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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 OSP 03088

Jerry Hinton III Petitioner, v. North Carolina Department of Public Safety Respondent.	**FINAL DECISION ON REMAND**

This contested case was heard by former Administrative Law Judge J. Randolph Ward on November 10, 2020, in the Office of Administrative Hearings in Raleigh, North Carolina, by virtual means. Following a July 5, 2022, opinion of the Court of Appeals of North Carolina to remand this contested case to the Office of Administrative Hearings, this contested case was reassigned to Administrative Law Judge Michael C. Byrne for further findings not inconsistent with that opinion.

APPEARANCES

Ms. Jennifer J. Knox
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Attorney for Petitioner Jerry Hinton III

Ms. Bettina J. Roberts
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Attorney for Respondent North Carolina Department of Public Safety

WITNESSES

For Petitioner:
Jerry Hinton III

For Respondent:
Portia Lucas
Tyrus C. McPhatter
Blaine Henderson, Jr.
Kim Heffney

Johnny Devon Hawkins

EXHIBITS

Admitted for Petitioner: Exhibit 1.

Admitted for Respondent: Exhibits 1-3.

ISSUE

Whether Respondent dismissed Petitioner from employment for disciplinary reasons without just cause.

BURDEN OF PROOF

The burden of proof was on Respondent to show by the greater weight of the evidence that it had just cause to dismiss Petitioner for disciplinary reasons for unacceptable personal conduct. N.C.G.S. 126-34.02; N.C.G.S. 126-35; N.C.G.S. 150B-25.1.

RELEVANT PROCEDURAL HISTORY

1. Petitioner Jerry Hinton III ("Petitioner") filed a petition for a contested case ("Petition") in the Office of Administrative Hearings ("OAH") on August 7, 2020, alleging that he was a career status State employee who was dismissed from employment for disciplinary reasons by Respondent North Carolina Department of Public Safety ("Respondent") without just cause in violation of N.C.G.S. 126-35. Respondent dismissed Petitioner, a correctional officer, for alleged violations of Respondent's policy on excessive force during an incident taking place at Polk Correctional Center in Butner on July 20, 2020, as well as for subsequent alleged misconduct in failing to follow a superior's orders regarding communicating information while Petitioner was on leave.

2. Former Administrative Law Judge J. Randolph Ward ("the ALJ") held a hearing of Petitioner's case on November 10, 2020, by virtual means.

3. On February 19, 2021, the ALJ issued a Final Decision upholding Petitioner's dismissal. Two other decisions followed. None of those decisions addressed Respondent's allegations that Petitioner also committed unacceptable personal conduct while on leave.

4. Petitioner appealed to the Court of Appeals. See N.C.G.S. 7A-29.

5. The Court of Appeals filed its opinion ("Remand Order") on July 5, 2022.

6. The Remand Order did not vacate the ALJ's ultimate conclusion that just cause existed for Petitioner's dismissal. The Remand Order states, in pertinent part, that "we conclude there was substantial, if not ample, evidence that [Petitioner] violated [Respondent's] policy by using excessive force." Remand Order, ¶ 16.

7. The Remand Order states that the ALJ's Findings of Fact "are insufficient to support its conclusion that [Petitioner's] conduct constituted excessive force. The [ALJ's] findings refer to the evidence only in a conclusory manner." Remand Order, ¶ 18.

8. The Remand Order continued, "[T]his Court has no authority to make findings of fact, even those facts which may be derived from a video of the conduct at issue. Those must be made by the Administrative Law Judge. We remand to the [ALJ] for further findings explaining how and why [Petitioner's] conduct constituted excessive force and violated [Respondent's] policy."

9. OAH received the Remand Order on July 28, 2022.

10. The ALJ retired from OAH effective July 28, 2022.

11. On August 1, 2022, the Chief Administrative Law Judge and Director of OAH reassigned this contested case to the undersigned Administrative Law Judge ("the Tribunal") to conduct appropriate proceedings on remand.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, including documents admitted into evidence, the Tribunal makes the following Findings of Fact. In making the findings of fact, the Tribunal has weighed all the admissible evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know, or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in this contested case.

