STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
13 OSP 19827

CAROLYN COLLINS, Petitioner, v. NC DEPARTMENT OF PUBLIC SAFETY, Respondent.	)))))))	**FINAL DECISION**

The contested case of Carolyn Collins, Petitioner herein, was heard before Administrative Law Judge Craig Croom on April 21-22, 2014 at the Office of Administrative Hearings in Raleigh, North Carolina. Both parties submitted Proposed Final Decisions on May 27, 2014.

APPEARANCES

PETITIONER: Michael C. Byrne
Law Offices of Michael C. Byrne, PC
150 Fayetteville Street, Suite 1130
Raleigh, NC 27601

RESPONDENT: Tamika L. Henderson
Yvonne Ricci
Assistant Attorneys General
N.C. Department of Justice
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WITNESSES

Petitioner did not call any witnesses.

The following witnesses testified for the Respondent:

Carolyn Collins
George Clark
Jerry Michael Frazier
Anne Precythe

EXHIBITS

Respondent's exhibits ("R. Exs.") 1 - 4 and 6 - 20 were admitted into evidence.

PARTY REPRESENTATIVES

The Petitioner's party representative was Petitioner, Carolyn Collins. The Respondent's party representative was Anne L. Precythe.

ISSUES

1. Whether Respondent had just cause on the grounds of gross inefficiency and unacceptable personal conduct to dismiss the Petitioner?

PRE-TRIAL MOTIONS

Petitioner made a Motion to Exclude Witnesses pursuant to N.C. Gen. Stat. 8C-1, Rule 615 and 26 NCAC 03 .0121. The Undersigned granted Petitioner's Motion to Exclude Witnesses.

Petitioner made a pre-trial motion pursuant to N.C.G.S.126-35(a) asking the Court to exclude evidence of Petitioner's active prior written warning. Specifically, Petitioner contended that Respondent could not introduce evidence of any fact that was not included in the dismissal letter. Petitioner argued that anything not specifically mentioned in the dismissal letter must be excluded.

Respondent argued that the written warning was relevant to determine the level of discipline which was appropriate. Moreover, Respondent asserted that the pre-disciplinary conference notification specifically referenced the prior written warning to which Petitioner had notice and an opportunity to respond. However, the dismissal letter did not specifically reference the prior written warning. The Undersigned ruled that it would only consider facts referenced in the dismissal letter. Therefore, the undersigned excluded all evidence of Petitioner's active prior written warning.

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 and Conclusions of Law. 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 the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

FINDINGS OF FACT

Petitioner's Employment History and Training

1. Carolyn Collins commenced her employment with the North Carolina Department of Public Safety ("Respondent") in 1994 as a Clerk/Typist III. (R. Ex.8). In 2001, she became a Probation/Parole Officer. (Transcript ("T.") p. 234). She eventually became a Probation Parole Officer II in 2004. At the time of her termination, she served as a Probation Parole Officer II in Bladen County, North Carolina.

2. Petitioner has served in certified positions since 2001 while employed with Respondent. These positions require certification by the North Carolina Criminal Justice Training and Standards Commission. (T. p. 34). Certified probation parole officers have the power to arrest. (T. p. 234).

3. Petitioner was required to attend annual in-service training in order to maintain her certification. Petitioner attended and successfully completed arrest search and seizure class on March 16, 2011. (T. pp. 34 - 35; R. Ex. 1).

4. Petitioner attended basic training on June 15, 2001 and was taught Respondent's proper arrest procedure in class. (T. p. 36). Moreover, Petitioner conceded that she had been trained on Respondent's arrest policy found in the Respondent's Policy and Procedure manual Chapter E, Section .0400. (T. pp.47-48; R. Ex. 9).

5. Petitioner received the essential job functions for her position as a Probation Parole Officer II and was able to perform those essential job functions. (T. p.36). "Essential Job Functions 3" is the "[a]bility to arrest, search and transport offenders and locate absconders using approved methods." (R. Ex. 2).

