

STATE OF NORTH CAROLINA  
COUNTY OF BURKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
13 OSP 11438 and 13 OSP 19135

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DENI L. CRAWLEY,	)	
Petitioner,	)	
	)	
V.	)	<b>FINAL DECISION</b>
	)	
NCDPS FOOTHILLS CORRECTIONAL	)	
INSTITUTION,	)	
Respondent.	)	

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This contested case was heard by Administrative Law Judge Donald W. Overby on March 20, 2015 at Burke County Courthouse in Morganton, North Carolina.

**APPEARANCES**

For Petitioner: Kirk J. Angel  
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For Respondent: Tamika Henderson  
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**PRELIMINARY MATTERS**

On March 20, 2015, Petitioner filed a Stipulation of Dismissal with Prejudice in File Number 13 OSP 11438, which contained issues of retaliation, hostile work environment and discrimination. Therefore, contested case, File Number 13 OSP 11438, is closed.

File Number 13 OSP 19135 is properly before this Tribunal and appropriate for disposition,

**ISSUE**

Whether Respondent had just cause to terminate Petitioner for unacceptable personal

conduct on July 29, 2013?

**WITNESSES**

Called by Respondent:

Petitioner

Jimmy Hassen, Sergeant

Larry Williamson, Assistant Superintendent of Program II

Harvey Suttles, Assistant Unit Manager

David Mitchell, Correctional Administrator

LaDonna Browning, Superintendent

Roger Moon, Regional Director (retired)

Richard Thomas, Assistant Superintendent of Custody and Operations (offer of proof)

Called by Petitioner:

None

**EXHIBITS**

The following were exhibits admitted on behalf of Respondent except as otherwise indicated ("R. Ex."):

R. Ex. 2:	January 13, 2012	Written Warning for Unsatisfactory Job Performance
R. Ex. 3:	January 13, 2013	Employee Action Plan
R. Ex. 4:	January 15, 2013	Memo from LaDonna Browning to Roger Moon regarding incident occurring on December 19, 2012 concerning Inmate Medlin
R. Ex. 5:	February 12, 2013	Written Warning for Unsatisfactory Job Performance
R. Ex. 13:	April 15, 2013	Zachary Whitfield Grievance
R. Ex. 14:	May 24, 2013	Memo from R. David Mitchell to Roger Moon re: Investigative Summary-undue familiarity and attempted workplace harassment - Zackary Whitfield
R. Ex. 15:	May 9, 2013 (start date)	Transcript between Petitioner and Inmate Zachary Whitfield
R. Ex. 16:	May 10, 2013	Memo to Petitioner from LaDonna Browning regarding Temporary Duty Assignment
R. Ex. 17:	June 13, 2013	Memo to Petitioner from LaDonna Browning regarding Notification of Pre-Disciplinary Conference

R. Ex. 18:	June 14, 2013	Pre-disciplinary Conference Acknowledgment Form
R. Ex. 19:	June 14, 2013	Petitioner's Internal Investigation Statement
R. Ex. 20:	July 24, 2013	Letter to Petitioner from LaDonna Browning regarding Notice of Second Pre-Disciplinary Conference
R. Ex. 21:	July 25, 2013	Pre-Disciplinary Conference Acknowledgment Form
R. Ex. 22:	July 25, 2013	Petitioner's Internal Investigation statement
R. Ex. 23:	June 17, 2013	LaDonna Browning internal Investigation statement
R. Ex. 24:	June 20, 2013	R. David Mitchell internal Investigation statement
R. Ex. 25:	June 14, 2013	Memo to Petitioner from LaDonna Browning regarding recommendation for disciplinary action
R. Ex. 26:	June 17, 2013	Letter from LaDonna Browning to Roger Moon regarding recommendation requested - disciplinary action
R. Ex. 27:	June 20, 2013	Memo from Roger Moon to George Solomon regarding recommended personnel action
R. Ex. 28:	July 29, 2013	Letter to Petitioner regarding Notice of Dismissal for unacceptable personal conduct
R. Ex. 29:	February 10, 2003	Memo signed by Petitioner regarding personal relationships between staff and offenders
R. Ex. 30:	September 19, 2013	Petitioner's Staff Training History
R. Ex. 32:	October 7, 2013	Employee Relations Committee finding of upholding dismissal
R. Ex. 33:	July 20, 2012	General Institution Procedures - Conduct of Employees
R. Ex. 34:	August 16, 2010	State of NC - Department of Correction - Division of Prisons - Conduct of Employees
R. Ex. 35:	October 1, 1005	Department of Correction - Personnel Manual - disciplinary Policy and Procedures
R. Ex. 36:	March 1, 2001	Department of Correction - Personnel Manual - unlawful workplace harassment and professional conduct policy

