

**STATE OF NORTH CAROLINA**  
**COUNTY OF WAKE**

**IN THE OFFICE OF**  
**ADMINISTRATIVE HEARINGS**  
**14 OSP 07170**

**ESTATE of TODD MCCRACKEN,**  
**Petitioner,**

**v.**

**NC DEPARTMENT OF REVENUE,**  
**Respondent.**

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**FINAL DECISION**

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This contested case was commenced by the filing of a petition on behalf of Todd McCracken on September 18, 2014. The hearing on the case commenced on February 11, 2015, before the Honorable Donald Overby, Administrative Law Judge. Respondent presented its witnesses, but Petitioner only had time to present one witness within the scheduled time allotted for the hearing. The hearing was continued to March 18, 2015. Via phone conference on March 17, 2015, Petitioner closed his case without further testimony, due in part to Petitioner's hospitalization. Petitioner died on April 2, 2015. An Order Substituting Party was entered on April 24, 2015, substituting the Estate of Todd McCracken as the Petitioner.

**ISSUE**

Whether Petitioner was discharged from his employment with the North Carolina Department of Revenue without just cause for unacceptable personal conduct.

**BURDEN OF PROOF**

The burden of proof is on the Respondent to show by the greater weight of the evidence that it had just cause to dismiss Petitioner for disciplinary reasons for unacceptable personal conduct.

**APPEARANCES**

For Petitioner: Michael C. Byrne  
Wells Fargo Capitol Center, Suite 1130  
150 Fayetteville Street  
Raleigh, NC 27601

For Respondent: Peggy S. Vincent  
Special Deputy Attorney General  
NC Department of Justice  
P.O. Box 629  
Raleigh, NC 27602-0629

### **EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner: Exhibits 1, 5, 9, 10B, 10C and 11.

For Respondent: 1 through 15.

### **WITNESSES**

For Petitioner: Melanie Tew, MD (*via phone*)

For Respondent: Thomas L. Dixon, Jr.  
April Day  
Donna Powell  
Michael J. Wenig (*Offer of Proof*)  
Stu Lockerbie (*de benne esse deposition*)  
Corey Blay (*de benne esse deposition*)

### **FINDINGS OF FACT**

1. Petitioner was a career status employee and had been employed by the North Carolina Department of Revenue ("Department") since November 14, 1988, serving as a Revenue Administration Officer III or Auditor-Advanced in the corporate division from October 1, 2004, until his termination, effective April 19, 2014. Prior to the events of this case, Petitioner had no prior disciplinary action in his record.

2. The primary purpose of Petitioner's job was to research and answer technical, highly complex and controversial tax inquiries and to resolve protested tax assessments and denied refunds prior to formal administrative hearings in the administration of corporate taxes. As a corporate tax auditor, he was required to provide an objective, fair and equitable responses to complex issues of taxation.

3. A function of Petitioner's job duties was interaction with "taxpayer representatives," or persons who represent a taxpayer in matters involving DOR.

4. In the regular course of his duties, the Petitioner had been assigned to research and prepare a response to a protest of a tax assessment by a large, multistate corporate taxpayer ("Taxpayer").

5. On February 18, 2014, the Petitioner had a telephone conversation with Mr. Corey Blay, an employee and representative of the corporate taxpayer. The phone call was initiated by Petitioner.

6. The discussion concerned Stuart (Stu) Lockerbie, a CPA from an international "Big Four" accounting firm and a representative of this particular taxpayer. Petitioner had had previous interactions with Mr. Lockerbie. Mr. Lockerbie had a reputation among people with whom he had worked in DOR for very aggressively representing his clients. Some staff, including Mr. Tom Dixon, Assistant Secretary for Tax Administration, spoke of Mr. Lockerbie in derogatory terms.

7. In 2011, during the course of prior cases in which Mr. Lockerbie was dealing with Petitioner, Mr. Lockerbie had spoken to Mr. John Sadoff, an Assistant Secretary for the Department of Revenue, about Petitioner's handling of his cases. There is some evidence that Mr. Lockerbie also spoke directly with the Secretary of DOR and the chief financial officer for DOR in 2012. Mr. Lockerbie was not speaking merely to immediate nor second level supervisors.

