

STATE OF NORTH CAROLINA  
COUNTY OF HAYWOOD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
20 OSP 00944

<p>Lisa A Tomlin Petitioner,</p> <p>v.</p> <p>Haywood County Haywood County Health and Human Services Agency Respondent.</p>	<p><b>FINAL DECISION</b></p>
--	------------------------------

THIS CONTESTED CASE was heard remotely before the Honorable Selina Malherbe, Administrative Law Judge, beginning on October 14-16 and 22, 2020, November 16, 2020 and April 21, 2021 via Microsoft Teams Videoconference. Respondent's Proposed Decision and Petitioner's Response were proffered on May 25, 2021 and June 7, 2021, respectively.

**APPEARANCES**

For Petitioner:

John Hunter  
John C. Hunter Law Firm  
One North Pack Square  
Suite 421  
Asheville, NC 28801

For Respondent:

Jonathan W. Yarbrough  
Constangy, Brooks, Smith & Prophete, LLP  
84 Peachtree Road, Suite 230  
Asheville, NC 28803

**EXTENSION OF TIME DUE TO EXTRAORDINARY CAUSE**

Pursuant to N.C.Gen. Stat. § 126-34.02(a), a final decision must be filed within 180 days after the commencement of a personnel case. The 180-day deadline in this contested case was August 27, 2020. This deadline, however, may be extended upon a showing of extraordinary cause. Extraordinary cause is defined in 26 NCAC 03 .0118(b) as "...out of the ordinary; exceeding the usual, average, or normal measure or degree; not usual, regular, or of a customary kind." The following constitutes extraordinary cause for the delay in the filing of the final decision in this contested case:

The COVID-19 pandemic and the disruption to everyone’s ordinary and regular work and life activities is unprecedented. Complications arising from the COVID-19 pandemic contributed to the delay of the preparation of the transcript of the evidentiary part of this contested case hearing, a process that took an abnormally long four months to complete, delaying the parties closing oral statements to April 21, 2021.

**EXHIBITS**

**Admitted for Petitioner:**

<b>Exhibit</b>	<b>Description</b>
P8	01.13.20 Email from McClure to Tomlin
P32	Job evaluations of Tomlin
P34	Notes of investigative interviews
P35	Email chain provided via email by Mr. Hunter on 10/22/20

**Admitted for Respondent:**

<b>Exhibit</b>	<b>Description</b>
R1	12.30.2013 Signed Employee Acknowledgement Form – Tomlin
R2	06.01.2018 Conversation with Lisa Tomlin recorded by Debbie Brown
R3	06.29.2018 Email from Dryman to Brown re: Lisa Tomlin
R4	07.09.2018 Email from Brown to Tomlin, Allison re: Follow-up to Conversation about using profanity
R5	Employee Statement – Julie Reynolds **not dated but references 02.22.19
R6	Employee Statement – Coleman Hudson **not dated but references 2.22.19
R7	02.25.2019 Employee Statement – Tracy Messer
R8	02.27.2019 Employee Statement – Holly Kinsland
R9	03.07.2019 Documentation of Employee Conference – Tomlin - Allison
R12	03.20.2019 Complaints from HHSA Staff and request to meet with County HR – documented by Kathi McClure
R14	03.22.2019 Email from McClure to Tomlin regarding meeting with staff
R15	03.25.2019 Haywood County HR Report of Formal Complaints from Income Maintenance Staff To Ira Dove from McClure, Patterson
R16	04.08.2019 – Haywood County HR Follow-up Report of Findings for an anon. complaint from HHSA IMC Case Workers prepared by Patterson
R17	05.10.2019 Letter from Allison, Dove to Lisa Tomlin
R18	05.31.2019 F&C Team notes
R19	06.10.2019 F&C Team notes
R20	06.19.2019 Email from Tomlin to McClure re: Debbie’s Training Plan
R21	06.21.2019 Certificate of Participation – Leadership Development – Tomlin
R22	06.28.2019 F&C Team notes
R23	07.10.2019 Henderson County HR Summary of Discussion Mediation – Lisa Tomlin and Debbie Brown

R24 07.12.2019 F&C Team notes

R25 08.06.2019 Email from Reynolds to Tomlin re: CSE Referrals

R26 08.07.2019 Meeting Teresa Allison held with Julie Reynolds, Lisa Tomlin re: Action Plan for F&C Team

