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STATE OF NORTH CAROLINA

COUNTY OF CURRITUCK

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
17 OSP 08518

Judith M Ayers Petitioner, v. Currituck County Department of Social Services Respondent.	**AMENDED FINAL DECISION ON REMAND (PER COURT OF APPEALS OCTOBER 5, 2021 OPINION)**

This matter comes before the undersigned Administrative Law Judge on remand from the North Carolina Court of Appeals' opinion, filed October 5, 2021, wherein the Court of Appeals ordered the Undersigned to remand this contested case to Respondent Currituck County Department of Social Services ("DSS") to complete its investigation and determination of whether there was any resulting harm to the agency as a result of Petitioner's unacceptable personal conduct at issue; what the harm was, if any; and what, if any was the corresponding disciplinary action taken as a result of the harm. See *Ayers v. Currituck Cnty. Dep't of Soc. Servs.*, 279 N.C. App. 514, 866 S.E.2d 785 (2021) ("*Ayers II*").

PROCEDURAL BACKGROUND

On November 21, 2017, Respondent terminated Petitioner's employment as a Child Protective Services, Social Worker Supervisor III for the unacceptable personal conduct of making a racial epithet during a private conversation with Respondent's Director at work. ("2017 Final Agency Decision;" Pet. Ex. 8)

On December 12, 2017, Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings appealing Respondent's Final Agency Decision and alleging that Respondent lacked just cause to dismiss her from employment under N.C. Gen. Stat. § 126-35.

On April 19, 2018, the Undersigned conducted a contested case hearing, pursuant to Chapters 126 and 150B of the North Carolina General Statutes, on Petitioner's appeal of her termination from employment. On June 13, 2018, the Undersigned issued a Final Decision, reversing Respondent's decision to terminate Petitioner's employment because Respondent failed to prove Petitioner engaged in unacceptable personal conduct and thus, failed to prove there was just cause to terminate Petitioner's employment.

On June 29, 2018, Respondent filed a Petition for Discretionary Review to the North Carolina Court of Appeals, pursuant to N.C. Gen. Stat. § 7A-29(a), § 126-34.02,

and Rule 18(b) of the North Carolina Rules of Appellate Procedure, appealing the June 13, 2018 Final Decision.

On October 1, 2019, the N.C. Court of Appeals issued its Opinion in *Ayers v. Currituck Cnty. Dep't of Soc. Servs.*, 267 N.C. App. 513, 833 S.E.2d 649 (2019)("***Ayers I***") vacating the June 13, 2018 Final Decision entered by the Undersigned and remanding this contested case to the Undersigned for new findings of facts supported by the evidence in the record and to continue its analysis under *Warren* as to whether Petitioner engaged in unacceptable personal conduct constituting just cause for her dismissal or for the imposition of other discipline. *Warren v. North Carolina Dept. of Crime Control & Public Safety, North Carolina Highway Patrol,* 221 N.C. App. 376, 726 S.E.2d 920 (2012).

On May 5, 2020, the Undersigned issued a Final Decision on Remand, reversing Respondent's decision to terminate Petitioner's employment. The Undersigned determined that while Respondent proved it had just cause to discipline Petitioner for engaging in unacceptable personal conduct by uttering a racial slur under N.C. Gen. Stat. § 126-35, given the mitigating factors presented at hearing, Petitioner's conduct did not rise to a sufficient level to warrant termination from employment under N.C. Gen. Stat. § 126-35(a). The Undersigned further found that Director Hurd's decision to fire Petitioner from employment was influenced by Ms. Hurds' past differences with Petitioner. Ultimately, the Undersigned reversed Respondent's decision to terminate Petitioner from employment and ordered Respondent to retroactively reinstate Petitioner, but suspend her for two weeks without pay and attend additional cultural diversity and racial sensitivity training. (Final Decision On Remand, May 5, 2020).

On June 2, 2020, Respondent filed a Notice of Appeal to the North Carolina Court of Appeals, pursuant to N.C. Gen. Stat. § 7A-29(a) and § 126-34.02, of the North Carolina General Statutes, appealing the May 5, 2020 Final Decision on Remand.

On October 5, 2021, the Court of Appeals issued its Opinion on Respondent's second appeal in *Ayers v. Currituck Cnty. Dep't of Soc. Servs.*, 279 N.C. App. 514, 866 S.E.2d 785 (2021) ("*Ayers II*"), holding that Respondent's Director Hurd failed to consider whether there was any harm to Respondent resulting from Petitioner's racial slur, but instead only considering the potential for harm. The Court of Appeals remanded this case to the Undersigned for remand to Respondent to conduct a complete, discretionary review of Petitioner's unacceptable personal conduct and corresponding disciplinary action. Of particular importance, the Court of Appeal noted:

> For us to conduct a meaningful appellate review regarding just cause for disciplinary action, the ALJ must make complete findings of fact regarding the harm to DSS resulting from Ayers' UPC, including whether any occurred. *See Wetherington I,* 368 N.C. at 593, 780 S.E. 2d at 548. The ALJ can only make such findings if DSS conducts a complete investigation under *Wetherington I.*

Ayers II, 279 N.C. App. at 517, 866 S.E.2d at 790 (2021).

Pursuant to the Court of Appeals October 5, 2021 Opinion, the Undersigned issued an Order on Remand on November 5, 2021 and remanded the case to DSS to complete its investigation and determination of whether there was any resulting harm to the agency as a result of Petitioner's unacceptable personal conduct at issue, what the harm was, if any, and what, if any, was the corresponding disciplinary action taken as a result of the harm, consistent with *Ayers II.*

On March 3, 2022, the Undersigned issued an Amended Order on Remand directing Respondent's Director to issue an Amended Final Agency Decision pursuant to the Court of Appeals' remand instructions, allowing Petitioner to file a written response to the Amended Final Agency Decision once it was entered, and setting a reconvened hearing for the purpose or presenting evidence of the reasons for Respondent's Amended Final Agency Decision and Petitioner's Response thereto.

On March 21, 2022, Respondent issued a Final Agency Decision Addendum (the "Final Agency Decision Addendum," R. Resp. Ex. 18)). Petitioner filed her Response to the Final Agency Decision Addendum on April 8, 2022 (Pet. Ex. 15). The Undersigned conducted the reconvened hearing on August 24, 2022.

Following the reconvened hearing, the Undersigned reviewed the Final Agency Decision Addendum, Petitioner's response thereto, the evidence of record including the evidence presented at the April 19, 2018 hearing, and the evidence presented at the August 24, 2022 reconvened hearing. After considering the arguments of counsel and each party's proposed Final Decision on Remand ("Final Decision on Remand II"), the Court of Appeals decision in *Ayers II* and other applicable law, the Undersigned now enters the following:

APPEARANCES

For Petitioner:	John D. Leidy, Hornthal, Riley, Ellis & Maland, LLP Elizabeth City, North Carolina (Appeared at 2018 and 2022 Hearings)
For Respondent:	John Morrison, The Twiford Law Firm Elizabeth City, North Carolina (Appeared at April 19, 2018 Hearing only)
	Courtney Hull, The Twiford Law Firm, Elizabeth City, North Carolina (Appeared at August 24, 2022 Hearing only))
	Jennifer Milak, Teague Campbell Dennis & Gorham, LLP Raleigh, North Carolina (Appeared at August 24, 2022 Hearing only)

ISSUE

Whether Respondent had just cause, pursuant to N.C. Gen. Stat. § 126-35, to discharge Petitioner from employment for unacceptable personal conduct?

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. § 126-35
25 NCAC 1I .02301, .2304, .2305

WITNESSES

April 19, 2018 Hearing

For Petitioner: Judith Ayers, Kathy Romm

For Respondent: Samantha Hurd, Sam Taylor, Tyeshia Phelps, Christal Berry

August 24, 2022 Hearing

For Petitioner: None

For Respondent: Samantha Hurd, Tiffany Sutton, Judith Ayers

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 – 13, 14-15

For Respondent: 1 – 16, 17-20[1]

FINDINGS OF FACTS

Parties

1. At the time of her discharge, Petitioner was a career State employee who worked as a Social Work Services Supervisor III for the Child Protective Services Unit of Respondent. Petitioner had been employed with Respondent since September 17, 2007 as a Social Worker III. Petitioner held a Master's degree in Education and Counseling and had previously worked at Virginia Beach Mental Health Therapy and Pasquotank Department of Social Services in North Carolina.

[1] Reference to admission of Respondent's Exhibit No. 24 (Transcript page 89 of 2022 hearing is a typographical error. There was no Respondent's Exhibit No. 24 identified, used, or admitted into evidence.

2. Respondent Currituck Department of Social Services ("Currituck DSS" or "Respondent") is a county human service agency offering public assistance, social work, and protective service programs to citizens of Currituck County. Respondent is subject to the laws, ordinances, and policies of Currituck County, the State of North Carolina, and the United States. Respondent services approximately 3108 clients per year including African American and Hispanic American clients.

3. Currituck DSS is divided into five separate units. Each unit is headed by its own supervisor who reports directly to the Director of Currituck DSS. The Foster Care Unit and Child Protective Services Unit are two of the five units. Both units provide child welfare services.

New Director of Currituck DSS Chosen – July 2017

4. Kathy Romm served as the Director of Currituck DSS for 19 ½ years until her retirement on June 30, 2017. Ms. Romm hired, supervised, and evaluated Petitioner during Romm's employment with Respondent.

5. On or about March 28, 2011, Ms. Romm promoted Petitioner to Supervisor III over Respondent's Child Protective Services Unit.

6. In 2015, Ms. Romm began making plans to retire and asked Petitioner if she was interested in being promoted to the position of Director. Petitioner was highly respected by the Currituck DSS Board of Directors and was Ms. Romm's "first choice" as her successor. Initially, Petitioner indicated that she was interested in the position. Petitioner later decided she did not want to commit to spending the next ten years as the Director of Currituck DSS and informed Ms. Romm that she had decided against becoming Director.

7. Ms. Romm asked another DSS employee, Samantha Hurd, if she was interested in the position. Ms. Hurd was the Supervisor of the Foster Care Unit with Respondent and had worked for Respondent since April 2011.

8. On July 1, 2017, Ms. Hurd became the Director of Currituck DSS and has continued to serve in that capacity since that time. As Director, Hurd administered all programs including hiring, disciplining, and discharging Respondent's personnel.

9. Both Ms. Hurd and Petitioner are Caucasian females.

Petitioner's Annual Performance Evaluations

10. From 2011 through 2017, Ms. Romm conducted the annual evaluations of Petitioner. (Pet. Exs. 9-13). Romm consistently rated Petitioner as "substantially exceeded" expectations in all areas and rated Petitioner's performance as "Excellent" in all areas. An "Excellent" rating was the highest possible evaluation rating an employee can receive in a performance evaluation.

11. Ms. Romm never had any concerns about Petitioner's professionalism, adherence to policy, attitude, or her work performance.

12. Until her dismissal, Petitioner had not received any prior disciplinary action during her employment with Respondent.

