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OFFICE OF ADMINISTRATIVE HEARINGS
01/27/2020 4:55 PM

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
19 OSP 03469

Alejandro Asbun

Petitioner,

v.

North Carolina Department of Health and Human Services

Respondent.

FINAL DECISION

THIS MATTER is before the Office of Administrative Hearings ("OAH" or "Tribunal") on the Petition for a Contested Case Hearing ("Petition") filed by Petitioner Alejandro Asbun on 17 June 2019. Petitioner seeks review of the Final Agency Decision ("Agency Decision") issued by Respondent North Carolina Department of Health and Human Services ("Department" or "Respondent" or "DHHS") on 21 December 2018 upholding Petitioner's dismissal from his employment with the Department.

Given the nature of Petitioner's contested case, the issue before this Tribunal is two-fold: (i) whether Respondent had just cause to dismiss Petitioner, a career state-employee, from his employment with the Department based on unacceptable personal conduct and (ii) whether Petitioner's dismissal was in violation of the Whistleblower Act. Based on the evidence presented at hearing, and for the reasons set forth below, the Undersigned REVERSES the Department's Final Agency Decision.

Law Office of Michael C. Byrne by Michael C. Byrne, Esq. for Petitioner Alejandro Asbun.

North Carolina Department of Justice by Joseph E. Elder, Assistant Attorney General, for Respondent North Carolina Department of Health and Human Services.

T.S. Jacobs, Administrative Law Judge.

I. PROCEDURAL HISTORY

1. This is an action arising out of a disciplinary action taken by a State agency against a career State employee subject to the North Carolina Human Resources Act[1] ("the Act"). The matter before the Tribunal primarily involves a dispute between Petitioner and Respondent regarding whether the Department has satisfied its burden of showing that Petitioner was discharged for just cause.

2. On 21 December 2018, Respondent issued the Agency Decision informing Petitioner of its "decision on [his] grievance of [his] dismissal from [his] position as Drug Unit Manager/Hum Services Program Manager" in July 2018. Citing Petitioner's "unacceptable personal conduct and unsatisfactory job performance," Respondent, in the Agency Decision, concluded that there was "just cause to dismiss [Petitioner]." Respondent further concluded "that there was no prohibited retaliation" for alleged "whistle-blower" activities.

3. On 17 June 2019, Petitioner filed the Petition requesting a contested case hearing as provided for under the Act. In the Petition, Petitioner alleged that Respondent's discharge was "without just cause" and in "[v]iolation of the

[1] *See generally* N.C. Gen. Stat. § 126-1, *et. seq.*

Whistleblower Act." The Chief Administrative Law Judge, by order dated 24 June 2019, assigned to the undersigned Administrtaive Law Judge ("ALJ") to preside over the course of these proceedings.

4. In the course of this contested case, the parties agreed by stipulation that:

a. Both Petitioner and the Department complied with the pre-disciplinary procedures contemplated by the Act and the Final Decision was issued in accordance therewith; and

b. Although the "dismissal letter attempted to state a claim for dismissal based on unsatisfactory job performance . . . the parties stipulate that the just cause issue in this case . . . is solely whether Petitioner was dismissed without just cause on the basis of unacceptable personal conduct."

See Internal Grievance Stipulation filed 30 August 2019.

5. On 30 August 2019, the Undersigned called this contested case for hearing on the merits. Both parties were present and presented evidence, in the form of testimony and documents, at the hearing.[2]

6. Following the contested case hearing, the Undersigned allowed both parties the opportunity to submit proposed final decisions containing proposed findings of fact and conclusions of law. The parties' proposed decisions were due thirty (30) days from the completion of the transcript for the contested case hearing. (T p. 277) The transcript was received by the OAH on or about 5 December 2019 and the parties, as ordered, submitted proposed final decisions for the Undersigned's consideration.

[2] A list of witnesses and exhibits admitted into evidence is attached hereto as Appendix A.

II. FINDINGS OF FACT

Based upon careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following factual findings that are material to the resolution of the dispute presented in this contested case. *See Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993), *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993) (recognizing "the trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute.") In making the following findings, the Undersigned has weighed all evidence 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 interests, bias, or prejudice the witness may have, 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.