Parties and Witnesses

1. Petitioner was employed by Respondent as a Correctional Officer III at Polk Correctional Center ("Polk Correctional"). T. 128.

2. Respondent dismissed Petitioner from employment on April 8, 2020, due to Petitioner's role in an alleged excessive force incident of unacceptable personal conduct against an offender ("Offender Santos-Guerra" or "the offender") on July 20, 2019, as well as additional alleged unacceptable personal conduct during Respondent's investigation of that incident. "[I]n addition to the excessive use of force, part of that dismissal was Mr. Hinton's overt refusal to comply to a directive given to him by a supervising official. So it was a dual – a dual incident of unacceptable personal conduct." T. 104 (Hawkins Testimony). However, the second ground for dismissal is not addressed in any of the various ALJ decisions, nor is any direction given to the Tribunal regarding this issue in the Remand Order.

3. Petitioner was a credible witness unless otherwise noted.

4. Portia Lucas ("Lucas") is a Correctional Captain employed by Respondent at Polk Correctional. T. 10. As of the date of the Incident, Lucas had worked at Polk for 18 years. T. 10. Except as otherwise noted, Lucas was a credible witness.

5. Tyrus C. McPhatter ("McPhatter") is a Correctional Officer II employed by Respondent at Polk Correctional. T. 33. As of the date of the Incident, McPhatter had worked at Polk for "a little over three plus years." T. 33. McPhatter's primary job duties are as a "transportation and receiving officer" involved in offender transport. T. 35. Except as otherwise noted, McPhatter was a credible witness.

6. Lucas and McPhatter were not sworn in prior to giving testimony. T. 45. See 26 N.C.A.C. 03.0121 ("All oral testimony at the hearing shall be under oath or affirmation and shall be recorded."). Neither Petitioner nor Respondent raised objections to this omission.

7. Blaine Henderson, Jr. ("Henderson") is a Correctional Officer II employed by Respondent at Polk Correctional T. 46. As of the date of the incident, Henderson had worked at Polk for "about 14 years." T. 46. Except as otherwise noted, Henderson was a credible witness.

8. Kim Heffney ("Heffney") works as an investigator for Respondent's Office of Special Investigations, or "OSI." T. 59. Prior to this employment, Heffney was a North Carolina SBI agent for 30 years. T. 60. Heffney led Respondent's investigation of the Incident. T. 60-61. Except as otherwise noted, Heffney was a credible witness.

9. Johnny Devon Hawkins ("Hawkins") is a Correctional Warden for the Respondent at Polk Correctional. T. 92. He has worked for Respondent for 27 years. T. 92. He became warden at Polk Correctional in 2018. T. 93. Hawkins was not on duty on the date of the conduct at issue and did not witness any of it. T. 93. Except as otherwise noted, Hawkins was a credible witness.

10. Offender Santos-Guerra, whose first name does not appear to be in evidence other than the initial "J.," (Respondent's Exhibits, Heffney Report), did not testify at the contested case hearing.[1]

Petitioner's Work History

11. As of the date of his dismissal, Petitioner had been a Correctional Officer for "a little over two years." T. 128.

12. Petitioner's most recent performance evaluation concluded that he "Meets Expectations." There was no other evidence of Petitioner's work performance submitted.

13. Petitioner had previously received a documented counseling session for a Driving While Impaired charge as well as a written warning for a no-call/no-show failure to report to

[1] The offender's surname is spelled differently in the transcript.

work. (Respondent's Exhibits, Final Agency Decision).[2] Neither the documented counseling nor the written warning was put into evidence.

14. A documented counseling is not disciplinary action under State Personnel Policy. 25 N.C.A.C. 01J.0604(a). Petitioner's prior disciplinary history is thus one written warning.

