

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 OSP 05459

<p>Donde Donte Rahheem Brooks Petitioner,</p> <p>v.</p> <p>North Carolina Department of Public Safety Respondent.</p>	<p>FINAL DECISION</p>
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This contested case was heard before Administrative Law Judge Melissa Owens Lassiter on March 29, 2021, virtually on Microsoft Teams, in the Office of Administrative Hearings in Raleigh, North Carolina pursuant to N.C. Gen. Stat. §§ 126-1 *et seq.*, N.C. Gen. Stat. § 150B-23, and Petitioner's contested case petition appealing Respondent's decision to dismiss him from employment for engaging in unacceptable personal conduct.

APPEARANCES

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

Respondent: Bettina J. Roberts
Assistant 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 in violation of Respondent's Use of Force policy?

GOVERNING STATUTES AND ADMINISTRATIVE RULES

N.C. Gen. Stat. §§ 126-34.02 and -35
N.C. Gen. Stat. § 150B-23 *et seq.*
25 NCAC 01J .0600 *et seq.*
N.C. Dept. of Public Safety, Use of Force Policy, Chapter F. Section .150 *et seq.*

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner: 3, 9

Respondent: 1, 3-5, 11-15
7-8 (inadmissible hearsay statements contained therein were excluded and not considered)

WITNESSES

Petitioner: Donde Brooks

Respondent: Sherry White, Correctional Sergeant I
John Milner, Investigator, Office of Special Investigation
Johnny Hawkins, Correctional Warden

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of witnesses presented at the hearing, stipulations, documents admitted into evidence, and the entire record in this proceeding as appropriate for consideration, having weighed all evidence and assessed the credibility of the witnesses, 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; whether such testimony is consistent with all other believable evidence in the case, and upon assessing the preponderance of the evidence from the record as a whole, the undersigned finds as follows:

Procedural Background

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

2. Petitioner is a career status State employee subject to the North Carolina State Human Resources Act (N.C. Gen. Stat. § 126-1 *et seq.*) who has been employed by the Respondent state agency since August 31, 2015. At the time of his dismissal, Petitioner was employed by Respondent as a Correctional Officer III at Polk Correctional Institution ("Polk CI").

3. Respondent's Polk CI is a close-custody correctional institution located in Butner, North Carolina. Polk CI is also a processing camp for youth offenders and contains the only High-Security Maximum Control Unit ("HCON" or "Supermax") in North Carolina. (T. p. 106)

4. On September 16, 2020, Polk CI Warden Johnny D. Hawkins notified Petitioner that he was recommending Petitioner be terminated from employment for engaging in unacceptable personal conduct and violating Respondent's Use of Force Policy on November 3, 2019; to wit: Petitioner "utilized unwarranted and unauthorized force when you pushed inmate Edmundson into a concrete wall." (Resp. Ex. 5) Petitioner appealed such dismissal through Respondent's internal grievance process.

5. On December 23, 2020, Respondent's Chief Deputy Secretary, Timothy D. Moose, considered and upheld an Employee Advisory Committee's recommendation to terminate Petitioner from employment for violating Respondent's Use of Force Policy on November 3, 2019. Specifically, Mr. Moose found that:

The evidence obtained during the investigation, your own admissions, and the facts presented at the EAH confirms that you did, in fact push inmate Edmundson into the wall while he was restrained. While you claim to have done so to prevent yourself from falling, the countervailing evidence establishes that your act was deliberate and lacked a proper correctional objective.

(Resp. Ex. 10)

6. On May 25, 2021, the Office of Administrative Hearings received the transcript of the March 29, 2021 hearing. The parties filed their proposed Final Decisions on June 22, 2021 and June 24, 2021, respectively.

7. Despite the due diligence of all parties, the time needed for completion of this matter, including the completion of each party's proposed Final Decisions, exceeded the usual, regular, and customary time limit due to the delay in receiving the transcript of the hearing. Therefore, the undersigned finds extraordinary cause exists for the issuance of this Final Decision beyond 180 days from the commencement of the case.

November 3, 2019 Incident at Issue

8. Issuance of a "Code 7" in Respondent's correctional institutions designates that a correctional officer ("officer") was involved in a use of force. (T. p. 40) When a Code 7 is issued, every officer who can respond reports to the location of the Code 7 for the safety of the offenders/inmates and the staff.

