

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 OSP 07416

Tiffany Ann Benson,)
Petitioner,)
)
vs.)
)
Debbie Hughes, North Carolina Department)
of Correction,)
Respondent.)

DECISION

This contested case was heard before Beecher R. Gray, Administrative Law Judge, in the Henderson County Courthouse, in Hendersonville, North Carolina, on October 18 and 19, 2011. Petitioner submitted a proposed decision on December 15, 2011. Respondent filed exceptions to Petitioner's proposed decision on December 22, 2011.

APPEARANCES

Petitioner: Linda Vespereny, Esq.
Law Offices of Glen C. Shults
959 Merrimon Avenue, Suite 204
Asheville, North Carolina 28804

Respondent: Oliver G. Wheeler, IV
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
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ISSUE

Whether Respondent North Carolina Department of Correction ("DOC") met its burden under N.C.G.S. § 126-35 to show "just cause" to terminate Petitioner's employment in light of the totality of the facts and circumstances surrounding Petitioner's conduct.

EXHIBITS

For Respondent:

- R. Ex. 1. NC Dept. of Correction Policy-Conduct of Employees, Issue Date 1/28/08
- R. Ex. 2. NC DOC Policy – Failure to Cooperate or Hindering and Investigation, Revision May 1, 2006

- R. Ex. 3. NC DOC Policy – Personal Dealings with Offenders of the Dept. of Correction, Effective 12/1/1997
- R. Ex. 4. June 29, 2010 Dismissal letter; June 10, 2010 Memo to Reggie Weisner, Acting Western Region Director from Debbie M. Hughes, Superintendent; June 5, 2010 Notification of Pre-Disciplinary Conference; June 7, 2010 Memo to Tiffany Benson from Debbie Hughes RE: Recommendation for Disciplinary Action; Pre-Disciplinary Conference Acknowledgement Form; NC Dept. of Correction, DOC Policy & Benefits, New Employee Statement of Understanding; Acknowledgement of Receipt of Personal Dealings with Offenders Policy; Acknowledgement of Receipt of Personal Relationships between Division Staff Memorandum and Personal Relationships between Division Staff Guidelines; Acknowledgement of Violence in the Workplace Guidelines; Acknowledgement of Conditions of Continued Employment; February 17, 2010 Temporary Reassignment of Tiffany Benson
- R. Ex. 7. NC DOC Internal Investigation, Employee/Witness Statements signed by Benson on Sept. 3, 2009; February 13, 2010 (two statements signed); March 4, 2010; and June 7, 2010
- R. Ex. 8. NC DOC Internal Investigation, Employee/Witness Statement signed by Mike Ball on March 4, 2010
- R. Ex. 10. NC DOC Statement by Witness, Benson, statement signed on 7/23/09
- R. Ex. 11. NC DOC Statement by Witness, Benson, statement signed on 7/23/09
- R. Ex. 12. NC DOC Statement by Witness Benson, Statement signed 7/22/09
- R. Ex. 13. EEO Complaint from Tiffany Benson, 3/17/2010
- R. Ex. 14. Written Warning dated October 16, 2008; Two Memos to Roger Moon from Debbie M. Hughes dated September 8, 2008 RE: Unacceptable Personal Conduct
- R. Ex. 16. NC DOC Disciplinary Policy and Procedures, Revised November 1, 2001
- R. Ex. 17. NC DOC Offender Information for inmate Kelly P. – Offender’s Disciplinary Infractions History

For Petitioner:

- P. Ex. 1. NC DOC Policy – New Hire Orientation Manual, Revised 5/1/06- re How long Disciplinary Actions are Active; How are Disciplinary Actions Resolved; Removal of Disciplinary Documentation from Employee Personnel File
- P. Ex. 3. NC DOC Policy and Procedure Development, Issued 1/16/08
- P. Ex. 4. NC DOC Appendix to Disciplinary Policy, Investigative Process, Appendix E, Effective October 1, 1995
- P. Ex. 6. DOC Personnel Manual, Appendix C, Personal Conduct, effective 10/1/1995;
- P. Ex. 7. NC DOC New Hire Orientation Manual, Special Provisions – Conditions of Employment, Revision May 1, 2006, Relationships between Employees; E-mail Acceptable Use Policy; NC DOC New Hire Orientation Manual, Unlawful Workplace Harassment & Professional Conduct Policy; Human Relations in the Workplace, Revision 5/1/06
- P. Ex. 8. NC DOC Information Security Policies Acknowledgement Form
- P. Ex. 9. NC DOC The Appraisal Process (TAP) for Benson, Appraisal Period 7/1/08-5/31/09; Final Evaluation, Section D, dated 6/10/10; Gate Log, List of

- Movements, 2/1/09-7/31/09 for Benson; Employee Time Report for period ending 6/20/09 and 6/27/09
- P. Ex. 12. E-mail from T. Benson to K. Burress, 8/6/09
- P. Ex. 15. Memo to Hughes from Mills, dated 9/12/09; Letter to T. Benson from Hughes dated 9/23/09; Request for Reasonable Accommodation
- P. Ex. 17. NC DOC Internal Investigation, Employee/Witness Forms signed by Benson on 9/3/09, 2/13/10 (total of three statements signed on 2/13/10); 3/4/10 (total of two statements signed on 3/4/10), 6/7/10 and 4/21/10
- P. Ex. 18. Fax Cover Sheet to Roger Moon dated 9/11/09, Redacted Statements by Inmate Witnesses Tanna S. (9/3/09); Tenshia S. (9/3/09); Tina R. (9/3/09); Kelly P. (9/4/09); Bethany N. (undated); Redacted Statement of staff member Jesse C. (8/30/09)
- P. Ex. 19. P. Ex. 19. Memo to Steve Bailey, Western Region Director, from Hughes, 2/17/10
- P. Ex. 24. P. Ex. 24. Copies of photographs and backs of photographs; Memo from Burress to Moon, 12/15/09; Memo from Sisk to Moon, 12/17/09; Memo to Bailey from Moon, 12/28/09; Letter to Burress from Moon and Bailey, 1/6/10
- P. Ex. 32. Application for Employment, Debbie Hughes, 1/9/93; Personnel Report for Hughes, 1/19/93; Application for Employment, Debbie Hughes, 9/29/94; Personnel Action Report for Hughes 12/1/94; Personnel Action Report for Hughes, 7/16/99; Personnel Action Report for Hughes, 12/4/03; Personnel Action Report for Hughes, 5/23/06; Personnel Action Report for Hughes, 5/2/08; Performance Log for Hughes; NC DOC The Appraisal Process (TAP) for Hughes, 6/1/10-5/31/11
- P. Ex. 33. NC DOC Internal Investigation Employee/Witness form Signed by Mike Ball, 3/4/10; NC DOC Employee Performance Review Form; Application for Employment, Coy Michael Ball, 4/3/87; Written Warning to Ball, 11/20/92; NC DOC Personnel Report, 11/16/92; Letter to Mark Hughes from Ball, 9/15/93; Memo to Spicer from M.B. Hughes, 11/22/93; Personnel Report for Ball, 11/22/93; Memo from Bailey to Bennett, 3/14/06; Personnel Action Report, 3/13/06
- P. Ex. 37. Written warning to Jesse C, 5/3/2010
- P. Ex. 38. Written Warning to Joice B., 6/17/11; Written Warning to Cynthia S., 10/13/08; Written Warning to Gennea S., 9/18/06; Letters to Billy B., dated 7/9/10 and 6/10/10
- P. Ex. 39. Statements by Jeremy C., 5/19/09, 6/1/09 (with letter from inmates), 6/10/09, 6/22/09; Letter to Patterson and Moon from Jeremy C.; E-mail from Jeremy C. to Bartlett and Pless, 6/1/09; E-mail from Jeremy C. to Bartlett, 6/9/09; E-mail from Sgt. Curtis R. to Burress, 5/27/09; E-mail from Sgt. Curtis R. to Jeremy C., 5/28/09; E-mail from McGearly to Sgt. Curtis R., 5/31/09; NC DOC Disciplinary Review, re inmate Kelly P.; Memo to Moon from Hughes, 7/17/09
- P. Ex. 41. Memo from Burress to Hughes, 7/7/09; Temporary Duty Reassignment, Sgt. Curtis R., 8/11/09; Notification of Pre-Disciplinary Conf., Sgt. Curtis R., 8/11/09; Recommendation to Demote, Sgt. Curtis R., 8/13/09; Personnel Action, Sgt. Curtis R., 8/20/09; Written Warning Sgt. Curtis R., 9/28/09; Reassignment Sgt. Curtis R., 9/28/09

