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STATE OF NORTH CAROLINA

COUNTY OF CURRITUCK

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
17 OSP 08518

Judith M Ayers Petitioner, v. Currituck County Department of Social Services Respondent.	**FINAL DECISION ON REMAND**

This matter comes before the undersigned Administrative Law Judge on remand from the North Carolina Court of Appeals, by opinion filed October 1, 2019, wherein the Court of Appeals vacated the undersigned's June 13, 2018 Final Decision in its entirety and remanded the case to the undersigned for new Findings of Fact and Conclusions of Law supported by the evidence in the record.

PROCEDURAL BACKGROUND

On November 21, 2017, Respondent terminated Petitioner's employment as a Child Protective Services, Social Worker Supervisor III for the unacceptable personal conduct of making a racial epithet during a private conversation with Respondent's Director at work.

On December 12, 2017, Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings appealing Respondent's Final Agency Decision and alleging that Respondent lacked just cause to dismiss her from employment under N.C. Gen. Stat. § 126-35.

On April 19, 2018, the undersigned conducted a contested case hearing, pursuant to Chapters 126 and 150B of the North Carolina General Statutes, on Petitioner's appeal of her termination from employment. On June 13, 2018, the undersigned issued a Final Decision.

On June 29, 2018, Respondent filed a Petition for Discretionary Review to the North Carolina Court of Appeals, pursuant to N.C. Gen. Stat. § 7A-29(a), § 126-34.02, and Rule 18(b) of the North Carolina Rules of Appellate Procedure, appealing the June 13, 2018 Final Decision.

On August 2, 2018, the Office of Administrative Hearings received the transcript of the contested case hearing pursuant to Respondent's June 6, 2018 request.

On October 1, 2019, the N.C. Court of Appeals issued its Opinion vacating the June 13, 2018 Final Decision and remanding this contested case to the undersigned for new Findings of Facts supported by the evidence in the record and to continue its analysis under *Warren* as to whether Petitioner engaged in unacceptable personal conduct constituting just cause for her dismissal or for the imposition of other discipline. *Warren v. North Carolina Dept. of Crime Control & Public Safety, North Carolina Highway Patrol,* 221 N.C. App. 376, 726 S.E.2d 920 (2012). The Court of Appeals further noted that the undersigned may, in its discretion, hold additional hearings in this matter.

APPEARANCES

For Petitioner: John D. Leidy, Hornthal, Riley, Ellis & Maland, LLP

For Respondent: John Morrison, The Twiford Law Firm

ISSUE

Whether Respondent had just cause, pursuant to N.C. Gen. Stat. § 126-35, to discharge Petitioner from employment for unacceptable personal conduct?

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. § 126-35
25 NCAC 1I .02301, .2304, .2305

WITNESSES

For Petitioner: Judith Ayers, Kathy Romm

For Respondent: Samantha Hurd, Sam Taylor, Tyeshia Phelps, and Christal Berry

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 - 13

For Respondent: 1 - 16

FINDINGS OF FACTS

Parties

1. At the time of her discharge, Petitioner was a career State employee who worked as a Social Work Services Supervisor III for the Child Protective Services Unit of Respondent. Petitioner had been employed with Respondent since September 17, 2007 as a Social Worker III. Petitioner held a Master's Degree in Education and Counseling

and had previously worked at Virginia Beach Mental Health Therapy and Pasquotank Department of Social Services in North Carolina.

2. Respondent Currituck Department of Social Services ("Currituck DSS" or "Respondent") is a county human service agency offering public assistance, social work, and protective service programs to citizens of Currituck County. Respondent is subject to the laws, ordinances, and policies of Currituck County, the State of North Carolina, and the United States. Respondent services approximately 3108 clients per year including African American and Hispanic American clients.

3. Currituck DSS is divided into five separate units. Each unit is headed by its own supervisor who reports directly to the Director of Currituck DSS. The Foster Care Unit and Child Protective Services Unit are two of the five units. Both units provide child welfare services.

New Director of Currituck DSS Chosen – July 2017

4. Kathy Romm served as the Director of Currituck DSS for 19 ½ years until her retirement on June 30, 2017. Ms. Romm hired, supervised, and evaluated Petitioner during Romm's employment with Respondent.

5. On or about March 28, 2011, Ms. Romm promoted Petitioner to Supervisor III over Respondent's Child Protective Services Unit.

6. In 2015, Ms. Romm began making plans to retire and asked Petitioner if she was interested in being promoted to the position of Director. Petitioner was highly respected by the Currituck DSS Board of Directors and was Ms. Romm's "first choice" as her successor. Initially, Petitioner indicated that she was interested in the position. Petitioner later decided she did not want to commit to spending the next ten years as the Director of Currituck DSS and informed Ms. Romm that she had decided against becoming Director.

7. Ms. Romm asked another DSS employee, Samantha Hurd, if she was interested in the position. Ms. Hurd was the Supervisor of the Foster Care Unit with Respondent and had worked for Respondent since April 2011.

8. On July 1, 2017, Ms. Hurd became the Director of Currituck DSS and has continued to serve in that capacity since that time. As Director, Hurd administered all programs including hiring, disciplining, and discharging Respondent's personnel.

9. Both Ms. Hurd and Petitioner are Caucasian females.

Petitioner's Annual Performance Evaluations

10. From 2011 through 2017, Ms. Romm conducted the annual evaluations of Petitioner. (Pet. Exs. 9-13). Romm consistently rated Petitioner as "substantially

exceeded" expectations in all areas and rated Petitioner's performance as "Excellent" in all areas. An "Excellent" rating was the highest possible evaluation rating an employee can receive in a performance evaluation.

11. Ms. Romm never had any concerns about Petitioner's professionalism, adherence to policy, attitude, or her work performance.

12. Until her dismissal, Petitioner had not received any prior disciplinary action during her employment with Respondent.

13. As Child Protective Services (CPS) Supervisor, Petitioner supervised seven Social Workers daily and on occasion, up to 18 employees from different units within the Currituck DSS. Petitioner also served as the Director's designee, supervising all Respondent's employees in Director's absence, which was at least monthly. (T. p. 34)

14. As the CPS supervisor, Petitioner's principal duty was to supervise a team of social workers responsible for receiving reports of child abuse and neglect. Petitioner screened such reports and determined if neglect or abuse had occurred. Petitioner coordinated the on-call system for Respondent to maintain coverage 24 hours a day, 7 days a week, 365 days a year. She was also engaged in substantial public interactions throughout the County and the local community. She regularly made court appearances, worked with law enforcement and mental health agencies, and met with Currituck County families. (T. pp. 161-162)

The Work Environment at Currituck DSS

15. Staff working in child welfare services regularly experience a high degree of stress in their work as they routinely deal with families in crisis and children who are subjected to abuse and neglect. (T. p. 192) Social workers and supervisors used language amongst themselves that may be different than the way they talk to clients or family members. It was common for staff in Respondent's Child Welfare Service Units to have an unusual sense of humor. (T. pp. 101, 192)

16. The supervisors at Currituck DSS allowed their staff to speak freely or vent by using off-color humor, urban slang, and profanity to relieve stress and anxiety at work. Currituck DSS staff used such language amongst themselves and were careful not to use inappropriate or unprofessional language when dealing with clients or members of the public. (T. pp. 99-101, 192) Petitioner explained this practice was "actually part of the training for staff retention and compassion fatigue to have safe places to talk and be yourself." (T. pp. 192, 193)

