FILED
OFFICE OF ADMINISTRATIVE HEARINGS
03/09/2023 4:58 PM

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 OSP 01259, 22 OSP 02060

Rickie R Bennett Petitioner, v. NC Department of Public Safety Respondent.	**FINAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT (Pursuant to N.C.G.S. § 1A-1, Rule 56)**

THIS MATTER came on for hearing on December 7, 2023 at the Office of Administrative Hearings (hereinafter, "OAH") in Raleigh, Wake County, North Carolina, before the Honorable Karlene S. Turrentine, Administrative Law Judge, upon consideration of Respondent NC Department of Public Safety's (hereinafter, "Respondent" or "DPS") Motion for Summary Judgment with Exhibits and Memorandum in Support of Respondent's Motion for Summary Judgment, both November 16, 2022, pursuant to N.C.G.S. § 1A-1, Rule 56 and 26 NCAC 3 .0101 and .0115.

EXTRAORDINARY CAUSE

Pursuant to N.C. Gen. Stat. §126-34.02(a) a final decision must be filed within 180 days after the commencement of the personnel case. Ordinarily, the 180-day deadline in this contested case would have been November 28, 2022. However, this deadline may be extended upon a showing of extraordinary cause. Extraordinary cause is defined in 26 NCAC 03 .0118(b) as "…out of the ordinary; exceeding the usual, average, or normal measure or degree; not usual, regular, or of a customary kind." In the case at bar, the Petition (22 OSP 2060) was filed on May 31, 2021 and the matter assigned to Judge Stacey Bawtinhimer. Petitioner filed his second EEO claim and, in response, Respondent filed a Motion to Stay and Consolidate (with 22 OSP 1259, filed April 4, 2022) on June 10, 2022. On June 27, 2022, both matters were reassigned to Judge Michael Byrne who issued an Order consolidating the two matters and staying both, as required by N.C.G.S § 150B-33(a). This constituted extraordinary cause in this matter and required the matter to be continued for several months.

ISSUE

Whether Respondent is entitled to judgment as a matter of law on Respondent's claim that Petitioner was terminated for just cause or on Petitioner's claims that he was terminated for reasons of religious discrimination or retaliation.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

The moving party bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Hensley v. Nat'l Freight Transp., Inc.*, 193 N.C. App. 561, 563, 668 S.E.2d 349, 351 (2008). "If the movant successfully makes such a showing, the burden then shifts to the non-movant to come forward with specific facts establishing the presence of a genuine factual dispute for trial." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002).

A Court must view the evidence in the light most favorable to the non-movant. *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835. A Court may also grant summary judgment against the moving party, if appropriate, and may be done on a judge's own motion. N.C. R. Civ. P. 56(c); *Carriker v. Carriker*, 350 N.C. 71, 74, 511 S.E.2d 2, 5 (1999); *A-S-P Assoc. v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 447 (1979); *Stegenga v. Burney*, 174 N.C. App. 196, 198, 620 S.E.2d 302, 303 (2005).

FINDINGS OF FACT

1. The parties are properly before this Tribunal in that personal and subject matter jurisdiction are proper and the parties received proper notice of hearing. N.C.G.S. § 126-34.02(a).

2. Findings of fact are neither necessary nor desirable when ruling on a motion for summary judgment, *Hyde Ins. Agency, Inc. v. Dixie Leading Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975), and decisions issued by the OAH granting such motions need not include such findings. N.C.G.S. § 150B-34(e).

3. However, it may be appropriate for a Court to summarize undisputed facts in support of its legal analysis and to provide context for its ruling. *Hyde Ins. Agency, Inc.*, 26 N.C. App. at 142, 215 S.E.2d at 165 ("[I]t is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment.").

4. Petitioner began working for DPS in 2010 and worked there continually until his employment was terminated on February 21, 2022. At the time of his suspension and later termination, Petitioner had been working as a Sr. Parole Case Analyst, reviewing parolees' records and gathering information regarding discretionary parole and the requirements therefore for the voting members of the Parole Commission. There is no dispute that Petitioner was a career State employee subject to the North Carolina Human Resources Act, pursuant to N.C.G.S. § 126-1.1.

5. The North Carolina Post-Release Supervision and Parole Commission (the "Commission") is an independent agency that is responsible for releasing offenders who meet eligibility requirements established in North Carolina General Statutes. Specifically, the Commission is empowered to set the terms of an offender's parole or post-release supervision, and they have exclusive authority to grant, suspend or revoke an offender's parole or post-release supervision. Pursuant to N.C.G.S. § 143B-721(f) recodified at N.C.G.S. § 143B-1491(f)(2021), all clerical, administrative, and other services required by the Commission are supplied through DPS employees by the DPS Secretary. The Commission's staff consists of corrections professionals including a psychologist, a DWI coordinator, senior parole case analysts, parole case analysts (of which Petitioner is one) and clerical support staff. DPS is a Cabinet-level agency subject to the Order and, as such, DPS employees are subject to the policies promulgated by OSHR pursuant to the Order. Moreover, the Commission serves at the pleasure of the Governor.

6. Respondent DPS is a State agency within the government of North Carolina and, at all times herein relevant, subject to N.C. Gen. Stat. § 126-1, *et seq*.

PROCEDURAL BACKGROUND

7. Petitioner filed two (2) Petitions in this matter—22 OSP 1259 and 22 OSP 2060.

8. Petitioner's first Petition for Contested Case Hearing (22 OSP 1259) was filed on April 4, 2022, in which he alleged, in pertinent part, that he was suspended without just cause, and specifically that he was:

> "suspen[ded] 5 days on leave without pay for insisting NCDPS follow their Religious Accommodation Policy. Petitioner was suspeded [sic] 5 days without pay and his record was marred by unfounded allegations of unacceptable personal conduct because Petitioner exercised his right to free expression of religious believe, said belief making full compliance with COVID 19 policy impossible; thoug a reasonable accommodation to the policy was available."

