

STATE OF NORTH CAROLINA
COUNTY OF LINCOLN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 00031

DAVID A. TUNO,)
Petitioner,)
v.)
LINCOLN CORRECTIONAL CENTER,)
Respondent.)

DECISION

This contested case was heard before the Honorable Eugene J. Cella, Administrative Law Judge, on May 2, 2013, at the Burke County Courthouse, Morganton, North Carolina.

APPEARANCES

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WITNESSES

The Petitioner, David Tuno, testified during the hearing, and called the following two other witnesses: Mr. Hicks, a Correctional Officer at Lincoln Correctional Center and John Crow, the Superintendent at Lincoln Correctional Center. The Respondent, North Carolina Department of Public Safety, Lincoln Correctional Center (hereinafter "Respondent" or "NCDPS") presented testimony from the following four witnesses: Ronnie J. Ritchie, a Correctional Sergeant at Lincoln Correctional Center (hereinafter "Lincoln"); Mark E. Casey, a Correctional Sergeant at

Lincoln; Charles D. Thrift, Jr., an Assistant Superintendent at Lincoln; and Roger Moon, the Western Region Director for the Respondent.

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1 - 5 were admitted into evidence. Respondent's exhibits ("R. Exs.") 1 - 3, 5-9, 11-16, 18, and 19 were admitted into evidence.

ISSUE

Did Respondent have just cause to terminate its employment of Petitioner for unacceptable personal conduct?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, 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 interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

BASED UPON the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

FINDINGS OF FACT

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.

2. NCDPS has a policy governing the personal conduct of its employees. (Respondent's Exhibit ("R. Ex.") 19.) The personal conduct policy is found in the NCDPS *Personnel Manual* as Appendix C to the Disciplinary Policy and Procedures. (R. Ex. 19 at pp. 38 - 41.) 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." (R. Ex. 19 at p. 38.) Unacceptable personal conduct includes the "the willful violation of known or written work rules;" as listed in Respondent's *Personnel Manual*. (R.. Ex. 19 at p. 38.) A specific example of unacceptable personal conduct includes the "[r]efusal to accept a reasonable and proper assignment from an authorized supervisor. Insubordination: Refusal to follow the orders of a superior or supervisor; or refusal to follow established policy or practice." (R.. Ex. 19 at p. 39.)

3. Petitioner began work for Respondent as a correctional officer at Lincoln in September 2001. Petitioner was separated from his employment with Respondent in 2004 and returned to his employment as a correctional officer in 2005. (Transcript (“T.”) pp. 15 - 16.)

4. Prior to Respondent’s termination of Petitioner’s employment, Respondent afforded Petitioner a pre-disciplinary letter and a pre-dismissal conference. (R.. Exs. 11 - 12; T. pp. 51 - 53.)

5. Respondent sent and Petitioner received a letter terminating his employment (“Dismissal Letter”) and afforded Petitioner the opportunity to administratively appeal his termination. (R. Ex. 16; T. p. 53.)

6. The Petitioner testified that he was scheduled to work on July 1, 2012, but he felt so ill that he could not work and called the unit between 12:30 and 1:00 a.m. and talked with Sergeant Ritchie informing Sergeant Ritchie that he could not work for his shift starting at 5:45 a.m., but the Petitioner did not call back to the facility and inform the day shift sergeant Mark Casey that he was sick and unable to report to work that day. (T. pp. 26 - 29.) Further, the Petitioner provided a written statement to Lincoln’s Assistant Superintendent Charles D. Thrift, Jr. on July 5, 2012, that indicated he did not get up until the afternoon on the day he was sick and that he did know that he was to have called back to the facility. (R. Ex. 1.)

7. Petitioner admitted that Lincoln maintains and trains its officers on standard operating procedures related to how officers are to conduct themselves, specifically procedures on staff attendance and call-in procedures. Petitioner further admitted that he was instructed on these procedures on a yearly basis while he was employed at Lincoln. (T. pp. 30 - 31.)

