STATE OF NORTH CAROLINA

COUNTY OF BURKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 OSP 03894

Mark Stout Petitioner, v. N C Department Of Public Safety Respondent.	**FINAL DECISION**

This matter was heard before the Honorable David F. Sutton, Administrative Law Judge, at the Catawba County Courthouse in Newton, North Carolina on August 3, 2016.

APPEARANCES

Petitioner: Michael C. Byrne
Law Offices of Michael C. Byrne
150 Fayetteville Street, Suite 1130
Raleigh, NC 27601

Respondent: Tamika L. Henderson
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602

WITNESSES

The following witnesses testified for the Petitioner:

Mark Stout

The follow witnesses testified for the Respondent:

Mark Stout;
Gregory Bullard;
Benjamin Edwards;
William McFalls;
Helen Harringer;
Carlos Hernandez;
Michael Slagle.

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1 and 7 were admitted into evidence. Respondent's exhibits ("R. Exs.") 1-13 and 15-20 were admitted into evidence. Respondent's Ex. 14 was presented as an offer of proof.

PARTY REPRESENTATIVES

The Petitioner's party representative was Petitioner, Mark Stout. The Respondent's party representative was Superintendent Michael Slagle.

PRE-HEARING MOTIONS

Petitioner filed three written pre-hearing motions styled First Motion in Limine, Second Motion in Limine, and Third Motion in Limine on August 1, 2016. Respondent objected to the written motions as they were filed less than ten (10) days before hearing. The Respondent's objection was overruled. Petitioner's First Motion in Limine, to sequester witnesses, was granted. Petitioner's Section Motion in Limine, to limit evidence strictly to the four corners of the dismissal letter was taken under advisement and addressed as specific evidentiary objections were raised during the course of the hearing. Petitioner's Third Motion in Limine, to exclude all evidence of a polygraph examination was granted in part. Specifically, any evidence related to the opinion of the examiner or the results were excluded. Evidence related to the polygraph examination used as an investigative tool was admitted. (T. p. 26)

ISSUE

Whether Respondent had just cause to dismiss the Petitioner, a career status State employee subject to the State Human Resources Act, for disciplinary reasons.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact and Conclusions of Law. In making the Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have. Further, the undersigned has carefully considered the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. After careful consideration of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner Mark Stout was employed with the Respondent North Carolina Department of Public Safety ("Respondent" or "DPS") in its prison facility at Mountain View Correctional Center. At the time of his dismissal Petitioner was a Correctional Sergeant, having been promoted from Correctional Officer. (T. p. 47-48, 90). Petitioner as of the events discussed herein had been employed with DPS since January 18, 2005. (P. Ex. 7).

2. In his nearly11 years of employment with DPS, Petitioner had received no prior disciplinary action. (T. p. 91).

3. Petitioner attended Basic Training and was trained annually thereafter regarding NCDPS policies and procedures including NCDPS' Conduct of Employees Policy and Unlawful Workplace Harassment Policy. (R. Ex. 19, 20; T. p. 48).

4. An essential job function of Petitioner's position was to ensure that his subordinates followed all DPS policy. (T. p. 48).

5. Petitioner was aware that as a Correctional Sergeant he was held to a higher level of conduct. (T. p. 48).

6. Petitioner's work performance was rated under the DPS "TAPS" system, which is a kind of rolling performance review where entries regarding work performance are made by multiple supervisors. (T. p. 91). During his 11 years of employment, Petitioner had good TAPS entries with no "below good" performance incidents noted. (T. p. 92).

7. Petitioner's most recent TAPS forms were admitted as (P. Ex 7); they show good ratings as well as written comments from Petitioner's superiors that were highly complementary of his overall work performance. (T. pp: 93-97).

8. Petitioner served at the prison as a "relief sergeant." Rather than serving on a specific shift, Petitioner filled in for sergeant on various shifts on an as needed basis. (T. p. 96).

9. The incidents giving rise to this case took place on the night of May 3, 2015. On that date Petitioner was working in the 2A West unit of the prison, which is a medium custody unit. (T. p. 97).

10. Petitioner supervised various Correctional Officers that night. Among them were Officers McFalls, Edwards, and Manning. McFalls was a new officer.

11. During the shift, Petitioner normally worked in an office doing paperwork on a computer. (T. p. 98). Petitioner was very busy with paperwork during a shift and at times had problems getting all his paperwork done. (T. p. 99).