22 OSP 1259 Petition ¶¶4-5. Petitioner filed an Amended Petition (in 22 OSP 1259) on April 11, 2022 in which the Tribunal found no significant change from the original.

9. On May 18, 2022, Respondent filed a verified Motion to Stay the matter on the basis that Petitioner had filed a Charge of Discrimination (Charge No.: 14B-2022-00013) with the Equal Employment Opportunity Commission ("EEOC") on November 22, 2021 in which Petitioner alleged that he was denied a reasonable accommodation and was working under threat of dismissal because of his religious beliefs—almost the exact same charges he raised against Respondent in the 22 OSP 1259 Petition.

10. On May 31, 2022, as required by N.C.G.S. § 150B-33(a), the Tribunal entered an Order Staying Proceedings Pending Federal Agency Decision and for Periodic Status Reports. This Order stayed the 22 OSP 1259 case.

11. On May 31, 2022, Petitioner filed his second Petition for Contested Case Hearing (22 OSP 2060), in which he alleged, in pertinent part, that he had been discharged without just cause. Specifically, Petitioner alleged Respondent engaged in: "discrimination leading to wrongul [sic] & unjustified dismissal from employment due to Petitioner's religious beliefs. …Petitioner has lost employment, wages, longevity pay, future increases in wages, full retirement benefits and & his reputation." 22 OSP 2060 Petition, ¶¶4-5.

12. On June 10, 2022, Respondent filed a Motion to Stay and Consolidate (in 22 OSP 2060), in which Respondent advised the Tribunal that Petitioner had filed a second Charge of Discrimination (Charge No.: 14B-2022-00025) adding the issue of his having been terminated.

13. On June 27, 2022, an Order of Consolidation was issued by OAH Chief Administrative Law Judge Donald van der Vaart, pursuant to N.C.G.S. § 150B-26. With the matters consolidated, the stay already set in 22 OSP 1259 immediately thereafter also applied to 22 OSP 2060. Both matters were also reassigned to the Honorable Michael Byrne.

14. Respondent thereafter filed timely Status Reports on June 27, 2022, July 27, 2022, August 26, 2022, and September 26, 2022.

15. On October 5, 2022, the Honorable Michael C. Byrne issued an Order Lifting Stay in 22 OSP 1259 indicating that the Office of Administrative Hearing Civil Rights Division had closed its investigation related to that case (EEOC Charge #14B-2022-00013). However, because the cases had been consolidated, the stay was lifted from both cases.

16. Following the stay's being lifted, the matters were reassigned to the Undersigned Administrative Law Judge.[1]

17. On October 6, 2022, the Undersigned issued a Scheduling Order, Notice of Prehearing Conference, Notice of Hearing and Second Order for Prehearing Statement.

18. Shortly thereafter, on October 6, 2022, Respondent filed a new Motion to Stay ("Second Motion") alleging that although the EEOC issued a "No Cause Notice of Determination" to Petitioner in relation to 22 OSP 1259, a determination had not yet been made as to the remaining charge of discrimination (EEOC Charge #14B-2022-00025) in 22 OSP 2060.

19. On October 21, 2022, the EEOC's investigation into Petitioner's EEOC Charge #14B-2022-00025 had been closed and, as a result, Respondent's new Motion to Dismiss in 22 OSP 2060 was denied. (Both EEOC Charges resulted in "No Cause" findings and Right to Sue letters being issued to Petitioner.)

20. On November 16, 2022, Respondent filed the Motion for Summary Judgment at issue (hereinafter, "Motion") with Exhibits, including the verified Declarations of Mary Stevens

[1] From October 6, 2022 forward, the two case files are the same, with every document filed in one matter also being automatically filed in the other matter.

(*See* Motion, Exh 2) and Judith Bradshaw (*See* Motion, Exh 3) and, a Memorandum in Support of its Motion. In its Motion, Respondent asserts that "no genuine issue of material fact exists and Respondent is entitled to judgment as a matter of law." Motion, p.1.

21. In response, on November 17, 2022, Petitioner filed a Motion to Dismiss (Respondent's) Motion for Summary Judgment and (Motion to) Compel Discovery.

22. On November 18, 2022, Respondent filed a Motion to Continue and its Response to Petitioner's Motion to Dismiss and Motion to Compel Discovery. In its Response, Respondent advised the Tribunal that Petitioner submitted a discovery request to Respondent the day before the close of discovery and, "Respondent advised Petitioner that it considered his Requests untimely because one day was insufficient to respond to 37 Requests for Admissions prior to the close of discovery."

23. Thereafter, on November 18, 2022, the Tribunal issued an Order Denying Respondent's Motion to Continue, Extending Respondent's Time to Respond to Petitioner's Discovery Request of November 3, 2022 & Notice of Hearing for Respondent's Motion for Summary Judgment. Therein it was ordered that "Respondent shall respond to Petitioner's discovery [R]equest [for Admissions] served November 3, 2022 on or before **November 28, 2022**. No new discovery requests shall be permitted. However, **BOTH PARTIES** shall see to it that they have fully responded to the discovery requests they have received through November 9, 2022 [the close of discovery]." Order filed 11/18/22, ¶¶3-4 (emphasis in original).

24. The hearing on summary judgment was set for December 1, 2022. *Id*. at ¶5. However, due to a scheduling conflict arising within the Tribunal, the hearing was continued and rescheduled with the consent of the parties to December 7, 2022. *See* Notice of Rescheduled Prehearing Conference & Hearing by Consent on Motion for Summary Judgment, filed December 2, 2022.

