STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
WAKE COUNTY	**13 OSP 20268**

WANDA RENFROW,	)	
	)	
Petitioner,	)	
v.	)	**FINAL DECISION**
	)	
NORTH CAROLINA DEPARTMENT OF REVENUE	)	
	)	
Respondent.	)	

This contested case was commenced by the filing of a petition on December 20, 2013. It was assigned to Fred G. Morrison Jr., Senior Administrative Law Judge. On March 3, 2014, Respondent filed a Motion for Summary Judgment. On April 21, 2014, Judge Morrison held a hearing on the motion and instructed the parties that he was taking the matter under advisement until Respondent issued a Final Agency Decision. After issuance of the Final Agency Decision on October 16, 2014, Judge Morrison resumed the hearing for the Motion for Summary Judgment on October 31, 2014, and heard oral arguments on the motion. On December 30, 2014, the parties submitted a Stipulation of Facts at the direction of Judge Morrison.

Each party contends that it is entitled to summary judgment. After careful consideration of Respondent's motion, the oral arguments, the matters of record, and the submissions of the parties, the undersigned determines the following:

STIPULATION OF FACTS

1. Petitioner was a career State employee, as defined in N.C. Gen. Stat. § 126-1.1(a).

2. From December 4, 1988, until December 1, 2013, Petitioner was continuously employed by Respondent in Respondent's Motor Fuels Division (now Excise Tax Division). Petitioner did not work in the Respondent's division of individual income tax at any time during her career with Respondent.

3. Petitioner was promoted to the position of Returns Processing Supervisor, Grade 61, in Respondent's Excise Tax Division in 2000.

4. Throughout Petitioner's long career, Petitioner received performance review ratings of Good, Very Good, or Outstanding. For her most recent performance review (2012-13), her immediate supervisor, Mrs. Christie Chewning, rated her Very Good and for her next most recent review (2011-12), Mrs. Chewning rated her Outstanding.

5. Mrs. Donna Alderman was an employee of the Division for over 30 years and was the supervisor of Christie Chewning. Her last position in the Division was as Assistant Director. She retired effective June 1, 2013. In her affidavit of March 12, 2014, Mrs. Alderman made the following statements:

> In my positions in the Motor Fuels Division, I was very familiar with the quality of Wanda Renfrow's work as well as her work ethic and her relationships with her co-workers. Wanda is an exemplary employee. Wanda is very knowledgeable about the work of the Division, she is very dependable, and the people in the unit she supervises love her. Wanda goes the extra mile to make sure that her work is done properly. Wanda is a go-to person I could rely on to get the job done.

6. Mr. Julian Fitzgerald was the Division Director for over 15 years and the supervisor of Donna Alderman. He retired effective August 1, 2013. In his affidavit of March 13, 2014, he made the following statements:

> Wanda Renfrow was an employee in the Motor Fuels Division for my entire tenure as Director. I am very familiar with the quality of Wanda Renfrow's work and her work habits. Wanda was a stellar employee. She had a spotless record. She was very good at her job and was always willing to make the extra effort. She was a valued employee and very highly regarded among her co-workers.

7. Petitioner's husband, Richard Renfrow, prepared their federal and state joint individual income tax returns for tax years 2008, 2009, and 2010, using a purchased software package and electronically filed them on time in calendar years 2009, 2010, and 2011 respectively. Petitioner and her husband have filed joint individual income tax returns since they were married over 33 years ago. Petitioner's affidavit states the following:

- Her husband has always been responsible for preparing the returns.
- She did not review the 2008, 2009, or 2010 joint returns before they were filed and did not sign them (as they were filed electronically).
- She thought the returns her husband prepared were correct.
- She trusts her husband and trusts him to prepare their income tax returns.
- She and her husband have never received a notice from the Internal Revenue service about having a return audited or owing more tax, including their 2008, 2009, and 2010 returns.
- Until the fall of 2011, she and her husband had never received a notice from Respondent about having a return audited or owing more tax.

8. Respondent has a long-standing employee tax compliance policy that is set out in a memorandum distributed each year to its employees. The memos dated February 11, 2009; February 8, 2010; and February 18, 2011 were restatements and reminders of the policy for tax years 2008, 2009, and 2010, respectively. All of these memos state that employees of the Department of Revenue "are expected to fully comply with" the tax laws and that "[f]ailure to comply with any of these policies will result in disciplinary action up to and including dismissal." The 2010 and 2011 memos add that failure to comply will result in "potential criminal

prosecution." The memo dated February 11, 2009, instructs employees that they "must make timely payments of any tax imposed by these laws and file any required return in a timely manner, even if you are due a refund or there is no tax due with the return." The memo dated February 8, 2010, adds that employees must file any required return in an "accurate manner." The memo dated February 18, 2011, states that "employees are required to report their correct tax liability on all tax returns" and to "pay all their tax liabilities in a timely manner" and explains that paying tax under an installment agreement does not constitute full compliance.

9. The February 18, 2011 tax compliance memo has an attachment called "Frequently Asked Questions" ("FAQ"), which includes the following questions and answers:

> **I don't know a thing about taxes and my spouse always does our return. What if there are errors on our returns and I didn't have anything to do with them?** *When you file a joint return, you and your spouse are jointly liable for the information on that return. If you have any reason to believe that the information included in that return is not accurate, you should file a married filing separately return.*
>
> **I know that I made a number of contributions to various organizations this year and had an illness that resulted in higher than normal medical expenses. I just don't have receipts or cancelled checks to support all of them. Can't I just estimate these deductions for my return?** *No, you must be able to substantiate any and all information included in your return and the requirements for substantiation vary. . . . The bottom line is, however, you must be able to prove that you are entitled to the deduction.*

10. The February 8, 2010, and February 18, 2011, tax compliance memos state that each employee is to sign an acknowledgement signifying that the employee has read and understood the memo and, for 2011, also read and understood the FAQ. The signed acknowledgment is to be given to the employee's supervisor to be collected by Human Resources. The acknowledgements accompanying these two memos state that by signing the employee acknowledges that compliance with the policies in the memo is "a condition of employment." By signing the acknowledgement, Petitioner indicated, among other things, that she had read and understood the excerpt quoted above. Respondent produced an acknowledgement signed by Petitioner for the February 18, 2011, tax compliance memo to which the FAQ was attached, but was unable to provide a signed acknowledgement of the memo dated February 8, 2010.