R27 08.09.2019 Email from Teresa Allison to Lisa Tomlin Julie Reynolds Deborah Brown re: Action Plan \*\*Includes Family and Children's Medicaid Action Plan

R30 09.05.2019 Debbie Brown's statement of discussion with Julie Reynolds on 09.04.2019

R32 09.20.2019 Email from Julie Reynolds to Allison, Brown, Tomlin re: Vision Quest \*\*Includes Family and Children's Medicaid Action Plan Rough Draft

R35 12.11.2019 Email from Brown to Tomlin, Allison re: Summary of Today's meeting and meeting on Thursday

R36 01.07.2020 Teresa Allison notes from Conversation with Lisa Tomlin

R37 1.07.2020 Julie Reynolds meeting notes with Brown, Tomlin and Reynolds – Subject: Current Work and general topics of F&C unit

R38 01.07.2020 F&C notes

R39 01.08.2020 Confidential email from Teresa Allison to McClure, Patterson, Dove re: To report incident of concern

R40 01.09.2020 Letter from Brown to McClure re: Formal Grievance letter against Tomlin

R41 01.09.2020 Email from Tomlin to Pullin, Owen, Vasquez, McGaha, Deese, Hicks, Penland, Trantham, Sorto, Reynolds, Brown re: F&C Processing Changes

R42 01.10.2020 Email from Allison to Tomlin, Dove, McClure, Patterson re: Meeting recap and Info.

R43 01.13.2020 Email from McClure to Dove, Patterson, Allison re: Meeting recap & Info – CONFIDENTIAL

R44 01.14.2020 Confidential email from Reynolds to McClure, Patterson re: attached letter \*\*including letter re: feelings concerning issues while supervising the F&C Team

R47 01.15.2020 Teresa Allison Summary notes – Amanda Gentry conversation

R48 01.16.2020 Interview with Amy Pullin - Documentation prepared by McClure

R49 01.16.2020 Interview with Danette McGaha - Documentation prepared by McClure

R50 01.16.2020 Interview with Rebecca Lackey - Documentation prepared by McClure

R51 01.17.2020 Interview with Brooklyn Johnson - Documentation prepared by McClure

R52 01.17.2020 Email from Tomlin to McClure, Patterson re: Requested Information for today's meeting RESPONDENT'S 688 – 698 CONFIDENTIAL

R53 01.17.2020 Letter from McClure, Haywood County HR to Tomlin re: Effective Immediately placed on Investigatory Status with Pay

R54 01.20.2020 Email from Tomlin to McClure, Dove, Allison, Patterson re: Meeting on 1.17.20

R55 01.21.2020 Heidi Hicks Summary

R56 01.28.2020 Email from Tomlin to McClure, Dove, Allison, Patterson re: PD Notice – Personnel Matter

- R57 01.29.2020 Letter From McClure Haywood County HR re: Pre-Disciplinary Conference. \*\*includes 03.07.2019 Documentation From Teresa Allison
- R58 01.29.2020 Letter from McClure Haywood County HR re: recommendation for formal disciplinary action up to and including termination.
- R59 03.23.2020 McClure’s Confidential Follow-up notes from complaint from Brown re: Tomlin
- R61 Mediation notes
- R62 Memo from Lisa Tomlin re: Hard past week and a half
- R63 Hallmark Card and Envelope
- R64 Leadership Materials
- R65 02.26.2019 Email from Lori Tomlin to Lisa Tomlin re: OMG \*\*includes attachment notes on Lisa Tomlin’s expectations and documentation
- R66 Haywood County Personnel Policy Manual – Job Performance Policy and Workplace Violence Policy
- R68 Voice message from Tomlin, Lisa A. to McClure [nupointvoicemail\_133022]
- R70 Statement from Holly Kinsland

**WITNESSES**

**Called by Petitioner:**

None

**Called by Respondent:**

Ira Dove  
 Kathi McClure  
 Debbie Brown  
 Teresa Allison  
 Julie Reynolds  
 Aimee Pullin  
 Amanda Gentry  
 Tracy Messer

**ISSUES**

Whether Respondent provided the Petitioner with a Pre-Dismissal Conference and process consistent with the requirements of due process, the rules of the North Carolina State Human Resources Commission and the duly adopted Personnel Policies of Haywood County.