25. At hearing, Respondent carried the burden of showing that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [it was] entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c).

THE UNDISPUTED FACTS:

a) In Executive Order No. 116, 34 N.C. Reg. 1744-1749, issued on March 10, 2020, Governor Roy Cooper declared a State of Emergency "to coordinate the State's response and protective actions to address the Coronavirus Disease 2019 (COVID-19) public health emergency and provide for the health, safety, and welfare of residents and visitors located in North Carolina…." Resp. Exh 13, p.1. Then, in his Executive Order No. 229 ("EO 229") issued August 31, 2021, Governor Cooper "extend[ed] measures to facilitate vaccine administration, COVID-19 testing, and the vaccine verification policy for cabinet agencies." *Id.* EO 229 was set to remain in effect through November 29, 2021 "unless repealed, rescinded or replaced by another applicable Executive Order." *Id.* at p.5.

b) In direct response to the Governor's executive orders (Resp. Exh 13), the Office of State Human Resources issued COVID-19 requirements including an alternative to vaccine to which all employees must adhere, on August 13, 2021. Resp. Exh 6. Respondent sent out agency-wide emails to let employees of DPS know of the coming new requirements.

c) On August 24, 2021, Petitioner emailed Ms. Bradshaw asking for a religious

> "accommodation/exception to the Governor's COVID 19 Vaccination and Testing Mandates[,]…based on a sincerely held religious belief that this COVID 19 project and related policies will ultimately be used to exclude people from employment, medical treatment, and travel and lead to that time described in KJV Bible—Revelations Chapter 13, verse 16-17[….] …I have never seen any worldwide agenda like this in my lifetime. …[T]his current COVID 19 project is a prelude to the times described in verses 16 and 17 above and I cannot in good conscience be a party to it by taking the vaccination or participating in any of its testing protocols, based on [his] sincerely held religious beliefs. …***Nevertheless*, I am willing to wear a mask while I am at work.**" Resp. Exh 11(emphasis added).

d) On August 8, 2021, Petitioner sent a religious accommodation request to Ms. Stevens stating:

> "I cannot in good conscience be a party to a process that leads to a morally and spiritually bankrupt destination by taking the vaccine or participating in any of its testing protocols, thereby giving approval to the whole mandatory testing/vaccination model. Furthermore, I find the vaccine manufacturers [sic] use of cell lines from aborted fetus' [sic] to test efficacy of the vaccine to be abhorrent and incompatible with my moral, ethical and spiritual core beliefs and values." Resp. Exh. 12.

e) On September 1, 2021, DPS issued its policy mirroring OSHR's policy regarding the new COVID regulations which was distributed to employees agency-wide. Resp. Exh 3. The purpose of DPS's policy was both to follow the Governor's Executive Orders and, thereby, to make the workplace a safer place for State employees as well to protect the public with whom State employees had to engage. The policy stated, in pertinent part:

   i) **"This policy does not mandate DPS workers to receive a COVID-19 vaccination."** *Id*. at p.1(emphasis added).

   ii) "This policy applies to all DPS Divisions." *Id*.

iii) "It is the policy of DPS to comply with the North Carolina Office of State Human Resources (OSHR) Requirement for Face Coverings and COVID-19 Testing as an Alternative to Proof of Fill Vaccination policy." *Id*. at p.3 (emphasis in original).

iv) "Workers should provide proof of COVID-19 vaccination if they are or may be required to come into an office, facility, or any other on-site venue for meetings, training, or any part of their duties OR even if they never come into an office or on-site venue, they interact regularly with the public as part of their job duties." *Id*. at 4 (emphasis in original).

v) **In the alternative**, "[w]orkers are required to submit to weekly COVID-19 testing if they are not fully vaccinated for COVID-19 and may be required to come into an office, facility, or any other on-site venue for meetings, training, or any part of their duties OR even if they never come into an office or on-site venue, they interact regularly with the public as part of their job duties. …Workers must produce a negative COVID-19 test result from a test conducted within the last seven days (168 hours) before the beginning of their shift[….]" *Id*. at 5 (emphasis in original).

vi) There was no penalty or possible discipline for employees choosing *either* to be fully vaccinated or tested weekly. The choice was each employee's to make.

vii) Although Petitioner "could go a few days without conversations or office visits," Petitioner's job required that he regularly meet with others from the office to exchange files, "sometimes" meet with Commissioners who stopped by to ask questions and, attend "infrequent" staff meetings. Petitioner's testimony.

f) On September 1, 2021, Mary Stevens, the Parole Commission's Chief Administrator granted Petitioner an accommodation by way of a Teleworking Agreement which allowed Petitioner to work from home, four 10-hour days, Monday through Thursday. The Teleworking Agreement stated: "Teleworking will be allowed Monday through Thursday beginning the week of September 6, 2021 and will be subject to review and rescission at any time by Parole Commission management or as guidance is received from the Department of Public Safety Human Resources. Resp. Exh 14, p.1 & 3.

g) Petitioner executed the Teleworking Agreement, with the understanding "that the telework agreement may be terminated at any time if [his] work performance and /or personal conduct is not satisfactory or the teleworking agreement no longer meets the business needs of DPS." Resp. Exh 14, p.4. Petitioner testified at hearing that he knew DPS had the authority to rescind the Teleworking Agreement at any time. Petitioner's testimony.

h) Petitioner understood the Teleworking Agreement did not exempt him from the policy requirement that, beginning September 8, 2021, he would either need to be fully vaccinated or begin uploading weekly testing results.

