

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11OSP11499

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| <p>Derick A Proctor, Petitioner,</p> <p>v.</p> <p>North Carolina Department of Crime Control and Public Safety, State Capitol Police Division, Respondent.</p> | <p style="text-align: center;">DECISION</p> |
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This contested case was heard before Beecher R. Gray, Administrative Law Judge, on August 13-14, 2012, at the Office of Administrative Hearings in Raleigh, North Carolina. Petitioner's proposed decision was received in the Office of Administrative Hearings on November 5, 2012. Respondent's proposed decision was filed on November 20, 2012.

APPEARANCES

Petitioner: Robert O. Crawford, III, Esq.
CRAWFORD & CRAWFORD, LLP
6500 Creedmoor Road, Suite 104
Raleigh, NC 27613

Respondent: Tammera S. Hill, Esq.
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
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ISSUES

1. Whether Respondent had sufficient just cause under N.C. Gen. Stat. § 126-35 to terminate Petitioner's employment for unacceptable personal conduct.
2. Whether Respondent retaliated against Petitioner by terminating his employment as a result of his prior, successful mediation to remove inaccurate and misleading documents from his personnel file.

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. §§ 126-34.1 and 35
25 NCAC 1J.0600 *et seq.*

WITNESSES

- (1) Candace N. Proctor, Wife of Petitioner
- (2) David W. English, Corporal, Durham Police Department
- (3) Eric C. Peterson, Corporal, Durham Police Department
- (4) Lenora F. Mitchell, Deputy Chief, State Capitol Police
- (5) Kay Meyer, Program Director, Data Integration, CJLEADS
- (6) W. Scott Hunter, Chief, State Capitol Police
- (7) Derick A. Proctor, Petitioner

EXHIBITS

Petitioner Exhibits (“P. Exs.”) 1-8 were admitted into evidence. Petitioner Exhibit (“P. Ex.”) 9 was accepted as an offer of proof.

Respondent Exhibits (“R. Exs.”) 1-19 were admitted into evidence. Respondent Exhibit (“R. Ex.”) 20 was accepted as an offer of proof.

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

FINDINGS OF FACT

Stipulated Facts

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. In 2007, Petitioner, Derick A. Proctor, a 23-year veteran law enforcement officer, was employed as a Public Safety Officer I with the State Capitol Police.

3. On July 14, 2011, Petitioner and his estranged wife, Candace Proctor, had a disagreement outside of her apartment in Durham, NC.
4. The Durham Police Department was called to her apartment complex.
5. No criminal charges were filed by Candace or the Durham Police Department nor was any domestic violence order entered as a result of the events on July 14, 2011.
6. On July 15, 2011, Petitioner was placed on investigatory placement.
7. On July 28, 2011, Chief Scott Hunter conducted a pre-disciplinary conference with regard to the incident on July 14.
8. A second pre-disciplinary conference was conducted on August 2, 2011.
9. On August 4, 2011, Petitioner was terminated from his employment with N.C. State Capitol Police by Chief Scott Hunter for unacceptable personal conduct.
10. In a Final Agency Decision dated September 7, 2011, Secretary Reuben Young upheld the dismissal from the N.C. State Capitol Police.
11. The Department of Crime Control and Public Safety became the Department of Public Safety effective January 1, 2012.

Adjudicated Facts

12. Petitioner has a B.A. degree in criminal justice from Shaw University and one year of divinity school. He was employed by the City of Raleigh Police Department for approximately four years and the Shaw University campus police department for more than 12 years. He began employment with the State Capitol Police in 2007.
13. On February 25, 2011, Petitioner's wife of six years, Candace Proctor, moved out of their apartment in Raleigh and into an apartment in Durham. Candace also had separated from Petitioner for several weeks in April 2010. At no time during their relationship did Petitioner call Candace names or verbally or physically threaten her. Although Candace Proctor characterized Petitioner's treatment of her as verbal and emotional abuse in her written statement, she insisted at this hearing that she did not tell the Durham Police Officers that Petitioner was verbally or emotionally abusive to her that night.
14. At the time in question in this case, Petitioner and Candace had two daughters, Alana, age 3, and Anaya, age 6. After the couple separated and began living apart in 2011, they had an informal verbal joint custody and visitation agreement including weekdays and weekends. Petitioner and Candace Proctor spoke daily by telephone at the time of this incident. Prior to July 14, 2011, Candace Proctor had advised Petitioner that she did not want him to come to her apartment and had not given him the address to her apartment.

Petitioner obtained her address when he was called by a creditor about a furniture bill on which Candace Proctor had become delinquent.

