STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
15OSP02299

Samuel Avery Furlow Petitioner v. N C Department Of Public Safety (Polk Correctional Institution) Respondent	**FINAL DECISION GRANTING SUMMARY JUDGMENT FOR RESPONDENT**

THIS MATTER is before the undersigned on Respondent's Motion for Summary Judgment, filed July 10, 2015, pursuant to Rule 56 of the N.C. Rules of Civil Procedure.

Petitioner Samuel Furlow, a "career state employee" within the meaning of N.C. Gen. Stat. § 126-1.1, alleged in his Petition initiating this contested case that he was "discharged without just cause" on December 4, 2014 for "unacceptable personal conduct," consisting of the use of "excessive force" on an inmate at Polk Correctional Institution (hereinafter, "Polk"), a constituent facility of Respondent NC Department of Public Safety, Division of Prisons, where he was employed by Respondent as a Correctional Case Manager.

As a career state employee, Petitioner may not be discharged, suspended, or demoted for disciplinary reasons without "just cause." N.C. Gen. Stat. § 126–35.

> [W]hether a State agency had just cause to discipline an employee requires three inquiries: (1) whether the employee engaged in the conduct the employer alleges; (2) whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the North Carolina Administrative Code [set out in 25 NCAC 1J .0614(8), cited *infra*.]; and (3) whether that unacceptable personal conduct amounted to just cause for the disciplinary action taken.

Bulloch v. N.C. Dept. of Crime Control & Pub. Safety, 223 N.C. App. 1, 5, 732 S.E.2d 373, 377 (2012). There are no allegations that Respondent failed to take the administrative steps required by N.C. Gen. Stat. §§ 126-35 and 126-34.01.

"It is not the purpose of [Rule 56] to resolve disputed material issues of fact[,] but rather to determine if such issues exist." Official Comment to N.C. Gen. Stat. § 1A-1, Rule 56. Regardless of disagreements the parties may have concerning collateral matters, if the undisputed facts of record show that one party is entitled to judgment as a matter of law, it should be summarily granted. "The nonmoving party is entitled to the most favorable view of the affidavits, pleadings

and other materials and all reasonable inferences to be drawn therefrom. See *Prior v. Pruett*, 143 N.C.App. 612, 617, 550 S.E.2d 166, 170 (2001), *disc. rev. den.*, 355 N.C. 493, 563 S.E.2d 572 (2002)." *Turner v. City of Greenville*, 197 N.C.App. 562, 677 S.E.2d 480, 483 (2009). Once jurisdiction is established, summary judgment may be less likely in personnel cases than most civil disputes, due to the prevalence of conflicting testimony. However, unacceptable personal conduct cases may be resolved by summary judgment. "A fact is material only if it constitutes a legal defense to a charge, or would affect the result of the action, or its resolution would prevent the party against whom it is asserted from prevailing on the point at issue." *Hilliard v. N.C. Dept. of Corr.*, 173 N.C. App. 594, 620 S.E.2d 14 (2005), citing *Bone Int'l, Inc. v. Brooks*, 304 N.C. 371, 375 283 S.E.2d 518, 520 (1981). (Summary judgment affirmed where employee "admit[ed] the alleged conduct, but offer[ed] explanations for it that he argue[d] justified it" that were deemed unavailing.) While "[j]ust 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*, 221 N.C. App. 376, 381, 726 S.E.2d 920, 924 (2012), *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012), "[w]hether conduct constitutes just cause…is a question of law…." *Id.*, 221 N.C. App. at 378, 726 S.E.2d at 923. When the critical facts are known, issues of "excessive force" may be resolved by summary judgment. *Turner v. City of Greenville*, 197 N.C.App. 562, 563, 677 S.E.2d 480, 481 (2009).

In this instance, the case can be determined by application of the law to the critical facts known due to a video recording of the actions for which Petitioner was terminated. In addition, the undersigned considered the *Affidavit of Samuel Furlow*; Petitioner's *Requests for Admissions Responses* and the attached policies and regulations; and the *Affidavit of Irvin Ryan* for the purpose of authenticating the video recording. Other documents, particularly Respondent's *Document[s] Constituting Agency Action*, were consulted to determine the parties' allegations and to identify persons shown on the video recording.

