

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 OSP 06084

JOHN GOMES PETITIONER,  V.  WINSTON-SALEM STATE UNIVERSITY RESPONDENT. RESPONDENT.	<b>FINAL DECISION</b>
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This contested case was heard before the Honorable J. Randall May, Administrative Law Judge, on 16 November 2015 in High Point, North Carolina.

**APPEARANCES**

**FOR RESPONDENT:** Matthew Tulchin  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, N.C. 27602

**FOR PETITIONER:** John Gomes  
4 Capen Street, Apt. 201  
Stoughton, MA 02072  
*Petitioner Pro Se*

**EXHIBITS**

**Admitted for Respondent:**

EXHIBIT	DESCRIPTION
1	Winston-Salem State University Drug Policy
2	WSSU Police Department Witness/Victim Statement of Mr. Tracy Warren dated January 14, 2015
4	WSSU Police Department Witness/Victim Statement of Mr. Brad Collins dated January 14, 2015
5	Incident/Investigation Report
6	Police Photos – Incident Images

7	Police Photos – Incident Images
8	Notice of Placement on Investigatory Status with Pay
9	Notice to Attend Pre-Disciplinary Conference
10	Disciplinary Decision of Dismissal

**Admitted for Petitioner:**

None

**WITNESSES**

**Called by Respondent:**

Campus Police Officer Greg Foreman  
 Corporal Dana Hamilton  
 Mr. Tracy Warren  
 Ms. Dianne Walker  
 Mr. Calvin Holloway

**Called by Petitioner:**

None

**ISSUES**

1. Whether Respondent had just cause to dismiss Petitioner.

**ON THE BASIS** of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence, or the lack thereof, 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 interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

The undersigned has also reviewed the entire file, including but not limited to the proposal for final decision of the Respondent and the filings of the Petitioner.

**FINDINGS OF FACT**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

2. Petitioner John Gomes was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes.
3. Respondent Winston-Salem State University (“WSSU” or “the University”) is subject to Chapter 126 and was Petitioner’s employer.
4. Petitioner was employed with WSSU as a Painter in the Department of Facilities Operation and Maintenance (the “Department”) for approximately eight (8) years. The Department provides routine and corrective maintenance; preventative maintenance; and non-routine maintenance to ensure operations of University buildings and campus lighting. The Department is organized into 6 different areas of operations, referred to as “Zones.” Petition; Resp. Exs. 2, 9-10.
5. Each Zone has a supervisor and a team leader. At all times during the relevant time period, Petitioner was assigned to Zone 2. Mr. Tracy Warren was the supervisor for Zone 2 and Mr. Brad Collins was the team leader for Zone 2. Resp. Exs. 2, 9-10. Both Mr. Warren and Mr. Collins were responsible for assigning work to Petitioner.
6. At all times during the relevant period, Ms. Diane Walker was the Director of the Department. She joined the University in 2012. As the head of the Department, Ms. Walker supervised more than 25 employees. All the Zone supervisors, including Mr. Warren, reported directly to Ms. Walker. Prior to joining WSSU, Ms. Walker served as Director of Operations and Maintenance at Prairie View A&M University. Ms. Walker is an experienced supervisor.
7. Petitioner was one of two painters employed in the Department. As a painter, Petitioner worked primarily in the residential halls and administrative buildings on campus. He was expected to follow reasonable instructions from his supervisors; fulfill work orders in an efficient and expedited manner; and adhere to all University policies and known work rules, including the University’s Drug Policy.
8. The University has a “zero tolerance” Drug Policy and does not condone the possession, use, or sale of illegal drugs among its students, staff, or faculty. Employees are responsible for knowing about and complying with the provisions of the Drug Policy and North Carolina law as it pertains to controlled substances. The University Drug Policy provides that employees found to be in possession of a controlled substance, including marijuana, will be disciplined. The penalties that may be imposed range from a written warning with probationary status to termination from employment. Resp. Ex. 1.
9. Petitioner was provided with a State vehicle to use – a motorized cart equipped with an enclosed storage space in the back for carrying equipment. Resp. Exs.6, 7.
10. Civitan Park is a city park located just south of campus, near Bowman Gray Stadium, the University’s football stadium. It is not part of the University campus and no Department employees were assigned to work in the park. Petitioner did not have any work

assignments in or near Civitan Park and had no work-related reason to be in or near the Park.

