

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 OSP 02524

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| Barbara Mullen Petitioner, v. North Carolina Department of Health and Human Services Disability Determination Services Respondent. | FINAL DECISION |
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On October 13, 2020, Administrative Law Judge Melissa Owens Lassiter heard this contested case in the Office of Administrative Hearings in Raleigh, North Carolina pursuant to N.C. Gen. Stat. §§ 126-34.02, 126-35, and 150B-23, and Petitioner's appeal of Respondent's decision to discharge Petitioner from employment for engaging in unacceptable personal conduct.

APPEARANCES

For Petitioner: Jennifer J. Knox
The Law Office of Jennifer Knox, PC
Raleigh, North Carolina

For Respondent: Joseph E. Elder
Special Deputy Attorney General
North Carolina Department of Justice
Raleigh, North Carolina

ISSUE

Whether Respondent had just cause to dismiss Petitioner from employment for engaging in unacceptable personal conduct?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 126-34.02
N.C. Gen. Stat. § 126-35
N.C. Gen. Stat. § 150B-23
25 NCAC 1J .0604 *et seq.*

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent: 1-2, 5-10, 17, and 21-25
20 – (Offer of Proof – Not Admitted)

WITNESSES

For Petitioner: Barbara Mullen

For Respondent: Geneva Johnson
Tracy Gray
Mike Piombino
Jacqueline Russell
Greg Chavez

FINDINGS OF FACT

BASED UPON careful consideration of the sworn witness testimony at hearing, the exhibits received and admitted into evidence, the entire record in this proceeding, having assessed the credibility of the witnesses by judging credibility of each witness including, but not limited to the demeanor of the witnesses, 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, the undersigned hereby finds:

Procedural Background

1. On March 18, 2020, Respondent dismissed Petitioner from employment for engaging in unacceptable personal conduct for:

(1) Abusing her professional credentials to access stored and confidential data for her own personal reasons and without a work justification, and

(2) Failing to cooperate during a management investigation and providing conflicting and untruthful information during the investigation.

Resp. Ex. 25.

2. Petitioner filed a timely grievance and proceeded through the internal grievance process. After a Step-2 grievance hearing, Respondent's hearing officer upheld Petitioner's dismissal. On June 8, 2020, Respondent issued a Final Agency Decision upholding Petitioner's dismissal.

3. Petitioner timely appealed the Final Agency Decision by filing a contested case petition with the Office of Administrative Hearings alleging she had been discharged from employment without just cause.

Parties

4. Petitioner is a career status State employee subject to the North Carolina State Human Resources Act who was employed by the North Carolina Department of Health and Human Services, Division of Disability Determination Services ("DDS" or "the Division") for 17 years as a Systems Administrator II.

5. At the time of her dismissal, Petitioner had no prior disciplinary actions.

6. Respondent DDS makes medical eligibility determinations for Social Security Disability benefits and for state Medicaid Disability claims. DDS is primarily funded by the federal government's Social Security Administration ("SSA") and stores information on the SSA servers.

Adjudicated Facts

7. Medical evidence is the cornerstone of DDS's disability determinations. DDS receives, stores, and creates confidential medical history, medical records, medical consultation reports, medical test results, and other medical data of applicants. Also, DDS receives and stores confidential personal data about age, employment history, educational history, health insurance information, financial status, marital status, Social Security numbers, and other personal and confidential information about applicants.

8. DDS, through SSA servers, stores various files, databases, and computer drives, including e-mail history, which DDS employees need to perform their jobs.

9. DDS employees have a personal identification number ("PIN") issued by the SSA. Most DDS employees store their personal work folders, including files containing some e-mails, on the "P: Drive," but some store their folders on the "X: Drive" or the "Y: Drive." The P: Drive folders are backed up in the "X: Drive" and "Y: Drive."

10. As a Systems Administrator II, Petitioner provided technical and analytical support for the Division and was one of several people responsible for supporting and maintaining the operations of all information processing technology.

