IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-875

Filed: 21 March 2017

Office of Administrative Hearings, No. 15 OSP 8687

JACQUELINE RENEE CROCKER, Petitioner,

v.

TRANSYLVANIA COUNTY DEPARTMENT OF SOCIAL SERVICES DIRECTOR TRACY JONES, Respondent.

Appeal by Respondent from a final decision entered 16 May 2016 by the Office of Administrative Hearings. Heard in the Court of Appeals 7 February 2017.

Donald H. Barton, P.C., by Donald H. Barton, for petitioner-appellee.

Womble, Carlyle, Sandridge & Rice, LLP, by Sean F. Perrin and Jackson R. Price, for respondent-appellant.

HUNTER, JR., ROBERT N., Judge.

Transylvania County Department of Social Services Director Tracy Jones ("Respondent") appeals from a final ALJ decision concluding Respondent lacked just cause to fire Jacqueline Renee Crocker ("Petitioner"). On appeal, Respondent contends the ALJ erred in: (1) allowing testimony of a witness not disclosed before the hearing; (2) including findings of fact which are unsupported by substantial

evidence; and (3) concluding Respondent lacked just cause to dismiss Petitioner. For the following reasons, we affirm.

I. Factual and Procedural Background

After sixteen years of service at DSS, Petitioner was fired by the Respondent at the urging of her supervisor, based upon a complaint filed by Sandra Brown. Respondent purportedly terminated Petitioner for "unacceptable conduct" in contacting ex parte a district court judge who presided over a custody dispute unrelated to Petitioner's work involving her daughter's boyfriend.

Following her dismissal, on 23 November 2015, Petitioner filed a Petition for a Contested Case Hearing, alleging Respondent fired her without just cause. In her prehearing statements, Petitioner alleged Respondent "had an agenda" to fire Petitioner since 2008.[1] On 15 January 2016, Respondent filed its prehearing statement, contending Petitioner's "impermissible use of her position and personal contacts" to influence the outcome of a private custody dispute led to her termination. On 29 February 2016, the Office of Administrative Hearings held a hearing for Petitioner's case. The evidence tended to show the following.

[1] We note Petitioner and Carson Griffin, the former interim Director of DSS, are parties to a separate litigation. In 2008, Petitioner and three other employees sued Griffin, in her individual capacity and as the former director of DSS. The trial court dismissed all of the claims in the suit, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. However, the merits of the separate litigation need not concern us here.

Petitioner's daughter, Kristin Crocker, dates Marquis Swarn.[2] Marquis is engaged in a custody dispute. ("Swarn custody dispute" or "custody dispute") While it was ongoing, Judge Emily Cowan presided over the Swarn custody dispute. As a social worker with DSS, Petitioner regularly appeared before Judge Cowan. While the custody dispute was being tried before Judge Cowan, Petitioner sat with her daughter. Petitioner did not testify at the hearing or talk to witnesses, judges, or officers. Following hearings and pursuant to a consent order, Judge Cowan entered the original custody order.

During the weekend of 8 August 2015, Petitioner planned to go to the beaches in Florida with her daughter, Swarn, and Swarn's daughter. Swarn's daughter told Sandra Brown, her grandmother, about going to the beach for the weekend. Brown managed a Facebook page dedicated to following and updating others on the Swarn custody dispute and posted the following on the page:

> [Swarn's daughter] was removed from the state without mother[']s consent on the day her case was to be heard in court. She was removed by Kristen Crocker and cps [sic] supervisor Renee Crocker and taken to another state. Kristen Crocker was advised by the mother to not remove the child and that permission was not being granted to remove the child, and to have the child ready for the ruling on Monday.

[2] "Marquis Swarn" is spelled as "Marques Swaren" in the hearing transcript, however, the correct spelling of the name is "Marquis Swarn."

As a result of Brown's Facebook post, Petitioner feared being arrested for kidnapping or having the children taken into custody.