15. There is no evidence that prior to the events of this case Petitioner was alleged to have used excessive force against an offender.

Absence of Dismissal Letter

16. Respondent submitted three exhibits and Petitioner submitted one exhibit. As noted, (see n.2 below), they are not numbered. Petitioner's actual dismissal letter (see N.C.G.S. 126-35) was not among the exhibits submitted; only the Final Agency Decision was admitted as an exhibit.

17. "In cases of such disciplinary action, the employee **shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action** and the employee's appeal rights." N.C.G.S. 126-35 (emphasis supplied). This written statement – the dismissal letter – is "a condition precedent that must be fulfilled by the employer before disciplinary actions are taken." Leiphart v. N. Carolina Sch. of the Arts, 80 N.C. App. 339, 350, 342 S.E.2d 914, 922 (1986), cert. denied, 318 N.C. 507, 349 S.E.2d 862 (1986).

18. The Final Agency Decision put into evidence by Respondent does not meet the requirements of N.C.G.S. 126-35, as it was issued well after the disciplinary action was taken. "Once a final agency decision is issued, a . . . State employee may appeal an adverse employment action as a contested case pursuant to the method provided in N.C. Gen. Stat. § 126-34.02[.]" Russell v. N. Carolina Dep't of Pub. Safety, 2022-NCCOA-209, ¶ 22, 871 S.E.2d 821, 827.

19. Moreover, "[a]ny reason not specifically mentioned in the [disciplinary action] letter and raised for the first time on appeal does not provide sufficient particularity of the reason for [disciplinary action] and is barred by N.C.G.S. § 126-35." Hardy v. N. Carolina Cent. Univ., 260 N.C. App. 704, 817 S.E.2d 495 (2018) (citing Leiphart at 80 N.C. App. at 350-51, 342 S.E.2d at 922).

20. Omission of the dismissal letter is therefore significant, as it hampers the Tribunal in the necessary task of comparing the "specific acts and omissions," or reasons, which Respondent gave for dismissing Petitioner at the time of that action to the actual evidence supporting (or detracting from) those reasons.

[2] Respondent submitted three exhibits. None appear to be numbered. They consist of video footage, Heffney's investigative report, and the Final Agency Decision letter upholding Petitioner's dismissal for unacceptable personal conduct.

21. Further, the Tribunal is unable to determine whether the reasons Respondent submitted at hearing are the same reasons provided to Petitioner at the time of his dismissal, thus ensuring Petitioner was provided notice and due process. "[N.C.G.S. 126-35] was designed to prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal." Leiphart, 80 N.C. App. at 351, 342 S.E.2d at 922.

22. Ordinarily, omission of the dismissal letter from the evidence would make full and appropriate review of this contested case an impossibility. However, the Tribunal's sole task on remand is to "make further findings explaining how and why [Petitioner's] conduct constituted excessive force and violated [Respondent's] policy." Remand Order, ¶ 19. This may be accomplished by reviewing the evidence and the record and making appropriate findings.

Incident of July 20, 2019

23. Petitioner was on duty at Polk Correctional on July 20, 2019.

24. While offenders were lined up to get their lunches in the prison meal facility, Lucas instructed Petitioner to engage in random searches of offenders in an attempt to locate a homemade weapon or "shank" used in an incident the previous evening. T. 129. Offenders selected for this search were told to step out of the lunch line and wait for further instructions. Initially, Petitioner had assistance in this task with other staff. T. 130. Eventually, Petitioner was left to conduct the random searches himself. T. 130.

25. Offender Santos-Guerra was one of the inmate Petitioner chose for a random search. T. 130. Petitioner did not know this offender personally as he is normally assigned to the prison's restrictive housing units. T. 130.

26. When Petitioner ordered Santos-Guerra to step out of line for a search, the offender stepped out of line "and went over where I directed him to go. He appeared to be compliant." T. 131 (Hinton Testimony). Petitioner then noticed that Santos-Guerra was "gone." T. 131.