11. Some employees would park near Civitan Park and walk to campus. Petitioner sometimes would give other employees rides in his State vehicle to and from Civitan Park during work hours. This was not part of his job duties.
12. University employees were known to congregate in Civitan Park during work hours and there had been prior complaints of people drinking alcohol and using illegal drugs, including marijuana, in the Park. As a result, Mr. Warren and Ms. Walker explicitly instructed Petitioner and the other employees in the Department to refrain from going to Civitan Park during normal work hours. The University's Campus Police Department was aware of these complaints and the reported drug use in the Park. Resp. Exs. 2, 4-5, 10.
13. In the afternoon of January 14, 2015, Mr. Warren and Mr. Collins were doing rounds on campus and checking on the status of work orders when they observed Petitioner and another Department employee, Mr. Michael Brown, driving in Petitioner's cart across campus heading in the direction of Civitan Park. Petitioner had been assigned to work in a different part of campus and was not where he was supposed to be. Resp. Exs. 2, 4-5.
14. Mr. Warren and Mr. Collins decided to follow Petitioner. They observed Petitioner and Mr. Brown drive into Civitan Park and park. They watched as the two men went to the back of the cart where they opened and closed the doors of the storage area several times. It appeared that the men were taking things out of the back of the cart. Petitioner's actions aroused the suspicions of Mr. Warren and Mr. Collins. There had been prior thefts of equipment from the Department and the men thought they were witnessing a crime being committed. The Petitioner and Mr. Brown also appeared to be smoking. Resp. Exs. 2, 4-5.
15. Mr. Warren called Campus Police to report the suspicious activity and provided Campus Police with the names and descriptions of the employees involved. Resp. Exs. 2, 4-5.
16. Corporal Dana Hamilton, who was on patrol in her marked police cruiser with a trainee, responded to the call. Corporal Hamilton has been a member of the Campus Police Department for six years and a corporal for two years. She previously was employed by the Davidson County Sheriff's Office. She is an experienced police officer who has successfully completed Basic Law Enforcement Training and received specialized training in criminal interdiction, including training on illegal drugs such as marijuana. She has participated in numerous arrests involving marijuana in her career. Resp. Ex. 5.
17. Corporal Hamilton was in route to Civitan Park when she observed Petitioner driving his painter cart away from the Park. Petitioner was the only person in the cart. Corporal Hamilton noticed that Petitioner was swerving and driving erratically. Corporal Hamilton was familiar with Petitioner and he matched the description provided to Campus Police by Mr. Warren. Resp. Exs. 5, 10.

18. Corporal Hamilton activated the lights and siren on her police car and attempted to stop Petitioner. However, Petitioner ignored Corporal Hamilton and continued driving. He attempted to evade Campus Police and drove onto a grassy area on campus. Petitioner drove for more than a quarter of a mile before stopping, all the while pursued by Corporal Hamilton in her police car with the sirens and lights flashing. Resp. Exs. 5, 10.
19. Corporal Hamilton approached Petitioner's cart and immediately smelled a strong odor of burnt marijuana coming from Petitioner and the cart. She also noticed that Petitioner's eyes were red and watery. Resp. Exs. 5, 10.
20. Corporal Hamilton explained to Petitioner the reason he was being stopped and asked him to exit the golf cart. She conducted a cursory plain view search of the driver's compartment, but did not find anything. Because the cart was University property, Corporal Hamilton drove the cart to the facilities building in order to obtain Ms. Walker's permission to search the vehicle. With Ms. Walker's consent, Corporal Hamilton and Officer Greg Foreman conducted a thorough search of the cart. Resp. Exs. 5, 10.
21. Campus Police found a rolled up painter's drop cloth in the storage area in the back of the cart. Campus Police unrolled the painter's drop cloth and found a gold and purple owl cigarillo pack inside the cloth. The cigarillo pack contained a clear plastic bag, inside of which was a green leafy substance. Based on her experience and training, Corporal Hamilton identified the green leafy substance as marijuana. Corporal Hamilton photographed the evidence and obtained written statements from Mr. Warren, Mr. Collins, and Mr. Brown. Resp. Exs. 2, 4-7.
22. The cart Petitioner was driving the day of his arrest had been assigned to him for that day. Although it was not his regular cart (the one he regularly used was being repaired), Petitioner was the only one to use it that day and it had been completely emptied prior to him using it. Resp. Exs. 5, 10.
23. Petitioner was placed under arrest and charged with possession of marijuana and possession of drug paraphernalia. Petitioner later received 40 days of community service and required to undergo mandatory drug screening. Resp. Ex. 5.
24. Petitioner's possession of marijuana constituted violations of the University Drug Policy and North Carolina law. Petitioner's visiting Civitan Park during work hours was also directly contrary to Mr. Warren's and Ms. Walker's instructions. Resp. Exs. 1, 5, 10.
25. As a result of Petitioner's insubordination and his possession of marijuana, Ms. Walker decided to place Petitioner on investigatory leave status with pay. Ms. Walker made the decision after consulting with Human Resources. Petitioner was informed that he could be dismissed as a result of the incident. Ms. Walker conducted her own investigation of the incident, during which she spoke to Campus Police and several University employees. Resp. Exs. 8-10.