R. Ex. 38:      October 6, 2014      Petitioner's Responses to Respondent's First Set of Interrogatories and Request for Production of Documents

R. Ex. 40:      May 9, 2013      Audio between Petitioner and Inmate Zachary Whitfield

No exhibits were admitted on behalf of Petitioner.

**BASED UPON** careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding as appropriate for consideration, 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 interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case:

**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:

**FINDINGS OF FACT**

1.      The parties are properly before the Office of Administrative Hearings on a Petition for Contested Case pursuant to Chapters 126 and 150B of the North Carolina General Statutes and the Office of Administrative Hearings has jurisdiction over both parties and subject matter as such. To the extent that 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.      Petitioner began work for Respondent on November 30, 1998 as a Correctional Officer at Foothills Correctional Institution ("Foothills CI") in Morganton, N.C.

3.      In 2009, Petitioner became a Case Manager at Foothills CI. As a Case Manager, she was responsible for meeting with inmates once a month to assist them with school and other programs while entrusted to the custody of the North Carolina Department of Public Safety ("NCDPS").

4.      In furtherance of her job duties as a case manager, Petitioner was required to provide supportive counseling and answer and follow up on inmate questions and problems.

5.      All inmates are assigned to a Case Manager, whose task is to follow the case management process that is implemented by the facility. This process establishes a system in which Case Managers assist and guide inmates in making adjustments to confinement, as well as preparing for a successful reentry into the community.

6.      Petitioner was dismissed from her position as a Case Manager effective July 29, 2013 for unacceptable personal conduct for engaging in undue familiarity with an inmate, fostering an unharmonious working environment against another DPS employee by alleging he treated an inmate unfairly and was a racist, and providing false information during an internal investigation. (R. Ex. 28)

7.      At the time of Petitioner's dismissal, she had two active written warnings based on unsatisfactory job performance for failing to properly enter case management notes. The first

written warning letter was issued on January 13, 2012 and the second written warning letter was issued on February 12, 2013. Both written warnings advised Petitioner that future performance or conduct incidents could result in additional disciplinary action up to and including dismissal. (R. Exs. 2,5) Petitioner was also placed on Employee Action plans to assist her with improving her job performance. (R. Exs. 3,5)

8. The circumstances leading up to Petitioner's dismissal began on April 15, 2013, when Inmate Zachary Whitfield submitted an Administrative Remedy Procedure, or grievance, to Foothills CI dated April 12, 2013.

9. The NCDPS allows inmates to voice his or her concerns through an Administrative Remedy Procedure, which is also known as the Grievance Procedure. Generally, a grievance is written by an inmate expressing concerns about an action, incident, alleged policy violation, or condition within the prison. The grievance will be investigated in a timely manner and the inmate is to receive a written response following the investigation. If the inmate is not satisfied with the result, the inmate may appeal to the facility Superintendent.

10. Inmate Whitfield's complaint alleged that Larry Williamson, Assistant Superintendent for Programs, had treated him "unequally" and had discriminated against him during a recent custody level review. (R. Ex. 13) Whitfield is a white male and Williamson is a black male.

11. Whitfield's grievance was accepted on April 16, 2013 by Harvey Suttles, Assistant Unit Manager, who was designated as the inmate grievance screener on D-Unit at Foothills CI.

12. Whitfield was interviewed by Suttles to discuss the grievance. According to Suttles, Whitfield seemed to be somewhat hostile during the time Whitfield was in his office. Whitfield told Suttles that his Case Manager had told him to write the grievance. Suttles found out that Petitioner was assigned as Whitfield's Case Manager.

