

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 08 CVS 21917

BRYAN BEATTY, SECRETARY OF)
THE N.C. DEPARTMENT OF CRIME)
CONTROL AND THE N.C.)
DEPARTMENT OF CRIME CONTROL)
AND PUBLIC SAFETY (N.C.)
HIGHWAY PATROL),)
)
Petitioner,)
)
v.)
)
CHARLES JONES,)
)
Respondent.)

ORDER

This matter came on for hearing during the January 6, 2010, Civil Session of Superior Court for Wake County, the Honorable James E. Hardin, Jr., Judge presiding, on Bryan Beatty and the North Carolina Department of Crime Control and Public Safety's PETITION FOR JUDICIAL REVIEW. After careful consideration and thorough review of the entire official record, the briefs submitted by both parties and the arguments made at the hearing, the undersigned finds the following:

STANDARD OF REVIEW

The scope of this Court's review is governed by N.C. Gen. Stat. § 150B-51. N.C. Gen. Stat. § 150B-51(c), states:

In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency *does not* adopt the administrative law judge's decision, the court shall review the official record *de novo*, and shall make findings of fact and conclusions of law. In reviewing the case, the court should not give deference to any prior decision made in the case and shall

not be bound by the findings of fact or conclusions of law contained in the agency's final decision. The court shall determine whether petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency decision; may remand the case to the agency for further explanation under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency for failure to provide the explanations; and may take any other action allowed by law.

Here, the State Personnel Commission (hereinafter "SPC") did not adopt the administrative law judge's (hereinafter "ALJ") decision to the extent that it made additions and deletions to the ALJ's findings of fact and conclusions of law. Although there are differences in the findings of fact and conclusions of law between the two decisions, the outcome of the SPC's decision is ultimately the same as that of the ALJ's recommended decision. Essentially, the ALJ determined that the North Carolina State Highway Patrol, (hereinafter "Patrol") did not have just cause to discipline Charles Jones (hereinafter "Jones"). The SPC determined that, while the Patrol did not have just cause to discipline Jones for *unacceptable personal conduct*, it did have just cause to discipline Jones for *unsatisfactory job performance*.

Because the SPC did not fully adopt all aspects of the ALJ's decision and because the Patrol has not adopted the ALJ's decision, this Court has conducted a *de novo* review of this case and gives no deference to any prior decision made in this matter. Accordingly, the Court does make the following:

FINDINGS OF FACT

1. In November of 1994, Jones was employed by the 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. (Pet. Ex 9)

2. In May of 2001, Jones was selected for the Patrol's Canine Handler School. (T p. 588) Ricoh, a Belgian Malinois, was assigned as his canine partner. (T p. 589) Jones was trained by Lieutenant Don Cole, of the Patrol to be a canine handler. (T p. 370) Following a six week canine handler course, Jones and Ricoh were certified as a Canine Team. (T p. 592) In addition to being certified as a handler by the Patrol, Jones was certified by the North American Police Work Dogs Association as a canine handler. (T p. 592) Canine Ricoh became certified as a police patrol/narcotics canine after completing fourteen weeks of training. (T p. 592)

3. Patrol training of canines consistently stressed Obedience & Control. (Pet. Ex. 12; T pp. 64-65) Canine handlers were taught to rule with an "iron fist" as canines were "weapons" which had to be under control at all times. (Res. Ex. 9) Having been taught "when your dog is not performing, bust his ass," handlers were taught to find what worked with each individual dog and handlers used whatever methods worked with their dogs. (T pp. 426-427; 432-437)

4. Generally, discipline, like striking or kicking the canine, is reserved for situations where the handler, or another party is in physical danger, such as when the canine displays aggression toward a handler. (Pet. Ex. 2; T pp. 222, 501) Canine handlers are taught to use reasonable judgment in exercising discipline and are not permitted to utilize just any technique to maintain control of an animal. (T p. 221)

