

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12 OSP 02219

RICCO DONNELL BOYD,

Petitioner,

v.

NORTH CAROLINA A&T  
UNIVERSITY,

Respondent.

**FINAL DECISION**

This contested case was heard before the Honorable Julian Mann III, Chief Administrative Law Judge, on August 28-29, 2012 in the Guilford County Courthouse, High Point, North Carolina. The record closed on December 17, 2012.

**APPEARANCES**

**FOR PETITIONER:** Dow M. Spaulding  
Attorney at Law  
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Greensboro, NC 27402

**FOR RESPONDENT:** Stephanie A. Brennan  
Assistant Attorney General  
North Carolina Department of Justice  
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**EXHIBITS**

**Admitted for Petitioner:**

<u>Exhibit</u>	<u>Date</u>	<u>Document</u>
1		Photograph

**Admitted for Respondent:**

<u>Exhibit</u>	<u>Date</u>	<u>Document</u>
1	08/28/12	Website Information about A&T University Police Department
2	8/21/07	Ricco Boyd Oath of Office
3	4/1/05	NC A&T University Police Department General Orders, Intro
5	12/17/08	Letter from Lt. Whitaker to Capt. Black re Ricco Boyd
6	1/5/09	Written Warning to Ricco Boyd
7	4/5/09	Notice of Counseling for Ricco Boyd
8	4/5/09	Notice of Counseling for Ricco Boyd (2d)
9	7/22/09	Written Warning to Ricco Boyd
10	8/12/09	Letter from Capt. Black to Ricco Boyd re Early Warning System
11	9/14/09	Letter from Capt. Feaster to Ricco Boyd re Early Warning System
12	10/1/09	Memo from Lt. Whitaker to Capt. Black re Ptl. Boyd Early Warning System
13	3/17/10	Notice of Counseling from Sergeant McAdoo to Ricco Boyd
14	08/05/10	Written Warning to Ricco Boyd
15	11/7/11	Letter from Capt. Black to Ricco Boyd re pre-disciplinary conference
16	11/8/11	Email from Ricco Boyd
16A	11/8/11	Email from Ricco Boyd with handwritten note
17	11/9/11	Email from Ricco Boyd to Sylvia Anderson, HR
18	11/9/11	Letter from Capt. Black to Ricco Boyd re dismissal
21	2/28/12	Letter from Chancellor Martin to Ricco Boyd re dismissal

## WITNESSES

**Called by Petitioner:** Ricco Boyd  
Thomas Bland  
Tony Scott  
Jeff Ellis

**Called by Respondent:** Barry Lynn Black  
Kelly White

## ISSUE

Whether Respondent had just cause to discharge Petitioner for unacceptable personal conduct.

**ON THE BASIS** of 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. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. At the time of his discharge, Petitioner Ricco Boyd was a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina (the State Personnel Act).
3. Respondent, North Carolina A&T University (“NC A&T”), is subject to Chapter 126 of the North Carolina General Statutes and was Petitioner’s employer.
4. From 2007 until his discharge on November 10, 2011, Petitioner was employed by Respondent as a police officer with the NC A&T University Police Department. **T pp. 24 & 155; Resp. Ex. 18**
5. The Mission of the Respondent NC A&T University Police Department (“Department”) reads in part as follows: “be proactive in the quest to reduce the opportunity for crime,

accidents, and the loss of individual and institutional property through investigative processes and improve the frequency of apprehension of those responsible.” The Department’s written vision states that the Department envisions: “a quality service-oriented agency with the ability to confront challenges and obstacles with knowledge and an extremely high level of professionalism;” “a motivated department that displays unquestionable integrity;” “providing timely and proficient service to faculty, staff, students and visitors;” and “a commitment to excellence.” The Department was the first historically black college or university to achieve accreditation by the Commission for Accreditation in Law Enforcement (CALEA), which requires compliance with at least 400 standards that have been accepted internationally as representing the best standards in law enforcement. The Department has sworn law enforcement officers and all the rights and authority of a law enforcement agency. **T pp. 25-29 & 35; Resp. Exs. 1, 2, 3.**

