

STATE OF NORTH CAROLINA
COUNTY OF ALEXANDER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 OSP 04783

<p>Jeffrey Miller Petitioner,</p> <p>v.</p> <p>North Carolina Department of Public Safety Respondent.</p>	<p>FINAL DECISION</p>
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This contested case was heard before Administrative Law Judge Selina Malherbe on March 21, 2022 via the WebEx virtual platform.

APPEARANCES

PETITIONER: Jennifer J. Knox
Law Office of Jennifer J.Knox
4600 Marriott Drive, Suite 200
Raleigh, NC 27612

RESPONDENT: Jaren E. Kelly
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

WITNESSES

For the Petitioner:

Jeffrey Miller (Petitioner)
Michael Shook, Correctional Officer

For the Respondent:

Darren Daves, Correctional Sergeant
John Lowery, Offender
Pamela Cox, Registered Nurse
Chad Clifton, Correctional Lieutenant

Deirdre Hatcher, OSI Investigator
Jeffrey Daniels, Assistant Regional Director
Eric Dye, Deputy Warden

EXHIBITS

Respondent's exhibits:

Resp. Ex. 1: Offender John Lowery's Grievance No.: 4870-2020-MPODH-12290
Resp. Ex. 2: Offender John Lowery's Statement dated June 2, 2020
Resp. Ex. 3: NCDPS Use of Force Policy
Resp. Ex. 5: Incident Report No.: 4870-20-329
Resp. Ex. 6: Video Footage
 C39 Inmate Intake
 C174 Restrictive Housing Entrance North View
 C176 Restrictive Housing Entrance East Corridor
 C199 Restrictive Housing West H-2
 C207 Restrictive Housing SIB H-1
Resp. Ex. 13: OSI Internal Investigation Report
Resp. Ex. 14: OSI Internal Investigation Report (Supplemental Report)
Resp. Ex. 19: Michael Gregory Shook Dismissal Letter

PARTY REPRESENTATIVES

The Petitioner's party representative was Petitioner, Jeffrey Miller. The Respondent's party representative was Jeffrey Daniels, Assistant Regional Director.

ISSUE PRESENTED

Whether Petitioner's actions were unacceptable conduct that provided just cause for Respondent to dismiss Petitioner from employment?

STANDARD OF REVIEW

Petitioner alleges that he was terminated without just cause. In personnel cases, the State agency bears the burden of showing by a preponderance (or the greater weight) of the evidence that Petitioner was discharged for just cause pursuant to N.C. Gen. Stat. § 150B-25.1(c). Respondent must demonstrate by a preponderance of the evidence that it had just cause to dismiss the Petitioner from employment 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 and Conclusions of Law. 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.

AFTER CAREFUL CONSIDERATION of the foregoing and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

FINDINGS OF FACT

1. Petitioner had been employed by the Respondent, North Carolina Department of Public Safety (“the Department), for more than three years at the time of his dismissal. Petitioner was assigned to Alexander Correctional Institution (Alexander C.I.) as a Correctional Officer III.
2. The series of events leading to Petitioner’s dismissal began on March 24, 2020.
3. On March 24, 2020, Offender John N. Lowery transferred into Alexander C.I. (hereinafter “Offender”).
4. While correctional staff processed Offender into Inmate Receiving, Offender had a problem with staff informing him that he could not have some of his personal items at the facility.
5. Staff restrained Offender with chains and while he was being brought out to view his property, Offender assaulted and injured a staff member by jerking on the chains.
6. Staff gained Offender’s compliance by using OC pepper spray and using hands-on force.
7. Staff placed Offender in a holding cell to be decontaminated because of the OC pepper spray and where he was treated by correctional medical staff.
8. The correctional medical staff notified the Restrictive Housing unit to take custody of Offender and transport him to Restrictive Housing.
9. After Offender was decontaminated, five correctional officers from Restrictive Housing, including Petitioner, arrived to transport Offender to Restrictive Housing.
10. Due to Offender being placed in shackles, the correctional officers took custody of Offender and placed him in a wheelchair.
11. Petitioner, along with his fellow correctional officers, transported Offender from Inmate Receiving to Restrictive Housing, while passing a number of video cameras.
12. Upon arriving in the Restrictive Housing block, the correctional officers placed Offender in the Restrictive Housing shower in order to retrieve a connecting chain for his shackles.