11. Respondent selected Petitioner's joint individual income tax returns for tax years 2008, 2009, and 2010 for audit.

12. In September of 2011, Petitioner received a letter from an auditor at Respondent informing Petitioner that the joint individual income tax returns of Petitioner and her husband for tax years 2008, 2009, and 2010 had been selected for audit by Respondent. The auditor provided a list of records for the Renfrows to bring and scheduled a meeting for September 28, 2011. She then worked with them, giving them time to substantiate the deductions. On February 22, 2012, the auditor issued an explanation of adjustment for the three years examined.

13. The auditor found that for the 2008 tax year, "[s]ome itemized deductions were claimed that you could not provide adequate records to support." Similarly, for the 2009 and 2010 tax years, the auditor found that Petitioner and her husband "could not provide adequate records to support all of the deductions claimed on your tax return." The primary unsubstantiated deductions for which the Renfrows had no documentation whatsoever were as follows:

2008	$22,385 cash contributions
	$ 11,063 medical deductions
2009	$23,376 cash contributions
	$16,098 medical deductions
2010	$21,250 cash contributions
	$14,535 medical deductions

14. The auditor disallowed the deductions that lacked supporting records, which almost doubled the taxable income for the Renfrows and accordingly increased the amount of tax due on their state joint returns for those years. The audit resulted in total tax due to the State in the amount of $7,107 for tax years 2008, 2009, and 2010.

15. On February 29, 2012, Respondent issued notices of assessment against Petitioner and her husband for the additional tax owed. Amended notices were issued on April 2, 2012. The Renfrows were then entitled to a period in which to appeal the amount of tax owed. They did not contest the tax. The notices of assessment did not include either a negligence penalty or a fraud penalty. According to the auditor, she had originally included the negligence penalty, but was instructed to drop it by Respondent.

16. According to Petitioner's affidavit, at some point after Petitioner met with Respondent's auditor, Petitioner met with her division Director, Mr. Julian Fitzgerald, to discuss the 2008, 2009, and 2010 returns.

17. After meeting with Mr. Fitzgerald, Petitioner received a call from Respondent's auditor informing Petitioner that she and her husband would receive documents in the mail setting up a payment plan to repay the amount of tax due. On March 23, 2012, Petitioner's husband signed the documents, which authorized Respondent to draft $315.00 from their joint checking account each month until the tax debt was paid. The monthly payment amount is more than ten percent (10%) of Petitioner's disposable income from her individual earnings.

18. The payment plan concluded in January of 2014 upon payment of all the tax and interest owed. Upon payment of the principal and interest, Respondent waived the failure to pay penalty.

19. Respondent administers its employee tax compliance policy through upper management. Upper management recommended termination of Petitioner. A representative of upper management communicated this decision to Director Julian Fitzgerald, who was expected to implement the decision. No one in the Excise Tax Division initiated or recommended disciplinary action against Petitioner. Mr. Fitzgerald had not implemented this decision as of his retirement effective August 1, 2013. In his affidavit of March 13, 2014, he stated that he did not agree with terminating Petitioner.

20. On November 5, 2013, Petitioner's then Acting Division Director, Mr. John Panza, met with Petitioner and gave her a Notice of Pre-Disciplinary Conference. The Notice recommended that Petitioner be dismissed on the basis of unacceptable personal conduct for "violation of the Department's Tax Compliance Policy." The Notice states that Petitioner's "Individual Income Tax Returns were examined for tax years 2008, 2009, and 2010" and that on each of those returns itemized deductions were claimed that Petitioner could not substantiate, resulting in a total state tax liability of $7,107 for those years. The Notice advised Petitioner that she was to attend a pre-disciplinary conference scheduled the next day.

21. According to Petitioner, in the more than 19 months that had elapsed since Petitioner's entry into the payment plan, no one at Respondent had said anything to Petitioner about the 2008, 2009, and 2010 returns.

22. In the time between Petitioner's entry into the payment plan and November 5, 2013, Respondent had "looked over" Petitioner's joint individual income tax returns filed for 2011 and 2012 but did not audit them or otherwise make a determination as to errors.

23. As of November 5, 2013, over 4½ years had elapsed since the filing of the 2008 return, over 3½ had elapsed since the filing of the 2009 return, and over 2½ had elapsed since the filing of the 2010 return. Over two years had elapsed since Petitioner received the September 2011 letter informing her of the audit. During this time, Respondent experienced a change of administration and two of the three individuals in Petitioner's supervisory chain within the Excise Tax Division at the time of the audit had retired.

24. On November 6, 2013, Respondent received a fax requesting that Petitioner be excused from work for medical reasons until November 12, 2013. Petitioner has a heart condition. Respondent sent correspondence to Petitioner on November 7, 2013, by overnight Federal Express rescheduling the pre-disciplinary conference for November 12, 2013.

25. On November 7, 2013, Petitioner submitted to Respondent the North Carolina form, "Claiming Your Monthly Retirement Benefit," on which Petitioner answered December 1, 2013, as the effective retirement date for the section, "Please choose an effective retirement date."