- P. Ex. 42. Employee/Witness Statement Form, Curtis R., 9/1/09
- P. Ex. 43. NC DOC Offender Information, Inmate Tanna S.; NC DOC Inmate Infractions, Inmate Tanna S.; NC DOC Offender's External Movements, Inmate Tanna S.; Inmate Infraction/Classification/Control Summary, Inmate Tanna S.; Housing Assignments, Inmate Tanna S.; Visitation History, Inmate Tanna S.; Offender Arrest History, Inmate Tanna S.; Inmate Infraction Information, Inmate Tanna S.; Inmate Summary Record, Inmate Tanna S.; Offender Sentence Information, Inmate Tanna S.; Inmate Release Plan, Inmate Tanna S.; Case Management Notes, Inmate Tanna S.
- P. Ex. 44. NC DOC Offender Information, Inmate Tenshia S.; Offender's External Movements, Inmate Tenshia S.; Housing Assignments, Inmate Tenshia S.; Inmate Release Plan, Inmate Tenshia S.; Case Management Notes, Inmate Tenshia S.; DOC Community Risk Assessment, Inmate Tenshia S.
- P. Ex. 48. Dismissal Letter to Keshia R., 6/7/10

WITNESSES

For Respondent: Debbie Hughes, Coy Michael Ball, Tiffany Benson

For Petitioner: Dickie Bryson, Jeremy Canipe

FINDINGS OF FACT

In making Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses, taking into account factors for judging credibility of witnesses, including, but not limited to, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, the demeanor of the witness, the witness' interests, bias, candor, and any prejudice the witness may have, as well as whether the testimony of the witness is reasonable and consistent with other believable evidence in the case. After careful consideration of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned makes the following FINDINGS OF FACT:

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2. Petitioner Tiffany Ann Benson ("Petitioner") is a former employee of Respondent North Carolina Department of Correction ("Respondent"). Beginning in February 2007, Petitioner was employed as a correctional officer at Respondent's Black Mountain facility for women and, later, at the Swannanoa Correctional Center for Women. While still employed at the Swannanoa Correctional Center for Women, Petitioner was reassigned to Craggy Correctional Center. (Transcript ("Tr.") pp. 7, 16, 258)

3. By letter dated June 29, 2010, Petitioner was terminated for unacceptable personal conduct. Specifically, the termination letter charged her with using profanity in the presence of inmates (but not at them), as well as insubordinate conduct by refusing to make a written statement during a March 4, 2010 meeting. (Tr. pp. 8, 297, 302, R. Ex. 4)
4. The centerpiece of this case is Petitioner's alleged conduct at a meeting with her supervisor on March 4, 2010. At that meeting, Superintendent Debbie Hughes attempted to pursue further questioning of Petitioner regarding inmate allegations against Petitioner. At an earlier meeting, Petitioner had admitted that on one occasion she had used the term "bullshit" within hearing distance of inmates. (Tr. pp. 8, 297) In order to appreciate the totality of the facts and circumstances of this case, certain background information was admitted into evidence, beginning with several issues that arose in the preceding year.

Background: Petitioner's Involvement with the Investigation and Reassignment of Sgt. Curtis R.

5. In May 2009, case manager Jeremy C. observed what he believed to be various rule violations by inmate Kelly P. Each time he attempted to have inmate Kelly P. written up for these violations, Sgt. Curtis R. (Petitioner's supervisor at the time) chose to "counsel" inmate Kelly P. rather than issue a written infraction. Counseling an inmate rather than issuing an infraction results in less severe repercussions to the inmate. For instance, the accumulation of infractions by an inmate can result in an increase in the time the inmate would be required to serve before being paroled, segregation of the inmate, and/or denial of certain privileges. (Tr. pp. 157-160, 166-67, 385-389, P. Ex. 39)
6. In addition, Jeremy C. received information that inmates Tanna S. and Tenshia S. were involved in bringing contraband from Manna Food Bank into the prison unit and he reported this to management. Jeremy C.'s supervisor, Dana Bartlett, later sent an e-mail to Assistant Superintendent Burress on June 9, 2009 reporting that Jeremy C. notified her that various inmates, including Kelly P. and "the ex-Manna girls," "were in and out of Sgt. Curtis R.'s office from 6:30 a.m. until a quarter to three" on the preceding Sunday. Additionally, the email reported that Jeremy C. notified her that e-mails from Assistant Superintendent Burress to Sgt. Curtis R. were made available to those inmates to read and that "four and five inmates at a time were standing behind Sgt. Curtis R. as he pulled up information on OPUS [Respondent's Management Information System]." Further, Ms. Bartlett stated in her e-mail that Correctional Officer Rutledge "was frustrated by the fact that . . . Tenshia S. was in Tanna S's room almost all day" and that it is reported that the email Jeremy C. sent to Assistant Superintendent Burress "regarding the info on Tenshia S., [etc.] was made available for inmates to read, and that is being talked about amongst the inmates." (Tr. pp. 387-388, P. Ex. 39)
7. During a June 16, 2009 staff meeting, Petitioner questioned Sgt. Curtis R. about his dismissal of inmates' rule violations, particularly those of inmate Kelly P., who was often seen in Sgt. Curtis R's office. Inmate Kelly P. was known by the correctional officers and other staff to be a ringleader and was called "mom" by the inmates. During the course of the staff meeting, the name of case manager Jeremy C. came up, who, as

mentioned earlier, recently had cited inmate Kelly P. for various violations which later were dismissed by Sgt. Curtis R. Sgt. Curtis R. made several derogatory remarks regarding Jeremy C. in the meeting, the most noteworthy of which was that Jeremy C. had been known as the “assassin” in facilities where previously he had worked. (Tr. pp. 47, 135-136, 360-362, 393-394, 398-399, P. Exs. 39 and 41)