6. Prior to 2012, warrants for post release supervision/parole violations went to the Chief Probation/Parole Officer. The Chief Probation/Parole Officer would assign the service of these warrants for arrest to a Surveillance Officer. Petitioner was not involved in this arrest process, except for paperwork after the offender was taken into custody.

7. In 2012, warrants for post release supervision/parole went to the Probation/Parole Officer II, the position held by Petitioner. The Probation/Parole Officer II had to serve the warrant or ensure that another officer served the warrant.

8. Petitioner has made no more than two arrests in her career as a Probation/Parole Officer.

The January 2, 2013 Incident

9. On January 2, 2013, Petitioner had a post release supervision/parole warrant for the arrest of Jeffrey Lewis ("the offender") under her supervision. (T. p. 37).

10. Prior to January 2, 2013, Petitioner had supervised the offender for the previous three months and met with him three times.

11. Petitioner originally didn't recall when she received the warrant or the supervision classification of Offender during her testimony at this hearing. (T. p. 37). However, she later stated she had the warrant in her possession prior to the day the offender arrived at her office. (T. p. 40). The offender was classified as Level I. (T. p. 199). An offender classified as Level I has the highest level of supervision. (T. p. 200).

12. Petitioner maintained during her testimony that the warrant was issued because the offender had missed office visits. (T. p. 39).

13. Petitioner informed a co-worker and relatively new probation/parole officer, Probation/Parole Officer George Clark, that she intended to arrest the offender and would like his assistance. She further testified that she told Officer Clark that she would call and let him know when she needed his assistance with the arrest. (T. p. 39). However, once the offender arrived in the office, she made eye contact with Officer Clark and nodded in consent that this was the offender. (T. p. 39). She never verbally conveyed to Officer Clark that the offender had arrived and she needed his assistance with the arrest. (T. p. 40).

14. Petitioner retrieved the offender's file and took the offender to her office. (T. p. 42). She never informed Officer Clark that she was initiating the arrest process. (T. p. 42). Petitioner's normal procedure was to engage the offender by asking him questions about how he was doing and "what have you been up to?" (T. p. 43).

15. Petitioner informed the offender that she had a warrant for his arrest. (T. p. 43). Prior to informing the offender about the warrant for his arrest, Petitioner did not call Officer Clark for assistance. (T. p. 42). She did not handcuff the offender. (T. p.43).

16. The offender asked the Petitioner if he could leave to smoke a cigarette because the jail was non-smoking. Petitioner allowed the offender to leave to smoke a cigarette. (T. p. 45). Based on her experience, Petitioner believed allowing the offender to smoke would be the best way to handle him at that time. (T. p. 45).

17. The offender left to smoke and never returned. (T. p. 45). Petitioner did not have a reason for not handcuffing the offender when she notified him that he was under arrest. (T. p.46).

18. In her statement, Petitioner stated that she informed the offender in the office that she had reported his pending charges to the Post Release Supervision and Parole Commission ("Commission") and the Commission had issued a warrant for his arrest. (R. Ex. 3; R. Ex. 8). However, during her testimony, she could not recall whether the offender had pending charges or the underlying conviction(s) for the offender being on post-release supervision. (T. p. 47).

19. Petitioner and Officer Clark searched for the offender but were unable to locate him. The offender was arrested a month later and was accused of two counts of first-degree attempted murder, possession of a firearm by a known felon and going armed to the terror of the public. (T. p. 49; R. Ex. 17).

The Investigation

20. Michael Frazier is the Judicial District Manager for District 13. He supervises the Probation/Parole officers in Brunswick, Columbus, and Bladen County. (T. p. 191).

21. Mr. Frazier received an alert regarding a serious incident report related to the offender that absconded from the Petitioner's office. (T. p. 193). When an offender under the supervision of a Probation/Parole Officer is charged with one of the designated serious crimes, an alert is sent to the NCDPS system that a serious incident has occurred. (T. p. 193).