11. As part of her responsibilities, Petitioner responded to requests for assistance from DDS employees, either by email, phone, through a formal help ticket system, or in person. Her security access gave her the ability to access other employees' computer drives, but not their email folders. Petitioner was one of three employees who had broad access to other employees' computer drives and various servers/drives used by DDS.

12. In August of 2019, Petitioner had a general conversation with Tracy Gray, the Deputy Director of Operations for DDS, about upcoming DDS employees' retirements, and upcoming changes in different DDS units. Ms. Gray and Petitioner speculated about who might apply for those positions, including who might be selected as the new Deputy Director for Program Integrity, Chothilda Brown's position.

13. Mike Piombino was the IT manager for all DDS staff. He directly reported to Jackie Russell and directly supervised Petitioner. Mr. Piombino had access to Ms. Russell's calendar and Petitioner's calendar. Sometime in September 2019, Mr. Piombino saw a Reorganization meeting listed on Jackie Russell's calendar and told Petitioner that he had seen such. A reorganization could affect their IT jobs if an employee is moved to a different server.

14. On September 19, 2019, Geneva Johnson, the Disability Hearings Unit Chief Manager, asked Petitioner to examine the laptop computer of an employee from Ms. Johnson's division that had been damaged. After examining the laptop, Petitioner asked Ms. Johnson if she wanted to see the damage that was done to it before she attempted to fix it. Ms. Johnson came to Petitioner's office. Lisa Stanley, a Hearings Officer in the Disability Hearings Unit (DHU), was taking a break and already in Petitioner's office when Johnson arrived. Petitioner offered Ms. Johnson and Ms. Stanley some jellybeans, and they casually chatted about work.

15. Petitioner then asked Johnson and Stanley what they knew about a possible reorganization of the DHU, and Chothilda Brown's former position. Ms. Brown had recently retired on September 1, 2019. Ms. Johnson denied knowing anything about a reorganization. Ms. Johnson did not have much to say to Petitioner, because she was so surprised. While Ms. Johnson knew some details about the reorganization, she did not feel comfortable acknowledging or sharing what she knew with Petitioner. Petitioner asked Ms. Johnson what she knew about the reorganization, but Ms. Johnson refused to share what she knew.

16. Petitioner speculated how such a reorganization might be accomplished. She guessed that since the Deputy Director over the Program Integrity Unit, Ms. Brown, was retiring soon, the reorganization might involve moving different teams under different supervisors. She speculated that the reorganization of the DHU might mimic the structure of the Medicaid Hearings Unit, as had previous changes at DHU. Petitioner spoke about a detailed reorganization of Quality Assurance, Disability Hearings Unit, PRO Professional Relations Office, Disability Call Center, Training Unit, and the Processing Center. After a few minutes of chatting and eating jellybeans, the three ladies returned to work. Petitioner thought nothing more of the conversation.

17. Ms. Johnson was surprised by the details Petitioner knew about the proposed reorganization. At the time, Ms. Johnson was the direct supervisor of Lisa Stanley. Having Ms. Stanley present during the conversation with Petitioner made Johnson feel a little uncomfortable.

18. Johnson was concerned about the details Petitioner knew about the DDS reorganization, so she spoke with Stephanie Sanders, Deputy Director of Operations. In turn, Ms. Sander and Ms. Johnson shared their concerns about Johnson's conversation with Petitioner with Tracy Gray, Deputy Director of Operations. Ms. Johnson, Ms. Gray, and Ms. Sanders visited the office of Jacqueline Russell, the Director of the DDS, and reported their concerns.

19. Ms. Russell had discussed a possible reorganization of DDS with very few people and only Greg Chavez, the Human Resources Manager, and Liz Wortham, Human Resources Personnel Analyst I, knew about that plan. Other deputy directors, such as Ms. Gray, knew information about a reorganization relevant to their respective areas but did not know the complete details of the reorganization plan.

20. Russell's reorganization plan would restructure the Disability Hearings Unit (DHU) by establishing two DHU Assistant Supervisors, each Assistant Supervisor being assigned half of the DHU Hearing Officers. A few additional positions would also be created to improve support for DDS staff and business procedures. One position being created was an Assistant Chief of Program Integrity which would have specific teams assigned for supervision.