i) OSHR required all employees to sign an attestation on or before September 15, 2021 which read: "I have read, understand and agree to abide by the policy set forth. I further understand that failure to fully comply with the policy and adhere to these standards may result in disciplinary action up to and including dismissal." Motion Exh 2.

j) Petitioner signed the attestation on September 9, 2021 (Resp. Exh 18, p.2) and acknowledge such on the witness stand.

k) At trial, Petitioner acknowledged he was subject to the policy's vaccination, testing and mask mandates but because he requested a religious accommodation, he felt no need to comply.

l) Petitioner testified that when he worked from home, he still had to come to the office every week and meet with a coworker to exchange files—leaving some and picking up new files. Nonetheless, because he did not *believe in* COVID or *agree with* the vaccine, Petitioner believed he was no threat to the coworker and he saw no reason why his failure to vaccinate or test would be of any concern to Respondent-employer or to the exposed coworker.

m) At least one of the coworkers assigned to exchange files with Petitioner was uncomfortable doing so because of the risk of contracting COVID from an unvaccinated and untested person. Resp. Exh. 28.

n) On September 15, 2021, DPS's ADA Compliance Officer in Human Resources, Judith Bradshaw contacted Petitioner to conduct an individualized review through the interactive process. During that conversation, Petitioner

> "explained [his] view of the current Executive order 224 and how politicians and office holders are making medical decisions for people, then stated, 'It is not a political issue, a person has to make their own decision about their health.' [He further] indicated [he] only wear[s] a mask 'to ease those who are conscious of COVID-19 or who believe in the COVID Project.' When asked about the testing aspect of [his] request, [Petitioner] disclosed [that he] had not visited the COVID Safe internal website but stated that '…**testing was inconvenient**.'"

Resp. Exh 15, p.1 (emphasis added).

o) On October 18, 2021, Ms. Bradshaw advised Ms. Stevens that Petitioner's accommodation

> "request could not be approved as it would amount to an undue hardship on DPS and a public health threat. Therefore, [his request for accommodation is *not* reasonable and] Mr. Bennett is required to adhere to DPS Policy (HR-600-04).
>
> Based on a memorandum from you dated September 7, 2021, you approved Mr. Bennett to participate in the DPS Pilot Telework Program. This was *not* an approved accommodation option by this [HR] office, but rather at your discretion. As such, Mr. Bennett was reminded that the Pilot Telework Program is based on agency needs and OSHR program guidelines/regulations.
>
> A letter was mailed to Mr. Bennett today to inform him of the decision. You may contact [him] and inform him that on his next regularly scheduled workday[,] he will be expected to fully comply with EO 224 and the corresponding OSHR and DPS policies."

Resp. Exh 16.

p) On November 10, 2021, Petitioner gave Respondent a typewritten, wet-signed and dated notice stating that he was

> "aware that the COVID 19 Policy, effective 09/01/2021 requires employees to have a negative COVID test result or Proof of Vaccination to work within the office[and, he…]do[es] not have a negative COVID test result to report or proof vaccination. [He] was asked to complete a statement providing his reasons for non-compliance…[b]ut [he] would not draft one under any unnecessarily tight timeframe…. [Nevertheless, i]t should be noted that [his] reasons for non-compliance are already a part of the file that is a part of the disciplinary file."

Resp. Exh 17.

q) On November 17, 2021, Petitioner submitted a typed, wet-signed statement to Respondent advising he was "aware that the COVID 19 Policy, effective 09/01/2021 requires employees to have a negative COVID test result or Proof of Vaccination to work within the office. …I do not have a negative COVID test result to report or proof of vaccination." Resp. Exh 17.

r) Petitioner admitted under oath that, upon return to in-office work, he still refused to get vaccinated or tested.

s) Beyond the Executive Orders and written work rules, Petitioner was instructed to come into compliance with the written work rules on numerous occasions:

i) On September 1, 2021, Interim Secretary Cassandra Hoekstra issued an email to all DPS employees (including Petitioner) instructing them they needed to be in compliance with EO 224;

ii) On September 3, 2021, along with its assigned mandatory attestation, OSHR electronically advised DPS employees (including Petitioner) that they must be in compliance with the new rules;

iii) On September 7, 2021, DPS Human Resources Director Michael Dail issued an email to all DPS employees (including Petitioner) providing access to the COVIDSafeNC platform to which employees could upload their vaccine and/or testing results and, therein Mr. Dail reiterated to Petitioner that compliance was mandatory;

iv) On September 15, 2021, during her interactive review with Petitioner, Ms. Bradshaw explained his options and instructed Petitioner that he must come into compliance with the EO 224;

v) In his Written Warning of November 17, 2021, Petitioner was plainly "directed to review the…policies and the Governor's Executive Order, and immediately bring yourself into compliance with the requirements established therein. Failure to follow, by tomorrow, the instructions as set out in this memorandum will constitute unacceptable personal conduct, specifically insubordination, and will result in disciplinary action up to and including dismissal[]"; and,

vi) On November 29, 2021 and January 4, 2021, Governor Cooper issued EO 238 and EO 244 respectively, which reiterated the requirement that cabinet agencies were directed to continue following the COVID policy;

t) Throughout the process, Petitioner told Respondent he refused to get tested because the testing was "inconvenient." Petitioner further confirmed this reasoning at trial.

