

GO TO #9 AND #19 FOR MACKEY REFERENCES, BUT READ THE ISSUE BECAUSE IT REVEALS HOW THEN SGT. MACKEY AND SGT ATCHISON MISUSED PUBLIC TRUST

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 DOJ 1925

THOMAS AUSTIN ATCHISON,)
)
Petitioner,)
)
v.)
)
NORTH CAROLINA PRIVATE)
PROTECTIVE SERVICES BOARD,)
)
Respondent.)
_____)

PROPOSAL FOR DECISION

This contested case was heard before Senior Administrative Law Judge Fred G. Morrison Jr. on November 18, 2003, in Raleigh, North Carolina.

APPEARANCES

Petitioner appeared pro se.

Respondent was represented by attorney Bradford A. Williams.

WITNESSES

Petitioner - Petitioner testified on his own behalf.

Respondent – Investigator Sarah Conner testified for Respondent Board.

ISSUE

Whether grounds exist for Respondent to deny Petitioner’s application for a private investigator license on grounds that he lacks good moral character or temperate habits?

BURDEN OF PROOF

Respondent has the burden of proving that Petitioner’s application for a private investigator license should be denied for lack of good moral character or temperate habits. Petitioner may rebut the Respondent’s showing.

STATUTES AND RULES APPLICABLE
TO THE CONTESTED CASE

Official notice is taken of the following statutes and rules applicable to this case:

G.S. 74C-2;
74C-3;
74C-8;
74C-9;
74C-11;
74C-12;
12 N.C.A.C. 7D § .0400.

FINDINGS OF FACT

1. Respondent Board is established pursuant to N.C.G.S. 74C-1 et seq. and is charged with the duty of licensing and registering individuals engaged in the private protective services industry, which includes private investigators.
2. Thomas Austin Atchison (hereinafter “Petitioner”) applied to Respondent Board in May 2003 for a private investigator license. Before applying for a private investigator license, Petitioner served in the Charlotte-Mecklenburg Police Department (hereinafter “CMPD”) as a law enforcement officer for approximately 13 years. He rose to the rank of sergeant while at CMPD and became a S.W.A.T. patrol and investigative supervisor. Petitioner retired from CMPD in April 2003 on disability.
3. Respondent Board assigned Investigator Sarah Conner (hereinafter “Investigator Conner”) to conduct Petitioner’s background investigation. As part of her investigation, Investigator Conner contacted CMPD to review Petitioner’s employment record.
4. Petitioner signed a release on May 13, 2003, which he submitted to Respondent Board along with his application. The release authorized Petitioner’s employers to submit documents to Respondent Board pertaining to its background investigation of Petitioner.
5. Respondent Board submitted into evidence as Respondent’s Exhibit 3 a February 5, 2003 memorandum from Darrel Stephens, chief of the Charlotte-Mecklenburg Police Department, to Patrick Clark, chairperson of the Charlotte-Mecklenburg Civil Service Board. The memorandum advised Mr. Clark that Petitioner on January 29, 2003, had been suspended for 30 working days without pay with the recommendation that he be demoted from sergeant to police officer.

6. In the February 5, 2003, memorandum to Mr. Clark, Chief Stephens alleged that on June 3, 2002, Petitioner became involved in a vehicle pursuit during which he violated several departmental rules of conduct and engaged in conduct unbecoming. The allegations included the following: (a) that Petitioner failed to evaluate the potential dangers involved with the pursuit because of the excessive speeds reached, and that “significant unreasonable danger to both the public and members of the Department was created;” (b) that Petitioner became involved in the pursuit as the primary unit while driving an unmarked patrol vehicle in violation of the department’s rules governing pursuits; (c) that Petitioner failed to activate his audio recording device during the pursuit in violation of the department’s rules governing pursuits; (d) that Petitioner exceeded the speed limit during the pursuit without activating his audible signal in violation of the department’s rules governing emergency responses; (e) that Petitioner engaged in conduct unbecoming by failing to inform his immediate supervisor, the pursuit supervisor, the Mecklenburg County District Attorney’s Office, and the police department’s internal affairs division, during its administrative investigation of the incident, that he had an unauthorized passenger in his vehicle during the pursuit; (f) that Petitioner engaged in conduct unbecoming by instructing two officers to remove the unauthorized passenger, a witness to the pursuit, from the crash scene where the pursuit ended; and (g) that Petitioner engaged in conduct unbecoming by instructing his passenger not to give a witness statement about her involvement in the pursuit.
7. Respondent Board’s Exhibit 4 includes the investigation completed by CMPD’s internal affairs division into the June 3, 2002, pursuit. The investigation contains exhibits 1-38, though exhibits 22-31 and 36 remain in the custody of CMPD. The investigation includes transcripts of interviews with Petitioner, other CMPD officers involved in the pursuit, and the passenger who rode in Petitioner’s vehicle during the pursuit.
8. Respondent Board submitted into evidence as Respondent’s Exhibit 5 a February 25, 2003, memorandum from Chief Stephens to Mr. Clark of the Civil Service Board. The memorandum advised Mr. Clark that Petitioner, on February 25, 2003, had been suspended without pay and was cited to the Civil Service Board with the recommendation that his employment be terminated.
9. The February 25, 2003, memorandum alleges that Petitioner engaged in conduct unbecoming and unsatisfactory job performance when he on multiple occasions in 2002 improperly recorded Sergeant N.V. Mackey’s duty time on daily duty status reports. The improper recording of Sergeant Mackey’s time allowed Sergeant Mackey to receive credit for hours worked which he in fact did not work.
10. Petitioner retired from CMPD on disability before the Civil Service Board could hold a hearing on CMPD’s request that his employment be terminated. Petitioner testified that he asked the Civil Service Board to hear the matter anyway, but the Board declined to do so because he was no longer an employee of the police department.

