

STATE OF NORTH CAROLINA
COUNTY OF ALAMANCE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 OSP 01567

STEPHEN R. WEST,

Petitioner,

v.

THE UNIVERSITY OF NORTH
CAROLINA AT CHAPEL HILL,

Respondent.

DECISION

The above-captioned case was heard before the Honorable Donald W. Overby, Administrative Law Judge, on 27 and 28 June 2012, in Raleigh, North Carolina.

APPEARANCES

For Respondent: Katherine A. Murphy
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602

For Petitioner: David G. Schiller
Schiller & Schiller
5540 Munford Rd., Suite 101
Raleigh, N.C. 27612

EXHIBITS

Admitted for Respondent:

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	09/01/08	Email correspondence between Jim Bodfish and Stephen West
2	06/17/09	Email from Linda Martin to Stephen West
3	07/02/09	Email correspondence between John Hart, Stephen West, and Lisa Apple
4	07/14/09	Email correspondence between Stephen West, Lisa Apple, John Hart, et al.

5	07/15/09	Email correspondence between Stephen West, Laura Martin, and Tom Struchen
6	07/16/09	Performance Review for Stephen West
7	09/22/09	Letter from Thomas Struchen to Stephen West re: written warning for unacceptable personal conduct
8	09/22/09	Notes of disciplinary meeting for Stephen West
9	09/23/09	Letter from Tom Struchen to Stephen West re: notice of placement on investigative leave
10	10/20/09	Letter from Tom Struchen to Stephen West re: notice to attend pre-disciplinary conference
11	10/22/09	Letter from Tom Struchen to Stephen West re: disciplinary decision of dismissal
12	N/A	Information Security Policy and Standards
13	N/A	Privacy/Confidentiality of Protected Health Information (PHI)

Admitted for Petitioner:

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	10/20/09	Letter from Tom Struchen to Stephen West re: notice to attend pre-disciplinary conference
2	10/22/09	Letter from Tom Struchen to Stephen West re: disciplinary decision of dismissal
5	05/28/09	Performance Review for Stephen West
6	07/16/09	Work Plan for Stephen West, with handwritten comments
7	07/16/09	Work Plan for Stephen West
10	02/12/09	Email correspondence between Stephen West, Jennifer Hiemenz, and Deborah Fuller
11	03/09/09	Email correspondence between Angela Rosenberg, Stephen West, Jim Bodfish, Jeffrey Low, et al.
12	05/13/09	Email correspondence between Jim Bodfish and Stephen West
14	06/10/09	Email from Jim Kenny to Stephen West, transmitting NFRD Reports Overview and Guidelines

15	06/18/09	Email from Jim Kenny to Stephen West
16	06/18/09	Email correspondence between Robert Berger, Allen Daugird, Mary-Ann Minsley, and Stephen West
18	06/30/09	Letter from Stephen West to Laura Martin and Jeff Low
19	07/01/09	Emails from Angela Rosenberg to Stephen West
20	07/02/09	Email from Jim Bodfish to Stephen West
21	07/02/09	Email correspondence between Stephen West and Lisa Apple
22	07/02/09	Email correspondence between John Hart, Stephen West, and Lisa Apple
24	07/13/09	Email from Stephen West to Lisa Apple
32	10/04/09	Email from Jim Bodfish to Pamela McBane
36	N/A	Photographs of office and computer
38	06/18/09 & 06/24/09	CDL HIPAA Compliance (Report)
40	07/01/09	Drawing of CDL floor plan
41	10/06/09	Email from Stephen West to Derek Hoar
44	09/21/09	Email from Stephen West to Janet Furman
47	02/12/09	Email from Melissa Cobb to Ellen Kwa, with copy to Stephen West, etc.