26. Respondent hand-delivered a Written Warning for Unacceptable Personal Conduct to Petitioner on November 17, 2021. Resp. Exh 18. Therein, Respondent cited the following reasons for the warning, Petitioner's: a) failure to follow NCDPS' COVID policy (#: DPS-HR-600-04) by submitting either proof of being fully vaccinated or weekly testing results; b) refusal (willful failure) to follow the policy; c) failing to "conduct [himself] in a professional manner in accordance with the agency's high standards….[by failing to] adhere to Executive Orders issued by the Governor, follow all reasonable directives given to [him] by an authorized supervisor, and the expectation that [he] abide by known or written work rules[,]" Resp. Exh 18, p.3; and, d) for having committed (though not charged or convicted) a Class 2 misdemeanor by violating N.C.G.S. § 166A-19.30(a) and N.C.G.S. § 14-288.20A. *Id.*

27. Over the signature line of the November 17, 2021 Written Warning reads: "By signing this letter, I acknowledge receipt of this Written Warning and further acknowledge that my failure to follow the instructions set out above will result in disciplinary action up to and including dismissal." Resp. Exh 18, p.4. Petitioner signed and dated the warning but wrote he did not agree with the signature acknowledgement so he was signing simply to acknowledge receipt of the warning. *Id.*

28. Upon his return to working in the office, Petitioner continued to refuse vaccination and testing believing he "ha[s] a valid claim for a reasonable accommodation to the mandates based on sincerely held religious beliefs[… and] NCDPS…ha[s] failed to address my claim in good faith and resolve this matter." Resp. Exh 19. However, Petitioner's outspoken reasoning for his refusal to be tested was that testing was "inconvenient."

29. Petitioner remained non-compliant and was placed on investigatory leave with pay on November 24, 2021. Resp. Exh 20, p.1. Additionally on November 24, 2021, Respondent issued to Petitioner a Notice of Pre-Disciplinary Conference to be held on December 6, 2021. Reiterating the same issues outlined in the Written Warning as well as Petitioner's continued refusal to comply with policy as basis for the discipline, Ms. Stevens stated: "Having considered the full range of disciplinary actions available pursuant to the OSHR Disciplinary Policy, I have decided a five (5) day Suspension without Pay is the most appropriate level of discipline." Resp. Exh 21, p.4. Petitioner was advised also therein that he would have opportunity to provide information about the conduct issues described therein. *Id.*

30. On November 29, 2021, Governor Cooper issued EO 238, further extending the requirement that Cabinet agencies continue to implement the COVID-19 Policy requiring workers to either be fully vaccinated or be tested for COVID-19 each week. EO 238 remained in effect through January 5, 2022, and was extended by another EO. Motion Exh. 2.

31. On December 7, 2021, Petitioner signed a Pre-Disciplinary Conference Acknowledgment in which he acknowledged he was given proper notice of the Pre-Disciplinary Conference, he was informed of the specific recommended disciplinary action and reasons supporting the recommendation leading to the conference, and; he was given the opportunity to provide a response and offer facts to support his position in the matter. Resp. Exh 22.

32. Following the pre-disciplinary conference, Petitioner was hand-delivered a Suspension Notice advising he was being suspended for five (5) days without pay based on his Unacceptable Personal Conduct and specifically, his insubordination in refusing to adhere to EO 224 by submitting his weekly COVID test results. Resp. Exh 23, p.1. Petitioner's suspension began on December 8th and ended December 14, 2021. He was directed to return to work on Wednesday, December 15, 2021. However, upon his return, Petitioner continued to refuse to comply.

33. The Governor further extended the requirement when he issued EO 244 on January 4, 2022, but Petitioner continued to insist—both verbally and in writing—that he would not be providing proof of vaccination or the alternative COVID test results. Resp. Exh 24.

34. Accordingly, Petitioner was again placed on Investigatory Leave with pay, this time for thirty (30) days. Resp. Exh 25, p.1. The Investigatory Leave was extended on February 4, 2022 for an addition fifteen (15) days to February 19, 2022. *Id.*

35. On February 15, Petitioner was hand-delivered a Notice of Pre-Disciplinary Conference to be held on Friday, February 18, 2022, again citing Petitioner's "willful violation of known and written work rules and insubordination." Resp. Exh. 27, p.1. Petitioner attended the conference, had an opportunity to respond, and offered nothing more than he had been offering as response for the last several months.

36. On February 16, 2022, Ms. Stevens received a letter from Leigh Kent, one of Petitioner's coworkers with whom he exchanged files. Ms. Kent's letter advised she was "uncomfortable…meeting with [Petitioner] to exchange mail and other work materials due to his refusal to be vaccinated or tested for COVID-19." Resp. Exh 28. As lead case analyst, Ms. Kent had the authority to assign another employee to exchange files with Petitioner but did not believe it was right that *any* employee should be subject to such risk. *Id.*

37. After considering the full range of possible disciplinary actions, Ms. Stevens issued Notice of Dismissal to Petitioner on February 21, 2022, for unacceptable personal conduct; specifically, his ongoing insubordination as a result of his continued refusal to comply with the Governor's Executive Order and the governing OSHR and DPS policy requirements. Resp. Exh 29, p.1-8. That same date, a revised dismissal letter correcting the effective date of Petitioner's dismissal was mailed to Petitioner via first class certified mail, return receipt #: 7019-2280-0000-6517-3249. Resp. Exh 29, p.9.

38. Petitioner timely appealed his dismissal and a hearing was conducted on April 18, 2022 during which Petitioner had opportunity to present testimony, exhibits, and any other evidence he deemed relevant to an independent Hearing Officer. The Hearing Officer recommended Petitioner's dismissal be upheld. Resp. Exh. 30, p.1.

39. On May 23, 2022, Chief Deputy Timothy Moose issued Notice of Final Agency Decision to Petitioner, in which he outlined the reasons for Petitioner's dismissal as well as Chief Dep. Moose's determination that, after "[h]aving considered the full range of disciplinary actions available" he concurred with the Ms. Stevens and the Hearing Officer that dismissal "is the most appropriate level of discipline." Resp. Exh 30, p.3.

