

STATE OF NORTH CAROLINA
COUNTY OF GASTON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 OSP 00844

Judith Smith Petitioner, v. Gaston County Government/Gaston County Department Human Services Respondent.	FINAL DECISION AND ORDER
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THIS MATTER came on for hearing before Hon. J. Randolph Ward on April 5, 2016, in Charlotte, North Carolina.

APPEARANCES

Petitioner: Ms. Judith Smith, *pro se*

Respondent: Mr. Samuel J. Shames
Asst. County Attorney of Gaston Co.
Gastonia, N.C.

EXHIBITS

Respondent: A: FMLA Physicians Certification Form (as completed)
B: *Same*, as faxed to Respondent HR office by physician's
C: Altered FMLA Form as submitted by Petitioner
D: Notice of Termination, dated January 6, 2016
E: Page 3 of Altered FMLA Form, as faxed by HR to DSS
F: Notice of Pre-Disciplinary Hearing, dated January 4, 2016

WITNESSES

Petitioner: Ms. Judith Smith, Petitioner
Mr. Robert M. Smith
Ms. Amy Rhyne

Respondent: Ms. Elizabeth Ashburner
Mr. David Gunderman
Ms. Karen Calhoun
Mr. Ken Henderson
Ms. Toscha Willis

ISSUE

Whether the Respondent had just cause to dismiss the Petitioner.

UPON DUE CONSIDERATION of the arguments and stipulations of counsel; the exhibits admitted; and the sworn testimony of each of the witnesses, viewed in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they may have, and whether their testimony is reasonable and consistent with other credible evidence; and, upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

FINDINGS OF FACT

1. The Petitioner Judith Smith (hereinafter, “Petitioner” or “Ms. Smith”) was employed as a Child Support Agent with Gaston County Health and Human Services (“Respondent”) – formerly, the “Department of Social Services” -- from June 1993 until January 6, 2016, the date of her termination giving rise to this contested case.
2. Petitioner injured her left ankle in July 2015. She sought treatment from a family medicine physician, who provided a plastic hard case “walking boot” to protect the ankle from re-injury.
3. When Petitioner’s injury did not improve under conservative treatment as expected, her family physician referred her to an orthopedic specialist, Dr. Olson, who initially put her in a plastic hard case walking “boot.” After seeing the Petitioner on September 22, 2015 and October 27, 2015, Dr. Olson diagnosed her as suffering from a “left ankle sprain,” primarily involving the “deltoid ligament,” and recommended a surgical procedure.
4. When Petitioner informed her supervisors of the impending surgery, she was given a “Certification of Health Care Provider for Employees Serious Health Condition (Family and Medical Leave Act),” Form WH 380-E, (hereinafter, “FMLA form”), with her employment schedule and duties already filled in on the first page, and was asked to have Dr. Olson fill out the remainder to provide Respondent with the physician’s “best estimate” of “the frequency or duration of [her] condition, treatment, etc.,” to guide them in approving intermittent FMLA leave. *See*, Respondent’s Exhibit A, page 1, “Section III” (hereinafter, “R Ex A, p 1.”)
5. Petitioner left work early one afternoon at the end of October 2015 to take the FMLA form to Dr. Olson’s office, where the doctor filled it out, in longhand. She left the completed form in the vehicle she used to commute to work, and also to transport her school-age children daily, until delivering the form to her supervisor on the morning of Monday, November 2, 2015.
6. Dr. Olson wrote the date “12-15-15” twice among his seven written answers on two pages of fill-in-the-blank questions in the FMLA form. The first and most prominent use of the

date was in response to “**Probable duration of condition:**” under “PART A: MEDICAL FACTS,” question “1,” on page 2 of the FMLA form. (R Ex A.)

7. On the following page 3, under “PART B: AMOUNT OF LEAVE NEEDED,” he estimated that “*recheck appts*” would take Petitioner out of work “**2-3 hours per day; 2-3 days per month from 9-22-15 through 12-15-15 (est).**” (R Ex A.)
8. Ms. Smith’s immediate supervisor was Elizabeth Ashburner. When she reviewed the complete FMLA form, Ms. Ashburner, she saw that someone had overwritten the fives with sixes in the date “12-15-15” where it appeared in Part D, on page 3, to estimate the “employee needs.” (R Ex C.) She felt that “12-16-16” there was illogical in light of the doctor’s estimate on the preceding page that the “duration” of the medical condition would extend only to “12-15-15,” and she brought this to the attention of her supervisor.
9. Respondent’s Human Resources office confirmed with Dr. Olson’s practice that the “needs” date was changed from “12-15-15” to “12-16-16” after the form left his hands. (R Ex B.)
10. Petitioner was given a Pre-Disciplinary Hearing Notice on January 4, 2016, citing the “discrepancy in the dates on page two and page three of the FMLA document as well as a write over the top of two dates which ... changed ... 2015 to 2016,” and declared that the “perceived actions in altering the FMLA documents as completed by your physician ... meet the definition of Misconduct” in Respondent’s personnel policy. (R Ex F, pgs 1 & 2.)
11. Following the Pre-Disciplinary Hearing, Petitioner was terminated on January 6, 2016 for “Dishonesty”; “Claiming paid sick leave for situations not authorized ...”; and, “Falsifying records.” (R Ex D, p 2.) It is not entirely clear that all members of the disciplinary hearing panel understood that granting FMLA leave *per se* did not obligate Respondent to pay Petitioner during such leave.
12. It appears from the evidence that the changes to the FMLA form were either the result of childish doodling, or an extraordinarily sloppy and inept attempt at fraud.
13. The evidence does not support an inference that Petitioner had any motive to ask for unpaid intermittent FMLA leave beyond the December 15, 2015 date certified by her physician.
14. There is no evidence that Petitioner ever represented to any person, either before or after giving the completed FMLA form to Respondent, that she needed or wanted intermittent leave until December 2016, or that Dr. Olson had authorized or recommended that she arrange to get FMLA intermittent leave for more than a year.
15. Ms. Smith had previously obtained intermittent FMLA leave to take her daughter to appointments when the girl suffered from a transitory condition lasting several months. Consequently, she was aware that FMLA leave was unpaid leave, and that generally it had to be planned in consultation with her supervisors. There is no suggestion in the evidence that Petitioner had any difficulty obtaining the leave she requested to aid her daughter.

