

THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 17402

FINAL DECISION

APPEARANCES

For Respondent: Stephanie A. Brennan
Special Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, N.C. 27602

ISSUES

1. Whether Respondent had just cause to suspend Petitioner without pay for three days for unacceptable personal conduct?
2. Whether Respondent discriminated against Petitioner, based on his age, by denying him a promotion and training?

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent:

Exh. 2	6/8/11 – 6/9/11 emails
Exh. 3	7/19/11 Written Warning
Exh. 4	8/26/11 Written Warning
Exh. 5	1/15/13 minutes
Exh. 6	2/12/13 minutes
Exh. 7	2/13/13 minutes
Exh. 8	4/19/13 minutes
Exh. 9	4/24/13 Notice of Pre-disciplinary Conference
Exh. 10	4/25/13 minutes
Exh. 11	Disciplinary Action Approval
Exh. 12	4/30/13 Suspension Without Pay
Exh. 13	5/31/13 letter from D. Olson
Exh. 15	Professional Conduct and Job Performance forms
Exh. 16	Performance Evaluation 1/1/11 to 12/13/11 (interim)
Exh. 17	Performance Evaluation 1/1/11 to 12/13/11 (annual)
Exh. 18	Performance Evaluation 1/11/12 to 12/31/11 (annual)
Exh. 19	Letter from John Scherer

WITNESSES

For Petitioner: Daniel Dugan

For Respondent: Tom Freshwater
 John Pollard
 David Olson
 Leanne Prete

FINDINGS OF FACT

Procedural Background

1. On April 30, 2013, Respondent suspended Petitioner for three days without pay for engaging in unacceptable personal conduct on April 19, 2013 by being “disruptive, disrespectful, and unprofessional to your supervisors as they were conducting a meeting with the Plumbing Shop.” (Resp. Exh. 12)

2. On May 29, 2013, Petitioner appealed his suspension by filing an internal grievance with Respondent. On July 24, 2013, after reviewing the grievance panel’s recommendation, Respondent’s Chancellor issued a Final Administrative Decision upholding Petitioner’s suspension for three days without pay. (Resp. Exhs. 13, 14)

3. On September 6, 2013, Petitioner appealed his suspension by filing a contested case petition with the Office of Administrative Hearings. On his petition form, Petitioner also checked that he was denied a promotion and transfer, and subjected to a layoff due to age discrimination. He wrote:

I have been denied promotion and training; and been suspended and repeatedly threatened with termination, due to age discrimination.

(Petition)

a. Petitioner alleged that at the internal grievance hearing, Dave [Olson] “handed me a paper that stated or documented, untrue facts that have become part of my permanent record and charges are still pending today.” He noted that Tom [Freshwater] didn’t mention that Petitioner had apologized to him, and “there were repeated references to things on my record yet there are errors and omissions on my personnel record.” Petitioner alleged that after Dave was hired, Petitioner was threatened with suspension, and Dave told Petitioner at a full plumbing shop meeting that Petitioner was “getting up there in age and should consider retiring.” (Petition)

b. Petitioner also claimed that he was threatened fifteen times in the packet for the grieving hearing alone. Petitioner asserted that the grievance was excessive, as state policy mandates a prior discipline [should] not be considered if there has been a clean record for the past 18 months. (Petition)

Adjudicated Facts

4. At the time of his suspension, Petitioner was a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina (the State Personnel Act), and had been employed as a plumber with Respondent since July of 2006.

