

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 OSP 07614

<p>Christine N Brewington Petitioner,</p> <p>v.</p> <p>N C Department Of Public Safety, State Bureau of Investigation Respondent.</p>	<p>FINAL DECISION</p>
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This case came on for hearing on January 11-12, 2016, before Senior Administrative Law Judge Fred G. Morrison Jr. in Raleigh, North Carolina.

APPEARANCES

Petitioner: J. Michael McGuinness
Attorney for Petitioner
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Respondent: J. Joy Strickland
Attorney for Respondent
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Law Enforcement Liaison Section
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ISSUES

Whether the Respondent had just cause to dismiss Petitioner from her employment with the North Carolina State Bureau of Investigation?

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 Senior Administrative Law Judge makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW.

In making the FINDINGS OF FACT, the undersigned Senior Administrative Law Judge has weighed all the evidence and has assessed the credibility of the witnesses by taking into

account the appropriate facts 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.

FINDINGS OF FACT

1. Both parties are properly before this Senior Administrative Law Judge, in that jurisdiction and venue are proper to decide the issue of whether Respondent had just cause to dismiss Petitioner from her employment with the North Carolina State Bureau of Investigation (SBI).

2. Prior to her termination, Petitioner was employed for seventeen years as a Special Agent with the North Carolina State Bureau of Investigation. During her career she received very favorable performance ratings in the area of Integrity (Petitioner's Exhibit # 18) and five character witnesses testified concerning her reputation for honesty; however, Petitioner had also received several written warnings for inadequate job performance and unacceptable personal conduct. On March 4, 2015, she was demoted from the position of Agent III to Agent II with a 5% reduction in pay and was reassigned to the Intelligence and Information Section. She did not appeal this demotion and reassignment. (Respondent's Exhibit # 11)

3. On September 3, 2014, between the hours of 8:00 a.m. and 5:00 p.m., Petitioner was officially on duty and working in her position as a Special Agent with the SBI assigned to the Diversion and Environmental Crimes Unit (DECU). (Respondent's Exhibit # 2)

4. Throughout that workday, Petitioner was wearing her credentials identifying her as an SBI agent and was carrying her SBI issued firearm in a holster.

5. On that date, Petitioner traveled from her home driving her SBI issued vehicle to Myers Drug Store in Lillington, North Carolina, to conduct interviews of pharmacy employees in connection with a drug diversion case that she was working in tandem with the North Carolina Pharmacy Board (Pharmacy Board).

6. Upon arriving at Myers Drug Store, shortly after 10:00 a.m., Petitioner met Pharmacy Board employee Catherine Elizabeth Collier (Collier) to conduct the interviews of several employees of the drug store.

7. Collier is employed as an inspector and investigator for the Pharmacy Board. Collier holds a bachelor's degree in animal science and a nursing degree. She conducts administrative inspections and investigations for the board. Collier is not a sworn law enforcement officer and does not have the authority to conduct criminal investigations. Collier's authority is limited to regulatory investigations. Collier began employment with the Pharmacy Board in June 2014. At that time she began her training program which included observing senior investigators and inspectors. The case that Collier was working on with Petitioner was the first case that she had worked for the Pharmacy Board.

8. Upon completing the interviews at the drug store, Petitioner and Collier went to a restaurant called the Sports Zone in Lillington, North Carolina, for a working lunch. Petitioner and Collier drove separate vehicles to the restaurant.

9. At the restaurant, Petitioner and Collier sat across from one another in a standard size booth.

10. Petitioner and Collier each ordered food. Petitioner ordered loaded potato chips and Collier ordered fish tacos. (Respondent's Exhibit # 1)

11. During the lunch, Petitioner ordered two Special Mixed Drinks which contained alcohol. They were pink in color mixed drinks which were served in a "stemmed bowl-type glass -- goblet style." Petitioner drank one of the drinks while eating lunch with Collier and ordered the second one prior to Collier leaving the restaurant. (Transcript pp. 23, 24)

12. Collier offered to pay for Petitioner's lunch with a Pharmacy Board credit card. Prior to paying her bill, Collier told Petitioner that she could not pay for alcohol and made a point of having the two mixed drinks separated from the food. Petitioner did not argue with Collier, correct her, or tell her that the drinks did not contain alcohol.