22. Frazier notified the Chief Probation/Parole Officer in Bladen County to have the Petitioner gather as much information as she could about the incident and the offender, so that he could advise the chain of command on the particulars of what occurred which caused the serious crime alert. (T. p. 193).

23. As a result of the alert and resulting serious crime report, Frazier completed an audit of the case. The audit revealed that Petitioner received an arrest warrant for the offender from the Commission on December 28, 2012. The offender came to Petitioner's office on January 2, 2013. After notifying the offender that he was under arrest, Petitioner allowed him to leave the building to smoke a cigarette. (R. Ex. 8). The offender was not captured until February 2, 2013. (R. Ex. 8). The offender was charged with two counts of attempted First-Degree Murder, Possession of Firearm by Felon and Going Armed to the Terror of the Public. These offenses were alleged to have occurred on February 9, 2013. (R. Ex. 8). As a result of the case audit, Frazier was then ordered to conduct an internal investigation. (T. p. 194).

24. Frazier conducted an internal investigation which included interviewing and obtaining written statements from Officer Clark and Petitioner. (T. p. 194). At the completion of the investigation, Frazier drafted a written investigation report and submitted the report up his chain of command. (T. pp. 194-195; R. Ex. 8).

25. Frazier's investigation reported that Petitioner violated NCDPS' arrest policy when she allowed the offender to leave in the middle of the process of conducting the arrest. (T. p. 195). Specifically, Frazier testified that once Petitioner informed the offender she had a warrant for his arrest, Petitioner failed to follow NCDPS arrest procedure which included handcuffing the offender. (T. p. 198; R. Ex. 9).

26. Frazier did not find any mitigating factors. (T. pp. 216, 225).

Petitioner's Dismissal

27. Petitioner was notified by letter dated June 18, 2013, that Respondent intended to hold a pre-disciplinary conference. (R. Ex. 11).

28. The pre-disciplinary conference was held on June 20, 2013. The pre-disciplinary conference letter was read to the Petitioner, and she was given an opportunity to respond to the allegations contained therein. The pre-disciplinary conference letter referenced Petitioner's prior active written warning. (R. Exs. 12 - 13).

29. Ann Precythe ("Director Precythe") is the Director of Community Supervision for respondent, Adult Correction and Juvenile Justice Court Services. She is responsible for overseeing administrative and field operations for the adult offender population of 105,000 offenders and the juvenile justice court services population of 10,500 in North Carolina. She also oversees 2,500 employees and 500 juvenile justice court services employees. (T. p. 297). Director Precythe previously served as probation/parole officer for ten (10) years. (T. p. 297).

30. Director Precythe is the final decision maker for employee disciplinary decisions for Probation/Parole officers like the Petitioner. (T. p. 299).

31. On June 28, 2013, Director Precythe received a dismissal package regarding Carolyn Collins which included a recommendation that Petitioner be terminated. (R. Exs. 15 - 16).

32. Director Precythe reviewed the Final Recommendation from Diane Isaacs, draft letter recommending dismissal, recommendation for disciplined (signed at the disciplinary conference), pre-disciplinary conference acknowledgement form, the pre-disciplinary conference notification letter, the investigation summary materials and a copy of the internal investigation and all supporting documentation including the written statements. (T. p. 301 - 305; R. Ex. 16).

33. Director Precythe reviewed all the information available to her. Based on her review, Petitioner's conduct on January 2, 2013 warranted dismissal. Director Precythe stated the act of placing an offender under arrest is one of the most dangerous and serious

responsibilities that every probation/parole officer has and should never be taken lightly. (T. p. 308).

34. Respondent trains officers on the arrest process and it is the officer's responsibility to execute arrests. If an officer is not comfortable making arrests, the officer should ask for assistance. (T. p. 308).

35. Petitioner placed herself as well as her co-workers and the public in danger by not following the appropriate arrest procedure (T. p. 308).

36. Director Precythe took into consideration that during the investigation Petitioner maintained that she had in fact properly followed the arrest policy. (T. pp. 314 - 315).