13. As Child Protective Services (CPS) Supervisor, Petitioner supervised seven Social Workers daily and on occasion, up to 18 employees from different units within the Currituck DSS. Petitioner also served as the Director's designee, supervising all Respondent's employees in Director's absence, which was at least monthly. (T. p. 34)

14. As the CPS supervisor, Petitioner's principal duty was to supervise a team of social workers responsible for receiving reports of child abuse and neglect. Petitioner screened such reports and determined if neglect or abuse had occurred. Petitioner coordinated the on-call system for Respondent to maintain coverage 24 hours a day, 7 days a week, 365 days a year. She was also engaged in substantial public interactions throughout the County and the local community. She regularly made court appearances, worked with law enforcement and mental health agencies, and met with Currituck County families. (T. pp. 161-162)

The Work Environment at Currituck DSS

15. Staff working in child welfare services regularly experience a high degree of stress in their work as they routinely deal with families in crisis and children who are subjected to abuse and neglect. (T. p. 192) Social workers and supervisors used language amongst themselves that may be different than the way they talk to clients or family members. It was common for staff in Respondent's Child Welfare Service Units to have an unusual sense of humor. (T. pp. 101, 192)

16. The supervisors at Currituck DSS allowed their staff to speak freely or vent by using off-color humor, urban slang, and profanity to relieve stress and anxiety at work. Currituck DSS staff used such language amongst themselves and were careful not to use inappropriate or unprofessional language when dealing with clients or members of the public. (T. pp. 99-101, 192) Petitioner explained this practice was "actually part of the training for staff retention and compassion fatigue to have safe places to talk and be yourself." (T. pp. 192, 193)

17. Ms. Hurd acknowledged that DSS staff using profanity in the workplace was not uncommon. (T. pp. 99-100)

18. Petitioner had heard Ms. Hurd use language among staff that she felt would be inappropriate to use in front of clients or members of the public. (T. p. 194) Petitioner had heard Ms. Hurd refer to clients and/or staff members as "lazy." (T. p. 194) She also heard Ms. Hurd call people "worthless" and "trifling." (T. p. 194) Petitioner described how Ms. Hurd would "come down the hall, kind of just more relaxed slang, greeting people like Hey, boo. Kind of just different, like unprofessional conduct . . . no clients in the hallway." (T. p. 194)

19. Ms. Hurd admitted that she has used profanity in the workplace. (T. p. 99) Ms. Hurd also jokingly said, "I'll cut him [insert an employee's name]" referring to another worker." (T. pp. 99-100, 203-204) She also admitted she had characterized the perception of parents of clients receiving assistance as "dishonest" (T. p. 100) and referred to people as "trifling." (T. pp. 100-101)

20. When asked "do you use other slang from time to time in the workplace?" Ms. Hurd responded:

> Yeah. I think it's not uncommon at all because of the level of stress of the position and the extreme circumstances that we're exposed to, the things that we see in the home, to have reactions like the statement you just used, that's trifling, referring to an situation or a circumstance that is really unusual, very hard to process, but not necessarily specifically about a person, but the circumstance or the behavior or the conduct in their parenting.

(T. pp. 99, 101)

Prior Disciplinary Actions of Employees at Currituck DSS

21. During Romm's nineteen years as Director of Currituck DSS, Romm dismissed three individuals for engaging in unacceptable personal conduct. Each of these employees had engaged in either a pattern or a series of unacceptable personal conduct repeatedly over a period of time. One employee lied to Romm for months regarding an unauthorized destruction of case records. A second employee refused to perform a core duty of her position. Ms. Romm fired that employee when the employee failed to perform a second core duty involving the safety of children and after the supervisor advised the employee of the serious consequences that could result from her continued refusal to perform her duties. A third employee falsely reported, written and verbally, the status of cases over several months. (T. pp. 212-214)

22. Ms. Room never terminated anyone for unacceptable personal conduct based solely on a one-time incident. She never terminated anyone for unacceptable personal conduct based on something the employee said in a private conversation. (T. p. 214)

23. Neither Ms. Romm nor Ms. Hurd ever dismissed an employee of Currituck DSS for using inappropriate or unacceptable language, including using any racial terms.

Pre-existing Friction Between Director Hurd and Petitioner

24. A preponderance of the evidence proved there was inherent conflict and friction between the Foster Care Unit and the Child Protective Services Unit over the assignment and management of cases before Ms. Hurd became Director of Respondent.

25. In the spring of 2011, Petitioner was promoted to supervisor of the Child Protective Services unit. In July 2011, Ms. Hurd began her employment with Respondent. Petitioner and Ms. Hurd worked right across the hall from each other. Ms. Hurd later was promoted to the Foster Care unit supervisor.

26. The preponderance of the evidence demonstrated there was also a history of friction between Petitioner and Ms. Hurd when they were supervisors of their respective units. Petitioner and Ms. Hurd had a difficult but professional relationship because their personalities did not mesh. In Ms. Romm's opinion, Ms. Hurd and Petitioner had trouble talking to each other and did not understand each other's messages, and the communication between them "just didn't happen at times." (T. p. 222) In addition, Petitioner and Ms. Hurd had significant philosophical differences regarding personnel issues. (T. p. 163)

27. While supervisors of their respective units, Petitioner and Ms. Hurd complained about each other to Ms. Romm. (T. p. 221) At hearing, Ms. Hurd and Petitioner acknowledged that their relationship was difficult, and that friction existed between them. Ms. Hurd conceded that she and Petitioner:

> [H]ad some very significant differences of opinion about personnel administration, our approach to supervision. So, I don't know that those philosophies ever changed, but we were able to get along to accomplish our work.

(T. p. 97)

28. While supervisors, Ms. Hurd called Petitioner to several meetings to discuss child welfare matters. Petitioner felt Ms. Hurd was critical of her personally and the work her unit was doing. (T. p. 163) Eventually, Petitioner asked Director Romm to meet with she and Ms. Hurd because Petitioner felt she had used all her strategies in attempting to work with Ms. Hurd. (T. pp. 163, 222) Ms. Romm met with Ms. Hurd and Petitioner and discussed Ms. Hurd and Petitioner's difficulties. All three agreed they had to work together cooperatively to get the work done. (T. p. 222)

29. Ms. Romm retired on June 30, 2017. On July 1, 2017, Ms. Hurd became Director of Currituck DSS and Petitioner's immediate supervisor.

30. Ms. Hurd and Petitioner continued to have a difficult relationship after Ms. Hurd became DSS Director. Ms. Hurd told Petitioner that talking to her "felt like nails on a chalkboard." (T. p. 164) Ms. Hurd told Petitioner she had to "talk to me differently than she talked to any of the other supervisors" and asked Petitioner why that was. (T. pp. 164-165) Petitioner couldn't explain why Ms. Hurd felt like she needed to do that. (T. p. 165)

November 3, 2017 Incident

31. On Friday, November 3, 2017, at approximately 4:45 p.m., Ms. Hurd entered a vacant office where Petitioner was working to seek Petitioner's assistance about missing demographic information on client intake forms for a monthly statistics report Ms. Hurd was compiling.

32. Ms. Hurd stood inside the doorway to the office while Petitioner sat at the desk. As Petitioner and Ms. Hurd reviewed the forms, Petitioner provided Ms. Hurd the race for most of the families listed on the forms, although she was not familiar with and did not know the race of the "F" family. The social worker who had recorded the information for the "F" family listed the race of the family member as "NR." "NR" is not a recognized or standard code used by Respondent.

33. Ms. Hurd asked Petitioner, "What does this ['NR'] mean?" Petitioner responded that she did not know the answer to Ms. Hurd's question. Ms. Hurd persisted and repeatedly asked Petitioner, at least two more times, "What does this [NR] mean?" Finally, Petitioner guessed, blurting out something akin to "I think it means nigra rican.**"** (T. pp. 173-174) (Amending spelling of "nigra" pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure to correct scrivener's error in drafting Final Decision and to conform to the evidence in the 2018 hearing transcript)

34. In contrast, Ms. Hurd believed Petitioner said the words "nigger rican" (hereinafter "n---rican.") (T. p. 46) Ms. Hurd was shocked by Petitioner's reply.

35. Petitioner immediately regretted her statement, told Ms. Hurd that she could not believe she had said that, and apologized to Ms. Hurd.

36. Ms. Hurd claimed she advised Petitioner she thought Petitioner needed more training, but Petitioner didn't recall hearing Ms. Hurd make that statement. (T. p. 176)

37. Shortly after Petitioner made the above-described statement, Petitioner and Ms. Hurd left the vacant office to locate the file for the "F" family. On the way, Petitioner apologized to Ms. Hurd again and said something like, "Please don't tell anyone about what I said, especially the first part. It's Friday." (T. pp. 174 -176) Petitioner made this request because she was embarrassed and surprised by what she had said.

38. When Petitioner reviewed the "F" family file, she learned the race of the "F" family was "white" and informed Ms. Hurd. Petitioner and Ms. Hurd had no further discussion that day about Petitioner's comment.

39. The vacant office where this conversation took place was fully enclosed and located on the hallway where DSS staff offices are located. The door to the office was open during the entire conversation. No one else was present in the vacant office with Petitioner and Ms. Hurd. Ms. Hurd thought two African American employees, Tyeshia Phelps, and Tiffany Sutton, were working in their offices nearby. (Pet. Ex. 2)

Pre-Disciplinary Conference

40. Ms. Hurd conferred with Respondent's attorney, Mr. Morrison, and Respondent's consultant, Drake Maynard multiple times during the weekend after November 3, 2017. Respondent's attorney provided Ms. Hurd with "Guidelines for Imposition of Discipline" in considering what disciplinary action Ms. Hurd should take regarding this matter. (Resp. Ex. 9) After such consultations, Ms. Hurd decided to summon Petitioner to a pre-dismissal conference early on Monday morning, November 6, 2017.

41. At approximately 8:30 a.m. on Monday, November 6, 2017, Ms. Hurd notified Petitioner, as soon as Petitioner arrived, that she was conducting a pre-dismissal conference in her office at 10:30 a.m. concerning the comments Petitioner had made on Friday, November 3, 2017. Petitioner was alarmed. Ms. Hurd did not provide Petitioner with any documentation at that time.

42. Petitioner attended the pre-dismissal conference at 10:30 a.m. with Ms. Hurd and Sarah Tyson from Human Resources. Ms. Tyson's role during the conference was to take notes. Respondent's Exhibit No. 13 is a copy of Ms. Tyson's notes. (Resp. Ex. 13) Ms. Hurd began the conference by explaining the purpose of the conference was to discuss Petitioner's statement to Ms. Hurd on November 3, 2017 and to give Petitioner an opportunity to respond.

43. Ms. Hurd handed Petitioner a November 6, 2017 letter and spoke verbatim from that letter. (Pet. Ex. 3) In this letter, Ms. Hurd advised Petitioner:

> . . . After looking at the letters "NR," you responded by laughing and stating the first thing you could think of is "nigger rican." I was quite shocked by your reply and advised you that I thought you would need more training.
>
> …
>
> Your behavior and actions **as described above** constitute unacceptable personal conduct . . .
>
> The statements you made were egregious, derogatory and are detrimental to our agency's reputation, employee morale and can affect customer service and our credibility with the community-at-large.
>
> As a result of your **unacceptable personal conduct, as described above**, I am considering terminating your employment.

(Pet. Ex. 3; emphasis added).

44. During the pre-dismissal conference, Ms. Hurd recounted how on November 3, 2017, near the close of business, she and Petitioner discussed abbreviations or codes on reports to help Hurd determine the children's races listed

on the reports. During that conversation, Ms. Hurd asked Petitioner about the "NR" code listed for the "F" family on a report. Ms. Hurd advised Petitioner that she heard Petitioner say "n--- rican"). Ms. Hurd advised Petitioner that Petitioner's conduct was unbecoming a supervisor and that Hurd was shocked. Ms. Tyson's notes indicated that Ms. Hurd then informed Petitioner that Petitioner's comments was "an egregious statement that impacts our reputation, community at large. The purpose of this meeting is to give you an opportunity to respond." (Resp. Ex. 13)

45. Thereafter, Petitioner apologized and told Ms. Hurd:

> It was [an] inappropriate comment . . . It was a guess. It was words [that] just came out of her mouth. I shocked myself. I apologize. I don't use these words in my personal life, my work life. I don't allow this in staffing. We were solving a 'word problem.' I apologize for me and to you. These comments were not to the family – I think not it means 'non-reported.' It was in a vacant office. It is inappropriate.