27. Petitioner completed searches of the other selected inmates and then went after Santos-Guerra. Petitioner found the offender elsewhere in the dining hall. T. 132. Petitioner found that Santos-Guerra had "jumped" his place in the lunch line and was acting "really suspicious" and "trying to hide." T. 139-140.

28. Petitioner approached Santos-Guerra and stated, "Hey, you were supposed to wait in this area over here. I need you to come with me." T. 132. By Petitioner's own version of events, "[t]he offender started to comply with me." T. 132.

29. According to Petitioner, when Petitioner tried to put his hand on Santos-Guerra and escort him from the room, "he snatched away from me, and he spun back towards me really quickly." T. 133. Petitioner continued, "When he swung back toward me, I did strike him once . . . . I punched him. It was all from reaction." T. 134.

30. Again, according to Petitioner, "there was a brief pause, and then [Santos-Guerra] comes back toward me. I'm trying to stop him from – from being able to hit me. Eventually we end up going to the ground, and he was struck three more times." T. 134. Petitioner continued, "I struck him a few times to pretty much keep him from coming back towards me."

31. The offender indeed "was struck three more times" – by Petitioner, who was atop the inmate. T. 155. As the video makes clear, Petitioner three times separately raised a closed fist at or above his shoulder level and punched the offender in the face. (Respondent's Exhibits, Video Footage, Camera 017).

32. On the cited footage, Petitioner's first full swing and close-fisted strike on Santos-Guerra occurs at approximately 12:28:08.227 on the video. (Id.) Petitioner's second full swing and close-fisted strike on Santos-Guerra occurs at approximately 12:28:08.677. (Id.) Petitioner's third full swing and close-fisted strike on Santos-Guerra occurs at approximately 12:28:09.227. (Id.) The video evidence is corroborated by a staff member who personally witnessed the Incident: "I saw Officer Hinton give like two, three hits to Inmate Santos." T. 38 (McPhatter Testimony).

33. During these three strikes, the Tribunal observes no corresponding attempts by Santos-Guerra to strike Petitioner, and indeed the Tribunal observes no (visually) apparent attempts by Santos-Guerra to resist Petitioner. The video evidence corroborates Heffney's conclusion during the OSI investigation that, "You can see in the video that the offender in no way resisted Officer Hinton," at least during the period of time Petitioner was striking the offender with his closed fist. T. 65 (Heffney Testimony).

34. Petitioner's claims that Santos-Guerra was attempting to fight or assault Petitioner at the time Petitioner struck him are unsupported by the admitted evidence, and the Tribunal finds that these claims are not credible.

35. After Petitioner rises off of Santos-Guerra, the video shows the offender lying inert on the floor for a brief period of time.

36. The video then shows Santos-Guerra springing to his feet and attempting to attack Petitioner. "And while we [were] assisting the inmate to his feet, the inmate, he had stated to Officer Hinton that he would get him because he had hit him in his face." T. 49, T. 55. (Henderson Testimony). The Santos-Guerra statement is hearsay, to which neither party objected. It is given appropriate weight; particularly so given Henderson also testified that Santos-Guerra said nothing to him. T. 55. See N.C.G.S. 150B-29.

37. In the course of trying to keep the offender from attacking Petitioner, Henderson was injured by the offender. "I sustained a swollen black eye, which was my left eye, due to the inmate elbowing me, trying to break away. And I also sustained a swollen left knee because when I – when I came down with the inmate on the floor, of course, I, you know, impacted my knee." T. 51 (Henderson Testimony). Henderson was out of work due to his injuries for approximately three months. T. 51-52; see also T. 38 (McPhatter Testimony).

38. Based on the video evidence, as corroborated by witness testimony, the Tribunal does not find credible Petitioner's testimony that he struck Santos-Guerra "a few times to pretty much keep him from coming back towards me" (T. 135). The Tribunal sees no evidence, other than Petitioner's claims, that Santos-Guerra was attempting to attack Petitioner at the time Petitioner struck the offender three times with a closed fist.

