

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DHR 00784

FINAL DECISION

APPEARANCES

Jose A. Coker
William W. Aycock, Jr.
The Charleston Group
P.O. Box 1762
Fayetteville, N.C. 28302-1762

Angela N. Gray
Gray Newell
7 Corporate Center Court, Suite B
Greensboro, N.C. 27408

EXHIBITS

Exhibit No.	Date	Document
1	10/23/2013	Job Description for A. Barron

		for Director of Housing
2	10/23/2013	User Learning – A. Barron
3	10/23/2013	Human Resources Policy and Procedure Manual
4	10/23/2013	November 11, 2012 notes of Dr. Susan Corriher regarding Consumer JS
5	10/23/2013	November 30, 2013 summary of events by A. Barron
6	10/23/2013	Transcribed text messages between A. Barron and Consumer JS
7	10/23/2013	November 26, 2013 notes of Dr. Susan Corriher regarding Consumer JS
8	10/23/2013	December 19, 2012 notification of termination to A. Barron
9	10/23/2013	Sign posted in lobby referring to Consumer JS
10	10/23/2013	U.S. Cellular billing charges for bill date 8/22/12, p.37-42; bill date 9/22/12, p. 37-40; bill date 10/22/12, p. 39; and bill date 11/22/12, p. 37- 39.
11	10/23/2013	Photo of text message from A. Barron to Consumer JS
12	10/23/2013	Picture of J. Smith requested by A. Barron

Admitted for Petitioner:

Exhibit No.	Date	Document
1	10/23/2013	2011 Corporate Compliance Manual
2	01/16/2014	Cellular Telephone Summary-bill date 9/22/2012, p. 3-9, and p. A0000001-A0000003
3	01/16/2014	Cellular Telephone Summary-bill date 10/22/2012, p. 3-9, and p. A0000001- A0000005
4	01/16/2014	Cellular Telephone Summary-bill date 11/22/2012, p. 3-8, and p. A0000001- A0000004

5	01/16/2014	November 6, 2012 letter from Eastpointe to A. Barron regarding investigatory placement
6	01/16/2014	December 4, 2012 letter from Eastpointe to A. Barron regarding extending investigatory status
7	01/16/2014	December 12, 2012 correspondence between Dr. Susan Corriher and A. Barron regarding notice of pre-dismissal conference
8	01/16/2014	January 10, 2013 Judgment from Wayne County, N.C. regarding sexual battery charges

Depositions of Dr. Susan Corriher and Ms. Karen Holliday were used for impeachment purposes during their individual testimonies. The depositions were not introduced into evidence and are not in any manner considered substantive evidence.

WITNESSES

Called by Respondent:

Dr. Susan Corriher
Theresa Edmondson
Consumer JS

Called by Petitioner:

Dr. Susan Corriher
Joy Coley
Karen Holliday
Albert B. Barron, Sr.

ISSUES

Whether Eastpointe Human Services (“Respondent”) had “just cause” to terminate its employment of Albert B. Barron, Sr. (“Petitioner”) for unacceptable personal conduct and conduct unbecoming of an employee that is detrimental to the agency services.

Based on careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned

has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. This matter is properly before the Office of Administrative Hearings, which has both personal and subject matter jurisdiction. The parties were properly noticed for hearing.

2. At the time of his termination, the Petitioner was a Career State Employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the “just cause” provision of N.C. Gen. Stat. § 126-35.

3. On January 14, 2013, Petitioner filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings (“OAH”) claiming he was terminated without “just cause” based on false accusations. He also contends that his dismissal was based on erroneous information, was arbitrary and capricious.

4. The Petitioner graduated from Mt. Olive College with a B.S. in Church Ministries in 1999. He holds two certifications. Since March 2006 he has held certification to provide substance abuse counseling issued through CSAC for the State of North Carolina by the North Carolina Practice Board. He is a certified occupancy specialist, being certified through the National Center for Housing Management, which he received in November, 2011. (T. Vol. 2, p. 301).

