

WITNESSES

For Petitioner:

1. Tammy Cagle, Petitioner

For Respondent:

1. Robert White, Former Chairman of Swain County Social Services Board
2. Thomas Decker, Former Swain County Social Services Board Member
3. Talmage Lee Jones, Jr., Former Swain County Social Services Employee
4. Sybil Wheeler, North Carolina Work First Program Consultant
5. Shelia Sutton Swain County Social Services Employee

EXHIBITS

For Petitioner:

7. Memorandum from Jerry Smith, interim director of Swain County Social Services
11. Facebook message from Kim Cunningham

For Respondent:

1. Notice to Petitioner from Respondent that Petitioner was being placed on investigative leave with pay, dated March 31, 2011
2. Notice to Petitioner from Respondent that Petitioner's leave was being extended, dated April 21, 2011
3. Notice to Petitioner from Respondent that Petitioner's leave was being extended for a second time, dated May 23, 2011
4. Notice to Petitioner from Respondent informing Petitioner of a scheduled pre-disciplinary conference for dismissal, dated June 7, 2011
5. Notice to Petitioner from Respondent confirming the result of the pre-disciplinary conference held on June 21, 2011, dated June 22, 2011
6. Notice to Petitioner from Respondent of Respondent's denial of appeal from decision to terminate Petitioner's employment, dated July 22, 2011
7. Swain County Personnel Policy
8. Swain County DSS Policy & Procedures Manual
9. Results of Case Review
10. Contact/Activity Log, dated September 30, 2009
11. Contact/Activity Log, dated May 10, 2011
12. Application of Jessica Kirkland
13. Client File for KaShayla B. Lossiah
14. Written telephone records from Talmage Lee Jones, Jr.

15. Written telephone records from Kim Cunningham
16. Written telephone records from Shelia Sutton

ISSUE

Whether Respondent had just to dismiss Petitioner from her employment?

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 (ALJ) makes the following Findings of Fact. In making the findings of fact, the undersigned has weighed all the evidence, or the lack thereof, 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, and 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. From the sworn testimony and the admitted evidence, the undersigned makes the following:

FINDINGS OF FACT

1. Prior to her dismissal, Petitioner had been employed with the Swain County Department of Social Services (Agency) for approximately thirteen (13) years.
2. Petitioner initially served as a social worker, was promoted several times and eventually became the director of the Department of Social Services in 2005.
3. Petitioner served as director until she was fired in 2011. Her annual salary was \$63,000.
4. While Petitioner was employed as director, Respondent was actively investigating an abuse and neglect case involving a toddler, Aubrey Littlejohn.
5. Aubrey Littlejohn died while she was still a client of Respondent.
6. While Petitioner served as director, and in response to the child's death, law enforcement officials executed a search warrant at Respondent's principal place of business.
7. In response to the death of Aubrey Littlejohn, the Swain County Sheriff's Department and the State Bureau of Investigation initiated a criminal investigation of the Swain County Department of Social Services.

8. Aubrey Littlejohn's death raised suspicion among the members of Respondent's Board; of notable concern was the possible mishandling of case documents by employees of the Department of Social Services.
9. On March 28, 2011, Respondent's Board held a meeting to discuss the Aubrey Littlejohn case and investigation. The meeting consisted of both open and closed sessions.
10. Petitioner attended the meeting on March 28, 2011.
11. At the March 28, 2011, meeting, Petitioner was orally informed that she was being placed on investigative leave with pay. The reason given for Petitioner's placement on leave was that the Board wanted to conduct an investigation into the death of Aubrey Littlejohn and the Respondent's and Petitioner's conduct in connection therewith. Petitioner was instructed to turn in her keys, turn in her cell phone, go home, and not to have any contact with any agency member about any agency business.
12. Respondent confirmed Petitioner's placement on investigative leave by letter dated March 31, 2011.
13. The March 31, 2011, letter indicated that Petitioner was being investigated. There was no indication of any reason for the investigation.
14. The letter also contained the following directive reiterating the prior oral instruction:
Please refrain from conducting any business associated with the Swain County Department of Social Services, from attending any meetings or functions on behalf of the Swain County Department of Social Services, and from making any business-related communication with any member(s) of the Swain County Department of Social Services' Staff. Your failure to comply with these requests shall result in further action taken by the Board, up to and including disciplinary action.
15. During the hearing, Respondent presented the witness testimony of Thomas Decker, former member of Respondent's Board, who testified that the Board was concerned that Petitioner might interfere with the investigation and/or intimidate other employees regarding the investigation.
16. Mr. Decker indicated that the board felt that it was appropriate to have someone other than Petitioner investigating the matter.
17. Respondent sent Petitioner written notice of an extension of the investigatory leave on May 23, 2011. In this letter the Board offered that Petitioner was being investigated for "allegations of job performance or personal conduct deficiencies."