9. On November 3, 2019, a Code 7 was issued in building C2 at Polk CI involving inmate Damien Edmundson and Officer M. Dancy. The inmate had cursed and repeatedly refused the directives of Officer Dancy to the point that Officer Dancy pepper sprayed the inmate to gain compliance. Petitioner was not involved in or present during this use of force. (Pet. Ex. 9; Resp. Exs. 7, 11)

10. Multiple correctional officers responded to the Code 7 and used force to place the inmate on the floor. Petitioner was working in Single Cell 1 when he heard the Code 7. He responded to the Code 7 after finishing what he was doing.

11. Some of the correctional officers, including Officer Darrell Averette, restrained the inmate, placing his hands behind his back and in handcuffs. Sergeant Rodesha Gregor and Officer Dominique Alford escorted the inmate outside C2 to transport him to the Medical Unit for detoxification from the pepper spray and to treat the inmate's injuries sustained during that use of force incident. The officers transported the inmate in a tactical escort hold as he continued to be combative. (Resp. Ex. 7)

12. Once in the yard outside building C2, Petitioner and Officer D. Tilley took over the escort. Petitioner was on the inmate's left side, and Officer Davion Tilley was on the inmate's right side. Because the inmate was continuing to be combative, Petitioner and Officer Tilley used a tactical escort hold on the inmate. (T. pp. 45-47) A tactical escort is used with noncompliant or unruly inmates because it prevents them from seeing where they are going and keeps them off balance, so they are less likely to try to continue fighting with the correctional officers. (T. pp. 45-47, 110)

13. In using the tactical escort, Petitioner and Tilley bent the inmate forward at the waist so that he was looking at the ground. Each officer walked slightly behind and to the side of the inmate, with one hand on the inmate's wrist, and one hand on the inmate's shoulder. Since Petitioner was on the inmate's left side and to the rear, Petitioner had his right hand holding the inmate's wrist, and Petitioner's left hand was on the inmate's shoulder. Tilley was on the other side doing the reverse. (T. p. 110)

14. During the escort, the inmate continued resisting by grabbing, pulling, and scratching at Petitioner's hand and glove. Petitioner told the inmate several times to stop grabbing and scratching his hand. As the escort neared the Medical Unit building, they had to walk through an opening in the chain-link fence. The sidewalk in that area was divided into grooves, and there was a slight downhill slope in the sidewalk. (Resp. Ex. 12, T. pp. 67-68)

15. Because the opening through the fence was too narrow for both officers and the inmate to walk through the opening side-by-side, they had to shimmy through the opening. (T. p. 111) Petitioner walked through the gate parallel with the inmate. Officer Tilley fell slightly behind them, then walked through the gate. Petitioner turned towards the inmate. The inmate suddenly accelerated forward, fell face first into the concrete wall located directly in front of him, and fell backwards to the ground. Officer Tilley had to extend his arms to keep up with the speed at which the inmate propelled forwards. Petitioner told Officers Tilley and Averette, "Man, I tripped, you guys." (T. p. 113)

16. Petitioner thought he [himself] may have stumbled or tripped over the inmate's feet or uneven pavement and that may have caused the inmate's fall. Petitioner just knew "there was a shift in weight that caused me to about lose control" of the inmate. (T. p. 112)

17. Petitioner and Officer Tilley immediately picked the inmate off the ground and continued walking him to the elevator. Officer Averette was walking directly behind the escort but didn't observe what happened. Officer Averette picked up the inmate's shoe that had slipped off and followed behind them. (Resp. Ex. 11) Petitioner and Officer Tilley, along with Officer Averette, escorted the inmate into the elevator and to the Medical Unit for evaluation.

18. In the Medical Unit, the inmate was assessed by the nursing staff. The inmate walked without difficulty, was oriented to his situation, and was in no apparent distress. The inmate refused treatment for his injuries including refusing a finger splint. (Resp. Ex. 7, p. 5 of 6)

19. The inmate suffered multiple abrasions and lacerations to his face and head area from hitting the concrete wall. (Resp. Ex. 13 - photos)

20. During this time, Sherry White was employed as a Correctional Housing Unit Manager I in Single Cell 2 at Polk CI. Unit Manager White investigated the November 3, 2019 use of force incidents. She interviewed Officers Tilley, Averette, Dancy, McGee, Bryant, Paul, Alford, Jefferson, Petitioner, Sgt. Gregory and the inmate. (Resp. Ex. 7)

21. Warden Hawkins received verbal reports that Officer Tilley was the officer who had pushed the inmate into the wall. Warden Hawkins also watched the video of the escort incident and determined that Officer Tilley had pushed the inmate into the concrete wall. Warden Hawkins thought the incident was "one of the most egregious incidents he had ever seen. He reassigned Officer Tilley for alleged excessive force pending investigation. (T. pp. 81-82).

