

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 OSP 05710

Joyce Lee,)
Petitioner,)
v.)
Orange County Department of Social)
Services,)
Respondent.)

FINAL DECISION

On August 6, 2015, Petitioner filed a contested case petition with the Office of Administrative Hearings appealing Respondent's July 27, 2015 termination of Petitioner's employment with Respondent for engaging in unacceptable personal conduct. In her petition, Petitioner alleged that Respondent wrongfully dismissed her without just cause, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and/or capriciously, and failed to act as required by law or rule.

On November 19, 20, and 30, 2015, Administrative Law Judge Melissa Owens Lassiter conducted a contested case hearing in this case in Raleigh, North Carolina pursuant to Chapters 126 and 150B of the North Carolina General Statutes. On January 19 and 20, 2016, the parties filed their respective proposed Final Decisions with the Office of Administrative Hearings.

APPEARANCES

For Petitioner: Charles E. Monteith, Jr., Shelli Henderson Rice, Monteith & Rice, PLLC, 309 West Millbrook Road, Suite 141, Raleigh, NC 27609

For Respondent: Annette Moore, Staff Attorney, Anne Marie Tosco, Associate Attorney, Orange County Attorney's Office, 200 South Cameron Street, Hillsborough, NC 27278

ISSUE

Whether Respondent had just cause to dismiss Petitioner from employment for engaging in unacceptable personal conduct?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 126-1.1, N.C. Gen. Stat. § 126-5
N.C. Gen. Stat. § 126-34.02, N.C. Gen. Stat. § 126-35
N.C. Gen. Stat. § 150B-23
25 N.C.A.C. 01I.2301, 25 N.C.A.C. 01I.2304
25 N.C.A.C. 01I.2308

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner:

1. Work Planning and Performance Review – April 15, 2002
2. Work Planning and Performance Review – June 2003
3. Work Planning and Performance Review – May 27, 2004
4. Work Planning and Performance Review – June 30, 2005
5. Work Planning and Performance Review – May 12, 2006
6. Work Planning and Performance Review – June 15, 2007
7. Work Planning and Performance Review – April 22, 2008
8. Work Planning and Performance Review – May 21, 2009
9. Work Planning and Performance Review – July 20, 2011
10. Work Planning and Performance Review – July 23, 2012
11. Work Planning and Performance Review – August 23, 2013
12. Work Planning and Performance Review – September 30, 2014
13. Petitioner's Response to September 30, 2014 Work Planning and Performance Review
14. Allen Coleman's Time Card – January 2015
15. Allen Coleman's January 2, 2015 E Mail
16. Petitioner's Notice of Termination
17. Petitioner's July 2015 Salary Increase
18. Orange County Code of Ordinances 28-20 Attendance Records
19. Description of February 28, 2013 Incident
20. Brenda Bartholomew's Investigation Follow-up

22. Allen Coleman's Statement Concerning June 25, 2015 Incident
23. Serena McPherson June 26, 2015 Email

For Respondent:

1. Work Planning and Performance Review dated May 21, 2001
2. Work Planning and Performance Review dated April 15, 2002
3. Work Planning and Performance Review dated June 2003
4. Work Planning and Performance Review dated May 27, 2004
5. Work Planning and Performance Review dated June 30, 2005
6. Work Planning and Performance Review dated May 12, 2006
7. Work Planning and Performance Review dated June 15, 2007
8. Work Planning and Performance Review dated April 22, 2008
9. Work Planning and Performance Review dated May 21, 2009
10. Work Planning and Performance Review dated July 20, 2011
11. Work Planning and Performance Review dated July 23, 2012
12. Work Planning and Performance Review dated August 23, 2013
13. Counseling Statement dated July 23, 2012
14. Work Planning and Performance Review dated September 30, 2014

15. Ms. Lee's Statement of Accomplishments for Ms. Coston
16. Allen Coleman's Timecard dated January 10, 2015 – January 23, 2015
17. January 30, 2015 Written Warning to Ms. Lee
18. July 3, 2015 Email from Brenda Bartholomew to Nancy Coston dated and attached DSS Investigation Follow-up Memorandum
19. Notice of Investigatory Suspension
20. July 23, 2015 Notice of Pre-disciplinary Conference
21. July 27, 2015 Notice of Termination
22. August 6, 2014 Email Communications between Denise Shaffer and Petitioner
23. August 28, 2014 Email Communications between Denise Shaffer and Petitioner
24. Denise Shaffer's Notes
25. June 26, 2015 Email from Katherine Thompson and attached Statement
26. Vehicle #886 Mileage Logs and Reservations for Respondent
27. Emails from Maria Retana to Petitioner and Amy Mitchell
28. Amber Lemon's Statement
29. January 30, 2015 Memorandum from Petitioner to Brenda Bartholomew re: 2013-2014 Work Planning and Performance Review (WPPR)
30. Memorandum from Petitioner to Brenda Bartholomew re: Retaliation Grievance with attached to Written Warning
31. May 25, 2015 Email from Brenda Bartholomew to Nancy Coston
32. April 4, 2015 Emails from Brenda Bartholomew to Accounting Technicians
33. Tyrone Williams's Timecard

WITNESSES

For Petitioner: Robert Gilmore, Joyce Lee, Elizabeth Phillips, Cynthia Pulliam, Amy Mitchell