6. All of Respondent’s police officers receive a copy of the Department’s General Orders and are responsible for knowing these orders. Petitioner was aware that he was responsible for knowing the General Orders and that violations of the General Orders could result in disciplinary action. The General Orders state that in a public service agency, “the reputation of the department is fundamentally dependent upon the personal conduct and professional competency of its individual members.” The General Orders require officers to be “attentive to their duties at all times.” They further state that “Sleeping on duty is forbidden for all employees.” **T pp. 36-39, 135-36, 217-219; Resp. Ex. 3**
7. In addition to the General Orders, officers have been otherwise informed not to sleep on the job. The Chief of Police personally told Respondent’s officers, during a required meeting of all patrol officers, that he, as Respondent’s Chief, would not tolerate officers sleeping on duty. A reasonable officer in the Department would be aware that sleeping on the job could lead to discipline, including termination. This result had been discussed at Department meetings. Petitioner was aware that sleeping on duty was prohibited. **T p. 39-40, 120, 135, 217-19**
8. According to the testimony of Lieutenant Barry Black and Major Kelly White, sleeping on duty, including the appearance of sleeping on duty, creates a serious safety hazard for the officer and the campus; damages the Department and University’s reputation and image; is reasonably related to the orderly, efficient and safe operation of the Department; and is tied to the performance expectations the Department requires of its officers. Police officers who enforce the law must have unquestionable integrity and perform at high standards to maintain the public trust and the ability to effectively enforce the law. **T pp. 70-71, 120, 136-38.**
9. Prior to the incident in question, Petitioner was subject to a series of disciplinary actions, including: (1) a January 5, 2009 written warning from Lt. Whitaker for using Department equipment or service other than for official business and for leaving the University area without informing anyone; (2) an April 2, 2009 Notice of Counseling for failure to

promptly report for duty; (3) an April 5, 2009 Notice of counseling for unacceptable personal conduct by being in a residence hall while off duty; and (4) a July 22, 2009 written warning by Lt. Bland for charging a person with the wrong offense, failing to use a body microphone while on traffic stops as required by the General Orders and failing to turn in a Sprint air card before ending his tour of duty; (5) a March 2010 Notice of Counseling from Sergeant McAdoo for falsely stating in an incident report that Petitioner had returned property to a victim at the scene when that was not true; and (6) an August 2010 written warning for failure to attend required training. Petitioner concedes that he made some bad decisions. **T p. 41-49, 58-60, 172-84; 200-02; Resp. Exs. 5-9, 13-14**

10. The Department attempted to work with Petitioner to improve his performance. In August 2009, the Department placed Petitioner in the Early Warning System for unsatisfactory job performance in order to assist him in bringing his job performance to a higher level. Petitioner was directed to meet with Captain Feaster and Lieutenant Whitaker to discuss ways to identify the necessary skills to assist him in his assignment. Petitioner met with Whitaker and they discussed “ways to help [Petitioner] become a better police officer.” During the discussion, they determined that “all of [Petitioner’s] written warnings [we]re due to him not listening to all radio traffic and poor officer safety.” Whitaker went over policies with Petitioner and “advised him that he seems to be very complacent in his duties.” Whitaker referred Petitioner to the Employee Assistance Program. Petitioner responded that he would become more serious about his job and act in a more professional manner. In addition to this formal process, Major White informally mentored Petitioner in an effort to keep him on the right path. Petitioner was advised on more than one occasion that he was not as alert as he should be, and he was told that he needed to improve his performance. **T p. 55-56, 134-35, 202; Resp. Exs. 10-12**
11. Even after his placement in the “Early Warning System” and despite the mentoring by Major White, Petitioner continued to have performance problems. The November 5, 2011 was not an isolated incident but was part of a continuing pattern. **Resp. Exs. 5-9, 13-14**
12. According to the testimony of Lieutenant Black, who was the Captain of the University Police Department and Patrol Commander at the time, that on November 5, 2011, he personally witnessed Petitioner sleeping in his vehicle while Petitioner was on patrol. At approximately 2:45 p.m. on November 5, 2011, Lieutenant Black observed Petitioner parked on University Circle in the middle of the street. When Lieutenant Black pulled his vehicle beside Petitioner’s vehicle, Lieutenant Black saw Petitioner tilted back in the driver’s seat with Petitioner’s seat reclined, his head back, his face toward the ceiling and his eyes closed. Black waited approximately fifteen to twenty seconds to see if Petitioner would acknowledge him. During the period of observation, while Lieutenant Black’s vehicle was running, he attempted to get Petitioner’s attention. Petitioner did not move and did not acknowledge Lieutenant Black’s presence. Lieutenant Black concluded that Petitioner was sleeping. Lieutenant Black’s testimony was credible. **T pp. 61-63, 98-100, 121-23; see also T. pp. 215-16**

