STATE OF NORTH CAROLINA	**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**13 OSP 08950**

VAN BUCHANAN, Petitioner,	)	
v.	)	**FINAL DECISION**
NC DEPARTMENT OF PUBLIC SAFETY, Respondent.	)	

This matter was heard before the Honorable Donald W. Overby, Administrative Law Judge, on September 11, 2013 at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

Petitioner: Michael C. Byrne
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Respondent: Yvonne Ricci
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WITNESSES

The Respondent, North Carolina Department of Public Safety (hereinafter "Respondent" or "NCDPS") presented testimony from the following seven witnesses: Petitioner, Van Buchanan; Michael Lamonds, a Correctional Training Instructor II for the Office of Staff Development and Training ("OSDT") for NCDPS; Robert Carver, a Chief Probation/Parole Officer ("CPPO") in the Division of Community Corrections ("DCC"), NCDPS; Michael Warren, a retired Probation/Parole Officer ("PPO") for NCDPS, DCC; Blake Walker, a PPO for NCDPS, DCC; Hanna Rowland, the Special Operations Administrator for NCDPS, DCC; and Diane Isaacs, the Division Administrator for Division 2 for NCDPS, DCC.

Petitioner Van Buchanan testified during Respondent's case in chief. The Petitioner did not present any other witnesses.

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1 and 2 were admitted into evidence. Respondent's exhibits ("R. Exs.") 1, 2, 4 - 22 were admitted into evidence. Respondent's exhibits 12, 14 – 18 were admitted containing hearsay, which was subject to corroboration, and subject to the appropriate weight to be given to the hearsay evidence if corroborated as well as the other evidence contained within those exhibits.

ISSUE

Whether Respondent had just cause to demote Petitioner for unacceptable personal conduct for employing a "shock knife" while teaching a training course at Piedmont Community College.

PRELIMINARY MATTERS

1. Petitioner moved to exclude witnesses from the hearing room, which was allowed by the Court.

2. Petitioner moved to exclude from evidence all evidence supporting any alleged ground for dismissal was not cited in the demotion letter given to Petitioner as required by law, specifically N.C.G.S. 126-35(a). The Court took the motion under advisement to rule on such issues as appropriate during the course of the hearing.

3. Petitioner stipulated at the outset of the hearing that he was offered the required internal procedural protections relating to the disciplinary action challenged, that he was given a pre-disciplinary conference, and that he properly received a demotion letter.

4. Petitioner also stipulated that he was afforded, and took advantage of, all the levels of the internal grievance procedure and that the Respondent, in that procedure, upheld its decision to demote Petitioner.

5. Petitioner stipulated that he did, as alleged by Respondent, employ a so-called "shock knife" or shock training knife, the property of Piedmont Community College, which was at that facility when Petitioner was conducting a training course there.

6. The Court excluded from evidence a written warning for "Unsatisfactory Job Performance" issued to Petitioner by Respondent on June 22, 2012. This written warning was not cited in the demotion letter as reason for demoting Petitioner.

BURDEN OF PROOF

The burden of proof is on the Respondent to show by the greater weight of the evidence that it had just cause to demote Petitioner for disciplinary reasons for unacceptable personal conduct.

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 makes the following Findings of Fact. In making the Findings of Fact, the Undersigned 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.

BASED UPON the foregoing and upon greater weight of the evidence in the complete record, the Undersigned makes the following:

FINDINGS OF FACT

1. The parties are properly before the Office of Administrative Hearings on a Petition for contested case hearing pursuant to Chapter 126 of the General Statutes, and the Office of Administrative Hearings has jurisdiction over both the parties and the subject matter as such.

2. Petitioner Van Buchanan is a career status permanent position employee of the Respondent North Carolina Department of Public Safety. As of the date of hearing, Petitioner had twenty years of service. Petitioner began his duties with Respondent as a Correctional Sergeant. Over the course of his service Petitioner was promoted to acting sergeant and then to lead correctional officer. Petitioner was subsequently promoted to Intensive Surveillance Officer and to Correctional Training Instructor in 2007. Petitioner performed his duties as a Correctional Training Instructor for approximately five years. This was the position Petitioner held at the time of his demotion. (T. p. 53-54)

3. Petitioner was also certified in other areas of training including Basic Law Enforcement General Instructor Training, NCPDS Firearms, NCDPS Control, Restraints, and Defensive Techniques, and Sheriff's Standards Commissioned Detention Officers certification, among others. (T. p. 62)

4. Petitioner was demoted to a Judicial Service Coordinator effective October 9, 2012, for unacceptable personal conduct. (T. p. 7; R. Ex. 8) Prior to Petitioner's demotion, Respondent properly afforded Petitioner a pre-disciplinary letter and conference. (T. p. 7; R. Exs. 4 and 5)

5. Diane Isaacs, currently the Division Administrator for Division Two for NCDPS, DCC, was Deputy Director of NCDPS, DCC at the time the decision was made to recommend discipline for the Petitioner. Ms. Isaacs recalls getting a report from then Division Two Administrator Kim Williams that the Petitioner had used a "shock knife" in training on January 30, 2012. After consulting with then NCDPS, DCC Director Guice, an internal investigation was initiated. (T. pp. 273 - 274)