21. Ms. Russell had previously instructed all employees who knew about the reorganization to keep it a secret. When she heard that Petitioner appeared to have inside knowledge of the reorganization, Ms. Russell became upset and thought someone had disobeyed her directive to keep the reorganization quiet.

22. Russell questioned all of the employees with knowledge of the reorganization about whether they had discussed it with the Petitioner. All of them denied having done so.

23. The only documents Russell knew that detailed her reorganization plan was an "O" (organization) chart Russell had emailed to Mr. Chavez and Ms. Wortham. Ms. Russell surmised that the only way Petitioner could have any knowledge of the reorganization was if she had improperly used her computer security credentials to read Ms. Russell's or other employees' emails and access their personal computer drives where information about the reorganization might be located.

24. On September 20, 2019, Ms. Russell and Mr. Chavez began investigating whether Petitioner had inappropriately accessed confidential information without authorization. On the morning of September 20, 2019, Ms. Russell came to Petitioner's office and asked to come with her. Russell and Petitioner walked to Greg Chavez' office. Ms. Russell and Mr. Chavez questioned Petitioner about her knowledge of the DDS reorganization. This meeting lasted between 30 minutes and 1½ hours. Petitioner was taken aback and stunned by Ms. Russell's aggressive accusations of wrongdoing based upon a casual conversation Petitioner had with Ms. Johnson and Ms. Stanley.

a. Petitioner did not reveal how she learned about the reorganization. She revealed that she had heard about a realignment from several people, but nothing specific. She denied having accessed any of this information by computer. Petitioner felt the meeting was an interrogation and a "witch hunt."

b. Ms. Russell did not believe Petitioner and continued to question her about how she knew the details of the reorganization. When Petitioner did not "confess," Ms. Russell became angry to the point that her neck turned red.

25. Ms. Russell placed Petitioner on Investigatory Leave with Pay effective September 20, 2019.

26. Russell and Chavez also talked with Mike Piombino, Petitioner's direct supervisor, on September 20, 2019. They asked Piombino whether Petitioner had the ability to access employees' emails. Mr. Piombino advised Ms. Russell that he did not know any information about a reorganization and had not accessed any information regarding a reorganization. He also advised them that he was not aware of any information being accessed by Petitioner or any Systems staff member that was not theirs or that was accessed inappropriately. Resp. Ex. 8. According to Mr. Piombino, Mr. Capps could have accessed the personal drive (P: Drive) of an employee while working on the Help Desk.

27. Piombino also advised Russell that Petitioner, Systems Administrator Otis Caps, and he had access to all employee emails and all employees' P: Drives. This information further led Ms. Russell to believe that Petitioner must have read her emails.

28. Mr. Piombino did not assist Ms. Russell in investigating Petitioner. Ms. Russell did ask Piombino to obtain the records for Petitioner's office telephone number.

29. Russell and Chavez interviewed Geneva Johnson on September 20, 2019. Ms. Johnson shared the details Petitioner had told her about how Petitioner understood the DDS would be reorganized, including that the DHU would be reorganized like the other Medicaid units. Johnson did not tell Petitioner what she knew about these changes. Johnson was surprised and uncomfortable that Petitioner knew about the reorganization because it was confidential. Ms. Johnson had not asked Petitioner how she learned about the reorganization plan. Resp. Ex. 5.

30. Also, on September 20, 2019, Ms. Russell emailed the Disability Program Administrators, Casey Allison, and Jennifer Marine, with the federal Social Security Administration ("SSA"). Russell asked them to review Petitioner's actions within the SSA system from July 1, 2019 through September 20, 2019 to determine whether Petitioner had viewed the personal drives, or P: Drive, of Ms. Russell, Ms. Wortham, and Ms. Brown.

31. On September 23, 2019, Ms. Russell updated her request of Ms. Marine and asked Marine to also research if Petitioner had accessed Russell's email account, and Mr. Piombino's email account and P: Drive without authorization. Resp. Ex. 25, p. 7.

32. The SSA's search took several months, during which time Ms. Russell extended Petitioner's investigatory leave until November 18, 2019.