16. Ms. Ashburner testified that she had supervised Petitioner for six or seven years, and that Ms. Smith was a “very good” employee.
17. Petitioner did not take time off work due to the ankle injury, except to attend appointments with her physicians.
18. Ms. Smith’s son has a chronic condition that requires professional attention, but she arranged to use her days off to address his needs.
19. To conclude that the alteration of the FMLA form was an attempt to defraud, it must be accepted that the perpetrator:
 - believed that convincing medical documentation could be obtained from the doctor’s office after December 15, 2015, or created, to exploit the deception;
 - accepted the risk that the secret would not be revealed during the communications between doctor’s office and Respondent;
 - either could not understand the obvious contradiction, or “discrepancy,” between the “duration of condition” date and the estimated “needs” date -- a year and day later -- or blithely accepted the risk that it might raise suspicion; and,
 - that having stolen a year’s extension by changing “2015” to “2016,” the perpetrator felt it was worth the risk to also steal an additional day by altering the date from the 15th to the 16th, making the alteration much odder, and arguably twice as noticeable. (R Ex A, pgs 2 & 3.)
20. Gaston County Social Services Division Director Karen B. Calhoun testified that Petitioner had no previous instance of employment discipline.
21. Petitioner’s husband, Robert M. Smith, testified that she had never been in legal trouble or been accused of fraud or dishonesty.
22. A friend of the Petitioner and her husband since junior high school, Amy Rhyne, testified that Ms. Smith was an honest and trustworthy person.
23. The Petitioner creditably testified that she did not alter the FMLA form after Dr. Olson filled it out.
24. Petitioner was discharged on January 6, 2016 with a letter giving notice that she had “the right to appeal this termination State Personnel Commission,” referencing 25 NCAC 01I .2310, last “amended effective July 18, 2002.” This letter is the only, and thus final, agency decision issued to the Petitioner. (R Ex D, p 5.)

25. Petitioner petitioned the Office of Administrative Hearings for a contested case hearing on January 26, 2016.
26. The parties were timely served with notice of this hearing on March 17, 2016.

BASED UPON the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. All employees of local social services departments are subject to the North Carolina Human Resources Act, Chapter 126 of the General Statutes. N.C. Gen. Stat. § 126-5(a)(2)b.
2. Petitioner is a career state employee, within the meaning of N.C. Gen. Stat. § 126-1.1, and is entitled to appeal to the Office of Administrative Hearings (“OAH”) on the grounds that she was “dismissed ... for disciplinary reasons without just cause.” N.C. Gen. Stat. § 126-34.02(b)(3).
3. While it appears that Respondent did not notice and initiate the grievance procedures contemplated by N.C. Gen. Stat. § 126-34.01 and 126-34.02(b)(3), no default of the agency can deprive the career employee her statutory right to appeal to OAH. N.C. Gen. Stat. § 126-35; *Early v. County of Durham Dep't of Soc. Servs.*, 172 N.C.App. 344, 616 S.E.2d 553, 551-52 (2005), *disc. rev. improvidently allowed*, 361 N.C. 113, 637 S.E.2d 539 (2006); *Jordan v. N.C. Dep't of Transp.*, 140 N.C.App. 771, 774, 538 S.E.2d 623, 625 (2000), *disc. rev. den.*, 353 N.C. 376, 547 S.E.2d 412 (2001); *CM v. Bd. of Educ. of Henderson County*, 241 F.3d 374, 386 (4th Cir.), *cert. denied*, 534 U.S. 818, 122 S.Ct. 48, 151 L.Ed.2d 18 (2001).
4. Ms. Smith timely petitioned OAH for a contested case hearing on January 26, 2016.
5. OAH has personal and subject matter jurisdiction over the parties and the issues in this contested case, pursuant to Chapters 126, Article 8 and 150B, Article 3 of the North Carolina General Statutes.
6. The burden of showing that a career State employee was discharged for just cause rests with the employer. N.C. Gen. Stat. § 126-34.02(d).
7. The preponderance of the evidence, and the reasonable inferences arising from proven facts, fail to show that Respondent had just cause to discharge the Petitioner.
8. The Petitioner is entitled to reinstatement to the position from which she was terminated, and back pay to the date of her termination. N.C. Gen. Stat. § 126-34.02(a)(1) and (3).

BASED UPON the foregoing Conclusions of Law, the undersigned issues the following:

DECISION AND ORDER

Petitioner shall be reinstated to the position from which she was terminated, or a like position with the same benefits and conditions of employment, and paid the wages and benefits she would have received but for her termination on January 6, 2016.

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 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.

SO ORDERED.

This the 22nd day of June, 2016.

J Randolph Ward
Administrative Law Judge