

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 15896

FINAL DECISION

APPEARANCES

ISSUE

STATUTES, RULES & POLICIES IN ISSUE

N.C. Gen. Stat. §§126-34, 126-34.1, 126-35
Title 25 of the N.C. Administrative Code on State Personnel

State Human Resources Manual, Section 7
EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent: 1 through 8

WITNESSES

For Petitioner: Petitioner

For Respondent: Kenneth Royster, Catherine Moessner, MaryMolly Taylor,
Stephanie Beard

FINDINGS OF FACT

Procedural Background

1. On April 3, 2013, Respondent terminated Petitioner from employment as as Administrative Assistant I for unacceptable personal conduct for losing her custodial agent certification by the NC Department of Corrections which allowed Petitioner to supervise inmates on the cleaning crew for the Kendall complex. (Resp. Exh. 4)

2. On July 31, 2013, Petitioner filed a petition for contested case hearing with the Office of Administrative Hearings alleging that Respondent had: (1) discharged her without just cause, and (2) retaliated against her for having filed a worker's compensation claim. Petitioner alleged how she had been harmed by Respondent's actions as follows:

Petitioner was terminated due to loss of Department of Correction privileges based on unsubstantiated inmate charge. Petitioner worked for Dept. of Commerce overseeing Dept of Corrections work release program. Petitioner had work comp restrictions at the time.

(Petition)

3. On October 3, 2013, the undersigned ALJ issued a Final Decision (In Part), granting Respondent's Motion to Dismiss Petitioner's claim of "worker's compensation retaliation," and dismissed such claim. The Office of Administrative Hearings retained subject matter jurisdiction over the just cause claim.

Parties/Background Facts

4. On September 1, 2003, the Employment Security Commission hired Petitioner as an Administrative Assistant I to supervise inmate cleaning crews. (T. pp. 37, 105)

5. Petitioner continued her employment when the Employment Security Commission became a Division of the Respondent on November 1, 2011, pursuant to 2011 N.C. Sess. Laws 401 (hereinafter referred to as the “Division”). The working title of Petitioner’s job was “custodial agent.” (T. pp. 37)

6. At all times relevant to this case, Petitioner’s supervisor was Catherine Moessner, Facilities Operations Manager (“Moessner”) (T. p. 37)

7. Wake Correctional Center is part of the North Carolina Department of Public Safety (“NCDPS”) (T. p. 21). NCDPS is the certifying authority of who will be a custodial agent. (T. pp. 26-27, 107) A “custodial agent” is an employee of either the NCDPS or of another State agency who has attended training and been issued custodial agent certification by Wake Correctional. (T. pp. 24, 41)

8. Respondent’s Division of Employment Security contracted with Wake Correctional Center for Wake Correctional Center to provide inmate labor to perform janitorial services at the Division’s offices at 700 Wade Avenue, Raleigh, North Carolina. (T. pp. 23, 38, 39; Resp. Exh. 1) The Division’s offices consist of two buildings, the Daniels Building and the Kendall Complex. (T. p. 38) That contract required inmates be supervised by a custodial agent while at the Division’s offices. (T. pp. 23, 40; Resp. Exh. 1, p. 1) Specifically, Section I., E. of that contract provides, “No inmate will be allowed to work in an area that is not supervised by a Custodial Agent.” (Resp. Exh. 1, p. 1)

9. In June 2010, Kenneth Royster (“Royster”) became the Correctional Superintendent II at Wake Correctional Center. (T. p. 21) He signed the contract between Wake Correctional Center and the Division on behalf of Wake Correctional Center.

