

STATE OF NORTH CAROLINA
COUNTY OF WAKE

THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 15762

KENNETH SHIELDS,)
)
 Petitioner,)
)
 v.)
)
 NC DEPARTMENT OF)
 PUBLIC SAFETY,)
)
 Respondent.)

FINAL AGENCY DECISION

On December 3, 2013, Administrative Law Judge Melissa Owens Lassiter heard this contested case at the Office of Administrative Hearings in Raleigh, North Carolina. On January 13, 2014, the undersigned issued an Order ruling that Respondent had just cause to discipline Petitioner for engaging in unacceptable personal conduct with Correctional Officer Mills on December 12, 2012. The undersigned also ruled that the following mitigating facts warranted Respondent taking less disciplinary action against Petitioner than demotion: (1) Officer Mills' insubordinate conduct during the December 12, 2012 discussion with Petitioner, and (2) Petitioner's brother had just been murdered.

On January 31, 2014, Petitioner filed its proposed Decision, a fee petition, and a fee agreement with the Office of Administrative Hearings. On February 14, 2014, Respondent filed Exceptions to Proposed Decision with the Office of Administrative Hearings. On February 20, 2014, Respondent filed a Response to Petitioner's Petition for Attorney's Fees and Cost.

APPEARANCES

For Petitioner: Michael C. Byrne
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For Respondent: Tamika Henderson
Assistant Attorney General
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ISSUE

Whether Respondent had just cause to demote Petitioner for the unacceptable personal conduct of displaying a baton to a subordinate and allegedly intimidating a subordinate?

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 - 4

For Respondent: 1 – 6, 8, 10 - 13

WITNESSES

For Petitioner: Petitioner

For Respondent: Donald Riley, Michael Mills, Cleo Jenkins.

PRELIMINARY MATTERS

At the beginning of the hearing, the undersigned granted Petitioner's Motion to Sequester All Witnesses from the hearing room. The undersigned took under advisement Petitioner's prehearing motion to exclude from evidence all evidence supporting any alleged ground for dismissal that was not cited in the demotion letter as required by law, specifically N.C. Gen. Stat. 126-35(a).

FINDINGS OF FACT

Procedural Background

1. On May 1, 2013, Respondent demoted Petitioner for engaging in unacceptable personal conduct on December 12, 2012 in violation of Respondent's Workplace Violence policy, Unlawful Harassment policy, and Professional Conduct policy. (Resp Exh 4) Respondent demoted Petitioner from a Correctional Assistant Unit Manager, pay grade 62, to a Correctional Officer, pay grade 62, and reduced Petitioner's annual salary from \$37,500 to \$28,600 (7.5%).

2. On July 25, 2013, Petitioner appealed his demotion by filing a contested case petition with the Office of Administrative Hearings. In that petition, Petitioner alleged that Respondent demoted him without just cause, and requested reinstatement, back pay, benefits, costs, and attorney's fees. Petitioner disputed that he attempted to intimidate anyone, and that his conduct constituted unacceptable personal conduct. He contended that the disciplinary action

Respondent took in demoting him flunked the *Warren* test in that the act at issue did not justify so drastic a disciplinary action as a demotion. (Petition)

Adjudicated Facts

3. At all times relevant to this case, Petitioner was a career state employee, having been employed with Respondent for 17 years. Petitioner began his employment with Respondent as a Correctional Sergeant. During the course of Petitioner's employment, Respondent promoted Petitioner to Correctional Assistant Unit Manager. At the time of his demotion, Petitioner was employed as a Correctional Assistant Unit Manager at Nash Correctional Institution in Nashville, North Carolina.

4. Respondent had taken no prior formal disciplinary action against Petitioner before demoting Petitioner from employment.

5. One of Petitioner's duties as Correctional Assistant Unit Manager was to keep track of overtime accrued by persons under his supervision. Both Petitioner and his subordinate managers were expected to reduce earned overtime as much as reasonably possible. In the course of those duties, Petitioner reviewed timesheets submitted and approved by subordinate managers. While doing so, Petitioner observed that one subordinate, Correctional Officer Michael Mills, had accrued some overtime without documents demonstrating the need for such overtime.