33. Ms. Russell's investigation lasted from September 20, 2019 until February 19, 2020. During that time, Ms. Russell also interviewed Tracy Gray (now retired), Geneva Johnson, Lisa Stanley, Chothilda Brown (now retired), and Otis Capps.

34. On October 16, 2019, Mr. Chavez and Ms. Russell interviewed Tracy Gray. Ms. Gray advised them that on September 19, 2019, Ms. Johnson and Stephanie Sanders shared Johnson's conversation with Petitioner and Stanley concerning the changes in the DHU. Gray knew about some general changes that Russell had suggested for DHU. Gray told Russell that she had not discussed the DDS reorganization plans with anyone and had not heard anyone else discussing such plans. Resp. Ex. 6.

35. During that interview, Ms. Gray did not tell Russell that she had talked with Petitioner, a few weeks before September 19, 2019, about employee retirements and a lot of changes occurring at DDS. During that prior conversation, Gray and Petitioner had speculated who would apply for the vacant DDS positions, including Chothilda Brown's prior, then vacant, position.

36. On November 15, 2019, Ms. Russell and Mr. Chavez interviewed Petitioner a second time. Petitioner felt pressured and under duress by Russell and Chavez to disclose how she learned about reorganization. As a result, Petitioner revealed that Tracy Gray had shared general information with her about the reorganization for [Chothilda] Brown's former position as Deputy Director of Program Integrity. Resp. Ex. 9. This was a personal conversation between Gray and Petitioner in Ms. Gray's office about three to four weeks before Petitioner's September 19, 2019 conversation with Lisa Stanley and Geneva Johnson. Ms. Gray did not provide detailed information about the reorganization. Petitioner told Russell and Chavez that after she had talked with Ms. Gray, she also learned about the reorganization from a retired DDS employee, Linda Randolph. Resp. Ex. 10.

37. Petitioner acknowledged she had full access to all information on the DDS system. Petitioner also told Russell and Chavez that she had accessed the P: Drive of other DDS employees at least two times. However, she advised she would not do so without an employee's permission or without a business reason. Resp. Ex. 10.

38. On November 18, 2019, Petitioner returned to work. Ms. Russell temporarily reassigned Petitioner to work in the Professional Relations Office while Russell continued her investigation into Petitioner's possible unacceptable personal conduct.

39. On November 18, 2019, Ms. Russell and Mr. Chavez interviewed Ms. Gray a second time. Ms. Gray corroborated Petitioner's statement that she and Gray had spoken about general changes about a possible reorganization a few weeks before September 19, 2019. Resp. Ex. 7. Gray confirmed that she did not share any specific information with Petitioner about the reorganization, but they generally discussed employee retirements, and lots of upcoming changes to different DDS units. Ms. Gray acknowledged that she and Petitioner also speculated about who might apply for those positions, including who might be selected as the new Deputy Director for Program Integrity. [Ms. Brown's former position] Resp. Ex. 7.

40. On January 2, 2020, Ms. Marine provided Ms. Russell the full results of the SSA search of Petitioner's P: Drive and email account from July 1, 2019 through September 19, 2019. Marine also provided Russell with the full content of the P: Drives and email accounts for Russell, Wortham, Brown and Piombino.

41. The SSA's search revealed no evidence that Petitioner had accessed any email accounts or P: Drives of any DDS employee to obtain information about a DDS reorganization. Based upon that information, Ms. Russell could not determine if Petitioner had inappropriately accessed Russell's email account or P: Drive or the email accounts and P: Drives of Ms. Wortham, Ms. Brown, or Mr. Piombino. Resp. Ex. 25, p. 13.

42. The SSA search listed three shortcuts on Petitioner's P: Drive to files from other employee's personal drives.

a. One shortcut titled "Salary" was created on Petitioner's P: Drive on August 11, 2016 at 11:58 a.m. The file had been created in Tony Barnette's P: Drive folder and was moved to the X: Drive after Mr. Barnette left employment at DDS.

b. One shortcut titled "RC II Equity Spreadsheet.xls" was created on Petitioner's P: Drive on March 4, 2016 at 1:24 p.m. The file was created on Gay Long's P: Drive and migrated to the Y: Drive when she left employment at DDS.

c. A shortcut named "Gay changes to Crutchfield_Competency/Assessment-06.doc" was found on Petitioner's personal drive and appeared to have been created on August 11, 2016 at 11:58 a.m. The file had been created in Tony Barnette's P: Drive folder and was moved to the X: Drive after Mr. Barnette left employment at DDS.