22. After Unit Manager White viewed the video footage as part of her investigation into the incident, she advised Warden Hawkins they needed to reevaluate the reassignments as she reported that Petitioner, not Officer Tilley, had pushed the inmate. White advised Warden Hawkins that Petitioner, not Tilley, had escorted the inmate on the left-hand side, "had inadvertently extended his arms out," and had "pushed the offender into that tower or concrete observation tower." (T. p. 82)

23. On or about November 15, 2019, Warden Hawkins reassigned Petitioner pending investigation. (T. p. 101) Warden Hawkins had to review the camera footage "over and over" and/or "on multiple occasions in order make a positive identity of Petitioner" as the officer who pushed the inmate. (T. p. 82)

24. Unit Manager White prepared an Incident Report detailing her investigation into the following incidents of use of force: (1) the hands-on physical force by Officer Alford, (2) the hands-on physical force by Officer Averette, (2) the hands-on physical force by Petitioner, (3) Officer Dancy using pepper spray on the inmate, and (4) Officer Paul using pepper spray on the inmate. (Resp. Ex. 7, pp. 1-6) White included photos taken of the inmate's injuries after the incident and video footage from the surveillance cameras

at Polk CI in her Incident Report. (Resp. Ex. 13; T. pp. 16-17) She recommended further investigation into the uses of force captured on the C19 Gym Exterior Corner camera and C13 Elevator camera. (Resp. Ex. 7, pp. 1-6)

Internal Investigation

25. OSI Investigator Milner conducted an internal investigation to determine if there was a policy violation during the November 3, 2019 incident involving Petitioner. (T. p. 56) Milner interviewed Petitioner, Correctional Captain Rene Harris, Correctional Officer III Darrell Averette, Officer Davion Tilley, and the inmate. He also watched the video of the incident by the facility's surveillance cameras. (Pet. Exs. 9, 10; Resp. Ex. 11)

a. Petitioner explained that during his and Officer Tilley's escorting the inmate, the inmate grabbed, and scratched at Petitioner's hand area, and tore the strap on Petitioner's glove on his hand. (Resp. Ex. 8) Petitioner advised that while he was "somewhat struggling (finger wrestling) to get his hand free of offender Edmundson, he (Brooks) stumbled." He stated he may have stumbled or tripped, although subtle, because he tripped over the inmate's feet or uneven pavement, but he denied pushing the inmate. Petitioner further noted that "keeping himself from falling on offender Edmundson was one of his primary objectives." (Resp. Ex. 8)

b. Milner outlined the results of his investigation in a report, including what he observed on the video footage of the incident. Milner's job was to "just outline the facts" but not make conclusions about the incident. He attached a copy of the policy he determined to be applicable to the incident, and a copy of the Incident Report to his report. Milner copied his report to OSI, legal, and Polk CI. (Resp. Ex. 8)

Dismissal Letter and Final Agency Decision

26. On September 15, 2020, Respondent conducted a predisciplinary conference with Petitioner about the November 3, 2019 incident. (Resp. Exs. 3, 5; T. pp. 89-90) During the predisciplinary conference, Petitioner explained that he may have tripped over the inmate's foot and caused the inmate to fall headfirst into the concrete tower, but that his actions were not intentional.

