

STATE OF NORTH CAROLINA  
COUNTY OF DURHAM

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 OSP 07975

<p>Brandon Lee Faison Sr. Petitioner,</p> <p>v.</p> <p>Eastern Correctional / NCDPS Respondent.</p>	<p><b>FINAL DECISION</b></p>
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This matter coming on to be heard and being heard before the undersigned, and the Petitioner appears pro se, and the Respondent is represented by Assistant Attorney General Ms. Yvonne Ricci.

**WITNESSES**

The Respondent, North Carolina Department of Public Safety (hereinafter “Respondent” or “NCDPS”) presented testimony from the following four witnesses: Brandon Lee Faison, Sr., the Petitioner, Michael Smith, the Assistant Superintendent for Custody and Operations at Eastern Correctional Institution (hereinafter “Eastern CI”), Roderick Eugene Herring, a Correctional Captain at Sampson Correctional Institution, and Michael Hardee, the Correctional Superintendent at Eastern CI. The Petitioner, Brandon Lee Faison, Sr., who testified during the hearing, did not present any other witnesses.

**EXHIBITS**

Respondent’s exhibits (“R. Exs.”) 1 - 14 were admitted into evidence. Respondent’s exhibit number 12 was limited to the admission of pages 1 – 8 of this exhibit number. Petitioner did not offer any exhibits into evidence.

**ISSUE**

Did Respondent have just cause to suspend the Petitioner without pay for ten consecutive work days for unacceptable personal conduct?

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following Findings of Fact. In making the Findings of Fact, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not

limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

**BASED UPON** the testimony and exhibits admitted into evidence, the undersigned makes the following findings of fact:

1. Petitioner is a citizen and resident of the State of North Carolina, and is a career state employee. He has worked for the Respondent since April, 2007, and served as Correctional Officer II at all relevant times herein.

2. Respondent has a policy governing the personal conduct of its employees. (Resp. Ex. 14)

3. The State Human Resources Manual and the North Carolina Department of Public Safety's Disciplinary Policy defines unacceptable personal conduct as "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 [.]" (Resp. Ex. 14, p.3)

4. Violations of policy for unacceptable personal conduct may result in disciplinary action, including suspension without pay without prior warning. (Resp. Ex. 14 at pp. 2 - 4)

5. NCDPS, Division of Prisons also has a policy regarding personal dealings with inmates that is found in the NCDPS, Division of Prisons Policy and Procedures Manual at Chapter A, Section .0200, Title: Conduct of Employees. The policy states, among other things, in Section .0202(f) that employees will not have "undue familiarity" with inmates, deliver messages or communicate with inmates using telephones or electronic devices, and report any such conduct within 48 hours of discovery.

6. In addition, this policy clearly states that "[a]ny employee involved in such personal dealings with inmates as outlined in section A.202(f) will be subject to disciplinary action up to and including dismissal." (Resp. Ex. 13 at pp. 3 - 4)

7. Petitioner acknowledged the undue familiarity policy set for the by the Respondent in a memorandum signed by him on April 16, 2007. (Resp. Ex. 4)

8. Pursuant to that memorandum, Petitioner was advised that he must maintain a professional relationship with inmates, and as such, he was prohibited from the following:

- a. Establishing personal relationships with inmates, and
- b. Discussing personal information with inmates, including information concerning his home, family, friends, or "other information not related to the general order of business with inmates."

9. This memorandum also directed employees to advise their superiors immediately upon discovering that a personal relationship may have been established.

10. Petitioner was suspended without pay for ten consecutive work days beginning on July 20, 2015, for unacceptable personal conduct relating to a personal relationship with an inmate. (T. p. 30; Resp. Ex. 9)

11. On March 19, 2015, Eastern CI Assistant Superintendent for Custody and Operations, Michael Smith, received information from a confidential source of possible inappropriate personal conduct between the Petitioner and Inmate Erin Mabe (OPUS #1248019).

12. On March 18, 2015, Inmate Mabe and the Petitioner became friends on the social networking site, Facebook.

13. Assistant Superintendent Smith reported this allegation involving the Petitioner, and Correctional Lieutenant Roderick Herring was assigned to conduct the internal investigation of this matter. (T. pp. 45, 46, and 52; Resp. Ex. 11)

14. Lt. Herring interviewed and obtained written statements from the Petitioner, Mr. Smith, and Inmate Mabe regarding the allegation. (T. p. 70)

15. Petitioner initially claimed he had “no knowledge” of the Facebook connection with inmate Erin Mabe in a statement he provided to Lt. Herring on March 21, 2015. Petitioner did admit in that statement that “anyone who request [sic] me on social networks if we have any mutual friends I accept request [sic].”