43. Even though the SSA did not find any evidence that Petitioner had inappropriately accessed the P: Drives or email accounts of Russell, Wortham, Brown, or Piombino, Ms. Russell still "strongly suspected" that Petitioner had improperly used her access credentials to view this information and refused to accept that she was wrong. Resp. Ex. 25, p. 13. Ms. Russell believed that Petitioner knew details of Russell's

proposed reorganization of DDS that she could have only learned by accessing files she was not authorized to access.

44. On February 13, 2020, Ms. Russell and Mr. Chavez questioned Petitioner a third time. They specifically asked Petitioner about the three shortcuts found on her P: Drive. Petitioner did not know what the "RC II Equity Spreadsheet.xls" file was, but that perhaps she had opened it when she was researching information about the FLSA issue that had arisen when Petitioner and other IT employees' positions were changed from nonexempt to exempt status. Changing those positions to exempt status meant those IT staff would no longer receive overtime pay for working over 40 hours in a week.

45. Ms. Russell interpreted Petitioner's statement as an admission by Petitioner that she had improperly accessed this file from another employee's personal drive, in violation of DHHS policy.

46. The "Gay changes to Crutchfield_Competency/Assessment-06.doc" shortcut was created on Petitioner's personal drive in 2016. When Ms. Russell questioned Petitioner about this shortcut on February 13, 2020, Petitioner surmised that she could have looked at that file as part of her responsibility to rewrite job descriptions for IT staff that Mike Barnette had initiated. Petitioner suggested another reason she might have accessed that file was to look for information to help her write up and apply for "Advanced" status in her job. Changing Petitioner's position to "Advanced" status would have been a promotion for Petitioner. Based on this statement, Ms. Russell believed that Petitioner had used her computer credentials to improperly access another employee's files for personal gain.

47. On March 18, 2020, Ms. Russell notified Petitioner of her decision that Petitioner had engaged in the unacceptable personal conduct alleged above and recommended Petitioner be dismissed from employment. Resp. Ex. 25.

a. Ms. Russell found that Petitioner was forthcoming throughout the investigation and provided contradictory information about how she learned of the planned DDS reorganization, whether she had accessed employee folders on DDS drives, and a conversation she had with a former DDS employee, Shawn Crutchfield.

b. Ms. Russell had not experienced any employee failing to be forthcoming and providing inaccurate information during a management investigation prior to this matter. She considered imposing a lesser disciplinary sanction against Petitioner. However, Russell decided that dismissal was the appropriate sanction given Petitioner's untruthful and inconsistent statements to Russell during the investigation that had eroded Russell's trust in Petitioner.

c. Ms. Russell was concerned about Petitioner's trustworthiness in light of her broad access to sensitive and confidential information and her failure to be forthcoming throughout the management investigation.

Analysis

48. Respondent failed to present sufficient, credible evidence proving Petitioner engaged in the unacceptable personal conduct alleged. Ms. Russell's letter dismissing Petitioner from employment was twenty-two (22) pages long. The length and specificity of the letter demonstrated the exhaustive efforts Ms. Russell took to find reasons to support her decision about Petitioner's "guilt;" a decision that Russell made at the beginning of her investigation.

49. In the dismissal letter, Ms. Russell acknowledged that:

Although I was unable to find direct evidence to indicate you reviewed the documentation the only way you would have been able to provide the details about the reorganization plan you shared with Ms. Johnson and Ms. Stanley was if you reviewed the documentation that supported it.

Resp. Ex. 25, p. 20. Even after the SSA search results contained no evidence proving Petitioner improperly accessed the email accounts and personal drives of Russell, Wortham, or Chavez, Ms. Russell still "strongly suspected" Petitioner had accessed documents related to the DDS reorganization from Russell's P: Drive and continued to search for any reason Petitioner may have accessed any DDS employee's P: Drive for personal gain or without having a business reason to do so.