17. Ms. Hurd acknowledged that DSS staff using profanity in the workplace was not uncommon. (T. pp. 99-100)

18. Petitioner had heard Ms. Hurd use language among staff that she felt would be inappropriate to use in front of clients or members of the public. (T. p. 194) Petitioner

heard Ms. Hurd refer to clients and/or staff members as "lazy." (T. p. 194) She also heard Ms. Hurd call people "worthless" and "trifling." (T. p. 194) Petitioner described how Ms. Hurd would "come down the hall, kind of just more relaxed slang, greeting people like Hey, boo. Kind of just different, like unprofessional conduct . . . no clients in the hallway." (T. p. 194)

19. Ms. Hurd admitted that she has used profanity in the workplace. (T. p. 99) Ms. Hurd also jokingly said, "I'll cut him [insert an employee's name]" referring to another worker. (T. pp. 99-100, 203-204) She also admitted she had characterized the perception of parents of clients receiving assistance as "dishonest," (T. p. 100) and referred to people as "trifling." (T. pp. 100-101)

20. When asked "do you use other slang from time to time in the workplace," Ms. Hurd responded:

> Yeah. I think it's not uncommon at all because of the level of stress of the position and the extreme circumstances that we're exposed to, the things that we see in the home, to have reactions like the statement you just used, that's trifling, referring to an situation or a circumstance that is really unusual, very hard to process, but not necessarily specifically about a person, but the circumstance or the behavior or the conduct in their parenting.

(T. pp. 99, 101)

Prior Disciplinary Actions of Employees at Currituck DSS

21. During Romm's nineteen years as Director of Currituck DSS, Romm dismissed three individuals for engaging in unacceptable personal conduct. Each of these employees had engaged in either a pattern or a series of unacceptable personal conduct repeatedly over a period of time. One employee lied to Romm for months regarding an unauthorized destruction of case records. A second employee refused to perform a core duty of her position. Ms. Romm fired that employee when the employee failed to perform a second core duty involving the safety of children and after the supervisor advised the employee of the serious consequences that could result from her continued refusal to perform her duties. A third employee falsely reported, written and verbally, the status of cases over several months. (T. pp. 212-214)

22. Ms. Room never terminated anyone for unacceptable personal conduct based solely on a one-time incident. She never terminated anyone for unacceptable personal conduct based on something the employee said in a private conversation. (T. p. 214)

23. Neither Ms. Romm nor Ms. Hurd ever dismissed an employee of Currituck DSS for using inappropriate or unacceptable language, including using any racial terms.

Pre-existing Friction Between Director Hurd and Petitioner

24. A preponderance of the evidence proved there was inherent conflict and friction between the Foster Care Unit and the Child Protective Services Unit over the assignment and management of cases before Ms. Hurd became Director of Respondent.

25. In the spring of 2011, Petitioner was promoted to supervisor of the Child Protective Services unit. In July 2011, Ms. Hurd began her employment with Respondent. Petitioner and Ms. Hurd worked right across the hall from each other. Ms. Hurd later was promoted to the Foster Care unit supervisor.

26. The preponderance of the evidence demonstrated there was also a history of friction between Petitioner and Ms. Hurd when they were supervisors of their respective units. Petitioner and Ms. Hurd had a difficult but professional relationship because their personalities did not mesh. In Ms. Romm's opinion, Ms. Hurd and Petitioner had trouble talking to each other and did not understand each other's messages, and the communication between them "just didn't happen at times." (T. p. 222) In addition, Petitioner and Ms. Hurd had significant philosophical differences regarding personnel issues. (T. p. 163)

27. While supervisors of their respective units, Petitioner and Ms. Hurd complained about each other to Ms. Romm. (T. p. 221) At hearing, Ms. Hurd and Petitioner acknowledged that their relationship was difficult, and that friction existed between them. Ms. Hurd conceded that she and Petitioner:

> had some very significant differences of opinion about personnel administration, our approach to supervision. So, I don't know that those philosophies ever changed, but we were able to get along to accomplish our work.

(T. p. 97)

28. While supervisors, Ms. Hurd called Petitioner to several meetings to discuss child welfare matters. Petitioner felt Ms. Hurd was critical of her personally and the work her unit was doing. (T. p. 163) Eventually, Petitioner asked Director Romm to meet with she and Ms. Hurd because Petitioner felt she had used all her strategies in attempting to work with Ms. Hurd. (T. pp. 163, 222) Ms. Romm met with Ms. Hurd and Petitioner and discussed Ms. Hurd and Petitioner's difficulties. All three agreed they had to work together cooperatively to get the work done. (T. p. 222)

29. Ms. Romm retired on June 30, 2017. On July 1, 2017, Ms. Hurd became Director of Currituck DSS and Petitioner's immediate supervisor.

30. Ms. Hurd and Petitioner continued to have a difficult relationship after Ms. Hurd became DSS Director. Ms. Hurd told Petitioner that talking to her "felt like nails on a chalkboard." (T. p. 164) Ms. Hurd told Petitioner she had to "talk to me differently than

she talked to any of the other supervisors" and asked Petitioner why that was. (T. pp. 164-165) Petitioner couldn't explain why Ms. Hurd felt like she needed to do that. (T. p. 165)

November 3, 2017 Incident

31. On Friday, November 3, 2017, at approximately 4:45 p.m., Ms. Hurd entered a vacant office where Petitioner was working to seek Petitioner's assistance about missing demographic information on client intake forms for a monthly statistics report Ms. Hurd was compiling.

32. Ms. Hurd stood inside the doorway to the office while Petitioner sat at the desk. As Petitioner and Ms. Hurd reviewed the forms, Petitioner provided Ms. Hurd the race for most of the families listed on the forms, although she was not familiar with and did not know the race of the "F" family. The social worker who had recorded the information for the "F" family listed the race of the family member as "NR." "NR" is not a recognized or standard code used by Respondent.

33. Ms. Hurd asked Petitioner, "What does this ['NR'] mean?" Petitioner responded that she did not know the answer to Ms. Hurd's question. Ms. Hurd persisted and repeatedly asked Petitioner, at least two more times, "What does this [NR] mean?" Finally, Petitioner guessed, blurting out something akin to "I think it means nigra rican.**"** (T. pp. 173-174) (Amending spelling of "nigra" pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure to correct scrivener's error in drafting Final Decision and to conform to the evidence in the hearing transcript)

34. In contrast, Ms. Hurd believed Petitioner said the words "nigger rican" (hereinafter "n---rican.") (T. p. 46) Ms. Hurd was shocked by Petitioner's reply.

35. Petitioner immediately regretted her statement, told Ms. Hurd that she could not believe she had said that, and apologized to Ms. Hurd.

36. Ms. Hurd claimed she advised Petitioner she thought Petitioner needed more training, but Petitioner didn't recall hearing Ms. Hurd make that statement. (T. p. 176)

37. Shortly after Petitioner made the above-described statement, Petitioner and Ms. Hurd left the vacant office to locate the file for the "F" family. On the way, Petitioner apologized to Ms. Hurd again and said something like, "Please don't tell anyone about what I said, especially the first part. It's Friday." (T. pp. 174 -176) Petitioner made this request because she was embarrassed and surprised by what she had said.

38. When Petitioner reviewed the "F" family file, she learned the race of the "F" family was "white" and informed Ms. Hurd. Petitioner and Ms. Hurd had no further discussion that day about Petitioner's comment.

39. The vacant office where this conversation took place was fully enclosed and located on the hallway where DSS staff offices are located. The door to the office was open during the entire conversation. No one else was present in the vacant office with Petitioner and Ms. Hurd. Ms. Hurd thought two African American employees, Tyeshia Phelps and Tiffany Sutton, were working in their offices nearby. There was no evidence that anyone else heard Petitioner's statement.

