STATE OF NORTH CAROLINA

COUNTY OF WAYNE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 OSP 08259

Shannon P. Baker,
Petitioner,

v.

North Carolina Department of Public Safety,
Respondent.

FINAL DECISION

The above-captioned case was heard before the Honorable Donald W. Overby Administrative Law Judge, on December 11, 2013 in Goldsboro, North Carolina. Petitioner filed a proposed decision on January 24, 2014, and Respondent's proposed decision was filed on February 2, 2014.

APPEARANCES

For Petitioner:
Glenn A. Barfield
Haithcock, Barfield, Hulse & Kinsey, PLLC
PO Drawer 7
Goldsboro, North Carolina 27533-0007

For Respondent:
Jodi Harrison
Assistant Attorney General
NC Department of Justice
PO Box 629
Raleigh, NC 27602-0629

EXHIBITS

Admitted for Petitioner:

Exhibit Number	Description
B-1	Probation and Parole Record for Mechelle Desalme
B-2	Mechelle Desalme's Criminal Record as Recorded in her Probation File
B-4	NCDPS Offender Public Information
C-2	Inmate Release Plan for Mechelle Desalme
E	Carolina Trucking Academy Employment Information for Mechelle Desalme

Admitted for Respondent:

Exhibit Number	Description

1	Email from Xiomara Laureano to Mike Chase, 10/12/11
2	Statement of Mechelle Desalme, 11/16/11
3	Statement of Mechelle Desalme, undated
4	The Appraisal Process (TAPS), Shannon P. Baker, 2010-2011
5	The Appraisal Process (TAPS), Shannon P. Baker, 2011-2012
6	PREA Investigation Memo, 09/16/11
9	Memo to Carla Bass from Cynthia Sutton, 09/20/11
10	OPUS Online Narrative Notes regarding Mechelle Desalme, 8/08/11 through 10/12/11
11	Section 8 of the Department of Correction Personnel Manual, "Personal Dealings With Offenders of the Department of Correction"
12	Section 6 of the Department of Correction Personnel Manual, "Appendix to Disciplinary Policy and Procedure"
13	Memo to Cornell McGill from Cynthia Sutton, 04/13/12
14	Memo to Cornell McGill to Diane Isaacs, regarding Internal Investigation, 09/30/11

WITNESSES

Called by Petitioner: Shannon P. Baker
Charlie Gray, Jr.

Called by Respondent: Christina Glaspie
Xiomara Laureano
Cynthia Sutton
Heather Bevell
Cornell McGill

ISSUE

The sole issue for consideration is whether Respondent had just cause to dismiss 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, 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 was reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACTS

1. The parties are properly before the Office of Administrative Hearings on a Petition pursuant to Chapter 126 of the General Statutes, and the Office of Administrative Hearings has jurisdiction over both the parties and the subject matter as such. The parties received notice of hearing more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.

2. Respondent, North Carolina Department of Public Safety, is subject to Chapter 126 of the North Carolina General Statutes, and was Petitioner's employer.

3. Prior to June 1, 2012, and at all times relevant to this case, Petitioner was employed by the North Carolina Department of Public Safety as a Probation Parole Officer II in District 8, Wayne County, North Carolina. (R. Ex. 4, 5.)

4. As of June 1, 2012 Petitioner was a career state employee as defined pursuant to G.S. 126-1.1.

5. Respondent terminated Petitioner on June 1, 2012.

6. Respondent's notice to Petitioner of his termination stated that an investigation had determined that Petitioner "engaged in undue familiarity with offender Mechelle Desalme who was an offender under your supervision. Your actions were a violation of policy and constitute unacceptable personal conduct."

7. On August 8, 2011, Petitioner was assigned the supervision of probationer Mechelle Desalme ("Desalme"), a new probationer. (Desalme Deposition ["Dep."] 56; R. Ex. 10.)

8. In August 2011, Ms. Desalme met with Petitioner at the probation office. During this visit Ms. Desalme leaned over Petitioner's desk to view a calendar, apparently exposing cleavage. Petitioner properly advised Ms. Desalme that she should dress appropriately and not be revealing in her attire. (Dep. 62, 70; Dep. Ex. 4.) Both Petitioner and Ms. Desalme confirm this conversation.

9. On September 16, 2011, Petitioner was administratively reassigned. His probation caseload was reassigned to other probation officers. (Transcript ["Tr."] 73.) Due to this reassignment, Petitioner was only Ms. Desalme's probation officer for five weeks, from August 8, 2011, to September 16, 2011. (Tr. 73.)