39. The Tribunal does not conclude that Petitioner's striking of Santos-Guerra rendered the offender incapable of further resistance, or that he was "knocked unconscious" as Hawkins testified. (T. 115). Unconscious persons do not spring to their feet and attack and/or injure others, as Santos-Guerra did Henderson. (T. 115-116).

40. Petitioner three times swung and struck with a closed fist to the face an offender that Petitioner was sitting on, and who was offering no apparent physical resistance at the time of any of the strikes. The Tribunal is unable to determine a "proper correctional objective," as required by Respondent's Use of Force policy (below), from the totality of this conduct.

41. Staff present at the scene noted immediate evidence of injuries to Santos-Guerra: "The inmate, from what I could see, he had bruises to his lip, and he had bruises to his eye." T. 48 (Henderson Testimony). There are statements in Heffney's report (p. 9 and P. 5 of the attachment) that the offender suffered injuries in the form of bruising or swelling, as corroborated by Henderson's testimony from the scene. The remaining statements regarding Santos-Guerra's injuries in the report are inadmissible hearsay. Hawkins testified (T. 102) that the offender "had substantial injuries that allowed us to have to take him and transport him out to an outside medical for treatment." However, Hawkins was not on duty that day and played no apparent role in that process; his testimony is therefore given appropriate weight.

Respondent's Use of Force Policy

42. Correctional officers are taught basic standards as to use of force. T. 30 (Lucas Testimony). Petitioner received training on and was "pretty familiar" with Respondent's Use of Force policy. T. 155-156.

43. Respondent assigned Heffney to investigate Petitioner's use of force on the offender. T. 60.

44. Heffney interviewed the offender along with numerous Polk Correctional employees. Of those persons he identified as interviewing, T. 61, only Lucas, Henderson, and Petitioner testified at the contested case hearing

45. Heffney also reviewed video footage of the interaction between Petitioner and the offender. T. 63-64.

46. Heffney concluded that Petitioner used excessive force "for the circumstances" against the offender. T. 65. Heffney testified that Petitioner should have first "verbally address[ed] the

issue," then employed pepper spray, and only third employ hands-on force. T. 67. Petitioner, said Heffney, "went to the third option immediately."

47. Heffney did not, however, testify as to what Respondent's Use of Force policy specifically is, or what it specifically says. Other witnesses for Respondent gave varying descriptions of what would or would not constitute proper (or improper) use of force:

    a. Q. "And with regards to inmates not following direct orders from a correctional officer, that within itself, does it justify the use of force that you saw on this date?" A. "No, sir. No, sir. And – and – and our policies clearly state, by refusing – you know, to – to refuse an order does not constitute force being used on the offender." T. 125 (Hawkins Testimony);

    b. "Mr. Hinton would have had the need to utilize the progressive order of force, which, first, is your verbal. Then it's your OC pepper spray. Then it's your hands-on, your impact tool. And then, you know, subsequently, the fifth being deadly force, which wouldn't have applied in this one here. So he had other means and avenues to handle the situation. So when I say it could have been done differently, Attorney Graves, I'm saying progressive order of force was not followed in this – in this incident here." T. 104 (Hawkins Testimony);

    c. "Well – well, typically, you know, you want to start off with your verbal commands. And if the offender doesn't comply, if the situation is feasible, you want to try to use pepper spray first. If the pepper spray – sometimes if the – the situation doesn't call for it, you may have to go hands-on. And sometimes, if hands-on doesn't work, you may have to use your standard baton." T. 18 (Lucas Testimony);

    d. "Punching? We don't authorize punching. If the offender swung on him, he could – he could have just taken control of his upper body and taken him to the floor to restrain him. We don't authorize punching." T. 19 (Lucas Testimony);[3]

    e. "No, sir. No, sir. And – and – and our policies clearly state, by refusing – you know, to – to refuse an order does not constitute force being used on the offender." T. 125 (Hawkins Testimony);[4]

    f. Henderson gave no testimony on Respondent's Use of Force policy.