5. The Petitioner began his employment with the Respondent in January, 2001 when he was hired by Respondent’s predecessor agency as a Substance Abuse Counselor trainee. He became a full-time Substance Abuse Counselor and worked in that position until 2006.

6. Petitioner was employed as the Housing Coordinator for Respondent from 2006 until 2012. (T. p. 306) His title changed to Director of Housing in July 2012. (R. Ex. 1) (T. Vol. 2, p. 303, 306). Respondent went through a merger and Petitioner’s job title changed, but Petitioner’s job position and duties did not change. (T. p. 21) Petitioner executed a new job description entitled Director of Housing in July 2012. (R. Ex. 1) (T. p. 24)

7. As Director of Housing, Petitioner ultimately determined who could get housing from Respondent. (T. p. 449)

8. Susan Corriher, PhD, (“Dr. Corriher”) is the Chief of Clinical Operations, which includes supervision over Respondent’s Housing Department. (T. pp. 19-20) Dr. Corriher was Petitioner’s direct supervisor from 2010 until Respondent terminated him in 2012. (T. p. 21-22)

9. Petitioner was already employed with Respondent when Dr. Corriher came to work there. While Dr. Corriher never personally provided any particular instructions on how Petitioner was to perform his job, there is ample evidence that Petitioner received considerable on-line training through his employment. (T. Vol. 2, p. 324-325)

10. Respondent maintained policy and procedure manuals and the employees, including Petitioner, would have ready access to those manuals. (R. Ex. 2, 3) Petitioner was provided access to the policies and procedures of Respondent online. All of Respondent's employee acknowledged that they read said policies. (T. pp. 23)

11. Respondent's Policy Manual discusses safeguarding consumer information, conducting oneself in a professional manner, the prohibition against personal relationships with consumers, and honest dealing with consumers and employees of Respondent. (R. Ex. 3) (T. p. 92)

12. Violation of Respondent's Policy Manual, including the Code of Conduct is grounds for dismissal. (R. Ex. 3) (T. p. 92)

13. Petitioner received training on matters including housing operations, HIPPA, client rights, customer relations, and customer service. (T. pp. 22, 425)

14. Petitioner was provided a copy of Respondent's Policy Manual, which includes Respondent's Code of Conduct, procedures related to disciplinary action, appeals, and grievances. The Policy Manual also addresses unacceptable personal conduct and dismissal. (R. Ex. 3) (T. pp. 28-29)

15. The Petitioner worked independently in the Goldsboro office, while Dr. Corriher worked in the Beulaville office. Therefore, Dr. Corriher did not supervise him on a day-to-day basis. (T. Vol. 1, p. 48-49) She did not expect him to talk to her about the day-to-day operations; however, she did expect him to report to her about matters that could affect the agency. (T. Vol. 1, p. 50-51).

16. Respondent's Housing Department provides a housing program that oversees grants and housing for people who have serious mental illness and are homeless. These consumers can be particularly vulnerable. (T. pp. 20, 104)

17. As Housing Coordinator, the Petitioner was responsible for seeking and applying for various grants through HUD. He was also required to meet with other agencies and representatives from the community that worked with housing, as well as with the service provider agencies that worked within Eastpointe's catchment areas. The homes were required to be inspected to make sure they met HUD's criteria for occupancy. On occasion, Petitioner also met with the clients themselves, at their homes or at the agencies. (T. Vol. 2, p. 307).

18. Karen Holliday has worked with the Respondent for approximately thirteen (13) years. For the last year and a half, she has worked as a Housing Specialist. She was supervised by the Petitioner from approximately 2008 until 2012. Petitioner was her direct supervisor.

19. Ms. Holliday first spoke to Consumer JS (“JS”) when JS applied for admission in the Shelter Plus Care program offered by the Respondent. The Shelter Plus Care program assists individuals with serious mental illnesses who are homeless with finding safe, affordable and decent housing. Consumer JS’s case manager, Joy Coley, submitted JS’s application to Holliday. JS’s application included information about her mental illness. Mental illness was a condition of JS obtaining housing through this program.

