STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 18255

Chris Edward Fidler, Petitioner, v. N.C. Department of Revenue, Respondent.	**FINAL DECISION**

THIS MATTER comes before the Honorable Donald W. Overby, Administrative Law Judge presiding, for consideration of Petitioner's Motion for summary Judgment filed with the Office of Administrative Hearings ("OAH") on April 4, 2014, as well as Respondent's response thereto filed with OAH on April 11, 2014 and Petitioner's response to Respondent's response filed with OAH on April 16, 2014. Having considered the respective filings of the parties and matters of record appropriate for consideration, the Court makes the following

CONCLUSIONS OF LAW

1. This matter is properly before the Office of Administrative Hearings for consideration.

2. Both parties contend in their respective submissions that there are no genuine issues of material fact. From the submissions there appears to be some question and disagreement of particular facts but the parties both contend that those facts do not impact the propriety of entry of summary judgment. Therefore, it is concluded that summary judgment is appropriate in this contested case.

3. Petitioner was dismissed from State service because of his use of a state issued cell phone for personal phone calls and texts. Respondent contends Petitioner's personal use of the state issued cell phone constitutes "Unacceptable Personal Conduct" ("UPC") as defined in 25NCAC 01 J .0614(8).

4. Petitioner is a "career state employee" as defined by N. C. Gen. Stat. § 126-1.1. As a career state, he could only be dismissed for "just cause." N. C. Gen. Stat. § 126-35; 25 NCAC 01J .0604.

5. UPC may be, among other things, "job related conduct which constitutes a violation of state or federal law; . . (or) the wilful violation of known or written work rules." 25NCAC 01 J .0614(8)(b)(d).

6. Although "just cause" is not defined by statute or rule, the words are to be accorded their ordinary meaning. Amanini v. Dep't of Human Resources, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining "just cause" as, among other things, good or adequate reason).

7. While "just cause" is not susceptible of precise definition, our courts have held that it is "a flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." NC DENR v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004).

8. In Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004), the Supreme Court 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 said that there is no bright line test to determine "just cause"—it depends upon the specific facts and circumstances in each case."

9. In Carroll, the Court went on to say that "not *every* violation of law gives rise to 'just cause' for employee discipline." In other words, not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline. *Id.* at 670, 599 S.E.2d at 901.

10. Further, the Supreme Court held that, "Determining whether a public employee had 'just cause' to discipline its employee requires two separate inquires: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes 'just cause' for the disciplinary action taken." NC DENR v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

11. In expounding on Carroll, the Court of Appeals in the Warren case articulates the tests that courts must consider in assessing whether or not discipline is proper and if so the degree of discipline. Warren establishes a commensurate discipline approach to discipline in North Carolina. It states:

> We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. 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. (Internal cites omitted.)

Warren v. N. Carolina Dep't of Crime Control & Pub. 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).

12. In this contested case both parties acknowledge that Petitioner did engage in the conduct alleged by Respondent; i.e., Petitioner did use a state issued cellular phone for his own personal and private use.

13. The second test under Warren is whether or not Petitioner's conduct falls within one of the categories of unacceptable personal conduct.

14. Respondent first contends that Petitioner's conduct is "job related conduct which constitutes a violation of state or federal law" and thus UPC. Respondent contends that Petitioner's actions are in violation of N. C. Gen. Stat. §14-91.

15. A person "violates" N. C. Gen. Stat. §14-91 when he or she "knowingly and willfully" misapplies or converts to his or her own use property of the state held in trust by that person. In this contested case, the only issue is whether or not Petitioner "knowingly and willfully" converted the property to his own use. Contentions by Petitioner that he did not otherwise deprive the State of the phones use and/or that there was no disruption in the performance of his job duties are without merit as to whether or not he violated the criminal statute.

16. A person acts "knowingly" when he or she is aware or conscious of what he or she is doing. A person does not act knowingly if he or she merely should have known.

17. "Knowing" or "knowledge" is not necessarily accomplished by establishing the existence of circumstances which cause the defendant to "reasonably believe" particular facts. "Knowledge connotes a more certain and definite mental attitude than reasonable belief, and whether knowledge is implied from circumstances sufficient to establish reasonable belief is a question for the jury." State v. Miller, 212 N.C. 361, 193 S.E. 388, 389 (1937)

18. In Underwood v. Board of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971), our Supreme Court noted:

> Knowledge means "an impression of the mind, the state of being aware: . . . It is usually obtained from a variety of facts and circumstances. [W]hen it is said that a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his

direction of it are such as to give him actual information concerning it." (Emphasis added.)

