, 11 S.E. 177, 179 (1922) (summarizing the interplay of burden, participant roles, and a decision by preponderance of the probative evidence regardless of who successfully introduced it or when). 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").~~

6. Conclusions of Law Paragraph # 16 should be deleted as contrary to the substantial evidence presented.

~~16. There is insufficient evidence of moral turpitude. Indeed, the totality of credible evidence demonstrates current, good moral character. Harris, supra.~~

7. Conclusions of Law Paragraph # 17-18 should be deleted as unnecessary.

~~17. The ALJ determines credibility. Brithaven of Morganton v. DHR, 118 N.C. App. 379, 388, 455 S.E.2d 455, 462-3, disc. rev. denied, 341 N.C. 418, 461 S.E.2d 754~~

(1995).

~~18. "[D]eciding which permissible inference to draw from evidentiary circumstances is as much within the fact finder's province as is deciding which of two contradictory witnesses to believe." *Halloway v. Tyson Foods, Inc.*, 193 N.C. App. 542, 548, 668 S.E.2d 72, 76 (2008).~~

8. Conclusions of law Paragraphs 20-21 should be deleted as contrary to the evidence presented.

~~20. The determinations of the Undersigned are based upon a preponderance of the credible evidence, after full hearing and significant deliberation.~~

~~21. Substantial evidence justifies adoption of the following proposal. G.S. 150B-42.~~

9. The Proposal for Decision should be removed to reflect the Final Decision of the Commission.

PROPOSAL FOR DECISION

~~WHEREFORE, Respondent should not revoke Petitioner's certification.~~

ORDER

It is hereby ordered that the Petitioner's justice officer certification is revoked for an indefinite period.

This the 23rd day of December 2024.

JOSHUA H. STEIN
Attorney General

/s/ J. Joy Strickland
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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** by mailing a copy to the address below:

**Timothy Kimbrell
110 Walker Street
Forest City, NC 28043**

This the 23rd day of December 2024.

JOSHUA H. STEIN
Attorney General

Attorney General

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