20. The Petitioner initially met Consumer JS when she was with her Case Manager, Joy Coley, at Eastpointe completing paperwork for the Shelter Plus Care Program. (T. Vol. 2, p. 342-344). The Petitioner was aware that everyone in the Shelter Plus Care program suffered a mental illness and homelessness. (T. Vol. 2, p. 315).

21. Ms. Holliday asked Petitioner if he would stop by Consumer JS’s house to drop off a copy of her lease while in route to Duplin County. It was late in the work day and Ms. Holliday was aware that Petitioner was going in that direction for a meeting the next day. The Petitioner agreed to stop at Consumer JS’s residence, and Ms. Holliday agreed that she would make Ms. Coley aware of it. (T. Vol. 2, p. 347).

22. There are several discrepancies between the testimonies of Ms. Holliday and Ms. Coley. Ms. Holliday contends that she called Ms. Coley and told her that the Petitioner would be dropping off the lease on his way to Warsaw and for Ms. Coley to let JS know that the Petitioner would be coming by the next day. Ms. Coley denies that Ms. Holliday called before Ms. Coley received a phone call from JS that Petitioner was at her home. Ms. Holliday contends that Ms. Coley had requested the lease be delivered to JS. Coley denies that she asked. There is also some discrepancy as to when Petitioner arrived at JS’s home the first time.

23. While there are these discrepancies, the essence of the series of events is that Petitioner was asked by Ms. Holliday to go to JS’s residence on the morning of August 24, 2012, and he did so.

24. Petitioner contends that he was going to JS’s residence do an inspection as well as drop off the lease. Ms. Holliday was clear that the only request was that Petitioner was to drop off the lease because JS needed the lease in order to get the water cut on to the residence. Ms. Holliday said that she usually did the inspections and that it was rare for Petitioner to do the inspections. Petitioner contends that he did all of the inspections.

25. On the morning of August 24, 2012, went to JS’s house. He went to the door but no one answered. As he walked back to the agency vehicle, JS came to the door. He returned, identified himself and said he was there to give her a copy of the lease agreement and conduct a walk through. JS indicated that she was not ready for him to come in at that time and asked him if he could return later. The Petitioner agreed. (T. Vol. 2, p. 348-349).

26. JS called Ms. Coley to tell her when she was ready for the Petitioner to return. Ms. Coley agreed and called Ms. Holliday that it was okay for Petitioner to stop at JS’s home.

27. Petitioner received a call from Ms. Holliday indicating that JS's case manager had contacted her and said that JS was ready for him to stop back there. (T. Vol. 2, p. 350).

28. When the Petitioner arrived the second time, the front door was open, but the storm door was closed. He knocked and JS came to the door. She asked him in and he provided her a copy of the lease agreement. JS was cooking breakfast for her two boys. Her boys were sitting in the kitchen and looking at pictures on her mobile phone. (T. pp. 178 -179, 429)

29. Petitioner contends that he just dropped off the lease and conducted the inspection. He engaged in friendly banter with the small children. JS contends that he did not drop off the lease and that he did not conduct an inspection.

30. Petitioner walked over to Consumer JS in the kitchen to tell her how "fine" and "sexy" she looked and requested a hug. While hugging Consumer JS, Petitioner grabbed her buttocks and as she turned grabbed her private parts. (T. pp. 179-180)

31. While he was in her home, Petitioner threatened to take her house from her if she told anyone about the contact. (T. pp. 179-180, 200) Because of what he told her, Consumer JS was scared that she could lose her home.

32. While in her home, Petitioner also promised to help Consumer JS get furniture. (T. p. 181) There had been a time when Petitioner did help clients within the program to obtain furniture, but money was not available on August 24, 2012.