(Resp. Ex. 13)

46. During the pre-dismissal conference, Petitioner handed Ms. Hurd a letter that she had written earlier that morning (Pet. Ex. 4). In the letter, Petitioner stated:

> You asked what a 'race code' meant that was handwritten [sic] by a social worker on a CPS Intake (DSS 1402), we each paused attempting to decipher as it was not clear and it was said as a random guess. I immediately commented that I couldn't believe I had just said that. I apologize for making that comment. I know the comment was unacceptable. It would be unacceptable in any setting, personal or professional. It was not said toward or about any person. I do not use such language in my role as a supervisor or in the past as a social worker. I have never used that language toward or about a staff member or client and do not use that language in my personal life. I take my role within the agency earnestly.

(Pet. Ex. 4) Petitioner also asked Ms. Hurd to think about her tenure and professionalism. (Resp. Ex. 13) Ms. Hurd explained what "investigatory leave" meant.

47. During this conference, Ms. Hurd did not advise Petitioner of the specific policy Petitioner had violated. (T. pp. 182-184) Petitioner did not read the entire letter (Pet. Ex. 3) from Ms. Hurd during the pre-dismissal conference. After the conference, Ms. Hurd collected Petitioner's keycard and escorted her out of the building.

48. After leaving the pre-dismissal conference, Petitioner read Ms. Hurd's letter in its entirety and prepared another letter to Ms. Hurd, dated November 6, 2017. (Pet. Ex. 3). Petitioner emailed this letter to Ms. Hurd who received it on November 7, 2017. In this letter, Petitioner explained that since she had become aware of the predismissal conference less than 2 hours before it began, it was difficult to fully absorb

"all that you said and offered in writing in our brief meeting," and she wanted to respond specifically to letter Ms. Hurd had given her during the conference. (Pet. Ex. 5) Petitioner was providing additional information and was not "denying that I didn't say anything that was inappropriate" or improper. (T. pp. 183-184)

49. In her November 6, 2017 letter, Petitioner explained that she did "not recall saying the words as they are spelled in your [Ms. Hurd's] letter, though I do not deny that I did say two unrelated words in the tone of answering a non-sensible word problem." (Pet. Ex. 5) Petitioner did not think her statement to Ms. Hurd disrupted any services provided at Respondent, negatively affected the morale of subordinates, or constituted conduct so severe to warrant skipping lesser sanctions than dismissal, such as discussing the conduct or developing a corrective action plan per county policy. Petitioner requested Ms. Hurd consider her prior performance and years of service in deciding the appropriate action. (Pet. Ex. 5)

50. On November 8, 2017, Ms. Hurd informed Petitioner by telephone that she was terminating Petitioner from employment and that a letter would follow.

November 8, 2019 Dismissal Letter

51. By letter dated November 8, 2017, sent by email and regular mail, Ms. Hurd set forth the basis upon which she was terminating Petitioner from employment. (Pet. Ex. 6). In that letter, Ms. Hurd concluded that Petitioner had engaged in unacceptable personal conduct on November 3, 2017 when Petitioner answered Ms. Hurd's question about a race code by saying, "n--- rican." Ms. Hurd opined that Petitioner's "n---rican" statement as:

> [E]gregious, derogatory, and extremely detrimental to our agency's reputation, employee morale and can affect customer service and our credibility with the community we serve. The statements you made were at work, within the scope of your professional employment, and were made precisely to the agency Director.

(Pet. Ex. 6) Ms. Hurd concluded that Petitioner's conduct was conduct for which no reasonable person should be expected to be warned of in advance, a willful violation of know or written work rules, and conduct unbecoming of an employee of Currituck DSS. Ms. Hurd applied the "Guidelines for Imposition of Discipline" in deciding to dismiss Petitioner from employment. (Pet. Ex. 6, Resp. Ex. 9) Ms. Hurd particularly considered Petitioner's position as a supervisor, Petitioner's initial acknowledgment of her inappropriate and unacceptable conduct during the pre-dismissal conference, and a July 21, 2017 discussion Ms. Hurd had with Petitioner about Petitioner's prior unprofessional conduct and argumentative statements. (Pet. Ex. 6)

52. Petitioner appealed the termination on November 14, 2017, pursuant to Respondent's internal appeals process. (Pet. Ex 7)

Initial Final Agency Decision – November 21, 2017

53. On November 21, 2017, Ms. Hurd issued her Final Agency Decision upholding the decision to dismiss Petitioner from employment for using the words "n—-rican" on November 3, 2017. (the "2017 Final Agency Decision") (Pet. Ex. 8) Although Ms. Hurd admitted at hearing that she had previously used demeaning and inappropriate terms at work, Ms. Hurd found that Petitioner's statement violated Article 5 of the Currituck County Personnel Policy, titled Conditions of Employment, which states:

> Some other types of prohibited activities related to unlawful workplace harassment include but are not limited to: . . .
>
> 3. Using demeaning or inappropriate terms or epithets. Telling off-color jokes concerning race, sex, disability, or other protected bases.

(Pet. Ex. 8, p. 3; Resp. Ex. 2, p. 35)

54. Ms. Hurd found that Petitioner's conduct undermined the principles and values of the Respondent's policy requiring DSS staff to respect and be sensitive to their client families' "cultural, racial, ethnic, and religious heritages." (Pet. Ex. 8, p. 4, Volume I Children's Services; Chapter VIII Child Protective Services; Resp. Ex. 2)

55. Ms. Hurd rejected Petitioner's claim that she was trying to solve a "word problem" as Ms. Hurd specifically noted that she had asked Petitioner a "direct question regarding the race of specific children" on November 3, 2017, and she thought that Petitioner's statement was "disparaging, derogatory and insulting remarks used to refer to members of a given ethnicity." (Pet. Ex. 8, p. 2)

56. Ms. Hurd also considered her past discussions with Petitioner, particularly on July 21, 2017, when Ms. Hurd advised Petitioner of her observations about Petitioner's "lack of receptiveness to supervision and why it is problematic." Ms. Hurd opined that, "I have observed the same response from you with the current situation." (Pet. Ex. 8, p 3) Based upon that opinion, Ms. Hurd felt there was a "potential for recurrence of unacceptable personal conduct [by Petitioner] in the future." (Pet. Ex. 8, p 3)

57. Ms. Hurd opined that Petitioner's conduct had affected Ms. Hurd's confidence in Petitioner's ability to serve in any position or any role within Currituck DSS where they serve vulnerable clients, stating "[y]our conduct is a great liability for the agency." (Pet. Ex. 8, p. 4)

58. Ms. Hurd's lack of confidence in Petitioner's ability to serve at Currituck DSS was contradicted by the fact that Petitioner had served over ten years at Currituck DSS with an unblemished record and with excellent evaluations by Petitioner's supervisor of many years.

59. Ms. Hurd decided to dismiss Petitioner from her employment with Respondent without having determined whether Petitioner's conduct caused Respondent any actual harm.

2018 Contested Case Hearing

60. At the 2018 Hearing, Petitioner admitted she "absolutely said something that's improper." "I'm still embarrassed by that." (T. p. 188) "I apologize for making that comment. I know the comment was unacceptable. It would be unacceptable in any setting, personal or professional." (Pet. Ex. 4)

61. She "had never made an off-color remark like that before in her [Ms. Hurd's] presence or anyone else's presence, at work or even my personal life." (T. p. 185)

62. In response to the question "Do you think you need prior warning that you're not allowed to use the word, "n---," in your professional context? Petitioner acknowledged, "No, I don't need prior warning. And that's why I said, Oh, my gosh, I can't believe I said that. I mean, it was obvious that I know that's not a professional word to say." (T. p. 201)

63. At the 2018 Hearing, Petitioner explained:

> I guess I used neither of those words often or ever, and those words are in my word bank because of people in my family.
>
> My grandmother was from Norfolk, an old southern lady, and she would refer to negroes as 'nigra.' And as kids we didn't know if that was a good word or a bad word, but by our generation, it was close enough that we just didn't say it unless we were imitating my grandmother.
>
> And 'rican,' my brother-in-law is from Ecuador, and he lived in New York, so he would often tell stories or different situations about stereotyping the different Latin American community up in New York. And he would refer to people as 'rican.'
>
> That's the only -- I can't say I intended to say any of this, but those are the words that would be in my personal word bank.

(T. p. 174)

64. Petitioner acknowledged that she never told Ms. Hurd, before the 2018 Hearing, that Petitioner actually said "nigra rican" and that Ms. Hurd had misunderstood what Petitioner had said on November 3, 2017. Petitioner explained that she did not do so because:

> I felt like the situation -- the incident -- I said something improper whether it was nigra or n-i-g-g-e-r. What she heard was improper, what I said was

> improper, and I still accept that . . . . I wouldn't allow my social workers to say that.

(T. pp. 197-198) By this admission, Petitioner conceded whichever variant of the subject terms she used, her statement was improper and unacceptable. From the outset of her utterance through the pre-dismissal conference, the internal appeal process, and the hearings before the Undersigned, Petitioner has readily admitted and accepted responsibility for her statement and that it was improper and unacceptable.

65. At the 2018 Hearing, Ms. Hurd opined that Petitioner's "n---- rican" comment to her on November 3, 2017 was unacceptable personal conduct as it was derogatory and disparaging towards members of a certain ethnicity. Ms. Hurd thought that Petitioner's comment made a:

> [S]ignificant impact [on her] because not only was it vulgar and crude and demeaning, but it was also discriminatory . . . [b]ecause she disparaged African Americans and Puerto Ricans, in my opinion, in using . . . those words, and I considered that to be overt racism.

(T. pp. 44-45, 86-87; Pet. Ex. 8, p. 2) She opined that Petitioner's comment was conduct related to Petitioner's supervisory job duties for which a reasonable person would not need prior warning. Ms. Hurd didn't think DSS needed to post a rule prohibiting the words Petitioner used. (T. p. 82) She further opined that Petitioner's conduct was unbecoming because Petitioner held a supervisory position and had a position of great influence among the county citizens. (T. p. 83) She thought Petitioner's conduct was "willful" and violated the "known work rule that one doesn't use that kind of language." (T. pp. 81-83) Ms. Hurd also thought Petitioner's language was discriminatory in violation of the Civil Rights Act. (T. p. 82)

66. Ms. Hurd did not believe Petitioner's claim that she was solving a word problem and made a "random guess" when she said "n--- rican." Ms. Hurd thought Petitioner's comment was "absurd" as Ms. Hurd asked a direct question regarding the race of specific children. (T. p. 84) Ms. Hurd lost confidence in Petitioner as a supervisor because Petitioner used disparaging words in her role as a supervisor, and because Ms. Hurd felt Petitioner gave significantly different recollections of her conduct in her two written responses to Ms. Hurd. (Pet. Exs. 4, 5) Ms. Hurd thought Petitioner's conduct on November 3, 2017 was the same type of unprofessional and inappropriate conduct Petitioner exhibited towards Ms. Hurd on July 21, 2017. (T. pp. 87-91) Ms. Hurd described Petitioner's conduct towards her, on July 21, 2017, as unreceptive to Ms. Hurd's supervision and feedback, and often defensive. (T. pp. 87-91; Pet. Ex. 8)

67. Ms. Hurd determined that Petitioner's conduct on November 3, 2017 was egregious, derogatory, and unacceptable as (1) conduct for which no reasonable person should expect to receive prior written warning, (2) conduct unbecoming of an employee of Respondent, and (3) willful violation of known or written work rules. (Pet. Ex. 8)

68. Ms. Hurd did not cite a specific known or written work rules that Petitioner willfully violated on November 3, 2017 until Hurd issued the Final Agency Decision letter on November 21, 2017. (T. p. 182)

69. In the Final Agency Decision letter, Ms. Hurd referenced Respondent's policy that prohibits unlawful workplace harassment including using inappropriate terms or epithets. She concluded that Petitioner's conduct undermined the principles and values of Respondent's policy requiring employees to respect the cultural diversity of Respondent's clients. (Pet. Ex. 8)

70. As an employee of Currituck DSS, Petitioner was subject to the Currituck County Personnel Policy which prohibited "unlawful harassment." This policy defined that term as:

> Conduct that violates this policy includes verbal, nonverbal, or physical behaviors that a reasonable person would find hostile or abusive **and one that the person, who is the object of the harassment, perceives to be hostile or abusive.**
>
> . . .
>
> Some other types of prohibited activities related to unlawful workplace harassment include, but are not limited to: . . .
>
> 3. Using demeaning or inappropriate epithets, telling off color jokes concerning race..."