6. Officer Mills was a member of the Prison Emergency Response Team ("PERT"). Serving on the PERT team was done on a volunteer/selection basis that was in addition to the member's regular work duties. Mills reported to Sgt. Gilbert for his PERT team activities. Whenever the PERT team had scheduled training, the PERT supervisors sent an email to the work supervisors advising them of that training.

7. If Officer Mills was required to attend training for PERT when he was scheduled to work at Nash Correctional, Mills was required to find a replacement to work his shift at Nash Correctional. Correctional Sergeant Donald Riley was Officer Mills' direct supervisor.

8. Around 8:00 p.m. on December 12, 2012, Officer Mills asked Sgt. Riley if he had received an email from Sgt. Gilbert that Mills had PERT training on December 14, 2012. Riley had not received an email, and walked to Petitioner's office to ask him if he had received such an email.

9. Petitioner informed Sgt. Riley that he had not received an email regarding upcoming PERT training for Officer Mills. Petitioner directed Riley to have Mills report to Petitioner's office to find out what was going on. Petitioner intended to discuss Mills' PERT training, overtime, and the reasons for Mills' overtime. Sgt. Riley arranged for Mills to come to Petitioner's office, and was present for the discussion between Mills and Petitioner.

10. Officer Mills had previous discussions with other members of the PERT team who had been questioned by their regular supervisors about the frequency of their PERT team

training and/or activities. However, Petitioner had no prior interaction with Mills on this issue or any other issue.

11. During the discussion, Petitioner initially questioned Mills about his service on the PERT team, and asked Mills who had approved Mills to be on the PERT rifle team. Mills told Petitioner he had been on the PERT team for one year. Petitioner advised Mills that he did not have an email showing Mills was on any team. Petitioner asked Mills when his training was. Mills stated Friday [12/14/12] at 6:00 am at Rocky Mount firing range. After Petitioner asked Mills who scheduled [PERT] training, Mills stated that Sgt. Gilbert sent an email to his supervisors. Petitioner informed Mills that he did not receive the email. Mills informed Petitioner that he could get with Sgt. Gilbert or Mr. Tuck. Petitioner told Mills he knew who to call. Petitioner asked Officer Mills, "Do you think it is fair that you get to go off with PERT and leave the unit short?" Mills responded that he is working when he with PERT, but he doesn't control the schedule. (Resp. Exhs. 9, 10; Riley & Mills testimony)

12. Petitioner asked, "How long do you think you've been gone?" Officer Mills opened his calendar, and read all his PERT activities from September 5, 2012 to December 11, 2012. Mills advised that sometimes he works eight days in a row without complaint. Petitioner asked Mills if he wanted to take leave time. Mills responded, "Sir, I don't want to talk about it." Petitioner said, "I'm going to talk about it." Mills said again, "Sir, I really don't want to talk about this." (Resp. Exhs. 9, 10; Riley & Mills testimony)

13. At this point, while individual witnesses tell different versions of the words used, the conversation became heated. Petitioner became angry, and started to raise his voice. Mills, without previously being dismissed by the Petitioner, stated that he "needed to leave," stood up, and walked through the door to leave Petitioner's office.

14. Petitioner ordered Mills back into the office, and told Mills that he had not given Mills permission to leave. Mills walked back into Petitioner's office to sit down when Petitioner stated, "Are you threatening me?" Neither Riley nor Mills understood why Petitioner made that statement. Mills advised Petitioner that he's never late for work, he works hard, and he does what he's told.

15. Officer Mills is in his early thirties, and in very good physical shape as he works out regularly and is trained in martial arts. Petitioner is in his early fifties, appears in sedentary physical shape, and is quite heavy. Both men have military backgrounds.

16. Petitioner claimed he was afraid of Mills due to his threatening actions and the significant disparity in their ages, physical status, and physical fitness. Petitioner was also on edge, because his brother had recently been murdered in a violent attack.