6. Petitioner's basic duties as a Correctional Training Instructor were scheduling, documenting, and conducting in-service training, including assisting with lesson plans and all aspects of in-service training. (T. p. 17.) Petitioner does not train anyone in his demoted position. (T. p. 63)

7. Petitioner generally trained probation and parole officers and other community corrections personnel. These persons were employees who had already completed basic training and were actively working in the field. T. 61. Petitioner also provided certified in-service training for probation, parole and community corrections personnel, who likewise were generally experienced personnel who had been working with offenders for many years. (T. pp. 61-62)

8. As a Correctional Training Instructor, Petitioner was also called upon to assist with instructor level training. In-service training is for NCDPS employees that are attempting to get re-certified whereas instructor training is for NCDPS employees who are or are training to become instructors. The intensity level of instruction is different for each type of training. (T. p. 18.)

9. Petitioner began teaching Control, Restraints and Defensive Techniques ("CRDT") in spring 2006. Respondent's CRDT in-service training has a lesson plan that is taught in two sections one being for basic functions and moves and a second for advanced skill training in blunt-edged weapon defense. (T. pp. 21 - 22.)

10. The incident that led to Petitioner's demotion occurred on January 30, 2012 when Petitioner was conducting a training course in "Blunt-Edged Weapons Defense, Phase III." (T. 63, R. Ex. 11). Respondent's 11 is the "lesson plan" for the training course Petitioner was conducting, along with other instructors, on the relevant date. (T. pp. 63-64) This was at least the second time the trainees in the class at issue had gone through this training. (T. 26)

11. The equipment listed on the lesson plan for the Blunt Edged Weapons Defense course is listed in the lesson plan as, "trauma bags, gymnastic mats, training knives, pen, pencil, and paper." (Emphasis added) (T. 64, R. Ex. 11)

12. The lesson plan, as noted, refers only to "training knives". It does not define or specify at all that a particular kind of knife is to be used in training, whether it be rubber, plastic, or shock knives. (T. p. 64)

13. Respondent owns equipment to be used for training and at times the instructors take that equipment with them for the training. At other times the facility where the training is to be conducted will provide the equipment. It is not unusual for the facility to provide the equipment to be used in training. (T. p. 65)

14. Petitioner did not bring training equipment to the training site at Piedmont Community College. The training equipment to be used by Petitioner and his fellow trainers on the day in question was provided by the college. (T. pp. 64-65)

15. The "training knives" provided to Petitioner on January 30, 2012, were training knives made of rubber, knives made of plastic, and a "shock knife". (T. p. 66) The "shock knife"

is a blunt-edged knife, specifically designed for training in blunt-edged weapons defense. (T. p. 127) It provides a mild electrical shock or biofeedback when the blade touches the skin and has settings for adjusting the intensity of the shock. (T. p. 30) Respondent only owns one "shock knife."

16. Petitioner, along with his fellow trainers, was to provide two-four hour blocks of instruction. The instructors had completed their course of instruction in accord with the lesson plan but had approximately one hour left in hour to complete the full eight hour training. Petitioner understood that he was expected to use the full eight hours designated for the course for training purposes. (T. p. 32)

17. Petitioner and instructor S.O. Newcombe introduced the shock knife to the class and demonstrated it. The shock knife Petitioner used belonged to Piedmont Community College and was about eight to ten inches long. The trainees were then told to engage in one on one "round-robin" training using the shock knife. The training with the shock knife, unlike the rubber and plastic knives used earlier in the class, could not be conducted other than one on one, as only one shock knife was available. (T. pp. 30, 33, 40)

18. Once the students were in "round-robin" instead of in groups, the level of anxiety increased. Petitioner had to separate two students, Roy Williams and Mike Warren, when Williams became too aggressive with the shock knife. (T. pp. 35-36)

19. Petitioner admits that he did not ask his supervisor or anyone in higher command if he could introduce the "shock knife" during the January 30, 2012 in-service training. (T. pp. 28-29, 79.) There is no evidence of a rule or a policy that required Petitioner to seek permission for using the "shock knife."

20. For all previous times the Petitioner has instructed in-service training, the training knives that were available at the training locations were either a hard plastic knife or a rubber-edged knife. Petitioner had not previously used a shock knife while instructing in-service training.

21. Petitioner was introduced to the use of a shock knife while assisting Mike Lamonds and Mose Cannon with an instructor level class, not in-service training. (T. p. 26 - 27, 30.)

22. The Office of Staff Development and Training ("OSDT") for NCDPS is the primary training provider, holds the curriculum lesson plans, and developed the lesson plans and training for staff of the Respondent's Division of Community Correction and Division of Prisons. OSDT staff is responsible for consulting with Respondent's management and administration to obtain approval for lesson plans and ensures that Respondent's training staff is following the established lesson plans. (T. pp. 95 - 96.)

23. OSDT created the CRDT program with two levels of training. One is the instructor level training program in which the participants must undergo a medical evaluation prior to the training. The second is the in-service training program in which the participants are

not required to undergo a medical evaluation prior to this training. OSDT staff are responsible for the training and certification of all the instructors.