10. On October 12, 2011, Ms. Desalme met with probation officer Xiomara Laureano ("Laureano"). During this meeting, Ms. Desalme told Ms. Laureano that she would like to have a different probation officer assigned. When pressed as to why she

wanted a different officer, it is reported that Ms. Desalme stated that she was not comfortable having Petitioner as her probation officer because he had made inappropriate advances towards her. Ms. Laureano relayed Ms. Desalme's statement to Ms. Laureano's supervisor, Mike Chase. (R. Ex 2, 8; "Dep." 86-87; Tr. 45.)

11. On November 16, 2011, Judicial District Manager Cynthia Sutton ("Sutton") was assigned to investigate the matter. (R. Ex. 9; Tr. 64.) Ms. Desalme was called into the probation office and was interviewed by Ms. Sutton and Chief Probation and Parole Officer Heather Bevell ("Bevell"). (R. Ex. 9; Dep. 88.) During this meeting, Ms. Desalme disclosed that on August 26, 2011, during a visit to her home, Petitioner had pressured her for sex and masturbated over her buttocks. (Dep. 82-85; Dep. Ex. 4, 5; R. Ex. 2, 9.)

12. District Manager Ms. Sutton found Ms. Desalme to be credible in her version of events and Petitioner not to be credible. (Tr. 77-80.) Ms. Bevell likewise believed Ms. Desalme but did not believe Petitioner. (Tr. 123-124.) Both felt that Ms. Desalme had been consistent in her recitation of the events.

13. Both Ms. Sutton and Ms. Bevell felt that Petitioner had not been consistent; however, when pressed the lack of consistency was the fact that Petitioner's version of the facts did not match Ms. Desalme's. Petitioner has steadfastly denied the allegations and has consistently told the same version of events, up to and including his testimony in court.

14. Ms. Sutton contends that Petitioner was less than consistent because he did not make detailed narratives of his home visits and he had failed to properly document such visits. Petitioner had been counseled before for failing to document. Petitioner contends that he cannot type or types very poorly. Ms. Sutton acknowledges that failing to document is a very common problem with probation officers across the entire state, not something unique to Petitioner.

15. Ms. Sutton contends that Petitioner should have offered something to refute Ms. Desalme's story. He steadfastly denied the allegations from the outset. He did make the statement that he "would not take a felony for Alicia Keys much less Desalme." He offered that Ms. Desalme should be able to describe his anatomy. Rhetorically, what else could he do to refute her story?

16. Petitioner was criticized for not interrupting Ms. Sutton as she was telling him of the allegations. Ms. Sutton was the Judicial District Manager, at least two steps his superior. Common sense and respect would seem to dictate that one would not interrupt such a superior while he or she are talking, even if relating something with which you may disagree.

17. Ms. Bevell and Ms. Sutton chose to believe Ms. Desalme over Petitioner but not because he was less than consistent in his version of events.

18. Ms. Sutton stated that the allegations were reported to the local District Attorney's Office. Despite the serious nature of the allegations there was no evidence that any criminal investigation of the incident or of Mr. Baker was ever initiated, and Mr. Baker was never interviewed by any law enforcement officer, other than by his supervisors in the probation and parole division.

19. The hearing of this contested case was originally set for Tuesday, August 27, 2013. Prior to the scheduled August 27, 2013 hearing date, Respondent arranged for Ms. Desalme to travel to North Carolina for the purpose of testifying at the hearing.

20. Ms. Desalme's itinerary as arranged by Respondent was attached to Respondent's motion to continue the hearing from August 27, 2013, which indicates that Respondent had arranged and paid for Ms. Desalme's travel to North Carolina on August 26, 2013, and for her return to Texas on August 27, 2013.

21. Late on Friday, August 23, 2013, Ms. Desalme contacted counsel for Respondent and represented to her that Ms. Desalme's father was gravely ill in Texas and that Ms. Desalme was traveling that night to be with him. Some evidence tends to indicate that she was already in Texas and had been staying there for some time. It is uncontroverted that she was in Texas in May 2013.

22. Ms. Desalme contacted Respondent's counsel again on Sunday, August 25, 2013, and represented to her that Ms. Desalme's father was terminally ill, had executed a "Do Not Resuscitate" order, and was not expected to live.