13. As the correctional officers placed Offender in the shower, all five of the correctional officers entered behind Offender where they were out of the view of the camera for 12-14 seconds.

14. The officers brought Offender out of the shower and placed him in the hallway while they cleared out the cell H-1 (“Hotel-1”) for him. Petitioner stood next to Offender as the other officers cleared the cell.

15. Staff placed Offender in cell H-1 where a camera was located.

16. Offender was seen by medical staff in cell H-1 where he was treated for injuries to his face and head by Licensed Practical Nurse Janet Klein and Registered Nurse Pamela Cox.

17. Two days after the incident, Sergeant Darren Daves (“Sgt. Daves”) addressed the disciplinary process for Offender’s assault on a staff member in Inmate Receiving.

18. Offender reported to Sgt. Daves that the correctional officers, including Petitioner, who had transported Offender to the Restrictive Housing unit, assaulted him and called him racial slurs. Offender filed a grievance regarding the assault. (Resp. Ex. 1)

19. Offender testified that Petitioner and the other officers slammed him in the shower and punched him.

20. Sgt. Daves was familiar with Offender from Offender’s first time at Alexander C.I. He stated that Offender is a manipulative inmate who is well known to lie about staff to get staff he does not like away from him. Sgt. Daves further stated that Offender did things “to bait staff” to react so that Offender could file grievances or write about staff to the regional office.

21. Sgt. Daves worked with Petitioner for two to five years and knows Petitioner had a good reputation: he supervised Petitioner, worked with him on the Prison Emergency Response Team (P.E.R.T) and trusted his decision-making; Petitioner was a person who other officers went to for advice; and he thought that the Offender’s allegations against Petitioner were false.

22. Sgt. Daves saw signs of injuries on Offender, but he thought that the injuries came from the Use of Force incident in Receiving.

23. Sgt. Daves reported Offender’s allegations to the chain of command.

24. Sgt. Daves asked Petitioner if there was a use of force incident in Restrictive Housing and Petitioner said there was not. He also asked Petitioner if Offender was self-injurious and Petitioner responded no. Petitioner did not make a Use of Force report.

25. Correctional Lieutenant Chad Clifton (“Lt. Clifton”) was assigned to investigate Offender’s allegations.

26. Lt. Clifton spoke with Offender, Petitioner, and other correctional officers regarding the allegations.

27. Offender provided a written statement to Lt. Clifton claiming that Petitioner, along with the other officers, assaulted him in the shower and that Petitioner called him racial slurs. (Resp. Ex. 2)

28. Lt. Clifton spoke with Petitioner twice about the injuries to Offender. He testified that in his 26 years of experience there had been instances where offenders injured themselves in order to get staff in trouble. When he asked Petitioner if that is what happened to Offender, Petitioner could not explain why there were injuries to Offender's face.

29. Lt. Clifton reviewed the various camera footage that captured Offender being transported from Inmate Receiving to Restrictive Housing. He noted that at all times prior to his entry into the Restrictive Housing shower, Offender did not have any injuries to his face. However, whenever Offender was taken out of the shower and placed in H-1, Offender showed injuries that consisted of blood running down his face. (Resp. Ex. 6)

30. Lt. Clifton was the supervising officer of Inmate Receiving and was present when the initial Use of Force in Receiving took place. There were no injuries to Offender's face when Offender left Inmate Receiving and was taken by the Restrictive Housing correctional staff members. He reasoned that the injuries sustained by Offender occurred during his transport from Inmate Receiving to Restrictive Housing.