13. Suttles sent the grievance to Williamson for a response as Williamson was the Step 2 reviewer for Foothills CI. (R. Ex. 13) The grievance was sent to Williamson even though the grievance revolved around Williamson's actions.

14. On April 18, 2013, Williamson reviewed the grievance which had been filed by inmate Whitfield on April 15, 2013. Williamson requested that Suttles bring the inmate to his office to discuss the allegations.

15. During his meeting with Whitfield, Williamson could sense that Whitfield was disgruntled about his custody promotion being denied. Williamson explained why his promotion was denied. Following that conversation Whitfield alleged that his Case Manager had told him to write the grievance.

16. Inmate Whitfield told Williamson that his case manager had informed him that Williamson was racist and that he would promote a black inmate to a different custody level, but he would not promote a white inmate. Upon hearing the allegations, Williamson immediately removed himself from the process because the allegations were concerning him.

17. According to Williamson, before Whitfield could state the name of his Case Manager, Williamson stopped him from talking, and instructed Suttles to escort Whitfield to Richard Thomas, Assistant Superintendent for Operations, office. At that point Williamson did not check to see who Whitfield's case manager was, although very soon thereafter he confirmed that Petitioner was in fact his case manager.

18. No evidence was submitted to this Tribunal to prove that Williamson was aware of the identity of Whitfield's Case Manager following the discussion between the two. While it might be assumed that Williamson knew, there is no evidence at all to confirm such assumption.

19. Williamson was concerned about the allegations that he was in any way a racist because Foothills CI population consists of inmates who have committed assaults, murder and some belong to gangs. Among the prison's population are white supremacists who have a tendency to be violent. Williams feared that he could be attacked, if it was rumored that he was racist or unfair toward white inmates.

20. Williamson's fear was reasonable that he would be a prime target for white supremacist or others if it was rumored that he was racist or unfair toward white inmates.

21. Once Suttles had escorted the inmate to his office, Thomas interviewed Whitfield concerning the grievance that he had filed. Suttles and Captain Harold Reep were present. Whitfield informed Thomas that Petitioner was his Case Manager and that she had instructed him to submit the grievance.

22. The inmate completed a written statement dated April 18, 2013 about the specific allegations reported by him to Mr. Thomas. (R. Ex. 14)

23. Petitioner's contentions that there is no credible evidence to prove that Suttles or Harold Reep were present during the interview, and that there is no credible evidence to prove that Whitfield voluntarily agreed to write the statement are without merit. There is no evidence presented to contradict the sworn testimony concerning the evidence of who was present and the voluntariness of Whitfield's statement.

24. The evidence is clear that inmate Whitfield's case manager was Petitioner.

25. In early May 2013, the NCDPS began a formal misconduct investigation into allegations of inappropriate conduct and undue familiarity between inmate Whitfield and Petitioner at Foothills CI.

26. There was no evidence presented in this contested case hearing concerning Whitfield's grievance in relation to Williamson; however, that was not the issue in this contested case hearing and thus it is irrelevant. If that grievance had relevance in this hearing, it was the Petitioner's burden to produce such information. A blanket assertion without any proof at all has no probative value and is unsupported.

27. At all relevant times, the Western Regional Director was Roger Moon. Director Moon designated David Mitchell as the primary investigator. (R. Ex. 14)

28. At all relevant times, Mitchell was the Operational Manager for the Western Regional Office. Earlier Mitchell had mediated a grievance Petitioner had against Respondent.

29. On or about May 2, 2013, as part of this investigation, Mitchell decided to place a recording device on inmate Whitfield to tape record a conversation between Whitfield and Petitioner in order to substantiate inmate Whitfield's allegations. The investigation was also to obtain direct evidence and corroborate inmate Whitfield's allegations regarding Petitioner which constituted undue familiarity and inappropriate conversation.

30. Petitioner was to return to work following vacation on May 9, 2013. On May 8, 2013, the recording device was supplied by Mitchell to Thomas. Mitchell tested the recording device to insure its proper functioning prior to providing the device to Thomas. On May 9, 2013 Whitfield was brought to Thomas's office and Thomas turned the recording device on and placed it in the front pocket of the inmates' jumpsuit. The recorder was not very well concealed.