24. Michael Lamonds is a Correctional Training Instructor II for OSDT. He has been employed in numerous positions with OSDT since March 1, 2005. Mr. Lamonds was employed as OSDT's CRDT Coordinator from about July 1, 2006 until about July 1, 2007, and in that role he was responsible for coordinating the CRDT instructor training program. (T. pp. 96 - 98, 156.)

25. Mr. Lamonds current position with OSDT is with E-Learning and Technology and it is not clear what his current job duties are. It is clear from his testimony that the function of OSDT is to train the instructors who are then certified by a training and standards commission. (T. pp. 95 - 97)

26. To Mr. Lamonds' knowledge, the Respondent owns only one shock knife. Mr. Lamonds himself purchased the shock knife for OSDT in 2006 while he was the CRDT Coordinator. According to Mr. Lamonds, in order to use and instruct others on the "shock knife", he had to complete an instructor certification provided for by the manufacturer of the "shock knife." To his knowledge he is the only person employed by NCDPS that has that certification to use the "shock knife." (T. pp. 115, 138, 154.)

27. The "certification" was offered by the manufacturer, not by the Respondent. The "certification" consisted of one hour of training, by completing a power point. There is no evidence that Respondent required either Mr. Lamonds or any other instructor to be "certified" to use the shock knife. (T. pp. 138 – 139)

28. To Mr. Lamonds's knowledge, the "shock knife" purchased by OSDT has been utilized in the six CRDT instructor schools and utilized in four cell extraction instructor training schools for which he was the coordinator from July 2006 until July 2007. To his knowledge it has not been approved for use in CRDT in-service training and has not been provided to instructors who instruct in-service training courses by OSDT. (T. pp. 115 -116, 121.) The use of the shock knife for training does not fall within the purview of his current duties. (T. p. 152)

29. Mr. Lamonds knowledge is limited to his experience in training instructors. While he testified about the lesson plan used for the in-service training at issue herein (as opposed to instructor training), the is no evidence how he is familiar with those lesson plans, or what degree if any he had in the formulation of those lesson plans. He does say that he edited the lesson plan at some point, but the plan itself shows who prepared it, who approved it, and who annually reviewed it—none of whom was Mr. Lamonds.

30. In offering his opinion about those lesson plans, Mr. Lamonds contended that "training knives" were the hard plastic or rubber knives only. Mr. Lamonds acknowledged that there is no rule, no regulation, no lesson plan or anything in writing anywhere with the Respondent which defined "training knives." (T. pp. 103–105.)

31. Mr. Lamonds also admits that his answers were applicable only to the time he was the training coordinator, a position which he has not held since 2007. He acknowledges that he has not been privy to what has happened with the training since he left the position as

coordinator, including if, when or how many times the Respondent's shock knife may have been used in training.

32. Mr. Lamonds was not Petitioner's instructor for the instructor level training and certification.

33. Mr. Lamonds stated that the "round robin" exercise described by the Petitioner is an exercise that he utilized as the CRDT Coordinator in the CRDT instructor level training course, and he introduced the "shock knife" during this instructor level training. Mr. Lamonds contends that the CRDT in-service lesson plan does not provide for instruction that includes the "round robin" exercise; however, the lesson plan likewise does not exclude that type of instruction. The lesson plan is silent on that subject.

34. Mr. Lamonds confirmed that the lesson plan specifies only "training knives" and that the lesson plan does not prohibit, as written, the use of shock knives. T. 126, 131. He identified all three knives – rubber, plastic, and shock – as constituting "training knives" and that all three serve exactly the same purpose. (T. pp. 126 – 127).

35. Mr. Lamonds also expressed that he would have liked to use shock knives in in-service training as well as the instructor training but the cost of the shock knives was prohibitive.

36. Mr. Lamonds described Petitioner as "a very good subject matter expert and a good instructor in the classroom". (T. p. 139)

37. Mr. Lamonds confirmed that per policy there would be instructors in addition to Petitioner present on the date in question given there were 15 to 16 trainees and the proper ratio of trainees to instructors is eight to one. (T. p. 141)

38. Mr. Lamonds acknowledged that if an instructor was using what would be recognized as an unauthorized or dangerous or unapproved training technique, he would have expected other instructors to intervene. (T. p. 142.) There is no evidence that the other DPS instructors intervened to stop usage of the shock knife. There was testimony that an instructor from the community college left the area at the time the shock knife was being used There is no evidence as to why the instructor left the area nor any evidence that this instructor intervened in any regard. Neither the community college instructor nor any other instructor present at the training, other than Petitioner himself, appeared to testify at the hearing.

39. Mr. Lamonds agrees that Respondent's Exhibit No. 11 is a copy of the lesson plan that would have been taught in the January 30, 2012, CRDT class in which the Petitioner was an instructor. Mr. Lamonds stated that the lesson plans for this CRDT in-service training course described training knives and that in his opinion based on his knowledge of OSDT policies and as a former CRDT Coordinator that the OSDT accepted and approved training knives for in-service training is either a rubberized or a rigid training knife.