12. At the vantage point from the computer on which he was working in his office, Petitioner had a line of sight to part of "B Wing" and the inmate closet, which is a supply closet.

(T. p. 99). He did not have visual line of sight for the whole unit, including the cell, cell #B-313, which is in large part the focus of events for this case. (T. pp. 99-100, 102).

13. At some point during the evening, Petitioner received an anonymous note claiming that the inmate in cell B313 was in possession of contraband materials. (T. p. 100). The alleged contraband was "strips," or pieces of paper containing a small amount of illegal drugs. (T. p. 100). The drug in question is a drug called "Suboxone," a form of methamphetamine. (T. p. 162).

14. The smuggling of contraband, including "strips," was a recurring issue at the prison. (T. p. 100). That an inmate suspected of having contraband did not receive visitors was not, for Petitioner, a reason not to search the inmate, as inmates who did receive visitors passed contraband to inmates who did not in an effort to avoid detection. (T. pp. 101-102).

15. Petitioner had no substantial prior interaction with Inmate Bullard, did not dislike him, and had no desire to humiliate or embarrass him. (T. p. 102).

16. Petitioner ordered that Inmate Bullard, the occupant of cell B-313, be strip searched. Petitioner ordered two officers, Edwards and McFalls, to conduct the search. (T. pp. 103-104). Two officers were sent because McFalls was a new officer and Petitioner wanted Edwards, the more experienced officer, to observe. (T. pp. 104-105).

17. On May 5, 2015, Gregory Bullard ("Bullard"), an African American inmate at MCI filed a grievance related to a strip search that was conducted by Officer William McFalls ("McFalls") and Officer Benjamin Edwards ("Edwards"). Bullard alleged that the staff laughed at him and humiliated him during the strip search. (R. Ex. 17).

18. Among the issues Bullard complained about was that McFalls directed the inmate to lift the foreskin of the inmate's genitalia during the search. (T. p. 106). However, policy requires this action during a strip search. (R. Ex. 16; T. p. 107).

19. During the strip search staff laughed at Bullard causing him embarrassment and humiliation. (T. p. 33). Bullard observed McFalls and Edwards go to the Petitioner's office after the search and continue to laugh and look up to his cell. (T. p. 35). McFalls and Edwards laughing was visible to the Petitioner and caused him further humiliation. (Id.)

20. Petitioner was not present for the search and had no involvement in the actual search activity (T. p. 107). Petitioner did not hear anything that McFalls or Edwards may have said during the search. (T. p. 108). Petitioner did not know any specific details of the search (barring that no contraband was not found) until the matter was later investigated. (T. pp. 113-114).

21. Petitioner, both during the investigation and at hearing, consistently and emphatically denied ever using the term "Alabama black snake" in reference to Bullard's genitalia. (T. pp. 111-112). No one else used the term within Petitioner's hearing. (T. p. 112).

22. Petitioner likewise denied using the term "snake hunt" in reference to Bullard's genitalia, and no witness testified that they heard Petitioner make that comment. (T. p. 112).

23. During the initial investigation of the incident in May, Petitioner was asked whether he had heard anyone use the term "Alabama black snake" in connection with the Bullard search. Petitioner said he had not. (T. p. 113). Petitioner was not asked whether he had heard anyone use the "snake hunt" term. (T. p. 114).

24. The instructions given to Petitioner at the start of the investigation interview process stated that questions would "relate specifically and narrowly to the performance of official duties and/or personal conduct." (T. p. 116). Petitioner interpreted these instructions as directions to simply answer the questions asked. (T. pp. 116-117).

25. During the first interview in May, Petitioner was not asked whether he looked up an inmate on OPUS (the prison information system) in connection with the Bullard search. (T. p. 119). Petitioner testified that he would have no reason to conceal the fact that he looked Bullard up on OPUS, and DPS did not advance one at hearing, nor did they produce evidence that doing so was contrary to policy. (T. pp. 111-112). In short, Petitioner initially omitted something that wasn't wrong.

26. In his subsequent interview, Petitioner stated that he heard someone reference a "snake hunt," which he did not state in his initial interview. However, as shown, Petitioner in his initial interview was asked only about the "Alabama black snake" comment. (T. pp. 116, 119-120).