It is undisputed that, on October 10, 2014, Petitioner responded, along with several other correctional officers, to a "Code 4" general summons for help issued by Correctional Officer Sandra Jones in Polk's Building C-3, B-Pod, who was unsuccessfully trying to quell a fight between two inmates, Muldrow and Scott. It is indisputable that following the fight, Petitioner struck inmate Muldrow several times with an expandable baton, because a surveillance camera made a video recording of these events. The video makes plain what testimony sometimes fails to capture. *State v. Sutton*, __ N.C. App. __, 754 S.E.2d 464, 468 (2014), *disc. rev. den.*, 367 N.C. 507, 759 S.E.2d 91 (2014)

This compact statement of Petitioner's view of the incident, not inconsistent with his Affidavit submitted in opposition to the Motion, was abstracted from his written statement of October 17, 2014 for Respondent's investigation, according to the Dismissal letter, where it was quoted:

> I ordered inmate Muldrow to lay on the ground, he refused so I struck him on his lower left leg with the baton ordering him to lie on the ground/floor. He refused to comply with my directive, so I struck inmate Muldrow on his right lower left [*sic*], and again ordered him to get on the ground/floor. He again refused to comply, so I struck inmate Muldrow again with the baton on his upper right leg. Inmate

> Muldrow then went to his knees. I ordered him again to lay on the ground/floor, he still refused, so I struck inmate Muldrow on the shoulder blade area and at that time he complied with my directive and laid down on the floor.

In his Affidavit, Petitioner averred that he had been trained at Polk, "among other training, on the use of the Monadnock Baton," (¶ 2) and had learned that the "use of force in crisis situations is permitted, among other circumstances, based upon (a) the size of the person being detained and the size of the officer involved, (b) [to] ensure compliance with a lawful order, and (c) [when] reasonably necessary to accomplish a legitimate correctional objection [*sic*]." (¶ 8) He argued that his actions were justified because "Muldrow repeatedly refused to follow my order. This was resistance to a lawful order and allowed him to remain in a status where he could again suddenly assault me or assault others. Only after Muldrow repeatedly refused to follow my orders did I employ my baton. The relevant procedures clearly allow me to employ my baton to, among other things, maintain or regain control of the situation[.]" (¶ 10) Petitioner characterized Inmate Muldrow, just before he struck him, as being a threat to others. "I approached Muldrow and intercepted him as he tried to leave the room by another exit that was unguarded by staff. Had I not done so, Muldrow could have been free to attack someone else." (¶ 7) "When I approached Muldrow…I believed that he continued to represent a danger to others, to himself, or to me." (¶ 9)

Chapter F of Respondent's *Prisons Policy & Procedures Manual, Custody and Security*, titled "Use of Force," was presumably familiar to Petitioner from the mandatory in-service training he described in his Affidavit. It sets out general principles applicable to all uses of force and specifically addresses applications of force with "individual control devices," including the "expandable baton." *Id*., .1502(g). The first paragraph of Subchapter .1504 "Procedures" was partially quoted in Petitioner's affidavit:

> Procedures for the use of force restrict the use of force to instances of justifiable self-defense, protection of others, protection of state property, prevention of escapes, and to maintain or regain control, *and then only as a last resort* and in accordance with appropriate statutory authority. In no event is physical force justifiable as punishment. *** Staff shall be instructed to use only the amount of force that is reasonably necessary to accomplish the correctional objective. Efforts at control through communication should be attempted if feasible prior to any use of force. Pepper spray or other techniques that reduce the risk of injury…Should be used as the first response to an aggressive inmates, if feasible….