40. His testimony in that regard is not supported by the credible evidence. There is no evidence of a "policy" at OSDT or the Respondent as to what constituted "accepted" or "approved" knives for training. There is no evidence of the course of conduct of any who have

held the coordinator position since Lamonds left in July 2007, nor how such coordinator has conducted classes and training. There is no evidence of how or if the shock knife has been used at all since Mr. Lamonds left. There is no evidence of how other instructors such as Petitioner have been instructed on using shock knives. Other than uncorroborated statements and speculation there is no evidence of a policy or written rule or even consistently communicated unwritten rule about the use of the shock knives.

41. Since the plain words of the lesson plan specified only "training knives," Petitioner interpreted that to mean he was not restricted to the use only of rubber or plastic knives and that the shock knife was not prohibited. Petitioner's recollection was that he was told orally in 2006 during a training school with Mr. Lamonds that the shock knife was an approved training tool for any training classes he conducted. (T. pp. 39, 41)

42. Mr. Lamonds contends that he explained to the Petitioner during a course of instructor level training at Vance Granville Community College that a "shock knife" is only authorized for use in CRDT instructor training and cell extraction instructor training. (T. pp. 109-112, 121; R. Ex. 11.) Mr. Lamonds did not recall a conversation with the Petitioner in which he told him that a "shock knife" could be used in CRDT in-service training. (T. pp. 101 - 102, 111, 113.)

43. Petitioner had used shock knives in other DPS training activities in the past. (T. pp. 65-66) All of the lesson plans for both instructor classes and for in-service training describes the knives to be used for training as "training knives," the same as Respondent's Exhibit 11. Mr. Lamonds agreed that the lesson plans for the training in which the shock knife was used was written the same way as the lesson plan being taught by Petitioner on the day in question with respect to training knives. (T. pp. 66, 133)

44. Petitioner contends that he did not order the class to use the shock knife. Petitioner stated that no trainee stated they were frightened of the shock knife and that the trainees seemed "excited" about using it. (T. pp. 71-72)

45. The evidence clearly shows that at least some members of the class were very apprehensive about using the shock knife but felt that it was part of their required training and their certification would be jeopardized if they did not go through with the training. The class members did not think participating in that part of the training was optional. They were not instructed that it was an optional exercise.

46. PPO Jessica Lynch, PPO James Lynch, and PPO Taylor Pratt participated in Petitioner's class and each believed that they had to use the "shock knife" based on the instructions of the Petitioner in order to keep their certification; i.e., participation was not optional. (T. pp. 229 - 238; R. Exs. 16 - 18.)

47. In response to questions from the Court, Petitioner stated that the "round robin" process was of persons volunteering to use the shock knife. Petitioner stated that no one objected to using the shock knife. (T. pp. 73, 90) It is particularly found as fact that participants did not "volunteer" to participate in the round robin, but instead in the round robin format each class member had to participate in front of the rest of the group.

48. Petitioner did inquire of the class at the conclusion of the training if anyone had been injured and no one responded that they were in fact injured. No one reported any injuries from using the shock knife, nor did anyone raise a question about it including the other instructors. (T. p. 73)

49. Robert Carver, a CPPO in NCDPS, DCC, was a participant in the CRDT in-service training on January 30, 2012 at Piedmont Community College in which the Petitioner was a lead instructor. Mr. Carver had attended approximately six to eight CRDT in-service training sessions prior to January 30, 2012 in which the Petitioner was an instructor, and the Petitioner had not previously used a "shock knife" during the training. (T. pp. 166 - 169.)

50. Mr. Carver stated that the Petitioner had the class participate in a round robin session in which the class used a shock knife to demonstrate on each other the six points of attack. The Petitioner decided who would demonstrate the attacks during this session. Mr. Carver felt that the level of aggression changed once the shock knife was introduced by the Petitioner for use of the class. Mr. Carver felt that the class was required to use the shock knife during the round robin session. (T. p. 170 - 178, 186; R. Ex. 12.)

51. Mr. Carver was present at the training as a trainee and he was concerned about being shocked by the knife and, additionally, was concerned for his subordinates. Carver did not, however, report the incident to anyone as a perceived policy violation. (T. p. 179)

52. Mr. Carver confirmed that at the end of the class Petitioner asked if everyone was OK. Carver likewise indicated in his written statement that Petitioner "asked … if everyone was OK and all staff either verbally said yes or did not answer. No one said, No." (T. pp. 179-180)

53. Mr. Carver in his written statement erroneously described the shock knife as a "Taser knife". (T. p. 185) Mr. Carver testified that he did not ask to be excused from the shock knife drill, but he did not know he had that option. He likewise did not express any concerns to Petitioner about the use of the shock knife at the lesson. (T. p. 181) Mr. Carver acknowledged that trainees were instructed by Petitioner that if they had questions about something that is being done or conducted during the training, that they should ask the instructors. (T. pp. 188-189) Neither Mr. Carver nor other witnesses asked any questions or raised concerns at the training about the propriety or safety of the usage of the shock knife. (T. pp. 178-182)

54. Michael Warren, a retired PPO for Respondent, was a participant in the CRDT in-service training on January 30, 2012 in which the Petitioner was the lead instructor. Mr. Warren was sixty-one years old when he participated in this class. Mr. Warren had attended one in-service class prior to January 30, 2012 in which the Petitioner was an instructor, and the Petitioner had not previously used a shock knife during the training. (T. pp. 192 - 193.)

