APPENDIX

OPINION OF THE SUPREME COURT OF NORTH CAROLINA

ALEJANDRO ASBUN

v

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

From N.C. Court of Appeals

(20-346)

From Office of Admin. Hearings

(19OSP03469)

O R D E R

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Petitioner on the 2nd of June 2021 in this matter pursuant to G.S. 7A-30, and the Motion to dismiss the appeal for lack of substantial constitutional question filed by the Respondent, the following order was entered and is hereby certified to the North Carolina Court of Appeals: The Motion to dismiss the appeal is "Allowed by order of the Court in conference, this the 27th of October 2021."

s/ Berger, J.

For the Court

Upon consideration of the petition in the alternative filed on the 2nd of June 2021 by Petitioner in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th of October 2021."

/s/ Berger, J. For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st of November 2021.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina
s/ M. C. Hackney

Assistant Clerk, Supreme Court of North Carolina

OPINION OF THE NORTH CAROLINA COURT OF APPEALS (En Banc)

From Office of Admin. Hearings

(19OSP03469)

No. 20-346

ALEJANDRO ASBUN,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

O R D E R

The following order was entered:

The motion filed in this cause by petitioner Alejandro Asbun on 30 April 2021 and designated 'Petitioner-Appellant's Motion for Rehearing En Banc Pursuant to N.C.G.S. 7A-16 And N.C.R. App. P. Rule 31.1(d) is denied. This Court's stay of the mandate entered 30 April 2021 is hereby dissolved, and the mandate shall be deemed issued as of the date of this order.

By order of the Court this the 19th of May 2021.

WITNESS my hand and official seal this the 19th day of May 2021.

/s/ Daniel M. Horne Jr.

Clerk, North Carolina Court of Appeals Copy to:

Mr. Alejandro Asbun, For Asbun, Alejandro

Mr. Joseph E. Elder, Assistant Attorney General, For NC Department of Health And Human Services

Hon. Julian Mann, III, Clerk of Admin. Hearings

OPINION OF THE NORTH CAROLINA COURT OF APPEALS

2021-NCCOA-152

No. COA20-346

Filed 20 April 2021

No. 19 OSP 3469

ALEJANDRO ASBUN, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.

Appeal by petitioner from final decision entered 27 January 2020 by Administrative Law Judge Tenisha S. Jacobs in the Office of Administrative Hearings. Heard in the Court of Appeals 24 March 2021.

Alejandro Asbun, pro se, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Assistant Attorney General Joseph E. Elder, for respondent-appellee.

ARROWOOD, Judge.

Alejandro Asbun ("Mr. Asbun") appeals from a final decision filed 27 January 2020 by an administrative law judge ("ALJ") in the Office of Administrative Hearings (the "OAH"). For the following reasons, we dismiss this appeal.

I. Background

Since October 2014, Mr. Asbun has been employed by the North Carolina Department of Health and Human Services ("DHHS") as a Drug Control Unit manager in the Division of Mental Health. Mr. Asbun was terminated on 31 July 2018. As of the date of his dismissal, Mr. Asbun was a career state employee subject to all provisions, protections, and appeal rights afforded to such government employees.

On 27 June 2018, DHHS dismissed Mr. Asbun for disciplinary reasons on the stated basis of unacceptable personal conduct. The offensive conduct included Mr. Asbun's release of a North Carolina Medical Board ("NCMB") report containing data from the North Carolina Controlled Substances Reporting System about NCMB members and their prescriptions of controlled substances for a period including the first quarter of 2018 ("Report D"). Report D contained information for over 20,000 prescribers, including personally identifiable information about some professionals not regulated

by NCMB. In support of its termination decision, DHHS claimed that Mr. Asbun released Report D without prior authorization from his supervisor, made errors in the report, and released the report knowing that NCMB intended to release portions of the report to the public.1

1 DHHS further accused Mr. Asbun of failing to report for work on two separate occasions.

Mr. Asbun had no prior disciplinary history during his employment with DHHS. To the contrary, Mr. Asbun had received positive and above-average performance reviews during his tenure with the agency.

This action was commenced by the filing of a petition for a contested case hearing by counsel for Mr. Asbun on 17 June 2019. Mr. Asbun claimed that DHHS had terminated him without just cause and in violation of the North Carolina Whistleblower Act. A hearing was held in the OAH before an ALJ on 30 August 2019. On 27 January 2020, the ALJ entered a final decision determining that DHHS had dismissed Mr. Asbun without just cause and ordered that he should be "retroactively reinstated to the same or similar position with back pay, attorney's fees, as well as all other remedies available under law." However, the ALJ concluded that Mr. Asbun failed to establish that his termination stemmed from a violation of the

Whistleblower Act codified in Chapter 126, Article 14 of our General Statutes.

On 25 February 2020, pursuant to N.C. Gen. Stat. § 126-34.02 and § 7A-29, Mr. Asbun, pro se, appealed the dismissal of his complaint regarding the alleged Whistleblower violation.

II. Discussion

"The following issues may be heard as contested cases in the OAH: (1) discrimination or harassment; (2) retaliation for protesting discrimination; (3) just cause for dismissal, demotion, or suspension; (4) denial of veteran's preference; (5) failure to post a State position, or to give a career State employee priority consideration for promotion; and (6) whistleblower grievances." Brown v. N. Carolina Dep't of Pub. Safety, 256 N.C. App. 425, 427, 808 S.E.2d 322, 324 (2017) (citing N.C. Gen. Stat. § 126-34.02(b)(1) (6)). Section 126-34.02(a) of the North Carolina General Statutes reads, in pertinent part, "[a]n aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a)." N.C. Gen. Stat. § 126-34.02(a) (2019) (emphasis added). Only an "aggrieved party" is entitled to appeal directly to this Court for review of a final decision by an ALJ in a contested case in the OAH. See N.C. Gen. Stat. § 126-34.02(a);

see also Harris v. N. Carolina Dep't of Pub. Safety, 252 N.C. App. 94, 98, 798 S.E.2d 127, 132, aff'd, 370 N.C. 386, 808 S.E.2d 142 (2017) (citations omitted); accord Sarda v. City of Durham Bd. of Adjustment, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) (holding that petitioners lacked standing to appeal from the respondent agency's decision).

In this case, the ALJ determined that DHHS failed to prove by a preponderance of the evidence that it had just cause to dismiss Mr. Asbun and therefore ordered that Mr. Asbun be retroactively reinstated to the same or similar position with back pay, attorney's fees, as well as all other remedies available under law. In the instant appeal, Mr. Asbun does not allege any additional actual damages apart from those already remedied by the final agency decision. Thus, assuming arguendo that Mr. Asbun had established that he was terminated in violation of the Whistleblower Act, he has not argued on appeal (in his briefs or other papers) that he would have received anything more than he previously received by virtue of the recourse ordered by the ALJ, which included all available remedies set out in N.C. Gen. Stat. § 126-34.02. Therefore, Mr. Asbun has failed to show this Court that he is an "aggrieved party" as that term is used in N.C. Gen. Stat. § 126-34.02(a). As such, Mr. Asbun is not entitled to judicial review of the final agency decision

dismissing his Whistleblower allegation. See N.C. Gen. Stat. § 126-34.02(a); see also Harris, 252 N.C. App. at 98, 798 S.E.2d at 132; accord Johnson v. N. Carolina Dep't of Pub. Safety, 266 N.C. App. 50, 61, 830 S.E.2d 857, 864 (2019) (declining to reach second contested issue due to court's holding that ALJ applied improper framework for determining propriety of first issue raised in support of contested-case hearing petition). To the extent Mr. Asbun implies that he is entitled to additional remedies under his dismissed Whistleblower claim, those requests are waived as they were not raised in the instant appeal. N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Nonetheless, Mr. Asbun asks this Court to issue an injunction prohibiting DHHS and officials at O'Berry Neuro Medical Treatment Center (his "new" employer following reinstatement) from retaliating against him for his prior actions. This claim was not part of his initial claim before the OAH nor could it have been. Mr. Asbun's claim for retaliation after reinstatement would properly be made by filing a new claim through the appropriate administrative channels. Mr. Asbun's attempt to litigate a case for retaliation involving speculative and future acts by officials at O'Berry Neuro Medical Treatment Center

is not properly before this Court in the instant appeal.