(Emphasis added.) Other pertinent, more detailed indications of how these policies are to be applied appear elsewhere in the *Manual*. "When time and circumstances permit, a sergeant or supervisor of higher rank should be present to supervise anticipated use of force or situations likely to result in use of force." *Id*., .1503(b). "An officer is prohibited from using force solely as a result of verbal provocation. An officer shall not strike or attempt to strike an inmate who has abandoned his/her resistance or who is effectively restrained." *Id*., .1503(d). Use of "individual control devices," including the "Expandable Baton," is limited "to [the] control violent or aggressive inmates." *Id*., .1504(f)(1). The *Standard Operating Procedures* derived from these policies provide that pepper spray should be the first level response to "violent, threatening or aggressive acting inmates;" then "hands-on physical force;" and only then the "expanded baton shall be *used*

as a final means to maintain order, and to control *violent or aggressive* acting inmates." (Emphasis added.) Standard Operating Procedures, Chapter F, §1503 Conditions for Use, A., B. & C.

The video recording was made with a fixed-position surveillance camera, taking in three levels of cells on the left, and on the right, the only entry/exit door to the "Pod" used during the recording. Beside the door is what appears to be an observation window, presumably for the guard post. A large courtyard or dayroom area in between fills most of the frame. As the recording begins, a half-dozen inmates are at two small tables or watching a TV on the wall, sitting on what appear to be molded plastic chairs. Officer Jones is the sole guard present.

At 9:58:10 AM, Officer Jones released inmate Muldrow from his cell, reportedly because he asked to use a mop. Muldrow immediately brushes past her and heads directly for inmate Scott, who jumps up from a table and comes to meet him, throwing the first punch. They fight with determination for approximately 1¼ minutes, during which Officer Jones attempts to break up the fight with the restrained use of pepper spray and her expandable baton. She sprayed towards them (not in their eyes, per .1504(b)(3)), and tapped them with her baton.

At 9:59:25 AM, after grappling and holding each other for 20 seconds, the inmates "break" and appear ready to re-engage, when Corrections Officer Sharra Gravitte arrives. Both inmates then literally step back as they are approached individually -- Muldrow by Officer Jones, and Scott by Officer Gravitte. Officer Jones pushes Muldrow's arm in the direction of his cell and apparently instructs him to return there, and he compliantly continues to step back. But Scott steps forward, appearing to yell at Muldrow, and Officer Jones turns and goes towards him, with Officer Gravitte also closing on him.

At 9:59:33 AM, Petitioner appears for the first time at the doorway of the guard post. As Officers Jones and Gravitte divert Scott towards the guard post, Muldrow begins walking towards his cell. Muldrow grabs up a plastic chair in his path, and hurls it across the floor into the wall to his right -- away from any people -- just as Petitioner appears to turn his attention towards him. At 9:59:40, seemingly reacting to Muldrow's triumphal demonstration, Petitioner grabs Officer Jones' baton from her hand and pursues Muldrow. Muldrow turns his head, as if reacting to a sound, but keeps walking toward the open door of his cell. Petitioner, running after him, strikes Muldrow on the back of the leg(s) with the baton for the first time at 9:59:42 AM. As Muldrow turns in reaction, Petitioner pushes him on the shoulder so that they face each other and strikes Muldrow in the leg(s) for the second time (9:59:45). Muldrow's arms dangle by his side. At 9:59:46 AM, Muldrow reacts defensively as he sees the third blow coming, but does not reach or move towards Petitioner. Petitioner lands a fourth blow, higher on the legs, at 9:59:48 AM, as Correctional Officer Hugh A. Brown approaches them. Less than a second later, Petitioner strikes Muldrow a fifth time (9:59:48). Each of the four blows to the front of the Muldrow's legs appeared to be progressively harder, and Petitioner administered the last three, and the two following them, gripping the baton with both hands. At 9:59:50 & 9:59:51 AM, with Petitioner and Officer Brown on either side of inmate Muldrow on his knees, Petitioner strikes Muldrow two more times on the back.

Respondent's Dismissal letter states, "There was no reason to use force after inmate Muldrow threw the chair unless you believed that another person was in imminent danger of being

harmed and no facts presented indicate that anyone was in imminent danger of harm." The video recording substantiates this observation.

Throughout the incident, inmate Muldrow showed no aggression or animus towards any person other than inmate Scott. At the time that Petitioner struck the inmate, he was moving away from inmate Scott and Officers Jones and Gravitte, and was walking towards and nearing his cell, after being visibly directed there by Officer Jones. He had "abandoned his resistance" to the guards' authority, which had consisted of continuing to fight Scott, contrary to Office Jones' demands that they both stop fighting. While throwing the chair as he returned to his cell was unacceptable behavior, it was not "violent, threatening or aggressive" towards any person, requiring and justifying use of the "expanded baton…as a final means…to control [a] violent or aggressive…inmate[]."