40. Throughout the process and in the Motion's hearing, Petitioner sustained that his religious accommodation request was premised on his belief that he could not take the vaccine because the COVID response was a government mandate or effective tool towards creating a one-world government, anti-Christ in nature, which would ultimately result in people not being able to buy or sell goods. Petitioner reiterated this position in the hearing.

41. **However, when asked about the alternative of being tested, Petitioner stated that he refused to be told what to do and, he didn't want the government running his life.** He then added that he did not want to "usher in the world system." When asked if his doctor told

him he needed to run some tests would that also violate his religious beliefs, Petitioner answered it would not and he would yield to the tests because "that's [my] choice" and not somebody telling him he had to do it. Petitioner's testimony.

42. On May 31, 2022, Petitioner timely appealed to OAH the agency's Final Decision of termination alleging he was discharged without just cause and discriminated and/or retaliated against on the basis of his religion. Petition, ¶4. (At the hearing, Petitioner argued Respondent harassed him and retaliated against him for asking for a reasonable accommodation.) What is not mentioned in his Petition but arises throughout documentation of record and was argued at hearing is that Petitioner alleges Respondent failed to "follow its own policy" to grant him reasonable accommodation.

43. At hearing, Respondent argued the alternative of testing *was* an accommodation. Petitioner argued that an accommodation could not be part of the policy and, there was *no* reasonable accommodation *for him* except for Respondent to allow him to work from home (presumably until the mandate was no more). When the Undersigned inquired about how his meeting with others and his exchange of documents could happen without placing other employees in harm's way, Petitioner responded that it was not a big deal and DPS could get a different employee to do it if Ms. Kent did not want to do the exchanges anymore.

BASED ON the foregoing Findings of Fact, the Undersigned makes the following

CONCLUSIONS OF LAW

1. 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). *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012).

2. Petitioner is a "career state employee" within the meaning of N.C.G.S. § 126-1.1(a) and, pursuant to N.C.G.S. § 126-5, is entitled to the protections of the North Carolina State Human Resources Act ("the Act"), N.C.G.S. § 126-1 *et seq.*

3. The Act outlines the procedures the State must follow in separating an employee such as the Petitioner from employment for cause due to unacceptable personal conduct specifically:

> "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. 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. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the agency through the agency grievance procedure for a final agency decision. However, an employee may be suspended

without warning for causes relating to personal conduct detrimental to State service, pending the giving of written reasons, in order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons. If the employee is not satisfied with the final agency decision or is unable, within a reasonable period of time, to obtain a final agency decision, the employee may appeal to the Office of Administrative Hearings. Such appeal shall be filed not later than 30 days after receipt of notice of the final agency decision. The State Human Resources Commission may adopt, subject to the approval of the Governor, rules that define just cause.

4. Additionally, N.C.G.S. § 126-34.02 sets out the only cause of action within OAH subject matter jurisdiction which Petitioner, as a State employee, has against Respondent for termination on the basis of discrimination, harassment and/or retaliation.

> "(a) Once a final agency decision has been issued in accordance with G.S. 126-34.01, an applicant for State employment, a State employee, or former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes.
>
> . . .
>
> (b) The following issues may be heard as contested cases after completion of the agency grievance procedure and the Office of State Human Resources review:
>
> (1) Discrimination or harassment.--An applicant for State employment, a State employee, or former State employee may allege discrimination or harassment based on race, religion, color, national origin, sex, age, disability, genetic information, or political affiliation if the employee believes that he or she has been discriminated against in his or her application for employment or in the terms and conditions of the employee's employment, or in the termination of his or her employment.
>
> (2) Retaliation.--An applicant for State employment, a State employee, or former State employee may allege retaliation for protesting discrimination based on race, religion, color, national origin, sex, age, disability, political affiliation, or genetic information if the employee believes that he or she has been retaliated against in his or her application for employment or in the terms and conditions of the employee's employment, or in the termination of the employee's employment.

N.C.G.S. § 126-34.02(a) – (b)(1) and(2).

5. "In contested cases conducted pursuant to this section, the burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer." N.C.G.S. § 126-34.02(d). However, the burden of showing he was unlawfully discriminated against, retaliated against, harassed, or terminated based on his religion rests on

Petitioner. *Id.* More importantly to start, Petitioner must carry the initial burden of establishing a prima facie case of religious discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), holding modified by Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993).

6. Recognizing Petitioner had no other discipline in his employment file prior to his refusal to take the COVID vaccine or get COVID tested, we begin with whether, on the basis of Petitioner's religion, Respondent discriminated or retaliated against Petitioner by failing to grant him a reasonable accommodation that would require neither getting the vaccine nor being tested.

7. Petitioner contends that Respondent

> "had a legal duty to reasonably accommodate h[is] religious beliefs and failed to do so. … P[etitioner] is correct that employers generally have a duty—subject to certain exceptions—to reasonably accommodate the religious beliefs of their employees under Title VII. 42 U.S.C. § 2000e–2 provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer ... to ... discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion[.]" 42 U.S.C. § 2000e–2(a)(1) (2013). This statutory provision operates in conjunction with 42 U.S.C. § 2000e(j), which states, in part, that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate ... an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (2013)."

Head v. Adams Farm Living, Inc., 242 N.C. App. 546, 552–53, 775 S.E.2d 904, 909 (2015).