(T. pp. 20-21; Resp. Ex. 2) On January 7, 2017, Petitioner acknowledged and verified that she had reviewed and read the updated Currituck County Personnel Policies which were effective January 7, 2017. (Resp. Ex. 3)

71. At all times relevant to this case, Petitioner was subject to, and received training on, the North Carolina Department of Health and Human Services Policy, Division of Social Services, Volume I, Children's Services, Chapter VII Child Protective Services which required Respondent's employees to:

> [S]upport parents by respecting each family's cultural, racial, ethnic, and religious heritage in their interactions with the family and our mutual establishment of goals.

(Pet. Ex. 8, p. 4; Resp. Ex. 4)

72. While Ms. Hurd found Petitioner violated Respondent's policy on staff respecting the cultural diversity of its clients, Ms. Hurd's admission that she too had participated in using derogatory terms at work set a double standard in how she was judging Petitioner's conduct.

73. At the 2018 hearing, Ms. Hurd indicated that she used the factors from *Warren v. North Carolina Dep't. of Crime Control & Public Safety, North Carolina Highway Patrol*, 221 N.C. App. 376, 726 S.E.2d (2012) in deciding to impose against Petitioner for engaging in unacceptable personal conduct on November 3, 2017. (T. p. 74) However, the preponderance of the evidence proved that Ms. Hurd actually relied upon and applied the more detailed *Employer Guidance on Imposition of Discipline* that Respondent's attorney had furnished Ms. Hurd during the weekend of November 3-5, 2017 when preparing the 2017 Final Agency Decision. (T. p. 74; Resp. Ex. 9) That document was taken verbatim from *Employment Law: A Guide for North Carolina Public Employers,* Third Edition by Stephen Alred, former faculty member of the UNC School of Government. (T. p. 48)

74. The *Employer Guidance Imposition of Discipline* lists the following twelve (12) variables or factors for North Carolina public employers to use when determining what disciplinary action to impose:

1. The nature and the seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, was committed maliciously or for gain, or was frequently repeated.
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
3. The employee's past disciplinary record.
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability.
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties.
6. The consistency of the penalty with those imposed, upon other employees for the same or similar offenses.
7. The impact of the penalty upon the reputation of the agency,
8. The notoriety of the offense or its impact upon the reputation of the agency.
9. The clarity with which the employee was aware of any rules that were violated in committing the offense or had been warned about the conduct in question.
10. The potential for the employee's rehabilitation.
11. The presence of mitigating circumstances surrounding the offense such as unusual job tension; personality problems, mental impairment; harassment; or bad faith, malice or provocation on the part of others involved in the matter.
12. The adequacy and the effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

(T. pp. 48-74; Resp. Ex. 9)

75. Ms. Hurd made "significant use" of the *Employer Guidance on Imposition of Discipline* by going through each of the twelve areas of consideration "on multiple occasions." She did so in order to make a balanced and fair decision about this case. (T. pp. 48-74)

76. Contrary to Ms. Hurd's attempts to make a fair and balanced decision when preparing the 2017 Final Agency Decision, Ms. Hurd failed to conduct a complete investigation to determine whether there was any harm to the agency, its employees, its clients, and the provision of child welfare services in Currituck County based on Petitioner's comment.

a. First, Ms. Hurd opined that "there was a high probability that other people heard" Petitioner's comment because of the close proximity of two other DSS employees working down the hall from Petitioner and Ms. Hurd (T. p. 46) and due to "other people that I couldn't identify that were walking in the hallway." (T. p. 58) DSS employee Tiffany Sutton was working in her office directly across the hall from Petitioner and Ms. Hurd, while Foster Care Unit Supervisor Tyeshia Phelps was working in her office two offices down the hall. Ms. Phelps and Ms. Sutton are African Americans.

b. However, Ms. Hurd did not interview these employees before she decided to dismiss Petitioner from employment to determine if they heard Petitioner's comment. Ms. Hurd admitted during the 2018 Hearing that she didn't "know who has heard it or who hasn't. I just know that no one has specifically come to me and stated they heard it." (T. pp. 121-122) It was not until the evening of November 8, 2017, after Ms. Hurd had dismissed Petitioner from employment, that Ms. Hurd even asked Ms. Phelps if she had heard anything unusual on November 3, 2017. Ms. Phelps responded "No." (T. pp. 118-119) That was the full extent of Ms. Hurd's interview of Ms. Phelps regarding Petitioner's comment.

c. Not until Respondent and its attorney were preparing for the April 19, 2018 Hearing did Ms. Hurd learn that Ms. Phelps did not hear Petitioner's statement to Ms. Hurd on November 3, 2017. (T. pp. 118-120).

d. Ms. Hurd dismissed Petitioner without knowing whether Tiffany Sutton heard Petitioner's comments because she did not ask Ms. Sutton if she heard the November 3, 2017 Hurd-Petitioner conversation before Ms. Hurd decided to dismiss Petitioner. (T. p. 93)

77. When confronted at the 2018 Hearing regarding why she did not interview DSS staff Ms. Sutton and Ms. Phelps, Ms. Hurd admitted that whether other people heard Petitioner's comment "really doesn't make a difference" (T. p. 93):

> Because I didn't want this decision to be based upon them hearing it or outreach about other people hearing it. I wanted it to be based upon the integrity of the agency and integrity of me as the director hearing it and needing to respond appropriately.

(T. p. 93) Ms. Hurd explained that she had knowledge of Petitioner's comment as a public official, "as the agency director entrusted with integrity of the agency. And I felt compelled to act. I also felt that my failure to act would be detrimental to the agency's reputation." (T. p. 122) She felt that, as the DSS Director, she represented all the citizens of Currituck County and that she needed to "take action" because she heard Petitioner's comment. (T. p. 131)

78. Ms. Hurd further opined that "in terms of employee conduct," she didn't think Petitioner's racial comment as a violation would have been more severe, if a client or public member had heard Petitioner's comment, because she "heard it directly." She thought Petitioner's comment "was pretty severe to say it precisely to the agency director." (T. pp. 131-132) Ms. Hurd decided to terminate Petitioner from employment for her racial comment because:

> I thought that the penalty of dismissal would preserve the reputation of the agency. I thought it would preserve it because it sets a very strong zero tolerance standard . . . to racism -- overt racism . . .. And racial epithets.

(T. p. 57)

79. Ms. Hurd erred when deciding to dismiss Petitioner in 2017 because she did not consider if Petitioner's "n--- rican" comment caused any actual harm to the agency's reputation. She only considered potential harm to the agency when preparing the 2017 Final Agency Decision. (T. pp. 58-59, 132, 135). In the 2018 Hearing, Ms. Hurd conceded that her consideration of the potential harm and potential recurrence of Petitioner repeating a racial comment in the future was based upon her own subjective belief. (T. p. 134)

80. There was no evidence presented at the 2018 Hearing proving that any DSS employee, other than Ms. Hurd, was even aware of Petitioner's comment. There was no evidence presented at the 2018 Hearing proving that any other employee's morale was affected by Petitioner's comment. Neither was there any evidence that the agency's credibility in the community had changed due to Petitioner's comment. (T. pp. 121-122)

81. As a result, Ms. Hurd's failure to conduct a complete investigation in 2017 resulted in Respondent deciding to dismiss Petitioner without considering all the required factors in *Warren v. North Carolina Dept. of Crime Control & Public Safety, North Carolina Highway Patrol,* 221 N.C. App. 376, 726 S.E.2d 920 (2012) and *Wetherington v. North Carolina Dep't. of Public Safety*, 368 N.C. 583, 593, 780 S.E.2d 543, 548 (2015).

DSS Investigation Following *Ayers II* and on Remand

82. Pursuant to the Court of Appeals October 5, 2021 Opinion, the Undersigned issued an Order on Remand on November 5, 2021, remanding this contested case to Respondent DSS to complete its investigation and determine whether there was any

resulting harm to the agency as a result of Petitioner's unacceptable personal conduct at issue, what the harm was, if any, and what, if any, was the corresponding disciplinary action taken as a result of the harm, consistent with *Ayers II. Ayers II*, 279 N.C. App. at 526-57, 866 S.E.2d at 795.

83. Respondent DSS Director Samantha Hurd understood from the decision of the North Carolina Court of Appeals in *Ayers II*, and the Undersigned's two Orders after remand following *Ayers II*, that she had previously failed to conduct a complete investigation to determine whether just cause existed for disciplinary action against Petitioner; particularly, whether Petitioner's unacceptable personal conduct resulted in harm to Respondent DSS.

84. On remand, Director Hurd reviewed the following information:

- Final Decision issued by Judge Lassiter on June 13, 2018.
- North Carolina Court of Appeals Order issued on October 1, 2019.
- Final Decision on Remand issued by Judge Lassiter on May 5, 2020.
- North Carolina Court of Appeals Order issued on October 5, 2021.
- The Amended Order on Remand issued by Judge Lassiter on March 3, 2022.
- The transcript from the Administrative Hearing conducted on April 19, 2018
- Petitioner's initial November 6, 2017 letter.
- The transcript from the pre-disciplinary conference held on November 6, 2017.
- A second November 6, 2017 letter submitted by Petitioner on November 7, 2017.
- Initial Termination of employment letter issued to Petitioner on November 8, 2017.
- A written local appeal letter submitted by Petitioner on November 14, 2017.
- The November 17, 2017 DSS local appeals hearing transcript. NOT AN EXHIBIT
- North Carolina Department of Health and Human Services' policies including enhanced practice for working with special populations, mission, vision, values, and cultural safety practice expectations.
- Currituck County Department of Social Services Job Descriptions and assess the essential functions of the social service positions for actual and potential harm caused by Petitioner's conduct. NOT EXH
- Currituck County's personnel policy.
- Civil rights compliance policy.
- Petitioner's response to Final Agency Decision from April 8, 2022.
- The North Carolina Administrative Code Title 1, Chapter II.
- Currituck County local appeals policy.
- F Case File.

85. On March 9, 2022, Ms. Hurd interviewed Tiffany Sutton. (R.T. p. 51; Transcript from August 24, 2022 Hearing ("2022 Hearing")) Ms. Sutton is African American and has been employed with Respondent as a Foster Care Social Worker for 14 ½ years, since June 2014.

86. Petitioner had supervised Ms. Sutton from Ms. Sutton's first day at work in June of 2014 until Petitioner was no longer with Respondent. (R.T. pp. 92-93)

87. On November 3, 2017, Ms. Sutton was working in her office on the day of the November 3, 2017 Incident. Sutton's office was located diagonally across the hallway from the vacant office where the Incident between Petitioner and Ms. Hurd occurred. Sutton's office was located more than 5'10" from the vacant office. (R. T. p. 95) (Pet. Ex. 2) Ms. Sutton did not hear Petitioner make the statement "n—rican" or hear any other specific details of the conversation between Petitioner and Ms. Hurd on November 3, 2017.