Most of the accounts in the Dismissal letter of the interviews and written statements of five Correctional Officers who witnessed these events confirmed that Petitioner was telling Muldrow to "get down" on the floor while striking him. All of them are also reported to have said that Petitioner's use of force was "unjustified" or "excessive," because the inmate posed no threat to anyone when Petitioner beat him. But assuming, *arguendo*, that assuring human safety urgently required immobilization of the inmate, a total of 7 blows in 9 seconds was excessive and unnecessary to that end.

As this is an employment matter, bearing on fitness to serve, with potential impact on persons that might otherwise come under Petitioner's custody and control, as well as implications for Respondent's mission, and its liability, it appears that this determination should be based on "whether the officer['s] actions [were] 'objectively reasonable' in light of the facts and circumstances confronting [hi]m, without regard to [his] underlying intent or motivation," just as claims of "excessive force" are evaluated in civil actions under 42 U.S.C. § 1983. *Glenn-Robinson v. Acker*, 140 N.C.App. 606, 613, 538 S.E.2d 601, 622 (2000), *disc. rev. denied*, 353 N.C. 372, 547 S.E.2d 811 (2001). However, Petitioner's actions did not evince an intent to merely "gain control" over the prisoner. Striking seven times in nine seconds, without pausing to allow the inmate an adequate opportunity to comply, was not reasonably calculated to merely achieve control. The prisoner might have been fearful that leaving his feet would make him more vulnerable to the ongoing attack. It may be that Petitioner felt, in good faith, that showing dominance over the inmate was a positive thing to do, and simply used poor judgment. However, Petitioner's use of force appeared to be administered as punishment.

In its discharge letter, Respondent cited provisions of the State Human Resources Manual and the Division of Adult Correctional Personnel Manual that parallel the following categories of "unacceptable personal conduct" set out in 25 NCAC 1J .0614(8):

> Unacceptable Personal Conduct means: (a) conduct for which no reasonable person should expect to receive prior warning; *** (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 person(s) over whom the employee has charge or to whom the employee has a responsibility….

The undisputed facts show that on October 10, 2014, Petitioner used excessive force against an inmate at Polk Correctional Institution, where he was employed by Respondent as a Correctional Case Manager, and that this behavior constituted "unacceptable personal conduct" within the meaning of 25 NCAC 1J .0614(8)(a), (d), (e) and (f).

The fact that an employee commits "unacceptable personal conduct" does not necessarily establish just cause for discharge. *Dep't. of Nat. & Economic Resources v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900-01(2004); *Warren*, 221 N.C.App. at 383, 726 S.E.2d at 925. However, in light of all the facts and circumstances of this case, discharge was justified. The act itself -- the way force was used -- would justify termination. But two other considerations militate for this result. The first is the context of the event. Petitioner intentionally inflicted pain on a person over whom Respondent is entrusted with near total control. Secondly, an agency's judgment about the proper application the rules under which it operates is generally due consideration. *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973). Deference seems to be particularly appropriate when dealing with the subject of an officer's behavior towards a prisoner in the "world apart" that is the prison.

FINAL DECISION

As the undisputed facts show that Petitioner engaged in "unacceptable personal conduct" within the meaning of 25 NCAC 1J.0614 (8) (a), (d), (e), and (f) by using excessive and unnecessary force against an inmate in Respondent's prison population on October 10, 2014, Petitioner is subject to discipline pursuant to 25 NCAC 01J .0604(a). The undisputed facts and circumstances show that Respondent's termination of Petitioner was justified. Consequently, Respondent is entitled to a summary decision in its favor as a matter of law. N.C. Gen. Stat. §§ 1A-1, Rule 56, & 150B-33(3a).

Respondent's decision to terminate Petitioner is AFFIRMED.

NOTICE

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29 (a). 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.

This the 9th day of September, 2015.

J. Randolph Ward
Administrative Law Judge