33. At some point on that same day after Petitioner left Consumer JS's home, he texted her mobile phone from his personal mobile number and requested pictures from Consumer JS. (R. Ex. 11) (T. p. 182) Consumer JS sent Petitioner at least one picture per his request. (R. Ex. 12) (T. pp. 185-186) The Petitioner responded by texting, "gorgeous". (T. Vol. 2, p. 362-366)

34. At the time, it was common practice at Respondent to communicate with co-workers on their personal cell phones during work hours and for work related issues. Ms. Holliday communicated with the Petitioner on both his agency cell and personal cell phones on the day in question day. There is evidence in the phone records which indicate that his agency phone was working properly and being used on that day. Five phone calls were either made from or to his work cell phone on August 24, 2012. (T. Vol. 2, p. 357) There was a period of time from sometime in September, 2012 through the date of his termination that his work cell phone was being serviced and he did not have a work cell phone.

35. There was an exchange of emails between JS and Petitioner over the next several days after Petitioner was at JS's home on August 24, 2012, and then the communication stopped for a period of time.

36. Within two days of the date when Petitioner was in JS's home on August 24, 2012, JS called Ms. Holliday complaining of Petitioner's actions while at her home. She was upset about how the Petitioner had treated her as well as having shown disrespect to her in front of her children. (T. pp. 261-262, 434)

37. Ms. Holliday emailed Petitioner telling him that she needed to talk with him. He came to her office the next day. Ms. Holliday told Petitioner that JS had complained of inappropriate conduct by him at her residence. Ms. Holliday was purposely vague and did not specify the exact nature of the complaint lodged against him by JS. She was confident that Petitioner knew to what she was referring. (T. pp. 261-262, 264)

38. Petitioner was evasive and not admitting to having done anything inappropriate at JS's home. Ms. Holliday reported this issue to Petitioner who was Holliday's direct supervisor. She did not report the incident further up the chain of command as policy would dictate, since he was the person upon whom the complaint was based. She did recommend to JS that she should call a 1-800 number to register a complaint.

39. JS had also complained about Petitioner promising help with furniture but not following through with the promise. There was a time when money was available to help clients with furniture, but such money was not available in August 2012.

40. The issue with the furniture was a separate issue. Ms. Holliday reported that issue directly to Petitioner as well who denied that he had promised furniture and that was considered the end of that issue. Petitioner was Holliday's direct supervisor and she did not report the incident further up the chain of command as policy would dictate, since he was the person upon whom the complaint was based.

41. According to Dr. Corriher, policy was for the employee receiving the complaint to make a written memorandum of the complaint and that a written response to the complaint should be mailed to the complainant within five days of the complaint. That was not done for either complaint from JS to Ms. Holliday concerning Petitioner.

42. Petitioner likewise did not report either complaint up the chain of command to Dr. Corriher or anyone else. He contends that he had always handled the complaints about furniture within his department, and, therefore, he felt no compulsion to report this one even though it was a complaint against him in particular.

43. Sometime during September 2012, Petitioner started receiving more text messages from Petitioner. He did not respond. Petitioner received further texts on October 31, 2012, from a number he did not recognize. He responded to this text and realized they were coming from JS. On November 2, 2012, he received more texts and it was at that time that he decided to call Dr. Corriher.

44. At the time he contacted Dr. Corriher, Petitioner was on vacation. Dr. Corriher scheduled a meeting to be held on November 5, 2012, Petitioner's first day back to work.

45. After returning to work but prior to going to that meeting with Dr. Corriher, Petitioner reviewed JS's file. The evidence is not clear concerning a criminal record check for JS. At her deposition, Ms. Holliday stated that she had run a copy of JS's criminal record and that she made a copy of it and gave it to Petitioner. At hearing she stated that she did not print the record check. Petitioner told Dr. Corriher that he had pulled the criminal record check, but at the hearing he denies that.

46. A criminal record has no effect at all on whether or not the applicant would qualify or get the requested housing. It makes no sense relative to their respective jobs as to why either Petitioner or Ms. Holliday would bother to get a criminal record for JS, even though there is some representation that JS had a prospective court date.

47. No evidence was introduced that either Ms. Holliday or Petitioner used any protected confidential medical information in order to obtain a criminal record check. There is no evidence that either violated HIPPA in order to obtain the criminal record check.