55. Mr. Warren stated that the Petitioner instructed the class on how to use the "shock knife." Mr. Warren was shocked by the knife during the class. After the class Mr. Warren observed a bruise which he believed was caused by the point of the shock knife sticking into his chest, not by the shock from the knife: "I don't think the shock would make you bruised … I don't know whether it would or not." (T. p. 212)

56. Although Mr. Warren had a mark or a bruise from the use of the knife, he stated that "it was nothing that required medical treatment … I was fine." Warren did not report any injuries at the close of the class nor did he make any complaint about the use of the shock knife for the duration of his remaining employment with DPS. (T. pp. 196-197, 211)

57. Following his retirement from NCDPS, in July 2012, Mr. Warren responded to a letter from Assistant Division Administrator Carla Bass. Mr. Warren advised Ms. Bass that he was ordered to use a shock knife by the Petitioner during CRDT training in January 2012. He wrote in part, "In my opinion I did not feel it was safe. . . . . I obtained a minor injury to my chest area, and Roy Williams to best of my knowledge had a minor injury to his neck, due to contact from the shock knife." (T. p. 194 - 199; R. Ex. 13.)

58. On examination Mr. Warren clarified his statement, that he "did not raise that [the shock knife] in the way of a complaint." (T. p. 200) Mr. Warren stated further that "if I hadn't gotten the letter [from Bass] I may have never said anything." (T. p. 217)

59. His report to Ms. Bass was six months after the date of the incident. In those intervening months no participants in the training class had complained to anyone in management in any regard about any impropriety within that training session.

60. As with others, Mr. Warren believed that he had to use the shock knife based on the instructions of the Petitioner in order to keep his certification. After Mr. Warren had participated in the part of the training session that involved the use of the shock knife he was a bit nervous and tense. Mr. Warren recalled sweating profusely and leaving the training room to go to the rest room so he could wash his face with cold water before returning to the training session. (T. p. 195 - 197.)

61. Mr. Warren did not report during the class that he was frightened. He did not ask to be excused from training with the shock knife. Warren stated that he did not think he could ask to be excused; however, he testified that he left the training area without asking permission from Petitioner and Petitioner "didn't bother me" and said nothing to him. (T. pp. 214-215).

62. Mr. Warren confirmed that his training partner became aggressive with the shock knife and Petitioner stepped in and separated them; however, Mr. Warren stated that the amount of intensity or aggression was the same during the training with the shock knife and the rubber knife. (T. pp. 196, 222)

63. Mr. Warren felt "intimidated" by Petitioner. However, there were other instructors, "two or three more at least", present at the class in addition to Petitioner. Warren was not intimidated by any of the other instructors but made no complaint to them and did not ask them to be excused from the training. (T. pp. 223-224)

64. Blake Walker, a PPO for Respondent was a participant in the CRDT in-service training on January 30, 2012, in which the Petitioner was the lead instructor. The Petitioner had not previously used a "shock knife" during the in-service classes Mr. Walker had attended prior to January 30, 2012, in which the Petitioner was an instructor. (T. pp. 239 - 240.)

65. As with others, Mr. Walker stated that he did not think use of the shock knife during training was voluntary. Mr. Walker asserted that the knife left a mark on knuckles on his right hand and the left side of his stomach. (T. pp. 240-241) Mr. Walker claimed that the injuries were caused by the power of the shock, not the point of the knife. (T. p. 247)

66. In his written statement, Mr. Walker wrote that Petitioner never stated that use of the shock knife was a mandatory exercise. (T. p.) 244. In his written statement, Walker wrote that Petitioner and another trainer, S.O. Newcastle, showed the class the shock knife.

67. Mr. Walker did not like Petitioner very much. He wrote that he always felt uncomfortable during training because Petitioner would "single him out" and call him by a name which apparently Mr. Walker did not like. (T. p. 245)

68. Mr. Walker confirmed, along with other witnesses, that Petitioner asked at the end of the class whether everyone was OK, and he did not report any injury. Mr. Walker did not file or make any complaint to higher authority. Mr. Walker confirmed that Petitioner told the class that if they had any questions about the training during the course, that they could and should ask them. (T. p. 248)

69. Although the minor injuries reported by Mr. Warren and Mr. Walker are not doubted, it does not seem that the injuries are directly related to the particular characteristics of the shock knife. Based upon the testimony of Mr. Lamonds and the demonstration by defense counsel during the hearing, it does not seem that the shocking element of the shock knife would have caused any red marks or bruises. The shock knife has various settings for intensity. At the time he used it in training, Petitioner set the knife to the lowest setting. (T. pp. 73-74) More plausibly the minor injuries would have been caused by the physical nature of the training.