50. Without any direct evidence of misconduct by Petitioner, Ms. Russell found Petitioner guilty of misconduct because she "understood" Petitioner had unlimited access to every employee's email account and P: Drive, and because she "found" Petitioner's refusal to give her the source of her knowledge about the reorganization "very concerning." Resp. Ex. 25, p. 20. Russell explicitly noted:

Despite my repeated explanations that I needed to know what you knew, you outright refused to provide any information, which led me to suspect that you acquired your knowledge of the plan to reorganize some areas of DDS by utilizing access to my email and/or personal folder; or P: Drive, without authorization.

Resp. Ex. 25, p. 20. (Emphasis added).

51. However, the only evidence Respondent produced at hearing that Petitioner had accessed any employees' P: Drive was from 2016, three years before Russell's investigation. Respondent presented no credible evidence at hearing showing Petitioner's motive or reason for accessing those P: Drives was for personal gain or was not without a business need to do so. While Ms. Russell described, in the dismissal letter,

a conversation with Ms. Chothilda Brown about whether Petitioner was authorized by management to access employees' P: Drive regarding the FLSA issue in 2017, Ms. Brown did not testify at this hearing, and thus, her statements to Ms. Russell are hearsay, and are not considered as credible evidence in this case.

52. The "Gay changes to Crutchfield_Competency/Assessment-06.doc" shortcut was created on Petitioner's personal drive in 2016. At hearing, Petitioner credibly explained that after her February 13, 2020 interview by Ms. Russell, she reviewed her documents about the FLSA issue and determined she was incorrect about why she may have accessed the "RC II Equity Spreadsheet.xls" file. By memorandum dated April 9, 2018, Petitioner and her coworkers provided information to Tara Meyers, then Interim Senior Director, and requested the August 2017 designation of their IT positions, including Petitioner's job, to exempt status, be reversed. Resp. Ex. 17. As such, the FLSA issue arose two years after Petitioner created this specific shortcut on her P: Drive in 2016, and therefore, Petitioner could not have accessed the "RC II Equity Spreadsheet.xls" file for her own personal gain regarding the FLSA issue. Without Petitioner's misstatement, Respondent presented no credible evidence at hearing that Petitioner accessed this specific file for her own personal reasons in violation of Respondent's "Acceptable Use Policy," "Acceptable Use Agreement," or Respondent's Internal Investigation Form. See Resp. Ex. 2.

53. At hearing, Petitioner also credibly explained that she incorrectly told Russell and Chavez when she may have accessed the "Gay changes to Crutchfield_Competency/Assessment-06.doc" file drive in 2016. The evidence at hearing showed that Petitioner had already achieved "Advanced status" in 2014, prior to the "Gay changes to Crutchfield_Competency/Assessment-06.doc" shortcut being created on her personal drive. Therefore, Petitioner could not have accessed the "Crutchfield_Competency" file to support upgrading her position to "Advanced Status." Without Petitioner's misstatement, Respondent presented no credible evidence at hearing that Petitioner accessed this specific file for her own personal reasons in violation of Respondent's "Acceptable Use Policy," "Acceptable Use Agreement," or Respondent's Internal Investigation Form. See Resp. Ex. 2.

54. The evidence at hearing established that Petitioner accessed and created a shortcut for the "Salary" file on August 11, 2016. When Russell and Chavez interviewed Petitioner, Petitioner suggested that she might have accessed that file while she was looking for FLSA Test Forms which DDS Human Resources had completed relating to the above-mentioned FLSA/overtime pay issue. However, Respondent failed to present any credible evidence at hearing, other than assumption and innuendo, that Petitioner accessed the "Salary" file for her own personal gain in violation of Respondent's "Acceptable Use Policy," "Acceptable Use Agreement," or Respondent's Internal Investigation Form. See Resp. Ex. 2.

