

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 OSP 13381

Phyllis Campbell,)
Petitioner,)
)
vs.)
)
North Carolina Department of Corrections,)
Respondent.)

DECISION

This contested case was heard before Beecher R. Gray, Administrative Law Judge, in the Office of Administrative Hearings, Courtroom A, located at 1711 New Hope Church Road in Raleigh, North Carolina, on April 5, 2012, and April 30, 2012. Petitioner submitted a proposed decision on July 9, 2012. Respondent filed exceptions to Petitioner's proposed decision on July 30, 2012.

APPEARANCES

Petitioner: James P. West, Esq.
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Respondent: Yvonne Ricci, Esq.
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ISSUES

Whether Respondent, formerly the North Carolina Department of Correction (now The Division of Adult Corrections in the Department of Public Safety), met its burden under N.C.G.S. § 126-35 to show "just cause" to terminate Petitioner's employment in light of the totality of the facts and circumstances surrounding Petitioner's conduct.

Whether Petitioner, Phyllis Campbell, met her burden under N.C.G.S. §§ 126-34.1(a)(3), 126-16, and 126-17 to show that she was discharged in retaliation for Petitioner's equal employment opportunity commission (EEOC) complaint based upon gender discrimination.

EXHIBITS

For Petitioner:

- P. Ex. 1: NC DOC Employment Appraisals of Phyllis Campbell for Fiscal Years 2010/2011 (Rating Cycle 23), 2009/10 (Rating Cycle 22), 2008/09 (Rating Cycle 21), 2006/07 (Rating Cycle 20), 2006/07 (Rating Cycle 19), 2005/06 (Rating Cycle 18), and 2004/05 (Rating Cycle 17)
- P. Ex. 2: NC DOC Witness Statement of Michael Lane

For Respondent:

- R. Ex. 1: NC DOC Witness Statement of Phyllis Campbell dated August 2, 2011
- R. Ex. 2: NC DOC Witness Statement of Phyllis Campbell dated July 5, 2011
- R. Ex. 3: NC DOC Witness Statement of Recardo Parker dated June 24, 2011
- R. Ex. 4: NC DOC Witness Statement of Bianca Pirtle dated June 25, 2011
- R. Ex. 5: NC DOC Letter from Lt. E. Ray to Mr. Anthony Perry dated July 19, 2011
- R. Ex. 8: NC DOC Employment Appraisal of Phyllis Campbell for Fiscal Years 2010/2011 (Rating Cycle 23)
- R. Ex. 9: NC DOC Memorandum from Kenneth Roster to Phyllis Campbell dated May 5, 2011 re: written warning addressing inmate interaction (admitted for the limited purpose of showing that Petitioner was issued a written warning for unacceptable personal conduct)
- R. Ex. 10: NC DOC Memorandum from Kenneth Roster to Phyllis Campbell dated May 5, 2011 re: written warning addressing possession of cigarette and lighter (admitted for the limited purpose of showing that Petitioner was issued a written warning for unacceptable personal conduct)
- R. Ex. 11: NC DOC letter from Kenneth Roster to Phyllis Campbell dated June 21, 2011 re: pre-disciplinary conference
- R. Ex. 12: NC DOC pre-disciplinary conference acknowledgement of Phyllis Campbell dated August 2, 2011
- R. Ex. 13: NC DOC letter from Kenneth Roster to Phyllis Campbell dated August 2, 2011 re: recommendation for dismissal
- R. Ex. 14: NC DOC memorandum from Kenneth Royster to Randall Lee dated August 3, 2011 re: recommendation for dismissal
- R. Ex. 16: Email to Kenneth Royster and Randall Lee dated August 23, 2011 re: draft dismissal letter for Phyllis Campbell and attached draft letter
- R. Ex. 17: NC DOC letter from Kenneth Roster to Phyllis Campbell dated August 30, 2011 re: dismissal for unacceptable personal conduct
- R. Ex. 18: NC DOC Personnel Manual Disciplinary Policies And Procedures, Section 6, Pages 1 (revised July, 1997), 4, 5, 7, 38, 39 (revised December 1, 1996), 40 (revised July 1, 2001), and 41 effective October 1, 1995
- R. Ex. 19: NC DOC Personnel Manual Unlawful Workplace Harassment and Professional Conduct Policy, Section 3, Pages 9 - 16, effective March 1, 2001 and all revised March 1, 2011)

- R. Ex. 20: NC DOC Personnel Manual Violence in the Workplace Section 3, Pages 23 (revised September 1, 2007), 24-31 (revised March 1, 2005), effective April 1, 1997
- R. Ex. 21: NC DOC Policy & Procedures Chapter A, Section .0200 Conduct of Employees Pages 1-8 Issued August 16, 2010
- R. Ex. 22: NC DOC Witness Statement of Phyllis Campbell dated March 24, 2011
- R. Ex. 23: NC DOC letter from Lorraine Dulin to Phyllis Campbell dated April 6, 2011 re: Equal Employment Opportunity (“EEO”) Office complaint
- R. Ex. 24: NC DOC EEO Complaint Form dated May 25, 2011
- R. Ex. 25: NC DOC Letter from Gloria Butler to Phyllis Campbell dated September 1, 2011 re: EEO Office investigation
- R. Ex. 26: NC DOC Personnel Late Reports of Recardo Parker, Gary Fuller, Anthony Modiza, and Rashad Martin