Mr. Asbun has made no showing that he is a party aggrieved in this appeal and, therefore, his appeal must be dismissed.

III. Conclusion

For the foregoing reasons, we dismiss this appeal.

DISMISSED.

Judges and CARPENTER concur.

Report per Rule 30(e).

FILED OFFICE OF ADMINISTRATIVE HEARINGS

01/27/2020 4:55 PM

OPINION OF THE NORTH CAROLINA OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF WAKE 19 OSP 03469

Alejandro Asbun

Petitioner,

v.

North Carolina Department of Health

and Human Services

Respondent.

FINAL

DECISION

THIS MATTER is before the Office of Administrative Hearings ("OAH" or

"Tribunal") on the Petition for a Contested Case Hearing ("Petition") filed by

Petitioner Alejandro Asbun on 17 June 2019. Petitioner seeks review of the Final Agency Decision ("Agency Decision") issued by Respondent North

Carolina Department of Health and Human Services ("Department" or "Respondent" or "DHHS") on 21 December 2018 upholding Petitioner's dismissal from his employment with the Department. Given the nature of Petitioner's contested case, the issue before this Tribunal is two-fold: (i) whether Respondent had just cause to dismiss Petitioner, a career state-employee, from his employment with the Department based on unacceptable personal conduct and (ii) whether Petitioner's dismissal was in violation of the Whistleblower Act. Based on the evidence presented at hearing, and for the reasons set forth below, the Undersigned REVERSES the Department's Final Agency Decision.

Law Office of Michael C. Byrne by Michael C. Byrne, Esq. for Petitioner Alejandro Asbun.

North Carolina Department of Justice by Joseph E. Elder, Assistant Attorney General, for Respondent North Carolina Department of Health and Human Services.

T.S. Jacobs, Administrative Law Judge.

I. PROCEDURAL HISTORY

1. This is an action arising out of a disciplinary action taken by a State agency against a career State employee subject to the North Carolina Human Resources Act1 ("the Act"). The matter before the

Tribunal primarily involves a dispute between Petitioner and Respondent regarding whether the Department has satisfied its burden of showing that Petitioner was discharged for just cause.

2. On 21 December 2018, Respondent issued the Agency Decision informing Petitioner of its "decision on [his] grievance of [his] dismissal from [his] position as Drug Unit Manager/Hum Services Program Manager" in July 2018. Citing Petitioner's "unacceptable personal conduct and unsatisfactory job performance," Respondent, in the Agency Decision, concluded that there was "just cause to dismiss [Petitioner]." Respondent further concluded "that there was no prohibited retaliation" for alleged "whistle-blower" activities.

3. On 17 June 2019, Petitioner filed the Petition requesting a contested case hearing as provided for under the Act. In the Petition, Petitioner alleged that

Respondent's discharge was "without just cause" and in "[v]iolation of the See generally N.C. Gen. Stat. § 126-1, et. seq. 3 Whistleblower Act." The Chief Administrative Law Judge, by order dated 24 June 2019, assigned to the undersigned Administrative Law Judge ("ALJ") to preside over the course of these proceedings.

4. In the course of this contested case, the parties agreed by stipulation that:

a. Both Petitioner and the Department complied with the pre-disciplinary procedures contemplated by the Act and the Final Decision was issued in accordance therewith; and b. Although the "dismissal letter attempted to state a claim for dismissal based on unsatisfactory job performance . . . the parties stipulate that the just cause issue in this case . . . is solely whether Petitioner was dismissed without just cause on the basis of unacceptable personal conduct." See Internal Grievance Stipulation filed 30 August 2019.

5. On 30 August 2019, the Undersigned called this contested case for hearing on the merits. Both parties were present and presented evidence, in the form of testimony and documents, at the hearing.

6. Following the contested case hearing, the Undersigned allowed both parties the opportunity to submit proposed final decisions containing proposed findings of fact and conclusions of law. The parties' proposed decisions were due thirty (30) days from the completion of the transcript for the contested case hearing. (T p. 277) The transcript was received by the OAH on or about 5 December 2019 and the parties, as ordered, submitted proposed final decisions for the Undersigned's consideration.

A list of witnesses and exhibits admitted into evidence is attached hereto as Appendix A.

II. FINDINGS OF FACT

Based upon careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following factual findings that are material to the resolution of the dispute presented in this contested case. See Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993), aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993) (recognizing "the trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute.") In making the following findings, the Undersigned has weighed all evidence 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 interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

A. The Parties

7. Respondent, North Carolina Department of Health and Human Services, Division of Mental Health/Developmental Disabilities/Substance Abuse Services ("DMH") operates the North Carolina Controlled Substances Reporting System ("CSRS"). The CSRS is part of the work performed by the Drug Control Unit ("DCU") of the Justice Section of DMH.

8. Petitioner was employed with Respondent as the DCU manager since October 6, 2014. He worked in this position until his dismissal on July 31, 2018. As the DCU manager, a significant part of his responsibilities included managing the CSRS. Petitioner was a career status State employee of Respondent.

B. Petitioner's Previous Employment with Respondent

9. Prior to his dismissal, Petitioner was in charge of the CSRS. (T p. 216) The CSRS is a registry and a database of prescribers of drugs scheduled as controlled substances by the US Drug Enforcement Administration ("DEA"') and DHHS. The CSRS is housed within the DCU and administered under Petitioner's work group. The CSRS collects information on controlled substance prescriptions and makes this information available to prescribers, dispensers and regulators.

10. In 2017, the North Carolina General Assembly passed the "Strengthen Opioid Misuse Prevention Act," or "The STOP Act," House Bill 243. The STOP Act amends sections of Chapter 90 of the NC General Statutes.

11. The STOP Act placed new responsibilities upon the DMH. Among other changes, the STOP Act requires that pharmacies promptly report certain information for any filled prescription of any controlled substance to the CSRS. The STOP Act creates a "5-day" and a "7-day" rule, which limit how many days of opioids can be prescribed for certain types of patients.

12. The STOP Act added 3 exceptions to the statutory confidentiality of CSRS data. The amendments allow, but do not mandate, DHHS to release otherwise confidential prescriber data. N.C. Gen. Stat. § 90-113.74(b1).