8. Thereafter, Petitioner notified Jeremy C. about what Sgt. Curtis R. had said about him in the June 16, 2009 staff meeting. Jeremy C. complained that Sgt. Curtis R. was creating a “hostile environment” for him and an investigation ensued. Petitioner and other staff present at the June 16, 2009 staff meeting were asked to provide written statements. Four (4) staff members confirmed that Sgt. Curtis R. referred to Jeremy C. as an “assassin” in the June 16, 2009 staff meeting. (Tr. pp. 131-132, 138-139, 361, 391, 397-398, P. Ex. 41)
9. Staff members later learned that Petitioner was responsible for notifying Jeremy C. of Sgt. Curtis R.’s remarks. (Tr. pp. 315-316)
10. Sgt. Curtis R. was very popular with both the inmates and the staff members as he was easier on inmates and staff than was Sgt. Mills. Sgt. Mills was a relatively new sergeant who had served as a “floating sergeant” and ran the shift much differently than did Sgt. Curtis R. Sgt. Mills was not popular with staff or inmates because she disciplined employees for “time management” issues, made sure inmates were given correct bed assignments according to their jobs, worked on inmate idleness issues, was more rigid and blunt than Sgt. Curtis R., and sometimes “talked down” to the officers. (Tr. pp. 43, 139-143, 305, 323-325, 341, 349-351, 362-363, 365-366, 382, 397, 405)
11. Sgt. Curtis R. was known to have inmates in his office and to dismiss write-ups on inmates. According to Jeremy C., Sgt. Curtis R. protected troublemakers, shared confidential information with inmates, and made changes to bed assignments so that lesbian inmate couples could be together. (Tr. pp. 158-161, 302-303, 362-363, 323, 385, 389-390, 392-396, P. Ex. 39)
12. On August 11, 2009, Sgt. Curtis R. was reassigned to Craggy Correctional Center as a direct consequence of Jeremy C.’s complaint. (Tr. pp. 13, 48, 398, P. Ex. 41) Some of the staff and several of the inmates were unhappy that Sgt. Curtis R. was transferred (Tr. pp. 366, 398) and a number of inmates wrote statements of support for Sgt. Curtis R., which were sent to department officials in Raleigh. (Tr. pp. 46-49, P. Ex. 18)

Ensuing Staff and Inmate Allegations Involving Petitioner

13. In July 2009, after staff learned that Petitioner was responsible for notifying Jeremy C. of Sgt. Curtis R.’s “assassin” statements, staff ceased speaking to Petitioner because they blamed her for the investigation of Sgt. Curtis R. and the inevitability that Sgt. Mills would replace him full-time. In addition, numerous degrading complaints were made against Petitioner. (Tr. pp. 313-318, 320, 323-324)

14. Indeed, even Petitioner's own witness, former Correctional Officer Dickie Bryson, testified that he did not think disciplinary action should have been taken against Sgt. Curtis R. (Tr. p. 365-366)
15. Prior to July 2009, Petitioner had good relationships with staff members who made the July 2009 complaints. Everyone on Petitioner's rotation signed birthday cards for her on June 1, 2009. A performance evaluation for the July 1, 2008 and May 31, 2009 period, signed by her superiors, Sgt. Curtis R. and Assistant Superintendent Kevin Burress on June 7 and 8, 2009, respectively, gave Petitioner either "good," "very good," or "outstanding" ratings on each of the entries and contained numerous positive narratives regarding such things as Petitioner's willingness to volunteer for extra duties, to be a team player, to focus on running the unit efficiently and smoothly, and to provide steady support for the shift/facility. Sgt. Curtis R. also encouraged Petitioner to attend "Disciplinary Officer Training" and to take the sergeant's exam because she was ready for more responsibilities. (Tr. pp. 305-307, 309, 311-312, 322-325, P. Ex. 9)
16. After being notified of the July 2009 allegations against her, Petitioner fully cooperated with the investigation and provided a number of written statements. On or about August 6, 2009, the investigation was resolved in Petitioner's favor. (Tr. pp. 288-290, 305-306, 320-322, 332, R. Exs. 10-12, P. Ex. 12)
17. On August 30, 2009, after initial reluctance, Correctional Officer Jesse C. made a written statement against Petitioner for allegedly making an inappropriate comment of a sexual nature to him during the night of a shakedown in June 2009. (Tr. pp. 60, 62-63, 71-72, 325-326, 332)
18. Thereafter, a new investigation of Petitioner was undertaken. On or about September 3, 2009, Petitioner was confronted with Correctional Officer Jesse C's allegations, which made her feel humiliated and degraded. Nonetheless, Petitioner again fully cooperated and provided a written statement denying the allegations. (Tr. pp. 204-205, 215-216, 262-264, 325-328, 332, R. Ex. 7)
19. During the night of the June 2009 shakedown, Correctional Officer Jesse C. was training two new officers. Superintendent Hughes did not, however, talk to those two officers as part of her investigation to verify Correctional Officer Jesse C.'s allegations against Petitioner. (Tr. pp.73-74) Further, Superintendent Hughes did not make any notes or tape recordings of her interview with Correctional Officer Jesse C., who had, in the past, been given "guidance" regarding his interactions with female inmates.¹

¹ In February 2009, Correctional Officer Jesse C. was given "guidance" in working with the female inmate population to ensure dealings with inmates are consistent with DOC policy. (Tr. pp. 72-73) In December 2009, correctional officer Jesse C. shared confidential inmate information with his former mother-in-law (which had security implications). Later, when questioned about this, correctional officer Jesse C. lied during an internal investigation in April 2010. He was finally given a written warning in May 2010 for these violations. (Tr. p. 63, P. Ex. 37) More recently, on April 8, 2011, Jesse C. was "counseled," but not disciplined, for unprofessional behavior due to a complaint for having an inmate within a secure area and having inappropriate communications with the inmate. (Tr. pp. 69-71) Sometime prior to Petitioner's October 2011 hearing, correctional officer Jesse C. resigned while under investigation for fraternizing with a former inmate. (Tr. pp. 61-67)

20. On September 1, 2009, Superintendent Hughes went to Craggy Correctional Center to meet with Sgt. Curtis R., at which time Sgt. Curtis R. made a written statement against Petitioner. Superintendent Hughes and Sgt. Curtis R. met in Assistant Superintendent Coy Michael Ball's office for this meeting. (Tr. p. 97) Assistant Superintendent Ball remembered meeting with Sgt. Curtis R. (Tr. p. 233)
21. On September 11, 2009, Superintendent Hughes faxed to her superior, Roger Moon of the Western Region, written statements from five inmates, including Kelly P., Tanna S., Tenshea S., Tina R., and Bethany N. Superintendent Hughes noted on the fax cover sheet that three of the inmates had not written supporting letters for Sgt. Curtis R. but two of the inmates had. (Tr. pp. 78-79, P. Ex. 18)
22. Petitioner was not questioned about any of these inmate allegations until February 13, 2010. (Tr. p. 329)

Petitioner on Medical Leave; Accommodation Request Denied

23. On September 12, 2009, Petitioner learned that she was scheduled for training, which was to begin the following Monday. At that time, Petitioner reported to her supervisor, Sgt. Mills, that she had been placed on a doctor's restrictions on September 10, 2009. Sgt. Mills placed Petitioner on medical leave and directed that she go home. (Tr. pp. 264, 332, P. Ex. 15)
24. Petitioner was scheduled to have knee surgery in October 2009, but wished to continue working until the date of the surgery as she was the sole supporter of her three children and needed the money. On or about September 21, 2009, Petitioner requested light duty accommodation² which was denied by Superintendent Hughes on September 23, 2009. (Tr. pp. 329-330, P. Ex. 15)

Concerns Regarding Possible Romantic Relationship Between Assistant Superintendent and Sergeant; Petitioner Responsible for Providing Pictures

25. Sometime in the fall of 2009, correctional officers received word from inmates that Assistant Superintendent Burress (mistakenly referred to as "Burrows" in transcript) had been seen embracing a female subordinate employee, Sgt. Sisk, at the prison. This was reported to Superintendent Hughes. (Tr. pp.81-82, 92-93, 165, 367-371, 373, P. Ex. 24)
26. Department of Correction policy entitled "Relationships Between Employees" strongly discourages supervisory employees from dating or engaging in romantic, intimate relationships with subordinate employees as such relationships have the potential for disrupting the workplace. The policy further states that management may transfer or make other work assignment changes to minimize potential workplace disruption or liability. (Tr. pp. 86-87, 375, P. Ex. 7)