13. Collier paid for one order of loaded potato chips (Petitioner's) and one order of fish tacos (hers) at approximately 3:28 p.m. (Respondent's Exhibit # 1) Collier left the restaurant "pretty much right after" paying her bill. (Transcript p. 84)

14. Collier recalled a man arriving toward the end of her lunch with Petitioner, who stayed at the table briefly but he did not sit down or order food and drinks. Collier left shortly after the man arrived. Collier's recollection of her interaction with this man is consistent with Petitioner's oral statements to Special Agent in Charge Kanawha Perry (SAC Perry) made during her May 20, 2015, investigative interview that her friend Michael Mansfield arrived near the end of Collier's and her lunch after Collier and she had already eaten their lunch and that "Mansfield met Collier just before she left." (Respondent's Exhibit # 4)

15. Collier did not remember seeing the man order mixed drinks or drink beer, or there being any beer on the table during her time at lunch. She only recalls seeing the two mixed drinks ordered by Petitioner while they ate lunch together. Collier opined that had the man sat down and ordered and consumed beer she would have remembered it. Collier's testimony in this regard is credible.

16. Collier did not immediately notify anyone of this incident. She indicated that while she thought it was unprofessional she did not understand how significant of an event it would be for a law enforcement officer to consume alcohol while on duty because she had not had any prior experience with law enforcement. Eight months later Collier was in Raleigh for an SBI Diversion School course and at an evening dinner after conclusion of the workday she told Special Agent Stephen Smith (SA Smith) of the SBI about this incident. Collier did not mention anything about Mansfield. SA Smith told Collier that he would have to report to his supervisor her observation

of Petitioner consuming alcohol while on duty.

17. SA Smith reported his conversation with Collier to his supervisor who in turn reported the allegation through the chain of command at the SBI. SBI management requested that SAC Perry of the Special Investigations Unit conduct an internal investigation concerning the allegation that Petitioner consumed alcoholic beverages while on duty. SAC Perry is the manager of the Special Investigations Unit which is responsible for criminal and internal investigations involving SBI employees.

18. SAC Perry, along with other SBI agents under his supervision, conducted an investigation into this allegation about Petitioner consuming alcohol while on duty.

19. By letter dated May 11, 2015, SAC Perry notified Petitioner that she was the subject of an internal investigation and that she would be required to submit to an investigative interview. In the letter, SAC Perry indicated that the date in question was “in or around January 2015.” (Respondent’s Exhibit # 5)

20. On May 20, 2015, SAC Perry and Assistant Special Agent in Charge Cecil Cherry (ASAC Cherry) interviewed Petitioner as part of the internal investigation. Prior to beginning the interview, SAC Perry read Petitioner her Garrity rights and discussed the May 11, 2015, letter he sent Petitioner explaining that she was under investigation. At that time, he corrected the date in question to September 3, 2014, instead of the January 2015 date listed in the letter. (By this time, SAC Perry and ASAC Cherry had learned that Petitioner and Collier had dined at the Sports Zone restaurant on more than one occasion). Petitioner did not ask for additional time to prepare for the interview after being told about the date correction and she did not have any questions before proceeding with the interview. During the interview, Petitioner denied drinking any alcohol during the September 3, 2014, lunch with Collier. She said that she drank two of what she called a “Sprite Delight”, a non-alcoholic drink containing Sprite, cranberry juice, grapefruit juice, and maybe pineapple juice. (Respondent’s Exhibit # 4)

21. During the May 20, 2015, interview, after Petitioner made the statements listed in Finding of Fact 20, SAC Perry showed Petitioner a Lillington Sports Zone receipt dated September 3, 2014, and timed 3:57 p.m. (Respondent’s Exhibit # 1), showing that Petitioner had paid for 5 beverages containing alcohol [three Coors Light beers (\$9.87) and two Special Mixed Drinks (\$15.98)]. At that time, Petitioner admitted that the signature on the receipt was hers; that the receipt was paid from her Visa debit card account; and that by the amount charged for the two Special Mixed Drinks on the receipt, the drinks contained alcohol. (Respondent’s Exhibit # 4)

22. Petitioner’s testimony that Mansfield arrived at the restaurant “around three o’clock, if not a little before” (Transcript p. 240); that Mansfield came in about midway through her meal with Collier and sat down while they finished their meal (Transcript p. 272); and that Mansfield ordered a beer as soon as he sat down and then “continued to order another beer” while Petitioner and Collier were finishing their meal (Transcript p. 241) is not credible in that it conflicts with the statements made by Petitioner to SAC Perry listed in Finding of Fact 14 and with Collier’s testimony listed in Findings of Fact 14 and 15. Collier’s testimony is more credible.