Petitioner texted Judge Cowan, "I need to ask you a personal matter. If you can text me back or call me, that will be fine. If you can't, I understand." Judge Cowan called Petitioner, and Petitioner told Judge Cowan she needed to ask a question regarding a personal matter. Petitioner wanted to know if she would go to jail for taking the children to Florida. Judge Cowan "gave [Petitioner] advice[,]"[3] and Petitioner called Attorney Charles W. "Mack" McKeller, Swarn's lawyer for the custody dispute. After the communication with Petitioner, Judge Cowan recused herself from the Swarn custody dispute. At the time of Judge Cowan's recusal, there were no substantive motions pending in the custody dispute.

Brown filed two grievances against Petitioner; however, only the second grievance is relevant to this appeal. On 25 September 2015, Brown attended a DSS Board of Director's meeting and filed the second grievance. Brown informed Tracy Jones, Director of Transylvania County DSS, of ex parte communications between Judge Cowan and Petitioner.

Following DSS protocol, Tony Dalton, the county attorney for Transylvania County, investigated the grievances filed against Petitioner. Regarding the first grievance, Dalton drafted a letter recounting a meeting between Dalton, Petitioner,

[3] The record is unclear as to what Judge Cowan told Petitioner during this "advisement."

and Carson Griffin, the Interim Director of DSS. The letter, dated 2 October 2015, detailed the meeting, discussed the need to avoid the appearance of impropriety, that the department was not going to discipline Petitioner, and cleared Petitioner of any wrongdoing.

Regarding the second grievance, Dalton traveled to Hendersonville and interviewed Judge Cowan. Judge Cowan told Dalton she recused herself from the Swarn custody dispute as a result of the ex parte communications with Petitioner. Jones obtained a recording of the hearing where McKeller discusses Judge Cowan recusing herself. Jones also obtained a letter from Michael Edney, a lawyer in the custody dispute. Edney's letter is as follows:

> On Monday, September 21st Mr. McKeller and I both arrived to Court prepared to hear the Motion. At the appropriate time we both came into the Courtroom. Once we were both at our respective counsel tables[,] Judge Cowan asked that we both approach the bench to speak with her. When we did, Judge Cowan related the following:
>
> She (Judge Cowan) had received a telephone call from Renee Cro[c]ker (DSS Supervisor and mother of Defendant's current girlfriend/baby-mother of [a] different child) concerning this case. Ms. Cro[c]ker did relate various facts of this case to Judge Cowan. Judge Cowan did not repeat the specific content of the statements made[,] but did say that she directed Ms. Cro[c]ker to talk to Defendant's attorney, Mr. McKeller, not her. Based upon this telephone call, and the statements made to her, Judge Cowan stated that she has a conflict and cannot hear the Rule 60(a) Motion. She recused herself and the matter was continued to be heard by Chief District Judge Athena Brooks.

Jones also received an order amending judgment in the custody dispute. The order included a note "Chief District Court Judge Athena Brooks, hearing the matter due to the self-recusal of District Court Judge Emily Cowan because of extra judicial communication by a non-party."

On 5 October 2015, Jones sent a letter to Petitioner, placing Petitioner on investigatory leave with pay. On the same day, Jones sent a letter to schedule a pre-disciplinary conference with Petitioner. In the letter, Jones specified Petitioner's communications with Judge Cowan was the conduct being investigated.

On 6 October 2015, Jones conducted a pre-disciplinary conference, which Jones, Petitioner, and Cindy Anders, an administrative officer at DSS, attended. At the conference, Petitioner admitted to sending a text message to Judge Cowan and speaking with Judge Cowan on the telephone. Petitioner apologized for her actions.

After the pre-disciplinary conference, Jones consulted with the county attorney and the Human Resources Director, Shelia Cozart, and decided to dismiss Petitioner from her position. Jones based the termination on Petitioner's prior consultations with the Interim Director and county attorney, prior notice to avoid the appearance of impropriety, and Petitioner's contact with Judge Cowan, which Jones characterized as "unethical behavior." When making her determination, Jones did not consider Petitioner's performance reviews.