26. On November 12, 2013, Petitioner attended the pre-disciplinary conference with Acting Director John Panza and Assistant Director Al Milak. Petitioner had secured representation by legal counsel before this date. Petitioner had had 7 days from the date she received the pre-disciplinary notice to consider what action she wanted to take and to seek counsel to advise her in this process.

27. At the conference, in addition to offering the evidence she wanted considered, Petitioner presented a letter and a note. The letter stated that "I do not want to be dismissed from my job. I intend to go through the internal review of the decision. . . . I love my job and what I do." The letter further stated, "Before any decision to dismiss me becomes final, I would like the opportunity to have my records reflect that I retired rather than I was dismissed." A note provided in addition to the letter and signed by Petitioner states "If the agency is not going to

reinstate my employment with the Department. I'am [sic] turning in my letter of retirement from Returns Processing Supervisor effective December 1, 2013."

28. After hearing the report from the persons conducting the conference, upper management made the decision to follow its previous recommendation to terminate Petitioner. In consideration of Petitioner's letter and note presented at the disciplinary conference, Respondent sent Petitioner a letter dated November 13, 2013, informing Petitioner that "We are accepting your resignation of retirement effective December 1, 2013. We understand you will be taking approved leave until that day. Per your request we have stopped any further disciplinary action."

29. Respondent did not give Petitioner a letter of dismissal or any document stating that Respondent had decided to dismiss Petitioner beyond the letter of November 13, 2013, "accepting your resignation of retirement" and stopping any further disciplinary action per her request. Respondent did not give Petitioner a notice of her appeal rights at the pre-disciplinary conference or at any other time. Voluntary retirement is not subject to appeal rights.

30. Respondent recorded Petitioner's termination of employment on the State's Beacon System as retired effective December 1, 2013, the date Petitioner selected on the Claiming Your Retirement Benefit she submitted.

31. By letter hand-delivered to Respondent on November 14, 2014, Petitioner stated,

> I received your letter today stating that "We are accepting your resignation of retirement effective December 1, 2013" and I want to be sure there is no misunderstanding here. In my November 13, 2013 letter to you, I stated that I do not want to be dismissed from my job and that I intend to go through the internal review of the decision. I further stated that "Before any decision to dismiss me becomes final, I would like the opportunity to have my records reflect that I retired rather than I was dismissed."
>
> My retirement is conditional and the triggering condition is a decision by you [Respondent] that you have considered all other options and have made a determination to dismiss me." As I stated in my letter, I love my job and I want to continue to work at the Department. Based on your letter, I can only conclude that you decided to dismiss me. If this conclusion is not correct, please advise me in writing. I do not want to retire unless I absolutely have to in order to avoid dismissal.

Respondent did not provide a further response to Petitioner because Petitioner's conclusion that the final decision had been to dismiss her was correct.

32. Respondent did not suggest retirement or resignation to Petitioner. Petitioner initiated the subject of retirement.

33. Petitioner stated in her affidavit of March 11, 2014, that she "submitted retirement papers out of concern for the loss of income she would experience if [she] were dismissed" and that she felt that she was "forced to retire."

34. The organizational charts for Respondent at the time of the 2011 audit establish the following chain from Petitioner to the Secretary of Revenue:

Petitioner – Returns Processing Supervisor
Christie Chewning - Assistant Manager of Operations, Excise Tax Division
Donna Alderman – Assistant Director of Excise Tax Division
Julian Fitzgerald – Director of Excise Tax Division
John Sadoff – Assistant Secretary for Exams
Linda Millsaps – Chief Operating Officer
David Hoyle – Secretary of Revenue.

The first four listed are in the Excise Tax Division and the last three listed are not in that Division.

35. The organizational charts for Respondent at the time the Notice of Pre-Disciplinary Conference was issued (November 5, 2013) establish the following chain from Petitioner to the Secretary of Revenue:

Petitioner – Returns Processing Supervisor
Christie Chewning - Assistant Manager of Operations, Excise Tax Division
John Panza – Acting Director of Excise Tax Division
Tom Dixon – Assistant Secretary for Tax Administration
Jeffrey Epstein – Chief Operating Officer
Lyons Gray – Secretary of Revenue.

The first three listed are in the Excise Tax Division and the last three listed are not in that Division.

36. Respondent identified the following individuals as having participated in the decision to impose disciplinary action on Petitioner as a result of Respondent's audit of Petitioner's tax returns for 2008, 2009, and 2010.

Jerry Coble – assistant secretary
Angela Crawford – former director of human resources
Joe Hengsen – former internal auditor
Linda Millsaps – former chief operating officer
John Sadoff – former assistant secretary of exams
Canaan Huie – former general counsel
Ton Dixon – assistant secretary
David Hoyle – former secretary of NC DOR
Tanya Sullivan, employee relations manager
Eric McKinney, director of human resources

Jerry Coble, Angela Crawford, Joe Hengsen, and Tanya Sullivan, Employee Relations Manager, served on a committee that reviewed the audit findings and applied the disciplinary criteria. Finally, Eric McKinney met with Tom Dixon, Julian Fitzgerald and Tanya Sullivan to discuss the disciplinary recommendations as applied to Petitioner based on the tax returns.

37. Of the individuals Respondent identified as participating in the decision to impose disciplinary action on Petitioner, only Jerry Coble, Tom Dixon, Tanya Sullivan, and Eric

McKinney were employed by Respondent on November 5, 2013. None of these individuals were in the Excise Tax Division in 2011 or 2013.

38. The disciplinary criteria applied by the committee were unknown to both Petitioner's Assistant Director and Director of Excise Taxes. Petitioner's division director, Julian Fitzgerald stated in his affidavit that "I had no influence on the determination of what disciplinary action to impose based on the results of the audits done on employees in the Division. I have never seen any written criteria for determining what discipline Respondent considers appropriate for mistakes on tax returns."