Pre-Disciplinary Conference

40. Ms. Hurd conferred with Respondent's attorney, Mr. Morrison, and Respondent's consultant, Drake Maynard multiple times during the weekend after November 3, 2017. Respondent's attorney provided Ms. Hurd with "Guidelines for Imposition of Discipline" in considering what disciplinary action Ms. Hurd should take regarding this matter. (Resp. Ex. 9) After such consultations, Ms. Hurd decided to summon Petitioner to a pre-dismissal conference early on Monday morning, November 6, 2017.

41. At approximately 8:30 a.m. on Monday, November 6, 2017, Ms. Hurd notified Petitioner, as soon as Petitioner arrived, that she was conducting a pre-dismissal conference in her office at 10:30 a.m. concerning the comments Petitioner had made on Friday, November 3, 2017. Petitioner was alarmed. Ms. Hurd did not provide Petitioner with any documentation at that time.

42. Petitioner attended the pre-dismissal conference at 10:30 a.m. with Ms. Hurd and Sarah Tyson from Human Resources. Ms. Tyson's role during the conference was to take notes. (Resp. Ex. 13) Ms. Hurd began by explaining the purpose of the conference was to discuss Petitioner's statement to Ms. Hurd on November 3, 2017.

a. According to Ms. Tyson's notes, Ms. Hurd told Petitioner "You used the term 'Nigger Rican' when I asked you about this coding." (Pet. Ex. 3) Petitioner apologized and told Ms. Hurd it was a guess; the words just came out of her mouth. (Resp. Ex. 13) She also acknowledged she said something like "it was "bad" directly after she made the statement at issue to Ms. Hurd. Petitioner acknowledged that she made a statement on November 3, 2017 that was inappropriate and unacceptable.

b. Ms. Hurd asked Petitioner why she had used "that word." Petitioner explained that it was because they were discussing a "word problem," and that is what came to mind. Ms. Hurd asked again "why that word" and pointed out that it was not a code, or anything used by Respondent to describe a client's race. Petitioner explained that she was shocked by her own statement, and that she did not use those words in her personal life or at work. Petitioner reminded Ms. Hurd that she did not make that comment to a client or any other employee. Petitioner pointed out that no one else heard the comment, and that she did not believe it warranted any disciplinary action.

43. During the pre-dismissal conference, Petitioner handed Ms. Hurd a letter that she had written earlier that morning. (Pet. Ex. 4). In the letter, Petitioner responded:

> You asked what a 'race code' meant that was hand written [sic] by a social worker on a CPS Intake (DSS 1402), we each paused attempting to decipher as it was not clear and it was said as a random guess. I immediately commented that I couldn't believe I had just said that. I apologize for making that comment. I know the comment was unacceptable. It would be unacceptable in any setting, personal or professional. It was not said toward or about any person. I do not use such language in my role as a supervisor or in the past as a social worker. I have never used that language toward or about a staff member or client and do not use that language in my personal life. I take my role within the agency earnestly.

(Pet. Ex. 4)

44. After some discussion during the pre-dismissal conference, Ms. Hurd provided Petitioner with a letter dated November 6, 2017 placing Petitioner on investigatory leave. (Pet. Ex. 3). In this letter, Ms. Hurd advised Petitioner:

> . . . After looking at the letters "NR," you responded by laughing and stating the first thing you could think of is "nigger rican." I was quite shocked by your reply and advised you that I thought you would need more training.
>
> . . .
>
> Your behavior and actions **as described above** constitute unacceptable personal conduct . . .
>
> The statements you made were egregious, derogatory and are detrimental to our agency's reputation, employee morale and can affect customer service and our credibility with the community-at-large.
>
> As a result of your **unacceptable personal conduct, as described above**, I am considering terminating your employment.

(Pet. Ex. 3; emphasis added.) Ms. Hurd also explained what "investigatory leave" meant. During this conference, Ms. Hurd did not advise Petitioner of the specific policy Petitioner had violated. (T. pp. 182-184) Petitioner did not read the entire letter (Pet. Ex. 3) from Ms. Hurd during the pre-dismissal conference. After the conference, Ms. Hurd collected Petitioner's keycard and escorted her out of the building.

45. After the pre-dismissal conference, Petitioner read Ms. Hurd's letter in its entirety and prepared another letter to Ms. Hurd, dated November 6, 2017. (Pet. Ex. 5). Petitioner emailed this letter to Ms. Hurd who received it on November 7, 2017. In this

letter, Petitioner explained that since she had become aware of the pre-dismissal conference less than 2 hours before it began, it was difficult to fully absorb "all that you said and offered in writing in our brief meeting," and she wanted to respond specifically to letter Ms. Hurd had given her during the conference. (Pet. Ex. 5) Petitioner was providing additional information and was not "denying that I didn't say anything that was inappropriate" or improper. (T. pp. 183-184)

46. In her November 6, 2019 letter, Petitioner explained that she did "not recall saying the words as they are spelled in your [Ms. Hurd's] letter, though I do not deny that I did say two unrelated words in the tone of answering a non-sensible word problem." (Pet. Ex. 5). She did not think her statement to Ms. Hurd disrupted any services provided at Respondent, negatively affected the morale of subordinates, or constituted conduct so severe to warrant skipping lesser sanctions than dismissal, such as discussing the conduct or developing a corrective action plan per county policy. Petitioner requested Ms. Hurd consider her prior performance and years of service in deciding the appropriate action. (Pet. Ex. 6)

47. On November 8, 2017, Ms. Hurd informed Petitioner by telephone that she was terminating Petitioner from employment and that a letter would follow.

November 8, 2019 Dismissal Letter

48. By letter dated November 8, 2017, sent by email and regular mail, Ms. Hurd set forth the basis upon which she was terminating Petitioner from employment. (Pet. Ex. 6). In that letter, Ms. Hurd concluded that Petitioner had engaged in unacceptable personal conduct on November 3, 2017 when Petitioner answered Ms. Hurd's question about a race code by saying, "n--- rican." Ms. Hurd opined that Petitioner's "n---rican" statement as:

> egregious, derogatory, and extremely detrimental to our agency's reputation, employee morale and can affect customer service and our credibility with the community we serve. The statements you made were at work, within the scope of your professional employment, and were made precisely to the agency Director.

(Pet. Ex. 6) Ms. Hurd concluded that Petitioner's conduct was conduct for which no reasonable person should be expected to be warned of in advance, a willful violation of know or written work rules, and conduct unbecoming of an employee of Currituck DSS. Ms. Hurd applied the "Guidelines for Imposition of Discipline" in deciding to dismiss Petitioner from employment. (Pet. Ex. 6, Resp. Ex. 9) Ms. Hurd particularly considered Petitioner's position as a supervisor, Petitioner's initial acknowledgment of her inappropriate and unacceptable conduct during the pre-dismissal conference, and a July 21, 2017 discussion Ms. Hurd had with Petitioner about Petitioner's prior unprofessional conduct and argumentative statements. (Pet. Ex. 6)

49. Petitioner appealed the termination on November 14, 2017 pursuant to Respondent's internal appeals process. (Pet. Ex. 7)

Final Agency Decision – November 21, 2017

50. On November 21, 2017, Ms. Hurd issued her Final Agency Decision upholding the decision to dismiss Petitioner from employment for using the words "n—rican" on November 3, 2017. (Pet. Ex. 8) Although Ms. Hurd admitted at hearing that she had previously used demeaning and inappropriate terms at work, Ms. Hurd found that Petitioner's statement violated Article 5 of the Currituck County Personnel Policy, titled Conditions of Employment, that states:

> Some other types of prohibited activities related to unlawful workplace harassment include but are not limited to: . . .
>
> 3. Using demeaning or inappropriate terms or epithets. Telling off-color jokes concerning race, sex, disability or other protected bases.

