

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 OSP 07837

FINAL DECISION

APPEARANCES

RESPONDENT: Tamika L. Henderson
Assistant Attorneys General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27609

Joseph Tenhagen

Vicky Lynn Stone
Jack Richard Haridister, Jr.
Lawrence Parsons
Todd Wayne Pinion

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1-10 and 12 were admitted into evidence.

Respondent's exhibits ("R. Exs.") 1-4 and 6-17 were admitted into evidence.

PARTY REPRESENTATIVES

The Petitioner's party representative was Petitioner, Joseph Tenhagen.

The Respondent's party representative was Lawrence Parsons.

ISSUES

Whether Respondent had just cause to dismiss Petitioner?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact and Conclusions of Law. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

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

FINDINGS OF FACT

1. Petitioner commenced his employment with the North Carolina Department of Public Safety ("NCDPS") in 2006 as a Correctional Officer. (R.Ex.6;Tr.pp.13-14).
2. Petitioner attended Basic Training and was trained annually thereafter regarding NCDPS policies and procedures. (Tr.p.14).
3. On or about January 10, 2014 Petitioner was employed as a Correctional Officer at Albemarle Correctional Institution ("Albemarle"). (R.Ex.6;Tr.p.14).
4. On January 10, 2014 Petitioner had four active written warnings. Petitioner received a written warning on February 25, 2011 for Grossly Inefficient Job Performance for

failing to remain alert on his work post. (R.Ex.1;Tr.pp.15-16). Petitioner received a second written warning on February 20, 2012 for Unacceptable Personal Conduct for calling a co-worker a name that the co-worker perceived as offensive. (R.Ex.2;Tr.pp.18). Petitioner received a third written warning on March 14, 2013 for Grossly Inefficient Job Performance for not remaining on his work post. (R.Ex.3; Tr.pp.18-19). Petitioner received a fourth written warning on January 9, 2014 for Unacceptable Personal Conduct for horseplay. (R.Ex.4;Tr.p.21).

5. When Petitioner began working as a Correctional Officer at Albemarle, Vickie Stone also was a Correctional Officer, the same rank as Petitioner. In 2013, both Petitioner and coworker Vickie Stone applied for a Correctional Sergeant position. Ms. Stone was promoted to the higher rank of Correctional Sergeant and Petitioner remained in the lower rank of Correctional Officer. (Tr.pp.85-86).

6. On January 10, 2014, Petitioner was assigned to Perimeter Patrol duty. A Correctional Officer assigned to Perimeter Patrol duty is responsible for patrolling the outer perimeter of the prison to protect against escape attempts, contraband or assault attempts. Petitioner concedes that it is an important post that affects prison security. (R.Ex.12-13; Tr.pp.23-24;104).

7. Petitioner was trained on and understood Albemarle's Standard Operating Procedures regarding Security and Control, Perimeter Security, and Perimeter Patrol Officers. (R.Ex.14;Tr.pp.24-26).

8. Albemarle's Standard Operating Procedures regarding Perimeter Security provide that a Perimeter Patrol Officer needing relief contacts the Gatehouse Officer to arrange relief. The policy provides that relief will be coordinated by the Sergeant assigned to the post of Master Control and Gatehouse and the Perimeter Patrol Officer will not stop the vehicle until relief is present. (R.Ex.12).

9. On January 10, 2014, when Petitioner was assigned to Perimeter Patrol Duty he was under the command of Sergeant Stone. (Tr.pp. 27).

10. At some point during his patrol duty, Petitioner stopped the vehicle in which he was patrolling in order to ascertain whether or not anyone was available to relieve him. (Tr.pp.30,53). Sergeant Stone saw Petitioner stop his vehicle and ordered him to continue to patrol. (R.Ex.6,p.00170;Tr.pp.72-73). It was a very foggy night which creates a security risk and Sergeant Stone wanted continuous roving. (Tr.pp.104-106). Petitioner became irate and yelled at Sergeant Stone that he had been patrolling for two hours and it was time for him to be relieved. (R.Ex.6;Tr.pp.108-109,115-116). In a written statement, Petitioner states that "I told her that my fucking relief was coming out the door." (R.Ex.6,p.000171)

11. Although Petitioner denies using profanity during this exchange, Petitioner testified that "I told her my friggin' relief was coming out the front door right now." He concedes that this language is derogatory. (Tr.p.231).

12. Sergeant Stone and Correctional Officer Jack Hardister heard Petitioner use profanity during this exchange. (R.Ex.6,pp.159,186;Tr.pp.109-110,156).

13. The Undersigned finds as fact that Petitioner directed profanity toward a superior officer during this exchange.

14. Petitioner concedes that he disobeyed Sergeant Stone's initial order for him to continue to patrol. (Tr.pp.29,55).

15. Sergeant Stone gave Petitioner another direct order to get back in his vehicle and patrol until he was called to be relieved. After being directed again, Petitioner did continue to patrol.

16. The Undersigned finds as fact that Petitioner willfully failed to follow a clear oral directive given by his superior officer.