18. While on leave, Petitioner made a phone call to Talmage Lee Jones, a manager at the Department of Social Services. The phone call was made on April 30, 2011.
19. While on leave, Petitioner made two additional phone calls to Talmage Lee Jones on April 14, 2011.
20. During the conversation that took place on April 30, 2011, Petitioner discussed the agency's attorney, Justin Greene, and how he had "turned against [them]." The comments were made in response to the Aubrey Littlejohn case and developments of which Petitioner had become aware.
21. During the first call on April 14, 2011, Petitioner discussed an article in a local newspaper, the Smoky Mountain Times, regarding her family members and the benefits that they received by virtue of Petitioner's extraordinary assistance.
22. Petitioner's assistance to her family members in securing their benefits went above and beyond that which is typically administered when an individual seeks benefits from the Department of Social Services.
23. Petitioner had been investigated for these transactions by previous board members and no disciplinary action was taken.
24. Petitioner also acknowledged, during the phone call, the Agency's directive not to discuss business related issues with other employees of the Department of Social Services.
25. During the second April 14, 2011, phone call from Petitioner to Talmage Lee Jones, Petitioner questioned Mr. Jones as to whether he had spoken with Sheila Sutton, an agency employee, with respect to the accounts from which Petitioner's family members' benefits were drawn.
26. Mr. Jones indicated to Petitioner that the phone calls made him feel uneasy and that he did not want to be involved in the situation.
27. Kim Cunningham, an agency employee, received a phone call from Petitioner on June 5, 2011, during which Petitioner questioned how an agency board member had obtained the phone numbers of her family members.
28. During the June 5, 2011, conversation Petitioner again acknowledged that she was not supposed to be contacting agency employees to discuss business.
29. Petitioner asked Ms. Cunningham specific questions as to whether certain individuals had been in attendance at meetings related to the Aubrey Littlejohn case.

30. Ms. Sheila Sutton, agency eligibility administrator, received a phone call from Petitioner on March 30, 2011.
31. During the March 30, 2011, phone call Petitioner asked Ms. Sutton questions related to the Aubrey Littlejohn case and investigation.
32. Petitioner testified at hearing that she was aware of the meaning of the term “business of Department of Social Services.”
33. Petitioner admitted that when she made the calls to Mr. Jones and Ms. Cunningham she was aware that she was not supposed to be contacting them regarding agency business.
34. The Board met with Petitioner in a closed session on June 6, 2011.
35. At this meeting, the Board concluded that it would hold a pre-disciplinary conference for dismissal of Petitioner on June 21, 2011.
36. On June 8, 2011, Petitioner received a notice of pre-disciplinary conference to be held on June 21, 2011, by letter dated June 7, 2011.
37. The notice of pre-disciplinary conference stated the following reasons for the proposed dismissal of Petitioner:

The Board has scheduled this pre-disciplinary conference for dismissal to discuss your failure to pursue your Masters of Social Work degree as requested by the Board and agreed upon by you following your appointment as agency director, your receipt of a travel stipend while simultaneously using a county vehicle for personal use, your conduct and procedure in administering agency programs that benefitted your immediate family, and your failure to comply with the Board’s directive of March 31, 2011 that you refrain from making business-related telephone calls to agency staff while on investigative leave.
38. Petitioner was given the opportunity to respond to the evidence against her, but was not afforded the opportunity to present witnesses or have an attorney present at the pre-disciplinary conference.
39. A pre-disciplinary conference was held on June 21, 2011.
40. On June 23, 2011, Petitioner received a letter dated June 22, 2011, that informed Petitioner that she was being terminated from her position as Director of Swain County Department of Social Services.