Whether Respondent had just cause to terminate Petitioner from her position as Income Maintenance Supervisor II in the Family and Children’s Medicaid Unit of the Haywood County Department of Health and Human Services.

## FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case. The undersigned also has reviewed the entire record herein including, but not limited to, the parties post-hearing oral arguments and memoranda of law, Respondent's Proposed Final Decision, and the Petitioner's comments and requested revisions of the Respondent's Proposed Final Decision.

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

2. Respondent Haywood County (hereinafter the "County"), by and through its County Health Department, is subject to Chapter 126-5 (a)(2) c. and was Petitioner's employer at all relevant times as herein described.

3. Petitioner was employed as an Income Maintenance Supervisor II for the Haywood County Department of Social Services ("DSS"), a consolidated agency with the Haywood County Health Department. Tr. 413, 1096.

4. As a Supervisor, Petitioner was part of the DSS leadership team. Petitioner reported to Debbie Brown, Income Maintenance Caseworker III/Economic Services Program Manager, who reported to Economic Services Director Teresa Allison, who reported to Ira Dove, Health and Human Services Director. Tr. 266, 268, 412-413, 552, 983, 985-986; R52. Kathi McClure is the Human Resource Director for Haywood County. Tr. 531.

5. In June 2019, Petitioner attended and completed leadership training conducted by McClure that provided detailed information on effective leadership skills, including effective communication and developing trust. Tr. 552-564; R21 & R64.

6. Brown's expectations for all of her subordinate supervisors, including Petitioner, were that in addition to monitoring work and ensuring that their subordinate employees are determining eligibility accurately and timely, that each supervisor is respectful, professional, and communicates well with her and with other supervisors in the Economic Services division of DSS. Tr. 267.

7. Brown had supervised Petitioner since Petitioner became a Supervisor and has had several conversations with Petitioner and opportunities to reinforce her expectations with Petitioner. Tr. 268.

8. On July 9, 2018, Brown warned Petitioner to “maintain a professional demeanor when dealing with issues with a co-worker, supervisor or a client, which includes speaking in a professional way without using profanity or other inappropriate language.” Tr. 274-275, 280-81; R4.

9. Rather than leading by example and being a positive role model for her unit and others in DSS, Petitioner targeted employees for abuse. One such target was Lisa Dryman, a supervisor for a different unit under Brown. Petitioner believed it was funny to hide, then to jump out, scaring Dryman who would respond with a high-pitched scream so that her coworkers overheard and would laugh. Tr. 61-62, 128, 142; R5 & R6.

10. Petitioner engaged in this same scaring conduct with other coworkers. R6.

11. On February 22, 2019, Petitioner’s unit in Family and Children’s’ Medicaid was having a birthday celebration. Tr. 61-62. Petitioner had been scaring Dryman and causing Food and Nutrition Services employees to complain about the noise. Tr. 63-64, 129.

12. Julie Reynolds, a supervisor of another unit under Brown, attempted to quiet the celebration but was met with rudeness, intimidating and belittling behavior from Petitioner. Tr. 67-68, 129-131. R5 & R7. Unhappy with being asked to quiet down, Petitioner went to Reynolds’s office where Petitioner caused such a scene that Income Maintenance Caseworker II in Food and Nutrition Services Tracey Messer went to Reynolds’s office where she observed Petitioner waving her arms in an angry motion and “hollering” at Reynolds. Reynolds was crying so Messer asked Reynolds if she wanted to be talking to Petitioner and Reynolds answered no. Petitioner started to argue with Messer but then left Reynolds’ office. Messer walked Reynolds to her car as she was still upset. Tr. 59, 69-73, 132-134, 190; R5 & R7.

13. The “scaring incident” involving Dryman on February 22, 2020 was investigated by Allison. Petitioner did not deny the actions which led to a documented employee conference held by Allison and Dove on March 7, 2019. Tr. 428-431, 991-992; R9. During the conference, Allison informed Petitioner of her expectations that she be professional and respectful in her communications, promote teamwork, get along with others and not intentionally cause conflict. Tr. 430.

14. On March 19, 2019, Petitioner contacted McClure because three of her coworkers requested to meet with McClure. McClure met with Petitioner’s coworkers on March 20, 2019 and heard their complaints concerning Dryman as a supervisor and their praise of Petitioner. R12.