8. Lincoln has established written standard operating procedures (“SOP”)that outline how correctional staff at Lincoln should conduct themselves, and correctional staff employed at Lincoln are trained on these procedures each year. (T. p. 30.) Lincoln has a SOP establishing guidelines for correctional staff to utilize when they are reporting late for work or taking unscheduled leave found in the Lincoln SOP titled, “Staff Attendance and Personnel Leave.” (R. Ex. 18.) The policy states, “Employees will notify their OIC [Officer-in-Charge] as soon as possible but no later than two hours prior to the established reporting time for each shift of circumstances, which require sick leave. Employees calling in advance to notify the shift OIC of their absence must notify their appropriate shift OIC of the emergency circumstances by 7:00 AM for day shift and 7:00 PM for night shift.” (R. Ex. 18, p. 8.) This Lincoln SOP was in effect and was the established process for taking unscheduled leave on July 1, 2012. (T. pp. 91 and 136.)

9. Lincoln Correctional Sergeant Ronnie Ritchie testified that he received a phone call from the Petitioner on July 1, 2012 advising him that the Petitioner was sick and would not be able to report to work on July 1, 2012. During this phone conversation Sergeant Ritchie told the Petitioner that he needed to call back and inform his shift supervisor Sergeant Casey prior to 7:00 a.m. that he was sick and unable to report to work in accordance with the Lincoln SOP for taking unscheduled leave. (T. pp. 115 - 117, 123; R. Exs. 2 and 4.)

10. Lincoln Correctional Sergeant Mark Casey testified that he was employed as the relief Sergeant at Lincoln on July 1, 2012. The Petitioner also was scheduled to work the day shift at Lincoln on July 1, 2012. Sergeant Casey further testified that while he was told at 5:30 a.m. by Sergeant Ritchie that the Petitioner was unable to report to work for his shift on July 1, 2012, Casey did not get any notification from the Petitioner on July 1, 2012, that he would be unable to report to work on that day as required by the Lincoln SOP for taking unscheduled leave. (T. pp. 125 - 127; R. Ex. 3.)

11. Lincoln's Assistant Superintendent Charles D. Thrift, Jr. investigated the July 1, 2012, incident involving the Petitioner failing to follow the Lincoln SOP for taking unscheduled leave. Mr. Thrift reported his findings to John Crow, the Superintendent at Lincoln. In the memorandum, dated July 5, 2012, addressed to Mr. Crow, Mr. Thrift concluded based on his findings during his investigation that the Petitioner by his own admittance had failed to call back as he was instructed to do so by a supervisor, thus violating NCDPS's personal conduct policy. (T. pp. 134 - 136; R. Ex. 5.) The July 5, 2012, memorandum also included reference to two previous occasions (February 28 and 29, 2012) in which the Petitioner failed to follow the directive of the night shift duty sergeant to call his supervising sergeant the following day. (R. Ex. 5.)

12. The Petitioner was issued a below good ("BG") in his TAP (the Respondent's Performance Management System known as The Appraisal Process) on August 8, 2011, for failing to follow procedures by calling his shift supervisor on August 3 and 4, 2011. (R. Ex. 9.)

13. The Petitioner was issued a BG in his TAP on March 1, 2012, for failing to call back to speak with his shift supervisor by 7:00 a.m. pursuant to Lincoln's SOP. (R. Ex. 8.)

14. Superintendent Crow received and reviewed Mr. Thrift's internal investigation and recommended to his supervisor the Western Region Operations Manager David Mitchell that the appropriate corrective action be taken against the Petitioner in a letter dated July 19, 2012. (T. pp. 85; P. Ex.3.)

15. During the hearing, Superintendent Crow testified about the importance of the Lincoln SOP setting the policy for staff attendance and personnel leave. Mr. Crow testified that staff shortages create security breaches leaving the facility potentially comprised and possibly endangering the general public. Lincoln correctional staff are required to call in to report their unexpected absence to their shift supervisor for multiple reasons including as a way to assure the shift supervisor is aware of the absence in case the information is not passed on to the shift supervisor, to allow the shift supervisor to get some indication of how long the officer anticipates being out of work, and for the benefit of the officer as it relates to compliance with aspects of the Family Medical Leave Act. (T. pp. 93 -94.)

16. In a letter dated August 13, 2012, the Western Region Director Roger Moon recommended to Deputy Director for Respondent's Division of Adult Correction James B. French that the Petitioner be dismissed for unacceptable personal conduct. (R. Ex. 14; T. pp. 77-78.)

17. In a letter dated July 19, 2012, the Western Region Director Roger Moon concurred with the recommendation that the Petitioner be dismissed for unacceptable personal conduct. (R. Ex. 13; T. p. 154.)

