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STATE OF NORTH CAROLINA

COUNTY OF JOHNSTON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 OSP 00145

Elizama Landaros-Gamboa Petitioner, v. Johnston County Department of Social Services Respondent.	**FINAL DECISION GRANTING PETITIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS**

THIS MATTER has come before the Honorable Karlene S. Turrentine, Administrative Law Judge, for consideration of Petitioner's Motion for Judgment on the Pleadings pursuant to N.C.G.S. § 1A-1, Rule 12(c) ("Motion"), filed April 26, 2022. Respondent filed its Response to the Motion on May 3, 2022, to which it attached five (5) exhibits. The Tribunal held a telephonic Prehearing Conference with the Parties' counsel on Friday, May 13, 2022, during which the Parties' counsel expounded on their positions regarding the Motion. Having fully reviewed and considered the pleadings and counsels' arguments, the Undersigned makes the following

FINDINGS OF FACT

1. Petitioner was demoted from an Income Maintenance Supervisor II to an Income Maintenance Caseworker II by Respondent-Johnston County Department of Social Services ("DSS" or "Respondent") for unacceptable personal conduct.

2. There is no question that DSS had the authority to demote Petitioner if there was just cause to do so.

> "Any [local government] employee, regardless of occupation, position, or profession may be warned, **demoted**, suspended or dismissed by the appointing authority. Such actions may be taken against employees with career status as defined in G.S. 126-1.1 only for just cause. The degree and type of action taken shall be based upon the judgment of the appointing authority in accordance with the provisions of this Rule. When just cause exists the only disciplinary actions provided for under this Section are:
>
> (1) Written warning;
> (2) Disciplinary suspension without pay;
> (3) **Demotion**; and
> (4) Dismissal.

. . .

> The imposition of any disciplinary action shall comply with the procedural requirements of this Section.

25 NCAC 1I .2301(a) and (e) (emphasis added).

3. However, the question presented in Petitioner's Motion is whether Respondent, in its December 16, 2021 Final Agency Decision ("Final Notice"), failed to give Petitioner *any reason amounting to just cause* for her demotion. *See* Motion, ¶6; and, Respondent's Prehearing Statement ("PHS"), Exh 2.

4. Petitioner further argues that the reasons Respondent gave Petitioner in its earlier notice of her demotion on December 2, 2021 ("Prior Notice"), require DSS' decision be reversed because none of the actions described fall within the definition of unacceptable personal conduct.

5. Contrarily, Respondent argues it is irrelevant that its Final Notice did not describe Petitioner's wrongful conduct because Petitioner was given a more extensive notice of the reasons for her demotion in its Prior Notice.

6. Respondent further argues that although it did not include details of Petitioner's alleged actions, the Prior Notice is adequate notice to Petitioner of the date and occurrence of her actions and thus, adequate notice from which Petitioner may appeal. *See* Response, p.1-2; and, Respondent's PHS, Exh 1, p.1.

7. Respondent's December 16, 2021 Final Notice does not describe any of Petitioner's actions or lack thereof which resulted in her demotion. Instead, the DSS Director, Scott Sabatino, states therein that "[b]ased on all the information presented for my review" he determined Petitioner's "conduct [to be] unbecoming of a state employee that is detrimental to state service, and the willful violation of known or written work rules." As such, he upheld the decision to demote her. Respondent's PHS, Exh 2.

8. Looking to the December 2, 2021 Prior Notice's reasons given for Petitioner's demotion, Respondent stated in pertinent part:

> "This letter serves as notification of your demotion to an Income Maintenance Caseworker II. The decision is based upon your unacceptable personal conduct as it relates to an incident that was reported and witnessed by employees on September 30, 2021. **It was alleged that you positioned your hand on Valerie McCoy, a person whom you manage, and directed the employee to her workspace.**
>
> During the investigation…**you admitted to tapping the employee on her shoulder and encouraging her to go back to her workspace**. On November 30, 2021, [during] a pre-disciplinary conference…**you admitted to innocently placing your hand on the employee**.

> As a supervisor, you are expected to maintain an environment in which employees feel respected and safe while at work. Your handling of this situation is deemed unacceptable personal conduct…."

Respondent's PHS, Exh 1, p.1 (emphasis added).

