

STATE OF NORTH CAROLINA
COUNTY OF JOHNSTON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
07 OSP 2222

Charles Jones)
Petitioner))
vs.)
Bryan Beatty, Secretary of NC Dept of)
Crime Control & Public Safety and the)
NC Dept of Crime Control & Public)
Safety (NC Highway Patrol))
Respondent))))

DECISION

This contested case was heard by Senior Administrative Law Judge Fred G. Morrison Jr. on April 28, 29 and 30, in Raleigh, North Carolina.

APPEARANCES

For Petitioner: John P. O'Hale, Attorney at Law, Smithfield, North Carolina

For Respondent: Ashby T. Ray & Tamara S. Zmuda, Assistant Attorneys General, North Carolina Department of Justice, Raleigh, North Carolina

ISSUE

Whether the Respondent had just cause (procedurally and substantively) to terminate Petitioner's employment with the State Highway Patrol for unacceptable personal conduct.

FINDINGS OF FACT

Petitioner Charles Jones served our country in the United States Marine Corps from May 1988 to May 1994. He worked as a military policeman and reached the rank of Sergeant(E-5) prior to being honorably discharged. In November of 1994, he was employed by the North Carolina Highway Patrol where for the next thirteen years he served as a Cadet, Trooper, Senior Trooper, Master Trooper, and Sergeant in various postings across North Carolina.

In May of 2001, Petitioner Jones was selected for the Patrol's Canine Handler School. Ricoh, a Belgian Malinois, was assigned as his canine partner. Following a six week course, they were certified as a Canine Team. In addition to being certified as a handler by the Patrol, Petitioner was certified by the North American Police Work Dogs Association as a canine handler. Canine Ricoh became certified as a police patrol/narcotics canine after completing fourteen weeks of training. Patrol training stressed Obedience & Control as primary. Troopers were told to rule with an iron fist as canines were weapons which had to be under control at all

times. Handlers were taught that they had to resolve discipline problems immediately. The Patrol had no approved or disapproved compliance techniques. Tough handling was customary. Having been taught “when your dog is not performing, bust his ass,” handlers used whatever methods worked with their dogs, including: choke collars, stun guns, sticks, cans filled with rocks, Alpha Rolls, windmilling, helicoptering, tying-off, tethering, lifting-up. “Do whatever to get control” was stressed in training sessions. For the protection of the dogs and the public, children as well as adults, dogs had to be trained to obey release commands immediately--- otherwise serious injury could result to humans, and dogs could die from swallowing illegal drugs. These dogs were not treated as household pets and public petting was forbidden.

Petitioner and Ricoh worked together as a successful team for six years, confiscating more than ten million dollars in cash and drugs. Ricoh lived in Petitioner’s home garage. Petitioner provided food, water, grooming and medical care for Ricoh at no cost to the State. Petitioner sought additional training for Ricoh whenever possible, especially concerning obeying the release command when Ricoh had an object in his mouth. Ricoh could be very possessive, aggressive, defiant and domineering, wanting to be the Alpha or Top Dog, and several times during training he had bitten Petitioner.

In addition to handling, training, and deploying a canine for narcotics sniffs, tracking of persons, and recovery of evidence, Petitioner supervised the training of other canine teams. He was recognized by other canine handlers as being the very best at his craft. Petitioner was assigned to conduct a four day canine maintenance narcotics training session August 6-9, 2007, involving Ricoh along with several other troopers and their dogs. During the afternoon of August 8, while Petitioner and Ricoh were doing a narcotics sweep in a training center building, Ricoh refused to release upon command a piece of fire hose he had been given as a reward for alerting to the presence of drugs. After several other efforts to correct Ricoh failed, Petitioner took him outside the building, put him on the ground from the deck, tied his leash to the top rail, suspended him with his rear paws on the ground, gave him 5 commands to release with each command being followed by a kick in the pants/flank with his right foot instep. The tying-off, commands and kicks took about 13 seconds. Ricoh released the treat, Petitioner picked it up, put it away, went up on the deck and untied Ricoh, which took another 13 seconds. Petitioner did not intend to harm or abuse Ricoh, nor did he. He wanted to get his attention and correct him. Ricoh was not injured and the partners continued the training session without further incident.

A fellow trooper used his cell phone to record Petitioner disciplining Ricoh. After he showed it to fellow troopers in the field, word got to Raleigh officials and was leaked to the press. Petitioner’s superiors, realizing their dogs had been treated worse during training, wrote him up for a less serious personal conduct violation which could have resulted in a written warning and/or three days suspension without pay. Because there had been several news reports of misconduct by troopers, the Governor’s press office became involved. CCPS Secretary Bryan Beatty viewed the trooper’s recording and had it sent to the Governor’s office where staff reviewed it and advised the Governor who decided that Petitioner should be dismissed from the Patrol. Petitioner was not confronted and asked for comments before this decision was made. Members of the Governor’s staff communicated the Governor’s decision to Secretary Bryan Beatty and Lieutenant Clendenin of the Patrol. Secretary Beatty told Colonel Clay and Lieutenant Clendenin told Lieutenant Colonel Lockley that “ they want him gone”. Upon being

