STATE OF NORTH CAROLINA

RICHMOND COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 18084

MEG DEMAY,
Petitioner,

-vs-

RICHMOND COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent.

FINAL DECISION

THIS MATTER came on to be heard before the undersigned Administrative Law Judge on May 16, 2014, at the Richmond County Judicial Center in Rockingham, N.C.

APPEARANCES

For Petitioner: Evelyn Savage
Van Camp, Meacham & Newman, PLLC
PO Box 1389
Pinehurst, NC 28370

For Respondent: Stephan R. Futrell
Kitchin Neal Webb Webb & Futrell, P.A.
PO Box 1657
Rockingham, NC 28380

ISSUE

Whether Respondent had just cause to demote the Petitioner from a Social Worker Supervisor III position to a Social Worker Position for unacceptable personal conduct?

WITNESSES

For Petitioner: Margaret DeMay, Petitioner

For Respondent: Farron Askins
Lillie C. Davis
Sharon Lindsey
Bernice ("Bunny") Critcher
David Richmond
Tammy Schrenker

EXHIBITS

For Petitioner: None.

For Respondent: Exhibits 1 - 14 were admitted; Ex. 7 was admitted for the limited purpose of corroborating the testimony of Director Schrenker about her investigation.

Based upon careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and the exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the undersigned has weighed all the evidence and has assessed the credibility of the witness by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witnesses, 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 witnesses testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case. In the absence of a transcript, the Undersigned relied upon her notes to refresh her recollection.

FINDINGS OF FACT

1. Petitioner has been continuously employed by Respondent ("DSS") since November 2000. She was promoted to the position of Social Worker Supervisor III in 2007.

2. Petitioner acknowledged her receipt of DSS's written policies on "Unlawful Workplace Harassment" and "Employee Integrity and Responsibility" on September 16, 2008, and on September 28, 2001, respectively.

3. The Policy Concerning Unlawful Workplace Harassment provides in pertinent part:

   The policy of [DSS] is that no employee may engage in conduct that falls under the definition of unlawful workplace harassment. All employees are guaranteed the right to work in an environment free from unlawful workplace harassment and retaliation. The [DSS] will thoroughly investigate all complaints made by employees and will take appropriate remedial or disciplinary action up to and including dismissal.

   Definitions are:

   1. **Unlawful Workplace Harassment** is unwelcome or unsolicited speech or conduct based upon race, sex, creed, religion, nation [sic] origin, age, color, or handicapping condition as defined by G.S. 168A-3 that creates a hostile work environment or circumstances involving quid pro quo.

2. **<u>Hostile Work Environment</u>** is one that both a reasonable person would find hostile or abusive and one that the particular person who is the object of the harassment perceives to be hostile or abusive. Hostile work environment is determined by looking at all of the circumstance [sic], including the frequency of the allegedly harassing conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.

R. Ex. 2

4. The policy on "Employee Integrity and Responsibility" provides in part:

   It is each employee's responsibility to work constructively toward developing and sustaining effective working relationships with fellow employees, clients, other agencies and the general public.

   R. Ex. 3

5. On Thursday, July 18, 2013, Petitioner attended a mandatory staff meeting of the Children's Protection Services ("CPS") Unit which consisted of approximately 27 employees. At such staff meetings, Bunny Critcher, the Program Manager for CPS, typically reviewed new policies and notices, and employees engaged in reinforcing "thank you's" to fellow employees for assistance or work on various cases.

6. At a momentary pause between topics discussed at the meeting, Petitioner announced that she had a FaceBook post that she wanted to read. The entire post is as follows:

   Ed Wilson
   You won't recognize me. My name was Antonio West and I was the 13-month old child who was shot at point blank range by two teens who were attempting to rob my mother, who was also shot. A Grand Jury of my mommy's peers from Brunswick GA determined the teens who murdered me will not face the death penalty...too bad I was given a death sentence for being innocent and defenseless.

   My family made the mistake of being white in a 73% non-white neighborhood, but my murder was not ruled a Hate Crime. Nor did President Obama take so much as a single moment to acknowledge my murder.