5. On August 8, 2007, Jones was taking part in a canine maintenance narcotics training session with Ricoh and several other troopers and their dogs. (T pp. 620, 623) During the afternoon of August 8, while Jones and Ricoh were doing a narcotics sweep in a training center building, Ricoh refused to release, upon several failed commands, a piece of fire hose he had been given as a reward for alerting to the presence of drugs. In order to impose discipline on the canine, Jones took Ricoh out onto the loading dock depicted in Respondent's Exhibits 11, 12, 13 and 14. Jones gave several commands to Ricoh to release the reward and attempted to lift Ricoh up with the lead to which he was attached. (T p. 629) Jones then directed Ricoh onto the ground and strung the lead over the railing of the dock. (T pp. 41, 629) Jones raised and lowered Ricoh several times before tying off the lead around the railing. (T pp. 41, 629) Jones then jumped off the loading dock and commanded that Ricoh release the reward. (T pp. 43, 629) Ricoh failed to obey this command. Jones then kicked Ricoh with his right foot five (5) times while Ricoh was suspended from the railing while only his rear paws touched the ground. (T pp. 43, 629-630) The force of Jones' kicks caused Ricoh's legs to swing out from underneath him. (Res. Ex. 1) Trooper Herndon made a recording of this incident with a cellular telephone from 15 to 20 feet away from the site. (T p. 43)

6. After kicking Ricoh in his flanks five (5) times and commanding him to release the reward, Ricoh dropped it. Jones then picked up the reward and returned it to his patrol vehicle, which was parked in front of the loading dock. After putting the reward away, Jones untied Ricoh and let him down from the dock. (Res. Ex. 2) The entire incident took 26 seconds and was over. (T pp. 37-44) Following this exercise of

discipline, Jones and Ricoh continued with the prescribed training for that day without further incident. The evidence clearly shows that Jones was attempting to correct Ricoh and did not intend to harm or abuse the dog. No evidence has been presented that Ricoh was harmed or injured in any manner due to Jones' conduct. (T pp. 84; 87-88; 229; 429; 709-710)

7. As described herein, fellow canine handler, Trooper Herndon, used his cell phone to record Jones disciplining Ricoh. (T p. 43) Trooper Herndon, had been a canine handler since 2004 at the time of the incident. (T p. 30) Trooper Herndon stated that he had not been trained to do what he observed Jones doing and had not seen this specific method used before. (T pp. 43, 53-55) Trooper Herndon became concerned and videotaped Jones' actions because he thought these training techniques were outside of the training approved by the Patrol to discipline canines. (T p. 43). Trooper Herndon showed the video taped on his cell phone to fellow troopers in the field and word of the incident was leaked to the press. (T pp. 46-55; 84-85; 87)

8. Several canine handlers, who had been trained by the Patrol, testified at the contested case hearing. None of the trainers and handlers who testified had ever seen the specific method used by Jones as depicted in Respondent's Exhibits 1 and 2. (T pp. 440, 517, 536, 547, 559, 572) None of the trainers and handlers who testified had ever used the training techniques that Jones was recorded doing in Respondent's Exhibits 1 and 2. (T pp. 389, 419, 559)

9. Lt. Cole, Jones' canine trainer, did not demonstrate or teach Jones the techniques displayed by his actions and portrayed in Respondent's Exhibit 1 and 2. (Res. Ex 7).

10. First Sergeant Rittenhouse, the canine supervisor, never demonstrated or taught Jones the actions portrayed in Respondent's Exhibit 1 and 2. (Res. Ex 7; T p. 80).