15. On March 20, 2019, an anonymous complaint concerning Petitioner and Dryman was received by the County’s Human Resources Office. R16.

16. On March 25, 2019, McClure sent to Dove a memorandum summarizing formal complaints and comments which included the statement that “employees feel they are caught in a ‘silent war’ between Dryman and [Petitioner]”. R15.

17. On April 8, 2019, a report of findings based on interviews of staff following the March 20, 2019 anonymous complaint states that there is conflict between the two supervisors, Dryman and Petitioner. R16.

18. On May 10, 2019, Dove and Allison sent a letter to Petitioner, informing her that her supervisor, Debbie Brown, would be giving her a series of “written instructions and assignments to complete ... to the best of your ability. In addition, you will be expected to make a full commitment to making a positive work experience.” R17

19. In Team meeting notes dated May 31, 2019, June 10, 2019 and June 28, 2019, Brown reports that the management structure was discussed and it was reinforced that there were no co-supervisors. Petitioner disagreed with Brown’s management structure and continued to question it. Tr. 288-291, 304-305; R18, R19 & R22.

20. On June 10, 2019, Brown met with Petitioner and Reynolds, trying to ensure a smooth transition of Julie Reynolds to a supervisor position in her division in July and to discuss team structure changes that would occur. She delineated the division of labor between Petitioner and Reynolds with each supervisor having responsibility for only her respective subordinate employees. Tr. 125, 138-139, 282-283, 287-288; R19. Brown specifically instructed that “staff needed structure and having two supervisors giving them directives could be confusing at times for staff.” R19.

21. During this meeting, Brown assigned employees to Petitioner’s and Reynolds’s respective teams. These assignments meant that the supervisors, Petitioner and Reynolds, were not to give directives to employees who were not on their own team and who they did not directly supervise. Tr. 139, 288-290; R19.

22. Petitioner was aware of Brown’s Training Plan for new employees and strongly disagreed with it. R19 & R20

23. On June 21, 2019, Petitioner received a certificate of participation for a leadership development class taught by McClure. R21

24. On July 10, 2019, McClure held a mediation discussion between Petitioner and Brown which was attended by Dove, Allison and Patterson. R23. Brown had hoped that the mediation would have resulted in them working together instead of Petitioner being defensive and argumentative. Tr. 295-298, 564-567.

25. In August 2019, Petitioner ignored Brown’s directive of June 10, 2019, by assigning work to a member of Reynolds’ team. Tr. 143-144, 294; R25.

26. On August 7, 2019, another meeting concerning an Action Plan for Brown’s team was held involving Brown, Allison, Petitioner and Reynolds. During this meeting, Petitioner was rude to Reynolds and disagreed with Brown. Tr. 303-304; R26.

27. On August 9, 2019, Allison developed, and reviewed with Petitioner and Reynolds, a Family and Children's Medicaid Action Plan. Tr. 151, 434; R27. This action plan was based on feedback from Brown and the staff, and contained many topics regarding professionalism and communication. Tr. 151-156. Both Petitioner and Reynolds were instructed to "[b]e the role model that sets the tone and example for the team to follow." R. 27.

28. Petitioner openly criticized Reynolds and Brown in a derogatory manner and was very open with subordinate employees regarding her feelings about "administration, higher ups", referring to both Reynolds and Brown as "bitches" and "incompetent," and held a "bash Julie" session with hers and Reynolds's subordinate employees. Petitioner's conduct "antagonized the situation and made it worse" saying things like Reynolds does not know how to do her job. Tr. 95-100.

29. Petitioner was an active participant in an exchange of several text messages wherein employees within DSS who were supervised by Reynolds where Reynolds was called a "Twatwaffle" and a "Twatapotomus". Tr. 28, 102-103, 111, 119. Petitioner referred to Reynolds as a "browner." Tr. 104. At no point did Petitioner exercise the discretion and authority expected of a member of the DSS leadership team to stop the disparaging conversation about Reynolds. Tr. 107.

30. In August and September, there were continuing issues related to Petitioner: assigning tasks to others who were not on her team; inappropriate responses in meetings toward her superior, Allison; suggestions to improve management; and staff distress about tensions in the division. R 25, 26, 27 & 30.