For Respondent: Nancy Coston, Denise Shaffer, Katherine Thompson, Allen Coleman, Donna Hall, Serena McPherson, Brenda Bartholomew, Maricruz Rios, Maria Retana, Amber Lemons, Louise Moize, Sharron Hinton, Tyran Fennell

FINDING OF FACT

Jurisdiction and Parties

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

2. Petitioner Joyce Lee was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes.

3. Respondent Orange County Department of Social Services (“DSS”) was Petitioner’s employer, and subject to Chapter 126.

4. In March of 1996, Petitioner began working for Orange County as an administrative assistant in the Orange County’s Public Works Department. In November 1996, she was promoted to a Business Officer position at the Orange County Health Department. On April 24, 2000, then DSS Director Marti Pryor Cook hired Petitioner to work as a Business Officer II at Respondent DSS. (Resp. Ex. 1; T. p 457) Petitioner was a member of Respondent’s management team, and reported directly to Respondent’s Director.

5. In 2001, Nancy Coston was hired as Director of DSS. At all times relevant to this case, Director Coston directly supervised Petitioner and other members of the management team. (Resp. Ex 2-12, 14; T. p. 9, 458-459)

6. As a Business Officer II, Petitioner managed the Administrative Division including the Accounting Unit, and was responsible for all agency financial, budgetary, and administrative activities, including facility managements and managing and reserving agency vehicles. Petitioner supervised approximately twenty-two employees, either through direct supervision or through a supervisor (T. p. 30, 70-71, 458-459, 463)

Petitioner's Termination from Employment

7. On July 20, 2015, Respondent issued a Notice of Pre-disciplinary Conference to Petitioner advising her that Respondent's Director Nancy Coston would conduct a pre-disciplinary conference with Petitioner on July 23, 2015 to discuss possible disciplinary action about Petitioner's "continuing pattern and practice of harassing and intimidating behavior toward agency staff which, if substantiated, would constitute personal conduct." (Resp. Ex. 20) In such Notice, Coston outlined several examples of Petitioner's interpersonal interactions and attitude toward staff, which would be discussed at the pre-disciplinary conference. These actions allegedly occurred from July 2012 through August 2014, and were the subject of counseling sessions Ms. Coston had with Petitioner.

8. On July 23, 2015, Ms. Coston and Respondent's Human Resource Manager, Tyran Ferrell, conducted a pre-disciplinary conference with Petitioner to allow Petitioner an opportunity to respond to the allegations listed in the Notice of Pre-disciplinary conference.

9. On July 27, 2015, Respondent terminated Petitioner's employment for engaging in unacceptable personal conduct, and issued a Notice of Termination to Petitioner. In that Notice, Respondent informed Petitioner that she had "exhibited a pattern of engaging staff at the agency [Respondent DSS] in a confrontational, intimidating, or angry manner." Respondent based its termination on Petitioner's personal conduct shown, (1) on June 25, 2015 towards a management analyst and accounting technician, and (2) a written warning on January 30, 2015 issued for similar behaviors. In the Notice of Termination, Director Coston also referenced Petitioner receiving a "number of counseling sessions in 2013 and 2014. . . for similar behaviors." Coston noted that she had:

. . . Discussed these behaviors with Petitioner on numerous occasions over a period of several years:

3. You have been provided counseling on anger management through the Employee Assistance Program;
4. When you have been counseled about these behaviors, you have not taken any responsibility for your actions and blame responses on the actions of others or have not awareness of how your behavior affects others;
5. On several occasions, your interactions with me has [sic] also been negative including several times when you told me you would not do what I asked you to do;
6. On January 30, 2015, you received a written warning for unacceptable personal conduct for inappropriate interactions with staff and for your retaliation against an employee. At that time, you were instructed to refrain from any intimidating or harassing behavior and to communicate and interact with all county staff in a professional, constructive, and positive tone and manner; and
7. You failed to follow instructions in your interactions with staff on June 25, 2015.

(Pet. Ex. 16, Resp. Ex. 21)

10. N.C.G.S. § 126-34.02 requires an employer state agency, before taking any personnel disciplinary actions, to furnish the subject State employee with "a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action." Based on that statute, Respondent is bound by the reasons stated in its July 27, 2015 dismissal letter to Petitioner in proving it had just cause to dismiss Petitioner from employment. After issuing its Notice of Termination, Respondent cannot rely upon evidence that was not listed in its dismissal letter to Petitioner, to bolster its reasons for terminating Petitioner from employment.

11. In the Notice of Termination, while Respondent cited that Petitioner "received a number of counseling sessions in 2013 and 2104," Respondent did not identify counseling sessions from 2012 – 2014 by specific date, and/or by subject name, other than the January 30, 2015 and June 25, 2015 incidents, as a basis for terminating Petitioner's employment.

a. In the Notice of Termination, Respondent failed to identify any counseling sessions it had cited in the Notice of Pre-disciplinary Conference, other than the January 30, 2015 written warning and June 25, 2015 counseling, as a basis for terminating Petitioner's employment. Neither did Respondent state that it relied upon any incidents addressed in Petitioner's annual performance evaluations ("WPPR"), as a basis to terminate Petitioner from employment.

b. Because Respondent did not list these above-cited events as a basis for terminating Petitioner's employment in the Notice of Termination, any such evidence is only allowed as background information, and/or for the purpose of showing that Ms. Coston had made

Petitioner aware that she was exhibiting inappropriate behavior in the workplace with agency staff on prior occasions.