48. Dr. Corriher was not aware of allegations of misconduct involving Petitioner until he called her on November 2, 2012. When Petitioner called Dr. Corriher he told her that he was calling per the advice of his counsel. Petitioner denies that he was calling at the advice of counsel and denies that he told Dr. Corriher that he was. (T. pp. 30-31)

49. Petitioner met with Dr. Corriher and Ken Jones, CEO of Eastpointe, on November 5, 2012, regarding allegations by JS. (T. p. 32) At the time of this meeting there had not been any written complaint or any notation of any complaint by anyone at Respondent concerning any interaction between Petitioner and JS. At that time Petitioner had not had any disciplinary action against him at all since becoming an employee of Respondent. (T. Vol. 2, p. 389)

50. After meeting with Petitioner on November 5, 2012, Dr. Corriher contacted Respondent's Human Resources and Compliance Director, Theresa Edmondson ("Edmondson"), to investigate the allegations against Petitioner. (T. pp. 36-37, 122) An investigative team was assembled to review the allegations involving Petitioner. The team consisted of Dr. Corriher, Edmondson, Respondent's Human Resources specialist Lynn Parrish ("Parrish"), and Respondent's Director of Grievance and Appeals Tashina Raynor ("Raynor"). (T. p. 38)

51. On November 6, 2012, Respondent placed Petitioner on investigatory status with pay pending investigation for unacceptable personal conduct. (R. Ex. 8) (T. pp. 123, 127)

52. Petitioner contends that the meeting with Dr. Corriher on November, 5, 2012 was the first time that he was aware that JS had made any complaint against him. However, Mrs. Holliday had made him aware of allegations within two days of the date he was in JS's home in August 2012 concerning both inappropriate contact with JS as well as the issue about furniture.

53. Respondent provided Petitioner an opportunity to submit information to address the allegations made against him by Consumer JS. Petitioner was interviewed and he submitted

a written statement. (T. p. 128) Petitioner's written statement was dated November 30, 2012. (R. Ex. 5) (T. pp. 44-45)

54. Petitioner's November 30, 2012 written statement refers to the text messages between him and Consumer JS. (R. Ex. 5) (T. p. 107) Petitioner provided Ken Jones some of those text messages which were forwarded over to Mr. Jones' cell phone. Respondent had those text messages transcribed. (R. Ex. 6) (T. pp. 46-47)

55. Dr. Corriher talked with Consumer JS by telephone on two (2) occasions regarding her allegations against Petitioner. (T. pp. 39, 108) Both telephone calls were on November 12, 2012.

56. During the first call, JS told Dr. Corriher that she did not want to talk to her and that she preferred to go through her lawyer. (T. Vol. 1, p. 64). JS was irritated at Dr. Corriher for calling her and asked her not to call again. (T. Vol. 1, p. 232). JS called Joy Coley, her case manager, and Ms. Coley told her who Dr. Corriher is and assured JS that it was alright for her to talk with Dr. Corriher.

57. JS subsequently called Dr. Corriher on the same day. She told Dr. Corriher during this second conversation that Petitioner touched her private parts. She also reported that Petitioner promised Consumer JS living room furniture. JS reported that Petitioner threatened to take away her housing if she told anyone and that she was afraid to report the incident. (T. pp. 39-40, 110) Dr. Corriher documented her telephone interviews with Consumer JS as part of the investigation file. (R. Exs. 4, 7) (T. pp. 40, 109)

58. Dr. Corriher never received a written statement from JS regarding inappropriate conduct by the Petitioner or a complaint regarding the alleged promise of furniture. (T. Vol 1, p. 66-67)

59. Joy Coley first learned of JS's allegations against the Petitioner when JS contacted her over the phone on November 12, 2012. The call to Ms. Coley was prompted by Dr. Corriher's call to JS. JS had not previously called and/or made a report to Ms. Coley about Petitioner. (T. Vol. 1, p. 243-247).

60. Dr. Corriher called Ms. Coley on November 19, 2012. Ms. Coley confirmed that JS made no complaints about the Petitioner. Ms. Coley said she had never heard any complaints about the Petitioner.