C. Respondent's Disciplinary Action against Petitioner

13. On 27 June 2018, Respondent dismissed Petitioner from employment for disciplinary reasons on the stated basis of unacceptable personal conduct. The offensive conduct included Petitioner's release of the North Carolina Medical Board ("NCMB") report containing data from the CSRS about NCMB members and their prescriptions of controlled

substances for a period including the first quarter for 2018 ("Report D"). Specifically, Respondent claimed that Petitioner released this report without prior authorization from his supervisor, Sonya Brown, made errors in the

report, and released the report knowing that the NCMB intended to release portions of the report to the public. Respondent further accused Petitioner of failing to report for work on two given days. See Respondent's Ex. 9, Dismissal Letter.

14. Report D contained information for over 20,000 prescribers, approximately half of the prescribers database. The NCMB subsequently shared some of the information in Report D with the press and news stories began to appear in publications like the News and Observer and local ABC News, citing data obtained from the report. The report also disclosed personally identifiable information, such as prescriber numbers and personally identifiable information about professionals who are not regulated by the NCMB: podiatrists, dentists, veterinarians, and nurses.

15. Petitioner had no prior disciplinary action in his employment with Respondent and had received good performance reviews from his managers.

D. Additional evidence from Contested Case Hearing

16. At hearing, Steven Mange, an attorney employed

by the North Carolina Department of Justice ("DOJ"), testified that he serves as a senior policy counsel at DOJ and has done so since 2017. (T p. 10) Mange was involved in drafting and other matters related to the so-called, STOP Act, which "dealt in several different ways with the operation of the [CSRS]." (T. pp. 10, 12) Mange described the STOP Act "as an effort to address the opioid epidemic in general." (T pp. 10-11)

17. Mange worked with Petitioner on multiple occasions regarding the STOP Act and the CSRS. (T pp. 12-13) Mange's understanding was that "part of [Petitioner's] job involved providing information gleaned from CSRS to the medical board to assist the medical board in doing their job." (T p. 25)

18. Mange testified that he had discussions with Petitioner concerning the confidentiality provisions under the STOP Act, and, more specifically, subsection (b1) of General Statute 90-113.74 (T p. 16) Mange explained that it was not his job to give legal advice to DHHS and that he did not legally advise Petitioner regarding the confidentiality provisions of the STOP Act. (T pp. 16-17) Mange further testified that, if Petitioner had asked him for legal advice regarding these issues, he would have informed Petitioner that he could not give it. (T p. 17)

19. Alex Akushevich worked with Petitioner at DHHS as a data analyst. (T pp. 29-30) Akushevich described his job as working "with any data-related tasks. That includes making reports from the CSRS data, some for the Medical Board, for nursing board, and then other ad hoc reports that may come up. (T p. 30) Petitioner was Akushevich's direct manager. (Id.)

20. Akushevich explained that "the company . . . that holds our data, they will send over some data extracts and those data extracts are -- every row is a prescription for a controlled substance dispensed in the state. And using that data, I kind of manipulate it to look more usable. So I make some graphs and then turn it into high- prescriber reports." (T p. 31) These reports "show which prescribers are prescribing . . . specific prescriptions for these drugs based on some filters." (Id.)

21. Akushevich testified that his understanding of Report D was "[m]eant to enforce the STOP Act or check for compliance, which means that we needed to see if prescribers were writing prescriptions for more than eight-day supply on the patient's first visit to the doctor-- or eight-day supply for opioids. And we needed to use the raw data to find the prescribers that were writing more than eight." (T p. 39)

22. Akushevich testified that he provided Report D to Petitioner as "kind of a rough draft[.]" (T p. 45) This testimony is in conflict with a written statement provided to Respondent at or around the time of the event, in which Akushevich stated that "I finished working on the changes around 9 p.m. that night, at which point I notified [Petitioner] that the report was complete." (T pp. 50-51, Res. Ex. 17) Akushevich's written statement makes no reference to Report D being a "kind of a rough draft." (T p. 62)

23. Akushevich testified that he found some provider names in the report that he thought should not be in there and, around that time, he did not know how to remove them. (T p. 58) Akushevich himself placed the erroneous data into Report D as no one else was inserting information into the report. (T p. 60) Akushevich stated during his testimony that, in his view, Petitioner had reasonably relied on him to include accurate data in Report D. (T p. 63)

24. Akushevich neither received nor experienced any discplinary action of any kind for placing erroneous information in Report D; he was not given counseling or an informal reprimand, and was not put on a performance improvement plan. (T pp. 61-62)

25. Akushevich testified that during Petitioner's employment, both Petitioner and another employee, John Womble, had authority to release reports to the

NCMB. (T p. 63) He further testified that such releases were a part of Petitioner's job and that there was no provision requiring Petitioner to seek pre-approval from anyone before issuing such reports. (Id.)

26. Akushevich testified that Petitioner was careful about confidentiality issues and that he had no information suggesting that Petitioner either arranged for or desired that information in Report D be released to any media source. (T p. 65)

27. Akushevich sent an email to Petitioner to inform Petitioner that erroneous information was in Report D. (T p. 58) The email was sent after Petitioner had released Report D to the NCMB. (T p. 67)

28. John Womble, who works with the CSRS, testified at hearing that his duties include "maintenance with the database, making sure that facilities, pharmacies, physicians are in compliance with the upload or supplying data to the database. I do some diversion or unusual prescription pattern reviews, and that information goes to AG for their review to either go out to the SBI for them to actually open up a case on." (T p. 76) During the relevant period, Petitioner was Womble's direct supervisor. (T p. 75)

29. Prior to Report D going to the NCMB, Petitioner, Womble, and Akushevich met to discuss it. It was

the understanding of all concerned that the report needed to be released by Friday of that week. (T p. 85) Womble proposed that he review the report for errors, a process he described as not unusual. (T pp. 80-81)

30. In reviewing Report D, Womble found multiple erroneous information, such as DEA numbers for facilities, that should not have been included in the report. (T pp. 82-83) Womble informed Akushevich of this, but did not inform Petitioner of his findings. (T. p. 84) Womble said that this was because he expected to see Petitioner the next day. (Id.) Womble did not attempt to inform Petitioner of the events that day (Thursday) despite having access to Petitioner's email and mobile phone and knowing the urgency connected with the release of Report D. (T pp. 93-95)

31. As with Akushevich, Womble testified it was his understanding that releasing reports, such as Report D, was part of Petitioner's job. (T p. 88)

32. Womble testified that Petitioner did not disagree with or dismiss Womble's suggestion that Report D be reviewed for accuracy and told Womble "to look it over." (T p. 89) Womble, at hearing, indicated that Petitioner requested Akushevich to "stay awake and rerun the reports; would include changes been discussed." (Id.) Womble also confirmed that he gave

the errors to Akushevich based on the understanding that Akushevich was to correct the errors before leaving work that day. (T p. 91)

33. With respect to Akushevich correcting the errors and reviewing the report, Womble stated: "If there was any concern from the analyst, then I would have expected him to get back with me and say, you know, 'There's possibly more' or things of that nature. But I never heard any more." (T pp. 96-97)

34. DHHS called Sonya Brown, Petitioner's prior supervisor, as a witness. Brown signed Petitioner's dismissal letter.

35. Brown and Petitioner did not discuss the release of Report D prior to its release to the NCMB. (T p. 109) After learning of its release, Brown requested various information regarding the report from Petitioner.