15. On July 1, 2011, because of State budget cuts, Petitioner was re-assigned from night patrol duty to a static daytime building security post at the Department of Public Instruction on the State Government Campus. Candace had visited Petitioner at the building on occasion.
16. It was typical for Petitioner and Candace to communicate in person, by phone, or by text message many times every day, even after their separation.
17. On July 14, 2011, Petitioner called Candace about a past due payment for furniture that was her responsibility and for which he had been called by the creditor or collection agency. Petitioner advised Candace that the creditor had threatened to repossess the furniture. Candace Proctor stopped making payments on the furniture bill, which was in her name, because a statement she received from the seller was incorrect about the amount owed. Petitioner contributed money to her, and she had responsibility for making the payments on this furniture.
18. Around 7:00 p.m. on July 14, 2011, Petitioner came to Candace's apartment and knocked on the door. Candace previously had not informed Petitioner of her apartment number. Candace answered the door and agreed to talk further to Petitioner about the furniture bill. He was not angry or upset. Petitioner did not enter Candace's apartment.
19. Candace joined Petitioner in his car where they discussed the furniture bill for about 10-20 minutes.
20. Petitioner then asked to take the couple's daughters out for a while and Candace willingly agreed.
21. Petitioner took his daughters to McDonalds for ice cream and to WalMart to buy two electronic games.
22. While they were out, and about five minutes after leaving her residence, Petitioner called Candace and asked her about a man being in her apartment that his daughter had just mentioned to him. Petitioner was upset because at the time they were in joint marital counseling and they had no agreement that they could see other people. Candace indicated that she did not wish to discuss the matter with him on the phone and declined to answer additional phone calls from him. Petitioner stated to Candace that maybe they should have a written agreement. Otherwise, the couple did not discuss the dating matter again.
23. Upon Petitioner's return with the girls at about 10:00 p.m., a disagreement ensued between Petitioner and Candace with regard to whether their older daughter, Anaya, would spend the night with Petitioner. This disagreement occurred when Petitioner attempted to further discuss, in the older daughter's presence, the matter of the other man

being in Candace Proctor's apartment as reported to Petitioner by the older daughter. It was not unusual for the girls to spend the night with Petitioner. At the time of the disagreement, the younger daughter already was out of the car.

24. Candace wanted Petitioner to let Anaya out of his car and to leave the premises. Petitioner did not allow Anaya to get out of the car, holding onto her arm. Anaya became disturbed by the discord between her mom and dad and began to cry.
25. Candace's sister was present at the apartment. She called the Durham Police Department at 10:09 p.m. on her own volition and handed the phone to Candace who spoke with the dispatcher and described the situation and the parties involved.
26. Three Durham police officers were dispatched and arrived at the scene in the parking lot of Candace's apartment complex. Petitioner was holding the minor child, Anaya, in his arms when Officer David English of the Durham Police Department arrived.
27. The first officer to arrive, Officer English, approached Petitioner and Candace and asked what was going on. Petitioner explained to him that they were having a disagreement about Anaya spending the night with him. Candace Proctor expressed her desire that Petitioner let Anaya go into the apartment and that he leave the premises and not call her any more that night.
28. Officer English then spoke individually with Candace. She told him that she wanted Petitioner to turn over Anaya and to leave.
29. The second officer to arrive, Officer Stoaks, spoke individually with Petitioner. Petitioner agreed to return Anaya and to leave the premises. A third officer, Officer Lashanda Williams, arrived and also spoke to Petitioner.
30. At the request of Officer English, Candace wrote a statement concerning the events of that night. (R. Ex. 4) Officer English thereafter asked Candace other questions during the ensuing investigation.
31. Officer English testified that he talked to Petitioner who anticipated his questions and repeatedly cut him off or interrupted him. Officer English testified that he was frustrated by Petitioner's denial that he had done anything wrong or had any responsibility for upsetting his daughter. Officer English described Petitioner's behavior as rude and discourteous.
32. Officer English testified that Petitioner was "dead calm" in his demeanor, using no profanity or raising his voice.
33. Petitioner informed the officers that his duty weapon was under the seat of his car. He brought the weapon with him for self-protection while in Durham because he knows the city does not have a good reputation for safety. It was not unusual for him to have his duty weapon with him when he was off-duty.