WITNESSES

- For Petitioner: Phyllis Campbell, Selena Burden, Portia Lucas, Rashad Martin, Michael Lane, Alberta McLaughlin, Cranston Bass

- For Respondent: Phyllis Campbell, Recardo Parker, Bianca Pirtle, Eric Ray, Kenneth Royster, James French, Bernard Walker, Gloria Butler

FINDINGS OF FACT

In making Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses, taking into account factors for judging credibility of witnesses, including, but not limited to, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the demeanor of the witness; the witness’ interests, bias, candor, and any prejudice the witness may have; as well as whether the testimony of the witness is reasonable and consistent with other believable evidence in the case. After careful consideration of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned makes the following FINDINGS OF FACT:

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.

2. The parties agreed to bifurcate the hearing and present evidence on the issue of whether Petitioner was terminated for just cause, on which Respondent bears the burden of proof, and then to present evidence of whether Petitioner had been subjected to unlawful retaliation, on which Petitioner bears the burden of proof. (Transcript (“Tr.”) pp. 105-107)

3. Petitioner Phyllis Campbell (“Petitioner”) is a former employee of Respondent North Carolina Department of Correction (“Respondent”). Beginning in July 2004, Petitioner was employed as a correctional officer at Respondent’s Polk Correctional Facility and then transferred to Wake Correctional Center in 2007. (Tr. p. 10)
4. By letter dated August 30, 2011, Petitioner was terminated for unacceptable personal conduct. Specifically, the termination letter charged her with exhibiting inappropriate behavior toward Officer Recardo Parker on June 24, 2011, by directing profane and abusive language at him in the presence of inmates waiting to eat. (R. Ex. 17)
5. Petitioner has been unable to secure employment since her termination by Respondent. (Tr. p 124)
6. Petitioner had a good to very good work record for at least the first six and one-half years of her seven year employment tenure with Respondent. In her first six annual evaluations, known as TAPS, she received an overall rating of “very good” four times and “good” twice. In the last TAP evaluation on May 15, 2011, given approximately four months prior to Petitioner’s termination, she received an overall rating of “good.” (P. Ex. 1, Tr. pp. 58 - 62)
7. Petitioner’s manager, Lieutenant Ray, characterized Petitioner as a good correctional officer and acknowledged that she generally was considered a very good employee. When asked about Petitioner’s reputation for being truthful, Lieutenant Ray admitted, “I have no reason to think [Petitioner] would falsify.” (Tr. pp 61 - 63)
8. In addition, Superintendent of Wake Correctional Center Kenneth Royster acknowledged that Petitioner was regarded as a good or very good employee until approximately the last four months of her employment. (Tr. pp. 84-85)
9. Respondent contends that Petitioner violated Respondent’s policies relating to abusive language, dealings with inmates, and violence in the workplace, and that the disciplinary action of termination of Petitioner’s employment for unacceptable personal conduct is consistent with the enforcement of Respondent’s policies. (R. Exs. 18, 19, 20, 21)
10. An internal appeal was held; the termination was upheld; and Petitioner timely filed her petition for a contested case with the Office of Administrative Hearings.

Just Cause Issue

11. On June 24, 2011, Correctional Officer Recardo Parker submitted to Respondent a complaint against Petitioner alleging that she yelled profane language at him while he was walking with Correctional Officer Bianca Pirtle in an area of the correctional facility in which inmates were present and that Petitioner yelled at him to ask what he had to say to her after she observed him shaking his head. (R. Ex. 4)

12. Officer Parker testified that Petitioner's actions caused a disruption among the inmates, and that they made comments to him about Petitioner's intention to "whop" him. (Tr. pp. 23-25)
13. On cross-examination, Officer Parker admitted that the written statement he submitted to Respondent at the time of the incident (identified as R. Ex. 4), which he characterized as a "full" and "complete" statement, did not include any mention of an inmate disruption and did not identify any comments being made by the inmates. (Tr. pp. 27)
14. Officer Parker further admitted that shortly before the alleged confrontation with Petitioner on June 24, 2011, Petitioner had attempted to report Officer Parker for a rules violation associated with a cell phone being brought into the prison facility by or on behalf of Officer Parker. (Tr. pp. 27-29)
15. Officer Parker acknowledged that the confrontation with Petitioner was not the only correctional officer confrontation in which he had been involved. He was involved in an unrelated incident with Officer Modica that took place in the presence of his managers at the prison facility, including Lieutenant Ray. Officer Parker testified that Officer Modica used profane language that was directed at Officer Parker as a result of the dispute about job duties. Officer Parker denied telling Officer Modica that they would need to take their dispute out "to the street." Officer Parker received only a verbal warning as a result of the incident with Officer Modica. (Tr. pp. 30-32)
16. Officer Parker's assertion under oath that Officer Modica used profane language that was directed at Officer Parker during their confrontation was contradicted by Lieutenant Ray, who was the manager of both correctional officers and was physically present during the incident. According to Lieutenant Ray, "I don't remember the profane language, but I remember [Officer Modica] coming in and making comments about Officer Parker's work ethic." According to Lieutenant Ray, if Officer Modica had used profane language that was directed toward Officer Parker, it likely would have resulted in only a verbal reprimand or a coaching. Officer Parker's denial under oath that he said to Officer Modica that they would need to take their dispute out to the street was also directly contradicted by Lieutenant Ray, who testified that Officer Parker responded to Officer Modica as follows: "We can talk about it up the street." (Tr. pp. 53-57)
17. Officer Parker's assertion under oath that Officer Modica used profane language directed at Officer Parker during their confrontation also was contradicted by Correctional Officer Lane. Officer Lane, who was present during the confrontation between Officer Modica and Officer Parker, did not believe that either officer cursed at the other. His written statement about the incident did not reflect the use of profanity by either officer; Officer Lane testified that he would have noted the profanity in his written statement if he had heard it. (Tr. pp. 189 - 192, P. Ex. 2)
18. Officer Parker's assertion under oath during the hearing that he did not say that he and Officer Modica could take their dispute out "to the street" also was contradicted directly by Officer Lane. According to Officer Lane, when Officer Modica confronted Officer