Performance Evaluations

12. From May 7, 2002 through 2008, Director Coston rated Petitioner's performance as "Proficient" or better in her annual WPPRs. Ms. Coston defined "proficient" as meaning an employee was meeting minimum expectations, and doing an acceptable job. (Resp. Ex 4, 7, 9, 10, 11, 12, 14, T. pp. 12-27, 39-40, 72-73, 76-89, 113-114, 119-122) In Petitioner's 2004 WPPR, Ms. Coston listed one of Petitioner's goals for the next year was "improving communication with staff by assuring staff understand the reasons for administrative decisions." (Resp. Ex. 4, T. pp. 12)

13. In Petitioner's 2009 WPPR, Petitioner received an "Exceptional" rating. Under Supervisor's Comments, Ms. Coston described Petitioner as "a very hardworking, dependable member of management who volunteers to help others." (Pet. Ex. 8) Coston noted that Petitioner appeared "calmer at work and has improved her relationship with staff." Coston noted that Petitioner did not have as many communication issues with staff, and her communication had improved during that review period. (Resp. Ex. 9, T. pp. 14)

14. Ms. Coston did not complete a performance evaluation for Petitioner in 2010. In October of 2011, Coston issued an annual WPPR to Petitioner, rating Petitioner's performance as "proficient." Under the Supervisor's Comments, Ms. Coston wrote:

[Given] the situation, Joyce is also seeking training on handling interpersonal and personnel issues at the workplace and will attend some additional training this year.

(Resp. Ex. 10) Petitioner was given additional training to improve her handling of staff and conflict so that things would not escalate. (T. pp. 15-16)

15. In Petitioner's 2012 WPPR, Ms. Coston wrote that:

Joyce will need to be conscience of her personal interaction style and its impact on staff. She and I have committed to working on improving communication and feedback loops.

(Resp. Ex. 11)

16. On July 23, 2012, Ms. Coston conducted a counseling session with Petitioner about overreacting in an angry tone at a July 13, 2012 supervisor's meeting, and reacting inappropriately to an agency supervisor in the hall in front of a client. Petitioner had also reacted very negatively toward Coston when she asked Petitioner to work on new codes for line staff to use on the day sheets. Petitioner told Coston she was not going to do it, that it was not part of her job, and that it was the job of the program staff. Coston advised Petitioner that:

This trend of anger, aggressive or rude behavior with other staff is totally inappropriate for an employee at this agency, and is particularly inappropriate for a member of management. . . . At our conference, I told you to refrain from using angry or curt tones with staff and not to give orders or instructions to staff in other divisions unless a division manager had asked you to intervene.

(Resp. Ex. 13) During the counseling session, Coston advised Petitioner to refrain from using angry and confrontational tones with agency staff, and recommended Petitioner get additional training on communication and conflict management. (Resp. Ex. 13)

17. In 2013, Respondent DSS underwent many changes, such as the implementation of NCFAST and new automated measures. Some of Petitioner's responsibilities were shifted to other sections of the agency. Petitioner was frustrated by these shifts in her areas and responsibilities, and attributed these changes to Ms. Coston. Both Coston and Petitioner acknowledge that issues began to escalate in 2013. Petitioner felt Ms. Coston excluded her from meetings, and that Ms. Coston was "on her" for the way Petitioner interacted with staff. (T. pp. 406-416, 532)

18. Petitioner did not sign her 2014 WPPR, because she did not believe the evaluation accurately reflected her accomplishments. (T. pp. 459-461) Petitioner believed she deserved a rating of "exceptional," instead of the "proficient" rating Coston had given Petitioner. Ms. Coston allowed Petitioner to write a list of her accomplishments during the review period in question. (Resp. Ex. 15) Ms. Coston and Petitioner discussed issues with Petitioner's 2014 WPPR at the September 30, 2014 meeting, and again in October 2014. (Resp. Exs. 14, 15, T. pp. 36-37, 41-45, 88-89, 513-519) On January 12, 2015, Ms. Coston received and reviewed Petitioner's list of her own accomplishments, before completing and signing Petitioner's 2014 WPPR.

January 30, 2015 Written Warning

19. On December 30, 2015, Respondent's Assistant Director, Denise Shaffer, asked Petitioner to verify whether Petitioner had created a "rule" limiting use of agency vehicle #886 to the administrative unit. Petitioner told Ms. Shaffer that she had limited use of agency vehicle #886 to administrative staff, or staff not transporting clients and children, because cars used by other staff transporting clients and children were often dirty. Petitioner thought administrative staff should not have to use dirty cars, and she wanted a clean car for administrative staff to use for running errands. Petitioner kept the reservation book for vehicle #886 in her office. Because Petitioner locked her office when she was absent from the office, vehicle #886 was inaccessible to the Accounting Technicians to make vehicle reservations for that car when Petitioner was absent from work. The reservation book also showed that vehicle #886 was always reserved to "Joyce."

20. After talking with Shaffer, Petitioner accused Mr. Coleman of telling Shaffer about Petitioner's "rule." Petitioner walked into Coleman's office, and asked him what gave him the authority to tell a supervisor that there was a car reserved to Petitioner. Coleman advised Ms. Coston that he was concerned Petitioner would retaliate against him for getting Petitioner into trouble.