27. On September 16, 2020, Warden Hawkins notified Petitioner of his decision to dismiss Petitioner from employment for engaging in unacceptable personal conduct on November 3, 2019. In this letter, Hawkins included notes of Petitioner's explanation of his actions. He also summarized statements by Officer Averette, Officer Tilley, the inmate, and the opinions by Captain Rene Harris and Investigator Milner of their observations of the C19 Gym Exterior camera video. (Resp. Ex. 5)

a. Officer Averette's statement corroborated Petitioner's statement that the inmate remained aggressive after Petitioner began escorting the inmate, that the

inmate scratched and grabbed at Petitioner's glove, that Petitioner ordered the inmate to stop scratching and pulling at his glove, and that Petitioner told Averette that his feet got tangled and this caused the inmate to fall.

b. In contrast, Officer Tilley alleged that Petitioner released his tactical escort of the inmate and used both hands to push the inmate into the concrete wall.

c. Captain Harris opined that the camera video showed that Petitioner "appeared to turn toward the offender and run him into the wall." Investigator Milner opined that the camera video showed Petitioner released the escort "pushing" the offender against the concrete wall.

28. Warden Hawkins terminated Petitioner from employment because Petitioner:

[V]iolated the Department's Use of Force Policy when you slammed offender Edmundson against the concrete wall. Your actions were not reasonably necessary to obtain a proper correctional objective, and the amount of force used was unwarranted, not justified, and not within the scope of policy. In addition, offender Edmundson was not resisting or being combative at the time force was used. Furthermore, statements you made about the incident during the internal investigation were contradicted by the video evidence. Your behavior in this incident is considered Unacceptable Personal Conduct.

(Resp. Ex. 5, September 16, 2020 Dismissal Letter) Warden Hawkins relied upon statements by officers during the internal investigation, Officer Tilley's description of the incident, the Incident Report, and the C19 Gym Exterior camera video of the subject incident. (Resp. Exs. 5, 11)

29. After an internal agency appeal hearing, an Employee Advisory Committee recommended Petitioner's dismissal be upheld.

30. On December 23, 2020, Respondent's Chief Deputy Secretary Timothy Moose issued a Final Agency Decision upholding the dismissal. (Resp. Ex. 10) In making Respondent's Final Agency Decision, Chief Deputy Secretary Moose determined that Petitioner pushed the inmate into the concrete wall while the inmate was restrained. Mr. Moose detailed that he relied upon Officer Tilley's observation of the subject incident, the C19 Gym Exterior camera video of the incident, and Petitioner's "own admissions" at the predisciplinary conference and the Employee Advisory Hearing to conclude that Petitioner's action was deliberate and lacked a correctional objective. (Resp. Ex. 10, p. 3)

31. Moose also found that while Petitioner claimed to have pushed the inmate to prevent himself from falling, "the countervailing evidence establishes that your act was deliberate and lacked a proper correctional objective." (Resp. Ex. 10, p. 3)

Analysis

32. The undisputed evidence at hearing showed that Officer Tilley and Officer Averette were the only officers near the subject incident on November 3, 2019. However, neither of those officers testified at the contested case hearing. The Undersigned excluded those officers' statements, as contained in Respondent's Exhibits 7 and 8, from the record as inadmissible hearsay. The Undersigned also excluded statements by other officers and statements by the subject inmate in Respondent's Exhibits 7 and 8 from the record as inadmissible hearsay. As a result, the Undersigned did not use any of those excluded statements in Respondent's Exhibits 7 and 8 to determine whether Petitioner pushed the inmate, whether that push was deliberate, and if Petitioner violated Respondent's Use of Force Policy.

33. Respondent's Exhibit 11 consists of several videos from Polk CI from November 3, 2019, including video of the subject incident taken from camera "C19 Gym Exterior Corner" (Resp. Ex. 11). Warden Hawkins used the video of the incident to positively identify Petitioner as the officer who pushed the inmate into the concrete wall on November 3, 2019. However, in making that identification, Warden Hawkins "had to review the camera on multiple occasions in order to make a positive identity of Officer Brooks" as the officer who escorted the inmate on Edmundson's left side (Resp. Ex. 11; T. p. 82).