41. The reasons given for Petitioner's dismissal in the June 22, 2011, letter included:
 - 1) Failing to comply with the Board's directive of March 31, 2011 that you refrain from making business related telephone calls to agency staff while placed on investigative status leave.
 - 2) For your conduct and procedure in administering agency programs that benefitted your immediate family.
42. The dismissal letter was defective because it did not provide specific details concerning the reasons for dismissal (dates, times, people contacted). This procedural violation was corrected on January 3, 2012, when Respondent specifically informed Petitioner of the forbidden telephone calls she had made.
43. Petitioner was afforded the right to appeal the decision.
44. Petitioner appealed the decision and Respondent denied the appeal.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. Petitioner timely filed her petition for contested case hearing pursuant to N.C. Gen. Stat. § 150B-23. The parties received proper notice of the hearing in the matter.
2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law.
3. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).
4. At the time of the termination of her employment, Petitioner was subject to the State Personnel Act in accord with N.C. Gen. Stat. § 126-5. The Petitioner was a "career state employee" as defined by N.C. Gen. Stat. § 126-1.1 and is subject to and governed by the provisions of the State Personnel Act, codified at N.C. Gen. Stat. § 126-1 *et seq.* The Petitioner's claim is that Respondent lacked just cause to dismiss her for one or more alleged acts outlined in her dismissal notification.

5. N.C. Gen. Stat. § 126-35 only permits disciplinary action against career state employees for "just cause." Although "just cause" is not defined in the statute, 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).
6. N.C. Gen. Stat. §126-35 states that in contested cases pursuant to Chapter 150B of the General Statutes, the burden of showing that a career employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer.
7. Administrative regulations provide two grounds for discipline or dismissal based on just cause: unsatisfactory job performance and unacceptable personal conduct. 25 NCAC 1J .0604. Unacceptable personal conduct includes, inter alia, "conduct for which no reasonable person should expect to receive prior warning," "the willful violation of known or written work rules," and "conduct unbecoming a state employee that is detrimental to state service." 25 NCAC 01J .0614. The rule also provides: "Insubordination means the willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning."
8. A single act of unacceptable personal conduct can constitute just cause for any discipline, up to and including dismissal. *Hilliard v. N.C. Dep't of Correction*, 173 N.C. App. at 597, 620 S.E.2d 17 (2005).
9. In determining whether a public employer has just cause to discipline its employees 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. See *Early v. County of Durham Dept. of Social Services*, 172 N.C. App. 344, 616 S.E.2d 553 (2005) (quoting *N.C. Dep't of Env't & Natural Res v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004)).
10. Case law in North Carolina suggests there are two approaches Courts must take when deciding whether employee discipline due to "unacceptable personal conduct" was just. The determining factor of which approach to follow is whether the alleged "unacceptable personal conduct" in which the employee engaged was criminal or non-criminal. See *In Warren v. N.C. Dep't of Crime Control & Pub. Safety*, 726 S.E.2d 920, 924.
11. In cases in which a state employee is disciplined for "unacceptable personal conduct" that does not involve criminal conduct, the North Carolina Court of Appeals interpreted the

North Carolina Supreme Court's decision in *Carroll* as adopting a "commensurate discipline" approach. See *Warren v. N.C. Dep't of Crime Control and Pub. Safety*, 726 S.E.2d 920, 924 (N.C. App. 2012). According to *Warren*, "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."

12. On multiple occasions Petitioner was insubordinate by willfully failing and refusing to carry out the reasonable order of her supervisors not to contact agency employees to discuss any business of the Swain County Department of Social Services while she was on investigatory suspension. Petitioner's insubordination constituted unacceptable personal conduct justifying her dismissal, which could be imposed without prior warning.
13. Respondent failed to comply with the procedural requirements for dismissing Petitioner from employment for unacceptable personal conduct by not providing specific written reasons/details of the forbidden telephone conversations. Respondent corrected the violation within six months, and at the hearing.
14. 25 NCAC 01B .0432(b) provides, "[f]ailure to give specific reasons for dismissal, demotion or suspension without pay shall be deemed a procedural violation. Back pay or attorney's fees, or both, may be awarded for such a period of time as the Commission determines, in its discretion, to be appropriate under all the circumstances."
15. Respondent has carried its burden of proof by the greater weight of the evidence that it had just cause to terminate Petitioner's employment.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the undersigned makes the following:

FINAL DECISION

While Petitioner's termination from employment is affirmed, Respondent shall award her six months in back pay (\$31,500) and \$5,320 for attorney's fees pursuant to 25 NCAC 01B .0432(b) & GS150B-33(11) which is appropriate under all the circumstances of this case.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, 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 Wake County or in the Superior Court of the county in which the party resides. 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. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

In conformity with the Office of Administrative Hearings' Rules, 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.** 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 is the 19th day of December, 2013.

Fred G. Morrison Jr.
Senior Administrative Law Judge