8. To prove discrimination in a religious accommodation case, Petitioner must employ the burden-shifting proof-scheme first articulated in *McDonnell Douglas, supra:*

> "The elements of a prima facie religious accommodation claim are (1) the plaintiff has a bona fide religious belief that conflicts with the employment requirement, (2) that he or she informed the employer of this belief, and (3) that he or she was disciplined for failure to comply with a conflicting employment requirement. *Chalmers v. Tulon Co. of Richmond,* 101 F.3d 1012, 1019 (4th Cir., 1996). 'If the employee establishes a *prima facie* case, the burden then shifts to the employer to show that it could not accommodate the plaintiff's religious needs without undue hardship.' *Id.*"

E.E.O.C. v. Firestone Fibers & Textiles Co., No. 3:04-CV-00467, 2006 WL 2620314, at *3 (W.D.N.C. Sept. 13, 2006), aff'd, 515 F.3d 307 (4th Cir. 2008). *See also* 42 U.S.C. § 2000e(j).

9. In the case at bar, there is little doubt Petitioner has a bona fide religious belief regarding the COVID vaccine (and *perhaps* all its protocols).[2] Further, Petitioner repeatedly informed DPS that because of this belief he refused to take the vaccine and/or get tested. Third, Petitioner was disciplined (first suspended, then terminated) for his failure to comply with the COVID policy as required by his employer. Therefore, Petitioner has established a *prima facie* case of a religious accommodation claim by showing he has met the three (3) necessary elements thereof.

10. "'If the employee establishes a prima facie case, the burden then shifts to the employer to show that it could not accommodate the plaintiff's religious needs without undue hardship.'" *Id.* (citations omitted).

11. Petitioner argued that the *only* accommodation that was reasonable was for Respondent to allow him to continue to telework from home (presumably until the COVID crisis ended—though Petitioner never stated how long such accommodation should last).

12. Conversely, Respondent deemed such accommodation to be an undue hardship as it placed Petitioner's coworkers (and the general public) at risk with whom Petitioner had to engage and interact to do his job. Respondent further asserted that the alternate COVID testing option within the policy *was* an accommodation.

13. The Tribunal, however, need not consider whether the alternate COVID testing was an accommodation. From the record, it is clear that full-time telework still did not resolve the issue that by his failure to follow the policy, Petitioner would continue to place other employees at risk of being exposed to COVID and the purpose of the policy would be thwarted. This risk worked an undue hardship on Respondent and its other employees, as signified by Ms. Kent's letter to DPS such that Respondent was not lawfully obligated to grant it. Resp. Exh 28.

14. The final determination must be whether Respondent had just cause to terminate him for Unacceptable Personal Conduct ("UPC"). In determining whether the agency has met its burden of proof, our appellate courts have long held that "[j]ust cause may be supported by either unsatisfactory job performance or personal misconduct which is detrimental to State service." *Amanini v. North Carolina Dept. of Human Resources,* 114 N.C. App. 668, 679, 443 S.E.2d 114, 120 (1994).

15. In considering Petitioner's alleged UPC, this "tribunal must examine two things: (i) 'whether the employee engaged in the conduct the employer alleges' and[;] (ii) 'whether that conduct constitutes just cause for the disciplinary action taken.'" *N. Carolina Dep't of Env't & Nat. Res. v. Carroll,* 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (quoting *Sanders v. Parker Drilling Co.,* 911 F.2d 191, 194 (9th Cir.1990), *cert. denied,* 500 U.S. 917, 111 S.Ct. 2014 (1991)).

16. In considering an employee's dismissal for UPC, 25 N.C.A.C. 1J. 0614 provides in pertinent part:

[2] There is question as to whether Petitioner's deeply held religious faith was the basis for Petitioner's refusal to get tested. This is discussed farther down in this decision.

"(7) Insubordination means the willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning.

"(8) Unacceptable Personal Conduct means, in pertinent part:

(a) conduct for which no reasonable person should expect to receive prior warning;
(b) job-related conduct which constitutes a violation of state or federal law;
(c) . . . an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
(d) the willful violation of known or written work rules;
(e) conduct unbecoming a state employee that is detrimental to state service[.]

25 N.C.A.C. 1J. 0614(7) and (8). Moreover,

(a) Employees may be dismissed for a current incident of unacceptable personal conduct, without any prior disciplinary action.
(b) Prior to dismissal of a career employee on the basis of unacceptable personal conduct, there shall be a pre-dismissal conference between the employee and the person recommending dismissal. This conference shall be held in accordance with the provisions of 25 NCAC 1J .0613.
(c) Dismissals for unacceptable personal conduct require written notification to the employee. Such notification must include specific reasons for the dismissal and notice of the employee's right of appeal.
(d) Failure to give specific written reasons for the dismissal, failure to give written notice of applicable appeal rights, or failure to conduct a pre-dismissal conference constitute procedural violations with remedies as provided for in 25 NCAC 1B .0432. Time limits for filing a grievance do not start until the employee receives written notice of any applicable appeal rights.

25 N.C.A.C. 1J. 0608.

17. In the present case, Respondent alleged Petitioner continually and consistently engaged in: a) insubordination; and, b) the willful violation of known and written work rules by his continuous refusal to either be vaccinated or get tested even after he was repeatedly instructed to do so. Resp. Exh 29.

18. Applying the definitions of unacceptable personal conduct to the actions alleged in Conclusions of Law ("COL") ¶ 17 above, Petitioner's repeated and unrepentant insubordination is conduct " . . . for which no reasonable person should expect to receive prior warning; . . . the willful violation of work rules…." 25 N.C.A.C. 1J. 0614 (7) and (8)(a) and (d).