23. Petitioner's testimony that her friend Mike Mansfield ordered and consumed all of the alcoholic beverages listed on the Sports Zone receipt that she paid with her debit card is not credible, in that it is not reasonable to believe that Mansfield ordered and/or consumed three beers and two mixed alcoholic drinks in the approximate 30 minute time period between 3:28 p.m. when Collier paid her bill and left the restaurant, and 3:57 p.m. when Petitioner paid her bill.

24. It is more likely than not that Mansfield ordered and drank the three beers while Petitioner drank her second mixed drink after Collier left the restaurant.

25. SBI Policy-Use of Alcoholic Beverages (Policy 5-14), in pertinent part, states:

A. An employee shall not drink intoxicating beverages while on official duty.

D. EXCEPTION: An exception may be made to this section if the employee can justify the fact that the use of intoxicants was a necessary part of an investigation.

(Respondent's Exhibit # 3)

26. SBI Policy 26 states in pertinent part:

The Bureau prohibits all persons from engaging in the following behavior while performing Bureau business, while on Bureau property, or while operating or riding in a motor vehicle on Bureau business:

2. The sale, transfer, distribution, or unauthorized use or possession of drugs or alcohol, or . . .

(Respondent's Exhibit # 3A)

27. SBI Policy-Truthfulness (Policy 5-14) states: An employee shall be truthful and complete in all written and verbal reports and statements pertaining to Bureau business and their Bureau related activities. (Respondent's Exhibit # 3)

28. It is more likely than not that Petitioner drank alcoholic beverages while armed and on official duty on September 3, 2014, and made untrue statements to SBI agents during the course of her investigative interview on May 20, 2015.

29. Petitioner was notified by letter dated June 3, 2015, that she was to attend a pre-disciplinary conference on June 10, 2015. The pre-disciplinary conference was held as scheduled and Petitioner was notified by letter dated June 11, 2015, from Acting Special Agent in Charge W. Ty Sawyer, of her dismissal effective on June 11, 2015. Petitioner filed an internal grievance and was provided with steps one and two of the internal grievance process which included mediation and a grievance panel. Petitioner was subsequently notified of the SBI's Final Agency Decision, which had been approved by the Office of State Human Resources, to dismiss her, by letter dated

September 28, 2015, signed by Deputy Director Janie Sutton, on behalf of SBI Director B.W. Collier. (Respondent's Exhibits 5 B-D, 6)

30. Janie Sutton (Sutton), deputy director for the SBI for one year and SBI employee for a total of twenty five (25) years, considered the totality of the circumstances regarding this disciplinary issue by reviewing the internal investigation, Petitioner's previous disciplinary record, and speaking to several SBI employees about this matter prior to recommending a decision to SBI Director B.W. Collier (Director Collier).

31. Based on all of the information that she reviewed, Sutton recommended to Director Collier that Petitioner be dismissed. Director Collier adopted that recommendation and designated authority to Sutton to sign the agency's final agency decision dismissing her. She was dismissed from the SBI for unacceptable personal conduct for consuming alcohol while on duty and being untruthful when questioned about the matter during the internal investigation. (Respondent's Exhibit # 5D)

32. Sutton, on behalf of the SBI, considered the seriousness of the offenses and Petitioner's disciplinary history which included multiple written warnings (for unsatisfactory work performance) and a recent demotion (for unacceptable personal conduct and unsatisfactory job performance) in determining the appropriate sanction for Petitioner's unacceptable personal conduct. Based on these considerations, Sutton determined that Petitioner's conduct warranted dismissal and she continued to hold that position on behalf of the SBI at hearing. (Respondent's Exhibits 5D, 9, 10, 11, 12, & 13)

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Senior Administrative Law Judge and jurisdiction and venue are proper.

2. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. 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.

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

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

5. N.C.G.S. § 126-35(a) provides, in pertinent part, that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." Although the statute does not define "just cause," 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).

6. 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) (Emphasis added.)

7. The North Carolina Supreme Court has held that: “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 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).

8. The following, per G.S. 150B-2(8c), constitutes substantial evidence (“relevant evidence a reasonable mind might accept as adequate to support a conclusion”) that Petitioner consumed an alcoholic beverage during her September 3, 2014, lunch:

a. During the lunch, Petitioner got what appeared to Collier to be a cocktail. It was pink in color in a stemmed bowl-type glass—goblet style. (Transcript p. 23) It was a different type of glass than the glass which Petitioner had consumed from during a previous lunch with Collier in August at the Sports Zone. (Transcript pp. 38-40) The name of the drink sounded like a cocktail of some sort. (Transcript p. 24) Collier believed the drink was some sort of alcoholic drink or beverage based on its name and appearance. (Transcript p. 68) Petitioner had one of these drinks with lunch, which she consumed while eating lunch, and had ordered a second one prior to Collier leaving the restaurant. (Transcript p. 24)

b. Collier paid for the Petitioner’s food portion of the bill by using her Pharmacy Board credit card. The Pharmacy Board typically does this as a professional courtesy. (Transcript p. 24) Collier told Petitioner that she could not put alcohol on her work credit card and made a point to separate that from the food portion of the bill. (Transcript pp. 24-25) When Collier told Petitioner that she could pay for the food, but that she could not pay for alcohol, Petitioner did not argue with or correct Collier or dispute that she was having alcohol. (Transcript p. 25)

c. The receipt for the bill Collier paid at the Lillington Sports Zone on September 3, 2014, at 3:28 p.m., indicates that Collier paid for one order of loaded potato chips and one order of fish tacos. Collier did not pay for any drinks. (Respondent’s Exhibit #1) Collier left the restaurant “pretty much right after” signing the tab for her bill at 3:28 p.m. (Transcript p. 84)

d. At some point a man came up to the table at the restaurant. Collier remembered the man being there briefly and that she left the restaurant shortly after he arrived. Collier did not remember this man sitting down at the booth with Petitioner and her and having food and drinks himself. Collier did not remember any beer being on the table or seeing anyone drink beer. Collier was of the opinion that had there been any beer at the table, she would have remembered it. Collier left the restaurant before Petitioner.

(Transcript pp. 50-55)

e. During the course of an investigative interview on May 20, 2015, Petitioner told SBI Special Agent in Charge Kanawha Perry that her friend Mike Mansfield showed up at the restaurant and ordered some food near the end of her lunch with Collier; that Collier and she had already eaten by the time Mansfield arrived; and that she recalled that Mansfield met Collier just before Collier left the restaurant. (Respondent's Exhibit # 4)

f. When Mansfield sat down in the booth beside Petitioner, he immediately ordered a beer. During the time that he was there with Petitioner, he continued to order beers. (Transcript p. 241) Mansfield normally drinks Coors Light beer. (Transcript p. 265) On this occasion Mansfield had forgotten his wallet, so Petitioner told him that she would pay for whatever he ordered and he could pay her back at a later date. (Transcript p. 242)

g. At 3:57 p.m., approximately 30 minutes after Collier had left and Mansfield had arrived at the restaurant, Petitioner paid a bill evidenced by a Lillington Sports Zone receipt indicating the purchase of one order of loaded potato chips (\$7.99), 3 Coors Light beers (\$9.87), and two Special Mixed Drinks (\$15.98). (Respondent's Exhibit # 1) Petitioner agreed that the two mixed drinks costing approximately \$8.00 each were liquor drinks, based on the price charged. (Respondent's Exhibit # 4)