11. The Patrol uses some canine training techniques, such as "helicoptering," "alpha roll," "recall with a parachute cord," "windmilling," "tying-off," "tethering," "lift-up," "choke-out," and various other distraction methods, that may be viewed as excessive to the general public. (T pp. 39, 71, 92, 185, 188, 224-23) Techniques, which allow for whipping the canine, striking it with an object such as a stick, use of a choke collar, and use of a stun gun are proven, tested, trained methods used by the the Patrol as well. (T pp. 426-427; 432-437; 449-450) All of these training techniques are extremely harsh and well beyond what an owner of a typical "house" pet would use to discipline or train a "family" dog. Police dogs, such as Ricoh, are not "house" pets. They are law enforcement "weapons" and must be approached, treated, and trained with this in mind. The specific training technique used by Jones on Ricoh on August 8, 2007, was not specifically approved by the Patrol. Although the training technique used in the subject case by Jones is not specifically approved by the Patrol, it is clear that this training method is no more extreme, excessive, or harsh than several of the other training methods which are approved for use by the Patrol. The training method used by Jones on Ricoh in this matter, while appearing excessive and extreme to the general public, is not

unreasonably outside of or substantially different from several of the training techniques that are tested, trained and approved for use by the Patrol.

12. On August 28, 2007, Captain Briggs became aware of Jones' conduct prompting him to complete a complaint form (HP-307), along with a copy of Respondent's Exhibit 1. These materials and complaint were then forwarded to Internal Affairs at Patrol Headquarters. (T pp. 115, 699-700).

13. Captain Castelloe reviewed the complaint and the first video, Respondent's Exhibit 1, and initially classified the complaint as "less than serious personal conduct." (Res. Ex. 3; T p. 117) Captain Castelloe believed Jones's actions were excessive and inappropriate, but not abusive. (T p. 159) This decision was made in the context of Jones' 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. (T pp. 202-203) At the time of this decision however, Captain Castelloe had not seen the second video (Resp. Ex. 2) or interviewed anyone when he made this initial determination.

14. On August 30, 2007, Captain Castelloe told Captain Briggs he (Briggs) could begin interviewing troopers regarding the complaint. (T p. 703) Captain Briggs interviewed several members of the Patrol canine team on that day. (T p. 704). As a result of his investigation, Captain Briggs determined that Jones' conduct violated Highway Patrol policy. (T p. 706).

15. Captains Briggs submitted his investigation to Major Hatcher. (T p. 712) Major Hatcher, who was in charge of Special Operations where Jones was assigned, made the determination that the type of violation depicted in the videos, was not one that should be handled in the field by a line officer. Correspondingly, he referred the investigation back to Captain Castelloe in the Internal Affairs Division. (Res. Ex. 6; T pp. 128-29, 712) From that point on, the Internal Affairs Division conducted the investigation. (T p. 129).

16. On August 31, 2008 Secretary Beatty was shown a copy of Respondent's Exhibit 1 by Captain Castelloe. (T pp. 189, 235) Later that day, Franklin Freeman, who served as Senior Advisor for Government Relations for Governor Easley, requested to see and was shown Respondent's Exhibit 1. (T pp. 118, 169, 236) Also present at that viewing were Reuben Young, Renee Hoffman and Sherri Johnson. (T p. 170) Following this review by Governor Easley's staff, the Governor made a decision that Jones was to be dismissed from the Patrol. Members of the Governor's staff communicated this decision to Secretary Beatty and Lt. Clendenin of the Patrol. Secretary Beatty told Colonel Clay that "they want him gone." (T pp. 323-324)

17. Later that day, on August 31, 2007, and in response to Governor Easley's decision to have Jones dismissed from the Patrol, Secretary Beatty ordered that Jones be placed on "investigatory placement." (T p. 268) "Investigatory placement" means that a Trooper's badge, gun, identification, vehicle and all other equipment be taken from him

or her. From that point, the individual in "investigatory placement" is not to represent the Patrol, or act in any official capacity during the time he or she is in that status. A Trooper who is on "investigatory placement" is expected to be available for interviews or meetings as the Patrol directs. Although the status of the Trooper is changed, he/she is still an employee of the Patrol and still receives pay and benefits for the duration of any "investigatory placement" period. (T p. 123-24)

18. On September 4, 2007, Captain Castelloe showed the second video, Respondent's Exhibit 2, to members of the Governor's staff. (T p. 199)