21. On January 9, 2015, Petitioner met with her staff, including Allen Coleman. She informed her staff that they should not work past their scheduled departure time unless they informed her in advance they needed to work late. That same day, Mr. Coleman returned from lunch late. Mr. Coleman's work hours were from 8 AM until 5 PM. At the end of the day, Petitioner noticed Coleman had not clocked out at his scheduled 5:00PM time, and directed Coleman to clock out. (T. pp. 466-468)

22. On January 13, 2015, Coleman was twelve minutes late returning from lunch. Petitioner observed Coleman did not leave work at his scheduled 5:00PM time that date. She did not think Coleman appeared to be working after 5:00PM. (T. pp. 471-72) Coleman claimed he worked late that day, or "flexed" his time, in order to work his allotted eight hours that day. He did not ask Petitioner if he could make up his time by staying late. Coleman clocked out at 5:06PM. (T. p. 472)

23. The next day, Petitioner changed Mr. Coleman's time "out" on his timecard, because Coleman had not followed Petitioner's instructions regarding working late, and as Coleman did not appear to be working after 5:00PM on January 13, 2015. Petitioner believed that she was authorized as Coleman's manager to adjust to employee time records. (T. pp. 466-473)

24. When Mr. Coleman returned to work on January 14, 2015, he saw his time "out" on his timecard had been changed to 5:00PM for January 13, 2015, reducing his hours worked for that day to 7.8 hours. A note on his timecard read, "Time after schedule work hour was not approved by supervisor. [jlee; 1/14/2015 8:50AM]." (Resp Ex 16, 17; T. pp. 50-51, 94-99, 203-207, 472, 606-618, 673-674) Mr. Coleman printed the relevant portion of his altered timecard, and showed it to Ms. Coston. Ms. Coston was very concerned that Petitioner was in fact retaliating against Mr. Coleman, especially after reviewing other staffs' timecards, and finding none of them had been changed without the staff member's involvement. (Resp Ex 16, 17; T. pp. 50-51, 94-99, 203-207, 472, 606-618, 673-674)

25. Ms. Coston and Ms. Shaffer interviewed Petitioner's staff about vehicle reservations and time cards. The Accounting Technicians supervised by Petitioner indicated there were major issues with timekeeping in their unit. Petitioner required them to clock in at exactly 8:00AM, and clock out at exactly 5:00PM, a requirement made difficult by the technical aspects of the County's timekeeping system, Kronos. Petitioner did not permit employees work over eight hours in a workday, even by .1 or .3 of an hour. If employees did not adhere to this strict schedule, they had to give a leave slip to Petitioner for that time. It was also clear from these interviews that employees had to go through Petitioner to use vehicle #886. Although some of the Accounting Technicians had never complained about Petitioner before these interviews, every Accounting Technician, when asked, expressed concerns about Petitioner's behavior towards them. (Resp Ex 24; T. pp. 147-149, 154-158, 199-201, 205-206, 247-254, 592-606, 683-684, 651-652, 683-685)

26. On January 22, 2015, Ms. Coston and Ms. Shaffer met with Petitioner regarding their concerns about vehicle #886, and Mr. Coleman's altered timecard. Petitioner told Ms. Coston and Ms. Shaffer that vehicle #886 had been set aside for administrative staff for two years, because she did not want to get in a nasty car. Petitioner admitted to asking Mr. Coleman about the car, because she was upset that he referred to vehicle #886 as "Joyce's car" when the administrative

staff car used that car. Petitioner also told Ms. Coston and Ms. Shaffer that if her staff went over their time on their lunch break, they had to submit a leave slip to Petitioner. Petitioner admitted she changed Mr. Coleman's timecard, because Coleman had not signed out at his scheduled time, and Petitioner did not believe he was working. Petitioner did not speak to Mr. Coleman before changing his timecard. (Resp Ex 17, 24; T. pp. 50-51, 91-93, 95, 141, 205-206, 683)

27. At approximately 11:00 a.m. on January 30, 2015, Petitioner hand-delivered a grievance concerning her 2014 WPPR with Brenda Bartholomew, Orange County's Human Resources Director. (Pet. Ex. 13, T. pp. 354, 461-462) In such grievance, Petitioner asserted that Ms. Coston had turned in her 2014 WPPR without allowing Petitioner the opportunity to comment, and that her 2014 WPPR was not a true representation of Petitioner's work accomplishments, as it rated her "Proficient," and not "Exceptional." Ms. Bartholomew did not share the document with Ms. Coston, because she did not believe Coston had the authority to investigate the complaint. (Resp Ex 15, 29; T. pp. 42-43, 56, 354-356, 461-462)

28. Approximately four and one half hours after Petitioner delivered her grievance to Ms. Bartholomew on January 30, 2015, Ms. Coston issued Petitioner a written warning for unsatisfactory job performance and personal conduct. (Resp. Ex. 17) This was the first written warning that Petitioner had received during her fifteen years of employment with Respondent. Coston issued this warning for the following reasons: (1) Petitioner had retaliated against employee Allen Coleman, and violated County policy by changing Coleman's timecard without talking with Coleman, and (2) Petitioner had created an inappropriate work environment in which employees felt harassed and intimidated. (Resp. Exs. 17, 24; T. pp. 51-52, 91, 95-100, 103-105, 673-674, 677) The closeness in time between Mr. Coleman first telling Coston he feared retaliation from Petitioner (early January 2015), and Petitioner changing his time card on January 13, 2015, made Ms. Coston believe that Petitioner had retaliated against Mr. Coleman for telling others in the agency about Petitioner's restricting the usage of vehicle #886.