9. Unacceptable personal conduct is defined as:

> "(1) conduct on or off the job that is related to the employee's job duties and responsibilities for which no reasonable person should expect to receive prior warning;
>
> (2) conduct that constitutes violation of State or federal law;
>
> (3) conviction of a felony that is detrimental to or impacts the employee's service to the agency;
>
> (4) the willful violation of work rules;
>
> (5) conduct unbecoming an employee that is detrimental to the agency's service;
>
> (6) the abuse of client(s), patient(s), or a person(s) over whom the employee has charge or to whom the employee has a responsibility, or of an animal owned or in the custody of the agency;
>
> (7) falsification of an employment application or other employment documentation;
>
> (8) insubordination that is the willful failure or refusal to carry out an order from an authorized supervisor;
>
> (9) absence from work after all authorized leave credits and benefits have been exhausted; or
>
> (10) failure to maintain or obtain credentials or certifications.

25 NCAC 1I .2304(b).

10. In its Prior Notice, Respondent cited 25 NCAC 1I .2304(b)(1), (5) and (6) to describe Petitioner's unacceptable personal conduct. Respondent did not allege Petitioner had willfully violated any work rules (pursuant to (b)(4)) except in its Final Notice but there, just as here before this Tribunal, Respondent failed to identify any work rule which Petitioner violated.

11. In its Response to the Motion, Respondent argues Petitioner's actions made the "employees feel disrespected and unsafe," (*see* Respondent's Response In Opposition to Petitioner's Motion, p.1 ("Response")).

12. Yet, the Prior Notice simply states that Petitioner is "expected to maintain an environment in which employees feel respected and safe while at work." Respondent's PHS, Exh 1, p.1. The notice does not assert that Petitioner failed to do so nor does it advise the way in which she failed to do so. The actions described do not reach the level of placing Petitioner on notice of *what she did or did not do* to make others (plural) feel disrespected and unsafe.

13. Moreover, although the Prior Notice names Ms. McCoy as the person Petitioner touched, nowhere does Respondent name the employees who were allegedly affected thereby.

14. Continuing in its Response, Respondent asserts many other details of the incident to sure up its notice to Petitioner. Respondent also attached five (5) exhibits to its Response and states, "…Petitioner stated [in her pre-disciplinary conference that], '(i)t was indicated [she] was at fault for pushing the…employee that led to this investigation,' fully acknowledging that [Petitioner] understood 'pushing' Ms. McCoy was the reason for her demotion. …[Thus,] Petitioner [had] adequate notice of the misconduct (improper physical contact with a subordinate employee) that caused her demotion[…]." Response, p.2-3. **Yet none of Respondent's written notices to Petitioner mention Ms. McCoy was pushed**.

15. In fact, **of all the additional information or allegations** contained in Respondent's Response to the Motion and attached exhibits, **none is in Respondent's PHS (pleading)**. More significantly, **none of those allegations are in Respondent's Final Notice, Prior Notice, or any other written notice to Petitioner**.

16. Attached to Respondent's Response are five (5) exhibits. Exhibits 2-5 are affidavits by other employees executed in May of 2022—five (5) months *after* Respondent issued its Final Notice to Petitioner. Respondent's Response Exhibit 1 is a hybrid of documents, the first of which is the transcript of Petitioner's deposition taken by Respondent on April 6, 2022. None of these documents may be considered "written notice" to Petitioner as each of them was written *after* her demotion.

17. Next, Respondent included emails as part of its Response Exh 1, the dates of which all occurred in November 2021—which is *prior to* the Final Notice, but none of those emails are written notice *from DSS to Petitioner regarding why she was demoted*.

18. Also included in Response Exh 1 is DSS' October 22, 2021 Notice [to Petitioner] of Administrative Leave with Pay (*Id.* at p.36), and DSS' November 15, 2021 letter to Petitioner inviting her to a pre-disciplinary conference on November 17, 2021. *Id.* at p.37. The pre-disciplinary conference letter states, in pertinent part, that the conference "is to discuss a recommendation for demotion…based upon your unacceptable personal conduct. This recommendation is being made due to your admittance of placing your hands on an employee for whom you are tasked with managing. The alleged incident occurred on September 30, 2021…." *Id.* (emphasis added).

19. Following, thereafter, is DSS' November 30, 2021 written reprimand to Petitioner

> "to confirm in writing our discussion of your unacceptable conduct on September 30, 2021. …It was reported by one of your employees, witnessed by others and admitted by yourself, that you committed a detrimental offense, by way of positioning your hand on the employee's person and directing that employee to their workspace. This is an offense of which you could be dismissed…. Disciplinary action will be determined, pending your response to the allegations, which may result in demotion up to and including termination."

Id. at p.38. Thereafter, Respondent's Exh 1 also includes the December 2 and December 16, 2021 letters outlined above.

