STATE OF NORTH CAROLINA COUNTY OF RICHMOND	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 11 OSP 10876

Rufus C. Carter III, Petitioner, vs. North Carolina Dept. of Correction, Division of Prisons, Respondent.	))))))))	**DECISION**

This case came for hearing before Administrative Law Judge Beecher R. Gray in Rockingham, North Carolina on the 20th day of April, 2012.

APPEARANCES

For Petitioner: Kirk Angel, Esq.
Angel Law Firm
6471 Morehead Road
Harrisburg, North Carolina 28075

For Respondent: Yvonne B. Ricci, Esq.
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
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WITNESSES

Carter III, Rufus C.
Boone, Matthew
Zimmerman, Carston
Covington, Ronald
Moore, Lukinda
Parsons, Lawrence
Swartz, Jesse
Neely, Richard
Pinion, Todd
Edwards, Donald
Jackson, Rick

EXHIBITS

Petitioner's Exhibit ("Ex.") 1 was admitted.

Respondent's Exhibits ("Exs.") 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 were admitted.

ISSUE

Whether Respondent had just cause to terminate Petitioner's employment for unacceptable personal conduct.

BASED UPON careful consideration of the sworn testimony by witnesses present at the hearing, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses, based upon the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, I make the following findings of fact:

FINDINGS OF FACT

1. Petitioner began working for Respondent in December 2001 as a Correctional Sergeant employed at Lanesboro Correctional Institution. (Transcript ("Tr."). pg. 11)

2. Petitioner's employment with Respondent was terminated for alleged violation of the standard operating procedures of Lanesboro Correctional, as well as State procedures regarding use of excessive force. Specifically, the policy that states, "an officer is prohibited from using force solely as a result of verbal provocation. An officer shall not strike or attempt to strike an inmate who has abandoned his resistance or is effectively restrained. The use of force as punishment is strictly prohibited." (Tr. pg. 154-156)

3. The events leading to Petitioner's discharge occurred on March 5, 2011, in the Anson Segregation Unit of the Lanesboro Correctional Institution. (Tr. pg. 13)

4. On the morning of March 5, 2011, at approximately 11:00 am, an inmate set a mattress on fire in the Anson Segregation Unit. As a result, Petitioner and several other officers reported to the Anson Unit to evacuate the inmates because of the smoke that filled the Pod. (Tr. pg. 13)

5. Upon arriving at the Anson Segregation Unit, Petitioner handcuffed the inmate who had started the fire and removed him to a holding cell in a different unit. After doing so, Petitioner returned to the Anson Segregation Unit to help evacuate other inmates. (Tr. pg. 14)

6. When Petitioner returned to the Anson Segregation Unit, he observed Inmate JF coming out of the Pod into an open area between Pods. Inmate JF was being followed closely by

Inmate VD. Both inmates had their hands behind their backs, apparently in handcuffs, and both were surrounded by 3 or 4 officers. Inmate VD managed to get his left wrist and hand out of his cuff--which may or may not have been securely fastened initially--and attacked Inmate JF, striking him repeatedly and with great force in the head and facial area with the handcuffs being used as brass knuckles. Inmate VD's right hand and wrist remained in the handcuffs the entire time of this episode. (Tr. pg. 24-26)

7. Inmate JF was knocked to the floor, where he remained, bleeding profusely. Inmate JF later was taken by prison officials to an outside hospital for evaluation and treatment of his wounds. (Tr. pg. 26, 36) At that time, the Anson Segregation Unit was very chaotic because of the attack and the previous fire, which had filled the area with smoke. Several inmates were screaming. (Tr. pg. 56-57)

8. Officer Boone restrained Inmate VD--who was on top of Inmate JF--by using a "bear hug" hold. Officer Boone stood Inmate VD up but was unable to contain the inmate. Inmate VD escaped the hold, at which point Officer Boone quickly backed away from the inmate. Inmate VD was belligerent and aggressive and was not responding to commands from the correctional officers. (Tr. pg. 26-27, 64-66)

9. The officers on the scene knew of Inmate VD's history of being violent and assaultive. Multiple officers, including Petitioner, instructed Inmate VD to get down on the floor. Inmate VD refused all commands to get down. (Tr. pg. 93) Inmate VD is a large male known to officers as a Bloods Gang inmate.