13. A pre-disciplinary conference was held on November 8, 2011. **Resp. Ex. 15**
14. Prior to the pre-hearing conference, Petitioner emailed a statement about the incident to Sylvia Anderson in HR at the University, in which Petitioner claimed that when Lieutenant Black told him a reasonable person would have believed he was asleep, Petitioner responded, “by advising [Black] that I had just arrived to that location and that my body was not positioned in a way in which I appeared to be asleep.” At the pre-hearing conference, Petitioner admitted that this statement was not correct and Sylvia Anderson noted this admission next to the statement. The next day, Petitioner e-mailed a revised statement to Sylvia Anderson in which he claimed that when Lieutenant Black told him a reasonable person would have believed he was asleep, Petitioner responded, “by advising [Black] that I had just arrived to that location and I did advised [sic] Captain Black that my eyes were closed and my head was back but I was not sleep [sic].” **T. 66-68, 84-87, 185, 187-89, 211-17; Resp. Exs. 16, 16A & 17**
15. Respondent discharged Petitioner effective 10 November 2011 for unacceptable personal conduct. **Resp. Exs. 18 & 21/Document Constituting Agency Action**
16. Petitioner appealed his discharge through Respondent’s grievance process. The Chancellor affirmed the dismissal. **Resp. Ex. 21/Document Constituting Agency Action**
17. According to Petitioner’s testimony, he was not sleeping but rather talking on speaker phone to his cousin on a 17-second communication which ended because his cell phone battery died. Petitioner’s explanation was not plausible. Lieutenant Black did not observe any signs that Petitioner was awake, or that he was talking on a cell phone at the time or checking his cell phone battery. Lieutenant Black did not observe Petitioner’s mouth move; nor observe Petitioner do anything with his phone. Petitioner offered contradictory testimony and his testimony generally was not credible or reliable.\*<sup>1</sup> Lieutenant Black’s testimony was credible and reliable.  
**T pp. 65-66, 185, 187-89, 206-09, 211-17; Resp. Exs. 16, 16A & 17**
18. Another of Respondent’s officer was a security guard, not a police officer on patrol. This officer who was alleged to be sleeping was not discharged because his supervisor did not have a clear view of the sleeping and, therefore, it was not substantiated. Other security officers, who were accused of sleeping, resigned as a result. Respondent has applied the no-sleeping rule uniformly and without discrimination. **T. pp. 144-47, 151, 240-43.**
19. Barry Black and Kelly White were credible witnesses and their testimony was supported, in part, by documentation.

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<sup>1</sup> \*Petitioner did not otherwise produce any evidence that would corroborate he was using his telephone (such as telephone records or the testimony of the person to whom he claimed he was speaking).

20. Petitioner was sleeping on duty or was engaged in conduct that was indistinguishable from sleeping.
21. Petitioner admitted that he was unlawfully parked, had his eyes closed, had his head back and had his seat partially reclined for at least 17 seconds while on active patrol. If Petitioner was not sleeping while on duty on November 5, 2011, Petitioner engaged in an activity indistinguishable from sleeping, and neglected his duties to the detriment of campus safety and security. **T. pp. 191-92, 224, 228; Resp. Ex. 18**
22. Petitioner was not under any duress or coercion that may have contributed to his conduct.
23. Petitioner did not have any official motivations for his conduct. Petitioner was engaged in a personal pursuit.
24. There are no significant mitigating factors.
25. Respondent had no improper motivation or improper consideration for terminating Petitioner.
26. Termination of Petitioner was reasonably related to the seriousness of the offense and the record of the Petitioner in his service with Respondent's Department. Respondent Department reasonably determined that there is no amount of time that would be acceptable for a police officer to engage in an activity that indicates sleeping on duty or an activity that is indistinguishable from sleeping on duty.
27. Petitioner's misrepresentation to Respondent during the disciplinary process about his body position calls into question his integrity and his fitness to remain as a sworn officer in Respondent's Department.

Based on the foregoing Findings of Fact, the undersigned makes the following:

#### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the just cause issue in this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they shall be so considered without regard to the given label.