Parker, Officer Parker responded by telling Officer Modica not to talk to Officer Parker in that manner again and if Officer Modica ever did “we can take it up the street,” which Officer Lane knew to mean Officer Parker was telling Officer Modica that they would need to step outside the facility and have a physical fight. At that point, Officer Lane intervened and asked Officer Modica to leave. (Tr. pp. 190-191).

19. Officer Parker further acknowledged that he had been involved in another unrelated incident with Officer Martin, but Officer Parker testified that it did not involve any “verbal or direct contact,” and asserted that he had not accused Officer Martin of using profane language directed at him at any time. (Tr. pp. 32-34)
20. Officer Parker’s testimony about the alleged incident with Officer Martin directly was contradicted by Officer Martin. Officer Martin testified that Officer Parker filed a complaint against Officer Martin alleging that Officer Martin had threatened him, walked up on him to beat him up, and used profanity directed at him. Officer Martin testified that Officer Parker lied about this incident, which Officer Martin asserted “never happened.” Officer Martin opined that Officer Parker “fabricates a lot.” Officer Martin was transferred to another shift temporarily after the alleged incident, but his employment with Respondent was not terminated. (Tr. pp. 183-184)
21. On cross-examination by Respondent, Officer Martin further elaborated that Officer Parker lied about two separate alleged incidents involving Officer Martin. In one incident, he alleged that Officer Parker falsely reported that inmates were present during an incident with Officer Martin in the facility yard. In the second incident, Officer Parker alleged that Officer Martin used profanity and threatened him in the presence of two staff members at a gate. (Tr. pp. 186-187)
22. With regard to the incident on which Petitioner’s termination is based, Petitioner testified that after she reported Officer Parker for violating facility rules by storing a cell phone in one of the facility’s gate areas, she saw Officer Parker in the facility yard at various times and he was smirking at her and saying “little things” to her all day long, so she loudly stated to Officer Parker while she was standing at her post approximately 20 feet away from him that if Officer Parker had something to say to her, he needed to say it. Petitioner denied using profanity at Officer Parker or making any physical gestures at him and denied that any inmates who were present in the area were disrupted or riled. She acknowledged that a few inmates were present when she spoke to Officer Parker during the incident. (Tr. pp. 118-121)
23. Officer Parker’s denials in his sworn testimony regarding alleged confrontations he had with other correctional officers were repeatedly and substantially contradicted by the sworn testimonies of Lieutenant Ray and Officer Lane as well as the testimony of Officer Martin. Considered in conjunction with Officer Parker’s established history for exaggerating incidents and the retaliatory motive Officer Parker may have had as a result of Petitioner having recently reported Officer Parker for a violation of facility policy involving cell phones, Officer Parker’s testimony that Petitioner loudly directed profanity at him during the June 24, 2011, incident with Petitioner is not credible.

24. Female Correctional Officer Bianca Pirtle accompanied Officer Parker during the June 24, 2011, incident involving Petitioner. According to Officer Pirtle, Petitioner yelled, acted in a threatening manner, and cursed at Officer Parker in the presence of approximately 60 inmates, which caused a disruption among the inmates. (Tr. pp. 36-39)
25. On cross-examination, Officer Pirtle admitted that Wake Correctional Center is a minimum security prison in which the inmates generally are regarded as safe. She also acknowledged that the inmate disruption was comprised of only two to three inmates making comments about the incident, none of which resulted in any discipline, and she did “not know” what the other inmates were doing to support her assertion that they were “riled.” (Tr. pp. 39 - 47)
26. Officer Pirtle also admitted on cross-examination that Petitioner was standing approximately 15-20 feet from Officers Parker and Pirtle during the incident and that Officer Parker did not indicate at any time that he was scared of Petitioner. (Tr. pp. 42-45).
27. Officer Pirtle acknowledged on cross-examination that she had been social friends with Officer Parker and had at least once met him at a bar after work during the time they worked together at Wake Correctional Center. (Tr. pp. 40 - 41)
28. Petitioner testified that Officers Parker and Pirtle are “close” and often are observed visiting each other at their posts during their shift. (Tr. p. 121)
29. The nature of the relationship between Officer Pirtle and Officer Parker and Officer Parker’s own lack of credibility raise material concerns about the credibility of Officer Pirtle’s testimony in support of Officer Parker with regard to the June 24, 2011, incident involving Petitioner.
30. After Superintendent Royster became aware of the alleged June 24, 2011, incident involving Petitioner and Officer Parker, the Superintendent ordered an internal investigation. On the basis of the investigation, he decided to recommend that Petitioner be dismissed from her employment with Respondent because she violated Respondent’s policies prohibiting expression of a threat, creation of a hostile work environment, and use of abusive language. (Tr. pp. 71-75)
31. On July 21, 2011, Respondent issued a letter from the Superintendent that was received by Petitioner on July 27, 2011, advising Petitioner of the scheduled date of a pre-disciplinary conference on August 2, 2011, based upon the decision to seek the termination of Petitioner’s employment because of the June 24, 2011, incident with Officer Parker. (R. Ex. 11)
32. On August 30, 2011, Superintendent Royster, acting on behalf of Respondent, issued a letter to Petitioner advising her of the termination of her employment for unacceptable personal conduct associated with the alleged June 24, 2011, incident involving Officers Parker and Pirtle based upon the conclusion that Petitioner used profanity towards Officer