informed of the Governor's decision, patrol officials sent Petitioner home on placement, took his car, dog and pistol, changed the charges, expedited the process, and fired him for unbecoming conduct. Because of pressure felt from the Governor's office, the Patrol did not give meaningful consideration to Petitioner's responses to the charges against him. A news article, quoting Secretary Beatty and Lieutenant Clendenin that Petitioner was being fired, was published at 12:38am on the morning that Petitioner's predismisal conference was scheduled for 10:00am. Lieutenant Clendenin also emailed the news article to all Patrol employees across the State at 9:58am. Following the conference, Patrol officials did not confer to discuss Petitioner's contentions before Lieutenant Colonel Lockley signed off on the firing. Prior to and at the hearing, Lieutenant Colonel Lockley admitted that he did the wrong thing by approving the predetermined firing decision because, in his opinion, Petitioner acted in the manner in which he was trained even though it was an ugly manner. I find Lieutenant Colonel Lockley, Petitioner, and other Patrol dog handlers who testified to this effect to be credible witnesses. Petitioner appealed his termination to Secretary Beatty, who had been in contact with patrol officials, the Governor and his staff, and the news media during the dismissal process. Secretary Beatty named an employee advisory committee which heard Petitioner's appeal and unanimously recommended that the dismissal be reversed. When Secretary Beatty rejected the committee's recommendation, Petitioner filed a Petition for Contested Case Hearing alleging lack of just cause for his dismissal and asking to be reinstated with an award of back pay and attorney's fees.

CONCLUSIONS OF LAW

1. Petitioner was a career state employee at the time of his dismissal. Because he is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a Decision to the State Personnel Commission. N.C. GEN. STAT. §§ 126-1 *et seq.*, 126-35, 126-37(a). (2007).

2. N.C. GEN. STAT. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." In a career state employee's appeal of a disciplinary action, the department or agency employer bears the burden of proving that "just cause" existed for the disciplinary action. N.C. GEN. STAT. § 126-35(d) (2007).

3. 25 NCAC 11.2301(b) enumerates two grounds for disciplinary action, including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct. "Unacceptable personal conduct" is defined as conduct for which no reasonable person should expect to receive prior warning; willful violation of known or written work rules; conduct unbecoming a state employee that is detrimental to state service; or, the abuse of--- an animal owned by the State. 25 NCAC 1J.0614(i)(4,5,6) (2007).

4. The North Carolina State High Highway Patrol's Directive H.1, Section VI "Unbecoming Conduct" provides as follows: "Unbecoming conduct shall include any conduct that constitutes unacceptable personal conduct pursuant to State Personnel Policy and any

conduct which tends to bring the Patrol into disrepute, or which reflects discredit upon any member(s) of the Patrol---.”

5. N.C.D.E.N.R. v. Clifton Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004), states that the fundamental question in determining just cause is whether the disciplinary action taken was just. Citing further, “Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” Our Supreme Court said that there is no bright line test to determine “just cause”—it depends upon the specific facts and circumstances in each case.

6. Respondent has not met the burden of persuading me by the greater weight of the evidence presented that it had just cause, procedurally and substantively, to terminate Petitioner’s employment. My reasons for concluding that this dismissal was not just are as follows:

- a. Petitioner was making a good faith training effort to make Ricoh release in accord with State v. Fowler, 22 N. C. App. 144 (1974), which held that punishment administered to an animal(a German Shepherd dog whose owners/trainers were breaking from digging holes by immersing its head for 45 seconds in a hole filled with water) in an honest and good faith effort to train it is not without justification and not “willful.” Also, G. S. 14-360(c)(2) exempts activities conducted for purposes of training, such as Petitioner did.
- b. In accord with the ruling in Fred A. Wilkie v. N. C. Wildlife Resources Commission, 118 N. C. App. 475 (1995), a reasonable person in Petitioner’s position would have expected to receive prior warnings prior to being dismissed, in view of Patrol customs concerning the rough and tumble handling by troopers of law enforcement canines during training sessions.
- c. Petitioner did not receive a required meaningful predissmissal conference because the Patrol’s decision to carry out the Governor’s decision to fire him had been made, released to the news media, and disseminated to all Patrol employees prior to such conference; nor did firing officials consider his contentions or confer after the conference prior to approving the firing. Also, Petitioner had no opportunity to explain his actions to those in the Governor’s office who decided and ordained that his employment with the Patrol should be terminated. See Margaret Y. Bishop v. North Carolina Department of Human Resources, 100 N. C. App. 175 (1990).

7. In State v. Wallace, 49 N. C. App. 475 (1980), Judge Harry C. Martin wrote a very learned dissertation on dogs. I commend it to those who read this decision. People have loved dogs from time immemorial. Jesus spoke of them in His conversation with a Canaanite woman in the region of Tyre and Sidon. I cherish my companionship with our three year old Golden Retriever, Counselor. He has followed in the paw prints of Talitha, Natasha, P. D., Rocky II, Rocky I, Cassie, Spitz, and many strays which have blessed my days since childhood. With them in mind, my final conclusion is that the State of North Carolina forego the future use

of dogs such as Ricoh for law enforcement purposes, unless it purchases fully trained canines to be handled by fully trained troopers who are given specific written compliance techniques.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's decision to terminate Petitioner's employment should be reversed and Petitioner should be reinstated with back pay and attorney's fees.

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 5th day of June, 2008.

Fred G. Morrison Jr.
Senior Administrative Law Judge

A copy of the foregoing was mailed to:

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This the 5th day of June, 2008.

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