19. Captain Castelloe, along with Lt. David Langley, conducted interviews of all the Troopers present at the canine training session where the videos, Respondent's Exhibits 1 and 2, were filmed. (Res. Ex. 7; T p. 130)

20. Once Captain Castelloe completed the Report of Investigation he submitted it, along with his recommendation for termination of Jones to Lt. Col. Lockley, Deputy Commander of the Patrol. (Res. Ex. 16; T p. 136) Captain Castelloe's recommendation was upheld. Accordingly, he was directed to conduct a Pre-Dismissal Conference with Jones. Said conference was conducted on Friday, September 7, 2007. (Res. Ex. 17; T pp. 138-39)

21. Jones was provided with written notice of the Pre-Dismissal Conference. (Res. Ex. 18)

22. At the Pre-Dismissal Conference, Captain Castelloe informed Jones of the allegations against him, as well as the disciplinary actions being considered. (T p. 143) Jones was given an opportunity to provide any information concerning his case which he wanted considered prior to a final decision being made in his case. (T pp. 143-44) Jones submitted a written statement along with several documents, all of which were forwarded to Lt. Col. Lockley for review. (Res. Ex. 19; T pp. 143-44) Prior to informing Jones of a decision in this case, Lt. Col. Lockley passed Lt. Clendenin in the hallway and asked about his (Clendenin's) meeting with the Governor's staff. Lt. Clendenin told Lt. Col. Lockley, that "the Governor wants Jones gone." (T p. 348)

23. Although Lt. Col. Lockley had been provided rebuttal materials relating to the claims against him (Jones) as contemplated by the procedures allowed for in the Pre-Dismissal Conference, Lt. Col. Lockley did not consider any of these materials as they were submitted to him by Jones prior to making the pre-determined decision to dismiss Jones from the Patrol. (T p. 332)

24. Jones was then dismissed from the Patrol on September 9, 2007. (T p. 717)

25. Lt. Col. Lockley testified that he did the "wrong thing" by approving the pre-determined decision to fire Jones because, in his opinion, Jones acted in the manner in which he was trained even though it was an "ugly manner." (T pp. 337-43)

26. Jones then appealed his termination from the Patrol to Secretary Beatty. Secretary Beatty, consistent with policy, named an "employee advisory committee" which heard Jones' appeal and which unanimously recommended that the dismissal be reversed and that Jones be reinstated. (T pp. 243, 270) Secretary Beatty then reviewed all the information that was provided to him regarding this matter. (T pp. 244-47) After reviewing all the information, Secretary Beatty stated that he had determined that Jones' actions on August 8, 2007 were not based on a training technique that was accepted by the Patrol, and accordingly he upheld Jones' dismissal from the Patrol. (T pp. 247-49)

27. On December 12, 2007, Jones then filed a petition for the hearing of a contested case in the Office of Administrative Hearings.

28. On April 28, 2008, Jones' case came on for hearing before the Honorable Fred G. Morrison, Jr., Senior Administrative Law Judge. At the call of the case for hearing, Ashby Ray, Assistant Attorney General appeared on behalf of the petitioner, and indicated that this case involved a "personal conduct" issue, and it was not a "job performance" case. (T p. 18) The contested hearing, in which evidence was received, was conducted over three (3) days, those being: April 28-30, 2008.

29. On June 5, 2008, Judge Morrison issued a recommended decision which framed the salient issue before him as:

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

30. On June 5, 2008, Judge Morrison entered a recommended decision in favor of Trooper Jones finding that he had been terminated from the Highway Patrol without just cause and recommending that Trooper Jones be reinstated as a member of the North Carolina Highway Patrol with all back pay, benefits, and attorney's fees.