Parker in the presence of inmates. The letter notified Petitioner of her appeal rights. Petitioner acknowledged her receipt of the letter by signing it. (R. Ex. 17)

33. With regard to the June 24, 2011, incident involving Petitioner and Officer Parker that formed the basis for the Superintendent's decision to recommend termination of Petitioner's employment, Superintendent Royster admitted on cross-examination that: (i) he was unaware that a day or two before the June 24, 2011, incident that Petitioner had reported Officer Parker for bringing a cell phone into the facility, although the Superintendent subsequently changed his testimony as to his knowledge of the report; (ii) Wake Correctional Center was a minimum security facility at which the risk of inmates "committing assault, escape, and those types of things" is "minimal"; and (iii) none of the inmates who were allegedly riled or disrupted by the June 24, 2011, incident were disciplined in any manner. (Tr. pp. 84, 91-94)
34. None of the allegedly riled inmates were called as witnesses to testify in the proceeding about what they saw or heard or how they acted during the June 24, 2011, incident at issue. (Tr. p. 93)
35. Selena Burden, who was employed as a correctional officer at Wake Correctional Center from 2004 through January 2011, testified that she was aware of instances in which correctional officers argued with each other in the presence of inmates at the prison facility, and none were terminated for this conduct. (Tr. pp. 159-160)
36. Correctional Officer Burden additionally testified credibly that she was aware of incidents in which one correctional officer used profanity when speaking with another officer in loud conversations, and it was "just a normal thing on the camp" that happened "[a]ll the time." She confirmed that she was not aware of any correctional officers being terminated for using profanity. (Tr. pp. 159-161)
37. Portia Lucas, who is employed with Respondent as a Sergeant at Polk Correctional Institution, a medium security facility where she has worked since 2002, testified credibly that she is aware of instances in which correctional officers argue with each other in the presence of inmates at Polk, and none have been terminated for such conduct. She also stated that she is aware of correctional officers using profanity on a regular basis and, after correcting herself, confirmed that none have been terminated for use of profanity. (Tr. pp. 168-171)
38. Chaplain Alberta McLaughlin testified credibly that she currently is employed with Respondent as a chaplain at Maury Correctional Facility and previously worked as a correctional officer at Wake Correctional Center from 2007 to 2009. She recounted an incident in which she had an angry argument that involved shouting at two correctional officers in the presence of inmates and their families during a visitation period. She yelled at the other two officers for violating policy by giving money to an inmate and interfering with her direct order for the inmate to hand over a photograph to her. She was not disciplined in any manner and was not aware of any investigation of the other two

correctional officers. Instead, Lieutenant Ray separated the correctional officers and then merely mediated the dispute. (Tr. pp. 194-199)

39. Petitioner's conduct during the June 24, 2011, incident with Officer Parker is within the prevailing, apparent norms of conduct and behavior at Respondent's correctional facilities that typically results in minimal, if any, discipline.
40. Included in the Superintendent's letter dated August 30, 2011, terminating Petitioner's employment were references to two written warnings issued in May 2011--one for inappropriate interaction with an inmate and another for possession of a partially smoked cigarette and lighter in the facility. (R. Ex. 17)
41. These two May 2011 written warnings were issued less than two months after Petitioner made a complaint to Superintendent Royster in mid-March 2011 against Sergeant Bernard Walker for gender-based employment discrimination. (Tr. pp. 85, 90)
42. Prior to Petitioner reporting gender-based employment discrimination to Superintendent Royster, she had been employed as a correctional officer by Respondent at Wake Correctional Center for approximately six and one-half years without receiving any written warnings from Respondent. (Tr. p. 123)
43. The Superintendent acknowledged that Petitioner came to him in the middle of March 2011 to bring a complaint of gender-based employment discrimination against Sergeant Walker based upon his treatment of her and the lack of opportunity for advancement. (Tr. pp. 85, 90)
44. Within one to two weeks after Petitioner complained to the Superintendent about gender discrimination by Sergeant Walker, Sergeant Walker reported Petitioner for undue familiarity with an inmate, which was the event upon which Petitioner's first written warning was based. (Tr. pp. 90-91)
45. Specifically, on March 20, 2011, Sergeant Walker accused Petitioner of standing too closely to and engaging in an extended conversation with an inmate, leading directly to Petitioner's first written warning in May 2011. (P. Ex. 1, Tr. pp. 90-91)
46. The timing of Sergeant Walker's complaint about an incident on March 20, 2011, raises significant concerns about its validity because of the likelihood for personal animus of Sergeant Walker toward Petitioner.
47. On May 4, 2011, Petitioner received a written warning dated May 5, 2011, issued by the Superintendent alleging that Petitioner had engaged in unacceptable personal conduct for her alleged March 20, 2011, interaction with an inmate. The written warning also referenced an action plan initiated on March 18, 2011, based upon 3 conversations between the Petitioner and the same inmate over a 3 month period. The written warning stated that "[t]his action is final and carries no appeal rights since this is the first written warning issued to you." (R. Ex. 9)