(Pet. Ex. 8, p 3; Resp. Ex. 2, p. 35)

51. Ms. Hurd found that Petitioner's conduct undermined the principles and values of the Respondent's policy requiring DSS staff to respect and be sensitive to their client families' "cultural, racial, ethnic, and religious heritages." (Pet. Ex. 8, p 4, Volume I Children's Services; Chapter VIII Child Protective Services; Resp. Ex. 2)

52. Ms. Hurd rejected Petitioner's claim that she was trying to solve a "word problem" as Ms. Hurd specifically noted that she had asked Petitioner a "direct question regarding the race of specific children" on November 3, 2017 and she thought that Petitioner's statement was "disparaging, derogatory and insulting remarks used to refer to members of a given ethnicity." (Pet. Ex. 8, p 2)

53. Ms. Hurd also considered her past discussions with Petitioner, particularly on July 21, 2017, when Ms. Hurd advised Petitioner of her observations about Petitioner's "lack of receptiveness to supervision and why it is problematic." Ms. Hurd opined that, "I have observed the same response from you with the current situation." (Pet. Ex. 8, p 3) Based upon that opinion, Ms. Hurd felt there was a "potential for recurrence of unacceptable personal conduct [by Petitioner] in the future." (Pet. Ex. 8, p 3)

54. Ms. Hurd opined that Petitioner's conduct had affected Ms. Hurd's confidence in Petitioner's ability to serve in any position or any role within Currituck DSS where they serve vulnerable clients. "Your conduct is a great liability for the agency." (Pet. Exh. 8, p 4)

55. Ms. Hurd's lack of confidence in Petitioner's ability to serve at Currituck DSS was contradicted by Petitioner serving over ten years at Currituck DSS with an

unblemished record and with excellent evaluations by Petitioner's supervisor of many years.

Administrative Hearing

56. At the administrative hearing, Petitioner admitted she "absolutely said something that's improper." "I'm still embarrassed by that." (T. p. 188) "I apologize for making that comment. I know the comment was unacceptable. It would be unacceptable in any setting, personal or professional." (Pet. Ex. 4)

57. She "had never made an off-color remark like that before in her [Ms. Hurd's] presence or anyone else's presence, at work or even my personal life." (T. p. 185)

58. In response to the question "Do you think you need prior warning that you're not allowed to use the word, "n---," in your professional context?, Petitioner acknowledged, "No, I don't need prior warning. And that's why I said, Oh, my gosh, I can't believe I said that. I mean, it was obvious that I know that's not a professional word to say." (T. p. 201)

59. At the contested case hearing, Petitioner explained:

> I guess I used neither of those words often or ever, and those words are in my word bank because of people in my family.
>
> My grandmother was from Norfolk, an old southern lady, and she would refer to negroes as 'nigra.' And as kids we didn't know if that was a good word or a bad word, but by our generation, it was close enough that we just didn't say it unless we were imitating my grandmother.
>
> And 'rican,' my brother-in-law is from Ecuador, and he lived in New York, so he would often tell stories or different situations about stereotyping the different Latin American community up in New York. And he would refer to people as 'rican.'
>
> That's the only -- I can't say I intended to say any of this, but those are the words that would be in my personal word bank.

(T. p. 174)

60. Petitioner acknowledged that she never told Ms. Hurd, before the contested case hearing, that Petitioner actually said "nigra rican" and that Ms. Hurd had misunderstood what Petitioner had said on November 3, 2017. Petitioner explained that she did not do so because:

> I felt like the situation -- the incident -- I said something improper whether it was nigra or n-i-g-g-e-r. What she heard was improper,

> what I said was improper, and I still accept that . . . . I wouldn't allow my social workers to say that.

(T. pp. 197-198) By this admission, Petitioner conceded whichever variant of the subject terms she used, her statement was improper and unacceptable. From the outset of her utterance through the pre-dismissal conference, the internal appeal process, and the contested case hearing, Petitioner has readily admitted and accepted responsibility for her statement and that it was improper and unacceptable.

61. At hearing, Ms. Hurd opined that Petitioner's "n---- rican" comment to her on November 3, 2017 was unacceptable personal conduct as it was derogatory and disparaging towards members of a certain ethnicity. She explained that Petitioner's comment made a:

> significant impact [on her] because not only was it vulgar and crude and demeaning, but it was also discriminatory . . . [b]ecause she disparaged African Americans and Puerto Ricans, in my opinion, in using . . . those words, and I considered that to be overt racism.

(T. pp. 44-45, 86-87; Pet Ex. 8, p. 2) She opined that Petitioner's comment was conduct related to Petitioner's supervisory job duties for which a reasonable person would not need prior warning. Ms. Hurd didn't think DSS needed to post a rule prohibiting the words Petitioner used. (T. p. 82) She further opined that Petitioner's conduct was unbecoming because Petitioner held a supervisory position and had a position of great influence among the county citizens. (T. p. 83) She thought Petitioner's conduct was "willful" and violated the "known work rule that one doesn't use that kind of language." (T. pp. 81-83) Ms. Hurd also thought Petitioner's language was discriminatory in violation of the Civil Rights Act. (T. p. 82)

62. Ms. Hurd did not believe Petitioner's claim that she was solving a word problem and made a "random guess" when she said "n--- rican. Ms. Hurd thought Petitioner's comment was "absurd" as Ms. Hurd asked a direct question regarding the race of specific children. (T. p. 84) Ms. Hurd lost confidence in Petitioner as a supervisor because Petitioner used disparaging words in her role as a supervisor, and because Petitioner gave significantly different recollections of her conduct in her two written responses to Ms. Hurd. (Pet. Exs. 4, 5) Ms. Hurd thought Petitioner's conduct on November 3, 2017 was the same type of unprofessional and inappropriate conduct Petitioner exhibited towards Ms. Hurd on July 21, 2017. (T. pp. 87-91) Ms. Hurd described Petitioner's conduct towards her, on July 21, 2017, as unreceptive to Ms. Hurd's supervision and feedback, and often defensive. (T. pp. 87-91; Pet. Ex. 8)

63. Ms. Hurd determined that Petitioner's conduct on November 3, 2017 was egregious, derogatory, and unacceptable as (1) conduct for which no reasonable person should expect to receive prior written warning, (2) conduct unbecoming of an employee of Respondent, and (3) willful violation of known or written work rules. (Pet. Ex. 8)

64. Ms. Hurd failed to cite the specific known or written work rules that Petitioner willfully violated until she issued the Final Agency Decision letter on November 21, 2017. In that letter, Ms. Hurd referenced Respondent's policy that prohibits unlawful workplace harassment including using inappropriate terms or epithets. She concluded that Petitioner's conduct undermined the principles and values of Respondent's policy requiring employees to respect the cultural diversity of Respondent's clients. (Pet. Ex. 8)

65. As an employee of Currituck DSS, Petitioner was subject to the Currituck County Personnel Policy which prohibited "unlawful harassment." This policy defined that term as:

> Conduct that violates this policy includes verbal, nonverbal, or physical behaviors that a reasonable person would find hostile or abusive **and one that the person, who is the object of the harassment, perceives to be hostile or abusive.**
>
> . . .
>
> Some other types of prohibited activities related to unlawful workplace harassment include, but are not limited to: . . .
>
> 3. Using demeaning or inappropriate epithets, telling off color jokes concerning race..."

(T. pp. 20-21; Resp. Ex. 2) On January 7, 2017, Petitioner acknowledged and verified that she had reviewed and read the updated Currituck County Personnel Policies which were effective January 7, 2017. (Resp. Ex. 3)

66. At all times relevant to this case, Petitioner was subject to, and received training on, the North Carolina Department of Health and Human Services Policy, Division of Social Services, Volume I, Children's Services, Chapter VII Child Protective Services which required Respondent's employees to:

> [S]upport parents by respecting each family's cultural, racial, ethnic and religious heritage in their interactions with the family and our mutual establishment of goals.