8. When the issue arose in 2011 between Mr. Lockerbie and Petitioner and Mr. Lockerbie became aware that Petitioner was upset with him, Mr. Lockerbie called Petitioner and apologized. Seemingly the issue was resolved and they continued to work together on cases.

9. Petitioner was unhappy, however, with Mr. Lockerbie for going to senior management and expressed his desire to not work with Mr. Lockerbie in his conversation with Mr. Blay in 2014. At the time of the conversation in 2014, the issue was raised over a power attorney which gave Mr. Lockerbie and three others the ability to handle matters for the taxpayer with DOR.

10. In his conversation with Mr. Blay, Petitioner told him that he was willing to work with any of the other CPAs in the firm retained by the Taxpayer, but would not or could not work with Mr. Lockerbie. (Blay dep. pp. 9,10). Mr. Blay could not remember whether Petitioner said "would" or "could." Three others were on the power of attorney to represent the taxpayer with DOR.

11. In referring to Mr. Lockerbie speaking to senior management with DOR, the Petitioner explained to Mr. Blay that he felt Mr. Lockerbie had "thrown him under the bus" in previous dealings. (Blay dep. pp. 9, 11) Further, because of Mr. Lockerbie going to senior management, the Petitioner felt that Mr. Lockerbie's previous accusations about Petitioner were inaccurate, that Mr. Lockerbie was looking after the best interest of his clients without considering the ramifications to Petitioner, and that Mr. Lockerbie was questioning Petitioner's abilities. (Blay dep. p. 9).

12. The phone conversation of February 18, 2014, caused Mr. Blay to question his company's decision to hire Mr. Lockerbie or the particular accounting firm only "a little bit."

Neither he nor his company took any action at all in regards to the professional relationship and especially in severing the relationship. (Blay dep. p. 13, T.p. 32). The professional relationship was not harmed. (Lockerbie dep. p. 17)

13. When Mr. Lockerbie learned of the February 18, 2014 phone conversation between Petitioner and Mr. Blay, he offered to his client that he, Lockerbie, would withdraw from the case if necessary to insure that the Taxpayer was best represented. (Lockerbie dep. p. 12) While he and Mr. Blay had that conversation, there does not appear to have been any real interest in changing the relationship

14. When Mr. Lockerbie learned of the February 18, 2014 phone conversation, he was perplexed because he had never had any other person, “and certainly not a person from the Department of Revenue” call a client and say they could not work with him. (Lockerbie dep. pp. 13-14). Mr. Lockerbie is rather disingenuous in being shocked that Petitioner called his client but seeing absolutely nothing wrong in discussing Petitioner’s work with senior management.

15. According to Mr. Lockerbie, the remarks that Petitioner had made to Mr. Blay caused Mr. Lockerbie concern about what Petitioner might have told any of Mr. Lockerbie’s other taxpayer clients and about whether Petitioner’s prejudice against Mr. Lockerbie might have negatively impacted the resolution of taxes in cases of other clients of Mr. Lockerbie. (Lockerbie dep. pp. 18-19). There had been several years intervening since the problem between Petitioner and Mr. Lockerbie had arisen and Lockerbie had not seen or heard of any negative repercussions at all. Mr. Lockerbie and Petitioner continued to work well together on the same cases about which Mr. Lockerbie had complained.

16. Mr. Lockerbie acknowledges that the ill will between Petitioner and him arose from an inquiry Mr. Lockerbie had made to the Department’s management about the slow progress being made on some of the cases of Mr. Lockerbie’s clients back in 2011. (Lockerbie dep. pp. 7 – 11).

17. Mr. Lockerbie feels he should be able to go to any supervisor at the Department to voice concerns about his client’s case, and states he has been encouraged by persons at the Department to do so. (Lockerbie dep. p. 27). If indeed that is policy at DOR, it would seem to set an incredibly bad precedent for any taxpayer representative to be able to go directly to an Assistant Secretary of the Department of Revenue, and possibly even to the Secretary. Alternatively, Mr. Lockerbie is entitled to special privileges to which no other taxpayer in North Carolina is entitled.

18. Both Mr. Lockerbie and Mr. Blay felt that they had had a good working relationship with Petitioner and that the comments were out of character for Mr. McCracken. Both Mr. Blay and Mr. Lockerbie seemed satisfied with the Petitioner’s apology.