27. Petitioner heard the comment on one occasion only while doing paperwork in his office after the search. (T. pp. 121-122). Petitioner considered that addressing the comment, which again was only made once, was of lesser importance than completing the paperwork that he was required to do. (T. pp. 122-123).

28. Petitioner likewise stated later, though not in his first interview, that he'd opined that the suspected contraband might have come through via visitation. Petitioner likewise said he had no reason to conceal this information initially and, given DPS does not fault Petitioner for ordering the strip search of the inmate, DPS produced no evidence of any culpability on Petitioner's part in not concealing this information. (T. pp. 124-125).

29. Moreover, Petitioner's understanding – confirmed by Slagle's testimony – was that the focus of the questions in May was whether the inmate was humiliated during the search itself, as part of some (unfounded) suspicion of officer hazing. (T. pp. 125-126).

30. Had Petitioner wished to conceal the additional information at issue, he simply could have stayed silent. (T. p. 127). Petitioner was given no contact information for the investigators so that he could add additional information to his statement and indeed was ordered specifically not to discuss the investigation with anyone. (T. pp. 127-128).

31. Petitioner volunteered the additional information because, upon being interviewed again, he thought it "the right thing to do." (T. p. 127). Petitioner also stated that he did not identify

Manning as the source of the "snake hunt" comment because he was unsure that it was Manning who said it. (T. p. 134). DPS counters that Petitioner volunteered the previously concealed information because he was worried about being polygraphed. However, DPS produced no evidence that Petitioner would have been asked, or was asked, during the polygraph about any of the information he allegedly "concealed" in the first interview.

32. McFalls claimed he was unable to tell whether Edwards was laughing during the search because "my back was to him." (T. p. 147). This was despite Edwards, by McFalls' own testimony, being "four or five feet" away. (T. p. 152).

33. McFalls claimed that Petitioner after the search asked him what he thought of his "first Alabama black snake," an apparent reference to the inmate's genitalia. (T. p. 148). McFalls said he laughed at the question. (T. p. 149). No evidence was presented that McFalls reported or attempted to report the remark at the time he claims it was made. (T. p. 150).

34. McFalls' entire service as DPS was slightly more than a month. (T. p. 150). McFalls said he resigned from DPS because of "the drama from this situation" (apparently the inmate search). (T. p. 150). When asked what kind of "drama," McFalls said "what it [this incident] stirred up," noting that he had already been in trouble with management because of some off duty conduct. (T. pp. 150-151).

35. McFalls said the inmate was "lying" in claiming that McFalls had made the inmate shake his penis back and forth, and also was lying about McFalls' general conduct during the search. (T. pp. 151, 155).

36. McFalls knew that in the initial investigation it was his conduct, primarily, that was being investigated. (T. p. 154). McFalls conceded that there was "enough drama" connected with the incident that he chose to resign his job. (T. p. 154).

37. McFalls claimed that Petitioner too was "lying" in denying the "Alabama black snake" comment. (T. pp. 155-156).

38. Edwards agreed with Petitioner's testimony that there was an issue with the drug "strips" being smuggled into the prison via the visitation process, and that a common way for inmates to avoid interception of the contraband was to pass it along to an inmate who did not receive visitors. (T. pp. 163-164).

39. Edwards testified that in ordering the search Petitioner conducted himself normally and professionally, and said nothing negative about the inmate. (T. p. 164).

40. Edwards agreed that from his position in the office Petitioner would have been unable to observe the search. (T. p. 166).

41. Edwards did not hear Petitioner say anything about an "Alabama black snake," either then or at any other time. (T. p. 167).

42. Edwards conceded during the internal investigation that he was laughing during the cell search. (R. Ex. 13, Bates Nos. 000013) Edwards also conceded that he was laughing with the Petitioner at Petitioner's office after and during the search of Bullard. (Id, T. p. 161-162). However, Edwards contended that he was laughing with the Petitioner about a video game. (R. Ex. 13, Bates Nos. 000014) Edwards proffered basis for laughing is not credible. The Undersigned notes that Petitioner denied laughing with Edwards or even witnessing the laughter. (R. Ex. 9, Bates. No. 000027; T. p. 65). The Undersigned finds as fact that Edwards was laughing in the presence of Petitioner after the strip search and Bullard witnessed the same.

43. Petitioner conceded that it would constitute unacceptable and unprofessional conduct for staff to laugh about conducting a strip search of an inmate. (T.p. 60).