55. While Mr. Piombino indicated that Petitioner had access to all DDS employees' emails, Respondent failed to produce any credible evidence at hearing proving Petitioner had access, and actually accessed, any DDS employees' emails or

email accounts at any time. In contrast, Petitioner credibly explained that in 2015, Tracy Brown and Chothilda Brown's request requested she attempt to access an employee's email regarding an issue with the employee's identification badges. Petitioner attempted, but was unable, to access that employee's email. Petitioner had not tried to access emails of any other employees since then.

56. Ms. Russell dismissed Petitioner for providing false and misleading information about her contact with Shawn Crutchfield, a former DDS employee. However, there was no evidence produced at hearing showing Petitioner's conversations with Mr. Crutchfield had anything to deal with Petitioner's job performance or accessing employee P: files and email accounts. In addition, Ms. Russell never contacted and questioned Mr. Crutchfield regarding his conversations with Petitioner. Respondent failed to present any credible evidence that Petitioner's conversation with a former DDS employee had any relevance to the alleged misconduct at issue in this case.

57. Ultimately, Russell found that Petitioner's unacceptable conduct constituted a:

[H]istory of arbitrarily accessing the P: Drives of upper management that . . . compromised the security of sensitive information at DDS, calls into question your integrity and trustworthiness, eroded the trust DDS management placed in you by giving you access to sensitive information, and severely eroded the trust I require in an employee of your position at DDS.

Resp. Ex. 25.

58. Respondent failed to present credible evidence that Petitioner engaged in a "history of arbitrarily accessing the P: Drives of upper management. Respondent failed to produce credible evidence that Petitioner compromised the security of sensitive information at DDS. In fact, Respondent failed to present any evidence proving Petitioner engaged in any unacceptable conduct which harmed, negatively affected, or created the potential for harm to Respondent, the SSA server, any DDS employees, or any DDS clients.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties, and the claims in this action, and the parties received proper notice of hearing in this matter. Despite the due diligence of all parties, given additional work responsibilities of Respondent's counsel during the motion portion of this case, and the negative impacts of the COVID-19 pandemic on all parties and this Tribunal, the time for completing this matter exceeded the usual, regular, and customary time of completion. For that reason, extraordinary cause existed for the issuance of this Final Decision more than 180 days from the commencement of the case. N.C. Gen. Stat. § 126-34.02(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); *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012).

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. Petitioner is a career status State employee entitled to the protections of the North Carolina Human Resources Act. N.C. Gen. Stat. § 126-1 *et seq.*

5. N.C. Gen. Stat. § 126-35 states 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."

6. "Just cause, like justice itself, is not susceptible of precise definition." *N. Carolina Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). Properly understood, 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.* (citation and quotation marks omitted). "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Id.*

7. Respondent has the burden of proof to demonstrate by a preponderance of the evidence that it had just cause to dismiss Petitioner from employment for engaging in unacceptable personal conduct. N.C. Gen. Stat. § 126-34.02(d).

8. Unacceptable personal conduct includes "conduct for which no reasonable person should expect to receive prior warning . . . the willful violation of known or written work rules . . . and conduct unbecoming a state employee that is detrimental to state service. . . ." 25 NCAC 01J .0614(8).

9. In *Warren v. North Carolina Dept. of Crime Control and Public Safety*, the North Carolina Court of Appeals laid out a 3-part approach to determine whether just cause exists to discipline a career State employee for unacceptable personal conduct:

The proper analytical approach is to *first* determine whether the employee engaged in the conduct which the employer alleges. The *second* inquiry is whether the employee's conduct falls within one of the categories of 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.

221 N.C. App. 376 at 383, 726 S.E.2d 920 at 925 (2012).

10. If an employee's conduct qualifies as unacceptable personal conduct, courts must consider a number of 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. Department of Public Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

11. Respondent DDS adjudicates disability claims for the Social Security Administration and determines eligibility for Social Security Disability Insurance, Medicaid, and Supplemental Security Income.