34. Petitioner volunteered to the responding officers that he had a video recording device in his pocket, which was confiscated by Sgt. Cloninger of the Durham Police Department.
35. Petitioner also wrote a statement for the police as requested by Officer Stoaks. (R. Ex. 4)
36. Candace leaned against her car in the parking lot within sight and hearing distance of Petitioner.
37. Candace did not see or hear Petitioner being rude, dismissive, or disrespectful to the Durham police officers. Petitioner, as instructed, sat on the curb or ground the entire time.
38. Candace Proctor told the officers that Petitioner had made an excessive number of calls to her that day. Upon Officer English's request, Candace retrieved her cell phone and showed it to him. Petitioner's phone records showed approximately 35 phone calls from his phone to Candace Proctor's phones between the hours of 11:45 a.m. and 10:12 p.m. on July 14, 2011.
39. Approximately two hours after the officers were dispatched, Officer English's supervisors, Sgt. J.M. Cloninger, and the watch commander, Lt. Perkins, arrived on the scene.
40. Sgt. Cloninger told Petitioner not to speak and to sit on the ground or else Petitioner would be arrested for obstruction. Petitioner believed that the officers were trying to find an offense that they could charge him with. His only option was to sit and wait, be cooperative, and to provide an explanation, if and when he was given an opportunity to do so.
41. Sgt. Cloninger wanted to take Candace to the magistrate's office to swear out criminal charges against Petitioner. Candace did not agree to do so.
42. Candace declined to press criminal charges for harassing phone calls or for domestic violence because she did not believe there was harassment or domestic violence, only a disagreement, which satisfactorily had been resolved. She simply wanted Petitioner to leave the premises. She did not believe that Petitioner was calling to annoy, harass, or intimidate her. Candace Proctor did want the officers to inform Petitioner not to make excessive phone calls to her unless it was about the minor children.
43. Candace was not concerned that Petitioner had his duty weapon in his car that night. She did not fear that he intended to do her harm. Candace Proctor did inform the dispatcher that Petitioner was a law enforcement officer. Officer English testified that the presence of a firearm is more likely when a law enforcement officer is involved in a domestic dispute.
44. The police officers placed Petitioner under investigatory detention for approximately three hours. Had he asked to leave, he would not have been permitted to do so.

45. The responding officers looked closely at possible crimes for which they could arrest Petitioner, including trespass; domestic criminal trespass; harassing phone calls; or resisting, delaying, or obstructing a police officer. Officer English wanted to make sure no special favors were done for Petitioner because Petitioner was a law enforcement officer.
46. Upon request of Sgt. Cloninger, Petitioner handed over his video recording pen that he had voluntarily informed the officers that he had. The device thereafter was placed in his car and returned to Petitioner who testified that the recordings had been deleted.
47. Officer English and his supervisors concluded that there was no crime with which they could charge Petitioner.
48. The Durham police contacted the State Capitol Police duty officer on call, Sgt. Benjamin Franklin, while they were at the scene. Sgt. Franklin called Deputy Chief Lenora Mitchell who then called Chief Scott Hunter.
49. Sgt. Cloninger told Petitioner that he was not going to be charged but that he was going to confiscate Petitioner's duty weapon and that Petitioner "had no say in the matter." Petitioner gave Sgt. Cloninger his car keys. The weapon was confiscated and returned to Sgt. Franklin of the State Capitol Police.
50. The Durham police escorted Petitioner in his vehicle from the City of Durham to the Wake-Durham county line. Officer English never has seen such action taken, except in this instance.
51. Petitioner remained calm and obeyed commands throughout his detainment. Although he interrupted Office English early in his detention, he did not raise his voice, curse at the officers, or call them names. He was not combative or argumentative, and he obeyed the officers' instructions to sit on the curb or grassy area, to hand over his video pen, and to hand over car keys so that his weapon could be confiscated. Under the circumstances, Petitioner was not disrespectful, discourteous, or rude to the officers. No alcohol or drugs were involved.
52. Officer David English admitted that there were grey areas in this case and that it was not a clear case of domestic violence. He further admitted that interrupting an officer could be the basis for a resist-obstruct-delay charge but that it would be weak.
53. The following morning, on July 15, Officer E.C. Peterson, a corporal assigned to the Durham Police Department Domestic Violence Unit, reviewed the report of the responding officer.
54. Officer Peterson telephoned Candace to follow up with her. Candace asked questions about custody issues and domestic violence restraining orders. Officer Peterson explained how to get a DVO order. Candace was not interested in pursuing criminal charges and did not do so.