5. Respondent is subject to Chapter 126 of the North Carolina General Statutes, and is Petitioner’s employer.

6. In 2011, Respondent received complaints from campus customers about Petitioner’s rude interpersonal interactions with them. (Resp. Exh. 2)

7. On July 19, 2011, Respondent Plumbing Supervisor, Sylvester Allen, issued Petitioner a written warning for unacceptable personal conduct based in part, on Petitioner’s argumentative, rude, and discourteous behavior in February April and May of 2011 with the campus customers. The warning referenced the fact that Petitioner’s conduct was not new as Petitioner’s supervisor had met with Petitioner in 2008 and discussed Petitioner’s “attitude and disrespectful behavior.” In this warning, Allen described Respondent’s expectations concerning Petitioner’s conduct toward others, that Petitioner should “refrain from engaging in any defensive debate or disagreement,”

and should use professional and respectful language in all his interactions with colleagues and customers. (Resp. Exh. 3)

8. On August 26, 2011, Mr. Allen issued a written warning to Petitioner for unsatisfactory work performance. Specifically, Allen based the written warning on Petitioner's "unnecessarily rude" conduct toward Housing and Residential life staff, and instructed Petitioner to "[c]ease rude interaction with others on campus. Communicate with all UNCW faculty, staff, and students in a professional manner." (Resp. Exh. 4)

9. In Petitioner's performance reviews, Petitioner's supervisors indicated that Petitioner needed to improve in the areas of communication and client service. Petitioner received rankings of "1" or "2" on a 5-point scale across multiple categories, supervisors and reviews. A rating of "1" indicates "Unsatisfactory Performance" and "2" indicates "Improvement" "5" indicates "Consistently Exceeds Expectations." (Pet. Exh. 16, 17, 18)

a. In Petitioner's 2011 interim evaluation, Petitioner's supervisor, Sylvester Allen, rated Petitioner a "2" for communication, a "1" for Client/Customer Service, and a "1" for Professional Conduct and Job Performance. In the performance evaluation, Respondent informed Petitioner that he was expected to "establish and maintain a professional relationship with customers . . ." and "[c]onduct self in a professional and courteous manner at all times." Allen also informed Petitioner that he "expect[ed] his conduct, particularly as it relates to his interaction with customers and fellow associates, to improve significantly." (Resp. Exh. 16)

b. In Petitioner's 2011 annual evaluation, Petitioner's supervisors, Eddie Kelly and Steve Pickard, rated Petitioner a "2" for communication, a "1" for Client/Customer Service, and a "2" for Professional Conduct and Job Performance. The supervisor comments reiterated their expectations from the written warnings that Petitioner should cease rude interaction with others on campus. (Resp. Exh. 17)

c. In Petitioner's 2012 annual evaluation, Petitioner's supervisor Eddie Kelly rated Petitioner a "2" for Work Coordination, noting a need to improve the ability to take directions from supervisors. Kelly rated Petitioner a "1" for Communication, a "2" for Client/Customer Service, and a "1" for Professional Conduct and Job Performance." In this evaluation, Kelly wrote:

Danny needs to work better as a team member with other UNCW employees, be more helpful, cooperative, accept feedback, take instructions, communicate in a calm and non-aggressive manner and accept responsibility for his actions. . . .

[Petitioner] has had multiple incidents where he has communicated inappropriately with his supervisors and other UNCW staff. Danny is expected to follow instructions given to him by his supervisor, communicate with all UNCW staff, faculty and students in a professional

and courteous manner and to follow the guidelines of the UNCW respect compact at all times.

(Resp. Exh. 18)

10. On at least five occasions (11/27/06, 6/13/07, 5/1/08, 4/21/09 and 1/26/12), Petitioner signed a "Professional Conduct and Job Performance Expectations" form that listed seven expectations for Petitioner. Two of these expectations were "Promote teamwork and achieve departmental and university goals" and "Be perceived by customers and co-workers as being a courteous, helpful and cooperative individual." (Resp. Exh. 15)

11. On January 15, 2013, Petitioner had a dispute with his supervisor, Eddie Kelly. That same day, during a meeting about the issue with his second-level supervisor, David Olson (Assistant Director of Physical Plant), and his third-level supervisor, Tom Freshwater (Director of Physical Plant), Petitioner acted in a rude, demeaning and disrespectful way toward Mr. Freshwater. (Resp. Exh. 5; see *also* Tr. 78-80, 125-31) The next day, David Olson called Petitioner to his office to discuss his behavior, and discussed with Petitioner expectations for being respectful and talking to people appropriately. (Resp. Exh. 6; Tr. 130-32)