² Petitioner was aware that other officers had been granted light-duty posts by being reassigned to other facilities with control rooms, wherein the officer is only required to sit in the control room, open doors, and watch cameras. (Tr. pp. 357-358)

27. Despite the reports of the relationship, Superintendent Hughes felt she could not investigate as the inmate who observed the two individuals kissing had since been released. (Tr. p. 83)
28. On two occasions in November 2009, while visiting a friend who happened to live near Sgt. Sisk, Petitioner noticed Assistant Superintendent Burress' truck parked in front of Sgt. Sisk's house. On one of these occasions, Petitioner saw Assistant Superintendent Burress give Sgt. Sisk a kiss. Petitioner was with a friend on both of these occasions. Petitioner's friend took a number of pictures, one of which showed Assistant Superintendent Burress leaving Sgt. Sisk's house. (Tr. pp. 88-90, 292-294, 303-305, 330-331, 333, P. Ex. 24)
29. Petitioner spoke to Correctional Officer Dickie Bryson and mentioned the photographs her friend had taken. Officer Bryson, who was concerned that nothing was being done about the Burress/Sisk situation, obtained the photographs from Petitioner and took them to Superintendent Hughes. Superintendent Hughes did not ask Officer Bryson to write a statement regarding the source of these photographs. (Tr. pp. 82, 294, 331-332, 373-375, 378-380)
30. After receiving the photographs, Superintendent Hughes spoke to her superior, Roger Moon. Roger Moon then undertook an investigation which consisted solely of asking Assistant Superintendent Burress and Sgt. Sisk about their relationship. After each denied any romantic relationship, Roger Moon concluded his investigation and found that there was no inappropriate relationship. (Tr. pp. 82, 90-92, P. Ex. 24)

Petitioner Returns From Medical Leave; Superintendent's Investigation Continues

31. On February 13, 2010, Petitioner returned to work from medical leave. Immediately, she was questioned by Superintendent Hughes about allegations from three of the five inmates whose statements earlier had been faxed by Superintendent Hughes to Roger Moon on September 11, 2009. Two of the inmates (Tanna S. and Tenshia S.) made embarrassing allegations regarding sexual information Petitioner had supposedly shared with them and the third inmate, Tina R., alleged that Petitioner revealed to her the contents of a letter that Petitioner had intercepted in August 2009. Only one of the inmates, Tina R., was identified to Petitioner during the questioning. (Tr. pp. 43-46, 124-135, 264-267, 333-335, R. Ex. 7, P. Ex. 17)
32. The Department of Correction's Investigative Policy provides direction regarding the interviewing of employees. When an employee denies wrongdoing, managers should, according to the policy, ask the employee why s/he thinks a particular witness would lie. (Tr. pp. 43-44, P. Ex. 4)
33. Superintendent Hughes admitted that, while questioning Petitioner, she did not provide Petitioner with the names of the two inmates who had accused Petitioner of making comments of a sexual nature even though, at the time, there were approximately 200 inmates at the prison. (Tr. pp. 44-46)

34. Superintendent Hughes, who personally talked to only a couple of the inmates, could not remember which of the inmates she talked to or when she talked to those inmates (Tr. p. 40). Contrary to the Department of Correction's policy, Superintendent Hughes did not document any interviews she had with these inmates and chose not to audiotape these interviews. Superintendent Hughes did not prepare any questions of any sort for these interviews, but rather relied exclusively upon the written statements which previously had been prepared by the inmates. (Tr. pp. 40-43, P. Ex. 4)
35. None of the signed inmate witness statements relied on by Superintendent Hughes were witnessed by staff. Further, the inmate witness statements do not contain the name of the person who obtained the statements, nor the date and time the statements were obtained. Superintendent Hughes had no idea when the inmates actually had written these statements, other than the inmates' own written indications on the statements. (Tr. pp. 59-60; P. Ex. 18)
36. The witness statement allegedly signed by inmate Tanna S. is dated 9/3/09 at 9:00 p.m.; the statement by inmate Tenshia S. is dated 9/3/09 at 8:37; the statement by inmate Tina R. is dated 9/3/09 at 11:13; the statement from inmate Kelly P. is dated 9/4/09 at 1:47 a.m.; and the statement by Bethany N. has no date. (Tr. pp. 58-59, P. Ex. 18)
37. The two inmates with whom Petitioner was alleged to have shared personal sexual information (Tanna S. and Tenshia S.) were known by department staff to be in a lesbian relationship, had moved from facility to facility within close proximity of the time of transfer of each other, and had been placed in the same dorm facilities while housed at Swannanoa Correctional Center. In addition, inmate records show that a family member of one of the inmates deposited money in accounts for both inmates. As indicated in paragraph 5, those two inmates specifically were mentioned in information provided by case manager Jeremy C. to management officials in June 2009 as inmates who were involved in the smuggling of contraband from Manna Food Bank and spending time with each other in each other's room. (Tr. pp. 179-186, 191-192, 389, 396, P. Exs. 39, 43, and 44)
38. With respect to the letter addressed to inmate Tina R., the evidence shows that Petitioner intercepted the letter in August 2009, at which time she called Sgt. Curtis R. to report the contents of the letter. Sgt. Curtis R. directed her to give the letter to Assistant Superintendent Burress. Petitioner turned the letter over to Yard Officer Bressler, who took it to Assistant Superintendent Burress. Upon receiving it, Assistant Superintendent Burress discussed the letter with Sgt. Faye, and then turned the letter over to Sgt. Mills, who told inmate Tina R. that she couldn't have the letter. There is no evidence that Petitioner revealed the contents of the letter to inmate Tina R. (Tr. pp. 125-127, 266, R. Ex. 7)

Petitioner Cooperates With Investigation; Requests Polygraph

39. At the February 13, 2010 investigative meeting, Petitioner again fully cooperated, made written responses, and volunteered to take a polygraph at her expense to stop any further

inmate accusations against her. During that meeting, Petitioner admitted that she had at one time cursed in front of inmates (i.e., she was overheard using the term “bullshit”), but not at inmates. Also, during the course of this meeting, Petitioner stated, both verbally and in writing, that she had witnessed Assistant Superintendent Burress and Sgt. Sisk kissing and that she was responsible for pictures which had been presented to the department by Correctional Officer Dickie Bryson. (Tr. pp. 81-82; 264-267, 291-292, 297, 301-302, R. Exs.7 and 13, P. Ex. 17)

40. Although Petitioner requested the opportunity to take a polygraph at her expense, Respondent never provided Petitioner with the opportunity to take a polygraph or any other type of lie detector test. Ironically, failing to submit to a polygraph examination when directed to do so by a Department Official constitutes violation of the department’s “Failure to Cooperate During or Hindering an Investigation” policy. (Tr. pp. 80, 341-342, R. Ex. 2)
41. Superintendent Hughes had authorization to ask Petitioner to take a polygraph on February 13, 2010 (though Petitioner actually offered to take a polygraph). When Superintendent Hughes later asked up the chain of command to provide Petitioner with the opportunity to take a polygraph exam, however, this was refused and no reason for this refusal ever was provided to Superintendent Hughes. Petitioner never was given a polygraph examination, despite Petitioner’s and Superintendent Hughes’ request for one. (Tr. pp. 80-81, 268)
42. In a February 17, 2010 memo to Western Region Director Steve Bailey, Superintendent Hughes voiced her opinion that she believed Petitioner shared personal information about herself with inmates, that she shared the contents of a letter that she intercepted with inmate Tina R., that these incidents were considered undue familiarity with inmates, and that Petitioner should be given corrective action. Finally, Superintendent Hughes stated (incorrectly) in this memo that Petitioner had an “active” written warning for insubordination and the use of profanity.” (P. Ex. 19) Contrary to Superintendent Hughes’ statement in the memo, this written warning had been “inactive” since February 2009. (Tr. p. 36, P. Ex. 9)