10. Individuals eligible for appointment as a custodial agent must be at least 20 years old, pass a criminal background check, and be in good standing with the State agency at which the inmate labor is to be provided. (T. p. 24) Individuals selected to be custodial agents also undergo training which includes training on the Prison Rape Elimination Act. (T. p. 24) Once an individual meets the qualifications and undergoes training, the NCDPS issues the individual a certification card. (T. pp. 24-25) The certification is valid for one year, and is renewed annually upon completion of refresher training. (T. p. 25) The certification is required pursuant to G.S. §148-4. (T. p. 25)

11. NCDPS determines whether an individual will continue to serve as a custodial agent, requiring that the individual not have a criminal history, be able to perform the tasks required to supervise inmates, and can foster an appropriate relationship and/or rapport with the inmates. (T. p. 27)

12. Inmates routinely complain about custodial agents. (T. p. 27) When an inmate complaint is received, NCDPS determines the type of investigation, if any, is needed. (T. p. 27) If a complaint possibly involving sexual violence or harassment of an inmate, NCDPS is mandated to conduct an investigation under the 2003 federal Prison Rape Elimination Act (“PREA”) (T. p. 28)

Adjudicated Facts

13. Petitioner was certified as a custodial agent, and supervised inmates at the Division's offices at 700 Wade Avenue, Raleigh, NC for nine years until February 2013. (T. pp. 32-33, 40, 107; Resp. Exhs. 2 and 3)

14. Petitioner's position description listed the primary purpose of Petitioner's position with the Division as being:

responsible for the services such as janitorial, facility maintenance, furniture relocation, disposal of materials, and other tasks as assigned at the Kendall Complex. This position therefore oversees inmate labor to provide the tasks as described, and provides other support in the absence of the inmates. To successfully provide the services required, this position must be formally trained in rules applicable to inmate supervision.

(T. pp. 61-62; Resp. Exh. 8, sec. I. B.)

15. Petitioner's position description listed that "License or Certification Required by Statute or Regulation: Not applicable." (Resp. Exh. 8, p. 7). However, Petitioner's annual performance evaluation plan provided that "the certification card [to supervise inmates] must be kept and maintained at all times and reviewed annually." (T. p. 62)

16. Petitioner's daily job duty was to supervise the inmate labor in the Daniels Building. (T. pp. 42, 106; Resp. Exh. 8) She typically supervised a crew of three inmates. She was responsible for transporting the inmates to and from Wake Correctional. Petitioner was responsible for making sure the inmates performed their work, and giving them instructions based on a typed instructional list of expectations. (T. p. 43) The inmates' duties included cleaning the bathrooms, dusting and vacuuming the hallways, offices and stairwells, stocking the cleaning cart and bathrooms, emptying the trash, cleaning the cafeteria, and performing other duties as directed. (T. pp. 43, 106) Petitioner was not responsible for personally providing cleaning services when she had an inmate crew present. If Petitioner did not have an inmate crew, she was responsible for these duties. If Petitioner had one inmate, she was required to help clean. (T. pp. 44, 61-62, 106; Resp. Exh. 8)

17. On or about January 17, 2012 [sic] [2013], Royster learned that an inmate complained that Petitioner had made an inappropriate or harassing comment to him. (T. p. 28) Royster requested Lieutenant Sandra Foster ("Foster"), with North Carolina Central Prison, to conduct a PREA investigation into that complaint. Foster was a trained PREA investigator used by Royster, because Royster did not have a trained PREA investigator at the time. (T. pp. 28-29) During an investigation, anything uncovered is examined, and can be considered when deciding whether to continue or terminate a custodial agent's certification. (T. pp. 31-32)

18. On or about January 17, 2013, Ms. Moessner, Petitioner's supervisor, was notified by Wake Correctional Center that Petitioner's custodial agent certification was temporarily

revoked pending an investigation. As a result, Ms. Moessner relieved Petitioner of her supervising duties pending the investigation, and pending further notice from Wake Correctional Center. (T. pp. 48, 104-105)

19. Foster prepared a report of her investigation, and Royster reviewed such report. Foster's investigation did not necessarily substantiate, meaning it didn't disprove or prove, the inmate's allegations. According to Mr. Royster, "the other findings in the investigation were equally as serious in my opinion. Therefore, based on the totality of the investigation," and as part of his job duties, Royster decided to terminate Petitioner's certification to supervise inmates. (T. p. 32)

20. After Foster's investigation was complete, Moessner received a letter from Lateisha D. Thrash, Assistant Superintendent of Programs at Wake Correctional Center dated February 20, 2013. The letter stated, in pertinent part:

Effective immediately, custodial agent certification for Ms. Rena Bridges has been terminated. As a result of this termination, Wake Correctional Center cannot permit Ms. Bridges to supervisor [sic] inmates assigned to this labor agreement. Additionally, she must immediately surrender the certification cards issued to her as part of the Custodial Agent Training she received.

