

## OFFICE OF ADMINISTRATIVE HEARINGS

# ANSON COUNTY

**15 OSP 1203**

**EDWARD LITTLE**

## Petitioner

**V**

**NC DEPARTMENT OF  
PUBLIC SAFETY**

## Respondent

## FINAL DECISION

This matter coming on to be heard and being heard June 16, 2015 in High Point, North Carolina, the Petitioner being represented by attorney Mr. Kirk J. Angel, and the Respondent was represented by Assistant Attorney General Yvonne B. Ricci, and based upon the evidence presented and the arguments of counsel, the undersigned makes the following findings of fact:

1. Petitioner is a citizen and resident of Anson County, North Carolina, and was employed at Brown Creek Correctional Institution as an Assistant Correctional Superintendent for Custody and Operations III.
2. Respondent is the state agency which operates Brown Creek Correctional Institution.
3. Petitioner has been employed with Respondent in various capacities and positions since November, 1991, and qualifies as a career state employee.
4. On October 13, 2014, Petitioner was demoted from Assistant Correctional Superintendent to a Correctional Officer.
5. The demotion, based on Unacceptable Personal Conduct, reduced Petitioner from pay grade 74 to pay grade 62.
6. Monetarily, the demotion reduced Petitioner's pay from \$55,211.00 to \$45,099.00.
7. Petitioner appealed the demotion internally, but said appeal was denied.
8. Petitioner received notification his appeal was denied on January 20, 2015, and timely filed a Petition for a Contested Case Hearing in the above-captioned matter.

9. On May 1, 2014, a committee at Scotland Correctional Institution conducted interviews for a vacant Assistant Superintendent of Custody/Operations I position.

10. The three-member panel included Ms. Katy Poole, Region Operations Manager, Ms. Mary Locklear, Assistant Superintendent of Programs at Lumberton Correctional Institution, and the petitioner.

11. One of the applicants interviewed for the position was a captain with the initials, C.C.

12. C.C. was rated "Excellent" on his responses to the interview questions.

13. C.C.'s interview rating sheets were superior to the other four applicants', and some of his responses were similar to the Respondent's benchmark answers.

14. In fact, Central Region Director for the Division of Prisons, Mr. J.C. Huggins, testified that C.C.'s responses were "almost verbatim to what the benchmark responses were for the questions." (Tr. p119).

15. Ms. Poole stated that she had interviewed C.C. previously, and he had never scored better than "average" in an interview.

16. Ms. Poole also stated that in her twenty years interviewing applicants, she could not recall an applicant who scored "excellent."

17. Concerns were raised that the interview process had been compromised, and Mr. Huggins ordered the interview committee to conduct a second round of interviews.

18. On May 12, 2014, the same five applicants were interviewed, but different questions were used to evaluate the candidates.

19. The three-member panel for these interviews consisted of Ms. Poole, the petitioner, and Mr. Larry Thompson, Assistant Superintendent of Custody/Operations at Tabor Correctional Institution.

20. C.C.'s responses to the new questions were determined to be "Below Good" during the May 12, 2014 interview.

21. Respondent launched an investigation following this interview to determine if, in fact, the May 1, 2014 interview had been compromised.

22. The Petitioner was interviewed on June 26, 2014 in connection with the investigation.

23. Petitioner was informed that the investigation was related to the possible compromise of the Assistant Superintendent of Custody and Operations I interview.

24. Petitioner signed an acknowledgment that the questioning related to “performance of official duties and/or personal conduct” and that his answers could be “used against him in an administrative or disciplinary action.” (Respondent’ Exhibit 1).

25. Petitioner also acknowledged that he had to provide “complete and accurate information,” and that he was not to discuss the investigation with any other employee, or he could be disciplined, to include dismissal. (Resp. Ex. 1)

26. Petitioner told the investigators that he had not provided C.C. with the questions or answers for the interview. (T. pp. 14 - 15; Resp. Ex. 1.).

27. As set forth below, this information was not accurate.

28. Following his interview with investigators, Petitioner reviewed his emails and found an email containing the questions and answers which he had forwarded to C.C.

29. Petitioner did not notify anyone associated with the investigation that the information he had provided was not accurate.

30. Following this interview, Petitioner told Correctional Administrator Sorrell Saunders that he had forwarded the email to C.C which included the interview questions and benchmark answers.

31. Mr. Saunders instructed Petitioner to inform investigators that he had forwarded the interview questions and benchmark answers to C.C.