39. The Assistant Director of the Division, Mrs. Donna Alderman, stated in her affidavit that "no one in [the Division] supervisory chain had any say in what disciplinary action, if any, was recommended for an employee of the Division as a result of audit findings. … Likewise, no one in that supervisory chain received any guidelines or criteria establishing the basis for determining what disciplinary action, if any, should be imposed on an employee as the result of audit findings. … I do not know who was making the decisions about what disciplinary action to impose. … I have never seen any written criteria for determining what discipline Respondent considers appropriate for mistakes on tax returns and I do not know that any exist. I have never received an explanation of any such criteria."

40. The disciplinary criteria were determined by and known to management above the level of Division Director Julian Fitzgerald and Assistant Director Donna Alderman, and the disciplinary decisions were also made at higher supervisory positions than the positions held by Mr. Fitzgerald or Mrs. Alderman.

41. On June 25, 2013, a meeting was held between Julian Fitzgerald, Eric McKinney, Tom Dixon, and Tanya Sullivan. Respondent's purpose for the meeting was to determine why Mr. Fitzgerald had not completed the instructions given to him by Mr. Dixon to terminate Petitioner as well as complete the discipline on other employees in his division who had violated the tax compliance policy. At this time, Mr. Fitzgerald's division was the only one in the agency that had not completed the disciplinary actions from this particular round of internal audits. While Mr. Fitzgerald indicated he did not want to terminate any employees, Mr. McKinney, Mr. Dixon, and Ms. Sullivan state that he agreed he would do as instructed. Over the next few weeks, he was asked by Ms. Sullivan several times whether he had completed the task. He had still not done so. Ms. Sullivan states that he confirmed to her that he had told the individuals involved that their discipline for breach of the tax compliance policy was still at issue. Petitioner states that he made no such statement to her.

42. This matter arose prior to December 1, 2013, the date the new process for disciplinary actions at the Department was made effective by the Office of State Human Resources. Petitioner filed a contested action at the Office of Administrative Hearings ("OAH") on December 20, 2013, without requesting a grievance hearing as was allowed under the process in effect at the time of her disciplinary conference. This filing was within 30 days of her retirement date of December 1, 2013, but was more than 30 days after she received the letter of November 13, 2013, stating that her resignation of retirement had been accepted.

43. At a hearing on the Respondent's motion for summary judgment, Judge Morrison expressed his concern that under the new personnel statute effective August 21, 2013, OAH did not have jurisdiction until a "final agency decision" had been made as defined by the new statute. Without deciding the merits of Respondent's motion for summary judgment and without prejudice to it being brought before him at a later date, this matter, at his suggestion, was submitted to the Department's Internal Grievance Committee for a determination.

44. Petitioner submitted evidence at her pre-disciplinary conference and at her Internal Grievance Hearing.

45. A final agency decision ("FAD") was issued on October 16, 2014, by Secretary Lyons Gray. The FAD states,

> The purpose of this letter is to inform you of the final agency decision regarding your internal grievance hearing held June 3, 2014. The purpose of the hearing was to investigate, review and recommend a course of action that I would then accept, change, or modify based on the evidence provided.
>
> Based on the evidence I have reviewed, I agree with the recommendation of the Internal Grievance Committee that your unacceptable personal conduct would have constituted good cause for your termination. However, because you requested to be allowed to resign before any decision to dismiss you became final, my final agency decision is that your resignation has been accepted.
>
> I understand that you have already filed a petition for a contested case hearing at the Office of Administrative Hearings. Therefore, I am not including the usual appeal rights in this letter. However, if you wish to further contest this decision you or your counsel should contact our attorney, Peggy S. Vincent, within 30 days of the date of this letter.
>
> The Office of State Human Resources has reviewed and approved this Final Agency Decision.
>
> I wish you every success in your future.
>
> Regards,
>
> Lyons Gray, Secretary
>
> NC Department of Revenue

46. The FAD was reviewed and approved by the Office of State Human Resources. "The proposed final agency decision shall not be issued nor become final until reviewed and approved by the Office of State Personnel (now named the Office of State Human Resources)." N.C. Gen. Stat. § 126-34.01 (2013) (parenthetical added).

47. Respondent does not require its employees to inform anyone at Respondent if they file an amended return that is unassociated with an audit.

48. Respondent believes it had just cause under N.C. Gen. Stat. § 126-35 to dismiss Petitioner from employment.

BASED UPON the foregoing Stipulation of Facts, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that any part of a stipulated fact constitutes a mixed issue of law and fact, it is deemed incorporated herein by reference as a conclusion of law.

2. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case and this matter is properly before OAH for consideration.

3. There are no genuine issues of material fact and summary judgment is appropriate in this contested case. "A party is entitled to summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.'" N.C. Gen. Stat. § 1A-1, Rule 56(c); *Steel Creek Development Corp. v. James*, 300 N.C. 631, 636-37, 268 S.E.2d 205, 209 (1980).

4. Respondent contends that Petitioner voluntarily retired and Petitioner contends that she was constructively discharged without just cause in violation of N.C. Gen. Stat. § 126-35. Petitioner seeks reinstatement, back pay, and attorney's fees.

5. Petitioner is a "career State employee" as defined in N.C. Gen. Stat. § 126-1.1(a)(2). As a career State employee, Petitioner could be dismissed for disciplinary reasons only for "just cause" and only in accordance with the requirements of N.C. Gen. Stat. § 126-35 and Section .0600 of Subchapter 1J of Title 25 of the North Carolina Administrative Code. N.C. Gen. Stat. § 126-35; 25 N.C.A.C. 01J .0604, 25 N.C.A.C. 01J .0608, and 25 N.C.A.C. 01J .0613.