88. Ms. Sutton learned about Petitioner's racial comment on November 3, 2017 after she noticed Petitioner was not reporting to work in November of 2017 and after hearing other social workers discussing or gossiping about the issue that had taken place. (R.T. pp. 98- 99, 119-120) She learned that Petitioner was not at work because of her statements about the race written on an intake report by one of her previous co-workers. The co-worker had used initials to indicate the race on the report. Ms. Sutton understood that Petitioner was not at work because of her making racial epithets in the workplace. (R. T. pp. 102-104)

89. However, Ms. Sutton was unable to state specifically when she first learned of the words Petitioner said during the Incident. At hearing, Ms. Sutton admitted that she was unable to provide any timeframe for when she learned of the details of the Incident and the words Petitioner used. Ms. Sutton could not say whether she learned of the Incident before she knew Petitioner had been terminated or after the April 19, 2018 contested case hearing. (R.T. pp. 99, 119-120)

90. Ms. Sutton was disappointed and shocked when she learned of the Incident and the words Petitioner used. She thought such statements were inappropriate, disrespectful, and belittling. (R.T. pp. 14 - 15, 120) She also thought Petitioner's use of racial epithets violated Respondent's unlawful workplace harassment policy prohibiting the use of demeaning or inappropriate terms or epithets, telling off-colored jokes concerning race. (R. T. pp. 105-106)

91. Before she learned of the Incident, Ms. Sutton had never had any problem with Petitioner. In fact, she got along well with Petitioner. (R.T. p. 113) Ms. Sutton trusted Petitioner's judgment. (R.T. p. 113) Ms. Sutton had observed Petitioner's work with families in crisis going through and needing protective services from Respondent as well as requiring foster placement. From Ms. Sutton's observation, Petitioner treated everybody fairly. (R.T. pp. 113-114)

92. Ms. Sutton would struggle with accepting guidance from the Petitioner relating to families of minorities or with communicating with Petitioner about guidance on particular cases that may relate to those different cultures. (R. T. p. 107).

93. Knowing that the Petitioner used the racial epithets at the workplace would also impact Ms. Sutton's trust in Petitioner's judgment because the Petitioner was the

initial decision maker when it came to intake forms and screenings. Those races are most identified on the reports and Ms. Sutton would be concerned that the Petitioner was making decisions based on allegations related to race. (R. T. p. 108). Ms. Sutton was concerned of Petitioner's biases and would question her decision-making. (R. T. p. 109)

94. Ms. Sutton could not imagine a more harmful word than the racial epithets used by Petitioner at the workplace. (R. T pp. 109-110). Ms. Sutton respected the department's decision to terminate the Petitioner. If the department had not terminated the Petitioner, Sutton would have looked at the department differently and would have even felt that the department felt the same racist way as the Petitioner did if appropriate termination had not taken place. (R. T. pp. 110-111).

95. In Ms. Sutton's opinion, Petitioner's use of racial epithets at work caused the agency harm because the agency and its people are supposed to be different. The agency is supposed to hold itself with high standards and core values that do not involve discrimination and the use of racial epithets. Use of racial epithets leaves a stain on the agency and on the agency's leadership. (R. T. p. 112).

96. Based on the Director Hurd's review of the above documents and additional investigation of this matter, Director Hurd considered and concluded that the Department of Social Services and specifically employee Tiffany Sutton had suffered actual harm as a result of Petitioner's unprofessional conduct. (R. T. p. 15).

97. Despite her personal concerns regarding Petitioner and being disappointed about the Incident, Ms. Sutton acknowledged that she respected Petitioner and got along well with Petitioner. Ms. Sutton conceded that she trusted Petitioner's judgment. (R.T. pp. 107, 114-115, 121-122)

98. Based on Ms. Sutton's observations of Petitioner working with families at DSS who needed services, Ms. Sutton thought Petitioner treated everyone fairly. Ms. Sutton acknowledged that she could work with Petitioner, but that she would struggle with Petitioner's racial slur, and how they would "mesh together me being of African-American descent." Ultimately, she noted, "I'm an adult and I can work with anyone." (R.T. pp. 114-115, 121-122)

99. During her 2022 investigation, Ms. Hurd did not consider whether there was any way to improve the relationship between Ms. Sutton and Petitioner. (R.T. pp. 57-58) Neither did Ms. Hurd discuss any way to improve the relationship with Ms. Sutton. (R.T. p. 58)

100. During her 2022 investigation, Ms. Hurd also reviewed the daily reception logs of visitors to the agency on November 3, 2017, and reviewed employee day sheet entries for November 3, 2017. (R.T. p. 59) Based on this review, Ms. Hurd learned that there was one client in the building at the time of the Incident and identified who was the client. However, Ms. Hurd did not make any effort to contact the client to see if they had heard or were aware of the Incident. (R.T. p. 62)

101. Ms. Hurd did not interview any other DSS employee when conducting the March 2022 Investigation other than Ms. Sutton. When Ms. Hurd previously asked DSS employee Tyeshia Phelps whether she was aware of the details of the Incident, Ms. Hurd learned from that Ms. Phelps did not know about Petitioner's statement during the Incident until Ms. Hurd told her about it in preparation for the April 2018 contested case hearing. (T. pp. 118-120)

102. During her 2022 investigation, Ms. Hurd did not try to determine how many employees had learned about details of the Incident since the April 2018 hearing or how they had learned of the Incident.

103. Given that nearly 4 ½ years had passed between the Incident and Ms. Hurd's 2022 investigation to determine whether DSS suffered any harm due to the Incident, Respondent failed to show whether any employee, client or other person heard about the details of the Incident for any reason other than because Ms. Hurd dismissed Petitioner.

104. Despite conducting the March 2022 Investigation, Respondent did not prove that any client or any person employed by DSS at the time of the Incident, or since then, learned of the words Petitioner used during the Incident before Ms. Hurd disclosed the details to certain DSS staff in preparation for the April 2018 contested case hearing.

105. Ms. Hurd made no effort to interview or question Petitioner as part of the March 2022 Investigation. Ms. Hurd did not give Petitioner a chance to respond to any of the information Ms. Hurd gathered during her March 2022 Investigation including whether Petitioner and Ms. Sutton would be able to work together without any difficulty, or to address any of the concerns that Ms. Hurd outlined in the Final Agency Decision Addendum.

106. Respondent did not show that any employee decided to leave their employment with Respondent because of Petitioner's racial comment during the Incident or because they knew of the Incident. (R.T. p. 80)

107. Respondent did not show that any child or family has been denied or unable to receive services from Respondent because of the Incident or because of anything that Petitioner did. (R.T. p. 80) Respondent did not show that any person has decided not to seek employment with Respondent because of the Incident. (R.T. p. 80)

108. Respondent has not been penalized by any governmental agency due to the Incident. (R.T. p. 80)

109. Respondent has not lost any funding because of the Incident. (R.T. pp. 79-80)

110. Despite the March 2022 Investigation, Respondent has not shown that any person was aware of the Incident or heard Petitioner's racial comment on November 3, 2017 other than Ms. Hurd.

111. Respondent did not show that any person learned of the Incident independently of Ms. Hurd's decision to terminate Petitioner.

112. Respondent did not show that any person, other than Ms. Hurd, was aware of the words Petitioner used in the Incident before Ms. Hurd disclosed the details of the Incident to some of her staff in preparation for the 2018 contested case hearing.

113. In the Final Agency Decision Addendum, Ms. Hurd characterized several matters as actual harm purportedly resulting from the Incident. However, these matters are all either descriptions of potential harm or resulted from Ms. Hurd's decision to dismiss Petitioner and were not caused by or the result of the Incident itself. These matters are as follows:

a. Ms. Hurd stated that Petitioner's conduct "interrupted the normal duties of the Director and other supervisory personnel causing them to assume your workload," and disrupted the flow of work. However, evidence at hearing showed that any interruption of Ms. Hurd's duties, other staff's duties, or workflow at DSS was not due to the Incident itself. (Resp. Ex. 18) Rather, this interruption and disruption resulted from Ms. Hurd's decision to place Petitioner on leave and Petitioner's resulting absence from the agency after Ms. Hurd dismissed Petitioner.

b. Ms. Hurd claimed that Petitioner's conduct caused damage in the form of legal expenses, the hiring and training of a replacement for Petitioner and the interruption of other personnel from their duties to be involved in the litigation process. (Resp. Ex. 18) However, these items were not caused by the Incident, but rather by Ms. Hurd's decision to dismiss Petitioner.

114. Ms. Hurd subjectively believed that Petitioner was not fit to be entrusted with her supervisory or other duties for Currituck DSS and claimed this belief constituted "harm" resulting from the Incident. (Resp. Ex. 18) However, Hurd's subjective belief was unsubstantiated, speculative, and unreasonable. Ms. Hurd's subjective opinion on these matters was not supported by a preponderance of the evidence and was contrary to other evidence in the record. The evidence at both the initial hearing and at the reconvened hearing showed without question that Petitioner was remorseful about making a racial comment during the Incident, that Petitioner's comment was uncharacteristic of her, and that there was no reasonable expectation or likelihood that Petitioner would repeat such comment. Respondent failed to present any credible evidence to rebut those facts.

115. Ms. Hurd's conclusion that "a bias was demonstrated by stereotyping a family based upon their last name" (Resp. Ex. 18) was not supported by the evidence. Both Ms. Hurd and Petitioner acknowledged that Petitioner did not know either the family listed on the form, or the race of family listed on the form. Petitioner was only answering Hurd's question regarding what did the letters "NR" mean. (T. p. 205) Given those facts, there was no proof that Petitioner was referring to the specific family listed on the form when she blurted out her racial comment. (T. p. 205)

116. Ms. Hurd claimed that between the pre-disciplinary conference and the DSS internal/local appeal, Petitioner submitted contradictory information about the Incident. However, an objective comparison of the information Petitioner submitted during the pre-dismissal conference and the internal appeal with Petitioner's written documents of the Incident did not support Ms. Hurd's contention. While Petitioner's written statements demonstrated an unwillingness to clarify the spelling of the words Petitioner used during Incident, Petitioner's refusal to further clarify what she said during the Incident was reasonably attributable to Petitioner's concern that Ms. Hurd had already made her decision about the Incident. (R.T. p. 208) Petitioner was also concerned that if she provided any more testimony about the Incident, Ms. Hurd would just "pick it apart and . . . make a deal out of that too." (R.T. p. 208)

117. In the March 21, 2022 Final Agency Decision Addendum, Ms. Hurd characterized Petitioner's refusal to answer Ms. Hurd's question, i.e. "Do you deny using the words "n" Rican," during the DSS local appeals hearing, as insubordination. Ms. Hurd wrote:

> The direct question you were asked required a response. Intentionally withholding information and refusing to answer a direct, reasonable question asked by your supervisor constitutes insubordination.

(Pet. Ex. 14)

118. During the DSS local appeals hearing, Ms. Hurd had the opportunity to direct and require Petitioner to clarify the words that Petitioner had used during the Incident, but Ms. Hurd did not require such clarification from Petitioner. Ms. Hurd claimed she did not know she had the authority to order a person to answer the question, even though Ms. Hurd was investigating Petitioner's conduct. (R. T. pp. 72-74) After Petitioner told Hurd she wasn't going to answer Hurd's question, Ms. Hurd did not tell Petitioner that Ms. Hurd would consider Petitioner to be insubordinate if Petitioner didn't answer Hurd's question. (R. T. pp. 207-208)

119. At the 2022 hearing, Petitioner acknowledged that if Ms. Hurd had directed her "to answer the question under penalty of some disciplinary action" whether Petitioner said "n--- rican" during the Incident, then Petitioner would "absolutely" have answered Hurd's question. (R. T. p. 208).

120. After concluding her investigation in November 2017 and terminating Petitioner from employment, Ms. Hurd never charged Petitioner with being insubordinate in any disciplinary letter or advised Petitioner that she was being terminated from employment for being insubordinate. The first time Ms. Hurd determined that Petitioner was engaged in insubordination in November 2017, was in Hurd's March 21, 2022 Final Agency Decision Addendum. (R. T. pp. 76-66) In that Final Decision Addendum, Ms. Hurd did not give Petitioner a new notice of appeal rights regarding Respondent's decision to terminate Petitioner for being insubordinate on November 3, 2017. Nevertheless, the evidence presented in these proceedings failed to show that Petitioner was insubordinate during the DSS local appeals hearing.