31. On November 22, 2019, an anonymous letter was sent to Dove, criticizing Reynolds as a supervisor and praising Petitioner as a supervisor. R33.

32. On December 11, 2019, Brown welcomed Petitioner back to work from family medical leave by leaving a Calla Lilly plant as a gift on her desk along with a card which said: "Lisa, Welcome ... so glad you are back! Please let me know if there is anything I can do to make your transition back to work easier. Debbie". Tr. 306-307, 441; R40 & R63. Brown later went to Petitioner's office to personally welcome her return to work. Tr. 307.

33. After a meeting with Brown where Petitioner's vacation request was denied, Petitioner left the gifted plant at Brown's office door along with the card which she had attempted to rip in half. Tr. 308-310, 313, 329, 441; R63.

34. After this incident, Brown went to McClure in Human Resources to raise concerns about Petitioner, and she complained to Dove and Allison that Petitioner was creating a hostile working environment and engaging in workplace violence. Tr. 329, 330, 441, 1014.

35. On December 11, 2019, Brown very clearly explained to Petitioner that Aimee Pullin had been promoted to Lead Worker and that she was under Brown's "direct supervision and any assignments for Aimee [Pullin] are given by [Brown]" Tr. 211-212; R35.



36. On January 7, 2020, Petitioner continued to question Brown's management of the division and felt that it was a "hostile work environment". During a meeting between Brown and her subordinate supervisors, Reynolds and Petitioner, Petitioner disagreed with the discussion and left the meeting before it ended. R37.

37. Later that day of January 7 2020, Petitioner called a meeting of employees in the Family and Children's Medicaid Unit which included Pullin and employees other than those Petitioner supervised. Tr. 166-168.

38. Neither Reynolds nor Brown were aware of the meeting even though their subordinate employees were summoned to attend by Petitioner. Tr. 168-169, 438.

39. Petitioner gave assignments to Pullin in direct defiance of the clear instructions given to her by Brown that she was not do so. Tr. 168-169, 438, 440; R39.

40. Petitioner assigned "shelter time" to subordinate employees who were not on her team, thereby rearranging the schedules of employees who she did not supervise. After her meeting, Petitioner sent an email to attendees, copying Reynolds and Brown, summarizing the changes she had implemented. Tr. 171, 316-320, 440, 508, 1015, 1075-76; R41.

41. On January 9, 2020, Petitioner sent an email to Allison, complaining about Brown's reorganization of the division and Brown's refusal to change the new organization. R42.

42. On January 9, 2020, Brown sent a letter to McClure "as a written formal grievance against Petitioner", complaining about Petitioner's bullying, intimidation, disrespect and argumentative nature towards her and others in the department. Tr. 328, 331, 586; R40.

43. On January 13, 2020, Petitioner sent an email to the Human Resources Office, complaining of a hostile work environment. R43.

44. On January 14, 2020, Reynolds filed a complaint against Petitioner with the Human Resources Office. Tr. 174-176, 588; R44.

45. On January 16, 2020, the County opened an investigation which consisted of interviewing several employees. Tr.684, 723, 847, 1016 & 1021; R47-51.

46. On January 17, 2020, Petitioner sent an email to McClure providing information regarding her complaint which included additional language highlighted in red type and accompanied by her job description. R52.

47. On January 17, 2020, McClure reviewed Petitioner's complaint and responded in detail to each of Petitioner's allegations. Tr. 652-675.

48. On January 17, 2020, after a meeting with McClure and others where she was informed of the details of the pending investigation and questioned regarding the allegations, Petitioner was suspended with pay pending the completion of the investigation. Tr. 684-685, 688, 1032; R53.

49. Later in the day of January 17, 2020, Petitioner sent an email to McClure, Dove, Allison, and Patterson, stating “I wanted to apologize for any of my actions that warranted your decision to place me on leave.” Tr. 688; R54. Petitioner further stated that she wanted to “work with all employees at HHSA with respect and kindness” and Petitioner hoped that the County would give her another chance now that she was aware of the issues regarding her actions. R54.