19. Ordinarily, just because the *allegations* of COL ¶17 fit within the definition of UPC, does not necessarily support a conclusion that Petitioner actually engaged in the conduct alleged, in answer to our first *Carroll* inquiry. *Carroll at* 665, 599 S.E.2d at 898. That "is a question regarding the sufficiency of the evidence to support [the] factual finding . . . ." *Follum v. N. Carolina State Univ.,* 204 N.C. App. 369, 696 S.E.2d 203 (2010).

20. Looking to the whole record, it is replete with Petitioner's own confirmations that he did, in fact, willfully refuse to be vaccinated or tested even though he *knew* that in doing so, he was in violation of the various Executive Orders, OSHR and DPS's policy. Even more, Petitioner does not dispute that he was instructed over and over to come into compliance with the EOs, work rules, and policy but chose not to do so—even at risk of losing his job.

21. Our U.S. Supreme Court

> "…established evidentiary standards to be applied governing the disposition of an action challenging employment discrimination. First, the claimant carries the initial burden of establishing a prima facie case of discrimination. **The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. If a legitimate, nondiscriminatory reason has been articulated, the claimant has the opportunity to show that the employer's stated reason for the claimant's rejection was in fact pretext**.
>
> . . .
>
> In applying this test, "the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee." *Id.* at ——, 749 S.E.2d at 108 (citation, quotation marks, and brackets omitted). Therefore, we must apply the *McDonnell Douglas* test in reviewing the trial court's entry of summary judgment for Defendant.

Head v. Adams Farm Living, Inc., 242 N.C. App. 546, 554, 775 S.E.2d 904, 910 (2015)(emphasis added).

22. In the case at bar, Petitioner's own unambiguous testimony established that he was discharged because he refused to do the weekly COVID testing as directed and required—for no reason but that he did not wish to be told what to do and it was inconvenient. Petitioner's "'…religion played no role in [his] decision.' Accordingly, [Responde]nt has met its burden of articulating a nondiscriminatory reason for h[is] discharge. *See Johnson,* —— N.C. App. at ——, 749 S.E.2d at 109 ('Defendant rebutted plaintiff's [*prima facie*] case [for wrongful discharge in violation of North Carolina public policy] by producing evidence of a legitimate, nondiscriminatory reason for plaintiff's dismissal[.]')".

Head at 558, 775 S.E.2d at 912.

23. There is substantial, competent, and unopposed evidence of record revealing that although Petitioner's deeply held religious beliefs restrained him from getting vaccinated, those beliefs were **not** the reason Petitioner failed to be tested. By his own testimony under oath, Petitioner admitted he refused to do the required weekly testing because it was "inconvenient" and he did not want the government telling him what to do.

24. Inconvenience is not a lawful excuse for insubordination and repeated refusal to follow work rules.

25. Respondent has met its burden that it had just cause to terminate Petitioner based on his continued insubordination and willful violation of work rules, which had nothing to do with his religion.

26. Regarding Petitioner's allegation that Respondent retaliated against him,

> "Petitioner is required to demonstrate proof of facts sufficient to prove a *prima facie* case of retaliation by the preponderance of the evidence. If []he does so, Respondent is required to state a legitimate, nonretaliatory reason for the personnel action at issue. If Respondent states such a reason, any inference raised by Petitioner's *prima facie* case is rebutted. In order to avoid summary judgment, Petitioner then must prove by a preponderance of the evidence 'pretext plus,' i.e., that (i) Respondent's stated reason(s) is not the real reason that Respondent took the action; *and* (ii) the real motive for the action was 'retaliation' of a type proscribed by N.C. Gen. Stat. § 126-36. *Tinsley v. First Union National Bank*, 155 F.3d 435, 443 (4th Cir. 1998).

Demetrice Arnetha Keith v. North Carolina Dept. of Corrections, Div. of Community Corrections, 2000 WL 33952917.

27. Yet, Petitioner has failed to bring forth *any* evidence in a form permitted by Rule 56, Rules of Civil Procedure, sufficient to establish a *prima facie* case of any retaliation claim or to demonstrate any dispute of material fact pertinent to establishing such a *prima facie* case.

28. By offering no evidence—substantial or otherwise—to support that he was either religiously discriminated against or retaliated against or, terminated without just cause, "p[etitioner] 'cannot produce evidence to support an essential element' of his claim. *See Bernick,* 306 N.C. at 440–41, 293 S.E.2d at 409." *DeMurry v. N. Carolina Dep't of Corr.*, 195 N.C. App. 485, 499, 673 S.E.2d 374, 384 (2009).

29. By a preponderance of the evidence, Respondent has met its burden that it had just cause to terminate Petitioner based on his continued insubordination and willful violation of work rules and, Petitioner has failed to show that Respondent's reasons for his termination were a pretext.

30. The pleadings, affidavits, and admissions on file show there is no genuine issue as to any material fact in this case and, as such, Respondent is entitled to judgment as a matter of law.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, **ADJUDGED**, **AND DECREED** that, pursuant to N.C.G.S. 1A-1, Rule 56, Respondent's Motion for Summary Judgment is **GRANTED**.

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 9th day of March, 2023.

Hon. Karlene S. Turrentine
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.

Rickie Recordo Bennett
rrb1st@protonmail.com
Petitioner

NC Department of Public Safety
4201 Mail Service Center
Raleigh NC 27699
Respondent

James B Trachtman
North Carolina Department of Justice
jtrachtman@ncdoj.gov
Attorney For Respondent

Tamika L. Henderson
North Carolina Department of Justice
tlhenderson@ncdoj.gov
Attorney For Respondent

Joseph Finarelli
NC Department of Justice
jfinarelli@ncdoj.gov
Non-Party Movant

This the 9th day of March, 2023.

Chesseley A. Robinson III

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