32. On July 9, 2014, Petitioner provided another written statement to investigators in which he stated that he and C.C. had spoken about a week following his receipt of the interview questions.

33. Prior to providing information to investigators in this statement, Petitioner again acknowledged that his answers could be “used against him in an administrative or disciplinary action.” (Resp. Ex. 2).

34. Petitioner also acknowledged that he had to provide “complete and accurate information,” and that he was not to discuss the investigation with any other employee, or he could be disciplined, to include dismissal. (Resp. Ex. 2).

35. In his written statement, the Petitioner indicated that he “told [C.C.] there was information on the application he could use as well as information I had gave him ... for interview purposes.” (Resp. Ex. 2).

36. Petitioner also testified that he and C.C. talked “about questions and different things that would be on the interview -- on past interviews.” (Tr. p20).

37. By forwarding this email to C.C., Petitioner provided confidential information regarding the interview to an individual who was scheduled to appear as an applicant for the position which was being filled.

38. Petitioner acknowledges that he sent the interview questions to C.C., and his contention that he did not intend to forward this particular information to C.C. is not credible.

39. Petitioner was copied on an email forwarded from Correctional Administrator Sorrell Saunders to Mr. J. Huggins and Ms. Melanie Wood on April 9, 2015.

40. The original email to Mr. Saunders was from Ms. Geraldine Lewis, an Administrative Services Manager with the North Carolina Department of Public Safety.

41. Ms. Lewis indicated in her original email that the "5-Tier Interview Questions" were included as attachments. (Resp. Ex. 4).

42. In addition, the email forwarded from Mr. Saunders to Petitioner lists "5-Tier Interview Questions" as an attachment. (Resp. Ex. 4).

43. The "5-Tier Interview Questions" attachment included the interview questions and benchmark answers. (Tr. p86).

44. Mr. Huggins received and reviewed the written investigation prepared by investigators.

45. Mr. Huggins recommended disciplinary action for Petitioner up to and including dismissal. (Tr. p121).

46. Mr. Huggins along with other decision makers initially considered dismissal of the Petitioner from his employment with the Respondent because he had disclosed confidential information and hindered the internal investigation, but in part because of the Petitioner's years of service and his prior overall job performance ratings, the decision was made to recommend the demotion of the Petitioner to a correctional officer for unacceptable personal conduct. (Tr. pp. 120 - 122, 131.)

47. Respondent ultimately determined that demotion was appropriate given Petitioner's history with the department, but lesser punishment was determined not to be appropriate given the severity of Petitioner's actions. (Tr. p122).

48. On September 24, 2014, Respondent mailed Petitioner a Notification of Pre-Disciplinary Conference which set forth the allegations against him, specifically that the Petitioner had provided interview questions and benchmark answers to C.C., given inaccurate information to the investigator assigned to his case, and had discussed the ongoing investigation with Mr. Saunders.

49. The September 24, 2014 letter also stated that Pre-Disciplinary Conference would be held on October 9, 2014, at 9:00 am in the South Central Region Office, and gave the Petitioner the option to participate in person or by phone.

50. A Pre-Disciplinary Conference was held on October 9, 2014, and the Petitioner attended said conference.

51. On October 13, 2014, Petitioner was notified by letter that he was demoted to the position of Correctional Officer for Unacceptable Personal Conduct. (Resp. Ex. 18).

52. The demotion letter indicated that the recommendation for demotion was approved in part because the Petitioner's "willful violation of the Merit-Based Hiring policy compromised the integrity of the employee selection process." Further, Petitioner compromised an ongoing internal investigation by contacting Sorrell Saunders, knowing that he was not to discuss the investigation with anyone, and the Petitioners' failure "to provide accurate information, thereby failing to cooperate and hindering the investigation." (Resp. Ex. 18).

53. In addition to providing notice to the Petitioner of his appeal rights, the October 13, 2014 letter notified Petitioner that the demotion would reduce his pay grade from 74 to pay grade 62, and that his pay would be reduced from \$55,211.00 to \$45,099.00.

54. The Final Agency Decision upholding the demotion was issued on January 13, 2015. Specifically, the Employee Advisory Committee found that the Petitioner had willfully violated the Merit-Based Hiring policy in compromising the employee selection process, compromised an internal investigation, failed to cooperate with an investigation, and hindered an investigation. (Resp. Ex. 19).

55. The Merit-Based Recruitment and Selection Policy is set forth in the Respondent's Human Resources Manual, HR 0.1. This policy clearly states that employment decisions are to be made impartially and without preferential treatment. (Resp. Ex. 20, p1).