(T. p. Resp. Exh. 2) Based on this letter, Moessner informed Petitioner that she could no longer supervise the inmates. (T. pp. 52)

21. Ronald Stancil was the other custodial agent overseeing an inmate cleaning crew on a daily basis in Division's Kendall Complex. (T. p. 44) The loss of Petitioner's certification caused a manpower issue, because there was only one supervisor to manage both the Kendall Complex and the Daniels Building. (T. p. 53)

22. With the loss of Petitioner's certification, the only job duties available to Petitioner were cleaning bathrooms, vacuuming, and trash collection. (T. p. 53) From January 17, 2013 through February 20, 2013, Petitioner sat at her work station, and asked her supervisor, Ms. Moessner, for work. However, Ms. Moessner "had no work – it was all administrative – to give" Petitioner. "Because of the investigation, we were not sure what to do so there were no job duties assigned." (T. p. 64) During that period, Petitioner stocked the bathrooms. After February 20, 2013, Petitioner performed the bathroom cleaning for approximately 2 days. (T. p. 55) Since Petitioner was recovering from knee replacement surgery, she was unable to perform the other duties. (T. p. 55)

23. In mid to late February of 2013, Petitioner contacted MaryMolly Taylor ("Taylor"), EEO Representative, to obtain assistance in finding her another position within the Division. (T. p. 73) Petitioner informed Ms. Taylor that the prisoners would not be available for her to supervise, that Petitioner's health was getting worse, and she would be unable to perform housekeeping duties. (T. p. 73)

24. Taylor considered and reviewed an imaging position and a position in the mail room as possible jobs for Petitioner. Taylor learned that the imaging job required heavy lifting, and there were no permanent positions available in that area. Taylor discovered that the mailroom job would have required heavy lifting. Ms. Taylor had learned from Petitioner's supervisor that Petitioner was unable to perform heavy lifting. (T. pp. 74-75) Taylor also looked at open positions of the same grade and salary level as Petitioner. The open position required office skills, but Petitioner did not have the required office skills. Further, Petitioner told Taylor the Division did not have anything else for her to do. (T. p. 76; Resp. Exh. 6)

25. On or about March 4, 2013, Petitioner met with Ms. Taylor, and gave Taylor a doctor's notes that restricted or limited Petitioner's ability to push, pull, stand, or bend. These restrictions rendered Petitioner unavailable to perform any cleaning work. (T. pp. 55-56, 76-77; Resp. Exh. 5) However, since Petitioner's primary job duty was to supervise and watch the inmates who cleaned the Respondent's building, the fact that Petitioner could not push, pull, stand or bend herself did not matter, and Petitioner would not be "unavailable" to work. (T. p. 83)

26. Respondent consulted Stephanie Beard, Personnel Supervisor II in Human Resources ("Beard"), to determine whether dismissal of Petitioner for loss of her custodial agent certification would be consistent with State policy. Beard recommended that dismissal would be consistent with the State Human Resource Manual's "Disciplinary Actions, Suspension and Dismissal" section which reads in pertinent part:

Employees in such classifications are responsible for obtaining and maintaining current, valid credentials as required by law, rule or regulation. Failure to obtain or maintain the legally required credentials constitutes a basis for immediate dismissal without prior warning, consistent with dismissal for unacceptable personal conduct or grossly inefficient job performance. An employee who fails to obtain or maintain legally required credentials may be dismissed without prior warning following a pre-disciplinary conference.