Jones described the communications between Judge Cowan and Petitioner as "an abuse of the public trust." In Jones's eyes, the subject matter of the ex parte communications was not important to her, as a decision maker, because the behavior of communicating with a judge is "unethical", a result of "poor judgment", and "inappropriate conduct." From what Jones knew, Petitioner's ex parte communications with Judge Cowan had no effect on the merits of the custody case. However, Jones did not care about the lack of impact on the custody case.

On 7 October 2015, Jones sent Petitioner a dismissal letter. In the letter, Jones stated "information we learned at the September 25, 2015 Social Services Board meeting which indicated Judge Cowan had recused herself from the private custody case because of the direct contact [Petitioner] had made with her regarding the court order" as the specific reason for firing Petitioner.

On 19 October 2015, Petitioner filed a grievance, stating Respondent fired her without just cause and requesting to be reinstated in her prior employment. Pursuant to the grievance, Petitioner and Respondent met on 28 October 2015. At the meeting, Petitioner informed Respondent she contacted Judge Cowan to ask whether certain behavior would be considered kidnapping and to ensure she appropriately followed court orders. On 2 November 2015, Jones sent Petitioner a letter, confirming the decision to fire Petitioner.

On 16 May 2016, the ALJ filed its final decision. The ALJ found, among other things, the ex parte contact did not affect the outcome of the custody dispute, Petitioner did not attempt to influence the outcome of the custody dispute, the ex parte communications did not unduly delay the custody dispute, and the contact did not result in any prejudice to the parties or their attorneys. The ALJ also found Petitioner knew, or should have known, the communication was improper, as such actions cast a negative light on DSS.

The ALJ concluded Petitioner engaged in the conduct alleged by Respondent and the conduct was unacceptable personal conduct. However, the ALJ concluded Respondent did not meet its burden of proving it had "just cause" to dismiss Petitioner and dismissal was not appropriate. The ALJ further concluded Respondent failed to consider the totality of all the facts and circumstances in making the decision to dismiss Petitioner. Respondent filed timely notice of appeal.

II. Standard of Review

We apply three separate standards of review to examine Respondent's appeal.

The issue of admissibility of McKeller's testimony is reviewed under an abuse of discretion standard. *See Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006) (citations omitted). "An '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.'" *In re T.L.H.*, 368 N.C. 101,

___, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372, S.E.2d 523, 527 (1988)).

Respondent's second contention on appeal, with regard to whether there is sufficient evidence to support the ALJ's findings of fact, is reviewed under the whole record test. *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (citations omitted). In applying the whole record test, this Court "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Id.* at 199, 593 S.E.2d at 769 (citations omitted). "Rather, a court must examine all of the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Id.* at 199, 593 S.E.2d at 769 (citations omitted). Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2016).

Lastly, regarding whether Respondent had just cause to terminate Petitioner, this Court's review of the ALJ's decision is twofold: "first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *N.C. Dept. of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (internal

quotation marks and citations omitted). The first inquiry is a question of fact, and is, thus, reviewed under the whole record test. *Id.* at 665, 599 S.E.2d at 898 (citations omitted). The second inquiry is a question of law and is reviewed *de novo*. *Id.* at 666, 599 S.E.2d at 898 (citations omitted). Under *de novo* review, the court considers the matter anew and freely substitutes its own judgment for the agency's. *Id.* at 660, 599 S.E.2d at 895 (citations omitted).

III. Analysis

A. McKeller's Testimony

On appeal, Respondent contends the ALJ committed an abuse of discretion by permitting McKeller to testify. We disagree.

The North Carolina Administrative Code governs prehearing filings in agency actions. In a party's prehearing statement, the party shall set out, among other things, "[a] list of proposed witnesses with a brief description of his or her proposed testimony[.]" N.C. Admin. Code tit. 26, r. 3.0104(c) (January 2017). If a party "fails to comply with an interlocutory order of an administrative law judge, the administrative law judge *may*" chose from a host of sanctions, including the exclusion of evidence. N.C. Admin. Code tit. 26, r. 3.0114 (January 2017) (emphasis added).