48. The Superintendent explained that the basis for the warning to Petitioner for undue familiarity with an inmate was the length of time Petitioner spoke with the inmate. However, he acknowledged that there is no policy with regard to the number of minutes that a correctional officer may speak with an inmate and that correctional officers are encouraged to establish a rapport with inmates because communication is regarded as the first line of defense in correctional facilities. He further acknowledged that Petitioner had been commended as recently as November 2010 for her interaction with inmates. (Tr. pp. 87 - 89)
49. According to Petitioner, the communication she had with the inmate that caused her first written warning for unacceptable personal conduct issued in May 2011 was no longer than conversations she had with other inmates; she discussed nothing of a personal nature; and Respondent did not have any policies limiting the amount of time a correctional officer could speak with an inmate. (Tr. pp. 114-117)
50. Petitioner also submitted a written statement dated August 2, 2011, as part of her internal appeal to Respondent, denying any inappropriate conversation with inmates and asserting that she was unaware of any policy setting a time limit on conversations with inmates. (R. Ex. 1)
51. Correctional Officer Burden, who worked with Petitioner as a correctional officer until January 2011, testified credibly that there is no specific time limit on speaking with inmates, and there are occasions when a correctional officer may speak with an inmate for fifteen to thirty minutes. She also emphasized that communication with inmates is regarded as the first line of defense for a correctional officer. (Tr. pp. 162-163) Sergeant Polk reiterated these principles. (Tr. pp. 171-173, 177- 181)
52. On May 14, 2011, Petitioner received a written warning issued by Superintendent Royster also dated May 5, 2011, alleging that Petitioner had engaged in unacceptable personal conduct for her possession of a partially smoked cigarette and a lighter in her pocket. The written warning stated that “[t]his action is final and carries no appeal rights since this is the second written warning issued to you.” (R. Ex. 10)
53. Even after her receipt of the two written warnings dated May 5, 2011, Petitioner received a TAP evaluation with a final evaluation date of May 15, 2011, that referenced both written warnings in the comments sections of the TAP but nevertheless awarded Petitioner an overall rating of Good. Petitioner also was identified in the TAP as being “currently on the [sergeant’s] eligibility list” for promotion from her position as a correctional officer. Included in the May 15, 2011, TAP was an interim evaluation dated November 14, 2010, which gave Petitioner an overall rating of Very Good. In addition, the interim review contained positive comments from her supervisor asserting that Petitioner “continues to work well with staff and inmates.” (P. Ex. 1, Tr. pp. 58 - 61)
54. Based upon the totality of the circumstances associated with the first written warning issued to Petitioner in May 2011 and the testimony of the witnesses regarding inmate communication policies, the first warning is not a valid basis upon which disciplinary

action against Petitioner as a result of the June 24, 2011, incident involving Petitioner and Officer Parker can be enhanced or otherwise justified.

Retaliation Issue

55. Although Petitioner passed the sergeant's exam in 2008 and her TAPS identified her as eligible for promotion from correctional officer to sergeant, she received very little training from her supervisors as to how to serve as a sergeant. Specifically, Petitioner received two days of training over a period of more than a year after first passing the exam. Petitioner received three more days of training over the remainder of her employment tenure with Respondent. (P. Ex. 1, Tr. pp. 224-226, 232)
56. Correctional Officer Bass confirmed that Petitioner received very little training in relation to the training provided to male correctional officers, including Officer Bass, and that training was allocated at the discretion of the supervising sergeant. (Tr. pp. 262-264)
57. Sergeant Walker, who became Petitioner's supervisor in 2010, never provided any training to Petitioner to serve as a sergeant. (Tr. pp. 236-238)
58. In marked contrast, males, including Correctional Officers Bass, Coslick, Mangum--all of whom had passed the sergeant's exam--and Lane, who had not passed the sergeant's exam, received regular and extensive training in sergeant level functions such as conducting investigations and using Respondent's computer management system. (Tr. pp. 225-226, 233-235)
59. Petitioner made informal complaints to her sergeant, her lieutenant, and other managers about the lack of training opportunities and the fact that males who had not passed the sergeant's exam were receiving training to become sergeants. (Tr. p. 226)
60. Petitioner expressed her concern to Sergeant Walker about her lack of training to become a sergeant. (Tr. p. 238)
61. Sergeant Walker, however, denied recalling any conversations with Petitioner relating to her lack of training opportunities or any other unfair treatment, and he asserted that she advised him that she did not have an interest in working in the operations center. Sergeant Walker also claimed to have provided sergeant training opportunities to another female correctional officer, Officer Pirtle. (Tr. pp. 272-274, 293-295, 308)
62. Petitioner was advised by another sergeant that Sergeant Walker "didn't want to be bothered" with Petitioner and to "just chill out for a while and then we'll train you." (Tr. pp. 238-239)
63. When she continued to be excluded from sergeant training, Petitioner went to Assistant Superintendent Perry to notify him that she was not receiving any training. (Tr. p. 241)