17. NCDPS is a para-military organization which operates on a chain of command; the operation and safety of the prison is dependent upon employees following directives. (Tr.pp.192).

18. Petitioner testified that he can question an order of a superior officer if he believes that his superior officer does not have all of the relevant information. (Tr.pp.255-57,269).

19. Petitioner testified that he does have the authority to override a sergeant's orders. (Tr.p.270).

20. On January 11, 2014, Petitioner was working in Albemarle's master control room which controls entrances and exits to the prison, including the master control room. It is possible to enter and exit the master control room only if the officer "buzzes" you in or out. (Tr.pp.33-34).

21. Sergeant Stone came to the master control room to discuss Petitioner's behavior from the previous day with him and that disobeying her orders was not acceptable.

22. Petitioner testified that he told Sergeant Stone that "she didn't have to fucking micro-manage a bunch of adults." (R.Ex.6,p.000165;T.pp.35,239-240).

23. At that point, Sergeant Stone said that she was done with the conversation and asked that Petitioner buzz her out. Initially, Petitioner did not buzz her out. Sergeant Stone had to give Petitioner a direct order more than once before he obeyed her command to let her out of the master control room. (Tr.pp.36-37,110-113).

24. Although he describes the incident differently, Petitioner testified that he recalls Sergeant Stone asking him twice before he buzzed her out the door. (Tr.pp.241-243)

25. The Undersigned finds as fact that Petitioner willfully delayed following a clear oral directive given by his superior officer.

26. Petitioner admits to stating that unless he committed a felony, NCDPS couldn't do anything to him because he had an open workers compensation claim. (R.Ex.6,p.000173; Tr.pp.39-40).

27. The Undersigned finds as fact that Petitioner believed that he could behave inappropriately at work without consequence.

28. NCDPS's Professional Standards Office conducted an investigation into Petitioner's conduct and submitted a report to NCDPS management. (R.Ex.6).

29. Petitioner was timely provided notice of a predisciplinary conference which was held on April 15, 2014. (R.Exs.7&10;Tr.pp.41-42). Petitioner was given the opportunity to speak and submit a written statement in which he admits to saying "freaking gatehouse" to Sergeant Stone on January 10 and to saying "one curse word during the conversation" with Sergeant Stone on January 11. He claims that he did not intend to be disrespectful, but "it was just one of those cases where the mouth works before the brain really gets moving." (R.Ex.8,p.125)

30. In January 2014, Todd Pinion was employed by NCDPS as the Regional Director of the Piedmont Region. In that position, he had oversight of twelve prison facilities including Albemarle. (Tr.pp. 188-189.)

31. Regional Director Pinion received and reviewed the Investigation report and consulted with his superiors at NCDPS prior to imposing discipline on Petitioner. He also considered the information Petitioner provided to DPS during his pre-disciplinary conference, the statements Petitioner made to DPS during the internal investigation, and the statements of other employees gathered during the internal investigation. (Tr.pp.190-191). In deciding on the level of discipline to impose on Petitioner, he considered Petitioner's years of service and his active written warnings. (Tr.pp.191).

32. Petitioner was dismissed on June 5, 2014 for Unacceptable Personal Conduct as defined as insubordination, the willful violation of know or written work rules, conduct unbecoming a State employee that is detrimental to State service, and conduct for which no reasonable person should expect to receive prior warning. (R.Ex.11).

33. Petitioner appealed his dismissal to the Employee Advisory Committee and gave a written statement in which Petitioner stated that in the incident on January 10, he told Sergeant Stone "that my relief was coming out the freaking door" and that on January 11 he told her that "she was fucking micro-managing." (R.Ex.15).

34. The Employee Advisory Committee affirmed Petitioner's dismissal in a Final Agency Decision entered on September 3, 2014. (R.Ex.16;T.p.49).

CONCLUSIONS OF LAW

1. All parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. 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 continuously employed as a State employee since 2006. At the time of his dismissal, he was a Career State Employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the just cause provision of N.C. Gen. Stat. §126-35.

3. Because Petitioner has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue the final decision in this matter.

4. Pursuant to N.C. Gen. Stat. § 126-35(d), in an appeal of a disciplinary action, the employer bears the burden of proving that “just cause” existed for the disciplinary action.

5. To demonstrate just cause, a State employer may show “unacceptable personal conduct” 25 N.C.A.C. 1J.0604(b)(2) or “grossly inefficient job performance” 25 NCAC 1J.0606.

6. The dismissal letter specified that the Petitioner was being dismissed for Unacceptable Personal Conduct.

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

8. An employer may discipline an employee for just cause based upon one instance of unacceptable personal conduct. 25 N.C.A. 1J.0604(b).

9. Section 126-35 does not define “just cause”, “however the words are to be accorded their ordinary meaning.” *Amanini v. Dep’t of Human Resources*, 114 N.C. App. 668, 678 – 679, 443 S.E.2d 114, 120 (1994) (defining “just cause” as, among other things, good and adequate reason).