10. Inmates can and have used handcuffs as a weapon against officers and other inmates. (Tr. pg. 27)

11. Feeling concerned for the safety of himself and others, Petitioner and several other officers present continued to order Inmate VD to get down and to place his hands behind his back. (Tr. pg. 28)

12. After Inmate VD failed to comply with multiple orders to get down, Ronald Covington, Correctional Captain and Petitioner's superior, gave Petitioner the order to pepper spray Inmate VD. (Tr. pg. 91)

13. Petitioner obeyed the order and administered a burst of OC pepper spray toward the inmate's facial area. (Tr. pg. 91)

14. Inmate VD attempted to wipe the spray out of his eyes, and Petitioner and other officers present continued to order the inmate to get down (Tr. pg. 30)

15. Even after being sprayed with OC pepper spray, Inmate VD failed to comply with the orders to get down, though he did turn around with his hands behind his back. The senior officer on the scene, Correctional Captain Ronald Covington, testified--and the undersigns finds as a fact--that Inmate VD was not under control when he turned around or when he was struck with a baton by Petitioner. (Tr. pg. 69)

16. Captain Covington asked, "Why isn't somebody putting their hands on that inmate?" (Tr. pg. 30) Captain Covington ordered Inmate VD to get down because he knew that Inmate VD was a very violent inmate who had a history of assaults. Inmate VD refused Captain Covington's commands.

17. Because of Inmate VD's failure to comply with Captain Covington's and the other officers' orders, and the reasonable concern he had for the safety of himself and the other officers present, Petitioner asked for, and was given, Officer Boone's baton. (Tr. pg. 32)

18. Petitioner used the baton to twice strike Inmate VD in the meaty part of the back side of his leg that was labeled as a "green zone" in his training, because it does minimal trauma. (Tr. pg. 17) Inmate VD was not down after the first strike but did go to the floor at the time of the second strike. Petitioner used a two-hand grip on the baton when he struck Inmate VD. Although Respondent argued that Petitioner's use of two hands on the baton for the strikes violated policy, no such policy was produced in this hearing.

19. After Petitioner struck Inmate VD once in the green zone of his leg, the inmate still failed to comply with the officers' orders to get down, so Petitioner struck the inmate a second time in the same area of his leg, at which point Inmate VD got down on the floor. (Tr. pg. 16-17)

20. Petitioner reasonably believed that his actions were justified. (Tr. pg. 33) At the time Petitioner struck Inmate VD, the inmate had stainless steel or chromed steel handcuffs dangling from one wrist, which he had used as a weapon to inflict substantial wounds on Inmate JF. The attending officers were demonstrating reluctance to approach or put hands on Inmate VD because of his continued aggression and belligerence and his known disposition for violence.

21. As long as Inmate VD had the dangling steel cuffs on his wrist, he had a weapon with which to inflict injury on any of the officers present who were attempting to get him under control. Witnesses described a dangling cuff roundhouse whirl maneuver available to Inmate VD which placed the officers at substantial danger of injury. Testimonial evidence established that the normal order of force continuum--oral order, OC pepper spray, hands-on, and baton strike--was followed in this instance, except for the hands-on level, because Inmate VD represented too much of a danger while he remained on his feet with a weapon. At the time of the baton strikes by Petitioner, Inmate VD had not abandoned his resistance and had refused repeated legitimate and reasonable commands.

22. After reviewing a surveillance video of the events, Respondent conducted an investigation to discover whether Inmate VD had abandoned his resistance before Petitioner struck him with the baton. (Tr. pg. 37-39) Respondent, having determined from its investigation that Petitioner had used the baton strikes on Inmate VD after the inmate had abandoned his resistance, terminated Petitioner's employment on the grounds of unacceptable conduct. (Tr. pg. 140)

BASED UPON the foregoing Findings of Fact, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter under Chapters 126 and 150B of the North Carolina General Statutes.

2. All parties correctly have been designated and there is no question as to misjoinder or nonjoinder.

3. "No career employee may be discharged, suspended, or demoted for disciplinary reasons except for just cause." N.C. Gen. Stat. §126-35 (2011).

4. "Just Cause" is not defined in the pertinent sections of the State Personnel Act or accompanying regulations. *N.C Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 899 (2004). See also, N.C. Gen. Stat. §126-35 (2011); 25 NCAC 01J.0604 (2011).

5. "Just Cause…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." *N.C Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004) (internal citations omitted).

6. Determining whether Respondent had just cause to terminate Petitioner's employment 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 termination. *N.C Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (internal citations and quotations omitted).