In this case, on 14 December 2015, ALJ Julian Mann III entered an Order for Prehearing Statements, ordering Respondent and Petitioner to file, among other things, "[a] list of proposed witnesses [they] may call at the hearing . . . ." On 14

January 2016, Petitioner filed her prehearing statement, but did not list McKeller as a proposed witness. Additionally, Petitioner filed two motions to amend her prehearing statement.[4] In both purported amended prehearing statements, Petitioner failed to list McKeller as a potential witness.

At the hearing, Jones mentioned McKeller during her testimony. At the mention of McKeller, Petitioner's counsel stated he intended to call McKeller as a witness. Respondent's counsel objected, based on Petitioner's failure to disclose McKeller as a potential witness in prehearing statements. The ALJ stated Petitioner "will have the opportunity to call Mr. McKeller since what Mr. McKeller has stated has been brought to -- brought before the Court." Upon further objections from Petitioner, the ALJ tabled the manner until Petitioner actually called McKeller.

Later in the hearing, the parties still disagreed regarding whether McKeller would testify. The ALJ concluded, "I'm going to allow Mr. McKeller to testify as it relates to the October 6 -- is that the right date, yes -- the matters included in the October 6 order amending judgment . . . after that."

In order to agree with Respondent, our Court must find the ALJ's decision is manifestly unsupported by reason, or so arbitrary it could not have been the result of a reasoned decision. *In re T.L.H.*, 368 N.C. at ___, 772 S.E.2d at 455. The ALJ did not abuse his discretion in allowing McKeller to testify. We cannot say the decision

[4] We note both of the proposed amended prehearing statements were stricken from the record by the ALJ.

to allow McKeller to testify is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. Respondent argued at the hearing McKeller's testimony was not necessary since McKeller's prior statement recalled in testimony was recorded as a public record. However, the ALJ reasoned he would allow McKeller's testimony "since what Mr. McKeller has stated has been brought to -- brought before the Court." Accordingly, reason supported the ALJ's decision, and we hold the ALJ did not abuse his discretion in permitting McKeller to testify.

B. Findings of Fact

Respondent next argues Findings of Fact Numbers 26, 28, 30, 31, 34, and 35 are not supported by substantial evidence.

i. Finding of Fact Number 26

Respondent argues Finding of Fact Number 26 is not supported by substantial evidence and should be stricken from the record. We disagree.

The finding states:

> Mack McKeller appeared and testified at the hearing of this contested case and provided clarification as to the reason why Judge Cowan recused herself from hearing any matter arising in the custody dispute. Mr. McKeller appeared before Judge Cowan during the session of Transylvania County District Court when Judge Cowan recused herself from the Custody Dispute. Judge Cowan's recusal was based primarily on the fact that she and the Petitioner were involved in the same community activities, that she and Petitioner knew each other both

> professionally and socially, and as a result it would not be proper for her to hear any matters arising in the Custody Dispute. The ex parte communication between Petitioner and Judge Cowan was an incident of their existing relationship (Tr. 116-118).

At the hearing, Judge Cowan invoked judicial immunity and did not testify regarding why she recused herself from the custody dispute. However, Dalton testified Judge Cowan recused herself due to ex parte communications with Petitioner. Moreover, at a hearing for the custody dispute, McKeller stated "Judge Cowan has had some communications with one of the parties, and she felt it rendered -- made her -- made it probably improper for her to hear this motion." In the order amending judgment filed in the custody dispute, Chief Judge Brooks stated she was hearing the matter "due to the self-recusal of District Court Judge Emily Cowan because of extra judicial communication by a non-party." Edney's letter also asserted Judge Cowan recused herself due to Petitioner contacting her and relating facts of the custody dispute.

However, McKeller testified:

> [MCKELLER]: -- I would assume that the reason that order -- that it's listed this way is because -- is because Judge Cowan did indicate that she didn't feel it was appropriate to hear a contested Rule 60 hearing. She stated that from the witness stand -- or from the bench, excuse me.
>
> She didn't feel it was appropriate to listen to a contested hearing once she found out that Ms. Crocker was involved, and she did what she was supposed to do, which

was recuse herself.