37. Petitioner used poor judgment in allowing the offender to leave to smoke a cigarette especially given the over ten (10) years of experience that the Petitioner had within community corrections. In spite of years of training, Petitioner failed to properly plan for the arrest of the offender and properly implement Respondent's arrest procedure. (T. p. 317 - 318).

38. Director Precythe took into account information in Petitioner's employment history that was not alleged in the dismissal letter when considering the appropriate level of discipline. (T. p. 335-7).

39. Director Precythe did not consider demotion to a non-sworn position, such as Judicial Services Coordinator, as an acceptable form of discipline due to Petitioner's past disciplinary history. (T. pp. 329 - 330). This prior disciplinary history was not specifically alleged in the dismissal letter. Therefore, the undersigned cannot consider this prior disciplinary history.

40. Director Precythe did not consider demotion to a non-sworn position, such as Judicial Services Coordinator, as an acceptable form of discipline due to the exercise of poor judgment concerning the arrest of the offender on January 2, 2013. The non-sworn position of a Judicial Services Coordinator requires the exercise of good judgment. That position monitors the unsupervised probation cases and needs to be kept on a time frame and carries the responsibility to report violations back to the court in a timely manner. (T. p. 331).

41. Director Precythe considered that Petitioner should have taken in consideration the underlying charge(s) which served as the basis for the offender's parole/post release supervision and the violations alleged for the parole/post release supervision. (T. p. 350). Failure to plan for an arrest is poor judgment by the Petitioner. (T. p. 350).

42. Petitioner was terminated on August 5, 2013 for grossly inefficient job performance and unacceptable personal conduct. The specific conduct and performance issues were listed as follows: 1) failure to follow proper procedure while attempting to arrest an Offender, 2) willful violation of known or written work rules, 3) conduct unbecoming a State employee that is detrimental to State service and 4) conduct for which no reasonable person

should expect to receive prior written warning. (R. Ex. 17). Petitioner filed a grievance on August 15, 2013.

Petitioner's Credibility Issues

43. During her testimony in this hearing, Petitioner often responded "I don't recall" or was hesitant when asked questions related to the offender's violations on parole/post release supervision and his later charges. (T. p. 38). She insisted that the warrant was issued for the offender's arrest due to the offender missing office visits. (T. p. 38). She testified under questioning from her attorney that the only issue presented by the offender was his missing appointments with her. (T. p. 68). She insisted that the pending charges referenced in her written statement referenced missed office visits. (T. p. 69; T. p. 92). However, immediately prior to the questioning by her attorney she testified that she simply did not recall if the offender had pending charges but believed that he got them subsequently. (T. p. 47). However, in her first written statement Petitioner indicated that she advised the offender that she had reported "the pending charges" to the Post release Supervision and Parole Commission and that the Commission had issued a parole/post release supervision warrant. (R. Ex. 3).

44. The undersigned considered for impeachment purposes that the warrant was issued for the offender's arrest due to a positive drug screen and pending charges. (T. p. 322). These pending charges included several counts of resisting arrest. (T. p. 206). In preparing to arrest the offender, the offender's pending charges were known or should have been known to the Petitioner as evidenced by her own written statement.

45. Petitioner indicated she had no reason to believe that the offender would flee and was surprised by his actions. (T. pp. 67, 77, 86). However, in preparing to arrest the offender, Petitioner was aware or should have been aware that the offender had been charged with resisting arrest as the information was readily available in the offender's file. (T. p. 206). Furthermore, Petitioner concedes that an officer's knowledge of an offender is relevant in how an officer effectuates NCDPS' arrest policy. (R. Ex. 3 at pg. 4).

46. Petitioner testified extensively that it was her belief that based on the "minor charges" the offender was facing he would have simply been released. (T. p. 83 - 85). She testified under questioning by her attorney that in her experience 90% of the time the offender would have simply been released and would not have resulted in the post-release supervision being revoked. (T. p. 85). However, when asked by Respondent what in her experience would happen when the offender was charged with more serious crimes such as resisting arrest and failing a drug screen the Petitioner stated, "I don't recall." (T. p. 111).