11. On direct-examination, Petitioner described the June 3, 2002, pursuit that led to his 30 day suspension without pay and recommendation that he be demoted. While on break, Petitioner met his girlfriend for dinner. The girlfriend was a CMPD officer who was off-duty at the time. Petitioner drove the two of them to a restaurant in his unmarked patrol car. As they left the restaurant after finishing dinner, Petitioner heard a call over his radio that a vehicle which had been stolen the previous night in a car-jacking had been spotted. Petitioner immediately responded to the call because he was near the location of the stolen vehicle. The driver of the vehicle failed to pull-over when another officer in a marked car turned on his emergency equipment. A pursuit began, and at some point during the chase, Petitioner fell behind the stolen vehicle and became the primary unit involved in the pursuit. During the pursuit, Petitioner's girlfriend continued to ride with him in his unmarked patrol car.
12. The pursuit lasted for approximately six miles. It involved multiple CMPD officers. The pursuit ended when the stolen vehicle wrecked. After wrecking, the driver of the stolen vehicle tried to car-jack another car in an attempt to flee. The suspect was eventually taken into custody, and Petitioner remained at the crash scene as a supervisor. Petitioner admitted he directed a CMPD officer who was at the crash scene to take his girlfriend back to the patrol station where her car was parked. Petitioner claimed he had his girlfriend taken from the crash scene because she had to report to duty soon at another patrol station and not because he intended to cover up the fact that he had an unauthorized passenger in his patrol car while on duty.
13. On cross-examination, Petitioner admitted that CMPD's departmental policies prohibited an off-duty officer from riding as a passenger in a patrol car driven by a fellow officer who was on-duty. Petitioner called this a "technical" rule that everyone in the department violated, including his supervising captain.
14. Petitioner testified that from June 2002 until October 2002 nothing was said to him about his role in the pursuit except his captain told him not to worry about it. That fall, Petitioner went out on disability. Petitioner alleged his captain was upset about Petitioner going out on disability. The captain purportedly made disparaging comments about Petitioner. Petitioner learned of these comments and allegedly confronted the captain, causing an argument. According to Petitioner, the internal affairs investigation was the result of his captain trying to get revenge on him.
15. On September 5, 2002, an internal affairs investigator interviewed Petitioner. At the end of the interview, the investigator asked Petitioner if he had anything else to add that had not been discussed during the interview. Petitioner said no. During the interview, Petitioner never disclosed that he had a passenger riding with him during the pursuit on June 3, 2002.
16. It took a second internal affairs interview, conducted on September 19, 2002, for Petitioner to disclose that he had a passenger riding in his vehicle during the pursuit.

Petitioner claimed on direct-examination that he didn't disclose this fact in the first internal affairs interview because his supervisor and his girlfriend's supervisor both knew the girlfriend had been in Petitioner's car during the pursuit.