56. The policy further provides that records for the selection process are to be confidential. (Resp. Ex. 20, p12).

57. Petitioner violated the Merit-Based Recruitment and Selection Policy of the North Carolina Department of Public Safety.

58. Unacceptable Personal Conduct includes "conduct for which no reasonable person should expect to receive prior warning; . . . the willful violation of known or written work rules; conduct unbecoming a state employee that is detrimental to state service[.]" (Resp. Ex. 22, p3); 25 N.C.A.C. 01J .0614(8)(a) (d) and (e).

59. Unacceptable Personal Conduct is similarly defined in the Department of Corrections personnel manual. (Resp. Ex. 22).

60. DOC's personnel manual provides examples of unacceptable personal conduct, including the "[b]etrayal of confidential information" and failing to cooperate with an investigation. (Resp. Ex. 22).

61. Petitioner engaged in unacceptable personal conduct by forwarding the email containing interview questions and benchmark answers to C.C.

62. Petitioner engaged in unacceptable personal conduct by discussing an ongoing investigation when he knew he was not permitted to do so, and signed a statement acknowledging the same.

63. Petitioner engaged in unacceptable personal conduct by failing to provide accurate information during the June 26, 2014 interview with investigators.

Based upon the foregoing findings of fact, the undersigned concludes as a matter of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein.

2. Both parties were properly noticed for hearing.

3. Any findings of fact that contain conclusions of law, or any conclusions of law that are findings of fact should be so considered without regard to the given labels.

4. At the time of his demotion, Petitioner was a career state employee as defined by Chapter 126 of the North Carolina General Statutes, and was entitled to the protections of the North Carolina Personnel Act and the administrative regulations promulgated thereunder.

5. N.C. Gen. Stat. § 126-35(a) provides that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause."

6. In an employee's appeal of 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).

7. N.C. Gen. Stat. § 126-35(a) does not define the term "just cause."

8. Just cause has been defined by our appellate courts as, among other things, good or adequate reason. *Amanini v. Dep't of Human Resources*, 114 N.C. App. 668 (1994).

9. 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." *N.C. Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 669 (2004) (internal citations omitted).

10. The proper inquiry in determining whether the discipline imposed was just, based on the facts and circumstances, is to consider, if the employee engaged in the alleged conduct, whether that conduct meets the definition of unacceptable personal conduct, and if so, whether the misconduct provides the requisite just cause for the action taken by the employer? *Warren v. North Carolina Dep't of Crime Control & Public Safety, N. Carolina Highway Patrol*, 221 N.C. App. 376, (2012).

11. A preponderance of the evidence shows Petitioner did engage in the conduct alleged by his employer when he forwarded the e-mail containing the interview questions and benchmark answers to C.C.

12. In addition, Petitioner failed to acknowledge in June 26, 2014 interview with investigators that he had forwarded the interview questions and benchmark answers to C.C.

13. In addition, Petitioner admitted to talking with Mr. Sorrell Saunders about the internal investigation.

14. 25 N.C.A.C. 01J .0604(b)(2) establishes that unacceptable personal conduct is a basis for just cause.

15. 25 N.C.A.C. 1J .0614(8) defines "Unacceptable personal conduct" as:

- a. Conduct for which no reasonable person should expect to receive prior warning;
- b. Job related conduct which constitutes a violation of state or federal law;
- c. Conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts an employee's service to the state;
- d. The willful violation of known or written work rules;
- e. Conduct unbecoming a state employee that is detrimental to state service;
- f. The abuse of a clients, patients, students or a person over whom the employee has a charge or to whom the employee has a responsibility or an animal owned by the state;
- g. Absence from work after all authorized leave credits and benefits have been exhausted; or
- h. Falsification of a state application or employment documentation.

16. An employee need not intend for his conduct to violate a work rule for a willful violation to occur. See *N.C. Dep't of Corr. v. McNeely*, 135 N.C.App. 587, 592–93 (1999); *Hilliard v. N. Carolina Dep't of Correction*, 173 N.C. App. 594, 597 (2005).

17. Petitioner's conduct falls within a category of unacceptable personal conduct as he violated the provisions of the Respondent's Merit-Based Recruitment and Selection process by failing to maintain the confidentiality of the interview materials.

18. Petitioner's actions are such that no reasonable person would expect to receive prior warning, a willful violation of known or written work rules, and conduct unbecoming a state employee that is detrimental to state service.