23. Consequently Respondent filed a motion to continue the hearing from August 27, 2013.

24. The Undersigned Administrative Law Judge required Respondent to produce from Ms. Desalme some documentary evidence supporting her statements regarding her father's terminally ill condition.

25. On August 26, 2013, Respondent's counsel spoke with Ms. Desalme who informed her that Ms. Desalme's father was to see a doctor at 2:00 PM central time and that Ms. Desalme would provide "a note from the doctor as soon as she receives it".

26. Later on Monday, August 26, 2013, the Undersigned Administrative Law Judge agreed to continue the case from its hearing date of August 27, 2013, "conditioned on OAH receiving something in written form from the doctor that her father is gravely ill or terminally ill." As stated in the email communication from this Tribunal, failure to provide that information would mean that Ms. Desalme's testimony would not be allowed.

27. Still later on the same day of August 26, 2013, Petitioner's counsel received from Ms. Desalme a note appearing to be from a medical provider in San Antonio Texas, stating that Ms. Desalme had been her father's "ride to physician office after ER visit."

Providing transportation to a doctor's office is hardly documentation that her father is "gravely ill or terminally ill."

28. The Undersigned Administrative Law Judge deemed this note to be insufficient to show that Ms. Desalme's father was gravely ill or terminally ill. In order to be fair with Respondent's counsel who had made such diligent efforts, the Undersigned gave her until the end of the week to produce the documentation. It was communicated again that failure to produce was grounds for not allowing Ms. Desalme's testimony.

29. Ms. Desalme had represented to Respondent's counsel that a "Do Not Resuscitate" order had been signed by her father, but no such order was ever provided to Respondent's counsel or to the court.

30. The hearing of this contested case was rescheduled for 9:00 AM, December 11, 2013.

31. Respondent's counsel diligently made concerted attempts to communicate with Ms. Desalme regarding her attendance at the hearing, but Ms. Desalme did not return her calls and Ms. Desalme did not appear at the hearing.

32. Ms. Desalme's probation records show that, approximately one year prior to claiming to Respondent's counsel that her father was terminally ill on the verge of death, Ms. Desalme had made repeated claims of a similar nature to her probation officers in support of her several requests to be allowed to travel to the State of Texas, which requests were granted. However it does not appear that Ms. Desalme ever documented her father's condition to her probation officers.

33. Ms. Desalme was deposed in this case on May 24, 2013. Desalme had apparently moved to Texas. Although the Undersigned had stated unequivocally that Ms. Desalme's testimony would not be allowed if the conditions of the continuance were not met, the Undersigned admitted her deposition into evidence due to her unavailability giving due regard to the circumstances as set forth above in determining the weight to be given and deemed appropriate to the deposition.

34. At the time of Ms. Desalme's deposition on May 24, 2013, and on and immediately prior to the first date for hearing on August 27, 2013, and on and immediately preceding the commencement of the hearing of this contested case on December 11, 2013, Ms. Desalme was residing in the State of Texas.

35. Ms. Desalme traveled to North Carolina and appeared for her deposition on May 24, 2013, with her travel and lodging expenses having been paid by Respondent and/or Petitioner.

36. Petitioner through counsel had proper notice of the deposition and Petitioner's counsel questioned Ms. Desalme during the course of the deposition regarding her allegations against Petitioner.

37. During Ms. Desalme's deposition, she testified that the Petitioner, her probation officer, had come to her home on August 26, 2011, and at some time over the course of several hours Petitioner forced himself upon her, ultimately kissing her bottom and masturbating in her presence, while his service weapon was at his feet.

38. Ms. Desalme did not report this incident to any authority at that time, but at some later time made a statement to a different probation officer, Xiomara Laureano, wondering if Mr. Baker had gotten into trouble. It was only upon further questioning from Laureano and Sutton that Ms. Desalme recounted her claims of sexual assault and battery.

39. The only evidence of the alleged sexual assault was the deposition testimony of Ms. Desalme.

40. Ms. Desalme's allegations of sexual assault were the only basis for Respondent's determination that the Petitioner had engaged in unacceptable personal conduct.

41. During Ms. Desalme's deposition, she testified to being sexually assaulted by her employer, Charlie Gray, while she was on work release. Prior to her deposition, Ms. Desalme had not reported these alleged assaults to any authority.