31. Lt. Clifton testified that whenever there is a use of force incident, the incident must be reported pursuant to NCDPS Use of Force Policy. (Resp. Ex. 3) Petitioner failed to file a report for the use of force incident as required by this policy.

32. Lt. Clifton prepared an Incident Report that disclosed his findings concerning the use of force in Receiving and in Restrictive Housing. (Resp. Ex. 5)

33. Lt. Clifton is familiar with Offender and knows Offender to be a manipulative inmate who has a history of issues with staff.

34. Lt. Clifton testified that Petitioner was a good correctional officer and he believed that Offender put Petitioner and the other officers in a "bad spot."

35. Lt. Clifton's Incident Report was sent to the Regional Office for review.

36. The Office of Special Investigations ("OSI") conducted their own internal investigation into the allegations and assigned Investigator Deirdre Hatcher to the investigation.

37. After being assigned the case, OSI Investigator Hatcher interviewed Petitioner, Lt. Clifton, Sgt. Daves, Nurse Cox, Offender, and the other officers involved. She also viewed video of the incident.

38. Investigator Hatcher prepared and submitted her investigation report to her supervisor to be sent to the Office of General Counsel on July 16, 2020. Her investigation findings were similar to the findings of Lt. Clifton's investigation. (Resp. Ex. 13)

39. Investigator Hatcher reviewed the video footage, making minute-by-minute notes of the incident captured on the video footage which she included. She specifically notes that the video footage from camera C39 for Receiving shows that "[t]here is a still photograph taken of offender Lowery at 1315 hrs [sic] to document him and the lack of injuries after the use of force in Inmate Receiving." (Resp. Ex. 13, p. 21)

40. A supplemental investigation was requested because of "several inconsistencies from staff accounts and evidence presented for consideration ... that there was video footage missing from what was provided to the OSI investigator." (R. 14 p. 3)

41. In her supplemental report, dated October 5, 2020, Investigator Hatcher states that the "[v]ideo footage confirmed there were no injuries on Offender Lowery's face and head as he exited Inmate Receiving." (Resp. Ex. 14 p. 7)

42. Based on the internal investigation, management determined that there was an unauthorized use of force by Petitioner and the other officers, and that none of the officers reported the use of force incident as required by policy.

43. Associate Warden Dye made a recommendation for disciplining Petitioner up to and including dismissal.

44. Following the internal investigation and grievance process, Petitioner was dismissed for Unacceptable Personal Conduct on July 19, 2021 and the dismissal letter was hand-delivered to him. (Resp. Ex. 19)

45. The relevant policies that Petitioner violated were: NCDPS Prisons Policy and Procedure Manual, Chapter F, Section .1500, Use of Force, Subsection .1503, Subsection .1506 Reporting Procedures and the State Human Resources Manual Disciplinary Action Policy regarding Unacceptable Personal Conduct.

46. After completing his internal agency appeals, the Employee Advisory Committee unanimously recommended that Petitioner's dismissal be upheld. On November 1, 2021, Petitioner was sent the Final Agency Decision upholding his dismissal.

47. In making its final determination, Respondent considered the severity of the March 24, 2020 incident, the harm resulting from the policy violations, the subject matter involved, the Petitioner's prison work history and the discipline imposed in other similar cases, as well as the entire range of disciplinary actions available under state law.

48. The Undersigned finds the testimony of Pamela Cox, Chad Clifton, Deirdre Hatcher, Jeffrey Daniels, Eric Dye and Darren Daves to be persuasive, consistent with other evidence and credible, and, therefore, gives it greater weight.

49. The Undersigned finds the testimony of Offender to be credible to a limited extent. Offender's testimony concerning the extent of his injuries and the place where the injuries occurred which is supported by other credible and objective evidence is given some weight. Offender's other testimony is not credible and is given no weight.

50. Petitioner testified concerning his activity during the events concerning Offender in the shower at Restrictive Housing. It was his testimony that although he assisted with transporting Offender from Inmate Receiving to Restrictive Housing in a wheelchair and then into and out of the shower, he never looked at Offender's face and "does not recall anything memorable."