121. At the 2022 Hearing, Ms. Hurd claimed that she was offended by Petitioner's racial comment on November 3, 2017. (R. T. p. 87) However, at the 2018 Hearing, Ms. Hurd testified that her reaction instead was one of shock. During the 2018 Hearing, Ms. Hurd never claimed she was "offended." (T. pp. 109-110) The evidence in the record clearly proved that the racial epithet Petitioner used during the Incident was not directed to or intended to describe Ms. Hurd.

122. Ms. Hurd claimed that Petitioner's racial epithet during the Incident violated various policies, including the agency's Civil Rights Action of 1964 Policy, the Currituck County Personnel Policies, and the agency's policies from the Division of Social Services Family Services Manual, by frustrating the purpose of having a policy to follow. Ms. Hurd noted that each of these policies prohibits racial epithets to be used during in the workplace. (R. T. pp. 166-168) She opined that a "supervisor who disregards policy is harmful because supervisors are intended to be leaders" at Respondent, and it is important that supervisors demonstrate compliance with those policies personally. (R. T. pp. 24-25) (Resp. Exs. 1-6)

123. While Ms. Hurd and Respondent claim that Petitioner violated various policies that Respondent is required to follow, Ms. Hurd and Respondent failed to demonstrate how Petitioner violated any of these policies when she spontaneously uttered a racial slur in a vacant office to her supervisor. Respondent failed to provide any instances when Petitioner exhibited and/or treated any co-worker, client, or anyone at DSS during her employment at DSS with bias. Respondent failed to show how Petitioner's racial slur violated any co-worker or client's civil rights or affected any provision of services. Neither did Respondent produce any evidence that Petitioner's racial slur cause any client or DSS worker to be treated unequally in the provision of services or in the workplace. Instead, Petitioner's testimony credibly rebutted these claims. (R. T. 166-174)

124. Ms. Hurd also claimed that Petitioner failed to "demonstrate introspection regarding your conduct" while she was on investigatory leave. The Undersigned finds that Ms. Hurd's claim was inaccurate. A preponderance of the evidence showed that Petitioner demonstrated introspection regarding her conduct in the Incident, both immediately following the Incident, throughout the local administrative processes, during the 2018 Hearing, and during the 2022 Hearing.

125. Ms. Hurd's assertion that the language used by Petitioner in the Incident "is considered hate speech" failed to demonstrate that the conduct was detrimental to State service or caused "social harm" given the isolated setting of the Incident. There was no harm to Currituck DSS's actual provision of services or ability to provide services, other than the fact that Petitioner was dismissed and unable to perform her duties for the agency. Ms. Hurd also failed to demonstrate any social harm resulting from the Incident.

126. Despite the March 2022 Investigation, Respondent did not show that there was any reasonable prospect that Petitioner would again use language like the language she used during the Incident, either in any part of the workplace, around other staff of

Respondent, or around clients or anyone from the public who used Respondent's services.

127. Petitioner's position with Respondent required her to testify in court on numerous occasions. (R.T. p. 206) Before the Incident, Petitioner was never counselled about her conduct or the way she testified. (R.T. pp. 206-207) There was no evidence that Petitioner's testimony or conduct in court was ever unprofessional or improper in any way, or would likely cause any harm to Respondent as a result of Petitioner's racial slur on November 3, 2017.

128. Despite the passage of over four and one-half years between the Incident and the 2022 Hearing, Respondent presented no evidence of any form of unprofessional conduct by Petitioner in any setting other than during the November 3, 2017 Incident.

129. Petitioner consistently expressed regret and embarrassment about the Incident in her conversations with and written submissions to Ms. Hurd following the Incident.

130. While testifying before the Undersigned on two separate occasions, several years apart, Petitioner has consistently demonstrated that she regrets and is embarrassed by her conduct from the Incident. (R.T. p. 208)

131. Respondent presented no evidence at the 2018 Hearing or at the 2022 Hearing that Petitioner's comment during the November 3, 2017 Incident affected the reputation of Currituck DSS, the morale of any DSS employees, or the provision of any services at Currituck DSS. No one at Currituck DSS or anyone outside of Currituck DSS, other than those Petitioner consulted for advice, had any knowledge about Petitioner's comment on November 3, 2017 until Ms. Hurd disclosed Petitioner's comment to Currituck DSS staff in preparation for the 2018 Hearing. The Undersigned finds that the Incident did not affect the reputation of Currituck DSS, the morale of any employee, or the provisions of any service at Currituck DSS.

132. In the November 8, 2017 termination letter and the November 21, 2017 Final Agency Decision, Ms. Hurd referenced a July 21, 2017 conversation with Petitioner to show she had placed Petitioner on prior notice that Petitioner's conduct towards Ms. Hurd was inappropriate and unprofessional. (T. pp. 90-91) (Resp. Exs. 14, 16) However, the preponderance of the evidence showed that Ms. Hurd actually relied upon the July 21, 2017 conversation to show support for, and further justify, her decision to dismiss Petitioner even though she never documented her July 21, 2017 conversation with Petitioner as a disciplinary action.

a. In the November 8, 2017 letter, Ms. Hurd wrote three long, detailed paragraphs describing the July 21, 2017 encounter between she and Petitioner and herself. (Pet. Ex. 6)

b. In the 2017 Final Agency Decision, Ms. Hurd described Petitioner's conduct during their July 21, 2017 conversation as "unprofessional" and

"unreceptive to feedback and often presented as defensive." (Pet. Ex. 8) She further noted, "[W]e have had many discussions regarding your lack of receptiveness to supervision and why that is problematic." "I have observed the same response from you with the current situation." (Pet. Ex. 8)

c. Respondent failed to produce any evidence supporting Ms. Hurd's assertions that Petitioner had engaged in any prior unacceptable personal conduct toward Ms. Hurd. In fact, the evidence showed the opposite. The undisputed evidence proved that Petitioner had been receptive to Ms. Hurd's feedback in November 2017 as she immediately took ownership of her error in making a racial comment and apologized to Ms. Hurd. From the moment after her utterance through the contested case hearing, Petitioner has acknowledged what she uttered was inappropriate and unacceptable and she expressed remorse for her error.

d. In addition, Ms. Hurd never issued any disciplinary action to Petitioner for prior job performance or conduct deficiencies. Ms. Hurd never documented the July 21, 2017 matter in writing or as a disciplinary action. There was no evidence Ms. Hurd documented "many discussions" with Petitioner about any prior unacceptable conduct.

e. Furthermore, the undisputed evidence established that Petitioner had never used a racial slur or similar language at work before November 3, 2017.

133. After conducting an investigation specifically to determine whether the agency suffered any actual harm resulting from the Incident, Ms. Hurd was unable to show that the agency suffered any actual harm. However, Ms. Hurd tried to portray the potential for harm as actual harm even though much of the potential harm was speculative, based only on her subjective belief, or is contrary to or otherwise refuted by the passage of nearly five (5) years since Ms. Hurd dismissed Petitioner.

134. The preponderance of the evidence including Ms. Hurd's testimony at both the 2018 and 2022 Hearings demonstrated that Ms. Hurd's decision to dismiss Petitioner from employment was influenced by Ms. Hurd's past philosophical differences with Petitioner and their past history.

a. Ms. Hurd acknowledged that she and Petitioner had some "very significant differences of opinion about personnel administration, and our approach to supervision." (T. p 97) She conceded that she didn't know that those philosophies ever changed but also claimed she and Petitioner were able to get along to accomplish our work. (T. p. 97)

b. Yet, on July 21, 2017, twenty (20) days after Ms. Hurd became Petitioner's supervisor on July 1, 2017, Ms. Hurd and Petitioner engaged in an "argumentative and adversarial dialog regarding the case transfer process." (Pet. Ex. 6) Four months after Ms. Hurd became DSS Director and Petitioner's supervisor, she terminated Petitioner's employment.

135. Ms. Hurd's findings or characterizations of actual harm she claims were caused by the Incident were unreasonable and were most likely the result of her bias in favor of supporting and justifying her original action in dismissing Petitioner.

136. Former DSS Director Romm supervised Petitioner from 2011 through 2017 and consistently rated Petitioner as "substantially exceeded" expectations in all areas and rated Petitioner's performance as "Excellent" in all areas.

137. Ms. Romm never had any concerns about Petitioner's professionalism, adherence to policy, attitude, or her work performance, and did not think Petitioner's conduct on November 3, 2017 was typical or characteristic of Petitioner's behavior.

138. Ms. Room had never heard Petitioner use that kind of language [racial slur] before. Petitioner's comment at issue never gave Ms. Romm any doubts or concerns about Petitioner's fitness to be a supervisor at Respondent DSS. (T. p. 223)

139. The preponderance of the evidence established that Petitioner's conduct on November 3, 2017 was an aberrant and unintended event. There was no evidence that Petitioner acted maliciously, with any racially-motivated reason or with any racially-motivated intent to offend, harass, or belittle any given ethnicity, race, or anyone with whom she worked. Instead, the evidence proved that Petitioner's statement was a careless mistake and a "momentary lapse in judgment" by a highly effective and professional employee.

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings, and jurisdiction and venue are proper under N.C. Gen. Stat. § 126-35(a).

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. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

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). "As the sole fact-finder, the ALJ has both the duty and prerogative to determine the credibility of the witnesses, the weight and sufficiency of their testimony, to draw inferences from the facts, and to sift and appraise conflicting and circumstantial evidence." *Harris v. N. Carolina Dep't of Pub. Safety,* 798 S.E.2d 127, 134 (N.C. Ct. App. 2017), *aff'd*, 370 N.C. 386, 808 S.E.2d 142 (2017).

4. N.C. Gen. Stat. § 126-35(a) provides that, "No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended or demoted for disciplinary reasons, except for just cause."

5. Petitioner was a career status employee at the time of her dismissal from employment and, as such, was vested with a constitutionally protected property interest in her job under the North Carolina Human Resources Act (N.C. Gen. Stat. § 126-1 *et seq.*); specifically, the just cause provision of N.C. Gen. Stat. § 126-35.

6. " Just cause" for the dismissal, suspension, or demotion of a career State employee may be established only on a showing of "unsatisfactory job performance, including grossly inefficient job performance," or "unacceptable personal conduct." 25 NCAC 1I .2304 and .02305 (2016).

7. Respondent bears the burden of proving that Petitioner engaged in unacceptable personal conduct and that just cause existed to terminate Petitioner. N.C. Gen. Stat. § 126-34.02(d); *Granger v. University of North Carolina at Chapel Hill,* 197 N.C. App. 699, 705, 678 S.E.2d 715, 718 (2009).

8. " Just cause, like justice itself, is not susceptible of precise definition." *North Carolina Dept. of Environment and Natural Resources v. Carroll,* 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). Our Supreme Court explained that "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." *Id.* "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Id.*

9. In *Warren v. North Carolina Dept. of Crime Control & Public Safety, North Carolina Highway Patrol,* 221 N.C. App. 376, 726 S.E.2d 920 (2012), the Court of Appeals delineated a three-part inquiry to guide judges in determining whether just cause existed for an employee's dismissal for unacceptable personal conduct:

> We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Warren, 221 N.C. App. at 382-83, 726 S.E.2d at 925 (citations and footnote omitted).

10. 25 NCAC 01I .2304(b) defines the term "unacceptable personal conduct" as including:

> (1) conduct on or off the job that is related to the employee's job duties and responsibilities for which no reasonable person should expect to receive prior warning;
> . . .
>
> (4) the willful violation of work rules; or
> (5) conduct unbecoming an employee that is detrimental to the agency's service;

First Prong – Did Petitioner engage in conduct Respondent alleged?