29. In the January 30, 2015 written warning, Coston also informed Petitioner that staff perceived Petitioner's behavior towards them as intimidating. Coston reminded Petitioner that Coston had counseled Petitioner about her communication style with staff on past occasions. Coston also instructed Petitioner that:

Your behavior has created an atmosphere of fear and intimidation that is unbecoming of an employee of your position and is a detriment to the agency work environment. In addition, your actions in altering an employee's official time record is a falsification of employment documents and a violation of work rules, and as such constitutes unacceptable personal conduct as a manager at this agency.

(Resp. Ex. 17) In the warning, Coston did not specifically identify which staff felt intimidated by Petitioner.

30. Finally, in the written warning, Ms. Coston directed Petitioner to: (1) refrain from any intimidating or harassing actions with any agency employees, (2) consult with the Director or Assistant Director before implementing any rules impacting agency staff, (3) participate in the Employee Assistance Program ("EAP") to address constructive ways to handle her frustration and

anger, and (4) immediately and continuously communicate and interact with supervisors and other County employees in a professional, constructive, and positive tone and manner.

a. Ms. Coston believed Petitioner would benefit from the EAP, because Petitioner often spoke to Ms. Coston in a very angry tone, even though Petitioner always insisted that she was not angry. Ms. Coston felt EAP could help Petitioner to understand why she was coming across to others as angry and hostile.

b. Ms. Coston also wanted Petitioner to be more flexible with staff, especially regarding their time. In the written warning, Coston also advised Petitioner that failure to follow these instructions could result in further disciplinary actions, up to and including termination from employment. (Resp Ex 17; T. pp. 52-55, 622-623)

31. After receiving the January 30, 2015 written warning, Petitioner no longer placed any restrictions on the use of vehicles that were assigned to Respondent. (T. p. 466), and did not change any employee time records after January 30, 2015. (T. pp. 474-475)

32. On February 20, 2015, Petitioner filed a second grievance with Brenda Bartholomew of Human Resources alleging that Ms. Coston had issued the January 30, 2015 written warning to Petitioner in retaliation for Petitioner's refusal to sign her 2014 WPPR. Ms. Bartholomew did not share the document with Ms. Coston. (Resp Ex 30; T. pp. 56, 354-355, 358, 477)

33. By letter dated March 2, 2015, Ms. Bartholomew informed Petitioner that she had received Petitioner's two grievances. Bartholomew advised Petitioner that since Respondent fell under the authority of the State's personnel policies, as opposed to the County's policies, Petitioner must follow State procedures for filing a grievance. (T. pp. 354, 358, 368, 478)

34. Ms. Bartholomew told Coston that Petitioner had filed a grievance alleging retaliation by Ms. Coston, though Ms. Bartholomew did not share the contents of the grievance with Ms. Coston. Ms. Coston told Bartholomew that Petitioner often expressed that she felt treated unfairly by Ms. Coston. Petitioner had also told Coston that others in the agency also thought Ms. Coston treated Petitioner unfairly. Ms. Coston asked Ms. Bartholomew to assess these claims, and other perceived morale issues within DSS, and permitted her to interview agency staff. (T. pp. 56-58, 358-360, 375-376, 384-385, 388-391, 674-676) Bartholomew investigated Petitioner's allegations by interviewing several agency employees, including Petitioner. (Resp. Ex. 31, 32; T. pp. 56-58, 360-362, 371-374, 383-385, 388-391, 676)

35. On or about June 24, 2015, Lindsey Shewmaker, Respondent's Economic Services Manager, instructed one of her employees, Katherine Thompson, to obtain information about rent and mortgage payments that Respondent had made to its clients. (T. pp. 174-175) Shewmaker told Thompson to talk with Allen Coleman regarding the information she needed. (T. pp. 175-176) Ms. Thompson arranged to meet with Mr. Coleman on the following day. (T. p. 176)

36. On June 25, 2015, Ms. Thompson met with Mr. Coleman in his office. (T. pp. 176) Petitioner observed Ms. Thompson, walked and stood at Mr. Coleman's office door, and asked

Thompson, in an angry tone, if she was “interviewing my people.” (T. pp. 176-177, 210, 479) Ms. Thompson replied that she was working on a project “for Lindsey and Nancy.” (T. pp. 177, 479) Petitioner told Ms. Thompson that she was not aware that Ms. Thompson needed information, and that Petitioner wished someone had informed her that Ms. Thompson would be visiting her division and staff. (T. pp. 479-480) Petitioner advised Thompson that next time, she needed to ask Petitioner first, and could not speak to Petitioner’s people without coming to Petitioner first. Thompson apologized. Petitioner stood there, and stared at Thompson for a few seconds before walking away. Thompson thought Petitioner appeared very agitated as Petitioner’s tone of voice was condescending, her eyebrows were raised, and her eyes were wide. Thompson felt like Petitioner was trying to appear threatening. (Pet. Ex. 22)

37. Accounting Technician Donna Hall overheard Petitioner speaking to Thompson. Hall thought Petitioner’s tone of voice was inappropriate, and her conduct was an overreaction. (Resp. Ex. 25; Pet. Ex. 23; T. pp. 58-60, 175-177, 181-182, 209-211, 243-244, 478-481, 619-621)

38. Petitioner did not say anything to Mr. Coleman during this incident. (T. p. 190) After Petitioner returned to her office, Mr. Coleman and Ms. Thompson decided to discontinue their meeting.