   I am one of the youngest murder victims in our Nation's history, but the media doesn't care to cover the story of my tragic demise, President Obama has no children who could possibly look like me - so he doesn't care and the media doesn't care because my story is not interesting enough to bring them ratings so they can sell commercial time slots.

   There is not a white equivalent of Al Sharpton because if there was he would be declared racist, so there is no one rushing to Brunswick GA to demand justice for

me. There is no White Panther party to put a bounty on the lives of those who murdered me. I have no voice, I have no representation and unlike those who shot me in the face while I sat innocently in my stroller, I no longer have my life.

So while you are seeking justice for Trayvon, please remember to seek justice for me too. Tell your friends about me, tell you [sic] families, get tee shirts with my face on them and make the world pay attention, just like you did with Trayvon.

Thank you.

R. Ex. 1

7. Of the four employees that Petitioner supervised at the time, three were African-American and one was Caucasian. The Caucasian employee was dating or married to an African-American male, and she is the mother of three mixed-race children.

8. While the Petitioner read the above post, several African-American employees left the meeting room and later returned. Other employees put their heads down on the conference room table.

9. When the Petitioner completed her reading of the post, Program Manager Critcher sensed that the post had caused much discomfort among the employees. She attempted to connect the post to the other items on the agenda, then called an end to the meeting. As the employees left the meeting, Petitioner attempted to apologize, but most employees had already left or did not hear her.

10. Because of the Petitioner's reading of the post, racial divides formed in the unit. At least two African-American employees spoke that day with Program Manager Critcher, who recommended that they address their objections to DSS Director Tammy Schrenker.

11. On the following day, Director Schrenker received four written complaints from African-American employees Farron Askins, Lillie Davis, Sharon Lindsey, and Jesuite Ellerbe. R. Exs. 4, 5, 6 & 7

12. Following receipt of those complaints, Director Schrenker spoke with every employee who attended the meeting. Every employee other than Petitioner said that reading the post was inappropriate. Director Schrenker found a divide among those employees as to the discipline that should be imposed for Petitioner's reading the post. One group felt that the political and racial content of the post was so egregious that Petitioner's leadership would thereafter be questioned and the reading could constitute Unlawful Workplace Harassment that had created a Hostile Work Environment. Another group felt that the reading, while troubling, warranted a low-level discipline. The last group seemed to believe that while the post was objectionable, no discipline was needed.

13. When Director Schrenker spoke with Petitioner about the post, Petitioner said that she read it "because it was about a child dying." Petitioner was surprised to hear that other employees had taken offense. Director Schrenker did not get the sense that Petitioner understood why her action was objectionable.

14. Petitioner offered to apologize, but was advised by Director Schrenker not to discuss the matter with any of her co-workers.

15. On July 31, 2013, Director Schrenker notified Petitioner in writing that she was considering severe disciplinary action because of Petitioner's Unacceptable Personal Conduct in reading that post during the mandatory staff meeting. R. Ex. 9

16. At the Pre-Disciplinary Conference on August 1, 2013, Petitioner provided a typed statement. She explained that during the staff meeting, she received notice of the FaceBook post and it indicated it was about a child's death. Because some discussion at the meeting related to child tragedies, she read the post. She said that before she read it aloud, she could only see the first paragraph and she had not read the entire post beforehand. When she completed the post, no one said anything, and the discussion moved to other topics; then the meeting concluded without any complaints or comments about the post. She admitted that she had violated known DSS policies against reading her cell phone for personal purposes during work hours and reading FaceBook for non-work purposes during work hours. She apologized for "any hardship or confusion the mis-interpretation of the words that [she] read but were not her own." R. Ex. 9 att. 3

17. On August 2, 2013, Director Schrenker notified Petitioner in writing that while she believed that there were sufficient grounds to terminate Petitioner, due to Petitioner's lengthy employment with Respondent, she elected to demote Petitioner to Social Worker in Investigative/Assessment and Treatment. Director Schrenker hand-delivered that written notice to Petitioner on that day. R. Ex. 10

18. Until the demotion Petitioner received in August 2013, Petitioner had never received a verbal or written warning, or any other disciplinary action. Petitioner got along well with her co-workers, and no one had ever heard her make an offensive or derogatory comment.