7. Where the employee has a reasonable belief that his or her conduct was appropriate or necessary, the conduct would not constitute just cause for discipline. *N.C Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 672, 599 S.E.2d 888, 902-903 (2004); *Urback v. East Carolina University*, 105 N.C. App. 695, 608, 414 S.E.2d 100, 102, disc. rev. denied 331 N.C. 291, 417 S.E.2d 70 (1992); *Mendenhall v. N.C. Department of Human Resources*, 119 N.C. App. 644, 652, 459 S.E.2d 820, 825 (1995).

8. Just cause requires that an employer's decision be based on substantial evidence, which is "more than a scintilla or a permissible inference" and cannot be established by "cherry picking" the facts upon which the employer relies without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Overton v. Goldsboro City Board of Education*, 304 N.C. 312, 322, 283 S.E.2d 495, 501 (1981); *Kandler v. Department of Correction*, 80 N.C. App. 444, 451, 342 S.E.2d 910, 914 (1986); *Thompson v. Wake County Board of Education*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (*citations omitted*); *Wiggins v. North Carolina Department of Human Resources*, 106 N.C. App. 302, 306-07, 413 S.E.2d 3, 5-6 (1992).

9. A career state employee may be dismissed without prior warning for unacceptable personal conduct, which is defined as:
    a. conduct for which no reasonable person should expect to receive prior warning;
    b. job-related conduct which constitutes a violation of state or federal law;
    c. conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
    d. the willful violation of known or written work rules;
    e. conduct unbecoming a state employee that is detrimental to state service;
    f. the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
    g. absence from work after all authorized leave credits and benefits have been exhausted; or
    h. falsification of a state application or in other employment documentation.

    25 NCAC 01J.0606 (2011). 25 NCAC 01J.0614(8) (2011)

10. In considering whether to take disciplinary action, a State employer is required to review "all relevant factors and considerations" and to weigh "factors of mitigation" as well. 25 NCAC 01B.0413.

11. The following factors have been widely used to determined whether there is just cause of discipline:
    a. Did the employer provide the employee forewarning or foreknowledge of possible or probable disciplinary consequences of the employee's conduct?
    b. Was the employer's rule or managerial order reasonably related to the orderly, efficient and safe operation of the employer's business and the performance that the company might properly expect of the employee?
    c. Did the employer, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of the employer?
    d. Was the employer's investigation conducted fairly and objectively?
    e. At the investigation, did the decision maker obtain substantial evidence or proof that the employee was guilty as charged?
    f. Did the employer apply its rules, orders and penalties even-handedly and without discrimination to all employees?
    g. Was the degree of discipline administered by the employer in a particular case reasonably related to the seriousness of the employee's proven offense and the record of the employee in his service with the employer?

    (See, e.g., Abrams and Noland, Toward a Theory of Just Cause in Employee Discipline Cases, 85 Duke Law Journal 594 (1985), cited in *N.C Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)

12. The preponderance of the evidence produced in this contested case established that Respondent did not have just cause to terminate Petitioner from its employment. Petitioner had a reasonable belief--as demonstrated by the evidence in this case--that the inmate had not abandoned his resistance and that the use of pepper spray and baton would subdue the inmate, and, therefore, did not violate Respondent's policy on the "excessive use of force."

13. Respondent did not show by a preponderance of the evidence that Petitioner failed to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by management of the work unit or agency. Respondent did not show that Petitioner's use of force in using pepper spray and baton on Inmate VD violated policy, institutional practices, or was otherwise an unreasonable response to the inmate situation with which Petitioner was confronted.

14. Under the provisions of Chapter 126 of the General Statutes of North Carolina and the administrative rules in 25 NCAC 01B .0421, 25 NCAC 01B .0423, 25 NCAC 01B .0424 , and 25 NCAC 01B .0428, Petitioner is entitled to reinstatement to his same or similar position, backpay, and reasonable attorney's fees and costs. Petitioner is entitled to all the benefits to which he would have become entitled but for his dismissal.

BASED UPON the foregoing **Findings of Fact** and **Conclusions of Law**, I make the following:

DECISION

Respondent's decision to dismiss Petitioner from its employment for unacceptable personal conduct is not supported by a preponderance of the evidence and is REVERSED. Petitioner is entitled to reinstatement to his same or similar position, back pay, and reasonable attorney's fees and is entitled to all the benefits to which he would have become entitled to but for his discharge.

ORDER AND NOTICE

It hereby is ordered that the agency serve a copy of the FINAL DECISION on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in now-repealed G.S. 150B-36(b). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written arguments to those in the agency who will make the final decision.

The agency making the final decision is the North Carolina State Personnel Commission.

This the 12th day of July, 2012.

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Beecher R. Gray
Administrative Law Judge