3. Respondent met its burden by the preponderance of evidence to show Respondent had just cause to discharge Petitioner. Petitioner's arguments to the contrary are without merit.
4. A career State employee may be discharged only for just cause. N.C.G.S. § 126-35(a). Respondent bears the burden of demonstrating just cause. N.C.G.S. § 126-35(d).
5. To demonstrate just cause, the Respondent may show "unacceptable personal conduct." 25 N.C.A.C. 1J.0604(b)(2). Unacceptable personal conduct includes "conduct for which no reasonable person should expect to receive prior warning;" "the willful violation of known or written work rules;" and "conduct unbecoming a state employee that is detrimental to state service." 25 N.C.A.C. 1J.0614(8(a), (d) & (e).
6. The Respondent may discharge an employee for unacceptable personal conduct without any prior warning or disciplinary action. 25 N.C.A.C. 1J.0608(a).
7. The employee's action (or actions) constituting unacceptable personal conduct "may be intentional or unintentional." 25 N.C.A.C. 1J.0610(a).
8. A sole instance of unacceptable personal conduct, by itself, constitutes just cause for discharge. *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).
9. For "conduct unbecoming a state employee that is detrimental to state service," 25 N.C.A.C. 1J.0614(8)(e), the Respondent does not have to show actual harm, but rather "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*, 173 N.C. App. at 597, 620 S.E.2d at 17.
10. Petitioner's actions on November 5, 2011 constituted unacceptable personal conduct.
11. Petitioner's conduct is "conduct for which no reasonable person should expect to receive prior warning." 25 N.C.A.C. 1J.0614(8). Petitioner's conduct also is "conduct unbecoming a state employee that is detrimental to state service." 25 N.C.A.C. 1J.0614(8). Petitioner's conduct is a "willful violation of known or written work rules" or utter disregard of such rules for officers employed by Respondent. 25 N.C.A.C. 1J.0614(8).
12. Respondent demonstrated with credible evidence and by its greater weight, that Petitioner's conduct was conduct for which no reasonable person should expect to receive a prior warning, that it willfully violated known or written work rules, or was in utter disregard of such rules, and that Petitioner's conduct constituted conduct unbecoming a state employee that is detrimental to state service.
13. Barry Black and Kelly White were credible witnesses.



14. Respondent demonstrated by the preponderance of the evidence that Petitioner was sleeping while on active patrol or Petitioner engaged in conduct indistinguishable from a person in a deep sleep. Petitioner demonstrated a sleeping posture by having his head back, his eyes closed, and his seat slightly reclined.
15. Petitioner's testimony as to his cell phone use at the time Lieutenant Black drove by his vehicle was implausible and contradicted by Lieutenant Black's testimony that he did not observe any sign that Petitioner was on a cell phone telephone call. Petitioner admitted making inaccurate statements, offered contradictory testimony about the events of November 5, 2011 and was not a credible witness. Notwithstanding Petitioner's testimony to the contrary, the undersigned concludes Petitioner's admitted version of his conduct was indistinguishable from sleeping and aggravated by Petitioner's intentional act of being in such a posture consciously parked in the middle of a street in broad daylight in a position indistinguishable from someone who was asleep.
16. Respondent followed all the required procedures to dismiss Petitioner for unacceptable personal conduct.
17. Petitioner was not under any duress or coercion that may have contributed to his conduct.
18. Petitioner did not have any official motivations for his conduct. Petitioner was engaged in an unofficial and personal activity.
19. There are no significant mitigating factors.
20. Respondent had no improper motivation or consideration for terminating Petitioner.
21. Termination of Petitioner was reasonably related to the seriousness of the offense and the record of the Petitioner in his service with the Department.
22. Respondent demonstrated with credible evidence and by its greater weight that Respondent had just cause for discharging Petitioner.
23. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner's actions constituted unacceptable personal conduct. Considering the totality of the circumstances, and utilizing guiding principles of equity and fairness, Respondent NC A&T University had just cause to discharge Petitioner.

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

**DECISION**

Respondent's decision to discharge Petitioner is **AFFIRMED**.

**NOTICE**

Under the provisions of North Carolina General Statute 150B-456, 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 Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. State § 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 \_\_\_\_ day of \_\_\_\_\_ 2013.

\_\_\_\_\_  
Julian Mann III  
Chief Administrative Law Judge