20. Respondent's notice to Petitioner includes its: a) October 22, 2021 Notice of Administrative Leave with Pay; b) November 15, 2021 Pre-disciplinary Conference invitation; c) December 2, 2021 Demotion Letter, and; d) December 16, 2021 Final Agency Decision letter. As such, they are part of the pleadings considered herein.

21. Respondent's Response Exhibits 1-5 (excepting as outlined in FOF #20 above) have been excluded from consideration herein.

STANDARD OF REVIEW

22. Regarding a motion for judgment on the pleadings, our Rules of Civil Procedure state that

> "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

N.C.G.S. § 1A-1, Rule 12(c).

23. When considering such a motion,

> "An administrative law judge may grant judgment on the pleadings, pursuant to a motion made in accordance with G.S. 1A-1, Rule 12(c), …that disposes of all issues in the contested case. Notwithstanding subsection (a) of this section, a decision granting a motion for judgment on the pleadings…need not include findings of fact or conclusions of law, except as determined by the administrative law judge to be required or allowed by G.S. 1A-1, Rule 12(c)…."

N.C.G.S. § 150B-34(e).

24. Our Supreme Court has long held that the purpose of North Carolina's Rule 12(c), regarding a judgment on the pleadings,

"…is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. **A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain**. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate. 5 Wright and Miller, Federal Practice and Procedure, s 1367 (1969).

Judgment on the pleadings is a summary procedure and the judgment is final. See James, Civil Procedure s 6.17 (1965). Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. **The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment.** *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 479 F.2d 478 (6th Cir. 1973).

The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. *Beal v. Missouri Pac. R.R. Corp.*, 312 U.S. 45, 61 S.Ct. 418, 85 L.Ed. 577 (1941); *Austad v. United States*, 386 F.2d 147 (9th Cir. 1967); *See* 2A Moore's Federal Practice, s 12.15 (1974); 5 Wright and Miller, Federal Practice and Procedure, s 1368 (1969). All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion. *Kohen v. H. S. Crocker Company*, 260 F.2d 790 (5th Cir. 1958); *Duhame v. United States*, 119 F.Supp. 192 (Ct.Cl.1954); *Hargis Canneries, Inc. v. United States*, 60 F.Supp. 729 (W.D.Ark.1945).

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974).

BASED ON the foregoing Findings of Fact, the Undersigned makes the following

CONCLUSIONS OF LAW

1. In keeping with 25 NCAC 1I .2301(e), Respondent was obligated to comply with certain procedural requirements, specifically: "…**to demote an employee the agency director or designated management representative must**…**[g]ive an employee who is demoted written notice of the specific acts or omissions that are the reasons for the demotion[.]" 25** NCAC 1I .2308(d) (emphasis added).

2. Also, our appellate courts long have held that:

"In addition to providing that career state employees may only be [demoted] for just cause, N.C.G.S. § 126–35(a) requires that '[i]n cases of such disciplinary action, the employee shall, **before the action is taken,** be furnished with a

> statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.' N.C.G.S § 126–35(a).
>
> N.C.G.S § 126–35(a) 'establishes a condition precedent that must be fulfilled by the employer before disciplinary actions are taken.' *Leiphart v. N.C. School of the Arts,* 80 N.C. App. 339, 350, 342 S.E.2d 914, 922 (1986).
>
> **The purpose of [N.C.G.S. §] 126–35 is <u>to provide the employee with a written statement of the reasons</u> for his [demotion]** so that the employee may effectively appeal his [demotion]. The statute (also) was designed to prevent the employer from summarily [demot]ing an employee and then searching for justifiable reasons for the [demotion].

Barron v. Eastpointe Hum. Servs. LME, 246 N.C. App. 364, 378, 786 S.E.2d 304, 314 (2016)(emphasis added).

3. By arguing that "Petitioner…requests this [T]ribunal to disregard all the evidence of her misconduct, and to act as though the notice served on Petitioner is the complete record of her misconduct, and that it was the full extent of what Petitioner knew about the allegations against her[,]" (Response, p.2), Respondent is admitting it did not serve Petitioner with notice of "the complete record of her misconduct." However, Respondent failed to serve Petitioner with *any* notice of misconduct.

4. Moreover, combining each of Respondent's writings to Petitioner, Respondent's reasons for demoting Petitioner are that: a) Petitioner admitted to touching Valerie McCoy, a subordinate, and encouraging or directing the employee back to her workspace; b) on September 30, 2021; c) with <u>unnamed</u> witnesses standing by. However, people (even strangers) touch one another regularly with no intent to harm or disrespect, i.e., to move past them in the grocery store, stop them from stepping into traffic unawares, make them aware they dropped something or to give them back something they dropped. Thus, the idea that, by tapping or touching another employee—standing alone—Petitioner committed misconduct, is absurd and, because it is a common occurrence, the allegations give neither Petitioner nor this Tribunal any understanding of why she should have been demoted.

