STATE OF NORTH CAROLINA

COUNTY OF TRANSYLVANIA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 OSP 08687

Jacqueline Renee Crocker Petitioner, v. Transylvania County Department of Social Services Director Tracy Jones Respondent.	**FINAL DECISION**

This contested case was heard before the Honorable David F. Sutton, Administrative Law Judge, on 29 February 2016 in Brevard, North Carolina.

APPEARANCES

FOR PETITIONER:
Donald H. Barton
Attorney at Law
158 East Main Street
Brevard, NC 28712

FOR RESPONDENT:
Jackson R. Price
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301 South College Street
Charlotte, N.C. 28202

EXHIBITS

Admitted for Petitioner:

EXHIBIT	DESCRIPTION
1	Tony C. Dalton Statement – October 2, 2015

Admitted for Respondent:

EXHIBIT	DESCRIPTION
1	J. Michael Edney Statement
2	Order Amending Judgment (*Brown v. Swarn – Transylvania County file No. 14 CVD 318)* – October 6, 2015
3	Notice of Placement on Investigatory Status with Pay – October 5, 2015
4	Notice to Attend Pre-Disciplinary Conference – October 5, 2015
5	Disciplinary Decision of Dismissal – October 7, 2015
6	Grievance Letter – October 19, 2015
7	Post Grievance Conference Letter – November 2, 2015
8	Carson F. Griffin Warning – May 15, 2015
9	Audio Recording – September 22, 2015 hearing (*Brown v. Swarn – Transylvania County file No. 14 CVD 318)*

WITNESSES

Called by Petitioner:

Jacqueline Renee' Crocker
Honorable Peter Knight
Tony C. Dalton
Honorable Emily Cowan
Charles W. "Mack" McKeller

Called by Respondent:

Tracy Jones
Cindy Anders
Kenny McAbee

ISSUES

1. Whether Respondent had just cause to dismiss Petitioner.

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

The undersigned has also reviewed the entire file, including but not limited to the proposals for final decision submitted by both the Petitioner and Respondent.

FINDINGS OF FACT

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 Jacqueline Renee' Crocker (hereinafter "Petitioner") was a career State employee subject to Chapter 126 of the North Carolina General Statutes.

3. Respondent Transylvania County Department of Social Services (hereinafter "Respondent" or "DSS") is subject to Chapter 126 and was Petitioner's employer.

4. Petitioner had been employed as a social worker with Transylvania County Department of Social Services for 16 years, and was a Children's Protective Services Supervisor since June 2013 (Tr. 127-128).

5. The Petitioner was dismissed from her employment with Respondent because of her relation to a civil custody action captioned, *Lauren Brown v. Marquis Swarn,* Transylvania County Case No. 14 CVD 318 (hereinafter 'Custody Dispute"), and primarily due to an ex parte communication she had with District Court Judge Emily Cowan about the terms of a Consent Order entered by Judge Cowan in the Custody Dispute (Tr. 52-53).

6. Marquis Swarn is the fiancé (boyfriend at the time of ex parte communication) of the Petitioner's daughter (Tr. 136).

7. Judge Cowan entered a Consent Order in the Custody Dispute resolving the terms of placement and visitation of the minor child sometime prior to the ex parte communication which lead to Petitioner's dismissal (Tr. 85).

8. The Petitioner's relation to the Custody Dispute was addressed on June 4, 2015 when Respondent's interim director, Carson Griffin, and Respondent's legal counsel, Tony C. Dalton, met with Petitioner to discuss a grievance filed by Sandra Brown, Lauren Brown's mother, wherein Sandra Brown alleged an information security breach within DSS (Tr. 19- 20).

9. Respondent investigated the grievance made by Sandra Brown prior to June 4, 2015 and cleared the Petitioner of any wrongdoing (Pet. Ex. 1; Tr. 20).

10. On June 4, 2015, the Respondent verbally communicated to the Petitioner the results of its investigation, that the Petitioner was not being disciplined, and discussed with Petitioner the need to avoid the appearance of impropriety (Pet. Ex. 1, Tr. 20).

11. In August 2015, the Petitioner was planning to take a family vacation to Florida with her daughter, grandson and, with the permission of Marquis Swarn, the minor child who was

the subject of the Custody Dispute. Prior to leaving for Florida the Petitioner wanted clarification regarding the terms of the Consent Order entered in the Custody Dispute so as to insure that she was not violating the Consent Order if she took the subject minor child to Florida. In order to gain clarification regarding the terms of the Consent Order, the Petitioner initiated an ex parte communication with Judge Cowan, the District Court Judge who entered the Consent Order (Tr. 132-133).