44. Petitioner conceded that he would have a duty to correct his subordinate staff if they were laughing about conducting a strip search in his presence. (T. p. 61). Petitioner further conceded that he heard Manning reference a "snake hunt." (T. p. 63).

45. There was conflicting evidence about whether the term "snake hunt" or "Alabama black snake" was used. The substantial weight of the evidence demonstrates that at least one of Petitioner's subordinates made reference to Bullard's genitals as a "snake" while in the presence of Petitioner.

46. Furthermore, the substantial weight of the evidence is that Petitioner witnessed his subordinates laugh about conducting an evasive strip search on an inmate under their charge.

47. Petitioner did not take any steps to correct the unacceptable conduct of his subordinates.

48. Slagle, though he testified that he concurred with Petitioner's dismissal, never spoke with Petitioner about the incident and never reviewed Petitioner's disciplinary or work history. (T. p. 267).

49. Slagle testified that in deciding whether to dismiss an employee, DPS managers were not required to consider, among other factors, the employee's disciplinary history and performance history. (T. p. 234).

50. Slagle did not dispute that Petitioner had a very good work history with DPS. (T. p. 236).

51. The original investigation of the incident, per Slagle, was twofold: to investigate the inmate's grievance and conduct the required PREA (Prison Rape Elimination Act) investigation. (T. pp. 239-240). In that investigation, the only person suspected of engaging in PREA-related activity was Officer McFalls. (T. pp. 239-240). However, Slagle subsequently stated that the primary focus of the original investigation was to determine whether McFalls, a rookie officer, was being hazed – and not whether anyone was making inappropriate comments about "snakes" (T. pp. 261-262).

52. Slagle confirmed that DPS interviewed various persons on the shift concerned to see if they had seen any evidence of hazing; all confirmed that they had not. (T. pp. 260-261).

53. Slagle conceded that Petitioner had nothing to do with any inappropriate conduct during the search of Inmate Bullard. (T. p. 250). However, Slagle testified that he would expect Petitioner to correct any staff that used a term like Alabama Black snake, snake hunt or that laughed during or immediately after a strip search. (T. p. 220).

54. Slagle testified that there was no place in the prison workplace for "inappropriate comments." (T. p. 263). However, prior to the incidents involving Petitioner, Slagle could not recall a single past incident where an employee had been fired for failing to "crack down" on inappropriate comments in the work place. (T. p. 264).

55. On December 4, 2015, Petitioner received a written notice of a scheduled pre-disciplinary conference from Slagle. (R. Ex. 1). This written notice stated that Slagle intended to recommend that DPS terminate its employment of Petitioner for unacceptable personal conduct.

56. The pre-disciplinary conference occurred as scheduled on December 7, 2015, at MCI. (R. Ex. 4). During the pre-disciplinary conference Petitioner was provided the specific reasons supporting the recommendation for his dismissal and Petitioner was given an opportunity to explain his side of the story and respond to the reasons specified. (R. Ex. 4).

57. Following the conference, DPS management approved the recommendation that Petitioner be dismissed. The Petitioner was notified by letter from Slagle dated December 8, 2015, that his employment was terminated based on unacceptable personal conduct. (R. Ex. 5).

58. The dismissal letter states that its finding that Petitioner engaged in unacceptable personal conduct was "based on the statements of Officers McFalls, Edwards, and Manning." However, DPS's own investigator, Helen Harringer, in her report, found those officers not to be credible – which she confirmed in her hearing testimony. (T. pp. 252-253). Everything that Petitioner was faulted for by DPS, except for the allegation of concealing information, was based on statements made by persons that DPS itself found not to be credible. (T. p. 253).

59. After completing his internal agency appeals, the Employee Advisory Committee unanimously recommended that Petitioner's dismissal be upheld. On March 17, 2016, Petitioner was sent the Final Agency Decision upholding his dismissal. (R. Ex. 7).

CONCLUSIONS OF LAW

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

1. All parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. 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. State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the just cause provision of N.C. Gen. Stat. §126-35.

3. Because Petitioner has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue the final decision in this matter.

4. 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).

5. To demonstrate just cause, a State employer may show "unacceptable personal conduct" 25 NCAC 1J.0604(b)(2) or "grossly inefficient job performance" 25 NCAC 1J.0606.

6. The dismissal letter specified that the Petitioner was being dismissed for Unacceptable Personal Conduct.

7. Respondent complied with the procedural requirements for dismissal for unacceptable personal conduct pursuant to 25 N.C.A.C. 01J .0606, .0608 and .0613.