70. Hanna Rowland, the Special Operations Administrator for NCDPS, DCC, testified that she is familiar with and knowledgeable of what are considered approved training knives for use in CRDT in-service training and that a shock knife is not approved for use during in-service training. (T. pp. 252 - 256.)

71. To Ms. Rowland's knowledge, no inquiry has been made to initiate the process for approval of the use of the shock knife for CRDT in-service training. There is no evidence that the shock knife was "approved" for use in instructor training.

72. In Ms. Rowland's opinion, the Petitioner's use of the shock knife during the in-service training in January 2012 was inconsistent with the written lesson plan. (T. pp. 257 - 258.) According to Mr. Lamonds, the shock knife is a "training knife" and there is no evidence to the contrary. Ms. Rowland's assertion is contradictory to the plain English language of the lesson plan. Further there is no written or documentary evidence that defines what constitutes "training knives"; there are no rules or regulations or writing of any nature that would confirm her opinion.

73. Ms. Roland admitted, along with other witnesses, that the lesson plan does not distinguish between particular types of training knives. (T. pp. 261-262) Roland never provided

any instructions to Petitioner about the manner in which the training was to be conducted and was never present for any training conducted by Petitioner. When asked whether the training materials for the course in which the shock knife was in fact used employ the same verbiage as the course Petitioner taught, Roland replied: "I do not recall." (T. p. 263)

74. Ms. Roland testified that at no point did she ever instruct Petitioner that he was not to use the shock knife in training. (T. p. 264) There is no evidence that anyone specifically instructed Petitioner that he was not to use the shock knife in training.

75. Ms. Roland confirmed that there were two other fully certified instructors present at the training course on the day in question in addition to the Petitioner. (T. p. 270)

76. Although there were as many as three other instructors present at the training session in question, no one was subjected to disciplinary action except the Petitioner. None of the other instructors ever tried to intercede in any manner to try to prevent the Petitioner from using the shock knife in the training. No other instructor spoke up during the training questioning the propriety of using the shock knife; none ever reported to his or her chain of command that there had been any impropriety during the training. This included instructor S.O. Newcombe, despite Blake Walker identifying Newcombe as being one of the two persons who showed the training class the shock knife. (T. pp. 291-300)

BASED UPON the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case per Chapter § 126 and § 150B of the North Carolina General Statutes. 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.

2. At the time of his discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1 et. seq. N.C.G.S. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." In a career State employee's appeal of a disciplinary action, the department or agency employer bears the burden of proving that "just cause" existed for the disciplinary action. N.C.G.S. § 126-35(d) (2007).

3. 25 NCAC 1I.2301(c) enumerates two grounds for disciplinary action, up to and including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct, which includes among others, "the willful violation of known or written work rules" and "conduct for which no reasonable person should expect to receive prior warning." 25 NCAC 01J .0614(8)(a) and 25 N.C.A.C. 01J .0614(8)(d).

4. The demotion letter specified that Petitioner was being demoted for unacceptable personal conduct. Specifically the letter dated October 9, 2012 states, "Your willful decision not to follow the approved lesson plan and require class participants to utilize a shock knife constitutes unacceptable personal conduct." (R.'s Ex. 8)

5. Respondent complied with the procedural requirements for demotion for unacceptable personal conduct pursuant to 25 N.C.A.C. 01J .0608 and .0613.

6. At the time of the demotion letter, Petitioner had a prior Written Warning which had been issued within eighteen (18) months; however, neither the pre-dismissal nor the dismissal letter made any reference to the written warning having been considered. 25 N.C.A.C. 1J.0614(6)(c).

7. N.C.D.E.N.R. v. Clifton Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004), states that the fundamental question in determining just cause is whether the disciplinary action taken was "just." Citing further, "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." Our Supreme Court has said that there is no bright line test to determine "just cause"—it depends upon the specific facts and circumstances in each case. Furthermore, "not *every* violation of law gives rise to 'just cause' for employee discipline."

8. In the more recent case of Warren v. NC Dept. of Crime Control & Public Safety, the Court of Appeals established a three-step analysis in further elucidating the Carroll analysis as follows:

> 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.C. Dep't of Crime Control & Pub. Safety, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012).

9. In order to apply the Warren tests, one must first look to the allegations to determine exactly for what the Petitioner is being punished. The demotion letter states he undertook a "willful decision" that he would not follow the approved lesson plan, and that having made that decision he would require the class to utilize a shock knife for training. The demotion letter further contends that the shock knife was an unapproved training device and that device left red marks and bruises on several of the participants. Further allegations are that the

training became so aggressive that it was necessary to stop the participants. Those allegations are taken as true by Respondent in finding that Petitioner engaged in unacceptable personal conduct.