64. When Assistant Superintendent Perry failed to take action, Petitioner went to Superintendent Royster in early March 2011 to complain that she was being excluded from opportunities to train to become a sergeant as a result of gender-based discrimination. She specifically asked to file a complaint against Sergeant Walker. The Superintendent advised Petitioner that he would take care of the matter. (Tr. pp. 241-242, 245)
65. The Superintendent acknowledged that Petitioner came to him in the period early to mid-March 2011 to bring a complaint of gender-based employment discrimination against Sergeant Walker based upon his treatment of her and the lack of opportunity for advancement but later changed his testimony to assert that Petitioner initially complained to him on March 24, 2011. (Tr. pp. 85, 90, 326, 329)
66. Before changing his testimony regarding the date on which Petitioner initially complained of gender discrimination, the Superintendent acknowledged that within one to two weeks after Petitioner complained to him about gender discrimination by Sergeant Walker, Sergeant Walker reported Petitioner for undue familiarity with an inmate, which was the event upon which Petitioner's first written warning was based. (Tr. pp. 90-91)
67. Specifically, on March 20, 2011, Sergeant Walker accused Petitioner of standing too closely to and engaging in an extended conversation with an inmate, leading directly to Petitioner's first written warning in May 2011. (P. Ex. 1, Tr. pp. 90-91, 275-278)
68. Sergeant Walker asserted that Petitioner came to him and apologized for discussing non-DOC related matters with the inmate during the March 20, 2011, incident. This claim is subject to significant credibility concerns as it is inconsistent with both Sergeant Walker's own report, which contains quotes from Petitioner, none of which are admissions of discussing non-DOC matter, and the sworn testimony of Petitioner. (Tr. pp. 288-293, R Ex. 9)
69. Sergeant Walker also addressed an alleged incident of undue familiarity between Petitioner and an inmate on May 23, 2011. (Tr. pp. 279-280) Respondent failed to offer any documentation of the alleged incident, despite Sergeant Walker's claim that he prepared a report of it. Moreover, this alleged incident was not addressed or relied upon by Respondent in any of its disciplinary or termination decisions involving Petitioner and is not relevant. (Tr. pp. 297-302, R. Ex. 17)
70. Sergeant Walker claimed to be fair "across the board" without regard to gender because he documented male correctional officers for arriving late to work. (Tr pp. 280-286, R. Ex. 26)
71. On March 24, 2011, Petitioner submitted a witness statement about the alleged incident with an inmate on March 20, 2011. In the statement, she detailed the manner in which she was treated discriminatorily by Sergeant Walker in relation to his treatment of male correctional officers. (R. Ex. 22)

72. Petitioner waited a few weeks after making her initial discrimination complaint to the Superintendent. After no action was taken in response to her complaint, Petitioner used the computer to electronically file a complaint of gender-based employment discrimination with Respondent's Equal Employment Opportunity office in late March 2011. (Tr. pp. 243, 312)
73. Petitioner's complaint of gender-based employment discrimination was made in good faith by Petitioner and she had a reasonable factual basis on which to lodge the complaint.
74. Approximately one month later, Sergeant Walker's accusation about the events of March 20, 2011, resulted in Petitioner's receipt of a written warning dated May 5, 2011, issued by the Superintendent, alleging that Petitioner had engaged in unacceptable personal conduct for the March 20, 2011, interaction with an inmate. The written warning also referenced an action plan initiated on March 18, 2011, based upon 3 conversations between Petitioner and the same inmate over a 3 month period. The written warning stated that "[t]his action is final and carries no appeal rights since this is the first written warning issued to you." (R. Ex. 9)
75. Petitioner acknowledged that she had been counseled by supervisors other than Sergeant Walker prior to March 2011 for allegedly engaging in extended conversations with an inmate and discussing non-work related issues. (Tr. pp 252-253)
76. After filing a second complaint of gender-based employment discrimination electronically in May 2011, Petitioner was interviewed in August 2011 by Gloria Butler, an employee of Respondent's EEO Office. Petitioner explained that Sergeant Walker was discriminating against her with regard to training and discipline because of her gender. (Tr. pp. 249-251, 312-313, 324-325)
77. Gloria Butler concluded that Petitioner had not been subjected to gender-based discrimination. (R. Ex. 25, Tr. pp. 313, 315)
78. Gloria Butler's investigation did not address the issue of whether Respondent retaliated against Petitioner for her complaint of gender-based discrimination.
79. James French, Deputy Director for Adult Corrections, made the final decision regarding the termination of Petitioner's employment and was not aware that she had made a complaint with Respondent's EEO Office or otherwise claimed gender-related employment discrimination. The Deputy Director acknowledged that he relied upon the recommendation of the Superintendent and did not conduct his own investigation or even review the written warnings given to Petitioner. (Tr. pp. 218-223)