48. As noted, none of these witnesses testified as to what Respondent's Use of Force policy actually says. However, Heffney's report, admitted into evidence, sets out the policy at Pages 3-4:

    State of North Carolina Department of Public Safety Prisons POLICY & PROCEDURES

[3] As shown below, Respondent's actual written Use of Force policy does not actually contain a blanket prohibition against punching.
[4] They don't so state (see below).

Chapter: F Section .1500
Title: ***Use of Force*** *Issue Date: 08/30/18*

.1501 PURPOSE
The purpose of this policy is to provide Prisons personnel direction in the use of non-deadly and deadly force, documentation requirements, and reporting procedures for use of force incidents.

.1503 POLICY
The following general guidelines apply to the use of force in Prisons.
(a) The use of force shall be permissible only to the extent reasonably necessary for a proper correctional objective. This prohibition shall not be construed to mean that staff must suffer an assault upon their person before taking appropriate defensive action or that the use of force by another must be met with strictly equal force on the part of staff.

[no Section .1504 appears in the Exhibit]

.1505 GENERAL
The use [sic] *of Force Policy as outlined in the DPS Policy and Procedure Manual, Section 2F.1500 will be followed at all times. The use of force shall be permissible only to the extent necessary to achieve a proper correctional objective. The use of unnecessary or excessive force is prohibited, and if it is determined that a staff member has abused an offender he or she will be subject to disciplinary action and may face additional criminal charges. This prohibition does not mean that a correctional staff member must suffer an assault upon his or her person before taking appropriate defensive action, or that the force used by the staff member must be equal to the force used by the offender.* ***(ACA Standard 4-4206).***[5]

49. Respondent's Use of Force policy as placed in evidence does not have a definitions section, nor did any witness at the hearing testify as to the definitions of any specific term(s) used in the policy.

50. Lucas and other witnesses for Respondent testified about the need to maintain a so-called "reactionary gap" between a correctional officer and an offender. T. 21-22, 28-30, 98, 168-169. This "reactionary gap" is referenced nowhere in Respondent's Use of Force policy as listed in Heffney's report. In any event, due to the dismissal letter being absent from evidence, the Tribunal cannot determine whether Respondent cited the "reactionary gap" as a reason for disciplining Petitioner. Respondent's Final Agency Decision letter, which is in evidence, does not reference a "reactionary gap."

51. The relevant portion of the Use of Force policy to this case, the Tribunal finds, is: *The use of force shall be permissible only to the extent necessary to achieve a proper correctional objective.*

[5] Bold type in original; italics added for clarity.

52. "Proper correctional objective" is not defined. In the absence of a specific definition, the Tribunal gives "proper" its ordinary meaning: "Appropriate, suitable, right, fit, or correct; according to the rules." Proper, Black's Law Dictionary (11th ed. 2019).

53. By a preponderance of the evidence, Respondent proved that no proper correctional objective existed for Petitioner to strike Santos-Guerra three times to the head or face, with a closed fist, while Santos-Guerra was neither physically resisting nor attempting to attack Petitioner.

CONCLUSIONS OF LAW

1. The Remand Order states that the Tribunal's sole task on remand is to make Findings of Fact supporting the ALJ's conclusion that Petitioner violated Respondent's Use of Force policy. This the Tribunal has so done.

2. Accordingly, the Tribunal may not make its own Conclusions of Law or additional Conclusions of Law, barring statements of legal authority necessary to determine the directed findings of fact.

3. The ALJ's decision was not vacated by the Court of Appeals. The Tribunal may not alter the outcome of this case.

FINAL DECISION

Petitioner's dismissal for unacceptable personal conduct, as upheld by the ALJ and the Court of Appeals, is **AFFIRMED**.

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 August, 2022.

Michael C. Byrne
Administrative Law Judge

CERTIFICATE OF SERVICE

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

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This the 31st day of August, 2022.

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