10. NCDPS has a policy governing the personal conduct of its employees. (Respondent's Exhibit (R. Ex. 22) The personal conduct policy is found in the NCDPS *Personnel Manual* as Appendix C to the Disciplinary Policy and Procedures. (R. Ex. 22 at pp. 38 - 41) The policy states, "All employees of the Department of Correction shall maintain personal conduct of an acceptable standard as an employee and member of the community. Violations of this policy may result in disciplinary action including dismissal without prior warning." (R. Ex. 19 at p. 38) As listed in the NCDPS *Personnel Manual*, "Personal Conduct" lists seven examples of what may be included in unacceptable personal conduct. The only ones that might have relevance to this contested case are #1. "[c]onduct for which no reasonable person should expect to receive prior warning;" and #4. "[t]he willful violation of known or written work rules." (R. Ex. 19 at p. 38)

11. The pre-disciplinary letter from Hannah Rowland dated August 30 2012 cites both of the specific reasons cited in paragraph 10 above; however, it states that "in general" these are included in unacceptable personal conduct without any explanation of how Petitioner's actions fit either description.

12. The demotion letter from Anne Precythe, dated October 9, 2012 and which is controlling, only states that using the shock knife as described was unacceptable personal conduct without reference at all to either of the specific reasons.

13. Based upon the facts and circumstances of this particular contested case, there is not sufficient credible evidence that Petitioner's actions were so egregious as to constitute conduct for which no reasonable person should expect to receive prior warning prior to a disciplinary action.

Warren Test: Step One

14. Step one of the Warren test asks if the Petitioner engaged in the conduct the employer alleges. The overwhelming evidence is clear that Petitioner did not willfully decide that he would not follow the lesson plan; in fact to the contrary he consciously followed the lesson plan.

15. The evidence clearly demonstrates that Petitioner made a conscious decision to utilize a shock knife during the in-service training on January 30, 2012. There is substantial evidence to show that two participants of the training did have red marks and or a bruise after the training. There is substantial evidence to show that the interaction between two participants became aggressive enough for Petitioner to intercede, but those two participants completed the training.

16. While Petitioner's decision to use the shock knife was willful, there is no evidence to support the contention that Petitioner willfully decided to not follow the lesson plan. The evidence is clear that Petitioner did indeed follow the lesson plan.

17. The lesson plan for this training lists "training knives" among the equipment to be used. There is no definition given for what constitutes "training knives" either in the lesson plan itself or in any written documentation within the auspices of the Respondent. The overwhelming evidence from Respondent's witnesses is that shock knives are indeed a type of "training knife."

18. The same phrase "training knives" is used in all lesson plans for all training in defense of blunt/edged weapons, including both the instructor training and the in-service training. The evidence is not clear as to whether or not the shock knives have been used in any in-service training, although there was some anecdotal and unsubstantiated testimony that to the very limited knowledge of those witnesses the shock knives were not used for in-service.

19. Assuming *arguendo* that shock knives have not been used in other in-service training, such is not in any measure persuasive that they were prohibited for such in-service training. Respondent's witness Mr. Lamonds stated that he would like to use the shock knives for in-service but that the reason that they were not used was because of the cost for purchasing the shock knives.

20. There is substantial and credible evidence that the shock knife was "approved" for use. The shock knives are approved for use in other trainings, especially the training of instructors. Petitioner was certified and had taught all levels of training and had been introduced to the shock knife during such training. While Respondent contends that there was nothing in the lesson plan that allowed use of the shock knife, there was nothing in the plan—or anywhere else for that matter—which prohibited its use. Use of the shock knife is simply not addressed—anywhere. The equipment to be used in the other course lesson plans was the same—"training knives" without specification. Common sense dictates that if they were to be banned from in-service then they would be banned from all training because the lesson plans and all written directives are the exact same.

21. Ms. Rowland's opinion that the Petitioner's use the shock knife during the in-service training in January 2012 was inconsistent with the written lesson plan is not supported by the competent evidence. (T. pp. 257 - 258.) According to Mr. Lamonds, the shock knife is a "training knife" and there is no evidence to the contrary. Ms. Rowland's assertion is contradictory to the plain English language of the lesson plan. Further there is no written or documentary evidence that defines what constitutes "training knives"; there are no rules or regulations or writing of any nature that would confirm her opinion.

22. The greater weight of the credible evidence does not support the contention that Petitioner was ever directed or that there was anything in writing to state that Petitioner was not to use the shock knife in in-service training. There is no rule or policy or any other written or consistent oral understanding of what constitutes training knives and when a shock knife may be used in training. Obviously no such "policy" was never communicated to the facility providing the equipment.

23. While it is true that two of the participants did have marks on their bodies after the training exercise, the contention that those marks were caused by the "device" is not supported by the credible evidence. The testimony of the witnesses who actually received those marks on their bodies contradicts the assertion that the marks were caused by the "device."

24. The most plausible explanation is that the marks were caused by the nature of the training and that at least one participant became overly aggressive. The marks were on two participants and not "several." Further, it was not necessary to stop any participants, let alone all participants as may be inferred from the demotion letter. Petitioner did intercede between two participants when one became overly aggressive. Mr. Warren even stated that the level of aggression was no more with the shock knives than it had been with the plastic and rubber knives, even though he was one of the ones who had marks on his body.

25. Prior to beginning instruction Petitioner advised the entire group that should they have any questions at all that they should ask either the Petitioner or one of the other instructors. During the training with the shock knife, no one raised any question or concern. It was reasonable for Petitioner to assume that if a participant had reservations that participant would have expressed his or her concerns to one of the instructors.