12. The ex parte communication between the Petitioner and Judge Cowan consisted of a text message and return phone call. The content of the text message from Petitioner to Judge Cowan was the following:

> "I need to ask you a personal matter. If you can text me or call me that would be fine. If you can't, I understand." (Tr. 133)

13. Judge Cowan responded to the text message by calling the Petitioner and telling her to call her lawyer (Tr. 88).

14. At the time of the ex parte communication, pending in the Custody Dispute was a North Carolina Rules of Civil Procedure Rule 60 Motion filed by Mack McKellar, attorney for Marquis Swarn, to correct a clerical error in the Consent Order (Tr. 114-115).

15. When the Rule 60 motion came on for hearing before Judge Cowan, Judge Cowan recused herself from hearing and ruling on the Rule 60 motion as well as any other matters arising in the Custody Dispute (Resp. Ex. 2; Tr. 24-25, 47-48).

16. On September 22, 2015, Chief District Court Judge Athena Brooks entered an Order Amending Judgment (Resp. Ex. 2) in the Custody Dispute correcting the clerical error contained in the Consent Order. The Order Amending Judgment was filed in the Office of the Clerk of Superior Court in Transylvania County on October 6, 2015. The Order Amending Judgment included the following language: "Chief District Court Judge Athena Brooks hearing the matter due to the self-recusal of District Court Judge Emily Cowan because of extra judicial communication by a non-party." (Resp. Ex. 2)

17. On September 25, 2015, Sandra Brown attended a DSS Board of Directors' meeting and informed Tracy Jones, the DSS Director, that Judge Cowan had recused herself from hearing a motion in the Custody Dispute because of ex parte communications she had with Petitioner (Tr. 31).

18. Following the September 25, 2015, meeting, Ms. Jones started an investigation into the veracity of the allegations made by Sandra Brown against Petitioner at said meeting. During her investigation, Ms. Jones obtained the following credible evidence confirming that Petitioner had instituted and engaged in an ex parte communication with Judge Cowan regarding the Custody Dispute:

a. Chief District Court Judge Athena Brooks' October 6, 2015 Order Amending Judgment (Resp. Ex. 2; Tr. 47-48);

b. Direct confirmation from Judge Cowan to DSS Attorney Tony C. Dalton that she had recused herself in the Custody Dispute because of ex parte communications with Petitioner (Tr. 24-25); and

c. The audio recording from a September 22, 2015 hearing in the Custody Dispute, in which Mack McKeller - Marquis Swarn's attorney - informed Chief District Court Judge Athena Brooks, who replaced Judge Cowan following her recusal, that Judge Cowan had recused herself because of extra-judicial communications with a non-party. (Resp. Ex. 9; Tr. 34, 41);

19. Judge Cowan did not dispute that the alleged ex parte communications occurred, or that she subsequently recused herself (Tr. 90). Petitioner did not dispute that the alleged ex parte communication occurred (Tr. 140).

20. The Respondent's social workers are trained not to contact judges directly regarding matters related to their work duties unless such communication concerns the immediate, non-secure custody of a child (Tr. 106 – 108).

21. On October 2, 2015, DSS attorney, Tony C. Dalton, at the request of Tracy Jones, wrote a statement memorializing the content of the June 4, 2015 meeting (Pet. Ex. 1; Tr. 18).

22. On October 5, 2015, Petitioner received a notice of Placement on Investigatory Status with Pay (Resp. Ex. 3) and a Notice of Pre-Disciplinary Conference was received by Petitioner on October 6, 2015 (Resp. Ex. 4).

23. Petitioner received her Notice of Dismissal on October 7, 2015, wherein Petitioner was dismissed from her employment with the Department because of the "information [Ms. Jones] learned at the September 25, 2015 Social Services Board meeting which indicated Judge Cowan had recused herself from the private custody case because of the direct contact [Petitioner] had made with her regarding the court order" (Resp. Ex. 5).

24. Petitioner had a long standing professional relationship with all of the District Court Judges holding court in Transylvania County, primarily due to the nature of her work responsibilities and the requirement that she appear before them and testify to matters relevant to the welfare of minor children. In addition, Judge Cowan served as the Attorney Advocate for the Guardian ad Litem program in Transylvania County prior to becoming a District Court Judge. The Guardian ad Litem program works closely with social workers involved in cases involving the welfare of minor children (Tr. 83 – 84).

25. During the hearing of this contested case, Judge Cowan invoked her judicial immunity and refused to answer why she had recused herself from hearing any matters arising in the Custody Dispute (Tr. 90-91).

