STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE	11 OSP 10877

James F Bridges Petitioner vs. N. C. Department of Transportation Respondent	)))))))	**DECISION ALLOWING SUMMARY JUDGMENT FOR RESPONDENT**

This matter comes before the Honorable Donald W. Overby, Administrative Law Judge Presiding, for consideration of Respondent's Motion for summary Judgment filed with the Office of Administrative Hearings (OAH) on February 14, 2012, as well as Petitioner's Response thereto filed with OAH on July 12, 2012. Having considered the respective submissions of the parties and matters of record proper for consideration of this pending motion, this Tribunal concludes that there is no genuine issue of material fact and that, therefore, summary judgment is appropriate.

Petitioner does not deny that he came to his work station on Good Friday 2011, a work holiday, and that he used the Respondent-employer's color copier to make in excess of 3200 copies to produce a booklet honoring mothers for Mother's Day at his home church. As a result of making those copies, Petitioner was disciplined by receiving a demotion and reduction in pay, which is the subject of this contested case.

The case of *Warren v. N. Carolina Dept. of Crime Control & Pub. Safety, N. Carolina Highway Patrol*, 726 S.E.2d 920, (N.C. Ct. App. 2012), which often cites and attempts to clarify *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888, (2004), is instructive for disposition of this summary judgment motion. *Warren* states that "[w]hether conduct constitutes just cause for the disciplinary action taken is a question of law. . . ." *Warren*, at p. 923, citing *Carroll* at p. 666. The act of printing the booklet by Petitioner, i.e. the "conduct", is not in dispute; therefore this Tribunal must decide the question of law of whether or not the act is just cause for the discipline.

Carroll states in pertinent part:

> Nonetheless, the fundamental question in a case brought under N.C.G.S. § 126–35 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.
>
> "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. Thus, not *every* violation of law gives rise to "just cause" for employee discipline.

Carroll at 669, 599 S.E.2d at 900–01.

In *Warren*, the Court of Appeals looked at the language used and the authorities cited by the North Carolina Supreme Court in *Carroll* to conclude that a commensurate discipline approach applies in North Carolina. The Court of Appeals in *Warren* went on to conclude "that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. *Warren,* at p. 925. Therefore, this Court is instructed to consider the specific discipline imposed as well as the facts and circumstances of each case to determine whether the discipline imposed was "just."

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case." *Carroll,* at 669, 599 S.E.2d at 900.

Warren v. N. Carolina Dept. of Crime Control & Pub. Safety, N. Carolina Highway Patrol, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012)

As regards the first inquiry in this instant contested case, Petitioner concedes that he did indeed engage in the conduct the employer alleges. To answer the "second inquiry", Petitioner's conduct does indeed fall with one of the categories of unacceptable personal conduct provided by the Administrative Code.

Petitioner's contentions raised in his response to the Respondent's motion are more appropriately considered as to whether or not the punishment administered is appropriate for the act he acknowledges that he did; i.e. the third inquiry as articulated in *Warren* above.

Petitioner concedes that his production of the booklet does violate a written or known work rule, but questions his discipline when others have violated the rule without repercussion. He seems to equate an occasional copy of birthday wishes or congratulatory wishes to his printing of over 3200 color pages. He attempts to trivialize the printing by rationalizing that he brought a 500-page ream of paper to do the printing, yet produced over 3200 copies. Petitioner states that he intended to print no more than 50 copies of about 40pages each—roughly 200 pages—but through inadvertence it ran to over 3200 pages. Petitioner apparently sees no problem with the very high number in that this particular printer is routinely used to print large volumes of work related materials. Lastly, Petitioner attempts to justify his actions by the fact that he has paid restitution—a restorative act. He did not offer to pay for the printing prior to doing it. It was only after being confronted with having used the printer did he offer to make any payment. Petitioner's attempts at justification and rationalization are without merit. To his credit Petitioner has apparently been a twenty-plus year employee without any prior disciplinary actions.

In as much as the determination of whether Petitioner's conduct constitutes just cause for the disciplinary action taken is a question of law, this Tribunal is called upon to weigh the facts and circumstances of this particular case, assess whether or not the criteria as set forth in *Warren* has been met and weight the discipline assessed. It is concluded as a matter of law that there is not an issue of fact, that the criteria of *Warren* has been met and that the punishment is appropriate for the unacceptable personal conduct of Petitioner using the employer's color copier to print in excess of three thousand two hundred copies for his own personal use. Therefore, Respondent's Motion for Summary Judgment is **ALLOWED**.

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this Decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 30th day of July, 2012.

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Donald W. Overby
Administrative Law Judge