Based upon the Findings of Fact, I make the following:

CONCLUSIONS OF LAW

1. All parties properly are before the Office of Administrative Hearings; jurisdiction and venue are proper. To the extent that the Findings of Fact contain Conclusions of Law or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.
2. Petitioner was a career State employee at the time of her dismissal and is entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), specifically, the just cause provision of N.C. Gen. Stat. § 126-35.
3. This case is based upon N.C. Gen. Stat. § 126-35 on the issue of whether Petitioner was disciplined by termination for “just cause” and whether Respondent properly considered and applied the necessary factors and facts in its decision to terminate Petitioner’s employment. N.C. Gen. Stat. §§ 126-34.1 and 126-17, address the issue of whether Petitioner was terminated in retaliation for protesting an alleged violation of N.C. Gen. Stat. § 126-16 based on gender-based employment discrimination by Respondent.
4. Under N.C. Gen. Stat. § 126-35(d), in an appeal of a disciplinary action, the employer bears the burden of proving that “just cause” existed for the disciplinary action.
5. N.C. Gen. Stat. § 126-35(a) provides that, “[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” The statute does not define “just cause.” The inquiry of whether a discharge is for “just cause” “requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” *N.C. Dep’t of Env. and Nat’l Resources v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)(cites omitted). “‘Just cause,’” like justice itself, is not susceptible of precise definition...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.” *Id.*
6. Just cause requires misconduct of a substantial nature and does not encompass technical violations of statute or official duty without a wrongful intention. Among the factors to be considered in determining whether just cause exists are: (i) whether the conduct is isolated or part of a pattern; (ii) the motivation of the employer in taking adverse action and whether there were any improper considerations; (iii) whether the employee intentionally violated clear agency policy and whether the violation was substantial; (iv) whether the employee was acting under any duress or injury that may have contributed to her conduct; (v) whether the employee was acting consistently with departmental practice and custom; (vi) the employee’s performance history; and (vii) any other significant mitigating factors.
7. The North Carolina Supreme Court has held that “[d]etermining whether a public employer 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.” *Id.* at 665, 599 S.E.2d at 898.

8. The standard used to determine just cause for termination is a different standard than that used for lesser discipline. See *Ramsey v. N.C. Div. Motor Vehicles*, 02 O.S.P. 1623 (April 26, 2004), *aff’d* 647 S.E.2d 125 (N.C. Ct. App. 2007) (holding that written warning, rather than termination, was appropriate penalty for violation of general order), *disc rev. denied*, 659 S.E.2d 739 (N.C. 2008).
9. Respondent failed to meet its burden of proof under N.C. Gen. Stat. § 126-35(d) to prove by a preponderance of the evidence that Petitioner engaged in the conduct of which she was accused in the June 24, 2011, incident that constitutes the basis for Respondent’s finding of unacceptable personal conduct and Respondent’s decision to terminate Petitioner. Specifically, Respondent failed to prove by a preponderance of the evidence that Petitioner either directed profanity at Officer Parker in the presence of inmates or that Petitioner threatened Officer Parker or otherwise acted in a manner that reasonably could be construed as threatening to Officer Parker. The testimonies of Officers Parker and Pirtle were not sufficiently credible to satisfy Respondent’s burden of proof. Respondent failed to offer any additional supporting testimony regarding the incident at issue. Petitioner’s testimony regarding the June 24, 2011, incident was credible and consistent with the positive employment evaluations of Petitioner given by Respondent over a period that exceeded 6 years, which lauded Petitioner for working “well with staff and inmates” as recently as November 2010. (P. Ex. 1)
10. Other correctional officers employed at Wake Correctional Center engaged in confrontations with each other and were subject to either no discipline or limited disciplinary action, such as a verbal warning. Officer Parker, whose complaint about Petitioner regarding the June 24, 2011, incident was the basis for Respondent’s termination decision, was--by his own admission--involved in at least two other confrontations with correctional officers, none of which led to termination or any significant discipline by Respondent of any of the officers involved despite Officer Parker’s allegation in each instance that profanity was directed at him by the other correctional officer involved in the confrontation. The credible testimony of Correctional Officer Burden, who stopped working as a correctional officer at Wake Correctional Center in 2011, confirms that such arguments and even the use of profanity occurred regularly at the correctional facility and none resulted in termination during her tenure. The credible testimony of Chaplain McLaughlin about her loud confrontation with two other correctional officers in the presence of inmates and their families without disciplinary consequence for any of the correctional officers involved provides further confirmation of the manner in which non-violent confrontations between correctional officers were handled at the correctional facility by Respondent. The considerable disparate treatment in this case prevents finding that Respondent had just cause to terminate Petitioner from employment. It would be unreasonable and unjust for Respondent to be able to strictly enforce rules prohibiting unacceptable personal conduct

against this Petitioner under the evidence in this case, in view of Respondent's history of inconsistency in enforcement at this correctional facility.