55. Officer Peterson asked Mrs. Proctor about how Petitioner found her apartment number. She did not know, but speculated that he must have gotten it through CJLEADS or some other cop source. Petitioner later told Candace that the furniture store creditor had given him her apartment number.
56. Upon the direction of his supervisors, Officer Peterson reported to the Office of the State Controller that Petitioner may have used the Criminal Justice Law Enforcement Automated Data Services (“CJLEADS”) to access data concerning Candace. (R. Ex. 4, pg. 7)
57. Candace called Officer Peterson back on July 27 to refute the assertion that she had told him that she believed Petitioner might have used some law enforcement tool to locate her address. Officer Peterson told her that the case was inactive.
58. Candace never changed her address on record with DMV.
59. On July 15, 2011, State Capitol Police Chief Scott Hunter placed Petitioner on paid Investigatory Placement upon becoming aware of the incident. (R. Ex. 2) He obtained and reviewed the DPD Incident Report and Officer English’s narrative report.
60. On July 15, 2011, Petitioner filed a written complaint with the Durham Police Department concerning his treatment. (P. Ex. 1)
61. On July 18, Petitioner gave Chief Hunter a written statement of the incident. (R. Ex. 3) Petitioner later provided Chief Hunter with a revised version with officers’ names included. (P. Ex. 2) Petitioner did not obtain the DPD Incident/Investigation Report until his internal grievance hearing. Petitioner did not see the handwritten statements until those were obtained in discovery in this contested case.
62. On July 19, Chief Hunter spoke to Sgt. Cloninger by telephone and got a synopsis of what happened on July 14-15. Chief Hunter made notes of his conversation with Sgt. Cloninger. (R. Ex. 6)
63. Chief Hunter did not know that Sgt. Cloninger had not arrived on the scene until approximately two hours after the officers were dispatched and that Sgt. Cloninger therefore did not have personal knowledge of Petitioner’s behavior during those two hours.
64. Several days after July 15, Petitioner informed Candace that he had been placed on Investigatory Placement. She thereafter provided a notarized statement dated July 27, 2011, because the details about Petitioner’s behavior on the night of the incident in Officer English’s narrative were not accurate. (R. Ex. 14, Bates pp. 11-13; P. Ex. 3)
65. According to Candace, she did not tell the Durham police officers that her husband was verbally and emotionally abusive or that she was afraid of Petitioner.

66. According to Candace, her July 27 statement is accurate. She was not and is not afraid of Petitioner. She obtained a domestic violence protective order against Petitioner in Wake County in 2010, which was dismissed by the presiding judge.
67. One or more of the Durham Police Officers have stated that believe that they could have charged Petitioner with Domestic Criminal Trespass on July 14, 2011, but did not do so.
68. Chief Scott Hunter assigned his deputy chief, Lenora Mitchell, to investigate the incident. Deputy Chief Mitchell has had a long career in law enforcement administration but was not trained as an investigator.
69. Chief Hunter told Deputy Chief Mitchell that Sgt. Cloninger had informed him that Petitioner's attitude was "indignant" and provided her with his notes from his telephone conversation with Sgt. Cloninger.
70. Deputy Chief Mitchell obtained the Durham Police Department Incident/Investigation Report. She did not interview Officer D.W. English who prepared the DPD Narrative Report. She did not contact Sgt. Cloninger or Lt. Perkins or any of the other any officers dispatched to the scene. She did not receive the handwritten statements of Petitioner or Candace obtained by the DPD at the scene. She did not receive the Case Supplemental Report from Officer Peterson.
71. Deputy Chief Mitchell asked Sgt. Franklin some clarifying questions. She understood that it was the decision of the DPD to confiscate Petitioner's duty weapon.
72. Petitioner was not prohibited from having his duty weapon with him when he was off-duty and he was lawfully in possession of it in Durham.
73. Deputy Chief Mitchell interviewed Petitioner on July 21 and received his written statement. (R. Ex. 3; P. Ex. 2) Petitioner told Deputy Chief Mitchell that he went to his wife's apartment to discuss a bill and to see his children. He admitted he was aware that Candace did not want him to come to her apartment. He handed over his cell phone and Deputy Chief Mitchell reviewed his call history on July 14-15. Petitioner said it was normal for him to call or text his wife many times per day. He conceded that the whole situation could have been avoided if he had let Anaya go upstairs rather than insisting that she spend the night with him. He did not indicate to Deputy Chief Mitchell that he physically had restrained his daughter, Anaya, from leaving his care or that he tried to further discuss the situation about another man in Candace Proctor's apartment while Anaya was present. He denied that he was rude or dismissive to the Durham police officers, testimony corroborated by Candace.
74. Deputy Chief Mitchell decided not to interview Candace, although she knew Candace was available. She did not believe that would be helpful to her investigation even though Candace was the only other witness to the incident other than Petitioner and the DPD officers. Deputy Chief Mitchell assumed Officer English's narrative report was accurate, factual, and sufficient, although disputed by Petitioner.