19. Petitioner attempted to explain to his supervisor, Mr. Dixon, that his medical issues may have been a factor in the inappropriate statements to Mr. Blay; however, Mr. Dixon was not interested in hearing about any medical issues. Mr. Dixon felt that it was a “complete lack of professional judgement” and had nothing to do with the medical problems Petitioner was having. It appears that indeed the medical issues were a factor.

20. The Petitioner's physician, Dr. Melanie Tew, stated that on February 18, 2014, Petitioner was experiencing a combination of high stress, anxiety, and the effects of increased dosage of a prescription anti-anxiety drug. Dr. Tew testified that this combination of factors more likely than not led to cognitive issues on the part of the Petitioner.

21. Immediately upon learning of the February 18 phone conversation, Tom Dixon, Assistant Secretary of Tax Administration at the Department, removed Petitioner from the case and ordered that Petitioner have no further contact with the Taxpayer or Mr. Lockerbie. (T.p. 29).

22. When Mr. Dixon found out about the conversation between Mr. Blay and Petitioner, he called both Mr. Blay and Mr. Lockerbie. According to Mr. Lockerbie, Mr. Dixon told him there had been other "instances" concerning Petitioner and that he (Dixon) would deal with them. Mr. Dixon's statement is highly inappropriate and appears to be revealing what should be confidential personnel information.

23. Petitioner is a CPA and had worked for the Department for more than twenty years. He knew or should have known that his comments were inappropriate.

24. The Department terminated the employment of Petitioner effective April 19, 2014, for unacceptable personal conduct alleging that it was conduct for which no reasonable person should expect to receive a prior warning and conduct that was unbecoming to a state employee that is detrimental to State service.

25. There is no evidence to support the contention that Petitioner's statements in his phone conversation were seriously damaging to the reputation of the Department or that his statements would or could cause serious harm to the reputation of the Department. The evidence does not support the contention that his statements called into question prior and future business of the Department with North Carolina taxpayers.

26. Any allegation or assertion that Petitioner's comments exposed DOR to a potential action for defamation is not supported.

27. Petitioner passed away on April 2, 2015 during the pendency of this contested case.

### **CONCLUSION S OF LAW**

Based on the Findings of Fact the undersigned makes these Conclusions of Law:

1. The parties are properly before the Office of Administrative Hearings on a Petition pursuant to Chapter 126 of the General Statutes, and the Office of Administrative Hearings has jurisdiction over both the parties and the subject matter.

2. Petitioner was a career State employee at the time of his dismissal. Because he is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear this appeal and issue a Final Agency Decision.

3. N.C.G.S. § 126-35(a) provides that “No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” In a career State employee’s appeal of a disciplinary action, the department or agency employer bears the burden of proving that “just cause” existed for the disciplinary action. N.C.G.S. § 126-35(d) (2007).

4. 25 NCAC 11.2301(c) enumerates two grounds for disciplinary action, including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct. Petitioner was dismissed only for Grossly Inefficient Job Performance and Unacceptable Personal Conduct.

5. N.C.D.E.N.R. v. Clifton Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004), states that the fundamental question in determining just cause is whether the disciplinary action taken was just. Citing further, “Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” Our Supreme Court said that there is no bright line test to determine “just cause”—it depends upon the specific facts and circumstances in each case. Furthermore, “not *every* violation of law gives rise to ‘just cause’ for employee discipline.”

6. In Warren v. Crime Control and Public Safety, the Court of Appeals held that in just cause cases:

The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case.

Warren v. N.C. Dep't of Crime Control & Pub. Safety, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012).

### **Step One: Did the Petitioner Commit The Conduct Alleged?**

7. The Petitioner did commit the conduct alleged to the extent that he made inappropriate remarks to Mr. Blay as set forth in the findings of fact above. Respondent’s contention in the dismissal letter that Mr. McCracken exposed the Respondent to “unnecessary risk” is not supported by competent evidence.

8. Respondent's contention in the dismissal letter that Mr. McCracken exposed the Respondent to a "risk of litigation for defamation of character" is not supported by competent evidence.

### **Step Two: Did Petitioner's Actions Constitute Unacceptable Personal Conduct?**

9. While DOR established that Petitioner made remarks that were either poor judgment and/or were unprofessional, establishing unacceptable personal conduct, as opposed to simply poor job performance, based on those remarks is not warranted.