34. Several employees of Respondent viewed the videos of the subject incident and issued their own subjective opinions of what they thought the C19 Gym Exterior camera showed. While some opined Petitioner did use force against the inmate, not all agreed. None of those employees agreed as to the degree of force which Petitioner allegedly used against the inmate.

a. In the Final Agency Decision, Mr. Moose cited Captain Rene Harris' opinion of the C19 video to rebut Petitioner's claim that he accidentally pushed the inmate. Capt. Harris had observed the subject video and found that "it appeared that you [Petitioner] slammed the offender against the concrete wall." (Resp. Ex. 10) Capt. Harris did not testify at the contested case hearing.

b. At hearing, Warden Hawkins opined that the C19 Gym Exterior camera video showed Petitioner "slung" the inmate into the concrete wall. He acknowledged that his opinion of the force of Petitioner's actions were contrary to Investigator Milner's opinion (T. p. 101). Warden Hawkins claimed the use of force was "one of the most egregious acts" that he had seen in his professional career. (T. p. 81)

c. During the internal investigation, Investigator Milner concluded that Petitioner "pushed" the inmate against the concrete wall. (Resp. Ex. 8) However, at the hearing, Investigator Milner admitted, "from the video, it was hard to tell whether he [Petitioner] pushed him [the inmate] or not but he – the – the offender

went forward." (T. p. 61) Milner conceded that he was unable to determine from the video what caused the inmate's forward motion. (T. p. 62)

35. The video of the subject incident from the C19 Gym Exterior camera was of a poor quality due to low resolution. Given the low resolution of this video, it is impossible to determine what caused the inmate to abruptly propel forward and hit the concrete wall. (Resp. Ex. 11; T. p. 68) The only certainty to the video is that the inmate accelerated forward, fell into the concrete wall, and fell to the ground. Afterwards, Officer Averette picked up the inmate's shoes. (T. p. 73) The video from the C19 Gym Exterior camera is unreliable and not credible to prove that Petitioner deliberately and intentionally pushed the inmate into the concrete wall on November 3, 2019.

36. For the same reason, the video from the C19 Gym Exterior camera on November 3, 2019 is not reliable evidence to disprove Petitioner's statement that he tripped or stumbled before the inmate hit the concrete wall.

37. In the Final Agency Decision, Moose also cited Petitioner's "admissions," made during the predisciplinary conference and the Employee Advisory Hearing, as proof that Petitioner used excessive force on an inmate on November 3, 2019. However, Respondent took Petitioner's statement out of context. While Petitioner admitted that he "pushed" the inmate, he further explained why he pushed the inmate, *i.e.*, to keep himself from falling on the inmate. Immediately after the incident, Petitioner told Officers Tilley and Averette that he tripped. (Resp. Exs. 7, 8, 10; T. pp. 112, 113) Through Officer Averette's internal investigation statements, Respondent was aware that Averette corroborated Petitioner's claim that he may have tripped. Furthermore, Investigator Milner conceded that there was a "little slope" in the walkway from the C2 building towards the concrete stairwell where the inmate hit with his head. (T. p. 66)

38. Throughout the internal investigation, the internal grievance process and this contested case hearing, Petitioner consistently maintained that he did not intentionally push the inmate, and that the incident was accidental in nature. (T. p. 117)

39. Respondent presented no other credible evidence at hearing proving that Petitioner purposefully propelled, slammed, or pushed the inmate into the concrete wall to either cause the inmate harm or for any purpose.

Other Factors

40. Since 2016, Petitioner has served on the Prison Emergency Response Team (PERT), an elite group of specially trained correctional officers who respond to security concerns. Petitioner received positive reviews of "Meets Expectations" in his recent performance evaluations. (T. p. 77) Warden Hawkins also acknowledged that Petitioner was a valuable person at Polk CI (T. p. 99).

41. On November 7, 2019, Petitioner attended training on SOP-PERT Advanced Transfer Techniques and SOP-PERT Control, Formation, Equipment and Techniques. (Resp. Ex. 5)

42. On November 1, 2019, Warden Hawkins issued a Written Warning to Petitioner for unacceptable personal conduct resulting from Petitioner striking an inmate in the face with his baton in violation of the Use of Force Policy. (Resp. Ex. 1) This incident occurred on September 8, 2018, more than one year before the subsequent disciplinary action. While Petitioner denied using force during this incident, he was unable to appeal the disciplinary action because it was a written warning. (Resp. Ex. 1)

43. It took Respondent fourteen (14) months to investigate and decide to issue Petitioner a written warning for the September 8, 2018 incident. At hearing, Warden Hawkins could not explain the delay in Respondent's issuance of that Written Warning and acknowledged the required time frame for issuing the Written Warning should have been 90 days, but clearly it didn't happen and the time frame of issuance was lengthy. (T. p. 97) As a result of this delay, Respondent issued the Written Warning for the September 8, 2018 incident two (2) days before the incident at issue in this case.