75. Chief Hunter was unsure whether he had provided Deputy Chief Mitchell with any of Candace's notarized statements to him that disputed the DPD narrative report.
76. In a report dated July 22, 2011, Deputy Chief Mitchell concluded that Petitioner had violated the State Capitol Police Rules of Conduct §2.08, specifically subsections (A)(1) Conformance to Laws and Rules, (B)(1) Unbecoming Conduct, and (D) Courtesy. (R. Ex. 7)
77. Deputy Chief Mitchell recommended that Petitioner be dismissed rather than suspended based on the totality of Petitioner's work history and the circumstances. She did not discuss her written recommendation with Chief Hunter.
78. By memo dated July 27, 2011, Petitioner was notified of a pre-disciplinary conference to be held the following day. (R. Ex. 8)
79. On July 28, 2011, Chief Scott Hunter conducted a pre-disciplinary conference with Petitioner regarding the incident on July 14-15.
80. Chief Hunter received and read the notarized statement signed by Candace concerning the incident. He did not consider the statement credible because he believed the statement written the night of the incident was the most credible and accurate information. (R. Ex. 14, Bates pp. 11-13; P. Ex. 3)
81. After the July 28 pre-disciplinary conference, and by letter dated July 29, 2011, Kay Meyer, CJLEADS Program Director, informed Chief Hunter that her office had received a complaint from Corporal Eric Peterson of the Durham Police Department. An audit report suggested Petitioner had potentially misused the CJLEADS system by accessing offender and DMV information for Candace Proctor on July 12. (R. Ex. 9) This was the first such report generated by CJLEADS as the system only had been operational on a state-wide basis for about six months.
82. By email dated July 29, 2011, after being contacted by Petitioner, Kay Meyer corrected her letter to Chief Hunter to state that Petitioner made the data inquiries on May 5, 2011, rather than July 12, 2011. (R. Ex. 10)
83. Kay Meyer provided to Chief Hunter an audit report for Petitioner's use of the system. (R. Ex. 11)
84. CJLEADS is a web-based system accessed via the internet that provides access to integrated law enforcement data to authorized criminal justice professionals in North Carolina. Access to the system is limited to authorized users who have gone through training and for authorized criminal justice purposes. Users have access to a guide. (R. Ex. 17) Although much of the information is public, the CJLEADS system itself is not a public information system.

85. Petitioner received his initial 2-3 hour in-class training on the CJLEADS system on March 29, 2011, along with other State Capitol Police officers. The system has many features and functionalities. CJLEADS is for authorized criminal justice purposes only. It is inappropriate to share information obtained through the database with family members, unless it is part of a criminal justice job function.
86. Corrective disciplinary action for use of the CJLEADS information system for other than authorized criminal justice purposes is left up to the individual agencies licensed to use the system. (R. Ex. 18)
87. After Petitioner worked with the business operations team for CJLEADS, he contacted Kay Meyer, expressing concern about why the CJLEADS staff were alleging that he had misused the system when, as he explained, he was just testing the system. Kay Meyer explained that such use was not allowed under the Access Use Policy. Petitioner initially told Kay Meyer that his wife was with him when he accessed the system but subsequently told her that his wife was on the phone with him at the time. Respondent considered Petitioner's use of the system in this fashion to be a violation of the CJLEADS policies, even though Petitioner and other officers were told by the instructor that they could practice on this new data system.
88. By memo dated August 1, 2011, Petitioner was notified of a second pre-disciplinary conference to be held the following day concerning the alleged misuse of CJLEADS data. (R. Ex. 12)
89. On August 2, 2011, Chief Hunter conducted a second pre-disciplinary conference with regard to allegations that Petitioner had improperly accessed the CJLEADS data system to acquire information about his wife on May 5, 2011.
90. Petitioner explained that on May 5, 2011, he accessed the CJLEADS offender and DMV information as part of his training and personal practice to familiarize himself with the system and not for any improper purpose. Petitioner was told in training that it was permissible to practice on the system using family members' names. He ran his name and his wife's name for purposes of practice with the system, as he believed was permitted. Petitioner informed Candace Proctor that a criminal charge matter in Smithfield still was showing up on her record.
91. A User Activity Audit Log was produced (in December 2011 in response to Petitioner's discovery request in this contested case) for all State Capitol Police officers who were trained on CJLEADS for the period March 29 – August 1, 2011. (P. Ex. 8)
92. The December 2011 audit report shows that many of the State Capitol Police officers who had training on or about March 29-30, 2011, subsequently ran the names of family members, friends, or other State Capitol Police officers. Two supervisors and one officer ran Petitioner's name on and after July 15 without direction to do so from Chief Hunter. (P. Ex. 8)

93. No other State Capitol Police officers were or have been counseled or disciplined for misuse of the CJLEADS system.
94. On August 4, 2011, Petitioner was terminated from his employment with N.C. State Capitol Police by Chief Scott Hunter for unacceptable personal conduct. The specific reasons cited by Chief Hunter were: (1) violation of the CJLEADS policy for access by accessing information on his estranged wife on May 5, 2011; (2) violation of State Capitol Police Rules of Conduct §2.08(B)(1) for unbecoming conduct; and (3) violation of State Capitol Police Rules of Conduct §2.08(A)(1) for violation of law. (R. Ex. 13)
95. The “Policy for Access to the CJLEADS Information System” states in pertinent part:

Information Protection Policy for CJLEADS

4. Information Security

- a. Officials, officers, employees, contractors, agents of a government agency or subdivision of such agency are granted access to the CJLEADS information system only for the performance of their official duties.*
- b. Use of access to the CJLEADS information system for any purpose outside the scope of those duties shall result in disciplinary action up to and including termination as determined by the AGENCY, and civil and/or criminal liability. Failure to ensure appropriate access and use of the CJLEADS information system may result in the AGENCY’S loss of access to CJLEADS.*

(R. Ex. 18)

96. State Capitol Police Rule of Conduct §2.08(B)(1) states as follows:

Employees shall conduct themselves at all times, on and off duty, in such a manner as to reflect most favorably upon the Division and in keeping with the high standards of professional law enforcement. Unbecoming conduct shall include any conduct that brings the Division into disrepute, reflects discredit upon any employee of the Division, impairs the operation and efficiency of the Division or of an employee, or violates any Division policy or directive.

(R. Ex. 1)

97. State Capitol Police Rule of Conduct §2.08(A)(1) states as follows:

Employees shall obey all laws of the United States, the State of North Carolina, and any local jurisdiction. A conviction or violation of any law

will be a violation against this directive. If the facts revealed in a thorough investigation indicate that an employee has committed acts that constitute violation of law, ordinance, or an infraction other than for a parking ordinance, the employee is deemed to have violated this section. A conviction in a court of law is not a requirement for an employee to be found in violation of this directive.

(R. Ex. 1)

98. Chief Hunter considered the range of discipline available to him and selected termination as being the most appropriate based upon the nature of the matter. It concerned Chief Hunter that Petitioner was involved in a situation with law enforcement in another jurisdiction and was discourteous and uncooperative. Chief Hunter did not separate the two issues (accessing CJLEADS and the incident on July 14-15) in deciding to dismiss Petitioner from employment. Chief Hunter was less concerned about the interactions between Petitioner and Candace except to the extent the same resulted in law enforcement becoming involved.
99. Chief Hunter was not concerned that the Durham police officers, who were white, may have treated Petitioner differently with undue scrutiny and harshness because he is black. Chief Hunter did not believe that the DPD, in not being able to charge Petitioner with a crime, knowingly and intentionally created a problem with his employment by seizing his weapon and escorting him to the county line. No witness could identify any statutory or regulatory authority for these two actions by the Durham Police Department.
100. The incident on July 14-15 was not publicized in the media. The only persons outside the State Capitol Police who knew about the incident were the involved Durham police officers (and Candace, her sister and children). Chief Hunter was embarrassed by the incident and believed it could or did bring his agency into disrepute. Notwithstanding the lack of publicity of this incident, Chief Hunter determined, to his own satisfaction, that Petitioner's conduct brought the agency into disrepute.
101. On August 4, 2011, Candace Proctor sent an email to the Department of Crime Control and Public Safety. (P. Ex. 4, Bates pp. 70-71) She did this on her own volition to correct misinformation about what had happened on the night of July 14-15.
102. Neither Chief Hunter nor any other representative of the State Capitol Police ever called Candace to inquire what had happened on July 14-15.
103. Chief Hunter had a long career with the State Highway Patrol and had been with the State Capitol Police since 2003, but he was not trained as an investigator.
104. On August 4, 2011, Candace Proctor also sent an email to the Durham police chief to explain what had happened on July 14-15 and to complain that it had not been handled appropriately by his officers. She stated that the incident should have been over in 30

minutes because Petitioner was willing to leave his daughter with her and go home. (P. Ex. 5, Bates pp. 72-73)

105. On August 16, 2011, Candace Proctor wrote another notarized statement to correct Officer's Peterson's report that she had complained that Petitioner improperly had used CJLEADS to obtain information about her. (P. Ex. 6, Bates pp. 74-75) She wrote in part:

This entire incident was blown out of proportion. As I stated to Chief Hunter, that if I say something one time, I am woman enough to repeat it and I will not stand for anyone throwing my name around to find ways to support their wrongdoing that goes for the Durham Police Department, Chief Hunter, or my husband Derick Proctor.

Now if anyone is interested in knowing the truth, this is the truth. This incident could have been resolved in 30 minutes and it lasted for over 3½ hours. Once Derick returned our children to me, he was free to leave. That was why I called for the Durham Police Department's assistance. Not to report a harassing phone call incident nor to report assistance for domestic violence!!!