42. Ms. Desalme testified that these sexual assaults took place in Mr. Gray's office at Carolina Trucking Academy.

43. Mr. Gray appeared at the hearing, and testified under oath.

44. The Undersigned Administrative Law Judge was able to see and hear Mr. Gray's testimony and observe his demeanor.

45. Mr. Gray denied all of Ms. Desalme's accusations of sexual assault, and further testified that his office at Carolina Trucking Academy is just inside the entrance to the building, and that there is a large window looking from the hallway into his office, through which any person entering or exiting the building could easily see any activity occurring in his office.

46. Mr. Gray went to great lengths to try to help Ms. Desalme. The Court finds Mr. Gray to be credible. Ms. Desalme's claim that Mr. Gray assaulted her is not credible.

47. Petitioner Shannon Baker testified under oath at the hearing. The Undersigned Administrative Law Judge was able to see and hear his testimony and to observe his demeanor.

48. Petitioner denied Ms. Desalme's allegations and recounted his home visit at her residence on the day in question. Petitioner's testimony at hearing was consistent with his previous statements when interviewed regarding the allegations. The Court finds Petitioner to be credible.

49. Ms. Desalme's inability or refusal to provide the requested documentation in support of her claims to Respondent's counsel that her father was gravely or terminally ill, her having used the exact same excuse approximately a year before without providing documentation to the probation office, and her later refusal to communicate with Respondent's counsel, and other matters of record indicate that Ms. Desalme had engaged in deception and was untrustworthy.

50. Ms. Desalme has a lengthy criminal record, and a lengthy history of serious drug abuse. These facts tend to suggest to the court additional reasons to find Ms. Desalme unreliable and to find that her deposition testimony was not credible.

51. A review of Ms. Desalme's testimony in the deposition reveals that it was rambling, disjointed and contradictory almost throughout the entire deposition questioning. Oftentimes her answers were contradictory; sometimes within the same rambling statement, sometimes within minutes. She admitted that she was still smoking crack while on probation although how much was very subject to change from moment to moment. She admitted that she was still prostituting while on probation, but that too was subject to change as to exactly what was meant by "prostituting" and whether or not her boyfriend knew. Even the recitation of the facts at issue was less than coherent and concise. Although the general description of the major events remained the same as she reported, the more particular facts were subject to change. It is difficult to understand exactly what Ms. Sutton and Ms. Nevel thought was consistent in her story since the story was not even consistent as she was relating it.

52. The Undersigned has personally either represented as a defense attorney or adjudicated as a district court judge literally hundreds of people who are substance abusers and drug addicts. It would be extraordinarily rare for someone to resort to prostitution to support a drug habit who was only an occasional user as Ms. Desalme reported in her deposition. Further, it is not uncommon for chronic substance abusers, including alcoholics, to tell his or her listener whatever the abuser thinks the listener wants to hear, and not necessarily with any regard to the truth. In this instance, the Court was not capable of observing Ms. Desalme in court and under oath in order to assess her truthfulness.

53. Two facts that did remain constant was Ms. Desalme stating that she just wanted another probation officer and that she did not want to get Petitioner into trouble, which could be interpreted to mean, among other things, that she really did not expect her story to have gathered so much momentum.

54. Ms. Desalme also stated that she was very aware of the form probationer's sign concerning the boundaries between probation officers and probationers, that she has signed several such forms and that she very easily could have reported these allegations.

55. Ms. Desalme is not credible.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case per Chapter § 126 and § 150B of the North Carolina General Statutes. 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. At the time of his discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1 et. seq. Petitioner, therefore, could only "be warned, demoted, suspended or dismissed by" Respondent "for just cause." 25 NCAC 01J .0604(a). The burden of showing "just cause" for discharge rests with the department or agency employer. N.C. Gen. Stat. §126-35(d) (2013).

3. One of the two bases for "just cause" is "unacceptable personal conduct," 25 N.C.A.C. 01J .0604(b)(2), which includes, "the willful violation of known or written work rules" and "conduct for which no reasonable person should expect to receive prior warning," as listed in the NCDPS *Personnel Manual*. 25 NCAC 01J .0614(8)(a) and 25 N.C.A.C. 01J .0614(8)(d); Respondent's Exhibit ["R. Ex."] 12.

4. The June 1, 2012, Dismissal Letter specified that Petitioner was being discharged for unacceptable personal conduct. Respondent complied with the procedural requirements for discharge for unacceptable personal conduct pursuant to 25 N.C.A.C. 01J .0608 and .0613.