44. The undisputed evidence also showed that ten (10) months elapsed between the November 3, 2019 incident and Warden Hawkins' issuing his September 16, 2020 recommendation to dismiss Petitioner from employment.

a. On May 2, 2020, Polk CI's Captain Donald Satterwhite reviewed and commented on Unit Manager White's Incident Report. The Incident Report also indicated the investigation was complete on May 2, 2020. On July 15, 2020, Superintendent Charles T. Johnson reviewed the Incident Report, noting therein that the "UOF [Use of Force] was investigated by OSI and disciplinary for staff is pending" and recommended no further action in this matter. (Resp. 7, p. 5) On December 1, 2020, Regional Director Averell Blank approved and concurred with the findings of the facility administrator on this matter. (Resp. Ex. 7, pp. 5-6)

b. On November 20, 2020, OSI Investigator Milner was assigned to investigate the subject incident. He completed his investigation and submitted his Report on February 3, 2020. Respondent's Office of General Counsel reviewed and approved Milner's Investigative Report on February 4, 2020, while another employee approved such Report on April 22, 2020. (Resp. Ex. 8, p. 10)

45. At hearing, Warden Hawkins acknowledged that the issuance of the Incident Report in this case certainly exceeded the required time frames. (T. p.97)

46. The undisputed evidence at hearing established that over two (2) months elapsed between Warden Hawkins' September 16, 2020 recommendation to dismiss and the December 23, 2020 Final Agency Decision was issued. (Resp. Exs. 5, 10) Thirteen (13) months elapsed between the November 3, 2019 incident and the December 23, 2020 Final Agency Decision dismissing Petitioner from employment.

47. The delays in Respondent issuing the November 1, 2019 written warning, completing its Incident Report and the OSI Investigation into the November 3, 2019 incident, and in issuing its recommendation and Final Agency Decision to dismiss Petitioner from employment further called into question whether Petitioner's alleged conduct was as egregious as Respondent alleged.

48. The preponderance of the evidence established that the inmate suffered abrasions and lacerations due to hitting the concrete wall and injured his wrist when he fell to the ground. The documentation from the Medical Unit's assessment of the inmate after the subject incident established that the inmate walked in the Medical Unit without difficulty and was oriented to his situation. The inmate refused medical treatment for his injuries and was in no apparent distress at the time of assessment. (Resp. Exs 7, p. 5; 8, p. 7) While this Tribunal does not discount the harm the inmate suffered, a preponderance of the evidence proved that the abrasions and lacerations the inmate suffered did not constitute serious injuries as alleged in the Final Agency Decision.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case, and the parties received proper notice of the hearing. Despite the due diligence of all parties and the delay in receiving the transcript as noted in the Findings of Fact, the time needed for completion of this matter exceeded the usual, regular, and customary time for completion and has presented a situation of a kind other than what ordinary experience or prudence would foresee. As such, extraordinary cause exists for the issuance of this Final Decision beyond 180 days from the commencement of this contested case pursuant to 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); and *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 State employee entitled to the protections of the North Carolina Human Resources Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the provisions found in N.C. Gen. Stat. § 126-34.02(b).

5. Respondent is subject to Chapter 126 of the North Carolina General Statutes as the employer of Petitioner.

6. N.C. Gen. Stat. § 126-35 states that "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause."

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

8. In *Warren v. North Carolina Dept' of Crime Control and Public Safety*, 221 N.C. App. 376, 726 S.E.2d 920 (2012), the North Carolina Court of Appeals established 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 unacceptable personal conduct provided by the Administrative Code If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third Inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Id. at 383, 726 S.E.2d at 925.

9. Accordingly, not every instance of unacceptable personal conduct will "give[] rise to 'just cause' for employee discipline." *Id.* (citing *North Carolina Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)). Rather, "just cause, like justice itself, is not susceptible of precise definition." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 901. 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.*

10. In determining whether unacceptable personal conduct constitutes just cause for dismissal under *Warren's* third inquiry, we look to several factors set forth in *Wetherington v. N.C. Dep't of Public Safety*, 368 N.C. 583, 780 S.E.2d 543 (2015). Those factors include "the severity of the violation, the subject matter involved, the resulting harm, the [employee's] work history, or discipline imposed in other cases involving similar violations." *Id.* at 592, 780 S.E.2d at 548.