6. Just cause for discipline or dismissal includes unacceptable personal conduct. 25 N.C.A.C. 01J .0604(b)(2). Unacceptable personal conduct includes conduct for which no reasonable person should expect to receive prior warning; job-related conduct which constitutes a violation of state or federal law; the willful violation of known or written work rules; and conduct unbecoming a state employee that is detrimental to state service. 25 N.C.A.C. 01J .0614(8)(a), (b), (d), and (e).

7. Petitioner's submission of retirement application documents does not create a presumption that Petitioner retired voluntarily. *Covington v. Dep't of Health and Human Serv.*, 750 F.2d 397, 943 (Fed. Cir. 1984)(citing *Gonzalez v. Dep't of Transp.*, 701 F.2d 36, 39 (5th Cir. 1983). Even if it did, Petitioner has rebutted this presumption.

8. An involuntary resignation amounts to constructive discharge. *Parker v. Bd. of Regents of Tulsa Junior College,* 981 F.2d 1159, 1162 (10th Cir. 1992) A resignation is involuntary when it is either forced by the employer's duress or coercion or it is obtained by the employer's misrepresentation or deception. *Leardini v. Charlotte-Mecklenburg Bd. of Educ*., 2011 U.S. Dist. LEXIS 42501 (W.D.N.C. 2011).

9. The question of whether coercion or misrepresentation, causing constructive discharge, occurred on the facts presented is a question of law. *Hargray v. City of Hallendale*, 57 F.3d 1560, 1567 (11th Circuit 1995).

10. It is concluded that Respondent lacked good cause, both procedurally and substantively, to terminate Petitioner and that, consequently, Petitioner did not voluntarily resign her position but was constructively discharged. These conclusions are based on the following reasons, each of which provides an independent basis for granting summary judgment to Petitioner:

a. Respondent failed to follow the procedure required for disciplinary action against Petitioner and this failure is a violation of due process that voids the disciplinary action as well as its effects.
b. Petitioner's retirement was involuntary because Respondent lacked good cause for its threatened dismissal of her and this lack of good cause renders the threatened dismissal coercive and her retirement involuntary.
c. Petitioner's retirement was involuntary because it was induced by her reasonable reliance on misleading and erroneous statements made by Respondent in both the Notice of Pre-Disciplinary Conference and the various employee tax compliance memos.
d. Respondent did not have just cause to dismiss Petitioner and Respondent's initiation of a disciplinary action to dismiss her in the absence of just cause and while her payment plan was in effect violates N.C. Gen. Stat. § 143-553.

Respondent Failed To Follow the Required Procedures

11. "It is well-settled that a career State employee enjoys a "property interest of continued employment created by state law and protected by the Due Process Clause of the United States Constitution." *Nix v. Dep't of Admin*., 106 N.C. App 664, 666, 417 S.E.2d 823, 825 (1992) (internal citations and quotations omitted). As a consequence, Respondent cannot "rightfully take away this interest without first complying with appropriate procedural safeguards." *Id*.

12. "The imposition of disciplinary action shall comply with the procedural requirements of this Section [.0600 of Subchapter 1J)." 25 N.C.A.C. 01J .0604(d). The procedural requirements of Section .0600 for a dismissal include the following:

a. A supervisor's recommendation of dismissal. 25 N.C.A.C. 01J .0613(4)(a).
b. The requirement that the individual who conducts the pre-dismissal conference with the employee have the authority to recommend or decide what, if any, disciplinary action to impose. 25 N.C.A.C. 01J .0613(4)(a).
c. A pre-dismissal conference between the employee and the person recommending dismissal. 25 N.C.A.C. 01J .0608(b).

13. Respondent violated the procedural requirements of 25 N.C.A.C. 01J .0613(4)(a) by failing to obtain a recommendation of dismissal from Petitioner's supervisor. Petitioner's

supervisor was Christie Chewning and she did not recommend dismissal. Likewise, none of the other individuals in the Excise Tax Division initiated or recommended disciplinary action against Petitioner. The individuals outside the Division who were above the Division Director in the chain from Petitioner to the Secretary did not supervise Petitioner and were not her supervisors as that term is applied in 25 N.C.A.C. .0613(4)(a). Even if they were, no one in that chain at the time of the audit was in the chain in 2013, and none of the four individuals Respondent identified in Fact # 36 as serving on a committee that applied the disciplinary criteria were in Petitioner's supervisory and management chain.

14. Respondent violated the procedural requirements of 25 N.C.A.C. 01J .0613(4)(a) when it allowed the pre-disciplinary conference to be conducted by individuals who had no authority to recommend or decide what, if any, disciplinary action was to be imposed on Petitioner. The individuals who conducted the conference had no input into the decision. They are not included in the list of individuals identified in fact # 36 as the ones who participated in the decision to impose disciplinary action. Respondent's disciplinary decisions were made "at higher supervisory positions" than director or assistant director of a division. The individuals who conducted the conference gave a report of the conference to upper management, which made the decision to terminate.

15. Respondent violated the procedural requirements of 25 N.C.A.C. 01J .0608(b) when it allowed the pre-disciplinary conference to be conducted by an individual who did not recommend dismissal. The individuals who conducted the conference were in the Excise Tax Division and no one in that division initiated or recommended dismissal.