50. Following the completion of the investigation, McClure sent the following email to Bryant Morehead, the Haywood County Manager, on January 23, 2020:

Bryant,

Just to give you an update. Krystal and I met with Ira and Teresa yesterday to discuss the recommendations for personnel actions on the individuals at HHSA. I did let them know that we had discussed this with you as well. After discussion and careful consideration, we agreed on the following actions to recommend to you: ... Lisa Tomlin will be terminated for Unacceptable Personal Conduct and Insubordination ... If you are still in agreement with this, I will prepare all of the documents and send to everyone for final review. We plan to wrap this up by Thursday of next week as we have to give all of these individuals due process as they are Career Status employees per OSHR guidelines. ... Thanks, Kathi P35.

51. Several minutes later, Morehead replied: “I am comfortable with moving forward with this plan.” P35.

52. As the Haywood County Manager, Morehead is the only person vested with the authority to make a final decision to dismiss Petitioner. Tr. 700 & 1089.

53. On January 28, 2020, McClure sent Petitioner a letter informing her that a Pre-Disciplinary Conference was to be held the next day, January 29, 2020, to discuss with Petitioner her “Unacceptable Personal Conduct” and her participation in creating and perpetuating “a negative work environment and a follow up meeting is scheduled to discuss the decision on Thursday, January 30, 2020.” Tr. 692-693; R56. This letter does not inform the Petitioner that she was subject to dismissal due to the allegations against her. Tr. 753.

54. On January 29, 2020, Petitioner attended the Pre-Disciplinary Conference held by McClure, Dove, Allison and Patterson. Tr. 694-695, 1034; R57.

55. Petitioner was provided a Pre-Disciplinary Conference letter which contained written notice of specific instances of alleged misconduct which were the same as those raised in the January 17, 2020 meeting. Tr. 695-698; R57.

56. The Pre-Disciplinary Conference letter also states that a “follow-up meeting is scheduled for Thursday, January 30, 2020, at 11:00a.m. in the Human Resources conference room to review the decision regarding your continued employment with Haywood County Health and Human Services.” R57.

57. The participants in the Pre-Disciplinary conference made no effort to subsequently confer with the County Manager or pass along any of the responses or information provided by the Petitioner at the Pre-Disciplinary Conference. Tr. 787, 790, 791 & 859-860.

58. Petitioner responded to the Pre-Disciplinary Conference letter in writing stating that she now knew “what [was] expected of [her] and how [her] opinion might affect the team and the agency” completely ignoring all the other efforts by the County to try to impress upon Petitioner its expectations for leaders within DSS. Tr. 698; R62.

59. On January 30, 2020, the meeting was attended by McClure, Dove, Allison, and Patterson. Tr. 700. Petitioner was informed that the County Manager had decided to terminate her employment for “Unacceptable Personal Conduct, Insubordination and active participation in creating and perpetuating a negative work environment” as stated in the letter dated January 29, 2020, the same date that the Pre-Disciplinary Conference was held. R58.

60. The letter identifies pertinent County personnel policies for: Unacceptable Personal Conduct, Insubordination, Hostile World Environment, Workplace Violence, Violence and Insubordination. R58 & R66.

61. The only documentation of the decision by the County Manager to terminate the Petitioner is the email correspondence of January 23, 2020 which occurred five days prior to the date of the Pre-Disciplinary Conference.

62. Petitioner was informed of her appeal rights and Petitioner had a copy of the County’s Policy Manual which includes policies regarding Disciplinary Actions, Suspension and Dismissal. Tr. 703, 705; R1 & R66.

63. Petitioner violated County policies concerning Unacceptable Personal Conduct and Insubordination.

64. Petitioner’s actions negatively affected her coworkers. R59. Amanda Gentry, requested to be transferred back to the Sheriff’s Department. Tr. 21, 35-36. Pullin was demoted from lead worker to LMC II. Tr. 106, 1029. Danette McGaha resigned from her employment in lieu of termination. Tr. 405, 542, 762. Rebecca Lackey resigned from her employment in lieu of possible termination. Tr. 543, 782-783, 1029.

BASED upon the foregoing FINDINGS OF FACT, the undersigned makes the following:

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal jurisdiction over the issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.

2. The parties are properly before the Office of Administrative Hearings and there is no issue of improper procedure.

3. 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.

4. Respondent Haywood County Health Department is subject to Chapter 126 of the North Carolina General Statutes and is the employer of Petitioner.