47. Petitioner testified that she did not recall what crimes the offender had been charged with after he absconded from her office. (T. p. 49). Petitioner did not recall that the offender was charged with two counts of attempted first-degree murder, possession of a firearm by a felon and going armed to the terror of the public despite those facts being noted in both her pre-disciplinary notification letter and her dismissal letter. (R. Exs. 13, 17). The fact that the

Petitioner cannot recall key facts which formed the basis of her termination in such a selective manner is viewed skeptically by this Court.

48. Petitioner informed the offender that he was under arrest. Prior to allowing the offender to leave her office to smoke, Petitioner testified that the offender did not state he was "going away for a long time". (T. p. 111). However, when shown her prior written statement wherein she informed NCDPS that the offender did indeed indicate his belief that he would be going to jail for a long time, the Petitioner testified that the statement refreshed her recollection. (T. p. 113). However, when directly asked by the Court for clarification purposes if she recalled the offender saying that to her, the Petitioner stated, "So I'm not—I don't know if that something that I –that I will simply say I don't recall." (T. p. 114).

49. Petitioner testified that she provided Officer Clark with a picture of the offender and told Officer Clark what time the offender was supposed to come in for his appointment. (T. pp. 70 - 71). Petitioner testified that when the offender arrived she looked at Officer Clark's eyes to make sure he knew that this was the offender that needed to be arrested. She testified Clark looked at her and nodded his head. (T. p. 73) However, in her first and second written statement she never stated that she showed Officer Clark a picture of the offender nor did she indicate that she made eye contact with Officer Clark and he nodded in acknowledgement. Instead in her first written statement, Petitioner stated that she informed Officer Clark to be on standby, and he was on standby waiting on her call. (R. Ex. 3). Officer Clark asked the Petitioner for a description of the offender and she never gave it to him. (T. p. 137). He also denied that Petitioner ever gave him a photograph of the offender. (T. p. 139).

50. The undersigned did consider that Petitioner often responded "I don't recall" or was hesitant when asked questions related to the offender's violations on parole/post release supervision and his later charges in determining Petitioner's credibility. While these issues of credibility did arise, the facts are undisputed that Petitioner did allow the offender to leave her office after she informed the offender that he was under arrest.

Petitioner's Contentions Regarding Arrest

51. Petitioner testified significantly under questioning from her attorney that NCDPS's arrest policy does not state when she was required to place the handcuffs on the offender. (T. p. 77). However, Petitioner later testified that based on her training she understood that NCDPS's arrest policy required her to place the offender in handcuffs once the offender could be subdued. (T. p. 121). While the arrest policy does not specifically state put the handcuffs on an offender immediately, common sense and good judgment dictates handcuffs be placed on the offender immediately in order to prevent an offender from escaping and fleeing apprehension as in the case. Once an offender is told of the arrest, all efforts should be made to handcuff the arrested offender. The Undersigned does not find Petitioner's testimony that she did not understand that the arrest policy required her to place the offender in handcuffs either immediately or as soon as possible after informing the offender that he was under arrest credible.

52. Throughout the disciplinary process and at the time of termination, Petitioner maintained that she believed that allowing the offender to leave her office to smoke a cigarette after informing him that he was under arrest was permissible under NCDPS' arrest policy. (R. Ex. 3). In fact, in her first written statement she stated, "it is my belief I did carry out properly. I feel find (sic) with the arrest properly." (R. Ex. 3 at pg. 6). Furthermore, Petitioner at that time did not believe she had placed the offender under arrest despite informing him that she had a warrant for his arrest. (R. Ex. 4 at pg. 4).

53. Petitioner admitted at this hearing that she made a mistake in effectuating the arrest process, and it was an error in judgment to allow the offender to leave her office to smoke. (T. pp. 86 - 87).