Petitioner Reassigned to All-Male Facility

43. On February 17, 2010, Petitioner was reassigned, pending investigation, to Craggy Correctional Center, an all-male facility. Prior to September 2009, Petitioner had requested a transfer to the Buncombe County unit or to Craggy Correctional Center. At the time, Petitioner was a young woman who never had worked with an all-male population and doing pat-downs of male inmates made her very uncomfortable. In addition, at the time, Petitioner was the sole supporter of three young children, one of whom had special needs. (Tr. pp. 268, 281, 340-42, R. Ex. 7)
44. When Petitioner arrived at Craggy Correctional Center in February 2010, she immediately was made to feel uncomfortable by other staff members and inmates. There were rumors about why Petitioner was at Craggy and staff members were told to stay

away from Petitioner because she was “bad news.” Further, the inmates subjected Petitioner to sexual harassment. (Tr. pp. 335-336)

March 4, 2010 Interrogation

45. On March 4, 2010, Petitioner was called into the office of Coy Michael Ball, Assistant Superintendent at Craggy Correctional Center, for further questioning regarding inmate allegations. Superintendent Hughes of Swannanoa Correctional Center also was present at this meeting. (Tr. pp. 222, 268)
46. Assistant Superintendent Ball had spent twenty-three (23) years at Craggy Correctional Center, working his way up from correctional officer to assistant superintendent. (Tr. p. 220) Several personal relationships existed between Assistant Superintendent Ball and various individuals involved in this case. For instance, Assistant Superintendent Ball has known Sgt. Curtis R. for years, having been a life-long friend of Sgt. Curtis R.’s brother, Keith, with whom Assistant Superintendent Ball went to high school. Keith was working at Craggy Correctional Center prior to Assistant Superintendent Ball’s employment there and Assistant Superintendent Ball listed him on his 1987 application as his “referral source” when he first applied for his job at Craggy Correctional Center. (Tr. pp. 237-238, 246, P. Ex. 33)
47. As noted earlier, Sgt. Curtis R. temporarily had been reassigned to Craggy Correctional Center in August 2009 pending an investigation. He remained at Craggy Correctional Center until October 2009, when he was transferred to another facility. (P. Ex. 41) While Sgt. Curtis R. was at Craggy Correctional Center, Assistant Superintendent Ball met with him to discuss what was going on and, at one point, Assistant Superintendent Ball sat down with him to discuss his investigation. (Tr. p. 233) Assistant Superintendent Ball testified that he wouldn’t want anything bad to happen to Sgt. Curtis R. (Tr. pp. 247-248)
48. Assistant Superintendent Ball has had important connections with Superintendent Hughes’ father, Marcus Hughes. On November 20, 1992, Sam Reed, the Superintendent of Craggy Correctional Center, disciplined Assistant Superintendent Ball for engaging in personal misconduct. Assistant Superintendent Ball was given a written warning and disciplinary transfer to Haywood Correctional Center. In September 1993, Assistant Superintendent Ball, after being reassigned to Haywood Correctional Center (which was a further distance from his home than Craggy Correctional Center), applied for a promotion to the position of lieutenant at Craggy Correctional Center. Marcus Hughes recently had become the new superintendent of Craggy Correctional Center. On November 22, 1993, Superintendent Marcus Hughes offered Assistant Superintendent Ball the opportunity to return to Craggy Correctional Center, along with the promotion to lieutenant. (Tr. 239-242, P. Ex. 33)
49. Finally, Assistant Superintendent Ball has close ties to Assistant Superintendent Burress. Assistant Superintendent Ball worked with Assistant Superintendent Burress for years and had been his supervisor at Craggy Correctional Center, prior to Assistant

Superintendent Burress' promotion in June 2007. In fact, Assistant Superintendent Ball supported Assistant Superintendent Burress' June 2007 promotion and testified that he liked Assistant Superintendent Burress, that he recommended that Assistant Superintendent Burress be promoted to captain for the Alexander facility, and that he wouldn't want anything bad to happen to Assistant Superintendent Burress. (Tr. pp. 228-230, 242, 248)

50. At the March 4, 2010 meeting, contrary to the Department of Correction's investigation policy (P. Ex. 4), Superintendent Hughes did not put Petitioner at ease. Rather, Superintendent Hughes made it clear that she already had reached a conclusion. Superintendent Hughes accused Petitioner of going out on medical leave early because she had gotten "wind" of the investigation (Tr. pp. 52-54, 336-337) (even though Petitioner wanted to continue working, as evidenced by her delay in notifying management of her doctor's restrictions (Tr. p. 52) and her subsequent request for light duty, which had been denied by Superintendent Hughes. (Tr. pp. 56-58, 336-337, P. Ex. 15)). Superintendent Hughes also commented that Petitioner's defensive demeanor "showed guilt." (Tr. p. 337) Indeed, Superintendent Hughes' February 17, 2010 memo to Western Region Director Bailey confirms that her mind already was made up when Superintendent Hughes explicitly stated that she believed Petitioner "shared personal information about herself with inmates [and] shared the contents of a letter that she intercepted with inmate Tina R." and that Petitioner's conduct warranted corrective action. (Tr. p. 153, P. Ex. 19)
51. Petitioner testified that, during the March 4, 2010 meeting, she felt that she didn't stand a chance, that her word didn't mean anything to the Department of Correction, especially since she had been willing to cooperate at the other investigative meetings, as well as to take a polygraph exam, and that it appeared as though Superintendent Hughes was trying to provoke her with various unjustified comments. (Tr. pp. 268, 279, 336-337)
52. Not knowing what type of degrading inmate accusations Petitioner would be asked to respond to, Petitioner stated that she would not answer any questions unless her lawyer were present. When this request was denied, Petitioner asked to see in a written policy whether she could have a lawyer present. (Tr. pp. 269, 337-338) Petitioner also told Superintendent Hughes that if Superintendent Hughes had not done a "half-assed" investigation, she wouldn't need to be continuing the investigation at that time. Petitioner questioned why she never was given a lie detector test. (Tr. p. 275)
53. Assistant Superintendent Ball made Petitioner feel uncomfortable when he stated that she could "play the lawyer card" all day, but that he would write her up for not cooperating. (Tr. p. 338)
54. Petitioner continued to refuse to answer questions during this meeting because she was not allowed to have a lawyer present and because she was not shown in any written policy why this request was not allowed. Petitioner provided a written statement to this effect and testified at the hearing that she believed that because of the seriousness of the matter, she felt that she should have been shown the policy which prevented her from

having a lawyer with her during the questioning. (Tr. pp. 32, 228, 269-275, 356, P. Ex. 17)