11. After receiving and considering the evidence, and entering findings of fact, an ALJ is free to substitute their judgment for that of the agency regarding the legal conclusion of whether just cause existed for the agency's action. *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)

Whether the Employee Engaged in Conduct Alleged?

12. An employee may be dismissed without any prior warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 NCAC 01J .0608(a). A single instance of unacceptable personal conduct may constitute just cause for dismissal.

13. Unacceptable personal conduct includes conduct unbecoming a state employee that is detrimental to state service, and/or conduct for which no reasonable person should expect to receive prior warning. 25 NCAC 01J .0614(8).

14. Respondent alleged that Petitioner violated its Use of Force Policy, Chapter F, Section.1500 *et seq.* by deliberately pushing a restrained inmate into a concrete wall on November 3, 2019.

15. Respondent's Use of Force Policy, Chapter F, Section .1503 Policy states in relevant part:

(a) The use of force shall be permissible only to the extent reasonably necessary for a proper correctional objective. This prohibition shall not be construed to mean that staff must suffer an assault upon their person before taking appropriate defensive action or that the use of force by another must be met with strictly equal force on the part of the staff.

(b) An officer is authorized to use whatever degree of force that reasonably appears to be necessary to defend the officer or a third party from imminent assault. Reasonable force is authorized in order to prevent an escape or to ensure compliance with a lawful order or to protect property or to return an escapee to custody . . . An officer should attempt non-forcible methods of offender control, but only to the extent reasonably possible under the circumstances as they appear to that officer.

...

(d) An officer is prohibited from using force solely as a result of verbal provocation. An officer shall not use force against an offender who has abandoned his/her resistance or who is effectively restrained. The use of force as punishment is strictly prohibited.

(Resp. Ex. 15)

16. Respondent's Use of Force Policy, Chapter F, Section .1504 Procedures provides in relevant part:

(j) Restraints and Escorting Restrained Offenders

- (2) Offenders will be escorted with their hands restrained behind their back . . . Escorting staff will take care to protect the offender from falling or assault by other offenders, as well as protecting themselves and others from assaultive behavior by the offender. It is recommended that at least one certified officer escort a restrictive housing offender. When escorting a restrained offender up or down stairs or over uneven ground, the officer will control and guide the offender by placing his/her hand on the offender's upper arm and maintaining this form of control while the offender is escorted. This form of hands-on physical contact is not considered a use of force when carried out in escorting situations.

17. Respondent failed to prove by a preponderance of the evidence that Petitioner deliberately pushed the inmate into the concrete wall on November 3, 2019. Respondent relied heavily upon a low-resolution video, taken from a camera at an unknown distance away from the incident, to prove Petitioner deliberately pushed a restrained inmate into a concrete wall. The fact that Warden Hawkins had to watch the video footage multiple times to positively identify Petitioner as the officer on the left side of the inmate demonstrated the poor quality of such video and the difficulty of discerning the specificity required to prove that Petitioner used excessive force. Various employees of Respondent who watched the C19 video did not even agree on what the video showed, *i.e.*, whether Petitioner "pushed" the inmate, "slung" the inmate, or "slammed" the inmate. At hearing, Investigator Milner acknowledged that from watching the video, it was hard to tell whether Petitioner pushed the inmate or not, and he was unable to determine from the video what caused the inmate's forward motion.

18. The only certainty from the video was that the inmate suddenly accelerated or propelled forward, fell face first into the concrete wall, and fell to the ground. Afterwards, the video showed Officer Averette picked up the inmate's shoe that had come off. The poor quality and lack of clarity of the video from the C19 Gym Exterior camera made the video unreliable and incompetent evidence to prove that whether Petitioner pushed the inmate, whether that push was deliberate, and if Petitioner violated Respondent's Use of Force Policy.

19. Respondent also relied upon statements by other officers, including Officer Tilley, to determine that Petitioner pushed the inmate and used excessive force. However, Respondent failed to present Officer Tilley, Officer Averette, or any other officers as witnesses at the contested case hearing. Therefore, any out-of-court statements made during Respondent's investigation of this matter were excluded as inadmissible hearsay evidence at the contested case hearing. Because Respondent's Exhibit No. 5 was admitted into evidence without objection, the officers' statements described in Respondent's Exhibit No. 5 were included in this Final Decision.