61. Ms. Coley stated that she reported the incident concerning her client JS to her superiors who reported to Respondent, who responded that the incident was being investigated.

62. Prior to the complaint made by JS against the Petitioner, Dr. Corriher had never received any other complaints or accusations against the Petitioner of inappropriate conduct by consumers or by any employee. She had never had to discipline the Petitioner for any reason.

63. Petitioner contends that the pictures were requested from JS to document a success story for the department, and that he would include those pictures in a power point presentation. Petitioner contends that he kept the pictures in a file with other pictures of other clients.

64. Credible evidence presented shows that no clients photographs had been used in power point presentations and that no such file containing photographs as contended by Petitioner has been found with JS's or any other consumer's picture, either in Petitioner's office or elsewhere. Petitioner's request for personal photographs from Consumer JS had nothing to do with Respondent's operations or serve any business purpose. (T. pp. 80, 82, 107, 473-474)

65. In early December 2012, Ms. Edmondson saw a sign that read, "Do not let [Consumer JS] go to Eastpointe under any circumstances per Albert Barron." The sign was located in the reception area of DSS, which is within the same building that Eastpointe occupies. (R. Ex. 9) (T. pp. 139-140, 154) The building is a locked building with security. Although the sign was theoretically visible to the public, there is limited access to the area where the sign was posted. (T. pp. 140-142, 476)

66. The sign was only observed approximately one month after Petitioner was placed on investigatory leave. The evidence does not support the contention that Petitioner requested the sign to be put up. Assuming *arguendo* that Petitioner did request the sign to be put up, there is no evidence to support the contention that such a sign with nothing more than a person's name is in any manner a HIPPA violation.

67. On December 17, 2012, Respondent provided Petitioner a pre-disciplinary conference pursuant to its Policy Manual. (T. p. 129)

68. On December 19, 2012, Respondent dismissed Petitioner from his employment with Respondent for unacceptable personal conduct and conduct unbecoming an employee that is detrimental to the agency services after considering all the information obtained during the investigation. (R. Ex. 8). (T. pp. 126, 129-131)

69. Respondent provided Petitioner with a copy of the December 19, 2012 termination letter and the internal grievance procedures. (T. pp. 132, 136)

70. JS filed a criminal charge of Sexual Battery against the Petitioner three months after the alleged incident took place. Both the Petitioner and JS testified at trial and the Petitioner was found not guilty. (T. Vol. 1, p. 204; T. Vol. 2, p. 413-414; Petitioner's Exhibit 8).

CONCLUSIONS OF LAW

1. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law contain Findings of Fact, they should be so considered without regard to the given labels.

2. Depositions of Dr. Susan Corriher and Ms. Karen Holliday were used for impeachment purposes during their individual testimonies. The depositions were not introduced into evidence and are not in any manner considered substantive evidence.

3. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes. The parties have been given proper notice of the hearing.

4. A career State employee may be dismissed only for “just cause.” N.C.G.S. § 126-35(a). The State employer has the burden of proving that there was “just cause” for the dismissal. N.C.G.S. § 126-35(d).

5. Petitioner was notified of his dismissal by letter dated December 19, 2012. Respondent followed the internal grievance procedures and the pre-disciplinary conference procedures. There is no issue that proper procedural steps were taken.

6. Pursuant to regulations promulgated by the Office of State Personnel, there are two bases for the dismissal of an employee for “just cause”: (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 25 NCAC 1J.0604 (b).