26. Mack McKeller appeared and testified at the hearing of this contested case and provided clarification as to the reason why Judge Cowan recused herself from hearing any matter

arising in the custody dispute. Mr. McKeller appeared before Judge Cowan during the session of Transylvania County District Court when Judge Cowan recused herself from the Custody Dispute. Judge Cowan's recusal was based primarily on the fact that she and the Petitioner were involved in the same community activities, that she and Petitioner knew each other both professionally and socially, and as a result it would not be proper for her to hear any matters arising in the Custody Dispute. The ex parte communication between Petitioner and Judge Cowan was an incident of their existing relationship (Tr. 116 -118).

27. District Court Judge Peter Knight recused himself from hearing any matter relative to the Custody Dispute after he made the decision that it was not appropriate for him or any of the other District Court Judges regularly holding court in Transylvania County to hear any such matters. Judge Knight's decision to recuse himself was based on the Petitioner's connection to the Custody Dispute and due to the regularity in which Petitioner appeared before him in various court proceedings, not because of any ex parte communication by the Petitioner or that Petitioner had tried to influence the outcome of the Custody Dispute (Tr. 13-14).

28. The ex parte contact did not affect the outcome of the Custody Dispute as the case had been settled by a Consent Order prior to the ex parte contact.

29. The Petitioner did not attempt to influence the outcome of the Custody Dispute and could not have affected the outcome of the case as the case had already been resolved by the entry of the Consent Order between the parties.

30. The ex parte contact did not unduly delay the Custody Dispute because the case had been resolved by the Consent Order.

31. The ex parte contact that Petitioner had with Judge Cowan did not result in any prejudice to the parties or their attorneys in the Custody Dispute.

32. Despite the fact that Petitioner's relation to the Custody Dispute was not related to her work duties, the Petitioner knew, or should have known, that an ex parte communication with Judge Cowan concerning the Custody Dispute was improper.

33. Social workers who engage in ex parte communications with judges cast a negative light on DSS.

34. Tracy Jones made the decision to dismiss the Petitioner based on the Petitioner's ex parte communication with Judge Cowan and the Respondent's connection to the unfounded allegations made against Petitioner prior to June 4, 2015.

35. In making her decision to dismiss the Petitioner from her employment, Ms. Jones did not consider all of the pertinent facts and circumstances of this particular case including the context and the content of the ex parte communication, that there was no harm caused by the ex parte communication, or that the recusals in the Custody Dispute by Judge Knight and Judge Cowan were based primarily on the fact that they had known Petitioner, professionally, for several

years. In addition, Ms. Jones did not consider the performance reviews of Petitioner during her sixteen (16) years as a social worker with Transylvania County DSS.

BASED upon the foregoing FINDINGS OF FACT, the undersigned makes the following:

CONCLUSIONS OF LAW

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

2. The parties are properly before the Office of Administrative Hearings and there is no issue of improper procedure.

3. 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.

4. Respondent Transylvania County Department of Social Services is subject to Chapter 126 of the North Carolina General Statutes and is the former employer of Petitioner.

5. A "career state employee" is defined as a state employee, or an employee of a local entity as described in N.C. Gen. Stat. 126-5(a)(2), who is in a permanent position with a permanent appointment and continuously has been employed by the State of North Carolina in a non-exempt position for the immediate 12 preceding months. N.C. Gen. Stat. § 126-1.1

6. At the time of her dismissal, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1, *et seq.*

7. A career State employee may be dismissed only for just cause. N.C. Gen. Stat. § 126-35(a). The State employer has the burden of showing by a preponderance of the evidence that there was just cause for dismissal. N.C. Gen. Stat. § 126-34.02(d).

8. Pursuant to regulations promulgated by the Office of State Personnel, there are two bases for the dismissal of an employee for just cause: (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 25 N.C.A.C. 01J .0604(b). However, "the categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case." 25 N.C.A.C. 01J .0604(c). Furthermore, "[n]o disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly." Id.

9. Petitioner's dismissal from her employment was based solely on the basis of unacceptable personal conduct.

10. An employee may be dismissed without any prior warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 N.C.A.C. 01J 0608(a). 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).

11. Unacceptable personal conduct, as defined by the Office of State Personnel, includes "conduct for which no reasonable person should expect to receive prior warning;" "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).

12. In the case of "conduct unbecoming a state employee that is detrimental to state service," the State employer is not required to make a showing of actual harm, "only a potential detrimental impact (whether conduct like the employees could potentially adversely affect the mission or legitimate interests of the State employer)." Hilliard, 173 N.C. App at 597, 620 S.E.2d at 17.

13. In the case of "willful violation of known or written work rules," the State employer's "work rules may be written or 'known' and a willful violation occurs when the employee willfully takes action which violates the rule and does not require that the employee intend his conduct to violate the work rule." Id.