39. After Ms. Thompson left Mr. Coleman’s office, she encountered Petitioner in the hallway. Petitioner told Ms. Thompson again that Ms. Thompson was not to speak to Petitioner’s people without consulting her first. Petitioner’s tone was cold and condescending. Petitioner further told Ms. Thompson that she might not have wanted her staff to give Ms. Thompson the information she sought. Ms. Thompson apologized repeatedly to Petitioner. After returning to her office, Ms. Thompson emailed her supervisor. Thompson asked to speak with her, as she was upset and shocked by the incident, as well as frustrated that an important project for Ms. Coston had been hindered. (Resp Ex 25; T. pp. 178-179, 182-183, 187-188, 481-482)

40. Ms. McPherson encountered Petitioner following this incident. Ms. McPherson could tell Petitioner was angry based on Petitioner’s demeanor and tone. Petitioner told Ms. McPherson it was unfair that people talked to her staff without her permission. (Pet Ex 24; T. pp. 285-286)

41. Mr. Coleman contacted Ms. Shaffer, and told her what transpired with Petitioner and Ms. Thompson. Mr. Coleman told Ms. Shaffer that Petitioner was upset, shaking, and her voiced was raised. Ms. Shaffer spoke with Ms. Thompson after speaking to Mr. Coleman, and found Ms. Thompson’s description of what transpired to be consistent with Mr. Coleman’s recounting of the incident. Ms. Shaffer asked Mr. Coleman, Ms. Thompson, and Ms. McPherson to write statements regarding the incident. (Resp. Ex. 25; Pet. Ex. 22-24; T. pp. 109, 149-152, 179-181, 213-215, 287-288, 291-293)

42. At hearing, Ms. Thompson’s testimony differed significantly from Mr. Coleman’s testimony regarding this matter. Mr. Thompson testified that Mr. Coleman told her he was nervous when he received Ms. Thompson’s email, and that he was afraid of being retaliated against again. (T. p. 182) In contrast, Mr. Coleman testified that he had no reservations about meeting with Ms.

Thompson, and that he does not recall telling Ms. Thompson that Petitioner had retaliated against him in the past. (T. pp. 222-223)

43. On June 26, 2015, Ms. Coston and Ms. Bartholomew met with Petitioner and issued a Notice of Investigatory Suspension. Through the Notice, Coston placed Petitioner on investigatory placement/suspension to allow Coston time to investigate allegations about Petitioner's conduct on June 25, 2015. (Resp. Ex. 19) That Notice provided:

. . . you have failed to follow the directions outlined in your January 30, 2015 Written Warning by failing to refrain from any intimidating or harassing actions with any employees of the department, including actions that could be deemed to be retaliatory. You also failed to communicate and interact with all County employees in a professional manner with a constructive and positive tone.

(Resp. Ex. 19) Bartholomew observed that Petitioner was visibly upset about the suspension. Petitioner accused Ms. Coston of being at fault for the suspension. (Resp. Ex. 19; T. pp. 60-61, 364-365, 377, 483)

44. Ms. Coston investigated the June 25, 2015 incident by interviewing Allen Coleman, Katherine Thompson, Ms. Everhart, Donna Hall, Cynthia Pulliam, and Serena McPherson. Neither Ms. Coston nor any other employee of Respondent contacted Petitioner during the course of Ms. Coston's investigation. (T. pp. 124, 484) Ms. Coston found the witness accounts of such incident consistently showed that Petitioner was intimidating when she spoke to Ms. Thompson on June 25, 2015. Based on these interviews, Coston concluded that Petitioner engaged in misconduct during the June 25, 2015 event. She considered possible disciplinary actions for Petitioner's conduct, including demotion. (T. pp. 61-62, 111, 124-125)

45. On July 20, 2015, Tyran Fennell, Orange County's Human Resources Manager, presented Petitioner with a Notice of Pre-disciplinary Conference from Ms. Coston notifying Petitioner of such conference scheduled for July 23, 2015. (T. pp. 485-486, 686, R. Ex. 20) Ms. Fennell discussed several potential outcomes with Petitioner, including resignation, retirement, termination, and the possibility that nothing would happen. At hearing, Ms. Fennell explained her conversation with Petitioner was similar to those she had with other employees who received a notice of pre-disciplinary conference. At the hearing, Petitioner stated Ms. Fennell only gave her two options: to retire or be terminated. (T. pp. 485, 686-687, 689-691)

46. The purpose of the pre-disciplinary conference was to discuss allegations that Petitioner had engaged in a continuing pattern, and practice of harassment and intimidation toward agency staff, which, if substantiated, would constitute unacceptable personal conduct. (Resp. Ex. 20; T. pp. 61-62, 124-125) Other than the June 25, 2015 incident, the Notice of Pre-disciplinary Conference did not mention any harassment and/or intimidation by Petitioner that had occurred since the January 30, 2015 written warning. Instead, such Notice cited multiple incidents, occurring between July 2012 and August 2014, as examples of Petitioner's alleged inappropriate behavior, which necessitated the pre-disciplinary conference. (Resp. Ex. 20) This Notice referenced several alleged incidents in which Petitioner intimidated staff. Three of those

incidents allegedly occurred in 2014. However, Coston failed to list a date or month in which such incidents allegedly occurred. (Resp. Ex. 20)