12. On February 12, 2013, management held a meeting with the plumbing shop and others to provide an update on a plumber licensing issue. Leanne Prete, Employee Relations Consultant in Human Resources, attended the meeting at management's request. At the meeting, Petitioner interrupted Mr. Freshwater and used a rude and inappropriate demeanor. (Resp. Exh. 6; Tr. 82-84, 132-35, 163-65) Ms. Prete was so stunned and disturbed by Petitioner's behavior and conduct in the meeting that she asked him to stay after the meeting to speak with him about it. Ms. Prete told Petitioner that his tone and manner were inappropriate and that she strongly recommended that he find a more respectful way to express his concerns. (Resp. Exh. 6; Tr. 163-65)

13. The day after the February 12, 2013 meeting, Mr. Olson asked Petitioner to come to his office to discuss his behavior during the meeting. Mr. Olson told Petitioner that no matter what his personal feelings were toward anyone, he was expected to act in a civil and respectful manner. He further told Petitioner that the incident would be documented, and that if he continued to repeat the conduct, there would be disciplinary action taken. (Resp. Exh. 7; Tr. 134-35)

14. At some point during his employment with UNCW, Petitioner claimed that Respondent UNCW was not in compliance with state law, because one or more of its plumbers, including the Plumbing Shop supervisor, were not licensed by the North Carolina State Board of Examiners of Plumbing, Heating & Fire Contractors ("Licensure Board"). By letter dated February 26, 2013, Respondent's Associate General Counsel wrote a memorandum to Respondent's Plumbing Shop ("the Shop"), and advised that UNCW plumbing employees are able to perform any of their job duties, which may be

subject to the Licensure Board's review, under the supervision of a NC licensed plumber. Associate General Counsel also advised the Plumbing Shop that any questions regarding plumbing licensing are matters between the university and the Licensure Board, rather than any individual employee. (Resp. Exh. 19)

15. On April 19, 2013, the Plumbing Shop management held a meeting with the plumbers to discuss the pending retirement of Eddie Kelly, the Shop's supervisor, and how that would impact the licensure issue that Petitioner had raised. Tom Freshwater, Director of the Physical Plant, informed the plumbing employees that given the short time [of two weeks] between Eddie Kelly leaving and a new supervisor being hired, he didn't see the need for a licensed supervisor at the Shop as they had licensed plumbers on staff. Petitioner interrupted Freshwater saying, "Tommy, what the heck are you saying, that you want us to purposely violated state plumbing laws?" (Resp. Exh. 8) Petitioner's tone was very loud, and his demeanor was very unprofessional and inappropriate. David Olsen interrupted Petitioner, and informed him that his tone was extremely disrespectful, and they don't talk to anyone, especially supervisors, in such a manner. (Resp. Exh. 8)

a. Petitioner continued in a louder tone, saying "Freshwater, what the heck are you thinking . . ." Olsen advised Petitioner his tone and language was still disrespectful and wouldn't be tolerated. Petitioner turned to Olsen and said, "Who is talking to you? No one is talking to you." (Resp. Exh. 8) Freshwater interrupted Petitioner and asked Petitioner to leave, because he was being disrespectful and disruptive. Petitioner walked towards the door, looked at Freshwater, and said, "You are the problem." Mr. Freshwater asked Petitioner to wait until the meeting was over so management could discuss Petitioner's conduct with him. Petitioner initially refused to leave the meeting, but later left the room.

b. After the meeting, Freshwater and Olson met with Petitioner, and discussed his behavior with him. Management thought Petitioner's demeanor was extremely inappropriate. (Resp. Exh. 8; Tr. 84-92, 114-16, 136-41)

16. As a result of Petitioner's behavior at the April 19, 2013 meeting, Petitioner issued a Notice of Pre-Disciplinary Conference.