14. The Petitioner engaged in unacceptable personal conduct when she initiated an ex parte communication with Judge Cowan concerning the Custody Dispute in which Petitioner had a personal interest. The ex parte communication with Judge Cowan was made in violation of the known work rules of the Respondent, and Petitioner knew, or should have known that the ex parte communication was improper. The ex parte communication made by Petitioner casts DSS in a negative light and has the potential of adversely affecting DSS by damaging the public trust in DSS.

15. Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges; and second, whether the conduct constitutes just cause for the disciplinary action taken. N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004).

16. In Carroll, the Supreme Court explained that the fundamental question is whether "the disciplinary action taken was 'just'. Further, the Supreme Court held that, "Determining whether a public employee had 'just cause' to discipline its employee requires two separate inquires: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes 'just cause' for the disciplinary action taken." Id. at 665, 599 S.E.2d at 898.

17. In Carroll, a personal conduct case, the Court went on to say that "not *every* violation of law gives rise to 'just cause' for employee discipline." In other words, not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline. Id. at 670, 599 S.E.2d at 901.

18. The flexible and equitable standard described in Carroll was recently affirmed by the Supreme Court's decision of Wetherington v. North Carolina Department of Public Safety, 780 S.E. 2d 543 (2015).

19. The two-prong test of the Carroll case was expanded in Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) review denied, 735 S.E.2d 175 (2012), which sets forth what this tribunal must consider as to the degree of discipline. It states:

> We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. 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. (Internal cites omitted)

Id.

20. The necessary application of Carroll and Warren to the instant case result in an affirmative answer to the first two inquiries. The Petitioner engaged in the conduct the Respondent alleged and the Petitioner's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Since the first two inquiries have been met, the next inquiry is whether the punishment is appropriate.

21. The final inquiry in the Warren analysis is determining whether the discipline imposed for that conduct was "just". 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."

22. In "balancing the equities" and trying to determine what is just, or the "right" thing to do, one must look at the totality of the facts and circumstances as opposed to just looking coldly and blindly at whether or not Petitioner violated rules or policy. Mitigating factors in the employee's conduct should be considered in this third prong. See Warren (citing Roger Abrams and Dennis Nolan, TOWARD A THEORY OF "JUST CAUSE" IN EMPLOYEE DISCIPLINE CASES, 1985 Duke L.J. 594 (September 1985)).

23. Respondent has not met its burden of proof that it had "just cause" to dismiss Petitioner. Because of the particular facts of this case, the punishment of dismissal was not appropriate.

24. Respondent did not consider the totality of all of the pertinent facts and circumstances of this individual case in making her decision to dismiss Petitioner from her employment. Director of Transylvania County DSS, Tracy Jones, made the decision to dismiss the Petitioner based on the Petitioner's ex parte communication with Judge Cowan and the

Respondent's connection to the unfounded allegations made against Petitioner prior to June 4, 2015. The decision to dismiss Petitioner was an application of an arbitrary consequence of Petitioner's unacceptable personal conduct. Ms. Jones made the determination to dismiss Petitioner without giving due consideration to the analysis required by Warren.

25. In making her decision to dismiss the Petitioner from her employment, Ms. Jones did not consider the context and the content of the ex parte communication, that the ex parte communication did not result in any harm to the Respondent or those individuals involved in the Custody Dispute, or that the recusals in the Custody Dispute by Judge Knight and Judge Cowan were based primarily on the fact that they had known Petitioner, professionally, for several years. In addition, Ms. Jones did not consider the performance reviews of Petitioner during her sixteen (16) years as a social worker with Transylvania County DSS.

26. Respondent has met its burden of proof to show that the Petitioner engaged in unacceptable personal conduct, however, after considering the totality of the facts and circumstances, the Respondent did not have just cause to dismiss the Petitioner from her employment.

27. Respondent substantially prejudiced Petitioner's rights; acted erroneously; failed to act as required by law; and acted arbitrarily or capriciously when Respondent dismissed Petitioner without just cause.

BASED upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned issues the following:

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that the Respondent substantially prejudiced Petitioner's rights, acted erroneously, failed to act as required by law; and acted arbitrarily or capriciously when Respondent dismissed Petitioner for "just cause". The Respondent's Final Decision terminating Petitioner's employment is therefore **REVERSED**;

It is **ORDERED** that Petitioner shall be reinstated to her position of Social Work Supervisor at the same pay grade she had while in that position. Petitioner shall be retroactively reinstated to this position of employment with the Respondent, with all back pay and benefits. Respondent shall pay to Petitioner and her attorney all reasonable attorney fees and costs incurred in this Contested Case.

NOTICE

This **Final Decision** is issued under the authority of N.C.G.S. § 150B-34.

Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29(a). The appeal shall be taken within

30 days of receipt of the written notice of finial decision. A notice appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This the 16th day of May, 2016.

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David F Sutton
Administrative Law Judge