55. Department of Correction Policy provides in its policy entitled "Policy and Procedure Development" at .0605(g)(4) that "Facility heads will be responsible for ensuring that policy and procedure manuals are located in areas that are generally accessible to staff. At a minimum, facility heads will ensure that at least one (1) printed copy of the policy and procedure manual is located in an area accessible to staff on a 24-hour, 7 day per week basis." (Tr. pp. 39-40, P. Ex. 3)
56. Petitioner was not given access to departmental policy after she was reassigned to Craggy Correctional Center in February 2010. She was not provided a copy of the department's policy regarding any entitlement to or lack of entitlement to legal representation during investigative meetings. Petitioner also did not have a computer at her post or internet access at her home on which to access this information. (Tr. pp. 270, 273, 339)
57. The Department of Correction written policy document was readily accessible in Assistant Superintendent Ball's office. Despite Petitioner's request, neither Assistant Superintendent Ball nor Superintendent Hughes allowed Petitioner to see or be shown any written policy that would preclude her from having a lawyer present during the meeting. Petitioner stated at this meeting that she would answer all questions if the written policy supported the denial of her access to legal counsel by Assistant Superintendent Ball and Superintendent Hughes. (Tr. p. 228, 271-274)
58. Petitioner provided credible testimony that, aside from referring to Superintendent Hughes' investigation as being "half-assed" and her refusal to answer degrading questions in the presence of Superintendent Hughes and Assistant Superintendent Ball without an attorney present or without first seeing in a written policy that she was not entitled to an attorney, she did not engage in any insubordinate or disrespectful conduct during the March 4, 2010 meeting. Petitioner's testimony that she was crying and looking at a blank wall is credible. (Tr. pp. 275-276, 338-339)
59. In a written statement signed by Petitioner on June 7, 2010, Petitioner apologized for the "half-assed investigation" comment. She explained that she felt frustrated with the physical and mental stress the investigation had imposed on her. Petitioner also explained that being reassigned to a male facility had also been very stressful as she had been harassed on a daily basis by inmates, that she felt like her life was endangered, and that she felt that inmates' words were believed over her word. She further stated that she felt that her integrity as a person, as well as a correctional officer, was under attack and that she was being made to feel like she was the inmate, rather than the correctional officer. (Tr. pp. 281-284, R. Ex. 7)

Disciplinary Conference; Recommendation

60. On June 5 and 7, 2010, Superintendent Hughes sent Petitioner a "Notification of Pre-Disciplinary Conference" and a "Recommendation for Disciplinary Action," respectively.

In both notices, Superintendent Hughes stated that it was her intention to recommend disciplinary action up to and including dismissal based on Petitioner's unacceptable personal conduct. Superintendent Hughes made specific references to a prior written warning issued to Petitioner on October 16, 2008. (R. Ex. 4)

61. Department of Correction Policy provides that "disciplinary actions shall be considered active until a manager or supervisor notes in the employee's personnel file that the reason for the disciplinary action has been resolved OR the employee receives a Good or better in the key responsibility/result (KRR) that is related to the performance issue for which the employee was disciplined on the most recent performance evaluation." Further, the policy states that "Once a disciplinary action has been deemed inactive, it has no value and shall not be used as supporting documentation for other disciplinary action" (emphasis added). (P. Ex. 1) As of February 15, 2009, the October 16, 2008 written warning had been deemed "inactive" per Sgt. Curtis R. and approved by Assistant Superintendent Burress, as indicated on the Employee Action Plan Form. Superintendent Hughes admitted that as of February 15, 2009, Petitioner did not have an active warning. (Tr. p. 36) Further, as of June 7, 2009, Petitioner had received a rating of "VG" (very good) on each of the KRRs included on her final evaluation. (Tr. pp. 307-312, P. Ex. 9)
62. Superintendent Hughes testified that she believed that it was important to reference the previous inactive warning in Petitioner's June 2010 dismissal letter and that she believed termination was justified based on everything that had happened, including Petitioner's previous written warning. (Tr. pp. 33-34)
63. Despite departmental policy, Superintendent Hughes persisted in including specific references to Petitioner's October 2008 written warning in a June 10, 2010 memo to Acting Western Region Director Reggie Weisner recommending that Petitioner be given disciplinary action up to and including dismissal as a result of her unacceptable personal conduct. Superintendent Hughes wrote, "Officer Benson has an active written warning in place for insubordination with a supervisor. She also used profanity during that encounter. It is common knowledge that she uses profanity in front of the inmates." On cross-examination, Superintendent Hughes admitted that she was incorrect in referring to the warning as "active" but that she felt it was important to include reference to the warning because "it shows a pattern of her behavior throughout her career." (Tr. pp. 216-218, R. Ex. 4)
64. The June 29, 2010 termination letter cited Petitioner for admitting to using profanity in the presence of inmates and for exhibiting disrespect during the March 4, 2010 meeting with Superintendent Hughes and Assistant Superintendent Ball, wherein Petitioner accused Superintendent Hughes of conducting a "half-assed" investigation and hindering the internal investigation by refusing to provide complete information at the March 4, 2010 meeting. Again, Superintendent Hughes referred to a written warning issued to Petitioner on October 16, 2008 (which became inactive in February 2009, as indicated in Petitioner's action plan) as supporting documentation for the termination, even though this is specifically prohibited by Department of Correction policy. (R. Ex. 4, P. Ex. 1)

65. It is clear from Superintendent Hughes' repeated reference to this previous written warning, as well as her reference to unsubstantiated matters (i.e., "it is common knowledge that that she uses profanity in front of the inmates")³, that the previous written warning, and other unsubstantiated matters, were considered in the recommendation to dismiss.

Treatment of Other Employees for Similar Offenses

66. Although complaints had been received that two individuals, Assistant Superintendent Burress and Sgt. Sisk, were engaged in a romantic relationship which had the potential for disrupting the workplace, Respondent showed little interest in conducting a proper investigation so that this matter could be dealt with appropriately. (Tr. pp. 82, 90-92, P. Ex. 24)
67. Further, when other employees have been disciplined for multiple violations of unacceptable personal conduct, including "hindering of investigations," each of these employees received only a written warning.
68. For instance, it was determined that Sgt. Curtis R. was not truthful during an internal investigation when he denied referring to Jeremy C. as the "assassin." Despite the fact that he had, according to the Department's policy, "hindered" the investigation by providing false information, he only was given a written warning for unacceptable personal conduct. There was no mention in the disciplinary letter that he had "hindered" the investigation. (P. Ex. 41)
69. Similarly, former Correctional Officer Jesse C. was charged with accessing NCDOC offender information on his departmental computer, printing the information, and giving it to his ex-mother-in-law. While being interviewed during an internal investigation on March 18, 2010, he provided a verbal and written statement professing that he did not provide this offender information to his ex mother-in-law. Later, during a follow-up interview on April 1, 2010, he admitted giving the printouts to his ex-mother-in-law. Correctional Officer Jesse C. was given only a written warning for these multiple violations, which included providing false information during the internal investigation. (Tr. pp. 64-68, P. Ex. 37) Prior to this, Correctional Officer Jesse C. had been given "guidance" in working with the female inmate population to ensure that dealing with inmates is consistent with Department policy. (Tr. pp. 72-73) On April 8, 2011, Correctional Officer Jesse C. was "counseled," but not disciplined, for unprofessional behavior relating to a complaint of having an inmate within a secure area and having inappropriate communications with the inmate. (Tr. p. 69)

³ Benson admitted that she had used the term "bullshit" within hearing distance of inmates on one occasion. (Tr. p. 297) Former Correctional Officer Dickie Bryson stated the following upon questioning about Petitioner's use of profanity in the workplace:

Q: Did you ever hear her curse in the workplace?