17. On April 25, 2013, Director Freshwater and Assistant Physical Plant Director David Olson held a Pre-Disciplinary Conference with Petitioner. (Resp. Exh. 9; Tr. 92-93) Mr. Olsen explained to Petitioner what disrespectful conduct Petitioner had exhibited during the April 19, 2013 meeting. Freshwater and Olson thought Petitioner failed to explain his behavior, was interruptive, and tried to direct the attention away from the issue at hand. Olson and Freshwater thought Petitioner was combative, argumentative, rude, and difficult throughout the meeting. (Resp. Exh. 10; Tr. 92-94, 141-42)

18. After consulting with HR and receiving approval from the Vice Chancellor, on April 30, 2013, Respondent suspended Petitioner for three days without pay as a

result of Petitioner's "disruptive, disrespectful and unprofessional" behavior toward his supervisors while they were conducting the meeting with the plumbing shop on April 19, 2013. (Resp. Exhs. 11, 12; Tr. 94-96, 142-45)

19. At the contested case hearing, David Olson, Tom Freshwater and John Pollard, a co-worker of Petitioner's, each testified credibly that Petitioner's behavior at the April 19, 2013 meeting was highly unprofessional and inappropriate. (Tr. 84-92, 114-16, 136-41)

20. Petitioner claimed that he was justified in his behavior, because he was concerned about the licensure issue. However, in February 2013, as noted above, Respondent's legal counsel informed the plumbers, by written memorandum, that legal counsel was aware of Petitioner's concerns, and had worked with the Licensing Board to address them. (Resp. Exh. 19) After Petitioner expressed his concerns about the licensure issue, Petitioner was not asked to perform work that would require a license even if UNCW was subject to the jurisdiction of the Licensing Board. (Tr. 77-78)

21. At hearing, Petitioner failed to present any evidence that Respondent disciplined Petitioner, because he had expressed any concern about the licensure issue. Rather, the preponderance of the evidence established that Respondent disciplined Petitioner after Respondent had "countless interactions with" Petitioner in a somewhat progressive manner," but Petitioner's conduct "wasn't getting any better," and "appeared to actually be getting worse." (E.g., Tr. 94-97, 105, 142-45, 150-51)

22. At hearing, Petitioner explained how David Olson, at a meeting concerning a supervisor's retirement, asked Petitioner whether he planned to retire soon. At hearing, Olsen explained that he made that comment because he was concerned about staffing issues, and did not mean to offend Petitioner. Mr. Olson acknowledged that apologized to Petitioner after Petitioner told Olsen he was offended. (Tr. 145-48)

23. Petitioner did not present any credible evidence of age discrimination against him by Respondent. Mr. Olsen's one off-handed comment, standing alone, does not establish age discrimination, and does not evidence any discriminatory animus or intent. Furthermore, Petitioner did not present any evidence that age was a factor in Respondent's decision to suspend him. Nor did he present any evidence that age was a factor in any decision affecting the terms and conditions of his employment.

24. At hearing, Petitioner testified about two situations in which he felt he was placed in unsafe working conditions. In contrast, Respondent's witnesses credibly explained why those situations were not, in fact, unsafe. (E.g., Tr. 99-102, 150-52)

25. Petitioner alleged that he was denied training. Respondent's witnesses credibly testified at hearing that Petitioner received training, and that he was not improperly denied any training that he requested. (E.g., Tr. 102-03, 152-53)

26. In his petition for contested case, Petitioner asserted that he was denied a promotion. However, Petitioner did not offer any testimony that he was denied promotion or that he applied for any promotions. Respondent's witnesses credibly testified that Petitioner would not have been a candidate for promotion due to his poor interpersonal skills. (Tr. 104)

27. Tom Freshwater, David Olson, John Pollard, and Leanne Prete were credible witnesses. Key parts of their testimony were supported by written documentation.