h. Eight months after the September 3, 2014, lunch (Transcript p. 58), Collier was in Raleigh to audit an SBI Diversion School course that was being presented by SBI Special Agent Stephen Smith (SA Smith). (Transcript p. 27) During an after-workday evening dinner (Transcript p. 27), Collier told Smith that she had seen Petitioner order two mixed drinks at lunch one day and thought that was why Petitioner was transferred from the Drug Diversion and Environmental Crimes Unit. (Transcript p. 70) Collier did not report any observations concerning Mansfield to SA Smith. (Transcript pp. 27-28, 58-59, 69-71)

i. It is reasonable to conclude that it is more likely than not that during the 30 minute time period between Mansfield's arrival at the restaurant and Petitioner's bill payment, Mansfield ordered, and Petitioner purchased, loaded potato chips (\$7.99) and three Coors Light beers (\$9.87); and that the two alcoholic Special Mixed Drinks (\$15.98) purchased by Petitioner are the two pink in color cocktail appearing drinks that Collier saw Petitioner order, one of which was consumed by Petitioner in the presence of Collier before the latter left the restaurant after finishing her lunch.

9. In view of my Findings of Fact and Conclusion of Law 8, the following, per G. S. 150B-2(8c), constitutes substantial evidence ("relevant evidence a reasonable mind might accept as adequate to support a conclusion") that Petitioner made untrue statements to SBI agents during her investigative interview on May 20, 2015:

a. Prior to being shown the September 3, 2014, Sports Zone receipt that showed her purchase of two Special Mixed Drinks, Petitioner told SAC Perry that she recalled that what she had to drink on that day were two of what she called the Sprite Delight with

no alcohol.

- b. After being shown the Sports Zone receipt, Petitioner again stated to SAC Perry that she did not have anything to drink that had alcohol in it and that Mansfield may have, but she did not. “That Other Dude Did It” (“TODDI”) is not credible.
- c. Petitioner denied to SAC Perry that she ordered the two Special Mixed Drinks and said it was possible that Mansfield had ordered them along with the three Coors Light beers. Collier is more credible than “TODDI”.
- d. Petitioner told SAC Perry that since she did not drink any alcohol, Mansfield must have ordered those drinks. “TODDI” is not credible; Collier is.
- e. Upon SAC Perry returning from his telephone conversation with Mansfield, Petitioner continued to deny having any alcohol to drink and stated that she could not explain how the five alcoholic drinks were on the bill she paid other than saying Mansfield had to have ordered them. “TODDI” is not credible.

10. The definition of unacceptable personal conduct includes: conduct for which no reasonable person should expect to receive prior warning; or the willful violation of known or written work rules; or conduct unbecoming a State employee that is detrimental to State service. 25 N.C.A.C. 1J .0614. Petitioner’s consumption of alcohol while on duty and her untruthfulness to SBI agents when questioned about it during the internal investigation meets all of these definitions of unacceptable personal conduct.

12. When an employer has just cause to discipline an employee for unacceptable personal conduct, “[t]he degree and type of action shall be based on the sound and considered judgment of the appointing authority.” 25 N.C.A.C.1J .0604.

13. A career State employee can be disciplined for a single act of unacceptable personal conduct up to and including dismissal. 25 N.C.A.C. 1J .0608. Petitioner’s conduct in consuming alcohol while on duty and being untruthful during an internal investigation constitutes unacceptable personal conduct for which she could be disciplined up to and including dismissal.

14. Respondent has met its burden of proof by showing by the preponderance of the evidence that it had just cause to dismiss Petitioner from her employment with the State Bureau of Investigation for unacceptable personal conduct. Respondent’s decision to dismiss Petitioner was for good reason and was just.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is the decision of the undersigned Senior Administrative Law Judge that Respondent’s decision to dismiss Petitioner from her employment with the State Bureau of Investigation is affirmed.

NOTICE

Pursuant to N.C.G.S. § 126-34.02, an aggrieved party in a contested case pursuant to Chapter 126 of the North Carolina General Statutes shall be entitled to judicial review of a final decision of the Office of Administrative Hearings by appeal to the Court of Appeals as provided by N.C.G.S. § 7A-29(a). The appellate procedure is dictated by the rules of appellate procedure. The appeal shall be taken within 30 (thirty) 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.

This the 29th day of March, 2016.

Fred G Morrison Jr.
Senior Administrative Law Judge