A: Just in general talking with me, pretty much, everybody might say a word here and there. But as far as that being an issue, no, I never heard her do that. (Tr. p. 405)

70. Another employee, Correctional Officer Cynthia S., lied during an investigation about inappropriate alcohol consumption by staff while attending correctional officer basic training. Three months later, when interviewed again about the same issue, this employee changed her story and provided the names of persons that consumed alcohol at the training program and the name of the person who mixed the drinks. This employee was given a written warning for providing false or purposefully misleading information during an internal investigation. (P. Ex. 38)
71. Finally, Correctional Officer Gennea S., who engaged in security violations by leaving an inmate unattended at a medical provider's facility and also engaged in two instances of unprofessional interactions with medical staff, was given a written warning. (P. Ex. 38)

Related Findings

72. Petitioner admitted during the February 13, 2010 questioning that she had used the term "bullshit" in front of an inmate once, but did not realize that the inmate had heard her. Petitioner denied ever cursing at an inmate. Other officers, as well as sergeants, have been known to curse and/or use curse words in front of inmates. (Tr. pp. 278, 299, 300-302, 349, 376, 405)
73. The undersigned takes judicial notice of the proposition that correctional officers serving Respondent have challenging, difficult, stressful, and dangerous jobs and that they are subjected to profanity on a weekly basis. These officers occasionally may say things that they should not, however, this does not necessarily warrant formal discipline.
74. The undersigned also takes judicial notice of the proposition that correctional officers who take a firm approach with inmates may become unpopular with inmates and that inmates have ample time to sit and discuss their displeasure with a particular staff member.
75. Petitioner did not willfully hinder the investigation during the March 4, 2010 meeting as it was not unreasonable, under the circumstances, for Petitioner to request to be shown the written policy prohibiting the presence of a lawyer at the meeting, especially when, as in this instance, the written policy was in close proximity in an adjacent room and readily retrievable.
76. Petitioner, through her behavior during the March 4, 2010 meeting, did not intend to harm, and did not harm Respondent or Superintendent Hughes. Petitioner's professionalism was exhibited in her June 7, 2010 written statement wherein she apologized for appearing to be disrespectful. Petitioner did not intend to violate any Department policy. Petitioner testified that, at the time she made the comment regarding Superintendent Hughes' "half-assed" investigation, she felt that she was being provoked and retaliated against by Superintendent Hughes and that she used the term because she didn't feel like the investigation was being conducted in a fair manner. (Tr. pp. 275-276, 279, R. Ex. 7)

77. Petitioner's comment was an isolated incident that did not include any vulgarity, other than a single reference to the term "half-assed."
78. Upon internal appeal, a hearing for Petitioner was conducted, Petitioner's disciplinary action was affirmed, and Petitioner timely filed her petition for a contested case hearing with the Office of Administrative Hearings.

Based upon the Findings of Fact I make the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings. This office has personal and subject matter jurisdiction to hear this contested case.
2. At the time of her dismissal, Petitioner was a career state employee subject to the provisions of North Carolina General Statutes Chapter 126, The State Personnel Act.
3. This case is based upon North Carolina General Statute § 126-35 and addresses whether Petitioner was disciplined by termination for "just cause" and whether Respondent properly considered and applied the necessary factors and facts in its decision to terminate Petitioner's employment.
4. Case law indicates that unacceptable personal conduct is misconduct of a serious nature. *N.C. Dept. of Environment and National Resources, Division of Parks and Recreation v. Clifton Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004)
5. Respondent has the burden of proof by a preponderance of the evidence that it had just cause to terminate Petitioner's employment.
6. N.C.G.S. § 126-35 does not define just cause. "The fundamental question . . . is whether the disciplinary action taken was 'just.' Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *N.C. Dept. of Environment and National Resources, Division of Parks and Recreation v. Clifton Carroll*, 358 N.C. 649, 669; 599 S.E. 2d 888, 900 (2004) "Just cause," like justice itself, is not susceptible of precise definition...It 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.* Just cause requires "misconduct of a substantial nature" and does not encompass "technical violations of statute or official duty without a wrongful intention."
7. Just cause terminations are reserved for substantial violations of work rules which are unjustified under the totality of the facts and circumstances after the application of mitigation principles and balancing. *Dietrich v. N.C. Highway Patrol*, 00 O.S.P. 1039, 2001 WL 34055881 (N.C.O.H August 13, 2001); *Carroll*, 599 S.E.2d at 900. When an agency seeks to establish just cause, "it cannot rest solely on the grounds that a

supervisor's directives were not carried out to their fullest extent." *Walker v. N.C. Dept of Human Res.*, 397 S.E. 2d 350 (N.C. Ct. App. 1990)

8. The standard used to determine just cause for termination is a different standard than that used for lesser discipline. (See *Gooch v. Cent. Reg'l Hosp.*, 09 O.S.P. 2398 (October 27, 2010) (finding sufficient evidence for a written warning, but no just cause for termination); *Raynor v. N.C. Dept. of Health and Human Servs.*, 09 O.S.P. 4648 (July 26, 2010) (finding penalty of dismissal did not match the deed done); *Ramsey v. N.C. Div. Motor Vehicles*, 02 O.S.P. 1623 (April 26, 2004), aff'd 647 S.E.2d 125 (N.C. Ct. App. 2007) (holding that written warning, rather than termination, was appropriate penalty for violation of general order), disc rev. denied, 659 S.E.2d 739 (N.C. 2008); *Warren v. N.C. Dept. of Crime Control*, 08 O.S.P. 212 (April 17, 2009) (no just cause for termination found, but commensurate discipline less than termination may be imposed)
9. In determining whether just cause exists, "all relevant factors and considerations" must be weighed, including factors of mitigation. Title 25 N.C.A.C. 1B.0413. Consistent with this, a broad review of a number of subfactors including, but not limited to, an evaluation of the following, is necessitated: (i) whether the conduct is isolated or part of a pattern; (ii) the motivation of the employer in taking adverse action and whether there were any improper considerations; (iii) whether the employee intentionally violated clear agency policy and whether the violation was substantial; (iv) whether the employee was acting under any duress or injury that may have contributed to his/her conduct; (v) whether the employee was acting consistently with departmental practice and custom; (vi) the employee's performance history; and (vii) any other significant mitigating factors. *Hill v. NC Dept. of Crime Control & Highway Patrol*, 04 OSP 1538
10. The Department of Correction's own policy states that both the victim and accused should be given digital voice stress analysis tests to add validity to examination results. (Tr. pp. 38) Further, the policy states that objective and thorough investigations should be conducted in accordance with departmental policy to ensure the integrity of the disciplinary process and to minimize the risk that employees are disciplined without cause. (P. Ex. 4) Deviations from accepted policy present dangerous opportunities for managers to retaliate against employees who are perceived as disloyal. Respondent failed to follow the intent of its own rules when it refused to give Petitioner a polygraph examination at her request and expense and when it failed to conduct an objective investigation leading up to its March 4, 2010 meeting with Petitioner. Superintendent Hughes failed to engage in policy-recommended techniques for effective questioning of the complaining inmates and did not evaluate the complaining witnesses for such things as impartiality and bias. Superintendent Hughes did not ask Petitioner why Petitioner thought the persons making the allegations would lie (in fact, Petitioner was not even given the names of two of the three complaining inmates, so she was not given an opportunity to explain why they may be likely to lie). Additionally, Superintendent Hughes did not put Petitioner at ease during the March 4, 2010 interview or stress that no conclusion had been reached, but rather told Petitioner that her demeanor indicated guilt. Further, Superintendent Hughes failed to document meetings or interviews she had with witnesses, relying instead, on the inmate's own handwritten statements, which were

prepared by the inmates in advance, in close proximity of time of each other, and none of which were witnessed by staff. Superintendent Hughes did not and could not prepare an investigative summary, as required by policy, because much of the above information was missing. Had Superintendent Hughes followed proper investigative procedures, she would have ensured the integrity of the disciplinary process and the March 4, 2010 meeting with Petitioner.