19. In State v. Stephenson, 218 N.C. 258, 10 S.E.2d 819 (1940), the Supreme Court explained "[t]he word 'knowingly' ... means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged." That definition has continuously and consistently been relied upon. See, *e.g.*, State v. Aguilar-Ocampo, 724 S.E.2d 117, 125 (N.C. Ct. App. 2012)

20. Respondent's reliance on State v. Pate, 40 N.C. App. 580, 583-84, 253 S.E.2d 266, 269 (1979) is not well founded. That case is based upon a violation of N.C. Gen. Stat. 14-90, the statute for embezzlement. That statute requires the defendant to either "fraudulently **or** knowingly and willfully" misapply or convert the property of his principle. (Emphasis added) That test is different from N.C. Gen. Stat. 14-91, which is only "knowingly and willfully."

21. In criminal cases North Carolina, unlike many other jurisdictions, does not accept the doctrine of "willful blindness" or the deliberate avoidance of the requisite knowledge. However, a defendant's reliance on the excuse of "I just didn't know" does not end the inquiry.

> Knowledge is a mental state that may be proved by offering circumstantial evidence to prove a contemporaneous state of mind. Jurors may infer knowledge from all the circumstances presented by the evidence. It "may be proved by the conduct and statements of the defendant, by statements made to him by others, by evidence of reputation which it may be inferred had come to his attention, and by [other] circumstantial evidence from which an inference of knowledge might reasonably be drawn." (Internal cite omitted.)

State v. Bogle, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

22. The applicable standard for whether or not Petitioner violated a state or federal law is NOT the standard applied in criminal cases of beyond a reasonable doubt. At this stage, the applicable standard is whether or not a preponderance of the evidence substantiates Petitioner's conduct violates the rule. While not equivalent, it is closely akin to the "probable cause" standard in criminal cases

23. There is sufficient circumstantial evidence to satisfy the standard articulated in Bogle from which it might be inferred that Petitioner had the requisite knowledge. This contested case is before the undersigned on summary judgment motion and both parties agree that there is no genuine issue as to material fact. As such, based upon the representations of the parties to this point, this "jury" can conclude that Petitioner "knowingly" violated N. C. Gen. Stat. §14-91.

24. The facts set out more particularly in paragraph 37 below are some of the facts from which it is concluded that Petitioner did "knowingly" engage in "job related conduct which constitutes a violation of state or federal law."

25. Respondent next contends that Petitioner's conduct was a "wilful violation of known or written work rules." (Emphasis added) The plain language of this rule establishes that there are two possible methods by which one might violate: violation of a known work rule, or, alternatively, violation of a written work rule. The use of "or" is a clear implication that the violation of a known work rule is not the equivalent of a written rule which does not require any actual knowledge.

26. "Willfulness" is not equivalent to knowledge. For an act to be willful, it is not necessary for the person to know that he or she is actually breaking the law.

27. A willful violation of known or written work rules occurs when an employee "willfully takes action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule." Teague v. N. Carolina Dep't of Transp., 177 N.C. App. 215, 222, 628 S.E.2d 395, 400 (2006), citing Hilliard v. N. C. Dept. of Correction, 173 N.C .App. 594, 620 S.E.2d 14.

28. Petitioner acknowledges that indeed such work rules exist. Petitioner acknowledges his personal use of the state owned cell phone violates such work rules.

29. Petitioner contends that such written work rules are buried deep within manuals and thus he did not have actual knowledge. In this instance, actual knowledge is not required.

30. Violation of known or written work rules is not equivalent to insubordination and does not require any further "reasonable and proper" instruction on the particular rules by a supervisor. Petitioner would yearly sign an acknowledgment that he was aware of and familiar with Respondent's policies and procedures.

31. There is no requirement that a supervisor or anyone in authority would have to have a face to face meeting with Petitioner and tell him of the prohibition on his personal use of the cell phone. Such a requirement would in essence require a supervisor to hold each employee's hand and go line by line through all policy requirements to insure that the employees understand every line. Such is untenable.