16. Lt. Herring’s investigation revealed that the Petitioner was in fact friends with Inmate Mabe on Facebook, and that Faison violated departmental policy by becoming Facebook friends with Mabe. (T. p. 75; Resp. Ex. 12)

17. In addition, Lt. Herring observed a message from Inmate Mabe’s account to Petitioner’s Facebook account which stated, “*you ain’t (sic) ready for it.*”

18. Immediately after the initial meeting with Lt. Herring, Petitioner checked his Facebook account and determined that he was Facebook friends with the inmate. (T. p. 25)

19. It was not until March 25, 2015, however, that Petitioner prepared a statement admitting he was Facebook friends with the inmate. (Resp. Ex. 3)

20. Petitioner admitted that he accepted a Facebook friend request from Inmate Mabe on March 18, 2015. (T. pp. 25, 40, and 42)

21. Petitioner also admitted that as a NCDPS correctional officer it is important for him to be diligent to ensure that he is not engaging in undue familiarity with an inmate even on social media. (T. p. 42)

22. Petitioner provided Respondent with a letter in which he alerted staff that he was friends with Inmate Mabe on Facebook that was received by Respondent on March, 25 2015.

23. Petitioner admitted that he did not contact any person employed by the Respondent at Eastern CI prior to March 25, 2015, regarding his discovery that he had become Facebook friends with Inmate Mabe on March 18, 2015. (T. pp. 26 – 27; R. Ex. 3)

24. Eastern CI Correctional Superintendent Michael Hardee reviewed the written investigation prepared by then Lieutenant Herring.

25. Superintendent Hardee submitted this investigation through his chain of command to the regional office and then to the central office for a final determination on what discipline to impose in this matter. (T. p. 89)

26. Respondent considered other forms of discipline in this matter including dismissal, but ultimately decided that a ten-day suspension without pay was the most appropriate form of discipline for the Petitioner. (T. pp. 94 -95)

27. Prior to the suspension, Respondent sent Petitioner a pre-disciplinary letter that informed him that he was being disciplined for being mutual friends on the social networking site, Facebook with Inmate Erin Mabe (OPUS #1248019).

28. The pre-disciplinary letter informed the Petitioner that his conduct involving Inmate Erin Mabe was a violation of the Respondent's policy regarding personal dealings with inmates.

29. Petitioner attended the pre-dismissal conference. (T. pp. 27 – 30; Resp. Exs. 7 and 8)

30. Respondent sent and Petitioner received a letter notifying him of his suspension without pay for ten consecutive work days ("Suspension without Pay Letter") and afforded Petitioner the opportunity to administratively appeal his suspension without pay. (T. p. 30; Resp. Ex. 9)

31. The Suspension without Pay Letter indicated that the recommendation for dismissal was approved in part because by the Petitioner's own admission he was Facebook friends with Inmate Mabe which is a violation of NCDPS's policy. (Resp. Ex. 9)

32. Petitioner acknowledged that on February 5, 2015, he attended an OSDT In-Service training concerning maintaining professional boundaries related to staff and offender relations. He also attended a combined sixteen hours of Female Offender Training on December 9, 2014. Petitioner further acknowledged that he attended a course related to the Prison Rape Elimination Act ("PREA") on December 2, 2014. The Petitioner admitted that his trainings included instruction and guidance on refraining from undue familiarity with inmates. (T. pp. 16 - 18, Resp. Ex. 1)

33. Petitioner admitted that he received and understood a written memorandum provided to Eastern CI staff regarding undue familiarity with inmates that included language that “[e]mployees are not to establish personal, intimate, or sexual relationships with inmates. . . . Failure to comply with these policies is considered personal misconduct which can result in disciplinary action up to and including dismissal.” (T. pp. 18 - 19, Resp. Ex. 4)

34. A connection on a social media site, including a Facebook friendship, is a personal relationship.

35. Petitioner admitted that he was provided and was familiar with the Respondent’s Personal Dealings with Offenders Policy. (T. pp. 19 - 20, Resp. Ex. 5)

36. Petitioner admitted that on October 29, 2007, he signed the Respondent’s Code of Ethics agreeing to “[c]omply with all laws, regulations, and rules governing the Department, and policies of the Department.” (T. pp. 20 - 21, Resp. Ex. 6)

Based upon the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the undersigned makes the following conclusions of law:

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

2. 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. Petitioner has been continuously employed as a State employee since April 16, 2007. At the time of his suspension without pay, he was a Career State Employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et. seq.*), and specifically the just cause provision of N.C. Gen. Stat. §126-35.

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

5. To demonstrate just cause, a State employer may show “unacceptable personal conduct” as set forth in 25 NCAC 1J.0604(b)(2) or “grossly inefficient job performance” pursuant to 25 NCAC 1J.0606.