31. Sergeant Jimmy Hassen immediately escorted inmate Whitfield to Petitioner's office. Hassen and Whitfield made no stops, did not touch or manipulate the recording device and went directly to Petitioner's office. On May 9, 2013, the recording device located on the person of Whitfield captured a continuous conversation between Petitioner and Inmate Whitfield, which

lasted approximately eighteen minutes. (R. Ex. 40) Hassen remained directly outside of Petitioner's office the entire time that Whitfield was in her office.

32. As soon as Whitfield came out of Petitioner's office, Hassen took the inmate from Petitioner's office directly to Thomas' office. Thomas and Browning checked to ensure that the recording device had captured the conversation by turning it on and ensuring that they heard voices. Thomas then called Mitchell.

33. Mitchell came and retrieved the audio recording from Thomas. That is the totality of people who had the care and/or custody of the recording device, or access to it, from the time Mitchell had delivered it to Thomas until Mitchell retrieved it from Thomas. There is no evidence that the recorder was tampered with in any regard.

34. The undersigned finds as fact that the recording device produced an audio recording of the May 9, 2013 conversation between inmate Whitfield and Petitioner.

35. The following day Petitioner was interviewed by Mitchell and LaDonna Browning, the Superintendent of Foothills CI.

36. Prior to the interview on May 10, 2013, Petitioner was reminded that NCDPS written workplace rules and investigatory procedure require her to provide completed and accurate information and that the penalty for providing false, incomplete and/or misleading information during the investigation was dismissal. Petitioner acknowledged those requirements and, in accordance with NCDPS published investigatory procedures, signed a written acknowledgment of those requirements before the interview began. Mitchell witnessed Petitioner's signature. (R. Ex. 14)

37. On May 10, 2013, after reading and signing the Internal Investigation Acknowledgment form, Petitioner was interviewed regarding the allegations that she engaged in undue familiarity with inmate Whitfield and fostered an unharmonious working environment. (R. Ex. 14)

38. Petitioner's interview consisted of sixteen questions specifically prepared by Mitchell after listening to the recording regarding Petitioner's interaction with inmate Whitfield on May 9, 2013 and April 11, 2013. Petitioner was then asked to respond in writing to the prepared questions.

39. In the written statement, Petitioner admitted that she engaged in a conversation with the inmate, but denied that she used profanity, that she discussed her personal information or that she discussed Williamson. (R. Ex. 14). The undersigned finds as fact that the foregoing assertions by the Petitioner were false.

40. Mitchell subsequently played audio segments of Petitioner and Inmate Whitfield's conversation on May 9, 2013.

41. After hearing the audio recording, Petitioner denied it was her voice on the tape.

42. Mitchell and Browning, listened to the audio recording on May 9, 2013. Mitchell and Browning were familiar and had personal knowledge of inmate Whitfield and Petitioner's voice. Browning testified that she had worked with the Petitioner for 13 years and was familiar with her voice. Both Mitchell and Browning confirmed that the voice on the audio recording was inmate Whitfield and Petitioner. (R. Ex. 40). Moreover, the contents of the tape corroborate this identification testimony. The male on the recording addresses the female on the recording as Ms. Crawley. More importantly, the female voice intentionally speaking about herself in third person when directing the inmate what not to say to other prison employees refers to herself as Ms. Crawley.

43. Subsequent to listening to the entire audio recording at hearing, Browning confirmed that the audio recording was the same recording she heard on May 9, 2013 and the voice was that of the Petitioner.

44. Whitfield's presence for the hearing or his unavailability was never raised as an issue during the hearing of this matter.

45. At the hearing, Petitioner testified and the audio recording was played in part and in its entirety twice. The female voice on the audio recording was the voice of Petitioner. (R. Ex. 40)

46. During this May 9, 2013 taped conversation, Petitioner repeatedly used profanity in speaking to inmate Whitfield. Petitioner discussed various personal topics with inmate Whitfield, to include that her daughters were biracial, and that she had written a grievance against Williamson. Petitioner also told the inmate not to "sell me out. . . Like I said I've got children to feed." (R. Exs. 15, 40)

47. DPS policy prohibits the use of profanity in the presence of inmates. During her testimony the Petitioner conceded that use of profanity in the presence of inmates violates DPS policy.