16. "When a Government agency does not follow its rules, regulations, or procedures, due process is violated and its action cannot stand." *Ameira Corp. v. Veneman*, 347 F. Supp. 2d 225, 226 (M.D.N.C. 2004). If dismissal from employment is based on a defined procedure, that procedure must be scrupulously observed. *Service v. Dulles*, 354 U.S. 363, 388-89 (1957) (reversing dismissal of petitioner for failure to comply with regulation). Regulations with the force and effect of law serve to supplement the statutory framework, and when they prescribe a procedure to be followed by the agency, it must be followed. *United States ex. rel. Accardi v. Shaughnessy*, 354 U.S. 260, 265 (1954). The purpose behind the *Accardi* principle is "to prevent the arbitrariness which is inherently characteristic of any agency's violation of its own procedures." *United States v. Hefner*, 420 F. 2d 809, 812 (4th Cir. 1969).

17. Respondent's violation of the procedural requirements denied Petitioner a meaningful pre-disciplinary conference in violation of due process.

18. Had Respondent followed the mandated procedures, there is more than a substantial chance that the result would have been different because of the high regard in which she was held by her supervisors. Consequently, Respondent's actions violated Petitioner's due process rights and her induced retirement -- the result obtained by Respondent's failure to comply with the procedures – must be stricken. See *Liephart v. North Carolina School of the Arts*, 80 N.C. App. 339, 348-49, 342 S.E. 2d 914, 923 (1986).

19. Respondent also violated N.C.A.C. 01J .0608(c) by failing to provide notice of appeal rights. N.C. Gen. Stat. § 126-35(a) clearly states that "the employee shall, before the [disciplinary] action is taken, be furnished with a statement in writing setting forth … the employee's appeal rights." Furnishing this statement is "a condition precedent that the employer must fulfill before disciplinary action against an employee may be taken" and is constitutionally mandated by due process. *Luck v. Employment Sec. Comm'n,* 50 N.C. App. 192, 194, 272 S.E.2d 607, 608 (1980).

20. Respondent decided to dismiss Petitioner and did so without notifying her of her appeal rights, as required by due process and N.C. Gen. Stat. § 126-35(a).

Respondent Lacked Good Cause In Initiating Discipline

21. "[A] threatened termination must be for good cause in order to precipitate a binding, voluntary resignation. *Christie v. United States.,* 518 F.2d. 584, 588 (1975)(*citing Autera V. United States,* 389 F.2d 815 (1968)).

22. Generally, a choice between the unpleasant alternatives of resignation or termination does not establish that the resignation was involuntary. *Stone v. Univ. of Md. Med. Sys. Corp.,* 855 F.2d 167, 174 (4th Cir. 1988). This general principle does not apply when "the employer lacked good cause to believe that there were grounds for termination." *Id*. at 174. If an agency lacks reasonable grounds for threatening to take an adverse action, the threatened action by the agency is "purely coercive." *Shultz V. United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987). Here, Respondent did not have good cause to believe that its threatened termination could be sustained. Consequently, its threatened termination of Petitioner was "purely coercive" and Respondent constructively discharged Petitioner without just cause.

23. Respondent lacked good cause to believe the threatened termination of Petitioner could be sustained for each of the following reasons:

a. The threatened termination is contrary to the procedural requirements of 25 N.C.A.C. Subchapter 01J, Section .0600, as explained above.
b. The threatened termination is contrary to the plain language of 25 N.C.A.C. 01J .0608(a), which requires a current incident of unacceptable conduct.
c. The threatened termination is contrary to the plain language of 25 N.C.A.C. 01J .0604(b)(2) and 25 N.C.A.C. 01J .0614(8), which require personal acts and not attributed acts.
d. The threatened termination is contrary to the settled case law on what constitutes unacceptable personal conduct and "just cause."

24. Dismissal for unacceptable personal conduct must be for a current incident of unacceptable personal conduct. 25 N.C.A.C. 01J .0608(a). The rules do not define "current;" therefore its ordinary meaning applies. *Meads v. N.C. Dep't of Agric*., 349 N.C. 656, 666, 509 S.E.2d. 165, 172 (1998) (applying dictionary definition of word "deposit" used in rule). The term "current" when used as an adjective means "of the present time." World Book Dictionary A-K 509 (9th Ed. 1993).

25. The incident of alleged unacceptable personal conduct set out in the November 5, 2013, Notice of Pre-Disciplinary Conference was not a current incident. It consisted of the filing of returns in 2009, 2010, and 2011 (for tax years 2008, 2009, and 2010) that were audited by Respondent in the fall of 2011.

26. Since the audit, Petitioner had entered into a payment plan on March 23, 2012, and that plan had been in effect for over 18 months and was near completion, Petitioner had received two annual performance reviews in which she was rated Outstanding on one and Very Good on the other, and Petitioner and her husband had filed two more joint individual income tax returns – one filed in 2012 for tax year 2011and one filed in 2013 for tax year 2012 – and Respondent had "looked over" these returns and made no adjustments to them. Respondent has offered no explanation whatsoever for the lengthy delay.

27. Case law confirms the short time period contemplated for dismissals based on unacceptable personal conduct. *E.g., Kea v. Dep't of Health and Human Serv*., 153 N.C. App. 595, 570 S.E. 2d 919 (2002) (less than one month between date sexual harassment claim filed against employee and employee's dismissal); *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 565 S.E.2d 716 (2002) (one month between traffic incident and dismissal). Even when a lengthy investigation was involved, the time between the incident and dismissal did not exceed 10 months. *Poarch v. N.C. Dep't of Crime Control & Pub. Safety*, 2012 N.C. App. LEXIS 1191, 741 S.E.2d 315 (2012) (10 months between complaint of officer's conduct and dismissal).

28. Assuming, arguendo, that Respondent could, at some prior point in time, have dismissed Petitioner for unacceptable personal conduct on the basis of the errors her husband made on their 2008, 2009, and 2010 returns, that time had passed. As of November 5, 2013, the errors on those returns were not a current incident. *Cf.* 25 N.C.A.C. 01J .0614(6) (disciplinary action deemed inactive if 18 months have passed since warning or action and employee does not have another active warning or disciplinary action that occurred within the last 18 months).