6. The suspension without pay letter specified that the Petitioner was being disciplined for unacceptable personal conduct.

7. Respondent complied with the procedural requirements for a suspension without pay for unacceptable personal conduct pursuant to 25 N.C.A.C. 01J .0604 and .0613.

8. Judgment should be rendered in favor of the State agency when the evidence presented establishes that the employee committed at least one of the acts for which he was

disciplined. *Hilliard v. Dept. of Correction*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005). An employer may discipline an employee for just cause based upon one instance of unacceptable personal conduct. 25 N.C.A. 1J.0604(b).

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

10. Just cause is a “flexible concept embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case.” *NC Dep’t. of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). In other words, a determination of whether disciplinary action taken was “just” requires “an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” The North Carolina Court of Appeals articulated a three-part “analytical approach” for determining where there is just cause for discipline. Under this approach, a court must answer the following inquiries to establish the existence of just cause:

- (a) did the employee engage in the conduct the employer alleges;
- (b) does the employee’s conduct fall within one of the categories of unacceptable personal conduct provided in the Administrative Code; and
- (c) if the employee’s actions amount to unacceptable personal conduct, did the misconduct amount to just cause for the disciplinary action taken? Just cause must be determined based upon an examination of the facts and circumstances of each individual case.

*Warren v. North Carolina Dep’t of Crime Control & Public Safety, N. Carolina Highway Patrol*, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) review denied, 735 S.E.2d 175 (N.C. 2012).

11. Here, the preponderance of the evidence shows that Petitioner engaged in the conduct alleged by Respondent. The Petitioner admits and the greater weight of evidence demonstrates that Petitioner was Facebook friends with Inmate Erin Mabe and that he failed to report his conduct in writing to his supervisor within the 48-hour time frame.

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

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

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

14. NCDPS suspended the Petitioner without pay for violation of NCDPS, Division of Prisons Policy and Procedures Manual at Chapter A, Section .0200, Title: Conduct of Employees, Section .0202(f) “Personal Dealings with Inmates,” which provides in part that employees will

maintain a quiet but firm demeanor in their dealings with inmates and will not indulge in undue familiarity with them, no employee will deliver or send messages or engage in written personal correspondence or converse with inmates via telephones or electronic devices, and any employee who learns that a person with whom they have had or have had a personal relationship has come under supervision of or is incarcerated by the Department of Public Safety shall report in writing to his/her supervisor within 48-hours of learning that the person is under supervision or incarcerated. (Resp. Ex. 13, pp. 3-4 of 10.)

15. There is no dispute that the Petitioner was Facebook friends with Inmate Erin Mabe.

16. Being Facebook friends with an inmate as found herein violates NCDPS' Conduct of Employees, Personal Dealings with Inmates Policy and constitutes unacceptable personal conduct as Petitioner's conduct violates a written work rule, conduct for which no reasonable person should expect to receive prior warning, and conduct unbecoming a state employee that is detrimental to state service.

17. As a Correctional Officer, Petitioner has a duty to ensure that his contacts and associates, on social media or otherwise, are in keeping with the safety and security precautions of his employer. Petitioner's personal social media policy of accepting friend requests from individuals who have connections with mutual friends is a potential safety and security issue, not only for himself, but for co-workers and other inmates.

18. Petitioner's failure to report in writing his discovery that he had become Facebook friends with Inmate Mabe until March 25, 2015 as found herein violates NCDPS' Conduct of Employees, Personal Dealings with Inmates Policy and constitutes unacceptable personal conduct as Petitioner's conduct violates a written work rule, conduct for which no reasonable person should expect to receive prior warning, and conduct unbecoming a state employee that is detrimental to state service.

19. An employee can be suspended without pay for unacceptable personal conduct without prior written warning. 25 NCAC 01I.2306.

20. Petitioner became unduly familiar with Inmate Erin Mabe by becoming Facebook friends with her and by his failure to report this activity in writing within 48-hours of his discovery that he had friended an inmate on Facebook. Petitioner's conduct created an unnecessary risk to the day-to-day operations and security of Eastern CI and to public safety.

21. Respondent met its burden of proof and established by substantial evidence in the record that it had just cause to suspend Petitioner without pay for unacceptable personal conduct. For the reasons stated in the pre-disciplinary conference notice and the suspension without pay letter, Respondent had just cause to suspend Petitioner without pay for unacceptable personal conduct.

## **FINAL DECISION**

The undersigned affirms Respondent's suspension without pay of Petitioner in that Respondent had just cause for this disciplinary action per N.C. Gen. Stat. § 126-35.

## **NOTICE**

**THIS IS A FINAL DECISION** issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statutes § 126-34.02(a): "An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 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 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 28th day of June, 2016.

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Philip E Berger Jr.  
Administrative Law Judge