(Pet. Ex. 8, p. 4; Resp. Ex. 4)

67. While Ms. Hurd found Petitioner violated Respondent's policy on staff respecting the cultural diversity of its clients, Ms. Hurd's admission that she too had participated in using derogatory terms at work set a double standard in how she was judging Petitioner's conduct.

68. At hearing, Ms. Hurd indicated that she used the factors in the *Warren v. North Carolina Dept. of Crime Control & Public Safety, North Carolina Highway Patrol*,

221 N.C. App. 376, 726 S.E.2d 920 (2012) to determine the appropriate disciplinary action to impose against Petitioner for engaging in unacceptable personal conduct on November 3, 2017. (T. p. 74) However, the preponderance of the evidence proved that Ms. Hurd actually relied upon and applied the more detailed *Employer Guidance on Imposition of Discipline* that Respondent's attorney had furnished Ms. Hurd during the weekend of November 3-5, 2017. (T. p. 74; Resp. Ex. 9) That document was taken verbatim from *Employment Law: A Guide for North Carolina Public Employers,* Third Edition by Stephen Alred, former faculty member of the UNC School of Government. (T. p. 48)

69. The *Employer Guidance Imposition of Discipline* lists the following twelve (12) variables or factors for North Carolina public employers to use when determining what disciplinary action to impose:

1. The nature and the seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, was committed maliciously or for gain, or was frequently repeated.
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
3. The employee's past disciplinary record.
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability.
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties.
6. The consistency of the penalty with those imposed, upon other employees for the same or similar offenses.
7. The impact of the penalty upon the reputation of the agency,
8. The notoriety of the offense or its impact upon the reputation of the agency.
9. The clarity with which the employee was aware of any rules that were violated in committing the offense or had been warned about the conduct in question.
10. The potential for the employee's rehabilitation.
11. The presence of mitigating circumstances surrounding the offense such as unusual job tension; personality problems, mental impairment; harassment; or bad faith, malice or provocation on the part of others involved in the matter.
12. The adequacy and the effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

(T. pp. 48-74; Resp. Ex. 9)

70. Ms. Hurd made "significant use" of the *Employer Guidance on Imposition of Discipline* by going through each of the twelve areas of consideration "on multiple occasions." She did so in order to make a balanced and fair decision about this case. (T. pp. 48-74)

71. Contrary to Ms. Hurd's attempts to make a fair and balanced decision, Ms. Hurd failed to conduct a complete investigation to determine whether there was any harm to the agency, its employees, its clients and the provision of child welfare services in Currituck County based on Petitioner's comment.

a. First, Ms. Hurd opined that "there was a high probability that other people heard" Petitioner's comment because of the close proximity of two other DSS employees working down the hall from Petitioner and Ms. Hurd (T. p. 46) and due to "other people that I couldn't identify that were walking in the hallway." (T. p. 58) DSS employee Tiffany Sutton was working in her office directly across the hall from Petitioner and Ms. Hurd, while Foster Care Unit Supervisor Tyeshia Phelps was working in her office two offices down the hall. Ms. Phelps and Ms. Sutton are African Americans.

b. However, Ms. Hurd never interviewed these employees before she decided to dismiss Petitioner from employment to determine if they heard Petitioner's comment. Ms. Hurd admitted that she didn't "know who has heard it or who hasn't. I just know that no one has specifically come to me and stated they heard it." (T. pp. 121-122) It was not until the evening of November 8, 2017, after Ms. Hurd had dismissed Petitioner from employment, that Ms. Hurd even asked Ms. Phelps if she had heard anything unusual on November 3, 2017. Ms. Phelps responded "No." (T. pp. 118-119) That was the full extent of Ms. Hurd's interview of Ms. Phelps regarding Petitioner's comment.

c. Not until Respondent and its attorney were preparing for this contested case hearing did Ms. Hurd learn that Ms. Phelps did not hear Petitioner's statement to Ms. Hurd on November 3, 2017. (T. pp. 118-120).

d. Ms. Hurd never knew if Tiffany Sutton heard Petitioner's comments because she never asked Ms. Sutton if she heard the November 3, 2017 Hurd-Petitioner conversation. (T. p. 93)

72. When confronted at hearing regarding why she didn't interview DSS staff Ms. Sutton and Ms. Phelps, Ms. Hurd admitted that whether other people heard Petitioner's comment "really doesn't make a difference" (T. p. 93):

> Because I didn't want this decision to be based upon them hearing it or outreach about other people hearing it. I wanted it to be based upon the integrity of the agency and integrity of me as the director hearing it and needing to respond appropriately.

(T. p. 93) Ms. Hurd explained that she had knowledge of Petitioner's comment as a public official, "as the agency director entrusted with integrity of the agency. And I felt compelled to act. I also felt that my failure to act would be detrimental to the agency's reputation." (T. p. 122) She felt that, as the DSS Director, she represented all the citizens of Currituck County and that she needed to "take action" because she heard Petitioner's comment. (T. p. 131)

73. Ms. Hurd opined that "in terms of employee conduct," she didn't think the Petitioner's racial comment as a violation would have been more severe, if a client or public member had heard Petitioner's comment, because she "heard it directly." She thought Petitioner's comment "was pretty severe to say it precisely to the agency director." (T. pp. 131-132) Ms. Hurd decided to terminate Petitioner from employment for her racial comment because:

> I thought that the penalty of dismissal would preserve the reputation of the agency. I thought it would preserve it because it sets a very strong zero tolerance standard. . . .to racism -- overt racism. . . And racial epithets.

(T. p. 57)

74. Ms. Hurd erred because she did not consider if Petitioner's "n--- rican" comment caused any actual harm to the agency's reputation. She only considered potential harm to the agency. (T. pp. 58-59, 132, 135). She thought there was a "possibility that the agency's reputation could be affected if ever a time came that this material got out. . . ." Yet, the undisputed evidence at hearing proved that no one heard Petitioner's "n--- rican" comment on November 3, 2017 except for Ms. Hurd. When Ms. Hurd decided to terminate Petitioner, there was no other DSS employee who was even aware of Petitioner's comment, no other employee's morale had been affected by Petitioner's comment, and no evidence that the agency's credibility in the community had changed due to Petitioner's comment. (T. pp. 121-122) Ms. Hurd's failure to conduct a full investigation resulted in her deciding to dismiss Petitioner without considering all the required factors under *Warren,* 221 N.C. App. 376, 726 S.E.2d 920.

75. Ms. Hurd conceded that her consideration of the potential harm and potential recurrence of Petitioner repeating a racial comment in the future was based upon her own subjective belief. (T. p. 134)

76. Respondent presented no evidence at the hearing, and the undersigned does not find, that Petitioner's comment on November 3, 2017 incident affected the reputation of Currituck DSS, the morale of any DSS employees, or any provision of services at Currituck DSS. No one at Currituck DSS or anyone outside of Currituck DSS, other than those Petitioner consulted for advice, had any knowledge about Petitioner's comment on November 3, 2017 until Ms. Hurd disclosed Petitioner's comment to Currituck DSS staff in preparation for this hearing.