54. While these issues of credibility did arise, the facts are undisputed that Petitioner did allow the offender to leave her office after she informed the offender that he was under arrest.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case under Chapters 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. The Office of Administrative Hearings has jurisdiction to hear her contested case and issue the final decision in this matter.

3. Petitioner was dismissed on August 5, 2013, and she filed her grievance on August 15, 2013. Grievances filed prior to August 21, 2013 are subject to the North Carolina State Personnel Act. Therefore, Petitioner was a career State employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et. seq.*). Furthermore, an employer may discharge, suspend, or demote an employee for disciplinary reasons upon a showing of just cause pursuant to N.C. Gen. Stat. § 126-35.

3. N.C.G.S. 126-35 (a) has been interpreted to require that the acts or omissions be described "with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge . . . . An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation." *Employment Security Commission v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981).

4. Pursuant to N.C. Gen. Stat. § 126-35(d) and N.C. Gen. Stat. § 150B-29(a), Respondent has the burden of proof by a preponderance of the evidence on the issue of whether it had just cause to discharge, suspend, or demote Petitioner.

5. An employer may discipline or dismiss an employee for just cause based on unsatisfactory job performance including grossly inefficient job performance pursuant to 25 NCAC 01J .0604(b)(1) or unacceptable personal conduct to 25 NCAC 01J .0604(b)(2). 25 NCAC 01J 0604(b).

6. 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." *North Carolina Department of Environment and Natural Resources, Division of Parks and Recreation v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004).

7. The dismissal letter specified that the Petitioner was being dismissed for grossly inefficient job performance and unacceptable personal conduct.

Grossly Inefficient Job Performance

8. Employees may be disciplined or dismissed for unsatisfactory or grossly inefficient job performance upon a showing of just cause. 25 N.C.A.C 1J .0604(c). Furthermore, an employee may be dismissed for a current incident of grossly inefficient job performance without any prior disciplinary action. 25 N.C.A.C. 01J .0606(a)

9. Pursuant to 25 N.C.A.C. 1J. 0614(5), "Grossly Inefficient Job Performance" "means a type of unsatisfactory job performance that occurs in instances in which the employee: fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency; and, that failure results in

> (a) the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) over whom the employee has responsibility; or
>
> (b) the loss of or damage to state property or funds that result in a serious impact on the State or work unit."

10. Respondent must demonstrate that 1) Petitioner failed to perform a job requirement satisfactory and 2) that failure resulted in the creation of the potential for death or serious bodily injury. *Donoghue v. North Carolina Department of Correction*, 166 N.C. App. 612, 616, 603 S.E.2d 360, 363 (2004).

11. 25 N.C.A.C. 1J. 0614(5)(a) only requires the creation of the potential for death or serious bodily injury and does not require that actual death or serious bodily injury result. *See North Carolina Department of Correction v. McKinney*, 149 N.C. App. 605, 609, 561 S.E.2d 340, 343 (2002) (interpreting previous 25 N.C.A.C. 1J .0606).

12. One of the essential job functions for Probation/Parole Officer II, the position held by Petitioner, is the "[a]bility to arrest, search and transport offenders and locate absconders using Division approved methods.

13. The Community Corrections Policy and Procedure Manual details the procedure in Chapter E, Noncompliance, Arrest, Section .0400, pages 230 – 234 ("arrest policy"). The policy states in relevant part, "Arrest Procedure. An officer will do the following when arresting an offender:

> (a) Identify himself or herself, informing the offender that he or she is under arrest and, as promptly as is reasonable under the circumstances, inform the offender of the cause of the arrest. G.S. 15A-401(c)
> (b) Handcuff the offender;
> (c) Search the offender;
> (d) Ensure that the offender is transported to the magistrate's without unnecessary delay;"