36. In the course of these activities, Brown asked Petitioner whether he was going to be in the office that day. Petitioner indicated the affirmative and that he would stop by her office. Brown did not see Petitioner in the office that day. (T p.114)

37. Brown sent Petitioner an email asking for a copy of the Report D, and testified that Petitioner did not respond to it. (T p. 114) During his testimony, Petitioner stated he did not turn over the report as

requested because he did not believe he could lawfully provide a copy of the Report D to Brown via e-mail. (T p. 237)

38. Brown placed Petitioner on investigatory leave and began an investigation of the circumstances surrounding the release of Report D. (T pp. 115- 134)

39. Petitioner in the course of the investigation informed Brown that he consulted with Mange about releasing Report D. (T pp. 120-121) Brown said that Mange did not advise members of her department regarding such issues. (Id.)

40. Brown concluded that confidential information was released in Report D in a manner inconsistent with the general statute. (T pp. 123-124) Her stated basis for this contention was that no rules had been developed for this kind of report. (Id.) The record is devoid of any action by Brown prior to Petitioner's releasing Report D informing Petitioner that the report could not be released in the absence of the development of such rules.

41. Brown summarized the basis for Petitioner's dismissal as "That the report was released inconsistent with the law, also inconsistent with DHHS policy, the poor quality of the report, also not reporting to work and not assisting in the investigation as needed." (T p. 134) Petitioner claimed that the report was provided pursuant to

subsection (b1) of General Statute 90-113.74 pertaining to "outliers." (T p. 123) Brown testified that subsection (b1)(1a) of General Statute 90-113.74 was included in the STOP Act and "was new." (T p. 104) She further indicated that she was unsure as to what the agency's "responsibilities were as it related to this [provision]." (Id.; see, e.g., (T. p 122 (Brown testifying that there were discussions regarding "the intent behind this new provision."))

42. Brown conducted Petitioner's most recent performance review.3 Brown rated Petitioner as "exceptional" in the area of CSRS oversight and operation – the Tribunal notes that DHHS provided Petitioner with only one of his performance reviews in discovery despite being requested to provide his complete personnel file. (T pp. 140-141) highest rating possible. (T p 142) All aspects of Petitioner's job performance were rated "successful" or "exceptional." (Id.) Exceptional is "work performance that consistently exceeded result expectations and DHHS values." (T p. 143) Brown concluded Petitioner's review by calling Petitioner "truly an asset" to the Division.

(Id.)

43. Brown confirmed that Petitioner, up to the events at issue, had received no prior formal disciplinary action of any kind during his years of employment.

(T pp. 143-144) Brown further conceded that, prior to the incident giving rise to the disciplinary action, there was an effort to get Petitioner a ten percent pay raise. (T p. 146) While Brown said that she considered Petitioner's performance review and disciplinary history in the decision to terminate his employment, this consideration is not referenced in the dismissal letter. (T pp. 145-146)

44. In regards to the failure to appear to work allegation contained in Respondent's dismissal letter, Brown stated that Petitioner lived in Goldsboro, some distance away from the office in Raleigh. (T p. 148) She testified that she had authorized Petitioner to work from home on Fridays. (T p. 149) A Friday was one of the two days Petitioner allegedly did not report to work. Brown could point to no occasion where, prior to this incident, she had faulted Petitioner's work attendance or working from home. (Id.)

45. On neither of the days in question did Brown contact Petitioner and tell him that he was not to work from home on those dates, even though she could have.

(T p. 150) Brown could think of no reason why Petitioner would have refused such a request. (Id.)

46. As for the permission to release reports, Brown said that Petitioner had released reports to the

NCMB previously and that Petitioner had the authority to independently release reports as he thought appropriate. (T p. 151)

47. Brown testified that Petitioner should have assumed there were errors in Akushevich's data; she could point to no policy or instruction communicating this to Petitioner prior to him being fired. (T p. 153)

48. Brown conducted both the investigation of Petitioner and issued the dismissal letter. She has no prior training as an investigator. (T pp. 153-154) She said she found it "odd" that she was both investigating Petitioner and dismissing Petitioner. (Id.) She brought her concerns about this issue to Human Resources and was told to proceed anyway. (T p. 154)

49. During the investigation, Brown refused Petitioner access to his own files. (T. p. 155) She agreed that this placed Petitioner at a "[d]isadvantage." (T p. 157)

50. At the time of hearing, Brown was unaware that Akushevich failed to correct the errors in Report D pointed out by Womble. (T pp. 157-158) She agreed that, when Akushevich informed Petitioner that report D was "complete," the expectation would have been that it was properly finished as exemplified by the following exchange between Brown and Petitioner's counsel:

Q. So Mr. Akushevich represented to Mr. Asbun the report was complete and it was right, and it wasn't?

A. Correct.

Q. And Mr. Asbun relied on that and filed the report, right?

A. He did.

Q. And you fired Mr. Asbun?

A. That's correct.

Q. And you didn't do a single thing to Mr. Akushevich?

A. Correct.

(T p. 160)

51. Petitioner both testified and had submitted a written statement that he consulted with both Mange and DHHS attorneys Pam Scott and Lisa Corbett, before releasing Report D. When asked if she disputed this contention, Brown replied "I don't know." (T pp. 163-164)

52. Brown was aware the entire time that Petitioner was talking to Mange about STOP Act issues and never told him he either could not do so or could not rely on what Mange said. (T pp. 165- 166)

Brown, who was the investigator, was unaware who at the NCMB released the information in Report D to the public, and testified that it was her understanding that Petitioner had told the Board not to do so. (T pp. 167-168) As exemplified by the following exchange between Brown and Petitioner's counsel:

Q. So, in other words, you're blaming him for the public release of

information that was, A, done by someone else, and, B, after he

specifically told him not to do it. Is that right?

A. That's correct.

Q. Okay. And who actually released the information to the press?

A. I don't have firsthand knowledge of that.

(T p. 167)

54. Brown also testified Kody Kinsley, an interim director at the time, directed Petitioner to inform management of the release of the report. (T p. 186) This directive (a) did not specifically reference Report D or any other report, and (b) was not given to Petitioner until after the Report was released. (T pp 187-189)

III. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and upon the preponderance of the evidence, the Undersigned makes the following Conclusions of Law for purposes of the Final Decision.

55. As an initial matter, the Undersigned concludes that (i) the parties are properly before the OAH, (ii) Notice of Hearing was proper, and (iii) pursuant to 26

N.C. Admin. Code 3.0118, extraordinary cause exists for the issuance of a Final Decision in this case beyond 180 days from the date of filing the contested case petition.

A. Just Cause

(i) Standard of Review

56. The "burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer." N.C. Gen. Stat. § 126-32.02(d).

57. Given the agency's burden of proof in "just cause" contested cases, an "ALJ, reviewing an agency's decision to discipline a career State employee within the context of a contested case hearing, owes no deference to the agency's conclusion of law that

either just cause existed or the proper consequences of the agency's action."

Harris v. N. Carolina Dep't of Pub. Safety, 252 N.C. App. 94, 102, 798 S.E.2d 127, 134 (2017), aff'd, 370 N.C. 386, 808 S.E.2d 142 (2017).

58. Rather, under the current iteration of the Act, the ALJ now has greater authority regarding the appropriate disciplinary action against a career State employee. See, e.g., N.C. Gen. Stat. § 126-34.02 (authorizing ALJ to render a final decision taking one of several actions to rectify an agency decision she deems erroneous); N. Carolina Dep't of Env't & Nat. Res. v. Carroll, 358 N.C. 649, 666, 599 S.E.2d 888, 898 (2004) (recognizing that the question of whether "just cause" exists is a question of law, which the ALJ has the authority to review de novo).