47. On July 23, 2015, Ms. Coston conducted a pre-disciplinary conference with Petitioner, and allowed Petitioner an opportunity to present information to her. Ms. Fennell also attended Petitioner's pre-disciplinary conference. At the pre-disciplinary conference, Coston gave Petitioner a copy of the Notice of Pre-disciplinary Conference. Coston allowed Petitioner an opportunity to read the Notice, and respond to the allegations within the Notice. Petitioner addressed many of the allegations outlined in the Notice during the pre-disciplinary conference. She defended her past behavior at the agency. Petitioner insisted she never used an angry tone, and denied she had engaged in harassing and intimidating behavior on June 25, 2015. Ms. Coston thought Petitioner accepted no responsibility for her actions. (Resp. Ex 20, 21; T. pp. 62-66, 487, 547-548, 621-622, 676-677, 687-688)

48. Following the pre-disciplinary conference, Ms. Coston reviewed Petitioner's statements, and considered alternate disciplinary actions. Ms. Coston felt it was her responsibility to protect staff after staff advised Coston that Petitioner was making staff feel harassed and intimidated. Given Petitioner's history of angry and intimidating behavior at DSS, Coston felt she could not guarantee Petitioner's intimidating conduct would not continue if she were to remain at the agency. Ms. Coston believed Petitioner's conduct warranted dismissal. (Resp. Ex 21; T. pp. 66-68, 106, 121-125, 508, 622)

49. On July 27, 2015, Ms. Coston issued Petitioner a Notice of Termination, incorrectly dated June 27, 2015, dismissing Petitioner from employment for the unacceptable personal conduct of a pattern of harassing, intimidating, confrontational, and angry behavior towards agency staff. Coston concluded that Petitioner's behavior had a negative impact on employees of the agency that continued even after counseling, after Petitioner participated in the County's Employment Assistance Program, and after Petitioner received a written warning for such behavior. (Resp. Ex 21; T. pp. 66-68, 106, 121-125, 508, 622)

50. The preponderance of the evidence presented at hearing showed that since July 23, 2012, Petitioner was aware that her behavior towards her staff had created an atmosphere of fear and intimidation that Petitioner's supervisor thought was "inappropriate for an employee at this agency, and is particularly inappropriate for a member of management." (Resp. Ex. 13) Again, through the January 30, 2015 written warning, Petitioner was made aware that her behavior towards staff was intimidating, and harassing. Petitioner's supervisor warned Petitioner again that she needed to refrain from such behavior, and she was expected to communicate and interact with staff in a "professional, constructive, and positive tone and manner." (Resp. Ex. 17)

51. The testimony of DSS employees regarding Petitioner's conduct was credible, and corroborated the testimony of other employees. The preponderance of the evidence established that Petitioner engaged in a pattern of harassing and intimidating conduct that detrimentally affected the working environment at Respondent's agency.

52. Since Petitioner's termination, the agency has a more positive, and less stressful atmosphere. (T. pp.255-256, 336-337)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes, and the parties received proper notice of the hearing in this matter. 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. Despite the parties' due diligence, and the complexity of the case, this case presented a situation of a kind that exceeded the usual, regular, and customary practice for completion of a contested case hearing. Consequently, pursuant to N.C. Gen. Stat. § 126-34.01, extraordinary cause existed so that the issuance of the Final Decision was rendered more than 180 days from the commencement of the case.

3. N.C. Gen. Stat. § 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."

4. At the time of her dismissal, Petitioner was a "career state employee," as defined under Chapter 126 of the North Carolina General Statutes, and thus, was entitled to the protections of the North Carolina Personnel Act, and the administrative regulations promulgated hereunder.

5. 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. Gen. Stat. § 126-35(d) (2007).

6. 25 NCAC 01I .2301(c) enumerates the two grounds for disciplinary action including dismissal, based on just cause, as set out in N.C. Gen. Stat. § 126-35. These two bases are: (1) Discipline or dismissal imposed based on unsatisfactory job performance, including grossly inefficient job performance, and (2) Discipline or dismissal imposed based on unacceptable personal conduct.

7. 25 NCAC 01I .2304 "DISMISSAL FOR PERSONAL CONDUCT" states:

- (a) Employees may be dismissed for a current incident of unacceptable personal conduct.
- (b) Unacceptable personal conduct is:
 - (1) conduct for which no reasonable person should expect to receive prior warning; or
 - (2) job related conduct which constitutes violation of state or federal law; or . . .
 - (4) the willful violation of known or written work rules; or
 - (5) conduct unbecoming an employee that is detrimental to the agency's service; or . . .

- (7) falsification of an employment application or other employment documentation; or
- (8) insubordination which is the willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is considered unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning;
- ...

One instance of unacceptable conduct constitutes just cause for dismissal. *Hilliard v. North Carolina Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

8. *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, the Court provided, "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." 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."