(T. pp. 90-91; Resp. Exh. 7)

27. On April 3, 2013, the Division sent Petitioner a letter dismissing her from employment with the Division based on unacceptable personal conduct. In this letter, Respondent explained that:

The decision to dismiss is based on the following:

1. Loss of Custodial Agent Certification that allowed you supervision of inmates on the cleaning crew for the Kendall complex.

(T. pp. 57-58; Resp. Exh. 4)

28. A preponderance of the evidence established that Petitioner's primary job duty was the supervision of inmates. Petitioner losing her custodial agent certification card meant Petitioner was unable to perform her daily job duties. (T. p. 65, Resp. Exh. 8)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal jurisdiction over the parties in this case, and the Office of Administrative Hearings (OAH) has subject matter jurisdiction. All parties are properly noticed.

2. At the time of her dismissal, the Petitioner was a career state employee entitled to protections of the North Carolina State Personnel Act; specifically, the "just cause" provision of N.C. Gen. Stat. §126-35.

3. N.C. Gen. Stat. §126-35(a) provides, in pertinent part, "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." The burden of showing the career State employee was discharged for "just cause" rests with the department or agency employer. N.C. Gen. Stat. §126-35(d)

4. 25 NCAC 01J .0604(b) enumerates two grounds for disciplinary action, including dismissal, for just cause: (1) unsatisfactory job performance, including grossly inefficient job performance, and (2) unacceptable personal conduct. "Unacceptable personal conduct" is defined to include conduct for which no reasonable person should expect to receive prior warning; job-related conduct which constitutes a violation of state or federal law; willful violation of known or written work rules; and conduct unbecoming a state employee that is detrimental to state service. 25 NCAC 01J .0614(8)

5. "Dismissal" is defined as "involuntary termination or ending of the employment of an employee for disciplinary purposes or failure to obtain or maintain necessary credentials." 25 NCAC 01J .0614(4)

6. The policy of the State as set out in the State Human Resources Manual regarding credentials is as follows:

B. Credentials

By statute, regulation, and administrative rule, some duties assigned to positions in the State service may be performed only by persons who are duly licensed, registered or certified as required by the relevant law or policy. All such requirements and restrictions are specified in the statement of essential qualifications or recruitment standards for classifications established by the State Human Resources Commission.

Obtaining and Maintaining Credentials

Employees in such classifications are responsible for obtaining and maintaining current, valid credentials as required by law, rule or regulation. Failure to obtain or maintain the legally required credentials constitutes a basis for immediate dismissal without prior warning, consistent with dismissal for unacceptable personal conduct or grossly inefficient job performance. An employee who fails to obtain or maintain legally required credentials may be dismissed without prior warning following a pre-disciplinary conference. An employee dismissed on this basis shall be given a written letter of dismissal with the specific reason for the dismissal and written notice of the right of appeal.

State Human Resources Manual, Discipline/Appeals/Grievances, Section 7, p. 20 (Revised: February 1, 2011)

7. State departments, institutions, agencies, and political subdivisions may hire inmates to perform work. In such cases, N.C. Gen. Stat. §148-4 provides in pertinent part:

Employees of departments, institutions, agencies, and political subdivisions of the State hiring prisoners to perform work outside prison confines may be designated as the authorized agents of the Secretary of Public Safety for the purpose of maintaining control and custody of prisoners who may be placed under the supervision and control of such employees, including guarding and transferring such prisoners from place to place in the State as their duties might require, and apprehending and arresting escaped prisoners and returning them to prison. The governing authorities of the State prison system are authorized to determine by rules and regulations the manner of designating these agents and placing prisoners under their supervision and control, which rules and regulations shall be established in the same manner as other rules and regulations for the government of the State prison system.

8. A preponderance of the evidence demonstrated that the Division had just cause to dismiss Petitioner from employment, pursuant to N.C. Gen. Stat. §126-35, as Petitioner lost her custodial agent certification that allowed Petitioner to perform the primary function of her job to supervise an inmate cleaning crew.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's decision to dismiss the Petitioner from employment for unacceptable personal conduct.

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 19th day of February, 2014.

Melissa Owens Lassiter
Administrative Law Judge