17. Petitioner's girlfriend failed to complete a witness statement detailing the June 2002 pursuit until after internal affairs began its investigation into the incident. On direct examination, Petitioner admitted he told his girlfriend not to do a witness statement. Petitioner felt that her statement would be unnecessary because it would contain the same information as his. Petitioner denied trying to cover up that he had an unauthorized passenger in his patrol car during the pursuit.
18. On cross-examination, Petitioner admitted his girlfriend was a witness to a crime when she observed the pursuit as a passenger in Petitioner's car. Petitioner acknowledged that at a crime scene the police take statements from all witnesses, not just select ones.
19. With regard to the allegation by CMPD that Petitioner at multiple times improperly recorded the time of a fellow sergeant, Petitioner admitted occasionally leaving Sergeant Mackey's name on daily duty status reports even when Sergeant Mackey failed to show for work. Petitioner explained that he and Sergeant Mackey were exempt employees who were not paid off the clock. CMPD did not use the daily duty status reports to keep track of how much the sergeants were owed in wages. Since the daily duty status reports weren't used to calculate his pay or Sergeant Mackey's pay, Petitioner didn't believe he was helping Sergeant Mackey to obtain funds fraudulently from the City of Charlotte. Petitioner also testified that it was a common practice in the department to leave a person's name on a daily duty status report even though that person may not have been present for work that day.
20. On cross-examination, Petitioner acknowledged that by improperly recording a sergeant's time on the daily duty status reports, that sergeant could accrue vacation time to which he otherwise would not be entitled. In other words, a sergeant could take a day off and not be charged a vacation day simply by having his name left on the daily duty status report.
21. Petitioner testified that from 1990, when he began his employment with CMPD, until 2002 he only had one disciplinary action taken against him by the department. He is 33 years old, he earned a GED in 1987 from Central Piedmont Community College, he completed basic law enforcement training, and he has no criminal record.
22. Petitioner gave Respondent Board five character references. Four were favorable and one was mixed. CMPD did not give Petitioner a favorable employment reference, and he is not eligible for rehire at CMPD. Petitioner cooperated with Respondent's investigator.

CONCLUSIONS OF LAW

An applicant for a private investigator license must establish to Respondent Board that he

has good moral character or temperate habits. See N.C.G.S. § 74C-8(d)(2) (2003). The Board may deny an application for a private investigator license when the applicant lacks good moral character or has intemperate habits. See N.C.G.S. § 74C-12(a)(25) (2003).

Though the North Carolina Supreme Court has yet to offer a definition of good moral character, it has described the qualities held by a person of good moral character. In the Matter of Basil Ray Legg, Jr., 325 N.C. 658, 386 S.E.2d 174 (1989), the Court noted that a person of good moral character is honest and candid. See id. at 672, 386 S.E.2d at 182.

Petitioner's employment record with the Charlotte-Mecklenburg Police Department (hereinafter "CMPD") includes a thirty-day suspension without pay on January 29, 2003, along with a recommendation of demotion and on February 25, 2003, another suspension without pay and recommendation of employment termination. CMPD took disciplinary action against Petitioner on January 29, 2003, for, among other things, failing to disclose during an administrative investigation that he had a passenger riding with him while he was involved in a vehicle pursuit on June 3, 2002. Additionally, CMPD cited Petitioner for his conduct immediately after the pursuit when he instructed two officers to remove his passenger from the crash scene where the pursuit ended and because he told his passenger that it was unnecessary for her to complete a witness statement.

A month after being suspended because of his actions during the June 2002 pursuit Petitioner was suspended again by CMPD and recommended for termination. CMPD recommended Petitioner for termination because on multiple occasions in 2002 he improperly recorded a fellow sergeant's duty time on daily duty status reports. The improper recording of the fellow sergeant's time allowed the sergeant to receive credit for hours worked which he did not work, or allowed him to take vacation days.

Petitioner's lack of full disclosure during CMPD's administrative investigation of the June 2002 pursuit and his role in improperly recording a fellow sergeant's duty time, enabling the sergeant to take some days off, called into question his forthrightness and was unacceptable conduct meriting disciplinary action by his employer. From the evidence presented, Respondent Board raised questions about Petitioner's moral character, but did not offer proof of any criminal convictions or addictions specifically listed under G. S. 74C-8(d)(2) which are prima facie evidence that an applicant does not have good moral character or temperate habits.

Petitioner's proven indiscretions do not constitute the lack of good moral character and temperate habits necessary to deny his application to become a private investigator. While his career as a law enforcement officer with the CMPD has ended, he is entitled to a second chance.

Based on the foregoing, the undersigned makes the following:

PROPOSAL FOR DECISION

The North Carolina Private Protective Services Board will make the final decision in this

contested case. It is proposed that the Board **reverse** its initial decision to deny Thomas Austin Atchison's application for a private investigator license.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with N.C.G.S. 150B-36(b).

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 pursuant to N.C.G.S. 150B-40(e).

The agency that will make the final decision in this contested case is the North Carolina Private Protective Services Board.

This the 23rd day of December, 2003.

Fred G. Morrison Jr.
Senior Administrative Law Judge