48. During Petitioner's interaction with inmate Whitfield, she repeatedly made disparaging comments about Williamson. These comments included that he was racist against whites, biased against women and a suggestion that he was only given his position with DPS because he was an educated minority. Petitioner also suggested that Williamson wasn't allowing her to give the inmate a lower custody classification which would allow him to have less restrictions, because the inmate was white. (R. Exs. 15, 40)

49. The Petitioner fostered an unharmonious working environment for Williamson, a DPS employee, by alleging to inmate Whitfield that Williamson was racist and that Williamson treated the inmate unfairly. Petitioner's conduct violated NCDPS Personnel policy, Section 3, Unlawful Workplace Harassment and Professional Conduct, Professional and Acceptable Personal Conduct. (R. Ex. 36)

50. Petitioner's conduct created a very real potential for harm considering the inmate



population served at Foothills CI and the potential for inmates to physically attack Williamson based on the perception that he was racist towards whites.

51. The Petitioner signed a memorandum acknowledging the personal dealings with offenders on February 10, 2003. This included that Petitioner was required to report any personal interactions with an inmate at the same work site. (R. Ex. 29, 45)

52. During the internal investigation, Petitioner was temporarily reassigned to Western Youth Institution on May 10, 2013. (R. Ex. 16).

53. After hearing the testimony and observing the demeanor of Petitioner, Williamson, Suttles, Hassen, Browning and Mitchell at trial, the Undersigned finds as fact that Williamson, Suttles, Hassen, Mitchell and Browning accounts of the events concerning May 9, 2013 and the internal investigation are more credible than Petitioner.

54. Petitioner provided false and misleading information in her internal investigation interview and written statements in violation of the NCDPS, Section 6, Disciplinary Policy and Procedures, failure to cooperate during or hindering an internal investigation policy.

55. The audio recording on May 9, 2013 was reduced to a type-written transcript by Mitchell. The transcript and the actual audio recording were provided to Regional Director Moon along with the investigation report and written statements. (R. Exs. 14, 15, 40)

56. After careful consideration, Regional Director Moon recommended to George Solomon, Director of Prisons, that Petitioner be dismissed for unacceptable personal conduct. The recommendation was approved through the chain of command. (R. Ex. 27)

57. Prior to Petitioner's dismissal, Respondent afforded Petitioner a pre-disciplinary letter and a pre-dismissal conference. (R. Exs. 17, 18, 20, 21)

58. During the pre-dismissal conference Petitioner was given the opportunity to respond to the allegations against her contained in the pre-disciplinary conference notification letter.

59. Respondent sent and Petitioner received a Dismissal letter terminating her employment and afforded Petitioner the opportunity to administratively appeal her termination. (R. Ex. 28)

60. After completing her internal agency appeals, Petitioner filed this contested case at the OAH on November 6, 2013. In her contested case petition, the Petitioner alleged that Respondent lacked "just cause" to end her employment for disciplinary purposes.

**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. This matter is properly before the Office of Administrative Hearings for consideration pursuant to Chapters 126 and 150 B of the North Carolina General Statutes.

2. NCDPS Personnel policy, Section 3, Unlawful Workplace Harassment and Professional

Conduct, Professional and Acceptable Personal Conduct states: "It is the responsibility of every employee and agent of the Department to conduct himself or herself in a manner that contributes to a workplace environment that is not only free of unlawful workplace environment harassment but also advances the mission and goals of the Department and fosters a harmonious working environment that encourages all employees to perform at their best."