51. The Undersigned finds the testimony of Petitioner Jeffrey Miller is not credible, and, therefore, is given lesser weight.

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. All parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. 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.

2. Petitioner is a Career State Employee entitled to the protections of the North Carolina Human Resources Act (N.C. Gen. Stat. § 126-1 et seq.), and specifically the provisions found in § 126-34.02(b)(1) and § 126-34.02(b)(4).

3. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611,612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

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

5. 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.

6. To demonstrate just cause, a State employer may show "unacceptable personal conduct" pursuant to 25 NCAC 1J.0604(b)(2).

7. Respondent complied with the procedural requirements for dismissal for unacceptable personal conduct.

8. It is well settled that an employer may discipline and dismiss an employee for just cause based upon one instance of unacceptable personal conduct. 25 N.C.A.C. 1J.0604(b).

9. Although section 126-35 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, 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).

Did Petitioner engage in the conduct as alleged?

11. Here, the preponderance of the evidence shows that Petitioner engaged in the conduct alleged by the Respondent. The greater weight of evidence demonstrates that there were no injuries to Offender prior to Petitioner and the other correctional officers placing Offender in the Restrictive Housing shower, however, once Offender was removed from the shower and placed in the holding cell, he had injuries to his face. Furthermore, Petitioner did not report that there was a use of force incident or that Offender had caused the harm to himself.

Does the employee’s conduct fall within one of the categories of unacceptable personal conduct?

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. Petitioner's conduct qualifies as all three enumerated categories of unacceptable personal conduct.

15. Respondent demonstrated that Petitioner's conduct as detailed in the dismissal letter constitutes unacceptable personal conduct.

Did Petitioner's misconduct constitute just cause for dismissal?

16. Petitioner committed an unauthorized use of force against Offender.

17. Petitioner failed to report a use of force to his supervisors or offer a reasonable explanation for why Offender had injuries that were not present before Petitioner taking custody of him.

18. Pursuant to the North Carolina Supreme Court's decision in *Wetherington*, the following factors must be considered in determining just cause:

- a. severity of the violation
- b. subject matter involved
- c. resulting harm
- d. work history
- e. discipline imposed in other cases involving similar violations. *Wetherington v. North Carolina Dep't of Public Safety*, 772 S.E.2d 77, 924-925 (N.C. 2015)

19. The violations of policy were severe when viewed in their entirety. The incident that occurred on March 24, 2020 was an unauthorized use of force where Offender sustained injuries and Petitioner did not report it as required by policy.

20. The subject matter of the violations committed by Petitioner concerns the care, custody, and supervision of those who have been committed to the custody of the Department which is essential to the mission of the Department.

21. The harm resulting from Petitioner's actions consisting of an offender being injured, no explanation for the cause of the injuries was given and no report for the use of force was filed.

22. Petitioner has a positive work history and it includes his most recent performance evaluation which states that he "Meets Expectations."

23. Respondent properly considered Petitioner's policy violations and resulting harm as well as potential harm as an aggravating factor when weighing the appropriate level of discipline imposed.

24. Petitioner's disregard for policies that directly impact the care, custody, and supervision of those who have been committed to the custody of the Department supports dismissal.

25. The Department met its burden of proof and established by substantial evidence in the record that it had just cause to dismiss Petitioner for unacceptable personal conduct. For the reasons stated in the pre-disciplinary conference notice, the dismissal letter, and the Final Agency Decision, Respondent had just cause to dismiss Petitioner for unacceptable personal conduct. On the basis of the above-noted Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

The Undersigned affirms Respondent's dismissal of Petitioner in that Respondent had just cause for this disciplinary action per N.C. Gen. Stat. § 126-35.

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.

IT IS SO ORDERED.

This the 9th day of June, 2022.



Selina Malherbe
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 9th day of June, 2022.



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