26. On February 23, 2015, Ms. Walker issued Petitioner a Notice to Attend a Pre-Disciplinary Conference due to his unacceptable personal conduct. In the Notice, Ms. Walker explained the reasons for the conference; namely, Petitioner's insubordination and violations of University policy and State law. Petitioner was again told that he could be dismissed as a result of his conduct. Resp. Ex. 9.
27. On or about February 27, 2015, Petitioner attended a Pre-Disciplinary Conference conducted by Ms. Walker and a representative from Human Resources, Mr. Calvin Holloway. Petitioner was again informed of the purpose of the conference and the allegations against him. Petitioner was provided with an opportunity to respond, but did not provide sufficient explanation for his unacceptable personal conduct. Instead, he acknowledged that he had smoked marijuana in the past and had violated his supervisors' directions not to go to Civitan Park during work hours. Although Petitioner claimed that he was set up by Mr. Warren and Mr. Collins and that Campus Police had planted the marijuana in his cart, he did not provide Ms. Walker or Mr. Holloway with any evidence or information to support his claims. Resp. Ex. 10.
28. Following the Pre-Disciplinary Conference, Ms. Walker consulted with Mr. Holloway and made the decision to dismiss Petitioner for his insubordination and his violation of the University's Drug Policy and North Carolina law. On March 18, 2015, Ms. Walker sent Petitioner a dismissal letter detailing the reasons for Petitioner's dismissal; specifically, unacceptable personal conduct for possession of and use of marijuana on campus and insubordination. Resp. Ex. 10.
29. Corporal Hamilton, Mr. Warren, Ms. Walker, Officer Foreman, and Mr. Holloway were credible witnesses. Furthermore, crucial parts of their testimony were supported by documentation.
30. Petitioner did not present any evidence or call any witnesses to testify on his behalf.

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal jurisdiction over the issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. The parties are properly before the Office of Administrative Hearings and there is no issue of improper procedure.
3. Respondent Winston-Salem State University is subject to Chapter 126 of the North Carolina General Statutes and is the former employer of Petitioner.
4. A "career state employee" is defined as a state employee who is in a permanent position appointment and continuously has been employed by the State of North Carolina in a non-exempt position for the immediate 24 preceding months. N.C. Gen. Stat. § 126-1.1

5. At the time of his discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1, *et seq.*
6. A career State employee may be dismissed only for just cause. N.C. Gen. Stat. § 126-35(a). The State employer has the burden of showing by a preponderance of the evidence that there was just cause for dismissal. N.C. Gen. Stat. § 126-34.02(d); see also Teague v. N.C. Dep't of Transp., 177 N.C. App. 215, 628 S.E.2d 395, disc rev. denied, 360 N.C. 581 (2006).
7. Pursuant to regulations promulgated by the Office of State Personnel, there are two bases for the dismissal of an employee for just cause: (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 25 N.C.A.C. 01J .0604(b). However, “the categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case.” 25 N.C.A.C. 01J .0604(c). Furthermore, “[n]o disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly.” Id.
8. An employee must receive at least two prior disciplinary actions before being dismissed for a current incident of unsatisfactory job performance. 25 N.C.A.C.01J .0605(b). In addition, the employee must be given a pre-disciplinary conference and written notice of the reasons for dismissal. 25 N.C.A.C. 1J.0605. However, an employee may be dismissed without any prior warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 N.C.A.C. 01J 0608(a). One instance of unacceptable conduct constitutes just cause for dismissal. Hilliard v. North Carolina Dep't of Corr., 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).
9. Unacceptable personal conduct, as defined by the Office of State Personnel, includes insubordination; “conduct for which no reasonable person should expect to receive prior warning;” “job-related conduct which constitutes a violation of state or federal law;” “the willful violation of known or written work rules;” and “conduct unbecoming a state employee that is detrimental to state service.” 25 N.C.A.C. 01J .0614(8). Insubordination is defined as the “willful failure or refusal to carry out a reasonable order from an authorized supervisor.” 25 N.C.A.C. 01J .0614(7)
10. In the case of “conduct unbecoming a state employee that is detrimental to state service,” the State employer is not required to make a showing of actual harm, “only a potential detrimental impact (whether conduct like the employee’s could potentially adversely affect the mission or legitimate interests of the State employer).” Hilliard, 173 N.C. App at 597, 620 S.E.2d at 17.
11. In the case of “willful violation of known or written work rules,” the State employer’s “work rules may be written or ‘known’ and a willful violation occurs when the employee willfully takes action which violates the rule and does not require that the employee intend his conduct to violate the work rule.” Id.

12. Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges; and second, whether the conduct constitutes just cause for the disciplinary action taken. N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004).
13. In Carroll, the Supreme Court explained that the fundamental question is whether “the disciplinary action taken was ‘just’”. Further, the Supreme Court held that, “Determining whether a public employee had ‘just cause’ to discipline its employee requires two separate inquiries: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes ‘just cause’ for the disciplinary action taken.” Id. at 665, 599 S.E.2d at 898.
14. In Carroll, a personal conduct case, 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.
15. The flexible and equitable standard described in Carroll was recently affirmed by the Supreme Court’s decision of Weatherington v. North Carolina Department of Public Safety, N. C. S.Ct. (No. 22PA14), filed 18 December 2015.
15. The two-prong test of the Carroll case was expanded in Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) review denied, 735 S.E.2d 175 (2012), which sets forth what this tribunal must consider as to the degree of discipline. 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)

Id. Having found the two prongs of Carroll have been met, the next inquiry is whether the punishment is appropriate as established in Warren.

16. Determining “just cause” rests on an examination of the facts and circumstances of each individual case. The facts of a given case might amount to just cause for discipline but not dismissal.

17. The final inquiry in the Warren analysis is determining whether the discipline imposed for that conduct was “just”. 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.”
18. 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. 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)).
19. Based on the preponderance of the evidence, Respondent met its burden of proof that it had “just cause” to dismiss Petitioner for unacceptable personal conduct. Because of the particular facts of this case, the punishment of termination was appropriate.
20. Petitioner’s insubordination alone would have been sufficient for termination. Mr. Warren’s and Ms. Walker’s requests that Petitioner stay away from Civitan Park during work hours were reasonable orders from authorized supervisors. Petitioner willfully failed or refused to comply with Mr. Warren’s and Ms. Walker’s requests. Petitioner’s conduct in disobeying his supervisors’ reasonable orders constituted unacceptable personal conduct which justified his dismissal.
21. Petitioner’s possession of marijuana constituted unacceptable personal conduct. Specifically, Petitioner engaged in conduct for which no reasonable person should expect to receive prior warning; willfully violated known or written work rules; willfully violated State law; and engaged in conduct that was unbecoming a state employee that is detrimental to state service.
22. The University has a zero tolerance drug policy and possessing marijuana violates North Carolina law. Petitioner’s possessing marijuana on campus constituted unacceptable personal conduct.
23. On the sole issue to be heard, Respondent met its burden to show that it had just cause to dismiss Petitioner. Respondent has met its’ burden of proof by showing that the employee engaged in the conduct the employer alleges; and, secondly, that conduct constitutes ‘just cause’ for the disciplinary action taken.
24. Respondent met its burden of proof that it did not substantially prejudice Petitioner’s rights; exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act in violation of Constitutional provisions; fail to act as required by law; act arbitrarily or capriciously; and/or abuse its discretion when Respondent dismissed Petitioner for “just cause.”

25. Respondent followed the procedures required before dismissing Petitioner for unacceptable personal conduct.

On the basis of the above Conclusions of Law, the undersigned issues the following:

**FINAL DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent has sufficiently proved that it had just cause to dismiss Petitioner and Petitioner's dismissal is therefore UPHELD.

**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 appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This the 27<sup>th</sup> day of January, 2016.

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J Randall May  
Administrative Law Judge