7. An employee may be dismissed without any warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 NCAC 1J.0608 (a). One instance of unacceptable conduct constitutes “just cause” for dismissal. Hilliard v. North Carolina Dep’t of Corr., 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

8. In order to prove “just cause” based on unacceptable personal conduct, Respondent must prove (1) Petitioner engaged in the conduct Respondent alleged; and (2) the conduct constitutes “just cause” for dismissal. North Carolina Dep’t of Env’t & Natural Res. v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

9. N.C.G.S. § 126-35(a) has been interpreted to require that the acts or omissions be described, “with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge. ... An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation.” Employment Security Commission v. Wells, 50 N.C. App. 389, 274 S.E.2d 256, (1981)

10. The December 19, 2012 dismissal letter specified that Petitioner was being discharged for “unacceptable personal conduct and conduct unbecoming an employee that is detrimental to the agency services.” (R. Ex. 8) “Conduct unbecoming an employee that is detrimental to the agency services” is merely one type of “unacceptable personal conduct” and not a stand-alone separate grounds for discipline. 25 NCAC 1J.0614 (I)

11. Standing alone, to state that one is disciplined for “unacceptable personal conduct” is not sufficient notice so that Petitioner would “know precisely what acts or omissions were the basis of his discharge.” The termination letter set out 6 numbered paragraphs which articulate the basis for the disciplinary action.

12. While the termination letter is rather inartfully drawn, Petitioner was given sufficient proper statutory notice of the reasons for his dismissal and the dismissal letter met the requirements of the law.

13. Petitioner was sufficiently notified of the specific acts that led to his dismissal allowing him to respond to the charges and prepare an effective representation, which he did. The dismissal letter was sufficiently specific. (R Ex. 8)

14. Although the statute does not define “just cause”, the words are to be accorded their ordinary meaning. Amanini v. Dep’t of Human Resources, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining “just cause” as, among other things, good or adequate reason).

15. While “just cause” is not susceptible of precise definition, our courts have held that it is “a flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case.” NC DENR v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004).

16. 25 NCAC 1J .0604(b) provides that an employer may discipline or dismiss an employee for “just cause” based upon unacceptable personal conduct or unsatisfactory job performance.

17. Pursuant to 25 NCAC 1J .0608(a), an employer may dismiss an employee without warning or prior disciplinary action for a current incident of unacceptable personal conduct.

18. In pertinent part, “Unacceptable personal conduct” is defined by 25 NCAC 1J.0614 (I) as:

- (1) conduct for which no reasonable person should expect to receive prior warning; or
- (4) the willful violation of known or written work rules; or
- (5) conduct unbecoming a state employee that is detrimental to state service.

19. In the case of “conduct unbecoming a state employee that is detrimental to state service,” the State employer is not required to make a showing of actual harm, “only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer).” Hilliard v. North Carolina Dep’t of Corr., 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

20. Primarily the conduct at issue concerns Petitioner’s interactions with Consumer JS, who had made accusations of inappropriate conduct by the Petitioner. JS has consistently told the same story from the outset. She reported first to Ms. Holliday, and later to Ms. Coley and to Dr. Corriher. Even though she decompensated in open court, she told the same story to this Tribunal that she has previously reported. It is found that her rendition of events is credible.

21. Within a matter of days of the interaction between JS and Petitioner in August 2012, Ms. Holliday told the Petitioner that JS was making accusations about him having inappropriate conduct while at her residence. Petitioner did not report that to anyone of authority above him until November 2, 2012, after had JS started contacting him again in October 2012.

22. The fact that he used is personal cell phone in contacting JS is of no consequence in that it was a usual and customary and accepted practice of Respondent's at that time. The contacts themselves were not work related and were inappropriate.

23. Petitioner asking JS for a photograph that her children had shown him was totally inappropriate. Petitioner's rationalization as to why he asked for the photograph is without merit.

24. Respondent has failed to prove that Petitioner directed anyone to erect a sign or in any regard give instructions that JS was not to be allowed to enter the building.

25. Respondent has failed to prove that Petitioner's obtaining a criminal record check was in any way improper.

26. Respondent has failed to prove that Petitioner violated HIPPA regulations in obtaining the criminal record check of JS. Respondent has failed to prove that posting a sign in public with JS's name on it violated HIPPA regulations, even if Petitioner had been responsible for the posting.

27. Respondent's Policy Manual and the HIPPA regulations are known and written work rules. Respondent has failed to prove HIPPA violations by Petitioner.