A. The Parties

7. Respondent, North Carolina Department of Health and Human Services, Division of Mental Health/Developmental Disabilities/Substance Abuse Services ("DMH") operates the North Carolina Controlled Substances Reporting System ("CSRS"). The CSRS is part of the work performed by the Drug Control Unit ("DCU") of the Justice Section of DMH.

8. Petitioner was employed with Respondent as the DCU manager since October 6, 2014. He worked in this position until his dismissal on July 31, 2018. As the DCU manager, a significant part of his responsibilities included managing the CSRS. Petitioner was a career status State employee of Respondent.

B. Petitioner's Previous Employment with Respondent

9. Prior to his dismissal, Petitioner was in charge of the CSRS. (T p. 216) The CSRS is a registry and a database of prescribers of drugs scheduled as controlled substances by the US Drug Enforcement Administration ("DEA") and DHHS. The CSRS is housed within the DCU and administered under Petitioner's work group. The CSRS collects information on controlled substance prescriptions and makes this information available to prescribers, dispensers and regulators.

10. In 2017, the North Carolina General Assembly passed the "Strengthen Opioid Misuse Prevention Act," or "The STOP Act," House Bill 243. The STOP Act amends sections of Chapter 90 of the NC General Statutes.

11. The STOP Act placed new responsibilities upon the DMH. Among other changes, the STOP Act requires that pharmacies promptly report certain information for any filled prescription of any controlled substance to the CSRS. The STOP Act creates a "5-day" and a "7-day" rule, which limit how many days of opioids can be prescribed for certain types of patients.

12. The STOP Act added 3 exceptions to the statutory confidentiality of CSRS data. The amendments allow, but do not mandate, DHHS to release otherwise confidential prescriber data. N.C. Gen. Stat. § 90-113.74(b1).

C. Respondent's Disciplinary Action against Petitioner

13. On 27 June 2018, Respondent dismissed Petitioner from employment for disciplinary reasons on the stated basis of unacceptable personal conduct. The offensive conduct included Petitioner's release of the North Carolina Medical Board ("NCMB") report containing data from the CSRS about NCMB members and their prescriptions of controlled substances for a period including the first quarter for 2018 ("Report D"). Specifically, Respondent claimed that Petitioner released this report without prior authorization from his supervisor, Sonya Brown, made errors in the report, and released the report knowing that the NCMB intended to release portions of the report to the public. Respondent further accused Petitoner of failing to report for work on two given days. *See* Respondent's Ex. 9, Dismissal Letter.

14. Report D contained information for over 20,000 prescribers, approxiamtelty half of the prescibers database. The NCMB subsequently shared some of the information in Report D with the press and news stories began to appear in publications like the News and Observer and local ABC News, citing data obtained from the report. The report also disclosed personally identifiable information, such as prescriber numbers and personally identifiable information about professionals who are not regulated by the NCMB: podiatrists, dentists, veterinarians, and nurses.

15. Petitioner had no prior disciplinary action in his employment with Respondent and had received good performance reviews from his managers.

D. Additional evidence from Contested Case Hearing

16. At hearing, Steven Mange, an attorney employed by the North Carolina Department of Justice ("DOJ"), testified that he serves as a senior policy counsel at DOJ and has done so since 2017. (T p. 10) Mange was involved in drafting and other matters related to the so-called, STOP Act, which "dealt in several different ways with the operation of the [CSRS]." (T. pp. 10, 12) Mange described the STOP Act "as an effort to address the opioid epidemic in general." (T pp. 10-11)

17. Mange worked with Petitioner on multiple occasions regarding the STOP Act and the CSRS. (T pp. 12-13) Mange's understanding was that "part of [Petitioner's] job involved providing information gleaned from CSRS to the medical board to assist the medical board in doing their job." (T p. 25)

18. Mange testified that he had discussions with Petitioner concerning the confidentiality provisions under the STOP Act, and, more specifically, subsection (b1) of General Statute 90-113.74 (T p. 16) Mange explained that it was not his job to give legal advice to DHHS and that he did not legally advise Petitioner regarding the confidentiality provisions of the STOP Act. (T pp. 16-17) Mange further testified that, if Petitioner had asked him for legal advice regarding these issues, he would have informed Petitioner that he could not give it. (T p. 17)

19. Alex Akushevich worked with Petitioner at DHHS as a data analyst. (T pp. 29-30) Akushevich described his job as working "with any data-related tasks. That includes making reports from the CSRS data, some for the Medical Board, for nursing

board, and then other ad hoc reports that may come up. (T p. 30) Petitioner was Akushevich's direct manager. (*Id.*)