10. Just cause 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 Dep’t. of Env’t & Natural Res. V. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). A determination of whether disciplinary action taken was “just” requires “an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” Id.

11. The North Carolina Court of Appeals articulated a three-part “analytical approach” for determining where there is just cause for discipline, to wit: “...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 in the Administrative Code; ... [and third] If the employee's act qualifies as a type of unacceptable personal conduct ... 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. North Carolina Dep’t of Crime Control & Public Safety, N. Carolina Highway Patrol*, 221 N.C. App. 376, 383, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) *review denied*, 735 S.E.2d 175 (N.C. 2012).

Did Petitioner engage in the conduct as alleged?

12. The preponderance of the evidence shows that Petitioner engaged in the conduct alleged by Respondent. He admitted that he did not obey a direct command from his supervisor on January 10, 2014 when she ordered him to continue to patrol the perimeter of the prison. Likewise, he did not obey a direct command from his supervisor on January 11, 2014 when she ordered him to buzz her out of Master Control.

13. The preponderance of the evidence also demonstrates that Petitioner used profane language when talking with his supervisor on both January 10 and January 11, 2014.

Does Petitioner’s conduct fall into one of the categories of unacceptable personal conduct?

14. NCDPS dismissed Petitioner for conduct unbecoming a State Employee that is detrimental to State service, conduct for which no reasonable person should expect to receive prior written warning, and for insubordination.

15. The next step in the *Warren* analytical process is whether the behavior falls into one of the categories of unacceptable personal conduct as defined by 25 N.C.A.C. 1J.0614(1) such as:

- (a) conduct for which no reasonable person should expect to receive prior warning;
- (b) the willful violation of known or written work rules;
- (c) conduct unbecoming a state employee that is detrimental to state service.

16. Any one of the types of unacceptable personal conduct identified above is sufficient to constitute just cause.

17. “The State Employee's Handbook defines insubordination as the refusal to accept a reasonable and proper assignment from an authorized supervisor.” *Mendenhall v. Department of Human Resources*, 119 N.C. App. 644, 651 (1995); and *see Employment Security Commission v. Lachman*, 305 N.C. 492, 506, 290 S.E.2d 616, 624–625 (1982); 25 NCAC 01J.0614(7). The refusal which is the basis of the offense must be a willful refusal, *Id.*, *Kandler v. Department of Correction*, 80 N.C.App. 444, 451, 342 S.E.2d 910, 914 (1986), and the reasonableness of the assignment must

be determined in light of the relative circumstances existing at the time of the incident, *Lachman*, 305 N.C. at 506, 290 S.E.2d at 624–625, and in light of the employee's reasonable perception of those circumstances. *Kandler*, 80 N.C.App. at 451. What constitutes a “reasonable” action by Petitioner is necessarily a subjective determination. *See, e.g., Mendenhall*, 119 N.C. App. At 651. Therefore, insubordination involves two elements: (1) A reasonable and proper assignment by an authorized supervisor; and (2) A willful or intentional refusal to comply with such instruction or assignment.

18. Insubordination is unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior written warning. 25 NCAC 01J.0614(7).

19. Sergeant Stone had the authority to direct Petitioner to continue to patrol the perimeter of the prison. The directive was reasonable and proper under the circumstances, and Petitioner willfully refused to comply with Sergeant Stone’s instructions. Petitioner’s refusal was not reasonable.

20. Sergeant Stone had the authority and it was within her appropriate job duties to counsel Petitioner regarding his insubordination on January 10, 2014. It was also reasonable for Sergeant Stone to end the conversation when Petitioner directed profanity toward her and to order Petitioner to buzz her out of the master control room. Petitioner willfully refused to comply with Sergeant Stone’s instructions. Petitioner’s refusal was not reasonable and it is of no consequence that Petitioner eventually complied.

21. The Petitioner’s conduct as found herein on January 10 and January 11 constitutes insubordination.

22. Petitioner’s insubordination and directing profanity toward his supervisor constitutes conduct unbecoming a State Employee that is detrimental to State service and conduct for which no reasonable person should expect to receive prior written warning.

Did Petitioner’s misconduct constitute just cause for dismissal?

23. Respondent had four active written warnings at the time of his conduct. *See* 25 NCAC 01J.0614(6)(c). Respondent properly considered Petitioner’s active written warnings when ascertaining the level of discipline.

24. Respondent could have properly been dismissed for his insubordination on January 10 and January 11 without prior written warning. 25 NCAC 01J.0614(7).

25. Respondent met its burden of proof and established by substantial evidence in the record that it had just cause to dismiss Petitioner for unacceptable personal conduct for the reasons stated in the pre-disciplinary conference notice and the discharge letter.

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

DECISION

The Undersigned affirms Respondent's decision to dismiss Petitioner in that Respondent had just cause for this disciplinary action pursuant to N.C. Gen. Stat. § 126-35.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statutes § 126-34.02(a): "An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing." In conformity with the Office of Administrative Hearings' Rules, 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.

This the 23rd day of March, 2015.

Selina M. Brooks
Administrative Law Judge