12. Respondent's "Acceptable Use for DHHS Resources Policy" states: "All individuals with access to state-owned data are responsible for the protection and confidentiality of such data." Respondent's Acceptable Use Agreement requires all users with data access are to conduct only activities authorized by Respondent. Respondent's Internal Investigation Form notes that an employee's refusal to cooperate in a reasonable, administrative investigation will be considered a personal conduct an my result in disciplinary action, including dismissal.

13. This Tribunal must first examine the evidence to determine whether Petitioner committed the acts of which she is accused. It is evident that this investigation was flawed from the start. Ms. Russell determined before she even spoke to the Petitioner that Petitioner must have improperly accessed other employees' emails and personal drives on their computers to learn about the reorganization of DDS, and she never retreated from this determination, even when the evidence did not support her conclusion.

14. In her own March 18, 2020 dismissal letter to Petitioner, Ms. Russell stated:

Although I was not able to find direct evidence to indicate you reviewed the documentation, the only way you would have been able to provide the details about the reorganization plan you shared with Ms. Johnson and Ms. Stanley was if you reviewed the documentation that supported it.

Resp. Ex. 25.

15. However, there was no evidence that Petitioner ever accessed this information, and all of the employees interviewed by Ms. Russell stated that they did not give any detailed information to Petitioner. Petitioner's explanation at hearing was that she never improperly accessed this information, and that no one gave her any details of the reorganization. This was a casual, speculative conversation during a work break while sharing jellybeans with co-workers.

16. While it appears that Petitioner did access two or three files from other employees' personal drives, the undisputed evidence showed that Petitioner accessed those files several years before Ms. Russell's investigation, and there was no evidence proving Petitioner did so for an improper purpose or for personal gain.

17. Ms. Russell found Petitioner's statements during the investigation to be false and misleading, but her opinion on this was corrupted by the fact that she had determined from the start that Petitioner had violated policies, and she refused to back away from this even when the evidence showed otherwise. Ms. Russell expected the Petitioner to confess to her, and when Petitioner did not, she assumed that she was continuing to cover up some misdeeds.

18. Since Respondent failed to prove that Petitioner committed the alleged unacceptable personal conduct, the first prong of the *Warren* analysis, the undersigned need not perform any analysis of the evidence under the second and third prong of the *Warren* just cause analysis.

19. Respondent failed to present sufficient, credible evidence to show that Petitioner violated any policy, agreement or Internal Investigation Form. As such, Respondent failed to prove that Petitioner engaged in unacceptable personal conduct, and thus, lacked just cause to dismiss Petitioner from employment. There must be more than mere speculation, assumption, personal beliefs, or an employee's own inconsistent guesses to terminate a career State employee for just cause. See *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 694–95, 575 S.E.2d 46, 52 (2003).

20. Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent deprived Petitioner of property, substantially prejudiced Petitioner's rights and acted erroneously, failed to act as required by law or rule, and abused its discretion by dismissing Petitioner from employment without just cause.

21. Under the provisions of Chapter 126 of the General Statutes of North Carolina and the administrative rules in 25 NCAC 01J .1306, 25 NCAC 01J .1308 & .1309, 25 NCAC 01J .1311, and 25 NCAC 01J .1319, Petitioner is entitled to reinstatement to her same or similar position, backpay, and reasonable attorney's fees and costs. Petitioner is entitled to all the benefits to which she would have become entitled but for her dismissal. 25 NCAC 01J .1300 *et seq.*

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. Petitioner's termination is ordered to be overturned and removed from her personnel file, and she shall receive back pay and attorney's fees, as well as all other remedies available under law. Petitioner's counsel may file a Petition seeking attorney's fees in accordance with N.C. Gen. Stat. § 150B-33 and N.C. Gen. Stat. § 126-34.02.

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 18th day of February, 2021.



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:

Jennifer J Knox
The Law Firm of Jennifer Knox, PC
jenknox74@gmail.com
Attorney For Petitioner

William Walton
N.C. Department of Justice
wwalton@ncdoj.gov
Attorney For Respondent

Joseph Edward Elder
NC Dept. of Justice, Office of the Attorney General
jelder@ncdoj.gov
Attorney For Respondent

This the 18th day of February, 2021.



Jerrod Godwin
Administrative Law Judge Assistant
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 919-431-3000