20. Akushevich explained that "the company . . . that holds our data, they will send over some data extracts and those data extracts are -- every row is a prescription for a controlled substance dispensed in the state. And using that data, I kind of manipulate it to look more usable. So I make some graphs and then turn it into high- prescriber reports." (T p. 31) These reports "show which prescribers are prescribing . . . . specific prescriptions for these drugs based on some filters." (*Id.*)

21. Akushevich testified that his understanding of Report D was "[m]eant to enforce the STOP Act or check for compliance, which means that we needed to see if prescribers were writing prescriptions for more than eight-day supply on the patient's first visit to the doctor-- or eight-day supply for opioids. And we needed to use the raw data to find the prescribers that were writing more than eight." (T p. 39)

22. Akushevich testified that he provided Report D to Petitioner as "kind of a rough draft[.]" (T p. 45) This testimony is in conflict with a written statement provided to Respondent at or around the time of the event, in which Akushevich stated that "I finished working on the changes around 9 p.m. that night, at which point I notified [Petitioner] that the report was complete." (T pp. 50-51, Res. Ex. 17) Akushevich's written statement makes no reference to Report D being a "kind of a rough draft." (T p. 62)

23. Akushevich testified that he found some provider names in the report that he thought should not be in there and, around that time, he did not know how to

remove them. (T p. 58) Akushevich himself placed the erroneous data into Report D as no one else was inserting information into the report. (T p. 60) Akushevich stated during his testimony that, in his view, Petitioner had reasonably relied on him to include accurate data in Report D. (T p. 63)

24. Akushevich neither received nor experienced any discplinary action of any kind for placing erroneous information in Report D; he was not given counseling or an informal reprimand, and was not put on a performance improvement plan. (T pp. 61-62)

25. Akushevich testified that during Petitioner's employment, both Petitioner and another employee, John Womble, had authority to release reports to the NCMB. (T p. 63) He further testified that such releases were a part of Petitioner's job and that there was no provision requiring Petitioner to seek pre-approval from anyone before issuing such reports. (*Id.*)

26. Akushevich testified that Petitioner was careful about confidentiality issues and that he had no information suggesting that Petitioner either arranged for or desired that information in Report D be released to any media source. (T p. 65)

27. Akushevich sent an email to Petitioner to inform Petitioner that erroneous information was in Report D. (T p. 58) The email was sent after Petitioner had released Report D to the NCMB. (T p. 67)

28. John Womble, who works with the CSRS, testified at hearing that his duties include "maintenance with the database, making sure that facilities, pharmacies, physicians are in compliance with the upload or supplying data to the

database. I do some diversion or unusual prescription pattern reviews, and that information goes to AG for their review to either go out to the SBI for them to actually open up a case on." (T p. 76) During the relevant period, Petitioner was Womble's direct supervisor. (T p. 75)

29. Prior to Report D going to the NCMB, Petitioner, Womble, and Akushevich met to discuss it. It was the understanding of all concerned that the report needed to be released by Friday of that week. (T p. 85) Womble proposed that he review the report for errors, a process he described as not unusual. (T pp. 80-81)

30. In reviewing Report D, Womble found multiple erroneous information, such as DEA numbers for facilities, that should not have been included in the report. (T pp. 82-83) Womble informed Akushevich of this, but did not inform Petitioner of his findings. (T. p. 84) Womble said that this was because he expected to see Petitioner the next day. (*Id.*) Womble did not attempt to inform Petitioner of the events that day (Thursday) despite having access to Petitioner's email and mobile phone and knowing the urgency connected with the release of Report D. (T pp. 93-95)

31. As with Akushevich, Womble testified it was his understanding that releasing reports, such as Report D, was part of Petitioner's job. (T p. 88)

32. Womble testified that Petitioner did not disagree with or dismiss Womble's suggestion that Report D be reviewed for accuracy and told Womble "to look it over." (T p. 89) Womble, at hearing, indicated that Petitioner requested Akushevich to "stay awake and rerun the reports; would include changes been discussed." (*Id.*) Womble also confirmed that he gave the errors to Akushevich based on the

understanding that Akushevich was to correct the errors before leaving work that day. (T p. 91)

33. With respect to Akushevich correcting the errors and reviewing the report, Womble stated: "If there was any concern from the analyst, then I would have expected him to get back with me and say, you know, 'There's possibly more' or things of that nature. But I never heard any more." (T pp. 96-97)

34. DHHS called Sonya Brown, Petitioner's prior supervisor, as a witness. Brown signed Petitioner's dismissal letter.

35. Brown and Petitioner did not discuss the release of Report D prior to its release to the NCMB. (T p. 109) After learnng of its release, Brown requested various information regarding the report from Petitioner.