11. Further, Respondent failed to follow its own rules when it built upon an earlier “inactive” warning (from October 2008) to arrive at its decision to terminate Petitioner. Department policy specifically provides that, once a disciplinary action has been deemed inactive, it has no value and shall not be used as supporting documentation for other disciplinary action. (P. Ex. 1) Superintendent Hughes repeatedly violated this policy throughout the disciplinary procedure. Respondent’s failure to follow this established rule is evidence that improper considerations went into the decision to terminate.
12. Given the nature of the inmate allegations previously submitted to Petitioner (i.e. allegations that Petitioner had discussed issues of a sexual nature with inmates), as well as the current climate of prosecutions of public employees for engaging in inappropriate sexual conduct with inmates, it was not entirely surprising that Petitioner felt the need to consult with legal counsel before continuing to answer embarrassing inmate allegations. Where a state employee has a “reasonable belief” that his conduct was appropriate or necessary, it will ordinarily not constitute just cause for discipline. *Carroll*, 599 S.E.2d at 900-02
13. Petitioner never intended to violate any agency policy, she did not willfully violate the Department’s personal misconduct policy, and there is no evidence that Petitioner’s action adversely affected or could have adversely affected the mission or legitimate interests of the state.
14. In addition, the evidence demonstrates that Respondent failed to consider and credit substantial and appropriate mitigation evidence in Petitioner’s favor. Petitioner’s cooperation during the preceding months, in the midst of the inevitable stress imposed upon Petitioner in having to respond to numerous embarrassing and degrading allegations by inmates and staff (many of whom were of questionable character and motives) (Tr. pp. 46-52, 62-68, 93-96, 161-162, 176-193, P. Exs. 18, 37, 39, 43-44, 48, R. Ex. 7, 10-12); Petitioner’s willingness to take a polygraph or other such lie detector test; Petitioner’s truthfulness and candor in admitting that she did at one time use profanity within hearing distance of an inmate and that she did refer to Superintendent Hughes’ investigation as “half-assed;” the stresses of being the sole support of three young children and being reassigned to an all-male facility, in the midst of an ongoing and humiliating investigation, all mitigate in Petitioner’s favor.
15. Other employees at Swannanoa Correctional Center engaged in conduct which was much more serious than the conduct attributed to Petitioner and were only issued a written warning. Selective enforcement of agency policy should be considered under State Personnel policy. See N.C. State Personnel Manual, Section 7, page 11: The employer

“should examine a number of factors...[including]...The disciplinary actions received by other employees within the agency/work unit for comparable performance or behaviors.” The considerable disparate treatment in this case speaks against finding that Respondent had just cause to terminate Petitioner from employment. It would be unreasonable and unjust for Respondent to be able to strictly enforce rules prohibiting unacceptable personal conduct as against this Petitioner, under the evidence in this case, in view of Respondent’s history of inconsistency in enforcement at this Correctional Center.

16. The totality of the speech and conduct of Petitioner (i.e. her admission that she had used profanity within hearing distance of an inmate, as well as her conduct during the March 4, 2010 meeting), under the particular circumstances then existing, were not sufficient to warrant termination. The March 4, 2010 incident was an extremely limited and isolated event that was certainly foreseeable, given the offensive nature of the inmate allegations presented to Petitioner, Petitioner’s reassignment to an all-male facility, management’s sloppy investigative process and failure to identify two of the complaining witnesses to Petitioner, management’s refusal to allow Petitioner to take a lie detector test, management’s hostility towards Petitioner and apparent provocation of Petitioner during the meeting (wherein Superintendent Hughes made various unjustified remarks, such as accusing Petitioner of going out early on medical leave because she got “wind” of the investigation or telling Petitioner her defensive demeanor was evidence of guilt), and management’s refusal to show Petitioner in the written policy why she could not have a lawyer present during the March 4, 2010 meeting.
17. In light of the totality of the evidence—including, but not limited to: the ongoing and embarrassing inmate allegations against Petitioner; the refusal to allow Petitioner to take a lie detector test as she had requested; management’s failure to notify Petitioner of the identity of two of the three inmates who provided the complaints against her and which led to the investigation of Petitioner; management’s failure to follow its own rules regarding investigations and the use of inactive disciplinary actions as supporting documentation for the termination; the disparate treatment of employees for the same or similar misconduct; management’s hostility towards Petitioner during the March 4, 2010 meeting; management’s refusal to show Petitioner the policy which prohibited her from having legal counsel present during the meeting; the reasonableness of Petitioner’s request to see policy regarding her right to counsel in the midst of an embarrassing, ongoing, and possibly incriminating interrogation; Petitioner’s cooperation during the preceding months of investigation, Petitioner’s candor and honesty regarding her admission of having used profanity in front of inmates as well as her admission of referring to Superintendent Hughes’ investigation as being “half-assed;” and the stress Petitioner was under at the time of the March 4, 2010 meeting--it is concluded that there is no sufficient justifiable basis in law, fact, or reason, for the termination of Petitioner under these facts and circumstances.
18. Further, Respondent’s handling of this case, as well as Respondent’s choice of punishment (i.e. termination) which was outside the range of punishment imposed for similar acts of misconduct by other employees, compels the fact-finder to question whether Respondent’s motivations were retaliatory in nature. Based on a review of the

facts, including, but not limited to, Petitioner's involvement with the investigation of Sgt. Curtis R. and Assistant Superintendent Burress, it is concluded that Respondent took improper considerations into account in arriving at its decision to terminate.

19. Respondent's termination of Petitioner was neither just nor equitable and, therefore, was in violation of the letter and spirit of the State Personnel Act, Carroll, and its progeny.
20. The foregoing Findings of Fact and Conclusions of Law require Petitioner to be disciplined at a level less than termination, such as suspension for three (3) days without pay, in order to be consistent with Respondent's practices at the time Petitioner was discharged.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent has not carried its burden of proof that Petitioner's conduct rises to the level of "just cause" for termination. Rather, the undersigned determines that Respondent should discipline Petitioner at a level other than by termination, as it has done with other employees who have engaged in similar conduct, and recommends that Petitioner be suspended for three (3) days without pay. Accordingly, Respondent's termination of Petitioner from employment is vacated and Petitioner shall be afforded the following remedies:

1. Petitioner shall be reinstated to her former position, with all credit for State service for all purposes being retroactive to the date of dismissal.
2. Petitioner shall be awarded, from the date of dismissal until her reinstatement (minus the three day suspension), back pay and benefits, including sick and vacation leave, and with all bonuses and increases she would have been eligible for had she not been dismissed.
3. Petitioner is awarded reasonable attorney's fees and costs under the provisions of G.S. 150B-(b)(11).
4. Respondent should correct portions of the information in Petitioner's personnel file to contain only true and accurate information in compliance with N.C. Gen. Stat. §126-25, as stated herein.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision. N.C. Gen. Stat. §150-B-36(a).

In accordance with N.C.Gen. Stat. §150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency,

the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The agency that will make the final decision in this case is the North Carolina State Personnel Commission. State Personnel Commission procedures and time frames regarding appeal to the commission are in accordance with Appeal to Commission, section 0.0400 *et seq.* of Title 25, Chapter 1, Subchapter B of the North Carolina Administrative Code (25 NCAC 01B.0400 *et seq.*).

IT IS SO ORDERED.

This the 18th day of January, 2012.

Beecher R. Gray
Administrative Law Judge