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, "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."

9. In Wetherington v. N.C. Department of Crime Control and Public Safety, 368 N.C. 583; 780 S.E.2d 543 (2015), the Supreme Court re-affirmed its previous ruling in Carroll. Wetherington also specifically held that matters that must be considered in determining whether just cause exists to discipline a career state employee include:

> [The] severity of the violation, the subject matter involved, the resulting harm, the [employee's] work history, or discipline imposed in other cases involving similar violations. We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.

Wetherington at 12-13, see also In re Enterprise Wire Co. & Enterprise Indep. Union, 46 Lab. Arb. Rep. (BNA) 359 (Mar 28, 1966).

10. Analyzing these factors, the Undersigned notes Petitioner's history, over ten years, of good work performance and lack of any prior formal disciplinary action. On the issue of the resulting harm, the evidence presented of any actual harm was limited to that of Inmate Bullard suffering unnecessary humiliation.

11. As for the charges of impeding an investigation, Slagle conceded that the focus of the initial investigation was not alleged inappropriate comments by staff, but rather whether some sort of hazing practices was at work with respect to a new employee's involvement in a search. The additional apparent focus of the initial investigation was on the inmate's treatment during the search – a search that Petitioner did not conduct and did not participate in other than ordering the search and receiving the results. Though DPS attempts (at least to some extent) to now question the search, Slagle stated that under circumstances where he suspected a prisoner possessed drug contraband of the kind alleged here, he himself would have ordered not only a search, but a strip search.

12. As DPS concedes that Petitioner's actions in ordering the search were proper, and the initial investigation had no focus on allegedly inappropriate comments outside the inmate search context, it is difficult to see how the information allegedly "concealed" by Petitioner (DPS's contention) or simply omitted through lack of initial recall (Petitioner's contention) operated to frustrate those goals.

13. Indeed, it is hard to determine what, if any, consideration DPS itself gave to the mitigating factors in deciding whether to dismiss Petitioner or impose some lesser form of discipline such as demotion, if merited. Slagle testified he gave no recommendation for dismissal to DPS upper management, stating that the information relevant to the dismissal came from the investigative team.[1] Harringer, the investigator, did not testify that she, or her team, made any kind of recommendation to DPS – indeed, she testified to the contrary.

14. In Warren v. Crime Control and Public Safety, the Court of Appeals, construing Carroll, 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.

[1] It is noted that Slagle stated his belief that DPS was not required to consider the employee's performance and disciplinary history in making a decision as to what level of discipline was appropriate in a given case. T. p. 234.

Warren v. N.C. Dep't of Crime Control & Pub. Safety, 221 N.C. App. 376; 726 S.E.2d 920 (2012); review denied, 366 N.C. 408, 735 S.E.2d 175, 2012 N.C. LEXIS 1195 (2012). The Court of Appeals followed the "Warren Test" in Clark v. N.C. Department of Public Safety, 2016 N.C. App. LEXIS 897 (September 6, 2016). Whether "just cause" existed for a given disciplinary action is reviewed by this Court as a question of law, under a de novo standard: "Not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline." Warren, at 382, 726 S.E.2d at 925 (citing Carroll, 358 N.C. at 669, 599 S.E.2d at 901. See also Clark at 31: "Whether just cause exists is a conclusion of law, which the ALJ had authority to review de novo. See, e.g., Carroll, 358 N.C. at 666, 599 S.E.2d at 898 (citations omitted)."

Employing this analysis:

Step One: Did the Petitioner Commit The Conduct Alleged?

15. The conduct alleged by DPS concerns essentially three issues. First, did Petitioner use the term "Alabama black snake" in reference to the inmate's genitalia? Second, did Petitioner impede or obstruct the DPS internal investigation by failing, initially, to give DPS information that DPS would have found useful or valuable in investigating the inmate search? Third, did Petitioner fail to properly supervise his subordinates by not taking corrective action when he allowed staff to laugh regarding a strip search of an inmate and allowed to staff to reference an inmate search as a "snake hunt"?