36. In the course of these activities, Brown asked Petitioner whether he was going to be in the office that day. Petitioner indicated the affirmative and that he would stop by her office. Brown did not see Petitioner in the office that day. (T p.114)

37. Brown sent Petitioner an email asking for a copy of the Report D, and testified that Petitioner did not respond to it. (T p. 114) During his testimony, Petitioner stated he did not turn over the report as requested because he did not believe he could lawfully provide a copy of the Report D to Brown via e-mail. (T p. 237)

38. Brown placed Petitioner on investigatory leave and began an investigation of the circumstances surrounding the release of Report D. (T pp. 115-134)

39. Petitioner in the course of the investigation informed Brown that he consulted with Mange about releasing Report D. (T pp. 120-121) Brown said that Mange did not advise members of her department regarding such issues. (*Id.*)

40. Brown concluded that confidential information was released in Report D in a manner inconsistent with the general statute. (T pp. 123-124) Her stated basis for this contention was that no rules had been developed for this kind of report. (*Id.*) The record is devoid of any action by Brown prior to Petitioner's releasing Report D informing Petitioner that the report could not be released in the absence of the development of such rules.

41. Brown summarized the basis for Petitioner's dismissal as "That the report was released inconsistent with the law, also inconsistent with DHHS policy, the poor quality of the report, also not reporting to work and not assisting in the investigation as needed." (T p. 134) Petitioner claimed that the report was provided pursuant to subsection (b1) of General Statute 90-113.74 pertaining to "outliers." (T p. 123) Brown testified that subsection (b1)(1a) of General Statute 90-113.74 was included in the STOP Act and "was new." (T p. 104) She further indicated that she was unsure as to what the agency's "responsibilities were as it related to this [provision]." (*Id.*; *see, e.g.*, (T. p 122 (Brown testifying that there were discussions regarding "the intent behind this new provision.")))

42. Brown conducted Petitioner's most recent performance review.[3] Brown rated Petitioner as "exceptional" in the area of CSRS oversight and operation – the

[3] The Tribunal notes that DHHS provided Petitioner with only one of his performance reviews in discovery despite being requested to provide his complete personnel file. (T pp. 140-141)

highest rating possible. (T p 142) All aspects of Petitioner's job performance were rated "successful" or "exceptional." (*Id.*) Exceptional is "work performance that consistently exceeded result expectations and DHHS values." (T p. 143) Brown concluded Petitioner's review by calling Petitioner "truly an asset" to the Division. (*Id.*)

43. Brown confirmed that Petitioner, up to the events at issue, had received no prior formal disciplinary action of any kind during his years of employment. (T pp. 143-144) Brown further conceded that, prior to the incident giving rise to the disciplinary action, there was an effort to get Petitioner a ten percent pay raise. (T p. 146) While Brown said that she considered Petitioner's performance review and disciplinary history in the decision to terminate his employment, this consideration is not referenced in the dismissal letter. (T pp. 145-146)

44. In regards to the failure to appear to work allegation contained in Respondent's dismissal letter, Brown stated that Petitioner lived in Goldsboro, some distance away from the office in Raleigh. (T p. 148) She testified that she had authorized Petitioner to work from home on Fridays. (T p. 149) A Friday was one of the two days Petitioner allegedly did not report to work. Brown could point to no occasion where, prior to this incident, she had faulted Petitioner's work attendance or working from home. (*Id.*)

45. On neither of the days in question did Brown contact Petitioner and tell him that he was not to work from home on those dates, even though she could have.