11. To the extent that Respondent relied upon Petitioner's two prior written warnings in May 2011 to enhance the disciplinary consequences applied to Petitioner as a result of the June 24, 2011, incident with Officer Parker or otherwise justify the decision to terminate Petitioner's employment, such reliance is neither proper nor reasonable. The first written warning, which was given without any right to appeal, was based upon an incident that occurred on March 20, 2011, involving an allegation that Petitioner spent too much time speaking with an inmate. The allegation was reported by Sergeant Bernard Walker, about whom Petitioner had recently lodged a complaint with the Superintendent about gender-based employment discrimination. Given the likelihood of discriminatory animus by Sergeant Walker, the absence of any policy of Respondent limiting the amount of time a correctional officer could speak with an inmate, the credible testimonies of Correctional Officer Burden and Sergeant Lucas that it is not unusual to engage in conversations of a significant time period with an inmate, and the fact that Petitioner positively was recognized in November 2010 and May 2009 in her TAPS for her interaction with inmates, the first written warning should be disregarded in determining the appropriate discipline for Petitioner.
12. The record contains no evidence that Petitioner at any time intended to violate any policy of Respondent; she did not willfully violate Respondent's personal misconduct policy; and the record contains no evidence that Petitioner's action adversely affected or could have adversely affected the mission or legitimate interests of the State in any material manner.
13. In examining the totality of the circumstances and all of the record evidence, including the nature of the allegations at issue, the credibility of the witnesses, and the favorable employment history of Petitioner, the actions of Petitioner were not sufficient to warrant termination.
14. Respondent's termination of Petitioner was neither just nor equitable and, therefore, was in violation of the letter and spirit of the State Personnel Act, *Carroll*, and its progeny.
15. Respondent's handling of this case, as well as Respondent's choice of punishment--termination--which was outside the range of punishment imposed for similar actions by other employees, raises a concern that Respondent's motivations were, at least to some extent, retaliatory in nature.
16. N.C. Gen. Stat. § 126-17 provides that "No State department, agency, or local political subdivision of North Carolina shall retaliate against an employee for protesting alleged violations of G.S. 126-16," which states that "All State departments and agencies and all local political subdivisions of North Carolina shall give equal opportunity for employment and compensation, without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition as defined in G.S. 168A-3 to all persons otherwise qualified, except where specific age, sex or physical requirements constitute

bona fide occupational qualifications necessary to proper and efficient administration. This section with respect to equal opportunity as to age shall be limited to individuals who are at least 40 years of age.”

17. Petitioner’s burden to prove retaliation requires her by the preponderance of the evidence to show “(1) that there was statutorily protected participation, (2) that an adverse employment action occurred, and (3) that there was a causal link between the participation and the adverse employment action.” *Whatley v Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d. 1325 (5th Cir. 1980). While the preponderance of the record evidence satisfies the first two elements, Petitioner has failed to prove by a preponderance of the evidence that the “but for” causal link standard set forth as element (3) has been satisfied.
18. Although a nexus exists between the time of Petitioner’s good faith complaint to the Superintendent of gender-based employment discrimination and the time Respondent initiated its adverse employment actions against Petitioner, Petitioner did not satisfy her burden of proving by a preponderance of the evidence that Respondent terminated her employment because of Petitioner’s complaint regarding gender-based discrimination. The termination of Petitioner was based primarily upon her confrontation with Officer Parker. The complaint made by Sergeant Walker of undue familiarity with an inmate, although ostensibly motivated by Sergeant Walker’s retaliatory animus, was not the sole factor in the decision to terminate Petitioner’s employment, and the record evidence was not sufficient to meet Petitioner’s burden of proving that decision-makers, Superintendent Royster and Deputy Director French, acted with discriminatory animus or that the termination resulted from Sergeant Walker’s March 20, 2011, complaint. Petitioner’s conduct does in fact warrant some lesser discipline than termination, which is the reason for the imposition of a five (5) day suspension without pay.
19. The foregoing Findings of Fact and Conclusions of Law require Petitioner to be disciplined at a level less than termination, such as suspension for five (5) days without pay, in order to be consistent with Respondent’s policies and practices at the time Petitioner was discharged.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent has not carried its burden of proof that Petitioner’s conduct rises to the level of “just cause” for termination, and Petitioner has not carried her burden of proof that Respondent’s conduct rises to the level of unlawful retaliation. Rather, the undersigned recommends that Respondent should discipline Petitioner by imposing a five (5) day suspension without pay. Accordingly, Respondent’s termination of Petitioner from employment is REVERSED, and Petitioner shall be afforded the following remedies:

1. Petitioner shall be reinstated to her former position, with all credit for State service for all purposes being retroactive to the date of dismissal.

2. Petitioner shall be awarded, from the date of dismissal until her reinstatement (minus the five (5) day suspension), back pay and benefits, including sick and vacation leave, and with all bonuses and increases she would have been eligible for had she not been dismissed.
3. Petitioner is awarded reasonable attorney's fees and costs under the provisions of G.S. 150B-33(b)(11).
4. Respondent should correct portions of the information in Petitioner's personnel file to contain only true and accurate information in compliance with N.C. Gen. Stat. §126-25, as stated herein.

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, in accordance with N.C. Gen. Stat. § 150B-26(b).

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision. 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 27th day of August, 2012.

Beecher R. Gray
Administrative Law Judge