77. At hearing, Ms. Hurd alleged that she referenced the July 21, 2017 conversation with Petitioner in the dismissal letters to show she had placed Petitioner on prior notice that Petitioner's conduct towards Ms. Hurd was inappropriate and unprofessional. (T. pp. 90-91) However, the preponderance of the evidence showed that Ms. Hurd actually relied upon the July 21, 2017 conversation to show support for, and further justify, her decision to dismiss Petitioner even though she never documented her July 21, 2017 conversation with Petitioner as a disciplinary action.

a. In the November 8, 2017 letter, Ms. Hurd wrote three long, detailed paragraphs describing the July 21, 2017 encounter between she and Petitioner. (Pet. Ex. 6)

b. In the Final Agency Decision, Ms. Hurd described Petitioner's conduct during their July 21, 2017 conversation as "unprofessional" and "unreceptive to feedback and often presented as defensive." (Pet. Ex. 8) She further noted, "[W]e have had many discussions regarding your lack of receptiveness to supervision and why that is problematic." "I have observed the same response from you with the current situation." (Pet. Ex. 8)

c. Respondent failed to produce any evidence supporting Ms. Hurd's assertions that Petitioner had engaged in any prior unacceptable personal conduct toward Ms. Hurd. In fact, the evidence showed the opposite. The undisputed evidence proved that Petitioner had been receptive to Ms. Hurd's feedback on November 2017 as she immediately took ownership of her error in making a racial comment and apologized to Ms. Hurd. From the moment after her utterance through the contested case hearing, Petitioner has acknowledged what she uttered was inappropriate and unacceptable and she expressed remorse for her error.

d. In addition, Ms. Hurd never issued any disciplinary action to Petitioner for prior job performance or conduct deficiencies. Ms. Hurd never documented the July 21, 2017 matter in writing or as a disciplinary action. There was no evidence Ms. Hurd documented "many discussions" with Petitioner about any prior unacceptable conduct.

e. Furthermore, the undisputed evidence established that Petitioner had never used a racial slur or similar language at work before November 3, 2017.

78. The preponderance of the evidence at hearing demonstrated that Ms. Hurd's decision to fire Petitioner from employment was influenced by Ms. Hurd's past philosophical differences with Petitioner and their past history.

a. Ms. Hurd acknowledged that she and Petitioner had some "very significant differences of opinion about personnel administration, and our approach to supervision." (T. p 97) She conceded that she didn't know that

those philosophies ever changed but also claimed she and Petitioner were able to get along to accomplish our work. (T. p. 97)

b. Yet, on July 21, 2017, twenty (20) days after Ms. Hurd became Petitioner's supervisor on July 1, 2017, Ms. Hurd and Petitioner engaged in an "argumentative and adversarial dialog regarding the case transfer process." (Pet. Ex. 6) Four months after Ms. Hurd became DSS Director and Petitioner's supervisor, she terminated Petitioner's employment.

79. Former DSS Director Romm supervised Petitioner from 2011 through 2017 and consistently rated Petitioner as "substantially exceeded" expectations in all areas and rated Petitioner's performance as "Excellent" in all areas.

80. Ms. Romm never had any concerns about Petitioner's professionalism, adherence to policy, attitude, or her work performance, and did not think Petitioner's conduct on November 3, 2017 was typical or characteristic of Petitioner's behavior.

81. Romm had never heard Petitioner use that kind of language [racial slur] before. Petitioner's comment at issue never gave Ms. Romm any doubts or concerns about Petitioner's fitness to be a supervisor at Respondent DSS. (T. p. 223)

82. The preponderance of the evidence established that Petitioner's conduct on November 3, 2017 was an aberrant and unintended event. There was no evidence that Petitioner acted maliciously, with any racially-motivated reason or with any racially-motivated intent to offend, harass, or belittle any given ethnicity. Instead, the evidence proved that Petitioner's statement was a careless mistake and a "momentary lapse in judgment" by a highly effective and professional employee.

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings, and jurisdiction and venue are proper under N.C. Gen. Stat. § 126-35(a).

2. 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. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946*); Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

3. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

4. N.C. Gen. Stat. § 126-35(a) provides that, "No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended or demoted for disciplinary reasons, except for just cause."

5. Petitioner was a career status employee at the time of her dismissal from employment and, as such, was vested with a constitutionally protected property interest in her job under the North Carolina Human Resources Act (N.C. Gen. Stat. § 126-1 *et seq*.); specifically, the just cause provision of N.C. Gen. Stat. § 126-35.

6. "Just cause" for the dismissal, suspension, or demotion of a career State employee may be established only on a showing of "unsatisfactory job performance, including grossly inefficient job performance," or "unacceptable personal conduct." 25 NCAC 1I .2304 and .02305 (2016).

7. Respondent bears the burden of proving that Petitioner engaged in unacceptable personal conduct and that just cause existed to terminate Petitioner. N.C. Gen. Stat. § 126-34.02(d); *Granger v. University of North Carolina at Chapel Hill,* 197 N.C. App. 699, 705, 678 S.E.2d 715, 718 (2009).

8. "Just cause, like justice itself, is not susceptible of precise definition." *North Carolina Dept. of Environment and Natural Resources v. Carroll,* 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). Our Supreme Court explained that "just cause" is a "flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Id.* "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Id.*

9. In *Warren v. North Carolina Dept. of Crime Control & Public Safety, North Carolina Highway Patrol,* 221 N.C. App. 376, 726 S.E.2d 920 (2012), the Court of Appeals delineated a three-part inquiry to guide judges in determining whether just cause existed for an employee's dismissal for unacceptable personal conduct:

> We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Warren, 221 N.C. App. at 382-83, 726 S.E.2d at 925. (citations and footnote omitted).

10. 25 NCAC 01I .2304(b) defines the term "unacceptable personal conduct" as including:

(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;

. . .

(4) the willful violation of work rules; or
(5) conduct unbecoming an employee that is detrimental to the agency's service;

First Prong of *Warren* Analysis – Did Petitioner engage in conduct Respondent alleged?

11. In this case, Ms. Hurd found that Petitioner engaged in unacceptable personal conduct on November 3, 2017 when she said "n--- rican." Petitioner alleged that she said "nigra rican." Our Court of Appeals held in *Ayers v. Currituck Cty. Dep't of Soc. Servs.*, 833 S.E.2d 649 (N.C. Ct. App. 2019), that "[t]he evidence reflects Petitioner either used the word "n---- rican" or the variant "nigra rican. In any event, the phrase employed by Petitioner constitutes a racial epithet." *Ayers*, 833 S.E.2d at 657 (citing *Friend v. Leidinger*, 588 F.2d 61, 68 (4th Cir. 1978) (Butzner, J., concurring in part and dissenting in part) (describing "nigras" as an epithet)).

12. At hearing, Petitioner acknowledged from the outset that she said something improper, whether it was nigra or "n---," and what she said was inappropriate and unacceptable in any setting, personal or professional. She apologized for making that comment. "As such, Petitioner, herself conceded whichever variant she used was improper and unacceptable." *Ayers*, 833 S.E.2d at 658. Therefore, the first prong of the Warren analysis was met.

Second Prong of *Warren* Analysis – Does Petitioner's conduct fall within one of the categories of unacceptable personal conduct provided by the Administrative Code?

13. Director Hurd alleged that Petitioner's comment "n--- rican" on November 3, 2017 constituted unacceptable personal conduct because it was conduct for which no reasonable person should expect to receive prior warning, the willful violation of known or written work rules, and conduct unbecoming of an employee of Respondent. 25 NCAC 1I .02304 (1), (4), and (5).

14. Based upon the preponderance of the evidence, the Fourth Circuit's analysis in *Spriggs v. Diamond Auto Glass*, and Petitioner's acknowledgement at hearing, Petitioner's racial comment constituted conduct for which no reasonable should expect to be warned in advance, and was conduct unbecoming of an employee of Respondent Currituck DSS in violation of 25 NCAC 01I .02304(b)(1) and (5). Petitioner even conceded she would not allow those under her supervision to use such language. For these reasons, the second prong of the *Warren* analysis is satisfied.

15. Nevertheless, Respondent also alleged that Petitioner violated two of Respondent's policies: to wit: (1) being respectful of cultural diversity and (2) prohibiting unlawful harassment.