29. Dismissal for "unacceptable personal conduct" by its terms requires personal conduct. The rules do not define "personal;" therefore, its ordinary meaning applies. *Meads v. N.C. Dep't of Agric*., 349 N.C. 656, 666, 509 S.E. 2d. 165, 172 (1998) (applying dictionary definition of word "deposit" used in rule). The term "personal" when used as an adjective means "belonging to a person; individual; private" and "done in person; directly by oneself, not through others or by letter." World Book Dictionary L-Z 1555 (9th Ed. 1993).

30. Determining whether the employee engaged in the conduct the employer alleges is the first of the three steps for determining whether just cause for discipline exists. *Warren v. N.C. Dep't of Crime Control and Public Safety*, 2012 N.C. App. LEXIS 770, 726 S.E.2d 920, 925 (2012). The Notice of Pre-Disciplinary Conference does not allege that Petitioner prepared the returns or knew or had reason to know the returns were incorrect. Instead it uses the passive voice, stating that "errors were made" on her returns. The just cause analysis fails at the first step because Respondent's threatened termination of Petitioner is based on acts done, not by her, but by her husband. Petitioner's acts were to rely on her husband to prepare their returns and to

promptly enter into a payment plan when told that her husband had made mistakes on the returns. Petitioner's husband had prepared their returns for decades and they had never received a notice from either the IRS or Respondent that a return contained an error. Petitioner's reliance was reasonable under the circumstances.

31. Petitioner's joint financial liability under the tax laws for errors on the returns does not negate the requirement that dismissal for just cause be based on personal acts and not attributed acts. Dismissal based on personal conduct requires substantial misconduct of the individual who is dismissed. E.g., *Poarch v. N.C. Dep't of Crime Control and Public Safety,* 2012 N.C. App. LEXIS 1191, 741 S.E.2d 920, 315 (2012), rev. denied 2012 N.C. LEXIS 1030, 735 S.E.2d 174 (on-duty sexual misconduct of highway patrol officer); *Granger v. University of N.C.*, 197 N.C. App. 699; 678 S.E.2d 715 (2009)(addressing co-workers with racially charged language); *Brunson v. N.C. Dep't of Correction*, 152 N.C. App. 430, 567 S.E.2d 416 (2002)(case worker held in contempt of court while on-duty).

32. The errors Petitioner's husband made on their returns were not considered by Respondent to be negligent or fraudulent. If they had been determined to be either negligent or fraudulent, Respondent would have assessed a penalty for negligence or fraud, as appropriate, as required by N.C. Gen. Stat. § 105-236. Subpart (a)(5)a. of that statute states: "For negligent failure to comply with [the state tax laws], without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence." Subdivision (a)(6) states: If there is a deficiency or delinquency in payment of any tax because of fraud with intent to evade the tax, the Secretary shall assess a penalty equal to fifty percent (50%) of the total deficiency. Respondent was required to assess negligence and fraud penalties if they applied. Respondent did not assess these penalties and had instructed the auditor to not assess the negligence penalty.

33. The second step of the *Warren* three-part test is to determine whether the employee's conduct falls within one of the categories of unacceptable conduct provided by the Administrative Code. *Warren* at 775, 726 S.E.2d 925. Here, none of the four grounds for unacceptable personal conduct referenced in the Notice of Pre-Disciplinary Conference applies. If Respondent had applied the settled case law to the facts, it could not reasonably have believed that it had good cause to dismiss Petitioner.

a. Respondent's acts negate the application of the category of "conduct for which no reasonable person could expect to receive a warning." Respondent believed it needed to warn employees about filing correct tax returns and did so in an annual memo.

b. The category of "job-related conduct which constitutes a violation of state or federal law" is inapplicable by its terms. Job-related conduct is conduct concerning the duties of the employee's job. Petitioner's preparation of her income tax return is not among her job duties. This category was added in response to two decisions by the North Carolina Court of Appeals holding that the employee's conduct fell into the category of job performance, and not personal conduct, and therefore required warnings before dismissal. *Leeks v. Cumberland*

County Mental Health, Developmental Disability, and Substance Abuse Facility, 154 N.C. App. 71, 78, 571 S.E.2d 684, 689 (2002). The category is further limited to violations that threaten the "immediate disruption of work or safety of persons or property," *Steeves v. Scotland County Bd. of Health*, 152 N.C. App. 400, 409, 567 S.E.2d 818, 820-21 (2002), and the mistakes on Petitioner's tax returns did not pose these threats.

c. The category of "willful violation of known or written work rules" is also inapplicable by its terms. The errors on Petitioner's joint returns, even if committed by her, were not even negligent, much less willful. Respondent's employee tax compliance policy was not a work rule because it did not apply to Petitioner's performance of her job. *E.g., Hilliard v. N.C. Dep't of Correction, 173 N.C. App. 594, 597, 620 S.E. 2d 14, 17, (2005)* (acts for which discipline imposed occurred while at job).

d. The category of "conduct unbecoming a state employee that is detrimental to state service" is rendered inapplicable by the facts. The incorrect returns were filed in three successive years starting in 2009. The Notice of Pre-Disciplinary Conference was issued on November 5, 2013. During that time, Petitioner continued her exemplary career and service to the state, resulting in a beneficial rather than a detrimental impact.

34. The third step of the *Warren* test is to determine whether the conduct amounted to just cause for the disciplinary action taken. *Warren* at 775, 726 S.E.2d 925. A commensurate discipline approach applies in North Carolina; unacceptable personal conduct does not necessarily establish just cause for all types of discipline. *Id.* Unacceptable personal conduct is misconduct of a serious nature. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E. 2d 888 (2004).