19. Petitioner appealed her demotion. At a hearing before Director Schrenker on August 21, 2013, Petitioner complained that the discipline was too severe, that she had adequately performed her duties during the investigation, that "harassment" requires more than one incident, and the majority of attendees at the meeting were not offended by the post. Director Schrenker affirmed the demotion. Petitioner appealed that decision to the DSS Board. R. Exs. 11 & 12

20. On appeal to the DSS Board on August 26, 2013, Petitioner repeated the arguments she had made to Director Schrenker. The Board affirmed Director Schrenker's decision. R. Ex. 13 On September 25, 2013, the Petitioner appealed this decision by

filing a Petition For A Contested Case Hearing with the Office of Administrative Hearings.

21. At the hearing held before the Undersigned, three African-American employees, Farron Askins, Lillie Davis and Sharon Lindsey, testified in accordance with their written complaints that they were shocked and offended by Petitioner's reading the post. The staff meeting occurred very soon after the announcement of the verdict in the trial of George Zimmerman for shooting Trayvon Martin, and feelings about the outcome of that case were very strong. As Petitioner was reading that post, Lillie Davis and Sharon Lindsey left the meeting room in order to compose themselves, but they returned because attendance at staff meetings was mandatory.

22. All three employees said that the article was racially insensitive and inappropriate for the workplace. They felt attacked because of their race and believed that they would thereafter question Petitioner's ability to make decisions in cases involving African-American clients or co-workers. They said that the Petitioner's reading of that post altered the spirit and mood of the unit from one of open doors and friendly chatter to closed doors and grim silence.

23. All three employees stated that Petitioner had never made racist statements before or since the staff meeting.

24. The Undersigned finds as fact that all three employees felt humiliated by Petitioner's conduct at the staff meeting and on the day of the contested case hearing remained distressed by it.

25. The Undersigned finds the testimony of Farron Askins, Lillie Davis and Sharon Lindsey to be credible.

26. Another supervisor, David Richmond, a Caucasian male, testified that he was shocked by Petitioner's reading of the post. He agreed that a racial divide formed in the unit because of the incident and that the tension had finally subsided as a result of time, staff attrition and re-assignments.

27. Program Manager Critcher testified that after Petitioner read the post, the other employees were effectively dumbstruck into silence. Critcher attempted to smooth over the silence by drawing some conclusions about tragedies involving children, but her perception was that the employees simply wanted to leave the room.

28. According to Director Schrenker, relations between African-American employees and Caucasian employees changed noticeably because of Petitioner's action. The atmosphere in the unit remained tense for several months. Gradually, tensions eased as distance from the incident cooled emotions among those employees who were present, and turnover and re-assignments among staff members introduced individuals who had not been at that staff meeting.

29. The Undersigned finds the testimony of David Richmond, Bernice Critcher and Tammy Schrenker to be credible.

30. Petitioner testified that she knows Respondent's policies about harassment and integrity, and against the use of Facebook at work. She acknowledged that as a supervisor she set a bad example at the staff meeting.

31. Petitioner testified that the article was "ridiculous" and she read it out loud to the end of the article so that she "could explain the ridiculousness of it."

32. Petitioner testified that she was not shocked that people were offended by the article but she was shocked because of what others thought about her after she read it out loud.

33. Petitioner has maintained since the staff meeting that she does not agree with the sentiments in the FaceBook post and that she has no animosity toward her African-American co-workers or President Obama.

34. Petitioner testified that after she realized that others were offended by her actions, she wanted to apologize to her co-workers.

35. Petitioner agreed that she should be disciplined for the use of her personal cellphone at work and for reading FaceBook during the staff meeting.

36. Petitioner did not agree that she should be disciplined for reading the article out loud.

37. The Undersigned finds as fact that Petitioner does not fully appreciate the wrongfulness of her conduct in reading out loud an article that is racially insensitive or how her insensitivity has caused harm.

Based upon the foregoing **Findings of Fact**, and upon the preponderance or greater weight of the evidence, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case regarding the discipline of DSS employees pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

2. 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.

3. At the time of the demotion, Petitioner was subject to and entitled to the protections of the State Personnel Act in accordance with North Carolina General Statute § 126-5(a).