(T p. 150) Brown could think of no reason why Petitioner would have refused such a request. (*Id.*)

46. As for the permission to release reports, Brown said that Petitioner had released reports to the NCMB previously and that Petitioner had the authority to independently release reports as he thought appropriate. (T p. 151)

47. Brown testified that Petitioner should have assumed there were errors in Akushevich's data; she could point to no policy or instruction communicating this to Petitioner prior to him being fired. (T p. 153)

48. Brown conducted both the investigation of Petitioner and issued the dismissal letter. She has no prior training as an investigator. (T pp. 153-154) She said she found it "odd" that she was both investigating Petitioner and dismissing Petitioner. (*Id.*) She brought her concerns about this issue to Human Resources and was told to proceed anyway. (T p. 154)

49. During the invesitgation, Brown refused Petitioner access to his own files. (T. p. 155) She agreed that this placed Petitioner at a "[d]isadvantage." (T p. 157)

50. At the time of hearing, Brown was unaware that Akushevich failed to correct the errors in Report D pointed out by Womble. (T pp. 157-158) She agreed that, when Akushevich infomed Petitioner that report D was "complete," the expectation would have been that it was properly finished as exemplified by the following exchange between Brown and Petitioner's counsel:

> *Q. So Mr. Akushevich represented to Mr. Asbun the report was complete and it was right, and it wasn't?*

A. Correct.

Q. And Mr. Asbun relied on that and filed the report, right?

A. He did.

Q. And you fired Mr. Asbun?

A. That's correct.

Q. And you didn't do a single thing to Mr. Akushevich?

A. Correct.

(T p. 160)

51. Petitioner both testified and had submitted a written statement that he consulted with both Mange and DHHS attorneys Pam Scott and Lisa Corbett, before releasing Report D. When asked if she disputed this contention, Brown replied "I don't know." (T pp. 163-164)

52. Brown was aware the entire time that Petitioner was talking to Mange about STOP Act issues and never told him he either could not do so or could not rely on what Mange said. (T pp. 165- 166)

53. Brown, who was the investigator, was unaware who at the NCMB released the information in Report D to the public, and testified that it was her understanding that Petitioner had told the Board not to do so. (T pp. 167-168) As exemplified by the following exchange between Brown and Petitioner's counsel:

Q. So, in other words, you're blaming him for the public release of information that was, A, done by someone else, and, B, after he specifically told him not to do it. Is that right?

A. That's correct.

Q. Okay. And who actually released the information to the press?

A. I don't have firsthand knowledge of that.

(T p. 167)

54. Brown also testified Kody Kinsley, an interim director at the time, directed Petitioner to inform management of the release of the report. (T p. 186) This directive (a) did not specifically reference Report D or any other report, and (b) was not given to Petitioner until after the Report was released. (T pp 187-189)

III. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and upon the preponderance of the evidence, the Undersigned makes the following Conclusions of Law for purposes of the Final Decision.

55. As an initial matter, the Undersigned concludes that (i) the parties are properly before the OAH, (ii) Notice of Hearing was proper, and (iii) pursuant to 26 N.C. Admin. Code 3.0118, extraordinary cause exists for the issuance of a Final Decision in this case beyond 180 days from the date of filing the contested case petition.

A. Just Cause

(i) Standard of Review

56. The "burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer." N.C. Gen. Stat. § 126-32.02(d).

57. Given the agency's burden of proof in "just cause" contested cases, an "ALJ, reviewing an agency's decision to discipline a career State employee within the

context of a contested case hearing, owes no deference to the agency's conclusion of law that either just cause existed or the proper consequences of the agency's action." *Harris v. N. Carolina Dep't of Pub. Safety*, 252 N.C. App. 94, 102, 798 S.E.2d 127, 134 (2017), aff'd, 370 N.C. 386, 808 S.E.2d 142 (2017).

58. Rather, under the current iteration of the Act, the ALJ now has greater authority regarding the appropriate disciplinary action against a career State employee. *See, e.g.*, N.C. Gen. Stat. § 126-34.02 (authorizing ALJ to render a final decision taking one of several actions to rectify an agency decision she deems erroneous); *N. Carolina Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 898 (2004) (recognizing that the question of whether "just cause" exists is a question of law, which the ALJ has the authority to review *de novo*).