10. Each agency in our State government has an expectation that its employees, will exercise sound judgment and decorum in dealing with others, particularly those who interact with the public on important issues as Petitioner certainly did. As noted, Petitioner by his own admission used poor judgment in making the comments.

11. It is difficult to place Petitioner's actions in the specific category of unacceptable personal conduct that merits the kind of discipline handed down to Petitioner. Employees are reasonably expected to act professionally at all times. Stated alternatively, while one would not reasonably expect to have to be warned to not act unprofessionally, the mere fact that one does indeed act unprofessionally does not in and of itself mean the person's acts warrant dismissal. Such acts may indeed be more appropriately job performance issues which would require warnings or some lesser form of discipline rather than dismissal.

### **Step 3: Did The Unacceptable Personal Conduct Justify The Discipline Imposed?**

12. Assuming *arguendo* that the conduct of Petitioner constitutes unacceptable personal conduct, the next required step in the Warren analysis is determining whether the discipline imposed for that conduct was just. "If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken." Just cause must be determined based "upon an examination of the facts and circumstances of each individual case." The Warren Court refers to this process as "balancing the equities". Here the discipline imposed was dismissal. Accordingly, the question is: does the personal conduct violation established justify dismissal?

13. In conducting this process, the Court notes Petitioner's substantial, discipline-free employment history with Respondent See Warren, referencing N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 666, 599 S.E.2d 888, 898 (2004): "In reaching this result, the Court examined the petitioner's exemplary employment record as well as the circumstances under which the petitioner exceeded the posted speed limit."

14. In relying on Warren and Carroll as quoted above, this Tribunal must look at the "circumstances" under which Petitioner committed the conduct alleged. This requires consideration of "mitigating factors" in the employee's conduct. 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).

15. The mitigating factors in this case are well established by the evidence cited above in the Findings of Fact. Petitioner's physician, who is found to be credible, testified, without contradiction, that the conditions under which Petitioner operated on the day in question more likely than not led to cognitive difficulties on the part of Petitioner. There is no evidence nor even inference that makes reference to any identical or even substantially similar conduct in Petitioner's twenty plus years of employment with this agency, which also lends credence to Dr. Tew's conclusions. Petitioner attempted to explain to Mr. Dixon that he felt his medical condition might have had an effect on his judgment causing this inappropriate conduct, but Mr. Dixon was not interested in hearing anything about his medical condition.

16. While Mr. Blay and Mr. Lockerbie expressed some concerns based upon Mr. McCracken's statements, neither took any affirmative actions to change anything as a result of Petitioner's statements. Respondent's witnesses uniformly stated that Mr. McCracken's actions were uncharacteristic and not the norm.

17. Finally, as noted, DOR's own witness testified that in the view of the agency the conduct did not rise to the level of dismissal, but that DOR had intended merely to demote Petitioner.

18. In consideration of all of these factors, to the extent unacceptable personal conduct was proven with respect to Petitioner's conduct, DOR did not establish just cause for Petitioner's dismissal. Petitioner's inappropriate comments to Mr. Blay are more appropriately poor job performance.

19. The Respondent did not meet its burden of proof by showing that Mr. McCracken engaged in unacceptable personal conduct by conduct for which no reasonable person should expect to receive a prior warning and conduct that was unbecoming to a state employee that is detrimental to State service.

20. Based upon the facts and circumstances of this case, an appropriate remedy would have been for Petitioner to be suspended for one week without pay.

21. Retroactively reinstating a State government employee is a remedy which in essence is a finding that the termination was improvident, and thus, the reinstatement is as though the severance in service never happened. Therefore, with the unusual circumstances in this case of the Petitioner's death, he obviously cannot return to state service; however, his estate is entitled to any back pay to which he would have been entitled. The period of "reinstatement" for which he would have been entitled is from the date of his termination until the date of his death.

22. It is found as fact and concluded as a matter of law that extraordinary factors exist which justify having exceeded the statutory deadlines for completion of this contested case, including but not limited to, the Petitioner's health issues which ultimately led to his death prior to the conclusion of this contested case.



The Court makes the following:

### **FINAL DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, and all the competent evidence at hearing, Respondent's decision to dismiss Petitioner is **reversed** and Petitioner is entitled to be retroactively reinstated by Respondent to the same or similar position held prior to his dismissal to the date of his death, with back pay less one week's pay paid to Petitioner's estate, as well as reasonable attorney's fees paid to Petitioner's counsel upon a properly supported fee petition.