(ii) Analysis

59. This contested case involves a claim of dismissal without "just cause" pursuant to General Statute 126-35.

60. It is well-settled that "[c]areer state employees, like petitioner, may not be discharged, suspended, or demoted for disciplinary reasons without 'just cause.'"

Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol, 221 N.C. App.

376, 379, 726 S.E.2d 920, 923 (2012) (citing N.C. Gen. Stat. §126-35)

61. The North Carolina Administrative Code provides two bases "for the discipline or dismissal of employees under the statutory standard of 'just cause:' (1)

Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance and (2) Discipline or dismissal imposed on the basis of unacceptable personal conduct." 26 N.C. Admin. Code 1I.2301(c). It is the latter that Respondent alleges against Petitioner in this contested case.

62. The Administrative Code defines unacceptable personal conduct as:

(1) conduct on or off the job that is related to the employee's job duties and responsibilities for which no reasonable person should expect to receive prior warning;

(2) conduct that constitutes violation of State or federal law;

(3) conviction of a felony that is detrimental to or impacts the employee's service to the agency;

(4) the willful violation of work rules;

(5) conduct unbecoming an employee that is detrimental to the agency's service;

(6) the abuse of client(s), patient(s), or a person(s) over whom the employee has charge or to whom the employee has a responsibility, or of an animal owned or in the custody of the agency;

(7) falsification of an employment application or other employment documentation;

(8) insubordination that is the willful failure or refusal to carry out an order from an authorized supervisor;

(9) absence from work after all authorized leave credits and benefits have been exhausted; or

(10) failure to maintain or obtain credentials or certifications.

25 N.C. Admin. Code 1I.2304.

63. When "just cause' exists, four (4) disciplinary alternatives may be imposed against an employee: (1) Written warning; (2) Disciplinary suspension without pay; (3) Demotion; and (4) Dismissal. 25 N.C. Admin. Code 1I.2301(a). Unacceptable personal conduct, however, "does not necessarily establish just cause for all types of discipline." Warren, 221 N.C. App. at 383, 726 S.E.2d at 925. Instead, "[j]ust cause must be determined based upon an examination of the facts and circumstances of each individual case." Id. (internal citations and quotations omitted); see also Whitehurst v. E. Carolina Univ., __ N.C. App. __, 811 S.E.2d 626, 633 (2018) (recognizing that "just cause" is "a concept embodying notions of equity and fairness to the employee." (internal citations omitted)).

64. Here, Petitioner's dismissal was based on allegations of unacceptable personal conduct. Respondent contends that Petitioner's alleged unacceptable personal conduct included: conduct for which no reasonable person should expect to receive a prior written warning, the willful violation of known written work rules, conduct that violates State or federal law, and conduct unbecoming a state employee that is detrimental to state service.

65. The North Carolina Court of Appeals has articulated a three-part analytical approach to determine whether just cause exists to support a

disciplinary action against a career State employee for 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. . .. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Warren, 221 N.C. App. at 383, 726 S.E.2d at 925. The Undersigned addresses each of these prongs below.
66. As to the first prong, Respondent alleges Petitioner released the Report D. This fact is undisputed. However, there is scant evidence to support a finding that Petitioner engaged in the following purported conduct:

a. Knowingly releasing the report to the public: The evidence shows that Petitioner did not know the report would be released to the public and, in fact, specifically communicated to the NCMB that the information contained in the report should not be released to the public.

b. Knowingly releasing the report with errors: The evidence shows that, while the ultimate release of the report was Petitioner's responsibility, Petitioner

was told by Akushevich that the report was complete. Neither Womble nor Akushevich told Petitioner that any errors remained in the report.

c. Failing to report to work: The evidence shows that Petitioner was permitted to work at home and that disputes about this only arose after the fact when Respondent was imposing disciplinary action.

67. As to the second prong, the Undersigned concludes that there is little, or nothing shown by the evidence that indicates any unacceptable personal conduct by Petitioner.

68. Again, Respondent's primary contention is that the Petitioner's release for the Report D amounted to unacceptable personal conduct. While it is undisputed that Petitioner released the report, the evidence fails to show Petitioner did so with any willful disregard of rules or statues. Petitioner had independent authority to release such reports without prior authorization and had done so multiple times in the past with no issue arising. Petitioner discussed the STOP Act, including the reporting requirements therein, with those he considered to be an authority on such matters. The reporting requirements in subsection (b1) of General Statute 90-113.74 of the STOP Act, which Petitioner believed applicable to release of information to the NCMB, were "new" and even Respondent was unsure of its

responsibilities with respect to these provisions. (T p. 104) There is no evidence that Petitioner was, prior to the release of Report D, given any order not to release it without prior permission or to handle the report differently from other ones.4 The purported directive from Kinsley was a single line in an email requesting that he be informed of anything going out of the division; it did not reference the report in question in any way. Notably, this directive was sent out after Petitioner's release of the report. This evidence, in addition to that shown regarding Petitioner's alleged knowledge of potential public release and errors, compels the conclusion that any action or omission committed by Petitioner appears to be properly characterized as an issue of job performance, not personal conduct. Indeed, it was after the incident involving Petitioner and giving rise to this contested case that Respondent started meeting with the medical board to establish a memorandum of agreement and restrict the board's access to information coming from Respondent. (T. p 169.)

69. Assuming arguendo that Petitioner's release of Report D constituted some level of unacceptable personal conduct, the Undersigned concludes that the third prong of Warren fails to support the dismissal of Petitioner.

70. The North Carolina Supreme Court has emphasized that an "appropriate and necessary component" of a decision to impose discipline on a career State employee is the consideration of certain factors, including: "the severity of the violation, the subject matter involved, the resulting harm, the [career State employee's] work history, or discipline imposed in other cases involving similar violations." Wetherington v. N.C. Dep't of Pub. Safety, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

71. Consideration of the Wetherington factors in this case favor Petitioner. Petitioner was a fairly long service employee with an excellent disciplinary and work history. With regards to commensurate discipline, the evidence shows that Akushevich, who was responsible for both including the inaccurate information in Report D and failed to either remove or timely inform Petitioner that it was not removed, received no discipline at all, while Petitioner was terminated. These factors, coupled with Respondent's rather troublesome conclusion that an employee may be fired for failing to heed a directive he had not yet been given, not only demonstrate that Respondent failed to prove it properly dismissed Petitioner for unacceptable personal conduct, but weigh against a finding of just cause.

B. Whistleblower Claim

72. North Carolina's policy is to encourage State employees to report fraud, substantial and specific dangers to public health and safety, and other similar matters to appropriate authorities. N.C. Gen. Stat. § 126-84(a). As a result, under the Whistleblower Act, a State agency may not "discharge, threaten, or otherwise discriminate against a State employee" for accurately reporting fraud or a substantial and specific danger to public health and safety. Id § 126-85(a).

73. In order to establish a claim under the Whistleblower Act, an employee must demonstrate: "(1) that the plaintiff engaged in a protected activity,

(2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff." Newberne v. Dep't of Crime Control and Safety, 359 N.C. 782,788,618 S.E.2d 201,206 (2005).