9. Though just cause is case-dependent and not exclusive, *Carroll* provides examples of some other actions where just cause were found:

Although there is no bright line test to determine whether an employee's conduct establishes "unacceptable personal conduct" and thus "just cause" for discipline, we draw guidance from those prior cases where just cause has been found. .. See, e.g., *Kea*, 153 N.C. App. 595, 570 S.E.2d 919 (employee violated known and written work rules, disobeyed direct order from superior, and made crude and offensive sexual advances to a co-worker); *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 565 S.E.2d 716 (2002) (highway patrol officer was stopped for speeding and driving while intoxicated); *N.C. Dep't of Corr. v. McNeely*, 135 N.C. App. 587, 521 S.E.2d 730 (1999) (correctional officer abandoned post without authorization and failed to remain alert while on duty); *Gray v. Orange Cty. Health Dep't*, 119 N.C. App. 62, 457 S.E.2d 892 (1995) (health department inspector engaged in inappropriate sexually oriented behavior during inspections of catering businesses [***53] owned by women), disc. rev. denied, 341 N.C. 649, 462 S.E.2d 511 (1995); *Leiphart v. N.C. Sch. of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914 (1986) (division director at North Carolina School of the Arts surreptitiously organized meetings with other division directors to discuss complaints against their superior), cert. denied, 318 N.C. 507, 349 S.E.2d 862 (1986).

10. In the recent case of *Warren v. NC Dept. of Crime Control & Public Safety*, the Court of Appeals crystallized the *Carroll* just cause analysis as follows:

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 PETITIONER COMMIT THE CONDUCT ALLEGED

11. In this case, Respondent proved by a preponderance of the evidence that Petitioner engaged in the alleged "unacceptable personal conduct" alleged by Respondent. Beginning in 2012, and again in 2015, Petitioner used an angry tone of voice, and confrontational and intimidating manner when addressing many of her staff at her employment. Through a written warning on January 30, 2015, Respondent warned Petitioner that her failure to make the required improvements to her conduct could result in her dismissal. On June 25, 2015, Petitioner again failed to refrain from intimidating or harassing employees of the agency, and failed to communicate with other County employees in a professional and positive manner when she confronted two agency employees. During Coston's investigation of that incident, other staff employees voiced similar concerns to Ms. Coston regarding Petitioner's hostile conduct. The June 25, 2015 incident of unacceptable personal conduct provided justification for Petitioner's dismissal.

STEP TWO: DID PETITIONER'S CONDUCT CONSTITUTE UNACCEPTABLE PERSONAL CONDUCT

12. Petitioner's actions constituted "unacceptable personal conduct" in violation of 25 NCAC 01I .2304. Petitioner engaged in "conduct unbecoming a state employee that is detrimental to state service," and "conduct for which no reasonable person should expect to receive prior warning" when she continuously addressed other agency employees in a harassing or intimidating manner, and used an angry tone to create a work environment in which agency employees feared retaliation from Petitioner. 25 NCAC 01I .2304(b)(1) & (5). Petitioner continued this pattern of conduct even after being counseled about such behavior on July 23, 2012, being warned by the January 30, 2015 written warning, and again on June 25, 2015.

13. Based on the foregoing, Respondent has met its burden of proof by showing that Petitioner engaged in the conduct her employer alleged, and, secondly, that conduct constituted 'unacceptable personal conduct' under 25 NCAC 01I .2304.

14. Having found the two prongs of the *Carroll* case have been met, the next inquiry is whether the punishment is appropriate as established in *Warren*.

STEP THREE: DID THE MISCONDUCT AMOUNT TO JUST CAUSE FOR THE
DISCIPLINARY ACTION TAKEN

15. The final inquiry of the *Warren* analysis is determining whether the discipline imposed for the conduct was “just.” Just cause must be determined based “upon an examination of the facts and circumstances of each individual case,” which the *Warren* court refers to as “balancing the equities.” In balancing the equities, one must look at the totality of the facts and circumstances as opposed to merely asking whether Petitioner violated rules or policy.

16. The totality of the facts and circumstances of Petitioner’s conduct include a fifteen-year employment with Respondent. The preponderance of the evidence established that during the last three years of employment, Petitioner engaged in abrasive, intimidating, and negative interactions with other agency staff, which continued to escalate despite a July 23, 2012 counseling from Ms. Coston and a January 30, 2015 written warning. Through these disciplinary actions, Petitioner was made aware that the tone of voice she used was not only hostile, but intimidating to her staff, and was more than just Petitioner’s “way” of speaking to others. Despite attending counseling through the Employee Assistance Program, Petitioner continued to engage in unacceptable personal conduct in the workplace. Under the particular facts of this case, Respondent met its burden of proving that it had “just cause” to dismiss Petitioner for this unacceptable personal conduct, and that the punishment of termination from employment was appropriate.

17. The preponderance of the evidence at hearing established that Respondent followed the procedures required before dismissing Petitioner for unacceptable personal conduct, and Respondent had just cause to dismiss Petitioner for her unacceptable personal conduct.

18. Respondent did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily and/or capriciously, or fail to act as required by law or rule when it dismissed Petitioner from employment.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned finds that Respondent’s decision to dismiss Petitioner from employment is **AFFIRMED**.

NOTICE

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such an appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29(a). The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This the 9th day of February, 2016.

Melissa Owens Lassiter
Administrative Law Judge