3. The NCDPS, Division of Prisons has a policy governing the personal conduct of its employees and interactions with inmates and the public. The personal conduct policy is found in the Division of Prisons Policy and Procedures Manual, Chapter A, Section .0200, Conduct of Employees. Sub-section .0202 (f)(1) provides that, "Employees will maintain a quiet but firm demeanor in their dealings with inmates and will not indulge in undue familiarity with them. Whenever there is reason for discussing an inmate's problems with him, employees will exhibit a helpful but professional attitude. No employee will discuss his or her personal affairs with an inmate." (R. Ex. 34 p. 3) Violations of this policy may result in disciplinary action including dismissal. (R. Ex. 34 p. 4)

4. Foothills CI also has a policy governing the personal conduct of its employees and interactions with inmates and the public. The personal conduct policy is found in the Foothills CI, General Institution Procedures, Chapter 1, Section .0800, Conduct of Employees. The Foothills CI conduct policy incorporates the NCDPS, Section .0200 and NC DPS Personnel Manual Section 6 policies by reference. Section XII (1) reiterates the importance of employees not indulging in unfamiliarity with inmates or discussing their personal affairs with inmates as stated in Division of Prisons, Sub-section .0202(f)(1). (R. Ex. 33 p 8)

5. The NCDPS, Disciplinary Policy and Procedures include a policy governing employee's conduct during internal investigations. Section 6, Disciplinary Policy and Procedures, Failure to Cooperate during or hindering an internal investigation policy provides that, "Employees are required to cooperate during such investigations by displaying truthfulness and honesty. An employee's failure to cooperate with Department officials or hindering an internal investigation constitutes unacceptable personal conduct and is representative of those causes considered for disciplinary action up to and including dismissal. Additionally, providing false or purposefully misleading information during the course of an internal investigation or discussing any aspect of the investigation with anyone other than the investigative personnel also constitutes unacceptable personal conduct and is representative of those causes considered for disciplinary action up to and including dismissal." (R. Ex. 35)

6. Petitioner was dismissed from State service for engaging in undue familiarity with an inmate, fostering an unharmonious working environment against another DPS employee by alleging he treated an inmate unfairly and was a racist, and providing false information during an internal investigation. Respondent contends that Petitioner's conduct constitutes "Unacceptable Personal Conduct" ("UPC") as defined in 25NCAC 01 J .0614(8).

7. Petitioner is a "career state employee" as defined by N.C.G.S. § 126-1.1. As a career state employee, she could only be dismissed for "just cause." N.C.G.S. § 126-35; 25 NCAC 01J .0604.

8. UPC may be, among other things, "(a) conduct for which no reasonable person should expect to receive prior warning;. . . (d) the willful violation of known or written work rules;. . . [or] (e) conduct unbecoming a state employee that is detrimental to state service[.]"

25NCAC 01 J .0614 (8)(a),(d),(e).

9. "Employees may be dismissed for a current incident of unacceptable personal conduct, without any prior disciplinary action." 25 N.C.A.C. 1J. 0608(a).

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

11. Although "just cause" is not defined by statute or rule, 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).

12. While "just cause" is not susceptible of 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." *NC DENR v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004).

13. In *Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), the Supreme Court 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 said that there is no bright line test to determine "just cause"--it depends upon the specific facts and circumstances in each case."

14. In *Carroll*, the Court went on to say that "not every violation of law gives rise to 'just cause' for employee discipline." In other words, not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline. *Id.* at 670, 599 S.E.2d at 901.

15. Further, the Supreme Court held that, "Determining whether a public employee had 'just cause' to discipline its employee requires two separate inquiries: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes 'just cause' for the disciplinary action taken." *Id.*, 358 N.C. at 665, 599 S.E.2d at 898.

16. In expounding on *Carroll*, the Court of Appeals in the *Warren* case articulates the tests that courts must consider in assessing whether or not discipline is proper and if so the degree of discipline. Warren establishes a commensurate discipline approach to discipline in North Carolina. It states:

We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. 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. (Internal cites omitted.)

*Warren v. North Carolina Dep't of Crime Control & Pub. Safety*, 221 N.C. App. 376, 382-383, 726 S.E.2d 920, 924-925 (2012) *review denied*, 735 S.E.2d 175 (2012).

17. The Undersigned finds by a preponderance of the evidence that Petitioner did engage in the conduct alleged by Respondent; i.e., Petitioner did engage in undue familiarity with an inmate; fostered an unharmonious working environment; and provided false information during an internal investigation.