5. There is *nothing* in *any* of the written notices to alert Petitioner that she was being accused of battery or assault against Ms. McCoy but, if Respondent is allowed to embellish its case against Petitioner at this stage with accusations that she pushed or shoved the employee, that is exactly what Respondent desires this Tribunal to believe. The Tribunal cannot be the first recipient of Respondent's written accusations against Petitioner.

6. In order for Respondent to have properly noticed Petitioner via the Prior Notice, there must be a way for Petitioner to know and understand that "positioning [of Petitioner's] hand on…a person [she] manage[d] and directing the[m]…to [their] workspace[]" or "tapping the employee on her shoulder" or "innocently placing [he]r hand on the employee[] was, in fact, unacceptable personal conduct. Respondent's PHS, Exh 1, p.1. This Tribunal does not find it possible to know and understand that the actions described by Respondent therein are unacceptable

personal conduct. In fact, the noticed allegations, even if proven, do not support a finding of just cause for her demotion.

7. To determine that an employee's "tapping" or "innocent touching" of another employee (including guiding a subordinate back to her workspace), without more, is misconduct, this Tribunal would have to conclude that a touching *per se* is misconduct, unlawful or abusive, and; thereby, an action for which any reasonable person would expect to be disciplined. The Tribunal can find no lawful basis upon which it can or should do so.

8. The actions described by Respondent in its various notices do not reach the level of placing Petitioner on notice of *what she did or did not do* to make others (plural) feel disrespected and unsafe nor do they support a finding or conclusion that Petitioner's actions on September 30, 2021 came within the definition of unacceptable personal conduct, pursuant to 25 NCAC 1I .2304(b).

9. The determination of whether Petitioner's conduct falls within one of the enumerated categories of unacceptable personal conduct is a matter of law. However, before that issue may be addressed, DSS had an obligation to

> "detail[] the specific acts [by Petitioner which] amount[ed] to 'unacceptable personal conduct,' [consistent with the Rule. Only then would t]he contested case hearing before the ALJ afford [Petitioner] an opportunity to dispute whether those specific acts occurred as a matter of fact and whether they constituted unacceptable personal conduct as a matter of law. The[n the] ALJ, in turn, ha[s] full authority to conclude as a matter of law that [Petitioner]'s conduct fell within one of the enumerated categories of unacceptable personal conduct. *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925.

Watlington v. Dep't of Soc. Servs. Rockingham Cnty., 261 N.C. App. 760, 766, 822 S.E.2d 43, 47 (2018).

10. The specificity of notice requirement of N.C.G.S. § 126-35 "was designed to prevent the employer from summarily d[emoting] an employee and then searching for justifiable reasons for the d[emotion]. *Leiphart v. N. Carolina Sch. of the Arts*, 80 N.C. App. 339, 351, 342 S.E.2d 914, 922 (1986). If Respondent wishes this Tribunal to believe Petitioner pushed or shoved Ms. McCoy, then its notice was insufficient to convey that.

11. However, looking to the pleadings and the four (4) written notices Respondent gave Petitioner, the greater weight of the evidence supports that Petitioner did nothing more than innocently touch Ms. McCoy in an attempt to get Ms. McCoy to get back to work.

12. The pleadings reveal there is no issue of material fact and Petitioner is entitled to judgment as a matter of law. *Ragsdale* at 137, 209 S.E.2d at 499.

FINAL DECISION

BASED UPON the foregoing Findings of Fact and Conclusions of Law, Petitioner's Motion for Judgment on the Pleadings is **GRANTED** and, Respondent's decision to discipline the Petitioner by demotion is hereby **REVERSED**.

IT IS THEREFORE ORDERED, **ADJUDGED**, **AND DECREED** that Petitioner's demotion be overturned and removed from her personnel record. Petitioner shall be reinstated to her prior position as a Income Maintenance Supervisor II and shall receive back pay, for all the time she has missed since being demoted, less the amount of pay she earned while demoted. Moreover, Respondent shall pay Petitioner's attorney's fees and costs pursuant to this Tribunal's future Order. Petitioner's counsel shall file a Petition for attorney's fees, in accordance with N.C. Gen. Stat. § 150B-33 and N.C.G.S. § 126-34.02, on or before June 15, 2022.

NOTICE OF APPEAL

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 20th day of May, 2022.

Hon. Karlene S. Turrentine
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 20th day of May, 2022.

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