5. NCDPS policy governing the personal conduct of its employees is found in the NCDPS *Personnel Manual* as Appendix C to the Disciplinary Policy and Procedures. The policy states, "All employees of the Department of Correction shall maintain personal conduct of an acceptable standard as an employee and member of the community. Violations of this policy may result in disciplinary action including dismissal without prior warning."

6. NCDPS policy governing the personal dealings with offenders by NCDPS personnel is found in the NCDPS *Personnel Manual*, Section 8. The policy states, "All employees of the Department of Correction as described in the section entitled 'coverage' shall treat offenders in a quiet, but firm manner and shall refrain from inappropriate and improper contact with them." Activities prohibited by this policy include, "Engag[ing] in sexual relations with an offender. Sexual relations includes, but is not limited to, vaginal intercourse, fondling, kissing, hugging, or any other intimate contact. Such acts are prohibited regardless of the offender's consent to the act." (R. Ex. 11.)

7. *N.C.D.E.N.R. v. Clifton Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), states that the fundamental question in determining just cause is whether the disciplinary action taken was "just." Citing further, "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." Our Supreme Court has said that there is no bright line test to determine

"just cause"—it depends upon the specific facts and circumstances in each case. Furthermore, "not *every* violation of law gives rise to 'just cause' for employee discipline."

8. The case of *Warren v. North Carolina Dep't of Crime Control & Public Safety* sets forth what this tribunal must consider as to the degree of discipline. It states:

> This passage instructs us to consider the specific discipline imposed as well as the facts and circumstances of each case to determine whether the discipline imposed was "just." Based on this language, and the authorities relied upon by the Supreme Court, we hold that a commensurate discipline approach applies in North Carolina. (Citing *N.C. Dep't of Env't & Natural Resources. v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 898 (2004)) The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case." (Internal cites omitted)

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

9. Despite having twice advised Respondent that Ms. Desalme's deposition would not be admitted into evidence, this Tribunal admitted Ms. Desalme's deposition in its entirety giving the deposition weight deemed appropriate under the facts and circumstances of this particular case.

10. In this instant contested case, the Court was not capable of observing Ms. Desalme under oath in order to assess her truthfulness. Her rambling deposition, her lack of truthfulness and cooperation with Respondent's counsel and this Court, her having lied about Mr. Gray and her having used the same excuse before without justification are all indicative that she lacks credibility and that she has not been truthful in relating the events concerning Petitioner.

11. No credible evidence was introduced at the hearing tending to substantiate Ms. Desalme's allegations. The Respondent failed to prove at the hearing by a preponderance of the credible evidence that Petitioner engaged in the conduct for which he was terminated.

12. In accord with the tests establish by *Warren*, Respondent has failed to show that Petitioner engaged in the conduct alleged by his employer, and thus has failed to meet the

first prong of the test. Respondent has not met its burden of proof and established by substantial evidence in the record that it had just cause to dismiss Petitioner for unacceptable personal conduct that violated NCDPS's Personal Conduct Policies.

13. Respondent did not have just cause to dismiss Petitioner from his position as a Probation Officer.

On the basis of the above Findings of Fact and Conclusions of Law, the Undersigned issues the following:

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Findings of Fact and Conclusions of Law cited above, and that the Findings of Fact properly and sufficiently support the Conclusions of Law. The Undersigned enters this Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. Based on those conclusions and the proven facts in this case, the Undersigned holds that Respondent has failed to carry its burden of proof by a greater weight of the evidence that there was just cause to dismiss Petitioner from his as a Probation Officer.

Petitioner is entitled to be reinstated, effectively immediately, to the same position from which he was dismissed, or to a comparable position with the same pay grade and benefits to which he is entitled by law. Petitioner is entitled to an award of back pay including any contributions into the state retirement system, and any and all other benefits Petitioner would have obtained had he not be dismissed. Petitioner shall be reimbursed his reasonable attorney's fees and costs.

The Undersigned Administrative Law Judge has reviewed the application of Petitioner's counsel for an award of attorney's fees and costs, and based on the application, and the accompanying affidavits, and on the Court's knowledge of the reasonable and usual fees and costs incurred in the prosecution of similar contested cases, Petitioner is awarded reasonable attorney's fees in the amount of $12,075.00 and his reasonable costs in the amount of $2,142.65.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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 03.0102, 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. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 14th day of February 2014.

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Donald W. Overby
Administrative Law Judge