106. Officer English noted what he considered red flags of domestic violence between Petitioner and Candace Proctor on July 14, 2011: (1) Petitioner's presence at the her apartment after being asked not to come there; (2) Officer English believed that Candace Proctor was exhibiting a fearful demeanor; (3) Petitioner had physical control of the minor child; (4) Officer English felt that Petitioner unnecessarily was interrupting his statements; and (5) Petitioner was in possession of a recording device. Officer English felt that Petitioner was using his training and experience in law enforcement to not break the law but rather to use it in such a way as to avoid committing a crime.
107. Petitioner exercised poor judgment in appearing at Candace Proctor's apartment on the night of July 14, 2011 after she had asked him to stay away.
108. Petitioner appealed his dismissal. (R. Ex. 14)
109. Following an internal grievance committee hearing, Secretary Reuben Young upheld Petitioner's dismissal from the N.C. State Capitol Police in a Final Agency Decision dated September 7, 2011, (R. Ex. 16) for the same reasons stated in Chief Hunter's termination memo dated August 4, 2011. (The reference in Secretary Young's Final Decision to Petitioner improperly accessing CJLEADS on July 12 is incorrect and should be May 5.)
110. Petitioner offered no substantial evidence on the issue raised by Petitioner in his petition, and upon which he bears the burden of proof, that Respondent retaliated against him for his prior successful mediation to remove inaccurate or misleading material from his personnel file.

CONCLUSIONS OF LAW

1. All parties properly are before the Office of Administrative Hearings; jurisdiction and venue are proper.
2. The Petition for a Contested Case Hearing timely was filed on September 21, 2011, making the provisions of N.C. Gen. Stat. § 150B-34 and 36 in effect at that time applicable to this case.
3. 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.
4. At the time of his dismissal, Petitioner was a Career State Employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the just cause provision of N.C. Gen. Stat. § 126-35.
5. Because Petitioner has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear his appeal.
6. Under N.C. Gen. Stat. § 126-35(d), in an appeal of a disciplinary action, the employer bears the burden of proving that “just cause” existed for the disciplinary action.
7. N.C. Gen. Stat. § 126-35(a) provides, in pertinent part, “No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” Although the statute does not define “just cause,” the words are to be accorded their ordinary meaning. *Amanini v. Dep’t of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining “just cause” as, among other things, good or adequate reason).
8. The North Carolina Administrative Code defines unacceptable personal conduct as, among other things, “the willful violation of known or written work rules” and “conduct unbecoming a state employee that is detrimental to state service.” 25 N.C. Admin. Code 1J.0614(8)(d) and (e) (2011).
9. “Just cause” does not carry a precise definition. Our courts have held that 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.” *N.C. Dep’t of Env’t and Natural Resources v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). Not every violation of law gives rise to “just cause” or employee discipline. *Id.*
10. The “rational nexus” approach applicable to off-duty criminal conduct is not applicable to off-duty non-criminal conduct. *Warren v. N.C. Dep’t of Crime Control and Public Safety*, ___ N.C. App. ___, ___, 726 S.E.2d 920, 925 (2012). Accordingly, then:

The proper analytical approach is to first determine whether the employee engaged in 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." *Id.*

Violation of CJLEADS Policy for Access

11. Based on the totality of the evidence presented at the contested case hearing and having weighed the credibility of witnesses who testified, Petitioner's accessing CJLEADS offender and DMV information on May 5, 2011, for his then-estranged wife Candace Proctor was not a willful violation of known or written work rules, to wit, the "Policy for Access to the CJLEADS Information System" and thus does not constitute unacceptable personal conduct.
12. Based on the totality of the evidence presented at the contested case hearing and having weighed the credibility of witnesses who testified, Petitioner reasonably believed, based upon his CJLEADS training class, that it was permissible to access such information for purposes of personal practice and to further familiarize himself with the system. Even though Petitioner disclosed information to his wife, this information was public information. The disclosure of information was not the stated basis for his termination. Petitioner did not access the information to discover his wife's new residence address.
13. Even if Petitioner's conduct in accessing CJLEADS offender and DMV information on May 5, 2011, for his then-estranged wife Candace Proctor constituted unacceptable personal conduct, it does not constitute misconduct amounting to just cause for the termination of his employment based upon the totality of the circumstances. Other State Capitol Police officers accessed the system for purposes other than official duties and have not been terminated or disciplined.

Violation of SCP Rule of Conduct §2.08(B)(1) Unbecoming Conduct and Job Performance

14. Based on the totality of the evidence presented at the contested case hearing and having weighed the credibility of the witnesses who testified, Petitioner's off-duty non-criminal conduct on July 14-15, 2011, during his three hour investigatory detention by the Durham Police Department, was not "rude, dismissive, and uncooperative" as alleged by Respondent. Although Petitioner demonstrated questionable personal judgment in going to his estranged wife's apartment and engaging in a disagreement over whether his daughter should spend the night with him, once the Durham police officers arrived on the scene he was calm and obeyed police commands. Petitioner obeyed all the instructions

of the investigating officers. The officers admittedly could find no crime with which to charge Petitioner. The officers' conduct in confiscating Petitioner's duty weapon and escorting him to the county line was unnecessary, excessive, and without legal justification or authority. The evidence does not show that Petitioner posed a threat to his wife, himself, or the public.