18. During the hearing, Mr. Moon testified that the basis for his recommendation for dismissal of the Petitioner was based upon “the recent actions, the fact that Mr. Tuno had two TAP entries for the same kind of behavior, as well as the two prior written warnings.” Moreover, in the opinion of Mr. Moon the Petitioner’s behavior showed a pattern of behavior that arose to the level of dismissal. (T. p. 155 - 157.)

19. The Deputy Director of Prisons for the Respondent Mr. Randall Lee and the Deputy Secretary of the Division of Adult Correction for the Respondent Tracy Little concurred with Mr. Moon’s recommendation that the Petitioner be dismissed for unacceptable personal conduct. (R. Ex. 15; T. p. 155.)

20. The Dismissal Letter indicated that the recommendation for dismissal was approved in part because the Petitioner by his own admission failed to contact his shift supervisor Sergeant Casey and inform Casey that he was sick and would be unable to report for duty as scheduled on July 1, 2012. The Petitioner’s refusal to follow a directive from Sergeant Ritchie was insubordination and constituted unacceptable personal conduct sufficient to warrant disciplinary action. This was not the Petitioner’s first incident of this type of behavior as his TAPs for cycles 24 and 25 showed BG entries for failure to call his shift supervisor after calling in sick. (R. Ex. 16.) The Dismissal Letter also noted that Petitioner received two active written warnings one for unacceptable personal conduct and a second for grossly inefficient job performance. The first was issued on July 26, 2011, for failing to follow multiple directives by Sergeant Casey to secure the door to the segregation unit and failing to follow the established SOP for escorting inmates from segregation to the shower; and the second was issued on March 9, 2012, for failure to remain alert while on duty supervising an inmate at an outside medical facility. (R. Exs. 6, 7, and 16.) Respondent issued these two written warnings within eighteen months of the Dismissal Letter. (R. Ex. 16.)

21. After completing his internal agency appeals, the Petitioner filed this contested case at the Office of Administrative Hearings on January 8, 2013. In his contested case petition, the Petitioner alleged that Respondent lacked “just cause” to end his employment for disciplinary purposes.

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 dismissal rests with the department or agency employer. N.C. Gen. Stat. §126-35(d) (2012).

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.” 25 N.C.A.C. 01J .0614(8)(d).

4. The Dismissal Letter specified that Petitioner was being discharged for unacceptable personal conduct.

5. At the time of the Dismissal Letter, Petitioner’s prior Written Warnings were still active disciplinary actions because eighteen (18) months had yet to pass since their issuance. 25 N.C.A.C. 1J.0614(6)(c).

6. Respondent complied with the procedural requirements for dismissal for unacceptable personal conduct pursuant to 25 N.C.A.C. 01J .0608 and .0613.

7. It is well settled that judgment should be rendered in favor of the State agency when the evidence presented establishes that the employee committed at least one of the acts for which he/she was disciplined. *Hilliard v. Dept. of Correction*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

8. Respondent met its burden of proof and established by substantial evidence in the record that it had just cause to terminate its employment of Petitioner for unacceptable personal conduct that violated NCDPS’s Personal Conduct Policies. (R. Ex. 19.) Petitioner’s failure to contact his shift supervisor Sergeant Casey and inform Casey that he was sick and would be unable to report for duty as scheduled on July 1, 2012, and Petitioner’s refusal to follow a directive from Sergeant Ritchie was insubordination and the willful violation of known or written work rules. Petitioner admitted in his written statement, dated July 5, 2012 that he did know that he was to have called the facility back. (R. Ex. 1.) It is well settled that in cases where the employee admits to the misconduct for which he/she was disciplined, judgment should be rendered in favor of the employing State of North Carolina agency. *Hilliard*, 173 N.C. App. at 598, 620 S.E.2d at, 17-18.

9. The Written Warnings are relevant to determining whether Respondent had just cause to terminate Petitioner’s employment. The Written Warnings were still active at the time of Petitioner’s discharge and were included in the Dismissal Letter.

10. Therefore, Respondent has met its burden of proof and established by substantial evidence in the record that it had just cause to terminate its employment of Petitioner for unacceptable personal conduct.

11. On the basis of the above-noted Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

The undersigned affirms Respondent's dismissal of Petitioner in that Respondent had just cause for this disciplinary action per N.C. Gen. Stat. § 126-35.

NOTICE

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 Wake County or in the Superior Court of the county in which the party resides. The appealing party must file the petition within thirty (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, North Carolina 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. 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 thirty (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 10th day of September, 2013.

Eugene J. Cella
Administrative Law Judge