74. Here, Petitioner alleged that he was dismissed in retaliation for engaging in protected activity under the Whistleblower Act. Petitioner did not present any direct evidence of retaliation; therefore, he would proceed under the McDonnell Douglas burden shifting framework.

75. In the absence of direct evidence of retaliation, a Petitioner must "seek to establish by circumstantial

evidence that the adverse employment action was retaliatory" under the McDonnell Douglas framework. Newberne, 359 N.C. at 790, 618 S.E.2d at 207. Under this framework, "once a [petitioner] establishes a prima facie case of unlawful retaliation, the burden shifts to the [respondent] to articulate a lawful reason for the employment action at issue." Id. 359 N.C. at 790-91, 618 S.E.2d at 207-08.

76. Petitioner failed to show by a preponderance of the evidence a prima facie case under the Whistleblower Act. Petitioner did not present any evidence of engaging in any activity protected by the Whistleblower Act or that Respondent was aware of such protected activity at the time Petitioner was dismissed.

77. Further, Petitioner has failed to establish any causal connection between any protected activity and his dismissal. Respondent's investigation was initiated after the release of Report D1-1 and the release was brought to management's attention by inquiries about the report from media outlets. This investigation ultimately resulted in Petitioner's dismissal.

78. In the absence of any evidence to support a Whistleblower Act claim, Petitioner has failed to show by a preponderance of the evidence that he was

dismissed in retaliation for engaging in activity protected by the Whistleblower Act.

IV. FINAL DECISION

79. Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned concludes that (i) Petitioner failed to establish a claim under the Whistleblower Act and (ii) Respondent has failed to prove by a preponderance of the evidence that Respondent had just cause to dismiss Petitioner. Given the Undersigned's "just cause" determination, Respondent's decision to terminate

Petitioner is REVERSED and Petitioner should be retroactively reinstated to the same or similar position with back pay, attorney's fees, as well as all other remedies available under law.

APPENDIX A

List of Witnesses and Exhibits Admitted into Evidence

A. Witnesses

For Petitioner: Petitioner

For Respondent: Steve Mange, Senior Policy Advisor

Alex Akushevich, Data Analyst

John Womble, Consultant

Sonya Brown, former manager

B. Exhibits

The following exhibits were accepted and admitted into evidence at the hearing

of this matter:

For Petitioner: Petitioner's Exhibits 2, 4, 5, 7, 8

For Respondent: Respondent's Exhibits 1, 2, 4-9, 13-21

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.

SO ORDERED, this the 27th day of January, 2020.

/s/ Tenisha S Jacobs

Administrative Law Judge

PETITION OF CONTESTED CASE HEARING

STATE OF NORTH CAROLINA IN THE OFFICE
OF
ADMINISTRATIVE HEARINGS
COUNTY OF WAKE

ALEJANDRO ASBUN (your name) PETITIONER, v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT. (The State agency or board about which you are complaining)	)	**PETITION FOR A CONTESTED CASE HEARING (N.C. Gen. Stat. § 126)**

I hereby ask for a contested case hearing as provided for by North Carolina General Statutes §126-34.02 because the Respondent has acted as follows:
(4) **MY APPEAL IS BASED ON:** (check all that apply)
* ___X__discharge without just cause ____suspension without just cause __
__demotion without just cause
_____failure to receive priority consideration __X__other (explain) **Violation of Whistleblower Act**
* The following occurred due to discrimination and/or retaliation for opposition to alleged discrimination:

_____employment	_____demotion
_____promotion	_____layoff
_____training **AND/OR**	_____termination

_____transfer
_____other (explain)

(5) Briefly state facts showing how you believe you have been harmed by the State/local agency or board:
Petitioner is a career employee who was dismissed without just cause for disciplinary reasons by the Respondent. Further, Respondent violated the Chapter 126, Article 14, the **Whistleblower Act**, because Respondent took adverse employment action against Petitioner because Petitioner made protected reports of matters of public concern set out in N.C.G.S. 126-84. Petitioner demands reinstatement, **treble damages**, back pay and benefits, costs, and attorney's fees. By taking these actions Respondent deprived Petitioner of property and substantially prejudiced Petitioner's rights and additionally, (1) Exceeded its authority or jurisdiction, (2) Acted erroneously, (3) Failed to use proper procedure, (4) Acted in violation of Constitutional provisions (5) Failed to act as required by law or rule, and/or (6) Was arbitrary, and capricious, and/or abused its discretion. Petitioner has exhausted all internal remedies before filing this appeal.

(If more space is needed, attach additional pages.)
Paygrade: 65+ Months of continuous State employment: 24+ Job title: Human Services Program Manager I
If applicant, I applied for: _____
(6) Date: June 17, 2019 (7) Your phone number: (919) 865-2572 (c/o Law Offices of Michael C. Byrne)
(8) Print your address: c/o Michael C. Byrne, Attorney, 150 Fayetteville St. Suite 1130, Raleigh, NC 27601
(street address/p.o. box) (city) (state) (zip)
(9) Print your name: Alejandro Asbun, by counsel (10):__/s/ Michael C. Byrne

You must mail or deliver a **COPY** of this Petition to the agency or board named on line (3) of this form. You should contact the agency or board to determine the name of the person to be served.

CERTIFICATE OF SERVICE

I certify that this Petition has been served on the agency or board named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed **OR** by delivering it to the named agency or board:
(11) Lisa G. Corbett, General Counsel (12) North Carolina Department of Health and Human Services
(name of person served) (agency or board listed on line 3)
(13) NC DHHS, 2001 Mail Service Center, Raleigh NC 27699 (address)
(14 June 17, 2019 (15) _____/s/ Michael C. Byrne
(your signature)

When you have completed this form, you **MUST** mail or deliver the **ORIGINAL AND ONE COPY** to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

Filing a Petition for a Contested Case Hearing **does not** constitute the filing of a discrimination charge with the EEOC or the Civil Rights Division of the Office of Administrative Hearings. Should you decide to file such a charge, you should contact the Office of Administrative Hearings, Civil Rights Division or the EEOC office nearest you; EEOC offices are located in the following cities: Charlotte, Raleigh, and Greensboro.

DHHS' LEGAL COUNSEL E-MAIL TO PETITIONER

NABP MOU and Proposed Amendment

DHHS executed a Memorandum of Understanding (MOU) with NABP regarding North Carolina's connection to PMP InterConnect in December 2014. From our discussions, I understand that for a number of reasons, DHHS has not yet provided its highly sensitive CSRS data to NABP for use with PMP InterConnect. One of these reasons were the substantial revisions contained in the Proposed Amendment to the MOU which NABP began circulating in the Spring of 2015, just a few months after the initial agreement was signed.

Based upon my review and the information you have provided regarding NABP's history and current business model, the Proposed Amendment which NABP has been pressing DHHS to execute contains several provisions which would not be in the best interests of the Department or North Carolina.

(1) **Expired MOU.** At the outset, it is important to note that the original MOU with NABP effective Dec. 19, 2014 had a one-year term, and could be renewed up to two times for a one-year period if the parties chose to do so, pursuant to the Term and Termination Section on page 3. Based upon information you provided regarding the history of the MOU, my understanding is the MOU has not been formally renewed. Thus, by its terms, the MOU technically expired one year after signature, on or about Dec. 19, 2015. While Section 3 of the Proposed Amendment includes language to clarify the provision addressing renewal terms for the MOU, it does not actually provide for a renewal or extension of the MOU for an additional or longer term. NABP might take the position that there was an unwritten agreement to renew and continue the MOU based upon its ongoing discussions with DHHS regarding the interconnection project. If DHHS decides to execute an amendment to the MOU, that amendment should include an appropriate provision extending the term of the original MOU.