[RESPONDENT'S COUNSEL]: So she recused herself because of communications with Ms. Crocker?

[MCKELLER]: No.

[RESPONDENT'S COUNSEL]: No?

[MCKELLER]: I don't think -- I -- I did not -- that's not the way I took it. She recused herself because she knew Ms. Crocker and she felt she was friends and she didn't feel like she should do a contested hearing involving potentially, at an angle, Judge Crocker. [sic]

It was not unusual. The -- the same thing happened with Judge Knight. He refused to hear any -- any sort of motion because Ms. Crocker works for DSS and he felt it was inappropriate. That's just what the judge does.

[RESPONDENT'S COUNSEL]: So I -- I want to be clear. You don't know if Judge Cowan recused herself because of communications with Ms. Crocker or not?

[MCKELLER]: I know what she said, what Judge Cowan --

[RESPONDENT'S COUNSEL]: You know what who said?

[MCKELLER]: -- what Judge Cowan said.

[RESPONDENT'S COUNSEL]: What did Judge Cowan say?

[MCKELLER]: Judge Cowan said that she was -- did not want to hear a contested case that involved Ms. Crocker because she communicated with Judge -- with -- with -- with her in a totally unrelated matter. I think they have a -- I think there's another grandchild who plays sports with her children, and they know each other.

> And so she just simply felt that it was -- if there was going to be a contested hearing, she shouldn't hear it, and so she did the appropriate thing, which was recuse herself.
>
> [RESPONDENT'S COUNSEL]: That's your testimony today?
>
> [MCKELLER]: Yes.
>
> [RESPONDENT'S COUNSEL]: Under oath?
>
> [MCKELLER]: Yes, because it's the truth.

McKeller also testified Judge Cowan's recusal was:

> [n]ot simply because [Judge Cowan] had communicated some with [Petitioner] . . . My testimony is that, when we went up to the bench to speak to Judge Cowan about this matter, she said she communicated with Ms. Crocker. Then she said that it was in the context of the fact that she sees her at games and out of Court -- I think she said Ms. Crocker's got a different grandchild, not the one at issue in our case, that played sports -- I'm trying to remember this, that played sports with her children.
>
> And so she would see her have communication with her from that perspective, and that she had had communication with her regarding this particular child, and so she felt it would be inappropriate because of the close connection there to hear a contested hearing.

Furthermore, McKeller testified:

> Well, she said because she was too close to Ms. Crocker. And this is a small county, and -- and -- or, actually, a small couple of counties, and people see each other. And so, I mean, Judge Knight, I think, for instance, in this same case, recused himself because he saw testimony from Ms. -- Ms. Crocker as a DSS worker and he

> felt like he shouldn't hear the case.
>
> So, I mean, it's been -- this is not uncommon. It's probably appropriate so that everybody knows they're getting a fair hearing.

When asked again whether Judge Cowan recused herself because of communications with Ms. Crocker, McKeller answered "Well, yes and no. It was because of communications with Ms. Crocker, but also because she had a personal relationship with Ms. Crocker and knew her from outside." But, when asked specifically regarding what Judge Cowan told him as a reason for the recusal, he answered, "[b]ecause she had had communications with [Petitioner] outside of Court . . . ."

Here, there is contradictory evidence regarding the reasons underlying Judge Cowan's recusal. On the one hand, there is testimony from numerous witnesses, including McKeller, and the Rule 60 Order evincing Judge Cowan recused herself due to ex parte communications with Petitioner. On the other hand, McKeller testified Judge Cowan recused herself because of the ex parte communications *and* her close relationship with Petitioner. The ALJ heard the evidence, saw the witnesses, and is in the best position to determine credibility of the witnesses. *See Carroll*, 358 N.C. at 662, 599 S.E.2d at 896 (citations omitted). It is not this Court's role to substitute our judgment or resolve conflicting testimony. *N.C. Dep't of Crime Control and Pub. Safety v. Greene*, 172 N.C. App. 530, 536, 616 S.E.2d 594, 599 (2005) (citations

omitted) (holding the courts are prohibited from deciding the credibility of witnesses, and may only decide whether substantial evidence of the findings exists in the record). We are required to only decide whether substantial evidence supports a contested finding. We hold there is substantial evidence supporting this finding.

ii. Findings of Fact Numbers 28, 30, 31

Respondent argues there is no evidence to support Findings 28, 30, and 31. We agree in part, and disagree in part.