### **NOTICE**

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

Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a notice of appeal as provided in G.S. 7A-29(a). Appeal of right lies directly with the North Carolina Court of Appeals. The appealing party must file the Notice of Appeal within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. A copy of the Notice of Appeal must be filed with the Office of Administrative Hearings and requires service on all parties.

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

This the 24<sup>th</sup> day of August, 2015.

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Donald Overby  
Administrative Law Judge

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14 OSP 07170

Estate of Todd McCracken Petitioner,  v.  N C Department Of Revenue Respondent.	<b>AMENDED FINAL DECISION</b>
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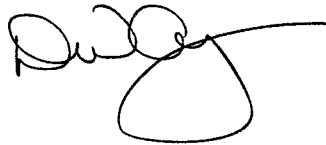
1. This case was heard before the Court and the Court subsequently issued a decision finding, as re-affirmed herein, that the Respondent NC DOR ("DOR") dismissed the Petitioner, the late Todd McCracken ("Petitioner") without just cause.
2. During the hearing process, the Petitioner died, and the Estate of Todd McCracken ("the Estate") was substituted as the Petitioner in this matter.
3. The Court has ordered that Petitioner be retroactively reinstated to employment with DOR from the date of Petitioner's termination up to and including the date of his death. The Court has likewise ordered that the DOR pay to the Estate all back pay and benefits, again up to and including the date of Petitioner's death.
4. The Court has been informed that the parties wish to resolve the case by the issuance of an Order from this Court to the following effect, thus constituting an Amended Final Decision. It is now, therefore ORDERED:
  - A. DOR will pay to the Estate a lump sum of \$120,000.00 within 30 days of the date of this Order, subject to deductions listed in the following paragraphs.
  - B. Of that \$120,000.00 sum, \$15,000.00 shall be separately paid to the Law Offices of Michael C. Byrne as mutually agreed upon reasonable attorney's fees in this case. This

sum shall be paid within 30 days of the issuance of this order without further request or condition.

- C. Of that \$120,000.00 sum, the sum of \$11,281.85 and \$4,450.42 shall be withheld by DOR and paid to the State Retirement System to ensure service credit for Petitioner from the date of his termination until up to and including the date of Petitioner's death.
  - D. The remainder of the \$120,000.00 sum, or \$89,267.73, shall be paid by DOR to the Estate within 30 days of issuance of this order without further request or condition. Prior to payment, DOR shall deduct applicable State and Federal income tax, and shall provide a written statement of such deductions along with the payment.
  - E. This Order is mutually agreed upon and shall be in full satisfaction of the Order previously issued in this case and DOR shall have no further liability to the Petitioner or the Estate for any claim of any kind, barring claims for breach or violation of this Order or to enforce this Order, nor shall the Estate have any liability to DOR for any claim whatsoever.
  - F. Both parties waive their right to appeal this Order to the North Carolina Court of Appeals
5. This Order constitutes an Amended Final Decision and is binding on the parties to this case. Following the fulfillment of the terms of this Order the parties shall report back to the Undersigned so that an Order of Closure may issue.

**SO ORDERED**

This the 18th day of December, 2015.

A handwritten signature in black ink, appearing to read 'D. Overby', with a large, stylized loop at the end.

Donald W Overby  
Administrative Law Judge

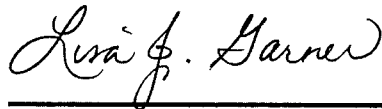
**CERTIFICATE OF SERVICE**

The undersigned, hereby certifies that a copy of the foregoing **AMENDED FINAL DECISION** is **DEEMED SERVED** upon the following persons the date it is enclosed in a wrapper and placed in an official depository of the United States Postal Service, as evidenced by the postmark date of the wrapper, addressed as follows:

Michael C Byrne  
Law Offices of Michael C Byrne PC  
150 Fayetteville Street, Suite 1130  
Raleigh NC 27601  
Attorney For Petitioner

Peggy S Vincent  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh NC 27699  
Attorney For Respondent

This the 18th day of December, 2015.



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Lisa J Garner  
North Carolina Certified Paralegal  
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