Note that the Proposed Amendment attempts to retroactively rewrite the original MOU from the beginning, purporting to make the Amendment effective as of the date of the original MOU. In many years of practice, I have never seen such a "nunc pro tunc" amendment, and although I have not researched this specific issue, I seriously question whether such an amendment purporting to make material changes to the initial contract retroactively, would be legally binding for the period of time before the amendment was signed.

(2) **NABP Right to Access/Use N.C. Data.** Subsection 1.a. of the Proposed Amendment would delete the existing provision of the MOU limiting NABP's right to access and use any and all information transmitted through the InterConnect system to properly provide services under the MOU and as authorized by the State, and specifically

disclaiming any claim of ownership in such information by NABP and its vendors. Instead it would replace this existing provision which protects N.C.'s PMP data, with a more narrow clause which merely prohibits use of protected health information or personally identifiable patient information transmitted through the InterConnect system for any purpose other than as specifically authorized by N.C. This proposed new provision contains no disclaimer of ownership to N.C.'s data transmitted through the PMP InterConnect system. Moreover, Section 1.b. adds what amounts to an escape clause to the existing provision of the MOU which requires NABP to cover "all reasonable, necessary and otherwise unfunded costs associated with modifying state PMPs to be able to interface with the PMP Interconnect." The proposed new caveat "to the extent funds are available and budgeted by NABP," essentially would transform this provision requiring NABP to cover such costs unconditionally, to a provision leaving the decision to cover such costs completely within NABP's discretion. Accordingly, under this proposed provision, if NABP chose to do so, it could require North Carolina to cover all costs associated with any modifications needed to allow the CSRS to interface with PMP InterConnect.

(3) **N.C. Right to Access/Use Non-State PMP Data.** Section 2 of the Proposed Amendment appears to add a new limitation on N.C.'s ability to provide or otherwise make available "non-State PMP data" obtained through the PMP InterConnect. This proposed limitation was not included in the original MOU, which appears to be silent on this particular issue. Although "non-State PMP data" is not defined in the MOU or Proposed Amendment, presumably that term refers to any and all data obtained or accessed by N.C. through the PMP Interconnect other than N.C.'s own PMP data. Under the terms of the proposed new Paragraph

10, DHHS would only be able to provide or make available such non-State PMP data to a state or another individual or entity through use of the PMP InterConnect. In other words, this provision would prevent the Department from sharing out-of-state PMP data as part of implementing its own effective PMP data access or interconnection arrangements with health care providers and systems in North Carolina. From our discussions and e-mails, I understand that you have information indicating that use of the PMP InterConnect for this purpose would require DHHS to use NABP's vendor, Appris, at a high cost.

(4) **NABP Sale of Data.** You have indicated that NABP is selling access to participating States' data to its vendor Appris for use by Appris in populating its NarcCheck System being sold to health care facilities. The original MOU does not authorize NABP or its partner solution providers (such as Appris) to do anything with N.C.'s PMP data other than use the data for purposes of providing services under the MOU relating to the PMP InterConnect. The MOU also does not appear to contemplate such a future disclosure and use of N.C.'s data. NABP Responsibilities, Paragraph 5 specifically provides, "NABP and its solution provider(s) may access or use information that is transmitted through the [InterConnect] System *to properly provide services under this MOU, to enhance access or delivery of PMP data, and also as specifically authorized by the State. . .*" (Emphasis added). Attachment A to the MOU, which sets out specific requirements governing access to N.C.'s PMP data provides in Paragraph 2 of the Confidentiality Section that the data in the CSRS "shall be released *through the NABP PMP InterConnect System*" *only to "[p]ersons licensed to prescribe or dispense controlled substances, and their delegates approved by NC DHHS, for the purpose of*

providing medical or pharmaceutical care for their patients. . . " From our discussions, I understand that DHHS has not authorized NABP or its partner solution provider to disclose and use the State's PMP data to populate its NarcCheck System or for any other for-profit enterprise, and that DHHS does not want to allow NABP to sell N.C. data in this manner.

(5) **Assignment Rights.** I agree with you that the revised Assignment provision included in Paragraph 4 of the Proposed Amendment is too one-sided, giving NABP far-reaching assignment rights and DHHS none. Based upon the information you have provided me regarding the history of NABP's actions pertaining to the PMP InterConnect and its interactions with States and others regarding PMP data, a provision allowing NAPB unfettered rights to assign the MOU "to any of its affiliates with common ownership, or a solution provider in addition to or to replace Appriss, Inc." is much broader than N.C. would want generally, and especially given the importance of the interconnection program and the sensitive data involved. The term "any of its affiliates with common ownership" is undefined and therefore, could potentially be very broad. Note also that there is no requirement for NABP to provide any written notice of such an assignment. This provision would significantly expand NABP's assignment rights under the original MOU, which allowed NABP to assign the MOU only to its named affiliate, National Association of Boards of Pharmacy Foundation, or a solution provider in addition to or to replace Appriss, Inc.

If the Department wishes to renew and amend the MOU, then in light of information you have learned about NABP's business model and practices following the execution of the initial MOU, it might be wise to take that opportunity to try to strengthen several of the terms of the original MOU to

better protect the Department's interests and N.C.'s CSRS and the data contained within that system. The terms of a reasonable amendment to the MOU would include, but not be limited to: extension of the original MOU term; more specific limitations on NABP's right to access and use North Carolina's data, including an express prohibition against sale of the data for other purposes and enterprises; reasonable limitations on NABP's assignment rights; and any revisions that may be necessary to facilitate the Department's ability to move forward with pursuing its own data sharing and interconnection solutions. I would be glad to assist in drafting an amendment if the Department decides to go that route. I understand NABP might not be very receptive to such an amendment. Of course, you can anticipate that NABP would want the revisions contained in its Proposed Amendment to be addressed in some manner as well. Perhaps a smart step to opening meaningful negotiations regarding NABP's proposed changes to the MOU would be to ask NABP to provide a written explanation of the reason for each suggested amendment and what each change is intended to achieve.

From our discussions, I gather that the relationship between DHHS and NABP is somewhat strained for a number of reasons. Based upon the information you have provided and the fact that currently the original MOU is expired, it would be most prudent to continue to withhold North Carolina's CSRS data from NABP until after mutually acceptable terms can be reached and incorporated into an MOU Addendum signed by both NABP and DHHS.

Please note that this memo contains a confidential attorney-client privileged communication, and is for internal discussion purposes only within DHHS. Accordingly, please do not share this memo or any excerpts of it with any persons or entities outside of DHHS.

Please let me know if you have questions regarding any of the above.