17. As Mills reentered the room, Petitioner remained seated, and opened his desk drawer where he kept a work-issued baton. A preponderance of the evidence established that Petitioner pulled the baton from the drawer, and held it below the desk level. Officer Mills could see the baton from where he was standing, but could no longer see the baton when he sat down. Petitioner kept the baton at the low profile position. Petitioner asked Mills "Are you going to

assault me? Are you threatening me?" Petitioner ordered Mills to sit down. Petitioner did not attempt to use the baton, nor did he threaten to strike Mills with the baton. (Resp. Exhs. 9, 10; Riley & Mills testimony)

18. Riley placed his hand on Petitioner's right hand. Petitioner replied, "No, I got this." Petitioner stared at Mills. Mills thought Petitioner was trying to intimidate him. (Resp. Exhs. 9, 10; Riley & Mills testimony)

19. Mills asked Petitioner, "Why do you think I'm going to assault you? Just because I come back into your office and say something in a passionate tone, you take that as a threat?" Petitioner replied, "Another officer tried that in the other unit, and I handles [sic] him too." Mills told Petitioner he had on a blue uniform, and was on the same team as Petitioner. Petitioner replied, "That doesn't mean anything." Mills asked Petitioner, "If someone walking into your office, talking to you like that makes you think they are coming to assault you, you've been in the business too long." Petitioner replied, "No. I ain't been doing this too long. You wasn't [sic] here when this was a close custody camp. How many use of force you been in?" Mills responded, "Not many, but enough to know when someone is trying to assault me." Mills explained that he reports to PERT when he's told, and 95% of the time, Petitioner, Mr. Sledge, or Sgt. Riley get emails about PERT training. Sgt. Riley agreed that 90-95% of the time, he receives some sort of email or memo telling him that Mills will be out of the unit. (Resp. Exhs. 9, 10; Riley & Mills testimony)

20. Shortly after this exchange, tempers cooled. Petitioner told Mills he had no problem with Mills' service on PERT, but merely wished for the proper documentation. Petitioner and Mills shook hands before the meeting ended, and Officer Mills left the office with Petitioner's permission.

21. On December 13, 2012, Sgt. Riley reported to work early, and reported the incident between Petitioner and Mills to the unit manager. Riley also wrote a statement about the incident, and placed the written statement in a drawer. Riley gave his statement to management after it launched its investigation into the matter.

22. Nothing was heard about the incident for several weeks. Petitioner considered writing Mills up for insubordination, but decided to let the issue go given the meeting ended on a good note. Mills likewise filed no complaint regarding Petitioner.

23. On January 4, 2013, Captain Juanita James, who did not testify, received a telephone call from a non-DPS employee, Misty Clark, who reported the incident. Misty Clark likewise did not testify at the hearing.

24. Following this telephone call, Respondent launched an investigation into the December 12, 2012 conversation. Cleo Jenkins, Assistant Superintendent of Custody, investigated the matter, and reported his findings to Butch Jackson, the Administrator in Charge.

25. During the investigation, Petitioner informed Mr. Jenkins that “when Officer Mills jumped out of his chair, his instincts took over, and that he still had his brother on his mind who was just recently been murdered.” (Resp. Exh. 7, p. 2)

26. In his report, Jenkins concluded that Petitioner violated Respondent’s Unlawful Workplace Harassment and Workplace Violence policies on December 12, 2012 as follows:

The act of taking the baton from his drawer during what is described as a heated conversation with a subordinate and his apparent efforts to intimidate him with stares as he held the baton in his hand in unacceptable under both policies.

(Resp. Exh. 6)

27. At hearing, both Sgt. Riley and Asst. Superintendent Jenkins conceded that Petitioner’s job was to monitor and review overtime. They also conceded that Petitioner was entitled to, as part of his job, question Officer Mills about his PERT activity, and his overtime, and that Mills was required to respond to such inquiries by Petitioner.