(ii) Analysis

59. This contested case involves a claim of dismissal without "just cause" pursuant to General Statute 126-35.

60. It is well-settled that "[c]areer state employees, like petitioner, may not be discharged, suspended, or demoted for disciplinary reasons without 'just cause.'" *Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol*, 221 N.C. App. 376, 379, 726 S.E.2d 920, 923 (2012) (citing N.C. Gen. Stat. § 126-35)

61. The North Carolina Administrative Code provides two bases "for the discipline or dismissal of employees under the statutory standard of 'just cause:' (1) Discipline or dismissal imposed on the basis of unsatisfactory job performance,

including grossly inefficient job performance and (2) Discipline or dismissal imposed on the basis of unacceptable personal conduct." 26 N.C. Admin. Code 1I.2301(c). It is the latter that Respondent alleges against Petitioner in this contested case.

62. The Administrative Code defines unacceptable personal conduct 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 N.C. Admin. Code 1I.2304.

63. When "just cause' exists, four (4) disciplinary alternatives may be imposed against an employee: (1) Written warning; (2) Disciplinary suspension without pay; (3) Demotion; and (4) Dismissal. 25 N.C. Admin. Code 1I.2301(a). Unacceptable personal conduct, however, "does not necessarily establish just cause for all types of discipline." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. Instead, "[j]ust cause must be determined based upon an examination of the facts and circumstances of each individual case." *Id.* (internal citations and quotations omitted); *see also Whitehurst v. E. Carolina Univ.*, __ N.C. App. __, 811 S.E.2d 626, 633 (2018) (recognizing that "just cause" is "a concept embodying notions of equity and fairness to the employee." (internal citations omitted)).

64. Here, Petitioner's dismissal was based on allegations of unacceptable personal conduct. Respondent contends that Petitioner's alleged unacceptable personal conduct included: conduct for which no reasonable person should expect to receive a prior written warning, the willful violation of known written work rules, conduct that violates State or federal law, and conduct unbecoming a state employee that is detrimental to state service.

65. The North Carolina Court of Appeals has articulated a three-part analytical approach to determine whether just cause exists to support a disciplinary action against a career State employee for 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. . .. 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.

Warren, 221 N.C. App. at 383, 726 S.E.2d at 925. The Undersigned addresses each of these prongs below.

66. As to the first prong, Respondent alleges Petitioner released the Report D. This fact is undisputed. However, there is scant evidence to support a finding that Petitioner engaged in the following purported conduct:

a. *Knowingly releasing the report to the public:* The evidence shows that Petitioner did not know the report would be released to the public and, in fact, specifically communicated to the NCMB that the information contained in the report should not be released to the public.

b. *Knowingly releasing the report with errors:* The evidence shows that, while the ultimate release of the report was Petitioner's responsibility, Petitioner was told by Akushevich that the report was complete. Neither Womble nor Akushevich told Petitioner that any errors remained in the report.

c. *Failing to report to work*: The evidence shows that Petitioner was permitted to work at home and that disputes about this only arose after the fact when Respondent was imposing disciplinary action.

67. As to the second prong, the Undersigned concludes that there is little, or nothing shown by the evidence that indicates any unacceptable personal conduct by Petitioner.

68. Again, Respondent's primary contention is that the Petitioner's release for the Report D amounted to unacceptable personal conduct. While it is undisputed that Petitioner released the report, the evidence fails to show Petitioner did so with any willful disregard of rules or statues. Petitioner had independent authority to release such reports without prior authorization and had done so multiple times in the past with no issue arising. Petitioner discussed the STOP Act, including the reporting requirements therein, with those he considered to be an authority on such matters. The reporting requirements in subsection (b1) of General Statute 90-113.74 of the STOP Act, which Petitioner believed applicable to release of information to the NCMB, were "new" and even Respondent was unsure of its responsibilities with respect to these provisions. (T p. 104) There is no evidence that Petitioner was, prior to the release of Report D, given any order not to release it without prior permission or to handle the report differently from other ones.[4] The purported directive from Kinsley was a single line in an email requesting that he be informed of anything going out of the division; it did not reference the report in question in any way. Notably, this directive was sent out *after* Petitioner's release of the report. This evidence, in addition to that shown regarding Petitioner's alleged knowledge of potential public release and errors, compels the conclusion that any action or omission committed by Petitioner appears to be properly characterized as an issue of job performance, not personal conduct.

[4] Indeed, it was *after* the incident involving Petitioner and giving rise to this contested case that Respondent started meeting with the medical board to establish a memorandum of agreement and restrict the board's access to information coming from Respondent. (T. p 169.)