The relevant findings are as follows:

> 28. The ex parte contact did not affect the outcome of the Custody Dispute as the case had been settled by a Consent Order prior to the ex parte contact.
>
> …
>
> 30. The ex parte contact did not unduly delay the Custody Dispute because the case had been resolved by the Consent Order.
>
> 31. The ex parte contact that Petitioner had with Judge Cowan did not result in any prejudice to the parties or their attorneys in the Custody Dispute.

First, regarding Finding of Fact Number 28, in Petitioner's cross-examination of Jones, Petitioner asked whether the communication with Judge Cowan had any effect on the merits of the custody dispute. Jones responded "[n]ot that I'm aware of." Further, Jones testified Swarn and the mother settled the custody dispute by consent.

Only a motion to correct a typographical error remained in the custody dispute. Thus, we hold there is substantial evidence to support this finding of fact.

Second, regarding Finding of Fact Number 30, there is substantial evidence the custody dispute was resolved by a consent order. However, there was still the issue of the Rule 60 motion, which could have been delayed by the ex parte communications and subsequent recusal of Judge Cowan. Upon our review of the whole record, we could not find substantial evidence showing the ex parte communications did not unduly delay the custody dispute. In fact, Jones testified the ex parte communications "prolonged the outcome" of the custody dispute. Besides Jones's testimony, there is no testimony regarding whether a delay resulted. We hold no substantial evidence supports this part of Finding of Fact Number 30, but said portion is inconsequential in our overall holding.

Lastly, regarding Finding of Fact Number 31, there is sufficient evidence supporting this finding. Several witnesses testified Judge Cowan entered the custody order pursuant to a consent order. Only a Rule 60 motion to correct a typographical error remained. We take note of contradictory evidence showing prejudice to the parties or attorneys in the custody dispute. Most importantly, Judge Cowan entered the original custody order. Thus, Judge Cowan should have been the judge to hear the Rule 60 motion. However, Judge Cowan recused herself and Chief Judge Brooks heard the motion, instead. The contradictory evidence does not negate

the substantial evidence supporting Finding of Fact Number 31. We hold there is substantial evidence supporting this finding.

iii. Finding of Fact Number 34

Respondent's arguments regarding Finding of Fact Number 34 are twofold: (1) there is no evidence regarding *Respondent's* connection with the prior allegations against Petitioner; and (2) there is only substantial evidence to support the ex parte communications being the reason for firing.

Finding of Fact Number 34 states:

> Tracy Jones made the decision to dismiss the Petitioner based on the Petitioner's ex parte communication with Judge Cowan and the Respondent's connection to the unfounded allegations made against Petitioner prior to June 4, 2015.

First, we agree there is not substantial evidence in the whole record regarding Respondent's connection to prior allegations made against Petitioner. At the hearing, several witnesses testified the prior allegations were made before Jones's tenure with DSS. Accordingly, this small portion of Finding of Fact Number 34 is unsupported by the evidence, but said portion is inconsequential in our overall holding.

Second, Respondent argues Petitioner was dismissed *solely* because of the ex parte communications with Judge Cowan. (emphasis added) Respondent is correct that Jones testified several times the reason for Petitioner's dismissal was the ex parte communications with Judge Cowan. However, Jones also testified the prior,

unfounded allegations were an issue for her and played a role in her decision to fire Petitioner. Although there is contradictory evidence, there is substantial evidence to support the part of Finding of Fact Number 34 regarding Jones's decision to dismiss Petitioner. It is not this Court's role to replace the ALJ's judgment when there are two conflicting views. As such, we hold this portion of Finding of Fact Number 34 is supported by substantial evidence.

iv. Finding of Fact Number 35

Respondent next argues Finding of Fact Number 35 is a conclusion of law and should be reviewed *de novo*. We agree.