32. Petitioner's conduct was a "wilful violation of known or written work rules." Thus, the Petitioner's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code as set forth as the second requirement in Warren.

33. Upon finding unacceptable personal conduct, the final inquiry in the Warren analysis is determining whether the discipline imposed for that conduct was just. "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."

34. In "balancing the equities" and trying to determine what is just, or the "right" thing to do, one must look at the totality of the facts and circumstances as opposed to just looking coldly and blindly at whether or not Petitioner violated rules or policy.

35. Mitigating factors in the employee's conduct should be considered in this third prong. 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).

36. Petitioner's discipline-free employment history with Respondent is considered, as well as his excellent prior work history. Petitioner received overall ratings of "good" to "outstanding" performance reviews. He was Agent of the Year in 2008. Also by mitigation, when confronted in April 2013, Petitioner was honest and admitted his personal use of the state cell phone. Petitioner identified for Respondent personal calls made on the state phone.

37. In looking at the facts and circumstance pertinent to this contested case, to determine whether termination was "just" one must consider the following factors as well:

    a. Petitioner's use of the cell phone was discovered by Respondent in February 2013 after the phone bill showed that the allotted minutes on Respondent's plan had been exceeded. That had not happened before.

    b. All of the overage was attributable to Petitioner.

    c. The overage alone for January, February and March 2013, averaged in excess of 5,000 minutes. Those were the only months in which the usage had exceeded the entire unit's allotment. The average use by the other agents in 2012 was 755 minutes per month. The sheer magnitude of usage by Petitioner's personal use of the phone is astronomical, making his justification even more incredulous.

    d. Petitioner had not had a personal phone since January 2011. He had relied solely on the state phone as his personal phone since January 2011, in excess of two years prior to discovery.

    e. If Respondent had an unlimited allotment plan, it is unlikely the personal use would have been discovered, and certainly not at the time that it was discovered.

f. To calculate how much Petitioner owed the state in restitution, the Respondent only charged Petitioner the amount that the entire plan was over the allotment, in essence giving him credit for unused minutes by his fellow officers. He did not offer to pay any restitution during the months in which the total bill did not exceed the allotment.

g. In the three months in which there was an overage, Petitioner had 45 calls that were more than an hour but less than two hours and 12 calls that were in excess of two hours. All of these calls were personal calls and many of them were made during Petitioner's work hours. It is incredible to believe that he saw nothing wrong with this.

h. Petitioner was told directly by a supervisor that texting was not allowed on the plan; however, he admits to texting anyway. He did not pay any restitution for the texting charge.

i. The only restitution Petitioner paid was by the calculated amount being withheld from his last pay check. Petitioner did not volunteer to pay before that, nor has he paid or offered to pay any amount since.

j. Petitioner did not pay or offer to pay full restitution, even though no number was ever tendered to him. He profited greatly by the method of calculating how much he was to pay as restitution for the overage.

k. Petitioner profited greatly from not having to pay for a personal phone, especially in light of the number of minutes he was using. He knew that a personal phone bill was an expense he no longer had.

l. Petitioner was a sworn law enforcement officer with a sworn duty to uphold the laws of this state and the United States. He was aware that other officers in his unit carried two phones, one state phone and one personal phone.

m. Aside from any knowledge attributable to being a law enforcement officer, applying a test of reasonableness, Petitioner should have known that using the phone for personal use was improper. Even those of lessor statue and education know to not take from the boss. A test of reasonableness would have told him talking with a friend on a state phone in excess of two hours was not proper.

n. Petitioner's justification that he simply did not want to carry, tend to and charge two separate phones is without merit.

38. The facts and circumstances of this contested case are distinguishable from the cases cited by Petitioner.

39. One act of unacceptable personal conduct can present just cause for any discipline of an employee, up to and including dismissal.

40. Based upon the facts and circumstances of this contested case, just cause exists to discipline the Petitioner and the "just" discipline for Petitioner is that he be dismissed and his termination upheld.

DECISION

Based upon the foregoing Findings of Fact and Conclusion of Law the Respondent's decision to terminate Petitioner's employment is **AFFIRMED** on the basis that Petitioner violated a State law and he violated a written work rule which constituted 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.

IT IS SO ORDERED.

This the 22nd day of August, 2014.

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Donald W. Overby
Administrative Law Judge