15. Based on the totality of the evidence presented at the contested case hearing and having weighed the credibility of the witnesses who testified, Petitioner's off-duty non-criminal conduct on July 14-15, 2011, does not fall within the category of "the willful violation of known or written work rules" to wit, State Capitol Police Rule of Conduct §2.08(B)(1) which prohibits "unbecoming conduct" either on or off-duty.
16. Based on the totality of the evidence presented at the contested case hearing and having weighed the credibility of the witnesses who testified, Petitioner's off-duty non-criminal conduct on July 14-15, 2011, does not fall within the category of "conduct unbecoming a state employee that is detrimental to state service." A "rational nexus" does not exist between Petitioner's off-duty conduct and the potential impact on his ability to perform his duties for Respondent.
17. Even if Petitioner's conduct on July 14-15, 2011, during his three hour investigatory detention by the Durham Police Department constituted unacceptable personal conduct, it would not constitute misconduct amounting to just cause for the termination of his employment based upon the totality of the circumstances.

Violation of SCP Rule of Conduct §2.08(A)(1)
Conformance to Laws and Rules

18. Based on the totality of the evidence presented at the contested case hearing and having weighed the credibility of the witnesses who testified, Petitioner's off-duty non-criminal conduct on July 14-15, 2011, before or during the three hour investigatory detention by the Durham Police Department, does not reveal that he committed any acts that constitute a violation of law as alleged by Respondent. Although Petitioner demonstrated questionable personal judgment in going to his estranged wife's apartment and knocking on the door, repeatedly telephoning her, and engaging in a disagreement over whether his daughter should spend the night with him, Respondent has not proven that any criminal offense was committed.
19. Based on the totality of the evidence presented at the contested case hearing and having weighed the credibility of the witnesses who testified, Petitioner's off-duty non-criminal conduct on July 14-15, 2011, does not fall within the category of "the willful violation of known or written work rules" to wit, State Capitol Police Rule of Conduct §2.08(A)(1) which requires conformance to law both on and off-duty.
20. The investigation conducted by Deputy Chief Lenora Mitchell and/or Chief Scott Hunter was not thorough as required by State Capitol Police Rule of Conduct §2.08(A)(1). Neither Mitchell nor Hunter interviewed Officer English, the reporting officer, or the

other officers on the scene. Neither Mitchell nor Hunter interviewed Candace. Chief Hunter did not give adequate credit to any of Candace's subsequent written statements that disputed Officer English's narrative report. Chief Hunter did speak to Sgt. Cloninger by phone, but did not know that Sgt. Cloninger was not present for at least the first two hours of the investigatory detention.

21. Even if Petitioner's conduct on July 14-15, 2011, before or during the three hour investigatory detention by the Durham Police Department constituted unacceptable personal conduct, it would not constitute misconduct amounting to just cause for the termination of his employment based upon the totality of the circumstances.
22. Respondent has not met its burden of proof and has not shown that it had just cause to terminate Petitioner from his employment with the State Capitol Police.
23. Petitioner has not met his burden of proof and has not shown that Respondent terminated his employment in retaliation for his prior, successful mediation to have inaccurate and misleading material removed from his personnel file.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the termination of Petitioner's employment for unacceptable personal conduct is not supported by a preponderance of the evidence constituting just cause. In view of insufficient evidence constituting just cause, Respondent's action in dismissing Petitioner for unacceptable personal conduct is REVERSED.

Petitioner is entitled to reinstatement with an award of back pay from the date of his termination until the date of his reinstatement, together with all benefits to which he would have become entitled but for his termination. Petitioner is entitled to an award of reasonable attorney's fees and costs. Petitioner has not shown by a preponderance of the evidence that Respondent terminated his employment in retaliation for his prior, successful mediation to have inaccurate and misleading material removed from his personnel file.

ORDER

It hereby is ordered that the agency serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b) (2011).

NOTICE

Before the agency makes its FINAL DECISION, it is required by N.C. Gen. Stat. § 150B-36(a) (2011) 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.

The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

The agency is required by N.C. Gen. Stat. § 150B-36(b) (2011) to serve a copy of the Final Decision to all parties and to furnish a copy to the parties' attorneys of record.

This the 6th day of May, 2013.

Beecher R. Gray
Administrative Law Judge