28. Respondent's Policy Manual discusses safeguarding consumer information, conducting oneself in a professional manner, the prohibition against personal relationships with consumers, and honest dealing with consumers and employees of Respondent. (R. Ex. 3) (T. p. 92)

29. Violation of Respondent's Policy Manual, including the Code of Conduct is grounds for dismissal. (R. Ex. 3) (T. p. 92)

30. Petitioner received training on matters including housing operations, HIPPA, client rights, customer relations, and customer service. (T. pp. 22, 425)

31. Petitioner was provided access to the policies and procedures of Respondent online. All of Respondent's employee acknowledged that they read said policies. (T. pp. 23)

32. Petitioner was provided a copy of Respondent's Policy Manual, which includes Respondent's Code of Conduct, procedures related to disciplinary action, appeals, and grievances. The Policy Manual also addresses unacceptable personal conduct and dismissal. (R. Ex. 3) (T. pp. 28-29)

33. Petitioner's willful failure to report the allegations against him until matters escalated violated known and written work rules.

34. Petitioner's personal relations and touching of Consumer JS were inappropriate behavior that constituted unacceptable personal conduct and conduct unbecoming an employee. Petitioner's interactions and text messaging with Consumer JS was "conduct unbecoming a state employee that is detrimental to state service."

35. A willful violation of known or written work rules occurs when an employee “willfully takes action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule.” Teague v. N.C. Dept. of Correction, 177 N.C. App. 215, 628 S.E.2d 395, 400 (2006) citing Hilliard v. N.C. Dept. of Correction, 173 N.C. App. 594, 620 S.E.2d 14, 17 (2005).

36. In Carroll, the Supreme Court explained that the fundamental question is whether “the disciplinary action taken was ‘just’”. Further, the Supreme Court held that, “Determining whether a public employee had ‘just cause’ to discipline its employee requires two separate inquiries: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes ‘just cause’ for the disciplinary action taken.” NC DENR v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

37. In Carroll, the Court went on to say that “not *every* violation of law gives rise to ‘just cause’ for employee discipline.” In other words, not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline. *Id.* at 670, 599 S.E.2d at 901.

38. In this case, Petitioner did in fact engage in the conduct as alleged in four of the six enumerated bases in the termination letter of December 19, 2012, which constitutes unacceptable conduct as defined by 25 NCAC 1J.0614 (I). Respondent had “just cause” for disciplining Petitioner.

39. Determining “just cause” rests on an examination of the facts and circumstances of each individual case. The facts of a given case might amount to just cause for discipline but not dismissal.

40. Having found the two prongs of the Carroll case have been met, then the next inquiry is whether or not the punishment is appropriate. The case of Warren v. N. Carolina Dep't of Crime Control & Pub. Safety sets forth what this tribunal must consider as to the degree of discipline. It states:

We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish “just cause” for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to “just cause” for the disciplinary action taken. (Internal cites omitted)

Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) review denied, 735 S.E.2d 175 (N.C. 2012)

41. Respondent met its burden of proof that it did not substantially prejudice Petitioner's rights, exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act in violation of Constitutional provisions, fail to act as required by law, act arbitrarily or capriciously, and/or abuse its discretion when Respondent dismissed Petitioner for "just cause".

42. Respondent had "just cause" to dismiss Petitioner for his unacceptable personal conduct.

43. Having given due regard to factors in mitigation, including Petitioner's longevity without any disciplinary action while employed with Respondent, and based on the preponderance of the evidence, Respondent met its burden of proof that it had "just cause" to dismiss Petitioner for unacceptable personal conduct without warning or other disciplinary action. Because of the particular facts of this case, the punishment of termination was appropriate.

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned issues the following:

DECISION

It is hereby ordered that Respondent has sufficiently proved that it had just cause to dismiss Petitioner based on his unacceptable personal conduct. Petitioner's dismissal is therefore **AFFIRMED**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under North Carolina General Statute § 150B-45, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed.

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 22nd day of April , 2014.

Donald W. Overby
Administrative Law Judge