11. In this case, Ms. Hurd found that Petitioner engaged in unacceptable personal conduct on November 3, 2017 when she said "n--- rican." Petitioner alleged that she said "nigra rican." Our Court of Appeals held in *Ayers v. Currituck Cty. Dep't of Soc. Servs.*, 267 N.C. App. 513, 833 S.E.2d 649 (2019) ("[t]he evidence reflects Petitioner either used the word "n---- rican" or the variant "nigra rican. In any event, the phrase employed by Petitioner constitutes a racial epithet." *Ayers*, 833 S.E.2d at 657 (citing *Friend v. Leidinger*, 588 F.2d 61, 68 (4th Cir. 1978) (Butzner, J., concurring in part and dissenting in part) (describing "nigras" as an epithet)).

12. Since November 3, 2017, Petitioner has acknowledged that she made an improper statement, whether it was nigra or "n---," and what she said was inappropriate and unacceptable in any setting, personal or professional. She apologized for making that comment. "As such, Petitioner, herself conceded whichever variant she used was improper and unacceptable." *Ayers*, 833 S.E.2d at 658. Therefore, the first prong of the Warren analysis was met.

Second Prong – Does Petitioner's conduct fall within one of the categories of unacceptable personal conduct provided by the Administrative Code?

13. Director Hurd alleged that Petitioner's comment "n--- rican" on November 3, 2017 constituted unacceptable personal conduct because it was conduct for which no reasonable person should expect to receive prior warning, the willful violation of known or written work rules, and conduct unbecoming of an employee of Respondent. 25 NCAC 1I .02304 (1), (4), and (5).

14. Based upon the preponderance of the evidence, the Fourth Circuit's analysis in *Spriggs v. Diamond Auto Glass*, and Petitioner's acknowledgement at hearing, Petitioner's racial comment constituted conduct for which no reasonable should expect to be warned in advance and was conduct unbecoming of an employee of Respondent Currituck DSS in violation of 25 NCAC 01I .02304(b)(1) and (5). Petitioner even conceded she would not allow those under her supervision to use such language. For these reasons, the second prong of the *Warren* analysis is satisfied.

15. Nevertheless, Respondent also alleged that Petitioner violated two of Respondent's policies: to wit: (1) being respectful of cultural diversity and (2) prohibiting unlawful harassment.

16. Respondent's Personnel Policy, Chapter VIII Child Protective Services explained how Respondent's "values are what we promise to do, the link between the agencies and the public. They provide a guide for service delivery and staff behavior" and "We support parents by respecting each family's cultural, racial, ethnic, and religious heritage in their interactions with the family and our mutual establishment of goals." (Pet. Ex. 8; Resp. Ex. 4) Without a doubt, Petitioner's utterance of a racial slur on November 3, 2017 undermined the principles and values of Respondent's requirement that its staff respect its' clients' cultural diversity, and thus, constituted unacceptable personal conduct under 25 NCAC 01 .02304(4).

17. Respondent's policy against unlawful harassment defined "unlawful harassment" as:

> Conduct that violates this policy includes verbal, nonverbal, or physical behaviors that a reasonable person would find hostile or abusive **and one that the person, who is the object of the harassment, perceives to be hostile or abusive.**

(Resp. Ex. 2) That is, this definition required two factors be met: (1) behavior a reasonable person would find hostile or abusive **and** (2) one [the behavior] the person, who is the object of the harassment, perceives to be hostile or abusive. (emphasis added). In this case, Respondent failed to prove the existence of a "person, who is the object of" Petitioner's utterance of the racial slur. Without such proof, Respondent failed to prove Petitioner's conduct constituted unlawful harassment in violation of Respondent's policy against unlawful harassment.

18. Being that Petitioner's conduct on November 3, 2017 constituted unacceptable personal conduct as noted above, the second prong of the *Warren* analysis was met.

Third Prong - Whether Petitioner's Misconduct Amounts to Just Cause for the Disciplinary Action Taken?

19. Appellate cases have made clear that just cause can only be determined from an examination of the facts and circumstances of each individual case. *Harris v. N. Carolina Dep't of Pub. Safety,* 798 S.E.2d 127, 134 (N.C. Ct. App. 2017), *aff'd*, 370 N.C. 386, 808 S.E.2d 142 (2017). 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. *North Carolina Dep't. of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).

20. In *Warren*, the Court noted: "Unacceptable personal conduct does not necessarily establish just cause for all types of discipline . . .. Just cause must be determined based upon an examination of the facts and circumstances of each individual case." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925 (internal quotations omitted.) The Court explained, "the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis." *Id*.

21. The Undersigned, as directed by Warren *and* Carroll, looks at the "circumstances" under which Petitioner committed the conduct alleged.

a. Petitioner's utterance of the racial slur was said in a vacant office where only Petitioner and her supervisor, Director Hurd, were present. Ms. Hurd repeatedly asked Petitioner what the code "NR" stood for after Petitioner had told Ms. Hurd at least two times that she did not know. After Ms. Hurd persisted, Petitioner blurted out a racial epithet. Both Petitioner and Ms. Hurd were shocked at Petitioner's comment, and Petitioner immediately apologized. Petitioner was embarrassed by her comment. She asked Ms. Hurd not to tell anyone what she said.

b. On and before November 3, 2017, the supervisors at Currituck DSS had allowed their staff to speak freely amongst themselves and use off-color humor, urban slang, and profanity to relieve their stress and anxiety caused by their jobs. Ms. Hurd admitted that she had used profanity in the workplace. Petitioner had heard Ms. Hurd call people "worthless" and "trifling."

c. There was a noted history of friction between Petitioner and Ms. Hurd relating back to when Ms. Hurd and Petitioner were supervisors, which was years before Hurd became Director on July 1, 2017. They had a difficult relationship. The friction was both personal in nature and based upon philosophical differences. This friction continued after Ms. Hurd became Director. Petitioner described at the 2018 hearing how Ms. Hurd, after becoming Director, told Petitioner that talking to her "felt like nails on a chalkboard." (T. p. 164).

22. For an act of unacceptable personal conduct to satisfy the just cause standard necessary to support a dismissal, the Tribunal must also consider various factors, including the severity of the violation, subject matter involved, resulting harm, work history of the Petitioner, and discipline imposed in other cases involving similar violations. *Wetherington v. North Carolina Dep't. of Public Safety*, 368 N.C. 583, 593, 780 S.E.2d 543, 548 (2015). In addition, the Supreme Court noted that the employer should consider a "range of disciplinary actions" and not just a "per se" or automatic dismissal for any violation of policy. *Id.* (See *Brewington v. North Carolina Dep't. of Public Safety, State Bureau of Investigation*, 254 N.C. App. 1, 802 S.E.2d 115 (2017), *disc. rev. denied,* 371 N.C. 343, 813 S.E.2d 857 (2018)).

23. In this case, Director Hurd admittedly made significant use of the twelve factors from the *Employer Guidance to Imposition of Discipline* (Resp. Ex. 9) in choosing

what disciplinary action in 2017, to impose against Petitioner for making a racial epithet. In fact, many of those twelve factors are similar to or align with the factors our Courts have said we should use to determine the appropriate discipline to impose in a just cause employment case. Nevertheless, the factors espoused by our Courts, not the factors determined or chosen by academia or based upon current societal trends and opinion, are the standards we are bound to use in a just cause determination.

24. Ms. Hurd admitted at the April 2018 hearing that she did not think it was significant whether anyone heard Petitioner's comment on November 3, 2017. However, whether anyone else heard such statement was a necessary consideration in weighing the evidence to determine the severity of the conduct and whether just cause existed to terminate Petitioner.

25. In *Granger v. University of North Carolina at Chapel Hill,* 197 N.C. App. 699, 678 S.E.2d 715 (2009), the Court of Appeals found that an employee's use of a racial slur in the workplace, where that employee was overheard by a subordinate, undermined the employee's [Granger] authority and exposed UNC to embarrassment and potential legal liability. The Court noted that:

> Respondent has policies prohibiting racial harassment or harassment in the workplace. Respondent has a duty to enforce these policies, and to further its stated goal of promoting an 'environment of tolerance and mutual respect that must prevail if the University is to fulfill its purposes.' As stated by the Fourth Circuit in *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. Md. 2001):
>
> Far more than a 'mere offensive utterance,' the word '[-----]' ["n ---] is pure anathema to African-Americans. 'Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as '[-----]' by a supervisor in the presence of his subordinates.'
>
> *Id*. We agree with the Fourth Circuit's analysis.
>
> By uttering this epithet in the workplace, where Petitioner was overheard by one of her subordinates, Petitioner undermined her authority and exposed Respondent to embarrassment and potential legal liability . . .
>
> *Id.,* 197 N.C. App. at 706.

26. The Undersigned agrees with the Fourth Circuit's analysis in *Spriggs v. Diamond Auto Glass* that use of the word "n---" is far more than just a mere offensive utterance and is a "pure anathema to African-Americans" that creates an abusive working and personal environment. *Id*. at 185. (*See Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("No other word in the English language

so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans.")) Petitioner's utterance of any variant or version of "n--- rican" was no exception.

27. In *Granger,* the employee's misconduct went beyond just using a racial epithet in the workplace as Granger was actually:

> [O]**verheard by one of her subordinates. Petitioner undermined her authority and exposed Respondent to embarrassment and potential legal liability**. Further, Petitioner had **attempted to obstruct the investigation, which amounted to insubordination.** Petitioner stated she would not hire another black person, Petitioner took and disposed of Jones- Parker's black history notebook, and **she created a 'general sense of intimidation in the workplace.'** When considered together, we hold the trial court did not err in finding that Petitioner's actions constituted unacceptable personal conduct for which dismissal was proper.

Id. (emphasis added.) The Court of Appeals made clear that: "Granger's actions, **when considered together,** support her dismissal under all four of the following definitions of unacceptable personal conduct . . . ." *Granger,* 197 N.C. App. at 707, 678 S.E.2d at 720 (emphasis added).

28. Petitioner's conduct, in this case, falls short of that determined by the Court of Appeals in *Granger* as sufficient to support dismissal from employment. Unlike Pamela Granger, Petitioner engaged in a one-time act of unacceptable personal conduct. Unlike Pamela Granger, Petitioner did not say "n--- rican" in referring to another coworker in the Currituck County DSS, but blurted out some variant of "n---rican" while trying to interpret the "NR" abbreviation during a private conversation with her supervisor. There was no evidence that Petitioner was trying to demean, harass, belittle, embarrass, or otherwise to target anyone else. Unlike Pamela Granger, Petitioner did not say she "would not hire another black person," her utterance was not overheard by one of her subordinate employees or any other employee at work, and she did not engage in insubordination. Petitioner surprised herself by her comment, immediately expressed remorse and embarrassment, and apologized to Ms. Hurd.

29. Ms. Hurd's belief, as explained in the April 2018 hearing, that Petitioner's utterance of "n---rican" or some variant thereof, to her, as Director of DSS, could not have been any more severe is unreasonable, illogical, and fails to take into account whether DSS suffered any harm as a result of Petitioner's conduct. As shown in *Granger,* Petitioner's calling a coworker or client of another ethnicity a racial slur with the intent to belittle, harass or demean would be far more severe than Petitioner's conduct on November 3, 2017. Ms. Hurd made the decision in November 2017 to terminate Petitioner when she was unaware if any harm had been caused by or resulted from the Petitioner's November 3, 2017 comment.

30. An employer's failure to fully investigate circumstances before making a determination that just cause exists to terminate an employee, can demonstrate

an inadequate and irrational decision-making process. *See Bulloch v. N.C. Dep't. of Crime Control and Public Safety*, 223 N.C. App. 1, 14, 732 S.E.2d 373, 383 (2012). As was the case in *Bulloch*, Ms. Hurd decided to dismiss Petitioner in November 2017 before Hurd had completed an adequate investigation into Petitioner's conduct. The fairness and completeness of the employer's investigation into an employee's unacceptable personal conduct can be one factor to consider in determining whether just cause exists for a particular disciplinary action. *See Bulloch*, 223 N.C. App. at 8, 732 S.E.2d at 379.