The finding is as follows:

> In making her decision to dismiss the Petitioner from her employment, Ms. Jones did not consider all of the pertinent facts and circumstances of this particular case including the context and the content of the ex parte communication, that there was no harm caused by the ex parte communication, or that the recusals in the Custody Dispute by Judge Knight and Judge Cowan were based primarily on the fact that they had known Petitioner, professionally, for several years. In addition, Ms. Jones did not consider the performance reviews of Petitioner during her sixteen (16) years as a social worker with Transylvania County DSS.

We agree with Respondent that Finding of Fact Number 35 is better labeled as a conclusion of law. Notably, Conclusion of Law Number 25 is nearly identical to

Finding of Fact Number 35.[5] "Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusion of law for purposes of our review." *Barnette v. Lowe's Home Ctrs., Inc.*, ___ N.C. App. ___, ___, 785 S.E.2d 161, 165 (2016) (citation omitted). We review Finding of Fact Number 35 as a conclusion of law *infra.*

C. Just Cause for Termination

Lastly, Respondent argues the ALJ erred in concluding Respondent lacked just cause to terminate Petitioner. We disagree.

Under N.C. Gen. Stat. § 126-35, "[n]o career State employee . . . shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2016). "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." *Wetherington v. N.C. Dep't of*

[5] Conclusion of Law Number 25 is as follows:

> In making her decision to dismiss the Petitioner from her employment, Ms. Jones did not consider the context and the content of the ex parte communication, that the ex parte communication did not result in any harm to the Respondent or those individuals involved in the Custody Dispute, or that the recusals in the Custody Dispute by Judge Knight and Judge Cowan were based primarily on the fact that they had known Petitioner, professionally, for several years. In addition, Ms. Jones did not consider the performance reviews of Petitioner during her sixteen (16) years as a social worker with Transylvania County DSS.

Pub. Safety, 368 N.C. 583, 591, 780 S.E.2d 543, 547 (2015) (internal quotation marks and citation).

"There are two bases for the . . . dismissal of employees under the statutory standard for 'just cause' as set out by G.S. 126-35." N.C. Admin. Code tit. 25, r. 1J.0604(b) (January 2017). First, an employee may be dismissed based on "unsatisfactory job performance." *Carroll*, 358 N.C. at 666, 599 S.E.2d at 899 (citations omitted). Second, an employee may be dismissed based on "unacceptable personal conduct." *Id.* at 666, 599 S.E.2d at 899 (citations omitted).

"Employees may be dismissed for a current incident of unacceptable personal conduct, without any prior disciplinary action." N.C. Admin. Code tit. 25, r. 1J.0608(a) (January 2017). *See also Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005) ("One act of [unacceptable personal conduct] presents 'just cause' for any discipline, up to and including dismissal.") (citations omitted).

In *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 726 S.E.2d 920 (2012), this Court articulated a three-step test to determine whether just cause exists to discipline an employee who has engaged in unacceptable personal conduct: (1) whether the employee actually engaged in the conduct the employer alleges; (2) whether the employee's conduct falls within one of the categories of unacceptable

personal conduct; and (3) whether the misconduct constitutes just cause for the disciplinary action taken. *Id.* at 379-83, 726 S.E.2d at 923-26 (citations omitted).

For the second *Warren* step, "unacceptable personal conduct" includes "conduct unbecoming a state employee that is detrimental to state service[.]" N.C. Admin. Code tit. 25, r. 1J.0614(8)(e) (January 2017). If the wrongful conduct is "conduct unbecoming a state employee that is detrimental to state service[,]" Respondent is not required to show actual harm. *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17 (citations omitted).