16. Respondent's Personnel Policy, Chapter VIII Child Protective Services explained how Respondent's "values are what we promise to do, the link between the agencies and the public. They provide a guide for service delivery and staff behavior" and "We support parents by respecting each family's cultural, racial, ethnic, and religious heritage in their interactions with the family and our mutual establishment of goals." (Pet. Ex. 8; Resp. Ex. 4) Without a doubt, Petitioner's utterance of a racial slur on November 3, 2017 undermined the principles and values of Respondent's requirement that its staff respect its' clients' cultural diversity, and thus, constituted unacceptable personal conduct under 25 NCAC 01 .02304(4).

17. Respondent's policy against unlawful harassment defined "unlawful harassment" as:

> Conduct that violates this policy includes verbal, nonverbal, or physical behaviors that a reasonable person would find hostile or abusive **and one that the person, who is the object of the harassment, perceives to be hostile or abusive.**

(Resp. Ex. 2) That is, this definition required two factors be met: (1) behavior a reasonable person would find hostile or abusive **and** (2) one [the behavior] the person, who is the object of the harassment, perceives to be hostile or abusive. (emphasis added). In this case, Respondent failed to prove the existence of a "person, who is the object of" Petitioner's utterance of the racial slur. Without such proof, Respondent failed to prove Petitioner's conduct constituted unlawful harassment.

18. Being that Petitioner's conduct on November 3, 2017 constituted unacceptable personal conduct as noted above, the second prong of the *Warren* analysis was met.

Third Prong of Warren Analysis - Whether Petitioner's Misconduct Amounts to Just Cause for the Disciplinary Action Taken.

19. Appellate cases have made clear that just cause can only be determined from an examination of the facts and circumstances of each individual case. *Harris v. N. Carolina Dep't of Pub. Safety,* 798 S.E.2d 127, 134 (N.C. Ct. App. 2017), *aff'd*, 370 N.C. 386, 808 S.E.2d 142 (2017). Just cause is a "flexible concept, embodying notions of equity and fairness," that can only be determined upon an examination of the facts and circumstances of each individual case. *North Carolina Dept. of Env't & Nat. Res v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).

20. In *Warren*, the Court noted: "Unacceptable personal conduct does not necessarily establish just cause for all types of discipline . . . . Just cause must be

determined based upon an examination of the facts and circumstances of each individual case." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925 (internal quotations omitted.) The Court explained, "the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis." *Id*.

21. The undersigned, as directed by *Warren* and *Carroll,* looks at the "circumstances" under which Petitioner committed the conduct alleged.

a. Petitioner's utterance of the racial slur was said in a vacant office where only Petitioner and her supervisor, Director Hurd, were present. Ms. Hurd repeatedly asked Petitioner what the code "NR" stood for after Petitioner had told Ms. Hurd at least two times that she did not know. After Ms. Hurd persisted, Petitioner blurted out a racial epithet. Both Petitioner and Ms. Hurd were shocked at Petitioner's comment, and Petitioner immediately apologized. Petitioner was embarrassed by her comment. She asked Ms. Hurd not to tell anyone what she said.

b. On and before November 3, 2017, the supervisors at Currituck DSS had allowed their staff to speak freely amongst themselves and use off-color humor, urban slang, and profanity to relieve their stress and anxiety caused by their jobs. Ms. Hurd admitted that she had used profanity in the workplace. Petitioner had heard Ms. Hurd call people "worthless and "trifling."

c. There was a noted history of friction between Petitioner and Ms. Hurd relating back to when Ms. Hurd and Petitioner were supervisors, which was years before Hurd became Director in July 1, 2017. They had a difficult relationship. The friction was both personal in nature and based upon philosophical differences. This friction continued after Ms. Hurd became Director. Petitioner described at hearing how Ms. Hurd, after becoming Director, told Petitioner that talking to her "felt like nails on a chalkboard." (T. p. 164).

22. For an act of unacceptable personal conduct to satisfy the just cause standard necessary to support a dismissal, the Court must also consider various factors, including the severity of the violation, subject matter involved, resulting harm, work history of the Petitioner, and discipline imposed in other cases involving similar violations. *Wetherington v. North Carolina Dept. of Public Safety*, 368 N.C. 583, 593, 780 S.E.2d 543, 548 (2015). In addition, the Supreme Court noted that the employer should consider a "range of disciplinary actions" and not just a "per se" or automatic dismissal for any violation of policy. *Id.* (See *Brewington v. North Carolina Department of Public Safety, State Bureau of Investigation*, 254 N.C. App. 1, 802 S.E.2d 115 (2017), *disc. rev. denied,* 371 N.C. 343, 813 S.E.2d 857 (2018)).

23. In this case, Director Hurd admittedly made significant use of the twelve factors from the *Employer Guidance to Imposition of Discipline* (Resp. Ex. 9) in choosing what disciplinary action to impose against Petitioner for making a racial epithet. In fact, many of those twelve factors are similar to or align with the factors our Courts have said we should use to determine the appropriate discipline to impose in a just cause employment case. Nevertheless, the factors espoused by our Courts, not the factors determined or chosen by academia or based upon current societal trends and opinion, are the standards we are bound to use in a just cause determination.

24. Ms. Hurd admitted that she did not think it was significant whether anyone heard Petitioner's comment on November 3, 2017. However, whether anyone else heard such statement was a necessary consideration in weighing the evidence to determine the severity of the conduct and whether just cause existed to terminate Petitioner.

25. In *Granger v. University of North Carolina at Chapel Hill,* 197 N.C. App. 699, 678 S.E.2d 715 (2009), the Court of Appeals found that an employee's use of a racial slur in the workplace, where that employee was overheard by a subordinate, undermined the employee's [Granger] authority and exposed UNC to embarrassment and potential legal liability. The Court noted that:

> Respondent has policies prohibiting racial harassment or harassment in the workplace. Respondent has a duty to enforce these policies, and to further its stated goal of promoting an 'environment of tolerance and mutual respect that must prevail if the University is to fulfill its purposes.' As stated by the Fourth Circuit in *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. Md. 2001):
>
> Far more than a 'mere offensive utterance,' the word '[-----]' ["n ---] is pure anathema to African-Americans. 'Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as '[-----]' by a supervisor in the presence of his subordinates.'
>
> *Id*. We agree with the Fourth Circuit's analysis.
>
> By uttering this epithet in the workplace, where Petitioner was overheard by one of her subordinates, Petitioner undermined her authority and exposed Respondent to embarrassment and potential legal liability.
>
> *Id.,* 197 N.C. App. at 706.

26. The undersigned agrees with the Fourth Circuit's analysis in *Spriggs v. Diamond Auto Glass* that use of the word "n---" is far more than just a mere offensive utterance and is a "pure anathema to African-Americans" that creates an abusive working and personal environment. *Id*. at 185. (*See Ayissi–Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("No other word in the English language

so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African–Americans.")) Petitioner's utterance of "n--- rican" or "nigra rican" was no exception.

27. In *Granger,* the employee's misconduct went beyond just using a racial epithet in the workplace as Granger was actually:

> [O]**verheard by one of her subordinates. Petitioner undermined her authority and exposed Respondent to embarrassment and potential legal liability**. Further, Petitioner had **attempted to obstruct the investigation, which amounted to insubordination.** Petitioner stated she would not hire another black person, Petitioner took and disposed of Jones-Parker's black history notebook, and **she created a 'general sense of intimidation in the workplace.'** When considered together, we hold the trial court did not err in finding that Petitioner's actions constituted unacceptable personal conduct for which dismissal was proper.