28. During cross-examination, Sgt. Riley acknowledged that Mills was insubordinate two times during the December 12, 2012 conversation with Petitioner. First, Mills was insubordinate when he repeatedly told Petitioner he did not want to discuss Petitioner’s concerns about Mills’ PERT activities. Second, Mills was insubordinate when Mills got out of his chair and walked towards the door to leave the office without being dismissed. (Riley testimony)

29. The preponderance of the evidence demonstrated that Mills was not disciplined, either formally or informally, for his insubordinate actions toward Petitioner. Likewise, Respondent did not discipline Officer Mills, either formally or informally, for advancing on a superior officer in what that superior considered was a threatening or assaultive manner.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the parties and this contested case, and the parties received proper notice of the hearing in this matter. 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 his demotion. Because he is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent lacked just cause for his demotion, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a Final Agency Decision.

3. N.C.G.S. § 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.G.S. § 126-35(d) (2007).

4. 25 NCAC 11.2301(c) 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.

5. The sole issue in this case is whether Respondent had just cause to demote Petitioner based on Petitioner’s alleged unacceptable personal conduct; to wit, whether Petitioner (1) violated Respondent’s Unlawful Workplace Harassment and Workplace violence policies, (2) engaged in conduct for which no reasonable person should expect to receive a written warning, and (3) engaged in conduct unbecoming a state employee.

6. *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.”

7. Though just cause is case-dependent and not exclusive, *Carroll* provides examples of some other actions where just cause were found:

Although there is no bright line test to determine whether an employee's conduct establishes "unacceptable personal conduct" and thus "just cause" for discipline, we draw guidance from those prior cases where just cause has been found. .. See, e.g., Kea, 153 N.C. App. 595, 570 S.E.2d 919 (employee violated known and written work rules, disobeyed direct order from superior, and made crude and offensive sexual advances to a co-worker); Davis v. N.C. Dep't of Crime Control & Pub. Safety, 151 N.C. App. 513, 565 S.E.2d 716 (2002) (highway patrol officer was stopped for speeding and driving while intoxicated); N.C. Dep't of Corr. v. McNeely, 135 N.C. App. 587, 521 S.E.2d 730 (1999) (correctional officer abandoned post without authorization and failed to remain alert while on duty); Gray v. Orange Cty. Health Dept., 119 N.C. App. 62, 457 S.E.2d 892 (1995) (health department inspector engaged in inappropriate sexually oriented behavior during inspections of catering businesses [***53] owned by women), disc. rev. denied, 341 N.C. 649, 462 S.E.2d 511 (1995); Leiphart v. N.C. Sch. of the Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986) (division director at North Carolina School of the Arts surreptitiously organized meetings with other division directors to discuss complaints against their superior), cert. denied, 318 N.C. 507, 349 S.E.2d 862 (1986).

8. In the recent case of *Warren v. NC Dept. of Crime Control & Public Safety*, the Court of Appeals crystallized the *Carroll* analysis as follows:

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."

Warren v. N.C. Dep't of Crime Control & Pub. Safety, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012).

9. In this case, the undersigned applies the *Warren* just cause analysis as follows:

Step One: Did Petitioner Commit The Conduct Alleged?

10. Sgt. Riley and Officer Mills offered consistent testimony in their written statements and testimony at hearing. They described how Petitioner opened his desk drawer, took his baton out of drawer, and held the baton in a low profile position. In contrast, Petitioner provided inconsistent versions regarding his actions with the baton. In his January 8, 2013 statement, Petitioner first stated that he grabbed the baton for protection. His instincts took over, and his brother had just been murdered. (Resp. Exh. 8) Yet, in his February 20, 2013 statement, Petitioner claimed he "touched" the baton by moving it so he could get out a NC 18 form to write down all comments and actions." (Resp. Exh. 3) Later, in his February 28, 2013 statement, Petitioner explained that he "reached for my desk drawer to pull out a NC 18 (Employee Witness Statement form). He noted that these forms were underneath the baton, OC spray, and handcuffs. (Resp. Exh. 11) Finally, during cross-examination, Petitioner claimed that he was scared, and put his hand on the baton.

11. There is no evidence that Petitioner actively threatened to strike Mills with the baton.

12. Respondent proved by the preponderance of the evidence that Petitioner committed the conduct of displaying the baton to subordinate Mills while in Petitioner's office.