In deciding whether there was just cause for termination, "[u]nacceptable personal conduct does not necessarily establish just cause for all types of discipline." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. *See also Bulloch v. N.C. Dep't of Crime Control & Pub. Safety*, 223 N.C. App. 1, 7, 732 S.E.2d 373, 378-79 (2012) (holding even if there was unacceptable personal conduct, it must *then* be determined whether the unacceptable personal conduct amounted to just cause for dismissal). This Court shall "balance the equities" by "examin[ing] . . . the facts and circumstances of [the] case" in order to determine whether the "conduct constitutes just cause for the disciplinary action taken." *Warren*, 221 N.C. App. at 379, 382-83, 726 S.E.2d at 923, 925. In making this determination, our Supreme Court recently emphasized that consideration of:

> factors such as 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 . . . is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.

Wetherington v. N.C. Dep't of Pub. Safety, 368 N.C. 583, ___, 780 S.E.2d 543, 548 (2015).

Respondent argues the ALJ committed the following errors in determining whether there was just cause for termination: (1) considering whether Petitioner's misconduct injured anyone, as injury is not required by law; (2) considering whether Respondent considered Petitioner's prior performance reviews; (3) concluding Respondent did not have just cause to terminate Petitioner; and (4) overturning the County's decision to terminate Petitioner "merely because the ALJ disagreed with [the] decision."

Respondent terminated Petitioner based on unacceptable personal conduct, namely "conduct unbecoming of a state employee that is detrimental to state service[.]" N.C. Admin. Code tit. 25, r. 1J.0614(8)(e). Respondent met its burden to prove the first two steps of *Warren*—(1) Petitioner engaged in the conduct alleged and (2) the conduct falls within a category of unacceptable personal conduct. *Warren*, 221 N.C. App. at 379, 726 S.E.2d at 923 (citations omitted). Moreover, neither party challenges the ALJ's findings regarding the first two steps of *Warren*.

The crux of this appeal is whether Respondent's termination of Petitioner was *just*. Just cause is a question of law, and is reviewed *de novo*. *Carroll*, 358 N.C. at

659, 599 S.E.2d at 894 (citations omitted). In our *de novo*[6] review, we first note Respondent is correct in asserting it is not required to show actual harm resulting from Petitioner's conduct for the conduct to rise to unacceptable personal conduct. Respondent is also correct in asserting Jones was not required to review Petitioner's past performance reviews, as one act of unacceptable personal conduct is sufficient to give rise to just cause. However, Respondent is incorrect in asserting these facts are wholly inappropriate for review as a part of the third step in *Warren*. As directed by our precedent, a review of the *facts and circumstances of each case* is required.

Although Petitioner engaged in unacceptable personal conduct, we cannot conclude termination is warranted in this case. Our holding is guided by the *Wetherington* factors: Respondent committed a severe violation by engaging in ex parte communications with Judge Cowan. The subject matter involved an order entered by Judge Cowan in the Swarn custody dispute. However, Petitioner's actions did not result in any harm, beyond a reassignment of trial court judges. Additionally, in her sixteen years with DSS, Petitioner engaged in this unacceptable personal conduct only once. Respondent failed to consider Petitioner's prior work history in the termination decision.

[6] Respondent argues the ALJ erroneously overturned the agency's decision to terminate Petitioner "merely because the ALJ disagreed with [the] decision." However, the ALJ concluded the agency's decision to terminate Petitioner was arbitrary and capricious. It is not true that the ALJ "merely disagreed" with the agency's decision.

Moreover, we agree with the ALJ that Respondent failed to consider "the context and the content" of the communications between Judge Cowan and Petitioner. Notably, Jones testified she was not concerned with the subject matter of the ex parte communications. In our balancing of the equities, we hold Respondent lacked just cause to dismiss Petitioner. Accordingly, we affirm the ALJ's conclusion that Respondent lacked just cause to terminate Petitioner.

IV. Conclusion

For the foregoing reasons, we strike parts of Findings of Fact Numbers 30 and 34 and affirm the ALJ's final decision.

AFFIRMED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).