28. In contrast, Petitioner's allegations were not supported by a preponderance of the evidence.

29. Respondent demonstrated with substantial evidence that Petitioner engaged in conduct for which no reasonable person should expect to receive a prior warning, and that violated known work rules concerning appropriate behavior. Because Petitioner was told several times to act in a civil manner, Petitioner's actions also constituted insubordination.

30. There were no significant mitigating factors to justify Respondent imposing a lesser sanction than a three day suspension.

31. Petitioner failed to present sufficient evidence that Respondent had an improper motivation for suspending Petitioner, or that Respondent made any improper considerations.

32. Petitioner's three-day suspension without pay was reasonably related to the seriousness of the offense, and Petitioner's record of service with the University.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the just cause issue in this contested case pursuant to Chapter 126 and Chapter 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. Petitioner was a career state employee at the time of his suspension. Because Petitioner is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent lacked just cause for suspension, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a Final Decision.

3. N.C. Gen. Stat. § 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. Gen. Stat. § 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 State employer may suspend an employee without pay for unacceptable personal conduct without any prior warning or disciplinary action. 25 N.C.A.C. 1J.0608(a). Unacceptable personal conduct includes “insubordination,” “conduct for which no reasonable person should expect to receive prior warning”; and “the willful violation of known or written work rules.” 15 NCAC 1J.0614(7); 25 N.C.A.C. 1J.0614(8)(a) & (d).

6. A sole instance of unacceptable personal conduct, by itself, constitutes just cause for discipline. *Hilliard v. N.C. Dep’t of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

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. The court in that case provided “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.” *Id.*

8. In the recent case of *Warren v. NC Dept. of Crime Control & Public Safety*, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012), 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 applying the *Warren* analysis to this case, the undersigned concludes that Respondent proved by a preponderance of the evidence that (1) Petitioner engaged in the alleged unacceptable personal conduct on April 19, 2013, and (2) Petitioner's conduct constituted "unacceptable personal conduct" as Petitioner's conduct was conduct for which no reasonable person should expect to receive a prior warning, conduct that willfully violated known or written work rules, and conduct constituting insubordination. 25 N.C.A.C. 1J.0614(8), 25 N.C.A.C. 1J.0614(8)m, 25 N.C.A.C. 1J.0614(7).

10. Respondent also proved by a preponderance of evidence that Petitioner's misconduct on April 19, 2013 amounted to just cause for a three day suspension. Petitioner's arguments to the contrary are without merit. Respondent followed all of the required procedures to suspend Petitioner for unacceptable personal conduct. There were no significant mitigating factors to justify Respondent imposing a lesser disciplinary action than suspension. Petitioner's suspension was reasonably related to the seriousness of the offense, and Petitioner's service with the University. Based on Petitioner's actions, and in light of his disciplinary history, the decision to suspend Petitioner was just.

11. Under N.C. Gen. Stat. § 126-34.1, Petitioner had the burden to prove Respondent discriminated against him, based on his age, by denying him a promotion and/or training. N.C. Gen. Stat. § 126-34.1. In this case, Petitioner failed to demonstrate with credible and substantial evidence that Respondent discriminated against him, based on his age, by denying him a promotion and/or training. Petitioner failed to establish that Respondent acted with any discriminatory animus based on Petitioner's age, or that Respondent exhibited any discriminatory animus against Petitioner that affected the terms and conditions of Petitioner's employment.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's decision to suspend Petitioner for three days without pay for engaging in unacceptable personal conduct.

NOTICE

Under the provisions of North Carolina General Statute 150B-456, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of 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. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was **served on the parties the date it was placed in the mail** as indicated by the date on the Certificate of

Service attached to this Final Decision. N.C. Gen. State § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47. The Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This _____ day of March, 2014.

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **FINAL DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

Daniel Dugan
5936 Saltaire Village Court
Wilmington, NC 28412
PETITIONER

Stephanie A. Brennan
Special Deputy Attorney General
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602
ATTORNEY FOR RESPONSENT

This the _____ day of March, 2014.

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-9001
Phone: 919-431-3000
Fax: 919-431-3100