

Tommie J. Porter, )  
Petitioner, )  
v. )  
The North Carolina Dept. of Correction )  
Polk Correctional, )  
Respondent. )

**DECISION**

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This contested case was heard by Administrative Law Judge Joe. L. Webster on February 13 and 14, 2012 in Raleigh, North Carolina.

**APPEARANCES**

For Petitioner: Rachael D. Rogers, Attorney at Law, Raleigh, North Carolina of the firm Russell Goetcheus & Associates.

For Respondent: Terence D. Friedman, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina.

**ISSUE**

Whether the Respondent had just cause to terminate Petitioner's employment with the North Carolina Department of Correction for unacceptable personal conduct.

**WITNESSES**

Petitioner testified on his own behalf and presented no further witnesses.

Respondent presented testimony from the following witnesses: Officer Shawn Studwick, Officer Latisha Hawkins, Captain Claudia Sherrod, Petitioner Tommie J. Porter, and Superintendent Lawrence Solomon.

**EXHIBITS**

Petitioner's Exhibits 6 through 12 were entered into evidence.

Respondent's Exhibits 1 through 2, 4, 6 through 11 were entered into evidence.

## **FINDINGS OF FACT**

Based upon the official documents in the file, the sworn testimony of the witnesses, and the other competent evidence admitted at the hearing, the undersigned finds the following facts:

1. The petitioner began working for the Department of Correction on March 17, 1999. Petitioner was terminated on January 24, 2011. At the time of Petitioner's dismissal, he was a Sergeant.
2. Respondent terminated Petitioner's employment following an investigation related to an incident that occurred on November 14, 2010 in which Respondent alleged that Petitioner used unnecessary force on an inmate, specifically inmate Villarreal Breyci (1156142).
3. On November 14, 2010 while in Dorm II A-Pod Petitioner gave inmates a verbal command to come to the dayroom for further instruction on the appropriate procedure for conducting count.
4. As a Sergeant, Petitioner had the authority to issue verbal commands to inmates.
5. Inmate Villarreal Breyci failed to follow Petitioner's first verbal command. As a result, Petitioner issued several verbal commands to Inmate Breyci, which Inmate Breyci continued to ignore.
6. Inmate Breyci walked in the direction of the bathroom in Dorm II A-Pod. Petitioner issued a verbal command to Inmate Breyci to not go into the bathroom. Inmate Breyci continued on into the bathroom.
7. Petitioner walked to the bathroom, picked up a plastic chair lying in his path, and threw the chair into the bathroom away from Inmate Breyci.
8. Petitioner threw the chair in an attempt to gain the attention of Inmate Breyci. Petitioner did not attempt to strike, nor did he strike, Inmate Breyci.
9. Inmate Breyci was observed in the bathroom, away from the area in which the chair was thrown, looking out the bathroom window.
10. The chair did not hit or injure Inmate Breyci, and Inmate Breyci exited the bathroom without any injury and with no problem.
11. Upon exiting the bathroom, Petitioner attempted to escort Inmate Breyci out of the Dorm to be counseled.
12. While escorting Inmate Breyci out of the Dorm, Petitioner placed his hand on Inmate Breyci's neck/shoulder area to assist him out the door.

13. Petitioner placed his hand on Inmate Breyci to assist him out the door because the inmate was stalling as he was leaving the Dorm. The inmate was also resisting Petitioner and speaking in an angry manner.
14. Inmate Breyci attempted to grab the Petitioner's baton. Petitioner used a baton retention technique to regain control of his baton. The technique the Petitioner used is one taught in training and approved by the Department of Correction.
15. Petitioner placed Inmate Breyci in a holding cell.
16. The Department of Correction Division of Prisons Policy and Procedures Use of Force Policy (Chapter F, Section .1500) allows for the use of hands-on force. Hands-on physical force may be used to restrain or move a non-aggressive, non compliance inmate.
17. Inmate Breyci acted in an aggressive, non compliant manner towards Petitioner.
18. Petitioner did not use unnecessary force on Inmate Breyci.