Id. (emphasis added.) The Court of Appeals made clear that: "Granger's actions, **when considered together,** support her dismissal under all four of the following definitions of unacceptable personal conduct . . . ." *Granger,* 197 N.C. App. at 707, 678 S.E.2d at 720 (emphasis added).

28. Petitioner's conduct, in this case, falls short of that determined by the Court of Appeals in *Granger* as sufficient to support dismissal from employment. Unlike Pamela Granger, Petitioner engaged in a one-time act of unacceptable personal conduct. Unlike Pamela Granger, Petitioner did not say "n--- rican" in referring to another coworker in the Currituck County DSS, but blurted out "nigra rican" or "n---rican" while trying to interpret the "NR" abbreviation during a private conversation with her supervisor. There was no evidence that Petitioner was trying to demean, harass, belittle, embarrass, or otherwise to target anyone else. Unlike Pamela Granger, Petitioner did not say she "would not hire another black person," her utterance was not overheard by one of her subordinate employees or any other employee at work, and she did not engage in insubordination. Petitioner surprised herself by her comment, immediately expressed remorse and embarrassment, and apologized to Ms. Hurd.

29. Ms. Hurd's belief that Petitioner's utterance of "n---rican" or "nigra-rican" to her, as Director of DSS, could not have been any more severe is unreasonable and illogical. As shown in *Granger,* Petitioner's calling a coworker or client of another ethnicity a racial slur with the intent to belittle, harass or demean would be far more severe than Petitioner's conduct on November 3, 2017. Ms. Hurd made the decision to terminate Petitioner when she was unaware if any harm had been caused by or resulted from the Petitioner's November 3, 2017 comment. The fact that Currituck DSS did not suffer any harm as a result of the November 3, 2017 incident weighs against finding that just cause exists for dismissing Petitioner from employment.

30. The preponderance of evidence proved there was only a minimal degree of potential risk that Petitioner's racial comment could or would have affected the agency's integrity, employee morale, DSS' provision of services. Ms. Hurd, Respondent's attorney and Respondent's consultant were the only ones who knew about Petitioner's misconduct. Given that Petitioner's conduct was a personnel matter, Ms. Hurd was bound to keep such matter confidential. The only harm that actually occurred did not happen until Respondent and Ms. Hurd advised DSS staff of Petitioner's conduct in preparation for this contested case hearing. That kind of harm does not weigh in favor of finding that this incident provided Currituck DSS with just cause to dismiss Petitioner.

31. Petitioner's ten-year employment history with no prior disciplinary actions and exemplary performance evaluations support a lesser disciplinary sanction than dismissal in this case. Former DSS Director Romm supervised Petitioner from 2011 through 2017 and consistently rated Petitioner as "substantially exceeded" expectations in all areas. Ms. Romm also rated Petitioner's performance as "Excellent" in all areas. Ms. Romm never had any concerns about Petitioner's professionalism, adherence to policy, attitude, or her work performance, and did not think Petitioner's conduct on November 3, 2017 was typical or characteristic of Petitioner's behavior. Romm had never heard Petitioner use that kind of language [racial slur] before. Neither did Petitioner's comment give Romm have any doubts or concerns about Petitioner's fitness to be a supervisor at Respondent DSS. (T. p. 223)

32. The relevant facts of this case, including mitigating factors, compare favorably to those in *North Carolina Dept. of Env't & Nat. Res v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004). In *Carroll,* the N.C. Supreme Court reversed the employer's demotion of Carroll, a park ranger, for exceeding the posted speed limit for about 1 mile of open road and activating his blue lights and siren to get to the hospital to admit his mother. Carroll also "used profanity or otherwise 'lashed out' at two fellow law enforcement officers" who arrived at the hospital to question him about the nature of his emergency. *Carroll*, 358 N.C. at 675. The Supreme Court found that the evidence did not support a finding that Carroll had engaged in sufficient conduct to support his demotion after considering all the facts and circumstances, including mitigating factors, such as Carroll's 20 years of employment with no prior history of disciplinary actions, and Carroll's supervisor's opinion that Carroll was a "very good employee who comported himself with honesty, integrity, and respect for others. *Id.* at 669, 670.

33. In this case, it was undisputed that neither Ms. Hurd nor Ms. Romm had encountered a similar conduct violation at Currituck DSS in the past. Neither Ms. Hurd nor Ms. Romm had dismissed any employee based on a single incident of misconduct in the past. In fact, prior disciplinary practices at Respondent demonstrated that dismissal was not ordinarily imposed for a single act of misconduct, and generally an employee would only be dismissed following a warning and repetition of some act of misconduct.

34. Respondent proved by a preponderance of the evidence that it had just cause to discipline Petitioner for engaging an unacceptable personal conduct under N.C. Gen. Stat. § 126-35 for uttering a racial slur.

35. However, given the mitigating factors, the undersigned concludes that Petitioner's misconduct did not rise to a sufficient level to warrant termination from employment under N.C. Gen. Stat. § 126-35(a). Those factors include Petitioner's disciplinary history, her years of service and prior performance, the severity of the violation, the lack of any harm sustained by Respondent, the minimal degree of potential risk of harm to the agency, and prior disciplinary actions at Currituck DSS. Petitioner took ownership of her mistake immediately, and apologized. She continued to accept that responsibility through the pre-dismissal process and through the contested case hearing. In addition, Respondent's work environment allowed DSS staff to use slang and profanity amongst themselves to relieve stress and anxiety on the job; though notably, utterance of a racial slur is quite different.

36. The totality of the facts and circumstances of this case demonstrate that Ms. Hurd's decision to fire Petitioner from employment was influenced by Ms. Hurd's past philosophical differences with Petitioner and their past history. On July 21, 2017, twenty (20) days after Ms. Hurd became Petitioner's supervisor on July 1, 2017, Ms. Hurd and Petitioner engaged in an "argumentative and adversarial dialog regarding the case transfer process." (Pet. Ex. 6) Four months after Ms. Hurd became DSS Director and Petitioner's supervisor, she terminated Petitioner's employment. While Ms. Hurd found Petitioner violated Respondent's policy requiring staff to respect its' clients' cultural diversity, Ms. Hurd's admission that she too had participated in using derogatory terms at work set a double standard in how she judged Petitioner's conduct.

37. Based upon the above Findings of Fact and Conclusion of Law, the totality of the facts and circumstances of this case, and pursuant to the authority in N.C. Gen. Stat. § 126-34.02(a), the undersigned hereby orders Respondent retroactively reinstate Petitioner to the same or similar position she held prior to her dismissal with back pay. The totality of the facts and circumstances in this case support imposition of the lesser disciplinary sanction of a two-week suspension without pay for committing the unacceptable personal conduct discussed in this case. Further, Petitioner shall participate in additional training on cultural diversity and racial sensitivity.

38. Pursuant to N.C. Gen. Stat. § 126-34.02(e), Respondent shall reimburse Petitioner for the cost of her reasonable attorney's fees incurred in the litigation of this contested case. Petitioner's attorney shall file a petition for attorney's fees with the Office of Administrative Hearings within ten calendar days of entry and filing of this Final Decision.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **REVERSES** Respondent's decision to terminate Petitioner from employment. Respondent shall retroactively reinstate Petitioner to the same or similar position she held prior to her dismissal with full back pay, suspend Petitioner for two weeks without pay, and order Petitioner to attend additional cultural diversity and racial sensitivity training. Based upon N.C. Gen. Stat. § 126-34.02(e), Respondent shall

reimburse Petitioner for the cost of her reasonable attorney's fees incurred in the litigation of this contested case.

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.

This the 5th day of May, 2020.

Melissa Owens Lassiter
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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Hornthal, Riley, Ellis & Maland, LLP
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John S Morrison
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This the 6th day of May, 2020.

Jerrod Godwin
Administrative Law Judge Assistant
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