4. In this matter, the burden of showing Petitioner was demoted for just cause rests with the Respondent. N. C. Gen. Stat. § 126-34.02.

5. "Determining whether a public employer 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 the conduct constitutes just cause for the discipline imposed. "[N.C. Dept of Env't & Natural Resources vs. Carroll, 358 N.C. 649, 665, 599 S.E.2d 895, 898 (2004)](citations omitted). "Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." [*Id.* at 669, 599 S.E.2d at 900](internal citations and quotation marks omitted)].

6. One of the two bases for "just cause" is "unacceptable personal conduct." 25 N.C.A.C. 01J.0604(b)(2).

7. Unacceptable personal conduct is: (1) conduct for which no reasonable person should expect to receive prior warning; or ... (4) the willful violation of known or written work rules; or (5) conduct unbecoming an employee that is detrimental to the agency's service...." [25 N.C.A.C. 011.2304(b)]

8. In the absence of evidence to the contrary, it is to be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." [Painter vs. Wake County Board of Education, 217 S.E.2d 650, 288 S.E.2d 165 (1975)] The burden is on the party asserting to the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [Rusher vs. Tomlinson, 119 N.C. App. 458, 465, 459 S.E.2d 285, 289 (1995), *aff'd*, 343 N.C. 119, 468 S.E.2d 57 (1996)] "If, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand." [Little vs. Board of Dental Examiners, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted)]

9. The testimony and evidence at the hearing showed that the Petitioner engaged in Unacceptable Personal Conduct by:

    (1) Reading her personal telephone during a staff meeting attended by everyone in her unit. The Petitioner's Program Manager had repeatedly told staff in the CPS that using phones for personal matters during work hours is not allowed;

(2) Reading FaceBook for non-investigative purposes during work hours. DSS Director Schrenker had, on multiple occasions, told DSS staff that being on FaceBook for non-investigative purposes during work hours is not allowed; and

(3) Reading out loud a FaceBook post with inflammatory racial and political content at a mandatory CPS staff meeting.

10. Reading the FaceBook post out loud constituted Unlawful Workplace Harassment. It was unsolicited, not on the agenda for the staff meeting, was unwelcome by other employees at the meeting, and was racially and politically provocative.

11. Even as the inflammatory nature of the post became (or should have become) apparent, Petitioner continued to read the post past the point where a reasonable person would have known that the post was inappropriate and controversial.

12. Petitioner's reading of this FaceBook post contributed to the creation of a Hostile Work Environment. A "single incident might well [be] sufficient to establish a hostile work environment." [Ayissi N. Etoh vs. Fannie Mae, 712 F.3d 572 (D.C.Cir.2013)] Employees under Petitioner's supervision felt personally attacked and humiliated because of their race. The incident interfered with normal relations in the unit and the effects continued to be felt through the time of the hearing on May 16, 2014.

13. The Petitioner's reading of the racially inflammatory post was detrimental to the unit's performance of its regular service. Petitioner's insensitivity raises doubts about Petitioner's ability to be racially objective in cases involving African-Americans.

14. Petitioner's Unacceptable Personal Conduct was just cause for the discipline imposed. Other possible disciplines were considered but found to be inappropriate for the level of personal conduct at issue. Director Schrenker believed that the conduct was sufficiently egregious to justify termination, but she allowed consideration for Petitioner's years of satisfactory performance without unacceptable personal conduct.

15. Petitioner did engage in the conduct alleged by her employer, and her conduct does fall within a category of Unnacceptable Personal Conduct violating the Respondent's policy on Unlawful Workplace Harassment and Hostile Work Environment and those relating to cell phone and FaceBook use.

16. Therefore, Respondent has met its burden of proof and established by substantial evidence in the record that it had just cause to demote the Petitioner for unacceptable personal conduct.

Based upon the foregoing **Findings of Fact** and **Conclusions of Law**, the Undersigned makes the following:

DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to uphold Respondent's demotion of Petitioner from Social Worker Supervisor III to Social Worker in Investigative/Assessment and Treatment.

NOTICE

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29 (a). 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.

IT IS SO ORDERED.

This 2nd day of July, 2014.

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Selina M. Brooks
Administrative Law Judge