### **CONCLUSIONS OF LAW**

1. The parties are properly before the Office of Administrative Hearings and received proper notice of the hearing in this matter. This office has jurisdiction to hear the matter and to issue a decision to the State Personnel Commission, which shall render a final agency decision.
2. At the time of his dismissal, Petitioner was a career state employee entitled to the protection of the North Carolina Personnel Act; specifically, the just cause provision of N.C. Gen. Stat. § 126-35.
3. N.C. Gen. Stat. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." In a career state employee's appeal of a disciplinary action, the department or agency employer bears the burden of proving that "just cause" existed for the disciplinary action. N.C. Gen. Stat. § 126-35(d) (2007).
4. Respondent has the burden of proof in this contested case hearing to show that it had just cause to dismiss Petitioner in accordance with N.C. Gen. Stat. § 126-35.
5. 25 NCAC 1I.2301(b) enumerates two grounds for disciplinary action, including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct. "Unacceptable personal conduct" 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 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. absence from work after all authorized leave credits and benefits have been exhausted; or
  - g. falsification of a state application or in other employment documentation.  
25 NCAC 1J.0614.
6. Petitioner was dismissed from his employment with the Department of Correction for unacceptable personal conduct.
  7. Respondent has not met the burden of persuading me by the greater weight of the evidence presented that it had just cause to terminate Petitioner's employment.
  8. None of the alleged bases for Petitioner's termination amount to "unacceptable personal conduct."
  9. None of the alleged bases for Petitioner's termination amount to "unacceptable personal conduct" because he did not break any of the Department's written work rules. See *North Carolina Department of Correction v. McNeely*, 135 N.C. App. 587, 593-94, 521, S.E.2d 730, 734 (1999) (holding that an employee's acts rose to the level of "unacceptable personal conduct" where the employee violated written Department rules by leaving his post and failing to remain alert while on duty as the Dormitory Patrol Officer at a correctional center and thereby threatening the security and safety of the department, citizens, employees, inmates, and others).
  10. None of the alleged basis for Petitioner's termination amount to "unacceptable personal conduct" because Petitioner in good faith believed that he was not breaking any of the Department's rules. *Gainey v. North Carolina Dept. of Justice*, 121 N.C. App. 253, 465 S.E.2d 36 (1996)(holding that the employee had not committed "unacceptable personal conduct" where the employee in good faith believed that he was not violating the rules of the Department).
  11. None of the alleged bases for Petitioner's termination amount to "unacceptable personal conduct" because his acts did not seriously disrupt the Department. See *Wiggins v. North Carolina Department of Human Resources*, 105 N.C. App. 302, 307, 413 S.E.2d 3, 6 (1992) (holding that a state health care center employees argument with his supervisor did not constitute personal misconduct where the argument did not cause "a serious disruption of the normal operations of his work unity which affected both the residents and employees of the unit.").

12. A reasonable person would expect to receive a warning prior to being terminated for any of the alleged bases for Petitioner's termination. Petitioner did not violate any state or federal law. Nor was Petitioner convicted of any offense. Petitioner did not willfully violate a known or written work rule. Petitioner did not engage in any conduct that was unbecoming a state employee that is detrimental to state service. Petitioner was not absent from work after all authorized leave credits and benefits have been exhausted.

### **DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's decision to terminate Petitioner's employment should be reversed. Petitioner should be reinstated to the position he held at the time of his termination or a substantially similar position with full back pay accruing from January 24, 2011, the date of his termination, to the date of his reinstatement; that he be awarded all benefits to which he would have become entitled, including any legislative salary increases, but for his termination; and that he be awarded reasonable attorney's fees and costs. Petitioner's personnel file should be appropriately rectified so as to reflect the fact that he was terminated without just cause. Any and all documents in his personnel file which indicate to any degree a contrary fact should be removed.

### **ORDER AND NOTICE**

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. State § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this Decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 4<sup>th</sup> day of June 2012.

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Joe L. Webster  
Administrative Law Judge