14. The arrest policy is unambiguous. The undersigned is not persuaded by the Petitioner's contention that the policy failed to state when the handcuffs were to be placed on the offender. Petitioner's own testimony under cross-examination revealed that she understood that the offender was to be handcuffed after he was informed he was under arrest and subdued. While the arrest policy does not specifically state put the handcuffs on an offender immediately, common sense and good judgment dictate that handcuffs be placed on the offender immediately in order to prevent an offender from escaping and fleeing apprehension as in this case. Once an offender is told of the arrest, all efforts should be made to handcuff the arrested offender. The Undersigned does not find Petitioner's testimony that she did not understand that the arrest policy required her to place the offender in handcuffs either immediately or as soon as possible after informing the offender that he was under arrest credible. Furthermore, quite simply, Petitioner violated the arrest policy by allowing the offender to leave and smoke a cigarette after the offender was told Petitioner had an arrest warrant for him. Nowhere in the policy is such action permissible.

15. Petitioner failed to perform a job requirement satisfactorily.

16. The inquiry now must turn to whether Petitioner's unsatisfactory job performance created the potential for death or serious bodily injury.

17. By allowing the offender to leave and smoke a cigarette after being told he was under arrest resulted in the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public. Petitioner's failure to follow its' arrest policy created the *potential* for death or serious bodily injury.

18. While evading capture, the offender was charged with two counts of attempted first-degree murder, possession of a firearm by a felon and going armed to terror of the public. However, the offender did not need to be charged with those horrible crimes or even be convicted of them in order for Respondent to determine that Petitioner's failure to follow Respondent's arrest policy and immediately place handcuffs on the offender created the *potential* for death or serious bodily injury.

19. A career state employee may be immediately dismissed for one incident of grossly inefficient job performance without any prior disciplinary action. *Steeves v. Scotland County Board of Health*, 152 N.C. App. 400, 407 567 S.E.2d 817, 821 822 (2002). Accordingly, Respondent established that Petitioner's conduct was grossly inefficient job performance.

20. Respondent met its burden of proof that it had just cause to dismiss Petitioner for grossly inefficient job performance.

Unacceptable Personal Conduct

21. The Department of Corrections Personnel Manual, Section 6, Appendix Personal conduct, defines unacceptable personal conduct as, "[w]illful violation of known or written work rules, conduct unbecoming a State employee that is detrimental to State service, and conduct for which no reasonable person should expect to receive prior warning."

22. An employer may discipline or dismiss an employee for just cause based upon unacceptable personal conduct. 25 N.C.A.C. 1J. 0604(c). Furthermore, an employee may be dismissed for a current incident of unacceptable conduct without any prior disciplinary action. 25 N.C.A.C. 01J .0608(a)

23. Respondent has the burden of proof to show by a preponderance of the evidence that it had just cause to discipline Petitioner for unacceptable personal conduct.

24. The proper analytical approach in just cause cases dealing with unacceptable personal conduct requires a three-step analysis. The first inquiry is 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 of 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." *Warren v. N.C. Dept. of Crime Control & Public Safety*, ____ N.C. App. ____, 726 S.E.2d 920, 925 (2012), *review dismissed, as moot*, 734 S.E.2d 867, 2012 N.C. LEXIS 1064 (2012).

Did Petitioner engage in the conduct as alleged?

25. Petitioner engaged in the conduct alleged by Respondent. She initiated the arrest of the offender. Petitioner then allowed the offender to leave to smoke a cigarette, and the offender never returned to the Petitioner's office in order to be taken into custody. Petitioner concedes she committed the conduct as alleged, and concedes she exercised poor judgment under the circumstances.

Does Petitioner's conduct fall into one of the categories of unacceptable personal conduct?

26. The next step in the *Warren* analytical process is whether the behavior falls into one of the categories of unacceptable personal conduct defined by 25 N.C.A.C. 1J. 0614(8) in relevant part:

> (a) conduct for which no reasonable person should expect to receive prior warning;
> (d) the willful violation of known or written work rules;
> (e) conduct unbecoming a state employee that is detrimental to state service;

27. Any one of the types of unacceptable personal conduct identified above is sufficient to constitute just cause.

28. After informing the offender she had a warrant for his arrest for violating the terms of his post release supervision/parole, Petitioner allowed the offender to leave her office and smoke a cigarette. The offender did not return to Petitioner's office. Petitioner's conduct is such for which no person should expect to receive prior warning and constitutes conduct unbecoming a state employee that is detrimental to state service.