5. A “career state employee” is defined as a state employee, or an employee of a local entity as described in N.C. Gen. Stat. § 126-5(a)(2) who is in a permanent position with a permanent appointment and continuously has been employed by the State of North Carolina in a non-exempt position for the immediate 12 preceding months. N.C. Gen Stat. § 126-1.1.

6. At the time of her termination, Petitioner was a career State employee subject to the provisions of the North Carolina Human Resources Act. N.C. Gen. Stat. § 126-1, *et seq.*

7. A career State employee may be terminated only for “just cause.” N.C. Gen. Stat. § 126-35(a). The State employer has the burden of showing by a preponderance of the evidence that there was “just cause” for discharge. N.C. Gen. Stat. § 126-34.02(d).

8. Pursuant to regulations promulgated by the Office of State Personnel, there are two bases for the termination of an employee for “just cause”: (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 25 N.C.A.C. 01I.2301(c).

9. Petitioner’s termination from her position as an Income Maintenance Supervisor II was based on unacceptable personal conduct.

10. An employee may be terminated without any prior warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 N.C.A.C. 01I.2301(c)(2); 25 N.C.A.C.01I.2304(a). One instance of unacceptable personal conduct constitutes “just cause” for demotion. *Hilliard v. N.C. Dep’t of Corr.*, 173 N.C. App. 594, 597, 620 S.E. 14, 17 (2005).

11. Unacceptable personal conduct, as defined by the Office of State Personnel, 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 an agency employee that is detrimental to the agency’s service.” 25 N.C.A.C. 01I.2304(b)(5).

12. In the case of “conduct unbecoming a state employee that is detrimental to state service,” the State employer is not required to make a showing of actual harm, “only a potential detrimental impact (whether conduct like the employee’s could potentially adversely affect the mission or legitimate interest of the State employer).” *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17.

13. Unacceptable personal conduct includes insubordination which “is the willful failure or refusal to carry out an order from an authorized supervisor.” 25 NCAC 01I .2304(b)(8).

14. The Petitioner engaged in unacceptable personal conduct when she assigned duties to and changed the schedules of employees who were not on her team in violation of directives from her supervisor; referred to her supervisor and to other employees in a derogatory fashion, engaged in and encouraged other employees in name-calling. Moreover, Petitioner had been coached, warned and admonished about this conduct numerous times. Petitioner’s conduct is unbecoming of an agency employee and casts the DSS in a negative light, adversely affecting job performance of County employees.

15. Petitioner engaged in insubordinate conduct when she willfully ignored the clear directives of her supervisor by assigning work and rearranging scheduled of employees who were not subordinate employees on her team.

16. In determining whether a public employer had “just cause” to discipline its employee the fundamental question is whether “the disciplinary action take was ‘just.’” *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

17. In *Carroll*, a personal conduct case, the North Carolina Supreme Court held “[d]etermining whether a public employee had ‘just cause’ to discipline its employee requires two separate inquiries: “whether the employee engaged in the conduct the employer alleges, and second, whether the conduct constitutes ‘just cause’ for the disciplinary action taken.” *Id.*

18. In *Harris v. N.C. Dep’t of Public Safety*, 798 S.E.2d 127 (N.C. App 2017), the Court reiterated its earlier explanation of what this tribunal must consider as to the degree of discipline, as enunciated in *Warren v. N.C. Dep’t. Crime Control & Public Safety*, 221 N.C. App. 376, 383, 726 S.E.2d 920, 924-925 (2012):

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.*

*Harris*, at 135 (quoting *Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925) (emphasis supplied by *Harris* decision).

19. The necessary application of Carroll and Warren to the instant case results in an

affirmative answer to the first two inquiries. The Petitioner engaged in the conduct the Respondent alleged and the Petitioner's conduct falls within two of the categories of unacceptable personal conduct provided by the Administrative Code.

20. The final inquiry in the *Warren* analysis is determining whether the discipline imposed for that conduct was "just." "Just cause" must be determined based "upon an examination of the facts and circumstances of each individual case," that is, the "balancing of equities."

21. Just cause supporting termination has been found in much lesser circumstances than the present. For example, just cause supporting termination has been found where an employee failed to activate a Gmail account. *Swauger v. University of North Carolina Charlotte*, 16 OSP 04726, 2017 WL 839585 (N.C.O.A.H.). Just cause also existed supporting termination where an employee refused to work scheduled work hours and displayed a negative attitude toward her supervisor. *Bailey v. Winston-Salem State University*, 06 OSP 021106, 2006 WL 3771925.