Thanks Very Much,

Pam

Pam Scott
Assistant General Counsel
Office of General Counsel
North Carolina Department of Health and Human Services
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MOTION TO COMPEL

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
08/15/2019 10:55 AM

STATE OF NORTH CAROLINA COUNTY OF WAKE Alejandro Asbun, Petitioner, v. North Carolina Department of Health and Human Services, Respondent	IN THE OFFICE OF ADMINISTRATIVE HEARINGS19 OSP 03469 **ORDER ON MOTION FOR EXTENSION AND MOTION TO COMPEL**

THIS MATTTER is before the undersigned Administrative Law Judge on Respondent North Carolina Department of Health and Human Services' Motion for Extension of Time and Petitioner Alejandro Asbun's Motion to Compel or Exclude Evidence. The Undersigned addresses each motion separately in the order in which they were filed with the Office of Administrative Hearings.1

I. Respondent's Motion for Extension of Time

1. On 6 August 2019, Respondent filed the Motion for Extension requesting "for an extension of time in which to [r]espond to Petitioner's First Set of Interrogatories and Request for Production."

2. Based on the motion, as well as Petitioner's response thereto, Petitioner's discovery requests appear to have consisted of interrogatories and requests for production of documents and were served on Respondent on 17 June 2019.

---

1 While both motions were filed with the Office of Administrative Hearings on the same day, Respondent's Motion for Extension was filed prior to Petitioner's Motion to Compel.

3. Respondent, in the Motion, represents that, in accordance with the rules governing contested case proceedings, it timely served a schedule of reasonable compliance indicating that it would provide responses to Petitioner's discovery requests on or before 2 August 2019.

4. Respondent now seeks to extend the response date to and including 19 August 2019; it sets forth the reasons for seeking the requested extension in the Motion. However, Respondent's request is untimely as it was filed after the response deadline it set in its own schedule of reasonable compliance.

5. Respondent's motion should therefore be denied. *II. Petitioner's Motion to Compel*

6. Petitioner, also on 6 August 2019, filed a Motion to Compel seeking an order compelling Respondent to respond to its discovery requests that were the subject Respondent's motion for extension.

As explained below, the Undersigned concludes that Petitioner has stated sufficient grounds for seeking an order compelling discovery.

7. Rule 37 of the North Carolina Rules of Civil Procedure gives the trial court express authority to compel discovery and to sanction a party for abuse of the discovery process. *Cloer v. Smith*, 132 N.C. App. 569, 573 (1999). This rule of civil procedure, as with many other rules, is applicable in contested case proceedings. 26 N.C. Admin. 3.0101 (a).

8. Here, Petitioner, in his Motion, articulates the grounds upon which he seeks to compel discovery from Respondent:

1. On June 17, 2019, Petitioner served discovery ("the discovery) on Respondent. A copy of that discovery is attached as Exhibit "A" to this Motion to Compel. Under OAH rules, answers were due, in the absence of a satisfactory schedule of reasonable compliance, 15 days from service (specifically, July 2, 2019).

4. . . .When the discovery was past due, the undersigned emailed Respondent's counsel attempting to confer with him regarding the discovery. Respondent's counsel said that he had sent the undersigned a schedule of reasonable compliance by mail.

5. This proposed schedule provided Respondent an additional month to respond to the discovery requests. In an attempt to further confer

with Respondent and avoid court action as contemplated by N.C.G.S. 1A-1, Rule 37, Respondent was told that if it failed to produce discovery by the deadline in question – a deadline set by Respondent itself – than Petitioner would have to file a Motion to Compel based upon the close proximity of the August 30 hearing date. ..

6. Respondent's self-imposed deadline to provide discovery expired Friday, August 2, 2019. No discovery of any kind had been provided as of that date; at which time the discovery had been outstanding for approximately 45 day[sic] Petitioner's Motion to Compel, pp. 1-2.

9. "[O]ne of the basic purposes of discovery is to facilitate disclosure of material and relevant information to a lawsuit so as to permit the narrowing of issues and facts for trial . . .." *Benfield v. Benfield*, 89 N.C. App. 415, 421–22 (1988). Failure to provide such discovery, which includes the failure to answer interrogatories or requests for production of documents, is sufficient grounds for seeking an order to compel. N.C. R. Civ. P. 37(a)(2).

10. Having carefully considered the articulated grounds in the motion and to allow for the timely presentation of this case, the Undersigned, in her discretion, concludes that Petitioner's Motion to Compel should be granted.

III. Conclusion

11. For the reasons explained above, it is therefore ORDERED that:

I. Respondent's Motion for Extension is DENIED;

II. Petitioner's Motion to Compel is GRANTED. Respondent is therefore ORDERED to comply with Petitioner's First Set of Interrogatories and Request for Production on or before **19 August 2019**. Failure of Respondent to comply with this Order may result in the imposition of sanctions as set forth in 26 N.C. Admin. Code 03.0112(g).

SO ORDERED this the 15th day of August, 2019.

TJ
Tenisha S Jacobs
Administrative Law Judge

PARTIAL PETTITIONER'S BRIEF TO N.C. SUPREME COURT

File No. _____

Tenth District

SUPREME COURT OF NORTH CAROLINA

****

ALEJANDRO ASBUN,	)	
Petitioner-Appellant.	)	**From Wake County Office of Administrative Hearing**
v.	)	
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES		19 OSP 03469
		COA 20-346
Respondent-Appellee.		

* *

NOTICE OF APPEAL BASED ON SUBSTANTIAL CONSTITUTIONAL QUESTION PURSUANT TO N.C. GEN. STAT. § 7A-30(1) & N.C. R. APP. P. 14

And

PETITION IN THE ALTERNATIVE FOR DISCRETIONARY REVIEW PURSUANT TO N.C. GEN. STAT. § 7A-31(c) (1), (2) & (3) AND N.C. R. APP. P. 15

ISSUE IV

Consequently, The U.S. Supreme Court has determined that due process is a flexible concept whose essence is the right to be heard at a meaningful time and in a meaningful manner. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); *see also State v. Valdez,* 88 N.M. 338, 540 P.2d 818 (1975). In addition, the U.S. Supreme court has determined that the Due Process Clauses protect civil litigants attempting to redress grievances as shown below:

> *"The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, at (1982). Also see, *Societe Internationale v. Rogers,* 3 57 U. S. 197 (1958).

In the same case the U.S. Supreme Court determine that a cause of action is protected by the Fourteenth Amendment's Due Process Clause.

> *"The first question, we believe, was affirmatively settled by the Mullane case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause" Logan v. Zimmerman Brush Co.*, 455 US 422 at 428 – (U.S. 1982). Also see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950).

The Fourteen Amendment's Due Process Clause protects Petitioner-Appellant's right to be heard upon established adjudicatory procedures. See Logan *v. Zimmerman Brush Co.*, 455 US 422 at 430 – (U.S. 1982). Also see, *Boddie* v. *Connecticut,* 401 U. S. 371, 380 (1971).

For the forgoing reason stated above, The N.C. Court of Appeal sua sponte dismissal of Petitioner-Appellant's gravely injured and violated Petitioner-Appellant's U.S. constitutional right pursuant to the U.S. Const. amend. XIV,

Sec I by dismissing Petitioner-Appellant's Whistleblower claim without affording Petitioner-Appellant the opportunity for a hearing in the North Carolina Court of Appeals on the merits of his claim. Recently, The U.S. Supreme Court wrote *"Only the written word is the law, and all persons are entitled to its benefit."* See. Bostock v. Clayton County, 590 U.S. __ (2020) at p. 2. WHEREFORE, this constitutional issue was timely raised by virtue of the Court of Appeals' violation of Petitioner-Appellant's constitutional right pursuant to N.C. Const. art. I, Sec. 18 as described in Petitioner-Appellant's motion to rehear en banc, which was the first available opportunity. This issue was not determined by the NC Court of Appeals.