31. On October 16, 2008, the State Personnel Commission entered a decision and order, stating, *inter alia*, that:

Pursuant to G.S. § 126-37, the States Personnel Commission hereby orders that the decision of the Administrative Law Judge in favor of the petitioner be **adopted** and the respondent's disciplinary action with regard to the petitioner's employment, i.e., dismissal for personal conduct, be reversed, and the Commission hereby finds that the respondent failed to meet its burden of proving that it had just cause for the petitioner's dismissal for personal misconduct but that the respondent did meet its burden of proving that it had just cause to issue petitioner appropriate disciplinary action for unacceptable job performance. (Emphasis supplied)

CONCLUSION OF LAW

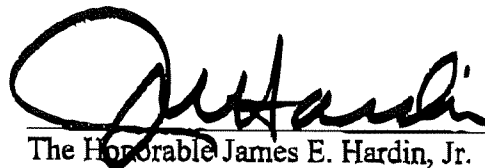
1. Jurisdiction is proper pursuant to N.C. Gen. Stat 150B-51.
2. Jones was a career state employee at the time of his dismissal, and therefore, entitled to the protections of the North Carolina State Personnel Act.
3. N.C. Gen. Stat. § 126-35(a) provides that, “[n]o career state employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.”
4. The agency employer bears the burden of proving that “just cause” existed for the disciplinary act taken. N.C. Gen. Stat. § 126-35 (d).
5. N.C.D.E.N.R. v. 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 stated that there is no bright line test to determine “just cause”- it depends upon the specific facts and circumstances of each case.
6. 25 N.C.A.C. 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 personnel conduct. “Unacceptable personnel conduct” is defined as conduct for which no reasonable person should expect to receive a prior written warning; 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. 1J.0614(i).
7. The Patrol uses and teaches canine training techniques that could be viewed as excessive, extreme, and harsh by the general public. Although Jones’ action on August 8, 2007, was not a technique used, taught, or accepted by the Patrol, the technique used by Jones within the context of these facts and circumstances shows that he was making a good faith training effort to correct behavior by Ricoh and that this conduct is in accord with State v. Fowler, 22 N.C. App 144 (1974). Further, that the training technique utilized by Jones is not unreasonably outside of or substantially different from several of the training techniques that are tested, trained and approved for use by the Patrol for the very purpose used here.
8. Jones’ action on August 8, 2007 does not violate the Highway Patrol’s policy on unbecoming conduct and does not constitute unacceptable personnel conduct under State Personnel policy.
9. The North Carolina State Highway Patrol has not shown by a preponderance of the evidence that it had just cause to terminate Jones for his action on August 8, 2007.

10. Lt. Col. Lockley failed to give meaningful consideration to Jones' statements and documents presented at his Pre-Dismissal Conference having not considering these materials at all. The fact that Lt. Col. Lockley failed to give meaningful consideration to Jones' statements and documents is a fatal procedural defect which constitutes a substantial violation of Jones' due process rights and which does not support his termination. The prejudice created by Lt. Col. Lockley's actions were not cured by Secretary Beatty's, so called "review" of the investigation prior to upholding the pre-determined decision to terminate Jones. Due process requirements are not satisfied absent a meaningful pre-termination opportunity to be heard, coupled with post-termination administrative procedures. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L. Ed. 2d 494 (1985). Accordingly, Jones' due process rights have been violated in a substantial and material manner and entitle him to "back pay" from the date of dismissal as the remedy for a lack of a meaningfully conducted pre-dismissal conference as contemplated by 25 N.C.A.C. 1B.0432. Where an award of "back pay" is made, an award of attorney's fees is authorized by N.C. Gen. Stat. § 126-4(11).

DECISION

Based upon a *de novo* review of this case and upon the foregoing Findings of Fact and Conclusions of Law, the Court adopts the rulings and recommended decision in this matter issued by the Honorable Fred G. Morrison, Senior Administrative Law Judge, and additionally, does sustain and uphold the State Personnel Commission's decision adopting Judge Morrison's decision and his rulings *in toto*, which direct that Jones "be reinstated with back pay and attorneys' fees" and, accordingly, IT IS SO ORDERED, ADJUDGED, AND DECREED.

This, the 22nd day of November, 2010, *nunc pro tunc* effective January 6, 2010.


The Honorable James E. Hardin, Jr.
Superior Court Judge Presiding