31. Because Ms. Hurd failed to conduct a proper and complete investigation to determine whether Respondent DSS suffered any harm as a result of Petitioner's unacceptable personal conduct until she was so directed by the Undersigned following *Ayers* II, Ms. Hurd failed to make a proper inquiry before dismissing Petitioner, and even before the 2018 Hearing, to determine whether any DSS employees were aware of the particulars of the Incident. Because Ms. Hurd delayed conducting a proper investigation into the issue of actual harm, DSS has been unable to show the specific timeframe in which any person, other than Ms. Phelps, learned of the racial epithet Petitioner used in her November 3, 2017 conversation with Ms. Hurd.

32. After being so ordered by the Undersigned following *Ayers II*, Ms. Hurd conducted a further investigation to determine whether DSS suffered any harm as a result of Petitioner's unacceptable person conduct. Despite that additional investigation, DSS did not produce any evidence to show that Petitioner's conduct during the November 3, 2017 Incident caused DSS to experience any actual harm. Respondent did not present any evidence showing that DSS experienced any harm from the Incident before Ms. Hurd decided to terminate Petitioner's employment.

33. The only evidence DSS presented showing any harm to DSS, caused by Petitioner's November 2017 statement, was that at least two employees of DSS had heard about the Incident at some later date. However, the evidence showed that Ms. Phelps only knew of the Incident because Ms. Hurd told her about it in preparation for the April 2018 hearing in this case. DSS failed to show that Ms. Sutton or any other employee had knowledge of the details of the Incident before the April 2018 hearing.

34. Based on a review of all of the evidence, and giving due consideration to the demeanor, credibility, ability to recollect the facts, and overall testimony of the witnesses who testified in the April 2018 hearing and the 2022 Hearing following remand, no client or employee of DSS was aware of the words Petitioner used during the Incident before Ms. Hurd disclosed it to Ms. Phelps in preparation for the April 2018 Hearing. That hearing only occurred because DSS terminated Petitioner.

35. Although Petitioner engaged in unacceptable personal conduct in using a racial epithet in the Incident, Petitioner did not cause and was not responsible for the disclosure or discovery of that conduct by anyone other than Ms. Hurd.

36. As the Party with the burden of proof in this case, Currituck DSS' failure to conduct a proper investigation for nearly five (5) years resulted in an inability by Currituck DSS to establish through competent and reliable evidence the timeframe during which anyone other than Petitioner and Ms. Hurd became aware of the racial epithet used by Petitioner during the Incident. There was an unreasonable delay in completing or performing a proper investigation in this case. The Undersigned finds that there was no reliable evidence to demonstrate that anyone at Currituck DSS learned of the Incident for any reason other than Ms. Hurd informed some of her staff about it in preparation for the 2018 Hearing or following that Hearing, because the Tribunal's decisions were published or otherwise available following the 2018 Hearing.

37. Despite the lengthy delay between the Incident and the 2022 Investigation, Respondent failed to show that any harm had proximately resulted from the November 3, 2017 Incident.

38. Petitioner's unacceptable conduct did not cause Respondent to experience any actual harm.

39. The fact that Currituck DSS did not suffer any actual harm as a result of the November 3, 2017 incident weighs against finding that just cause exists for dismissing Petitioner from employment.

40. Ms. Hurd's Final Agency Decision Addendum seeks to characterize the potential harm that she considered to result from the Incident as actual harm. Ms. Hurd erred by characterizing potential harm as actual harm.

41. Much of the potential harm Ms. Hurd describes in the Final Agency Decision Addendum and in her testimony during the 2022 Hearing is based solely on speculation and conjecture. Ms. Hurd overstates the weight and risk of this potential harm, and failed to consider it in the light of Petitioner's history of professional, effective, and compassionate conduct and performance with Respondent.

42. The preponderance of evidence proved there was only a minimal degree of potential risk that Petitioner's racial comment could or would have affected the Respondent's integrity, employee morale, or provision of services. Ms. Hurd, Respondent's attorney, and Respondent's consultant were the only ones who knew about Petitioner's misconduct before the April 2018 hearing. Given that Petitioner's conduct was a personnel matter, Ms. Hurd was bound to keep such matter confidential. The only harm that actually occurred did not happen until Respondent and Ms. Hurd advised DSS staff of Petitioner's conduct in preparation for this contested case hearing. That kind of harm does not weigh in favor of finding that this incident provided Currituck DSS with just cause to dismiss Petitioner.

43. In *Watlington v. Dep't of Soc. Servs Rockingham Ct'y*, 261 N.C.App. 760, 822 S.E.2d 43 (2018), the Court noted:

> T]he absence of actual harm, however, does not preclude the ALJ from finding the existence of the potential for harm from the evidence, and (Watlington) does not argue that repeated acts with the potential to cause harm cannot give rise to just cause for dismissal.

822 S.E.2d at 51, fn. 6. In the present case, however, Petitioner only engaged in one act of unacceptable personal conduct. In contrast to *Watlington*, in which the employer showed that the employee had engaged in a series of acts of misconduct, Petitioner's single act of misconduct created a much lesser potential for harm, and it is not reasonable to expect that Petitioner would repeat that or any other form of misconduct.

44. Petitioner's ten-year employment history with no prior disciplinary actions and exemplary performance evaluations support a lesser disciplinary sanction than dismissal in this case. Former DSS Director Romm supervised Petitioner from 2011 through 2017 and consistently rated Petitioner as "substantially exceeded" expectations in all areas. Ms. Romm also rated Petitioner's performance as "Excellent" in all areas. Ms. Romm never had any concerns about Petitioner's professionalism, adherence to policy, attitude, or her work performance, and did not think Petitioner's conduct on November 3, 2017 was typical or characteristic of Petitioner's behavior. Romm had never heard Petitioner use that kind of language [racial slur] before. Neither did Petitioner's comment give Romm any doubts or concerns about Petitioner's fitness to be a supervisor at Respondent DSS. (T. p. 223)

45. The relevant facts of this case, including mitigating factors, compare favorably to those in *North Carolina Dep't of Env't & Nat. Res v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004). In *Carroll,* the N.C. Supreme Court reversed the employer's demotion of Carroll, a park ranger, for exceeding the posted speed limit for about 1 mile of open road and activating his blue lights and siren to get to the hospital to admit his mother. Carroll also "used profanity or otherwise 'lashed out' at two fellow law enforcement officers" who arrived at the hospital to question him about the nature of his emergency. *Carroll*, 358 N.C. at 675. The Supreme Court found that the evidence did not support a finding that Carroll had engaged in sufficient conduct to support his demotion after considering all the facts and circumstances, including mitigating factors, such as Carroll's 20 years of employment with no prior history of disciplinary actions, and Carroll's supervisor's opinion that Carroll was a "very good employee who comported himself with honesty, integrity, and respect for others. *Id.* at 669, 670.

46. In this case, it was undisputed that neither Ms. Hurd nor Ms. Romm had encountered a similar conduct violation at Currituck DSS in the past. Neither Ms. Hurd nor Ms. Romm had dismissed any employee based on a single incident of misconduct in the past. In fact, prior disciplinary practices at Respondent demonstrated that dismissal was not ordinarily imposed for a single act of misconduct, and generally an employee would only be dismissed following a warning and repetition of some act of misconduct.

47. Respondent proved by a preponderance of the evidence that it had just cause to discipline Petitioner for engaging an unacceptable personal conduct under N.C. Gen. Stat. § 126-35 for uttering a racial slur.

48. The Undersigned has considered the totality of the circumstances and the factors required by *Wetherington* and concludes that Petitioner's misconduct did not rise to a sufficient level to warrant termination from employment under N.C. Gen. Stat. § 126-35(a). Those factors include Petitioner's nonexistent disciplinary history, her years of service and prior performance, the severity of the violation, the subject matter of the Incident, the lack of any harm sustained by Respondent, the minimal degree of potential risk of harm to the agency, and prior disciplinary actions at Currituck DSS.

a. Petitioner took ownership of her mistake immediately and apologized. She continued to accept that responsibility through the pre-dismissal process and through the contested case hearing.

b. In addition, Respondent's work environment allowed DSS staff to use slang and profanity amongst themselves to relieve stress and anxiety on the job; though notably, utterance of a racial slur is quite different.

49. The totality of the facts and circumstances of this case demonstrate that Ms. Hurd's decision to fire Petitioner from employment was influenced by Ms. Hurd's past philosophical differences with Petitioner and their past history.

a. On July 21, 2017, twenty (20) days after Ms. Hurd became Petitioner's supervisor on July 1, 2017, Ms. Hurd and Petitioner engaged in an "argumentative and adversarial dialog regarding the case transfer process." (Pet. Ex. 6)

b. Four months after Ms. Hurd became DSS Director and Petitioner's supervisor, she terminated Petitioner's employment. While Ms. Hurd found Petitioner violated Respondent's policy requiring staff to respect its' clients' cultural diversity, Ms. Hurd's admission that she too had participated in using derogatory terms at work set a double standard in how she judged Petitioner's conduct.

50. After a thorough consideration of the Final Agency Decision Addendum and the evidence presented at the 2018 Hearing and the 2022 Hearing, the Undersigned determines that Ms. Hurd's analysis and decision to terminate Petitioner as set forth in the Final Agency Decision Addendum is influenced more by her history of friction with Petitioner and a desire to justify her original decision to terminate Petitioner than by a proper or reasonable application of the *Wetherington* factors or "upon an examination of the facts and circumstances of (the) case." *Carroll,* 358 N.C. at 669, 599 S.E.2d at 900.

51. Based upon the above Findings of Fact and Conclusion of Law, the totality of the facts and circumstances of this case, and pursuant to the authority in N.C. Gen. Stat. § 126-34.02(a), the Undersigned hereby orders Respondent to retroactively reinstate Petitioner to the same or similar position she held prior to her dismissal with back pay. The totality of the facts and circumstances in this case support imposition of the lesser disciplinary sanction of a two-week suspension without pay for committing the unacceptable personal conduct discussed in this case. Further, Petitioner shall participate in additional training on cultural diversity and racial sensitivity.

52. Pursuant to N.C. Gen. Stat. § 126-34.02(e), Respondent shall reimburse Petitioner for the cost of her reasonable attorney's fees incurred in the litigation of this contested case, including attorney's fees incurred during all appeals of this case to the N.C. Court of Appeals and all subsequent remands. *Hunt v. N.C. Dep't of Pub. Safety,* 266 N.C. App. 24, 830 S.E.2d 865 (2019); *review denied,* 373 N.C. 60, 832 S.E.2d 732 (2019). Petitioner's attorney shall file a petition for attorney's fees with the Office of Administrative Hearings within ten calendar days of entry and filing of this Final Decision.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby **REVERSES** Respondent's decision to terminate Petitioner from employment. Respondent shall retroactively reinstate Petitioner to the same or similar position she held prior to her dismissal with full back pay, suspend Petitioner for two weeks without pay, and order Petitioner to attend additional cultural diversity and racial sensitivity training.

Based upon N.C. Gen. Stat. § 126-34.02(e), Respondent shall reimburse Petitioner for the cost of her reasonable attorney's fees incurred in the litigation of this contested case pursuant to an Order enumerating reasonable attorney's fees incurred by Petitioner during the pendency of this contested case including attorney's fees incurred during the appeals of this case to the N.C. Court of Appeals and all subsequent remands.

NOTICE OF APPEAL

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.

SO ORDERED, this the 31st day of January, 2023.

Melissa Owens Lassiter
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.

John David Leidy
Hornthal, Riley, Ellis & Maland, LLP
jleidy@hrem.com
Attorney For Petitioner

Courtney S. Hull
The Twiford Law Firm
courtneyhull@twifordlaw.com
Attorney For Respondent

Jennifer Milak
Teague Campbell Dennis & Gorham LLP
jmilak@teaguecampbell.com
Attorney For Respondent

John S Morrison
The Twiford Law Firm
jmorrison@twifordlaw.com
Attorney For Respondent

This the 31st day of January, 2023.

Christine E. Cline
Law Clerk
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850