35. Just cause must be determined on the facts and circumstances of each case. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 901 (2004)(not every violation of law gives rise to "just cause" for employee discipline). Even if Petitioner had prepared the returns on which the errors were made, the facts and circumstances of this case would require balancing Petitioner's spotless and exemplary career against the conduct. Any reasonable weighing of this balance would determine that equity and fairness would not be served by dismissing Petitioner. *See, e.g., Kelly v. N.C. Dep't of Env't & Natural Res.*, 192 N.C. App. 129, 664 S.E.2d 625 (2008)(employees' misdemeanor off-duty violations of fin fish laws administered by Department not just cause for disciplinary 5-day suspension without pay for unacceptable personal conduct). Termination of Petitioner's employment would not have been "just".

36. Application of the *Warren* three-part test for determining whether just cause exists for discipline establishes that all three parts of the test fail here. Respondent therefore lacked good cause for initiating disciplinary action against Petitioner.

Respondent Misrepresented the Alternative To Retirement

37. A resignation is involuntary when it is induced by an employee's reasonable reliance on the employer's misrepresentation of a material fact concerning the resignation. A misrepresentation is material if it concerns the alternative to resignation. *Stone v. Univ. of Md. Med. Sys. Corp*., 855 F.2d 167, 174 (4th Cir. 1988). "A decision made . . . based on misinformation . . . cannot be binding as a matter of fundamental fairness and due process." *Covington v. Dep't of Health and Human Services*, 750 F.2d 937, 943 (Fed. Cir. 1984).

38. The November 5, 2013, Notice of Pre-Disciplinary Conference set out the alternative to retirement and that alternative was dismissal based on failure to comply with Respondent's employee tax compliance policy. The Notice hinges entirely on failure to comply with that policy and that policy misstates the settled law on both the consequences of failure to comply with the policy and on the grounds for dismissal based on just cause.

39. The tax compliance memos demand perfection of employees in filing returns, but failure to achieve perfection is not the standard for just cause for discipline. The memos all end with the categorical statement that failure to "fully comply" or to report "correct tax liability" will result in disciplinary action. By this policy, an employee will be subject to disciplinary action for any mistake on a return, regardless of the source or reason for the mistake and regardless of whether the mistake was made by a paid preparer or another individual on whom the employee reasonably relied to prepare the return.

40. Petitioner relied on Respondent's statements in the Notice about her impending dismissal when she began to prepare for that occurrence and completed the "Claiming Your Monthly Retirement Benefit" form. It is not surprising that a career employee with a stellar record would consider retirement as a way to avoid the humiliation of dismissal, the blemish on her record, the difficulty the dismissal would pose in seeking other employment, the loss of income, and the loss of health benefits. *Cf. Nix v. Dep't of Admin.*, 106 N.C. App 664, 668, 417 S.E.2d 823, 827 (1992) (noting that "to take disability retirement after you are told you will be terminated on a specific date is hardly a voluntary career change"). In the absence of Respondent's threatened dismissal, Petitioner would clearly not have begun to explore retirement. Her initiation of retirement was based on the misinformation contained in the Notice of Pre-Disciplinary Conference.

Respondent Violated Public Policy

41. The public policy of the state is expressed in the statutes enacted by the North Carolina General Assembly. *Cauble v. Trexler*, 227 N.C. 307, 311(1747).

42. N.C. Gen. Stat. § 143-553 expresses the public policy of the state with respect to the repayment of debts owed to the state by state employees. It prohibits the termination of a state employee who owes a debt to the state while the employee is making payments under a written agreement to repay the debt through periodic withholding of at least ten percent (10%) of the employee's net disposable earnings.

43. The installment payment plan Petitioner made with the State was in effect on November 5, 2013, and that plan met the requirements of N.C. Gen. Stat. § 143-553.

44. Respondent could terminate Petitioner while Petitioner was subject to the payment plan only if authorized by another statute. N.C. Gen. Stat. § 126-35 authorizes dismissal only for just cause, and the agency has the burden of establishing just cause. N.C. Gen. Stat. § 126-34.02(d). Respondent cannot meet this burden. Respondent initiated dismissal against Petitioner in violation of the public policy in N.C. Gen. Stat. § 143-553 and its actions are void as against public policy.

BASED UPON the foregoing Stipulation of Facts and Conclusions of Law, the undersigned makes the following:

FINAL DECISION

1. Respondent's Motion for Summary Judgment is DENIED.

2. Summary Judgment is GRANTED to Petitioner.

3. Petitioner shall be reinstated to her former position, Returns Processing Supervisor (Data Entry Supervisor II), in Respondent's Excise Tax Division.

4. Petitioner shall be awarded, from December 1, 2013, until her reinstatement, back pay and benefits to which she would have been entitled had she not been constructively discharged. The back pay shall be reduced by the amount of retirement benefits received by Petitioner for the period December 1, 2013, until her reinstatement.

5. Petitioner is awarded reasonable attorney's fees and costs under N.C. Gen. Stat. § 150B-23.2(a) and § 150B-33(b)(11), in the amount of $35,287.50, as submitted in Second Affidavit filed on January 14, 2015.

NOTICE

Pursuant to N. C. Gen. Stat. 126-34.02, any party wishing to appeal this Final Decision may commence such by appealing to the North Carolina Court of Appeals as provided in N. C. Gen. Stat. 7A-29(a). The party seeking review must file such appeal within thirty (30) days after receiving a written copy of the Final Decision.

This the 16th day of January, 2015.

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Fred G. Morrison Jr.
Senior Administrative Law Judge