18. The second test under *Warren* is whether or not Petitioner's conduct falls within one of the categories of unacceptable personal conduct.

19. Respondent contends that Petitioner's conduct was a "willful violation of known or written work rules." 25NCAC 01 J .0614 (8)(d).

20. A willful violation of known or written work rules occurs when an employee "willfully takes action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule." *Teague v. N. Carolina Dep't of Transp.*, 177 N.C. App. 215, 222, 628 S.E.2d 395, 400 (2006), *citing Hilliard v. N. C. Dept. of Correction*, 173 N.C. App. 594, 620 S.E.2d 14 (2005). Actual knowledge of the work rules is not required.

21. Petitioner's conduct was a "willful violation of known or written work rules."

22. The preponderance of evidence showed that Petitioner exhibited poor judgment in engaging in undue familiarity with an inmate, making disparaging comments that another NCDPS employee was racist and unfair, repeatedly using profanity and hindering an internal investigation by providing false information.

23. The credible evidence showed that Petitioner's conduct created a serious threat to another NCDPS employee's life and well-being among inmates at Foothills CI.

24. The preponderance of evidence showed that Petitioner's conduct was conduct unbecoming a state employee that is detrimental to state service.

25. In the case of "conduct unbecoming a state employee that is detrimental to state service," the State employer is not required to make a showing of actual harm, "only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer)." *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17.

26. Thus, the Petitioner's conduct falls within two of the categories of unacceptable personal conduct provided by the Administrative Code as set forth as the second requirement in *Warren*.

27. The preponderance of evidence showed that Respondent had two active written warnings. *See* 25 N.C.A.C. 1J.0604, 25 N.C.A.C. 1J.0605. Respondent appropriately considered Petitioner's prior written warnings when ascertaining the appropriate level of discipline to impose.

28. It is well settled that judgment should be rendered in favor of the State agency when the evidence presented establishes that the employee committed at least one of the acts for which she was disciplined. *Id.*, 173 N.C. App. at 597, 620 S.E.2d at 17.

29. One act of unacceptable personal conduct can present just cause for any discipline of an employee, up to and including dismissal.

30. The undersigned admitted the audio recording into evidence over Petitioner's objection. Pursuant to Rule 901 of the North Carolina Rules of Evidence testimony, as to accuracy based on personal knowledge is all that is required to authenticate a tape recording, and a recording so authenticated is admissible. *State v. Jones*, N.C. 330, 344-45, 595 S.E.2d 124, 134 (quoting *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991)). The undersigned finds that the testimony of Mitchell and Browning was sufficient to both identify the voices on the audio recording and to authenticate its contents pursuant to Rule 901. Moreover, the tapes contents corroborate the identification testimony. *See State v. West*, 317 N.C. 219, 345 S.E.2d 186 (1986) (audio recording found on side of the road was properly authenticated and admitted into evidence based on testimony of victim and investigating sheriff who were familiar with the Defendant's voice. Additionally, the contents of the recording corroborated the identification testimony).

31. Petitioner engaged in undue familiarity on May 9, 2013 with inmate Whitfield in violation of Division of Prisons Policy and Procedures Manual, Chapter A, Section .0200, Conduct of Employees. Sub-section .0202 (f)(1) and the Foothills CI, General Institution Procedures, Chapter 1, Section .0800, Conduct of Employees policies. (R. Exs. 33, 34)

32. Based upon the totality of evidence just cause exists to discipline the Petitioner and the "just" discipline for Petitioner is that she be dismissed. Accordingly, Petitioner's termination is **upheld**.

### **DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law the Respondent's decision to terminate Petitioner's employment is **AFFIRMED**.

### **NOTICE AND ORDER**

**THIS IS A FINAL DECISION** issued under the authority of N.C.G.S. § 150B-34. Under the provisions of N.C.G.S. § 126-34.02(a): "An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing."

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C.G.S. § 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.

Under N.C.G.S. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of the Court of Appeals 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.

IT IS SO ORDERED.

This the 28<sup>th</sup> day of April, 2015

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The Honorable Donald W. Overby  
Administrative Law Judge