69. *Assuming arguendo* that Petitioner's release of Report D constituted some level of unacceptable personal conduct, the Undersigned concludes that the third prong of *Warren* fails to support the dismissal of Petitioner.

70. The North Carolina Supreme Court has emphasized that an "appropriate and necessary component" of a decision to impose discipline on a career State employee is the consideration of certain factors, including: "the severity of the violation, the subject matter involved, the resulting harm, the [career State employee's] work history, or discipline imposed in other cases involving similar violations." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

71. Consideration of the *Wetherington* factors in this case favor Petitioner. Petitioner was a fairly long service employee with an excellent disciplinary and work history. With regards to commensurate discipline, the evidence shows that Akushevich, who was responsible for both including the inaccurate information in Report D and failed to either remove or timely inform Petitioner that it was not removed, received no discipline at all, while Petitioner was terminated. These factors, coupled with Respondent's rather troublesome conclusion that an employee may be fired for failing to heed a directive he had not yet been given, not only demonstrate that Respondent failed to prove it properly dismissed Petitioner for unacceptable personal conduct, but weigh against a finding of just cause.

B. Whistleblower Claim

72. North Carolina's policy is to encourage State employees to report fraud, substantial and specific dangers to public health and safety, and other similar matters to appropriate authorities. N.C. Gen. Stat. § 126-84(a). As a result, under the Whistleblower Act, a State agency may not "discharge, threaten, or otherwise discriminate against a State employee" for accurately reporting fraud or a substantial and specific danger to public health and safety. *Id* § 126-85(a).

73. In order to establish a claim under the Whistleblower Act, an employee must demonstrate: "(1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff." *Newberne v. Dep't of Crime Control and Safety,* 359 N.C. 782,788,618 S.E.2d 201,206 (2005).

74. Here, Petitioner alleged that he was dismissed in retaliation for engaging in protected activity under the Whistleblower Act. Petitioner did not present any direct evidence of retaliation; therefore, he would proceed under the *McDonnell Douglas* burden shifting framework.

75. In the absence of direct evidence of retaliation, a Petitioner must "seek to establish by circumstantial evidence that the adverse employment action was retaliatory" under the *McDonnell Douglas* framework. *Newberne,* 359 N.C. at 790, 618 S.E.2d at 207. Under this framework, "once a [petitioner] establishes a prima facie case of unlawful retaliation, the burden shifts to the [respondent] to articulate

a lawful reason for the employment action at issue." *Id.* 359 N.C. at 790-91, 618 S.E.2d at 207-08.

76. Petitioner failed to show by a preponderance of the evidence a prima facie case under the Whistleblower Act. Petitioner did not present any evidence of engaging in any activity protected by the Whistleblower Act or that Respondent was aware of such protected activity at the time Petitioner was dismissed.

77. Further, Petitioner has failed to establish any causal connection between any protected activity and his dismissal. Respondent's investigation was initiated after the release of Report D1-1 and the release was brought to management's attention by inquiries about the report from media outlets. This investigation ultimately resulted in Petitioner's dismissal.

78. In the absence of any evidence to support a Whistleblower Act claim, Petitioner has failed to show by a preponderance of the evidence that he was dismissed in retaliation for engaging in activity protected by the Whistleblower Act.

IV. FINAL DECISION

79. Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned concludes that (i) Petitioner failed to establish a claim under the Whistleblower Act and (ii) Respondent has failed to prove by a preponderance of the evidence that Respondent had just cause to dismiss Petitioner. Given the Undersigned's "just cause" determination, Respondent's decision to terminate Petitioner is **REVERSED** and Petitioner should be retroactively reinstated to the

same or similar position with back pay, attorney's fees, as well as all other remedies available under law.

APPENDIX A

List of Witnesses and Exhibits Admitted into Evidence

A. Witnesses

For Petitioner: Petitioner

For Respondent: Steve Mange, Senior Policy Advisor
Alex Akushevich, Data Analyst
John Womble, Consultant
Sonya Brown, former manager

B. Exhibits

The following exhibits were accepted and admitted into evidence at the hearing of this matter:

For Petitioner: Petitioner's Exhibits 2, 4, 5, 7, 8

For Respondent: Respondent's Exhibits 1, 2, 4-9, 13-21

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 27th day of January, 2020.

Tenisha S Jacobs
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 27th day of January, 2020.

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