19. Petitioner was or should have been aware of the Respondent's policies related to maintaining confidentiality in the employee selection process.

20. Petitioner's conduct in forwarding the email to C.C. which contained interview questions and benchmark answers amounts to just cause for the disciplinary action taken, i.e. demotion.

21. Petitioner knew, or should have known, the contents of the email before he forwarded the same to C.C. The attachment was clearly identified as "5-Tier Interview Questions." A reasonable person with the same or similar experience as the Petitioner would have at the very least exercised a greater degree of caution in receiving and transmitting such information.

22. Further, the mere title of the attachment, "5-Tier Interview Questions" should have placed the Petitioner on notice that the attachment contained interview questions.

23. Especially given the fact that the title "5-Tier Interview Questions" appeared twice in the email, Petitioner had a duty to know and understand the contents of the email before he forwarded the same to anyone, let alone an applicant for the position the interview questions applied.

24. Petitioner willfully violated a known work rule in forwarding the email to C.C.

25. An employer may discipline an employee for just cause based upon one instance of unacceptable personal conduct.

26. Petitioner's action in forwarding confidential information to C.C. is sufficient, standing alone, to constitute unacceptable personal conduct for which Respondent could discipline the Petitioner.

27. Petitioner, however, also engaged in unacceptable personal conduct when he discussed the ongoing internal investigation with Mr. Saunders.

28. Said action is conduct for which no reasonable person should expect to receive prior warning, a willful violation of known or written work rules, and conduct unbecoming a state employee that is detrimental to state service.

29. Petitioner's conduct in discussing the ongoing investigation with Mr. Saunders amounts to just cause for the disciplinary action taken, i.e. demotion.

30. In addition, Petitioner's conduct rose to the level of unacceptable personal conduct when he failed to provide accurate information in his original statement to investigators.



31. Said action is conduct for which no reasonable person should expect to receive prior warning, a willful violation of known or written work rules, and conduct unbecoming a state employee that is detrimental to state service.

32. Petitioner's conduct in failing to provide accurate information amounts to just cause for the disciplinary action taken, i.e. demotion.

33. Respondent met its burden of proof and established by substantial evidence that just cause existed to demote Petitioner for unacceptable personal conduct.

34. Petitioner's action in compromising the interview adversely affected the hiring process of the North Carolina Department of Public Safety. Not only did Respondent have to utilize additional time and resources to ensure the integrity of the hiring process by conducting additional interviews for applicants, but Respondent was forced to engage in a prolonged investigation because the Petitioner refused to provide accurate information when requested.

35. In addition, Petitioner was aware that he was not permitted to discuss an ongoing investigation, and the facts clearly demonstrate that Petitioner discussed the investigation with Mr. Saunders. Petitioner's action had the potential to further delay and compromise the internal investigation.

36. Balancing the equities, the nature and severity of the employee's offense, among other things, determines what form of discipline is appropriate. See *Warren* at 923. Central Region Director Huggins concluded that a lesser form of discipline, including either a coaching or written warning would not be sufficient due to the seriousness of the nature of the conduct engaged in by Petitioner by providing confidential interview questions and benchmark answers to C.C.

37. But for Petitioner's history of service with the Respondent, Petitioner would have been dismissed.

38. Substantial evidence exists that Respondent had just cause to demote the Petitioner for unacceptable personal conduct.

39. Procedurally, the Respondent complied with the requirements for demotion for unacceptable personal conduct set forth in 25 N.C.A.C. 01J .0613.

40. Respondent is required to conduct a Pre-Disciplinary Conference pursuant to 25 N.C.A.C 01J .0613(3)(c), which the Respondent did on October 9, 2014. Petitioner was given advanced notice in writing of the Pre-Disciplinary Conference, which included the time, date, and location of said conference, along with the issues that provided the basis for dismissal.

41. Respondent also provided Petitioner with written notice of the specific acts and omissions which led to his demotion in the October 13, 2014 letter as required by 25 N.C.A.C 01J .0613(3)(d).

42. The October 13, 2014 letter also advised the Petitioner how the demotion would impact his salary and pay grade, and provided information regarding his appeal rights as required by 25 N.C.A.C. 01J .0613(3)(e) and (f).

Based upon the foregoing findings of fact and conclusions of law, the Respondent had just cause for the disciplinary action taken in this matter pursuant to N.C. Gen. Stat. §126-35, and the Petitioner's claims are denied.

### **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 4th day of September, 2015.

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Philip E. Berger, Jr.  
Administrative Law Judge