Step Two: Did Petitioner's Actions Constitute Unacceptable Personal Conduct?

13. Respondent's Workplace Violence Policy states that:

It is the responsibility of every employee and agent of the Department to conduct himself or herself in a manner that contributes to a workplace environment that is not only free of unlawful workplace harassment, . . .

Examples of Prohibited and Legally Dangerous conduct

1. Threats of physical violence of harm; display of items that imply such a threat.

(Resp. Exh. 12)

14. Respondent proved by a preponderance of the evidence that Petitioner displayed the baton in a manner that implied a threat to Officer Mills, even if the Petitioner did not overtly threaten to use or imply the baton. Petitioner's display of the baton constituted the unacceptable personal conduct of a "willful violation of known or written work rules," conduct for which no reasonable person should expect to receive prior warning, and conduct unbecoming a state employee that is detrimental to state service.

Step 3: Did The Unacceptable Personal Conduct Justify The Discipline Imposed?

15. The third step in the *Warren* analysis is determining whether the discipline imposed for that conduct was just in that:

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.'

The Warren Court refers to this process as "balancing the equities." *Id. at 902, 925.*

16. In conducting this process, the Court notes Petitioner's long, discipline-free employment history with Respondent. (*See Warren*, referencing *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 898 (2004): "In reaching this result, the Court examined the petitioner's exemplary employment record as well as the circumstances under which the petitioner exceeded the posted speed limit.")

17. The undersigned, as directed by *Warren* and *Carroll*, looks at the "circumstances" under which Petitioner committed the conduct alleged. Here, Officer Mills was insubordinate to Petitioner during Petitioner's proper inquiry into Mills' PERT activities. By his own admission, Officer Mills refused and/or resisted Petitioner's attempts to discuss the issue, and attempted to leave Petitioner's office of his own volition, and without being first being dismissed. Under the applicable personnel policies of any State agency, insubordination constitutes unacceptable personal conduct.

18. Examination of the third prong also requires consideration of "mitigating factors" in the employee's conduct. (*See Warren*, citing Roger Abrams and Dennis Nolan, TOWARD A THEORY OF "JUST CAUSE" IN EMPLOYEE DISCIPLINE CASES, 1985 Duke L.J. 594 (September 1985). In this case, the undersigned concludes that Mills' insubordination towards Petitioner, and the fact that Petitioner's brother had just been murdered were mitigating factors that warranted Respondent taking less disciplinary action against Petitioner than demotion.

These mitigating factors obviously influenced Petitioner's perceived view of a threat by Mills, and obviously influenced Petitioner's actions on December 12, 2012.

19. Given the above mitigating factors, the undersigned concludes that Petitioner's misconduct did not rise to a sufficient level to warrant Respondent demoting Petitioner to a Correctional Officer position. Instead, based on a preponderance of the evidence and the above mitigating factors, the undersigned concludes there was just cause for Respondent to suspend Petitioner for ten days without pay.

20. Petitioner is hereby awarded attorney's fees, which he reasonably incurred in pursuing and prosecuting this action. Based upon the Affidavit of Petitioner's Attorney, Michael C Byrne, Petitioner is hereby awarded attorney's fees in the amount of \$10,458.75, which shall be paid as provided by law.

FINAL AGENCY DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and all the competent evidence at hearing, Respondent's decision to demote Petitioner is **REVERSED**. Respondent shall retroactively reinstate Petitioner to the same or similar position held prior to his demotion, with all back pay, and benefits which he would have been entitled to receive since his demotion on May 1, 2013.

Petitioner is hereby awarded Attorney's Fees in the amount of \$10,458.75, as supported by the fee petition submitted in this case, to Petitioner's attorney, Michael C Byrne, as provided by law. Instead of the discipline imposed by Respondent, Respondent shall suspend Petitioner from employment for ten days without pay. The relevant documents in Petitioner's personnel file shall be adjusted to reflect this change.

ORDER AND NOTICE

Under the provisions of N.C. Gen. Stat. § 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 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 26 N.C.A.C. 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-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 26th day of February, 2014.

Melissa Owens Lassiter
Administrative Law Judge