26. Conversely, most of the participants felt that they had no latitude in whether or not to participate. Each felt that it was required training that required successful completion in order to be re-certified and to continue employment. It was not perceived as voluntary participation in the round robin training sessions with the shock knife. Such belief by those participants also was reasonable.

27. After the class Petitioner asked if any one was injured or if there were any issues to which everyone either responded that there were no injuries or did not respond at all.

28. Petitioner's use of the shock knife in training which left marks on two of the participating trainees is only egregious and subject to discipline if he "willfully" decided to not follow the lesson plan as written. Petitioner followed the lesson plan and thus did not engage in the conduct as alleged for his demotion.

Warren Test: Step Two

29. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Having found in Step One above that the Petitioner did not engage in the specific conduct the employer alleges as grounds for his demotion, it is not necessary to address Step Two. However, this Tribunal choses to address the second step as set out in Warren.

30. The October 9, 2012 demotion letter does not state which category of unacceptable personal conduct was impugned by Petitioner's use of the shock knife. As stated above, only two categories might apply to the facts and circumstances here and one has been addressed and dismissed in paragraph 13 above. The only "category of unacceptable personal conduct" to be addressed would be the willful violation of known or written work rules.

31. The "lesson plan," which is the document Respondent claims Petitioner violated, is not a "work rule," the knowing violation of which constitutes unacceptable personal conduct. Even if it was, Petitioner did not violate the lesson plan as discussed in Step One above.

32. There is no evidence that Petitioner or anyone else could be disciplined for failing to follow the lesson plan as set forth by policy or rule or other writing within the Respondent. There was no evidence that Petitioner was told or warned that he could be disciplined at all for failure to follow the lesson plan. In fact, part of Petitioner's rationale was to use the shock knife to fill in the training for an additional hour because the class had successfully completed the other parts of the training. Some testimony was to the effect that he could have ended the class early, which clearly would have been contrary to the written lesson plan. Petitioner followed the lesson plan as written.

33. There is no evidence of what constitutes "training knives" or what constitutes an "approved" training knife (or what is not approved) in existence in written form anywhere within the Respondent.

34. If such existed, there is no evidence of how anyone within Respondent's employ would have had knowledge of approval or disapproval of use of shock knife. Ms. Rowland may have "known" but no evidence how or if such knowledge would have been disseminated, and there is no evidence that such information was in fact disseminated. One cannot expect any employee to abide by a written or known work rule if it is neither written nor known.

35. The training equipment for this training course was provided by Piedmont Community College, including the shock knife. Absent specific prohibition or rule or policy, it was not unreasonable for Petitioner and the other instructors to believe that the shock knife was available for use. Piedmont Community College was obviously not on notice that the shock knife was not to be used.

36. Respondent's claims that the shock knife posed a special threat of injury were not borne out by the evidence. The special characteristics of the shock knife were not responsible for the very minor injuries during the course of instruction.

37. Petitioner inquired at the end of the training if there were any injuries. None were reported. Petitioner, therefore, did not know that any trainee suffered injury through training with the shock knife blade.

38. This Court concludes that Respondent did not meet its burden of proof in showing that the Petitioner actions in training with the shock knife constituted any of the categories of unacceptable personal conduct.

Warren Test: Step Three

39. The Tribunal only proceeds to the third step of the Warren test "If the employee's act qualifies as a type of unacceptable conduct." Having found in Steps One and Two that indeed Petitioner's acts do not constitute unacceptable conduct as alleged in the demotion letter, further analysis is not required. As in Step Two, this Tribunal choses to address the third step briefly. Assuming *arguendo* that the facts and circumstances of this case did demonstrate some level of unacceptable personal conduct, the Court concludes that the discipline imposed would not be equitable and would not be "just."

40. There were no complaints by anyone involved in the training; neither students nor other trainers. The inquiry which gave rise to the discipline was in response to Mr. Warren responding to a letter, and Mr. Warren even states that he was not complaining.

41. Even if the trainees felt as though they had no choice but to participate, there was never any expression that the training was excessive or in any way inappropriate—at any level.

42. There was an interval of six months between the events and the discipline. But for Warren's off-hand comments nothing would have come of this. There was no effort on the part of Petitioner or anyone else to conceal the use of the knife: i.e., there was no "cover-up."

43. There were as many as three other instructors participating in the training. None of them reported a policy violation, protested, or intervened against the use of the shock knife. Petitioner was the only person disciplined over the incident.

Based on these Findings of Fact and Conclusions of Law, and the competent evidence at hearing, the Court makes the following:

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and all the competent evidence at hearing, Respondent's decision to demote Petitioner is **REVERSED** and Petitioner shall be retroactively reinstated by Respondent to the same or similar position held prior to his demotion, with back pay and attorney's fees paid to Petitioner and his attorney by Respondent.

ORDER AND NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under North Carolina General Statute § 150B-45, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed.

The appealing party **must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03. 0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**.

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 13th day of January, 2014.

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Donald W. Overby
Administrative Law Judge