20. Respondent's reliance on Petitioner's "admissions," at the predisciplinary conference and at the Employee Advisory Hearing, that he pushed the inmate was also

misplaced and taken out of context. While Petitioner conceded he pushed the inmate, he explained he did so to prevent himself from falling and was not done intentionally, but accidentally. Investigator Milner's agreement at hearing that the sidewalk contained a little slope in the area where the incident occurred gave credence to Petitioner's statement that he may have tripped before the inmate propelled forward.

21. Furthermore, it is not believable that a correctional officer who is a member of the elite PERT team, and for whom there is no evidence that he intentionally and with malice pushed the inmate, did so in the middle of the open yard at a HCON/Supermax prison, in full view of Officers Tilley and Averette, and in full view of the facility's cameras.

22. Respondent failed to prove by a preponderance of the evidence that Petitioner violated its Use of Force Policy, Chapter F, Section.1500 *et seq.* on November 3, 2019 by pushing the inmate into the concrete wall, deliberately pushing the inmate, and violating Respondent's Use of Force Policy in so doing.

23. Respondent's evidence was insufficient to prove Petitioner pushed a restrained inmate or had the intent to push a restrained inmate into the concrete wall on November 3, 2019. Respondent's evidence was insufficient to prove Petitioner used excessive force in pushing a restrained inmate into a concrete wall on November 3, 2019 in violation of Respondent's Use of Force policy.

24. Because Respondent failed to prove Petitioner violated its Use of Force Policy Chapter F, Section .1500 by using excessive force, Respondent failed to prove it had just cause to dismiss Petitioner from employment for unacceptable personal conduct. The Tribunal need not proceed to the second and third prongs of the *Warren* 3-step inquiry on this Use of Force issue.

25. However, assuming *arguendo* that some violation of Respondent's regulations occurred in this incident, thus constituting some level of unacceptable personal conduct, based on the evidence at hearing (as opposed to Respondent's unproven contentions about that evidence), Petitioner's demonstrated conduct does not justify dismissal, and for more than one reason. See *Renfrow v. N. Carolina Dep't of Revenue*, 245 N.C. App. 443, 444, 782 S.E.2d 379, 380 (2016) (under 25 N.C.A.C. 1J.0608, career status State employee could be dismissed only for a current incident of unacceptable personal conduct); see also *Wetherington v. N. Carolina Dep't of Pub. Safety*, 368 N.C. 583, 584, 780 S.E.2d 543, 544 (2015); *Whitehurst v. E. Carolina Univ.*, 257 N.C. App. 938, 811 S.E.2d 626 (2018) ("Wetherington factors" do not justify most severe sanction of dismissal).

26. Respondent shall retroactively reinstate Petitioner to the same or similar position, as required by 25 NCAC 01J .1311. N.C. Gen. Stat. § 126-34.02(a). See *Harris, supra*; see also *Davis v. NC Dep't of Health & Human Servs.*, 836 S.E.2d 344 (N.C. Ct. App. 2019).

27. Respondent shall reinstate any applicable provisions of service credit, retirement, and sick leave due under 25 NCAC 01D .1006, and sick and vacation leave credit accrued during the period of Petitioner's separation from employment. All references to this dismissal shall be removed from Petitioner's personnel files.

28. Respondent shall additionally award back pay under 25 NCAC 01J .1306 to Petitioner from the date of Petitioner's separation from employment up to and including the date Petitioner is retroactively reinstated to employment as ordered above.

29. Under the authority of N.C. Gen. Stat § 150B-33(11), and as the Undersigned has ordered reinstatement and back pay, Respondent shall pay Petitioner's reasonable attorney's fees. 25 NCAC 01J .1319. Petitioner's attorney shall file a petition for attorney's fees reasonably incurred during the handling of this contested case, within thirty (30) days from the date of this Final Decision.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Respondent's decision to terminate Petitioner from employment should be and is **REVERSED**. Petitioner shall be reinstated to the same or similar position and receive back pay, costs, and attorney's fees, as well as all other remedies available under law. Petitioner's counsel shall file a Petition for attorney's fees reasonably incurred during the handling of this case within 30 days from the date of this Final Decision and 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 23rd day of July, 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.

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This the 23rd day of July, 2021.



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