29. Willful violation of a known or written work rule turns on whether the employee acted willfully, not whether the employee intended to break a rule. *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005) (citation omitted).

30. The arrest policy is a known, written work rule.

31. Petitioner's failure to follow the arrest policy was admittedly willful.

32. There is substantial, credible evidence in the record showing that Petitioner's failure to abide by the Respondent's arrest policy constituted conduct for which no reasonable person should expect to receive prior warning, was a willful violation of known or written work rules, and conduct unbecoming a state employee that is detrimental to state service.

33. Petitioner's conduct on January 2, 2013 constituted unacceptable personal conduct for which Respondent had just cause to discipline the Petitioner.

Did Petitioner's conduct amount to just cause for dismissal?

34. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry of 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." *Warren*, ____ N.C. App. at ____, 726 S.E.2d at 925 (2012). The *Warren* Court refers to this process as "balancing the equities."

35. Petitioner had been working in a certified position with Respondent for over a decade. She had been trusted with the powers of arrest for twelve years. The act of arresting an offender is inherently dangerous and should never be taken lightly. Petitioner was or should have been aware that the warrant of arrest for this particular offender was issued because the offender had been recently charged with, among other things, resisting arrest. Petitioner should have been prepared for the offender to be noncompliant. Petitioner knew that the offender was on post release supervision and the underlying violent offense for which he was released from prison to post release supervision. Petitioner knew or should have known the real potential for death or serious bodily injury which was created when she informed the offender that she had a warrant for his arrest and then did not properly execute the rest of the arrest process.

36. While evading apprehension, the offender was finally apprehended by law enforcement and was charged with two counts of attempted first degree murder, possession of a firearm by a known felon, and going armed to the terror of the public.

37. Mitigating factors in the employee's conduct should also be considered in this third prong. *See Warren*, citing Roger Abrams and Dennis Nolan, TOWARD A THEORY OF "JUST CAUSE" IN EMPLOYEE DISCIPLINE CASES, 1985 Duke L.J. 594 (September 1985).

38. Petitioner insisted during the disciplinary process that based on her experience she believed that her conduct was proper and in accordance with the arrest policy. However, Petitioner admitted at this hearing that she made a mistake in effectuating the arrest process, and it was an error in judgment to allow the offender to leave her office to smoke.

39. Petitioner has been employed with Respondent since 1994. The undersigned considered that Petitioner did not regularly make arrests in her position. Petitioner made no more than two arrests during her career as a Probation/Parole Office II. While she had the power to arrest, Petitioner did not regularly exercise that power. She relied on the Bladen County Sheriff and Surveillance Officers to make arrests prior to a change in policy in 2012.

40. Respondent considered prior disciplinary action, not included in the dismissal letter, in its decision to dismiss Petitioner. In light of the prior disciplinary action not being stated in the dismissal letter, the undersigned did not consider the prior disciplinary action.

41. Respondent had just cause to discipline the Petitioner. Petitioner did not comply with Respondent's arrest policy. Petitioner's failure to abide by the arrest policy constituted unacceptable personal conduct.

42. The ability to arrest is an essential job function for a Probation/Parole Officer II. Petitioner failed to perform this essential job function. Accordingly, the undersigned finds that there was just cause to dismiss the Petitioner for unacceptable personal conduct.

43. Respondent met its burden of proof that it had just cause to dismiss the Petitioner for unacceptable personal conduct.

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

FINAL DECISION

The undersigned Administrative Law Judge finds that Respondent's dismissal of Petitioner for just cause should be **UPHELD.**

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of 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 _____ day of _____, 2014.

_____

Craig Croom
Administrative Law Judge