16. On the first issue, the Undersigned does not find that DPS proved, by the greater weight of the evidence, that Petitioner used the term "Alabama black snake." The sole evidentiary support for this claim is the testimony of McFalls, who himself was the primary suspect of wrongdoing (and knew himself to be such) in the initial investigation, and who himself resigned over the incident, citing "drama." The DPS investigator found in her final report that neither McFalls nor Edwards were credible persons – a finding not made in reference to the Petitioner. Under such evidence, the Undersigned cannot find that DPS has proven, by the greater weight of the evidence, that Petitioner used the "black snake" phrase. It is thus unnecessary to proceed further with respect to this allegation.

17. With respect to the second allegation, Petitioner testified that in the time between his initial interview in May, 2015, and his polygraph examination several months later, he recalled additional details of some of the matters being investigated and informed the polygraph examiner of his desire to provide that additional information. Petitioner wrote an additional written statement on these issues. Accordingly, assuming arguendo that Petitioner's failure to share this information at the time of the initial interview was deliberate, the Undersigned will proceed to analyze the next step with respect to this allegation.

18. With respect to the third allegation, Petitioner failed to correct the behavior of his subordinate staff which violated the department's conduct policy and Operational Searches policy, despite Petitioner's knowledge that it was his essential job function to do so. Petitioner was obligated to intervene and correct the conduct and language of his subordinates upon, and having

failed to do so, the Undersigned is obligated to proceed to analyze the next step with respect to this allegation.

Step Two: Was the Conduct Committed Unacceptable Personal Conduct?

19. With respect to the second allegation, failure to be complete and forthright during the investigation, the evidence shows that Petitioner omitted details that were (or were eventually) deemed pertinent by DPS to matters it was investigating, and that Petitioner did not supplement his response until ordered to a polygraph test.

20. DPS suggests that Petitioner was afraid that being subjected to a polygraph test prompted Petitioner to come forward with additional information. Without more, this theory is merely an assumption. "Assumptions are simply not evidence." Richmond v. City of Asheville, 775 S.E.2d 925; 2015 N.C. App. LEXIS 551 (2015).

21. Petitioner maintains that he came forward with the additional information out of a desire to be complete.

22. Further, with respect to the "snake hunt" allegation, Petitioner was not asked about usage of that term, as opposed to "Alabama black snake," in May – in the course of an investigation focused on possible hazing and PREA (Prison Rape Elimination Act) issues.

23. Without more, the Undersigned cannot conclude that Petitioner committed unacceptable personal conduct by failing to reveal his knowledge of a comment he wasn't asked about.

24. Further militating against an intention on Petitioner's part to obstruct or impede the investigation is the idea that the Petitioner, had he truly had such an intention, merely could have stayed silent. Instead, Petitioner volunteered to the examiner that he had additional information he wished to share and wanted to correct some of his earlier statements.

25. With respect to the allegations relative to the Petitioner's failure to correct the conduct and language of his subordinates, DPS contends that Petitioner's failure to intervene constituted unacceptable personal conduct. The Undersigned agrees with DPS. DPS policies cited at hearing require officers to use professional language and to maintain a quiet but firm demeanor in dealing with inmates. Referring to an inmate search as a "snake hunt" and laughing while conducting a strip search violates the stated policies. Petitioner's failure to correct the behavior of his subordinates given the circumstance in which Inmate Bullard was placed is unacceptable personal conduct by Petitioner.

26. The Petitioner's failure to correct the inappropriate conduct only increases the likelihood that the actions will be repeated in the future.

27. Under these facts, formal discipline, in the form of a suspension without pay, would have been warranted. However, the Undersigned concludes that due to the following noted factors: (a) a good performance and discipline-free work history; (b) a lack of prior conduct of a similar

nature; and (c) the lack of prior incidents where officers were dismissed for failing to "crack down" on similar behavior by subordinates, Respondent did not have just cause to dismiss Petitioner from his employment.

DECISION AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that the Respondent acted erroneously and as required by law when Respondent dismissed the Petitioner for "just cause,", however, the Respondent has sufficiently proven that it had just cause to suspend the Petitioner based on his unacceptable personal conduct. The Respondent's Final Decision, terminating Petitioner's employment is therefore, REVERSED; however, it is ORDERED that Petitioner shall be suspended for a period of two weeks without pay beginning December 8, 2015. Following the period of suspension, DPS is ordered to retroactively reinstate Petitioner to the same or similar position, with all back pay and benefits. Respondent shall pay Petitioner's reasonable attorney's fees following receipt of a petition for the same.

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.

This the 11th day of October, 2016.

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David F Sutton
Administrative Law Judge