22. Respondent has met its burden of proof to show that Petitioner engaged in unacceptable personal conduct and considering the totality of the facts and circumstances, the Respondent had "just cause" to terminate Petitioner.

23. Before an employee may be disciplined, an agency must comply with the procedural requirements set forth in 25 N.C.A.C. 01I.2308(4).

24. The Administrative Code required that the supervisor recommending dismissal to discuss the recommendation with agency director. This requirement was met in that Ira Dove, the Agency Director, discussed the dismissal with Allison and McClure. 25 N.C.A.C. 01I.2308(4)(a). Furthermore, the person conducting the pre-dismissal conference must have the authority to decide what, if any, disciplinary action would be imposed. Dove had the authority to discipline and terminate the Petitioner with the consent of the County Manager. Tr. 1016-1017; N.C. Gen. Stat. sec. 153A-77e.

25. The County Manager possessed the final authority to decide if the Petitioner was to be terminated or not. It is uncontested that the County Manager did not conduct nor attend the Pre-Disciplinary Conference. Respondent thus acted in violation of 25 N.C. Administrative Code 01I. 2308.4(a).

26. The County conducted a pre-dismissal conference with the Petitioner. Dove, as Agency Director, conducted the pre-dismissal conference to review information from the Petitioner and to inform her of the prospect for dismissal orally and in writing. N.C.A.C. 01I.2308(4)(d),(e). Based on her written response, Petitioner knew and acknowledged her potential dismissal.

27. The County subsequently met again with the Petitioner to communicate its decision to terminate her employment for unacceptable conduct. This was communicated to the Petitioner orally and in writing. N.C.A.C. 01I.2308(4)(f).

28. Petitioner received a full hearing before the undersigned Administrative Law

Judge. Petitioner was represented by counsel and was able to both present witnesses to testify on her behalf and to testify on her own behalf, although she declined to do so, and to cross-examine Respondent's witnesses. Therefore, any due process deficiencies that may have resulted from the manner that Respondent conducted the pre-dismissal conference were cured by the OAH hearing. *Haas v. N.C. Dep't of Crime Control and Pub. Safety*, 206 N.C. App. 761 (2010) citing to *Hilliard*, 620 S.E.2d at 18.

29. Petitioner received both a pre-termination opportunity to respond to the allegations against her and a post-termination administrative hearing, fully satisfying due process requirements for the termination of her employment.

30. A preponderance of the evidence indicates that the decision to terminate the Petitioner had been made prior to providing her with the opportunity to be heard at a properly noticed and conducted Pre-Disciplinary Conference.

31. In cases such as this, in which it is determined that the Respondent ultimately possessed "just cause" to terminate the Petitioner, but where there have been violations of the Petitioner's due process and procedural rights in the termination process, the normal, customary and well established legal remedy for such violations is an award of back pay, attorney fees and costs to the Petitioner through the date of the contested case hearing at which "just cause" is established, but not reinstatement. *Bishop v. N. Carolina Dep't of Hum. Res., O'Berry Ctr.*, 100 N.C. App. 175, 178, 394 S.E.2d 702, 704. See also, 25 NCAC 01J.1306(1)

### **FINAL DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby decides that:

Respondent had "just cause" to terminate the Petitioner and the Respondent's decision to terminate the Petitioner is AFFIRMED; and

Respondent failed to provide the Petitioner with the legally required Pre-Dismisal process leading to termination and, therefore, Petitioner is awarded back pay from the date of her termination on January 30, 2020 to the last date of the hearing, April 21, 2021, and all reasonable attorney fees.

### **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.

**IT IS SO ORDERED.**

This the 8th day of July, 2021.



Selina Malherbe  
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.

John C Hunter Esq.  
John C. Hunter, Attorney at Law  
johnhunter@jchlawfirm.com  
Attorney for Petitioner

Jonathan Yarbrough  
Constangy, Brooks, Smith & Prophete  
jyarbrough@constangy.com  
Attorney for Respondent

This the 8th day of July, 2021.



Viktoriya Tsuprenko  
Paralegal  
N. C. Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh, NC 27609-6285  
Phone: 984-236-1850