WITNESSES

Called by Respondent:

Laura Martin
Thomas Struchen
Jeffrey Low
John Hart
Dr. James Bodfish

Called by Petitioner:

Stephen R. West

ISSUES

1. Whether Respondent had just cause to dismiss Petitioner.
2. Whether Petitioner's discharge was in retaliation for his reporting instances of what he perceived as being HIPAA violations

Based on careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. Petitioner Stephen R. West was a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina ("the State Personnel Act").
3. Respondent University of North Carolina at Chapel Hill ("UNC-CH") is subject to Chapter 126 and was Petitioner's employer.
4. Petitioner began his employment with UNC-CH in July of 2007, first as a temporary employee, and then permanently in September 2007. Petitioner was hired as a receptionist to work in the Center for Development and Learning ("the CDL"), which, organizationally, was part of the UNC Medical School. T. pp. 7-8, 34, 78, 141 Jeffrey Low, who was the Deputy Director for Administration, Finance, and Information Technology, hired Petitioner and initially served as Petitioner's immediate supervisor. T. pp. 77-79
5. In 2008, the CDL and several other departments on campus merged to form the Carolina Institute for Developmental Disabilities ("the CIDD"). T. p. 7. Although the CDL technically ceased to exist as an entity, the witnesses continued to refer to the group that had comprised the CDL as the "CDL".
6. The CDL's mission was to provide education, research, and service for people with developmental disabilities and their families. The CDL included a clinic for people with developmental disabilities. T. p. 34. Working within the CDL were both faculty and staff. The faculty members reported to their respective Department Heads and Dean,

while the staff reported to CDL personnel. Testimony of James Bodfish (not recorded)

7. One of the duties assigned to Petitioner while in the position of receptionist was to attend meetings related to transitioning the CDL into a new electronic scheduling and billing system referred to as "GE," which was already being used by other departments on campus. As the receptionist, Petitioner was familiar with the complications associated with scheduling appointments for patients in the CDL. The CDL was also beginning to use "WebCIS," an electronic system for managing patient records, but Petitioner was not assigned duties with respect to WebCIS. T. pp. 35, 45-46; Testimony of James Bodfish (not recorded); Pet. Ex. 5
8. While working as the receptionist, Petitioner developed concerns regarding protected health information ("PHI") of patients in the clinic. The issues about which Petitioner was concerned included PHI being left on the counter in the front lobby; diagnoses being discussed in the front lobby and the playroom where others could hear; consultations being conducted in those same areas; and other chart issues. T. p. 143
9. Petitioner brought up HIPAA concerns as early as August of 2008.
10. Petitioner brought some of his concerns to Laura Martin, who was the Clinic Coordinator for the CDL and became Petitioner's supervisor sometime in 2008; Ms. Martin thought that Petitioner had some good suggestions for improving confidentiality and many of his suggestions were implemented. T. pp. 8, 48
11. Petitioner also brought his concerns to Dr. James Bodfish, who was the Director of the CDL and the Associate Director of the CIDD. His concerns were well-received by Dr. Bodfish. Testimony of James Bodfish (not recorded); Resp. Ex. 1
12. Petitioner also brought his concerns to Jeffrey Low, Deputy Director for Administration, Finance, and Information Technology, who was also the HIPAA officer for the CDL. T. pp. 9-10, 79-80
13. Among other items, Petitioner mentioned to Mr. Low that he overheard a conversation in the lobby about sensitive information. Mr. Low reminded the people involved not to have such conversations in a public place. Mr. Low encouraged Petitioner to bring any HIPAA concerns to his attention. T. pp. 9-10, 77-81
14. Many of those about who Petitioner complained were physicians. In Mr. Low's experience, with respect to policies and regulations, working with physicians was at times difficult. In his opinion, physicians are trying to deliver good care and some view HIPAA as an impediment. Violations repeatedly occur and it is necessary to keep reminding some doctors to do things correctly concerning HIPAA. T. p. 87
15. Whenever Petitioner brought an issue to Mr. Low's attention, Mr. Low would address it. Mr. Low would not necessarily report back to Petitioner, especially if there was a

confidential personnel issue involved. This was also true of Dr. Bodfish, Ms. Martin and others to whom Petitioner reported. T. pp. 87-88

16. Dr. Bodfish engaged in discussions with John Hart, the Chief Audit and Compliance Officer for the UNC Health Care System, about HIPPA matters unrelated to Petitioner's complaints. There was overlap between some of the issues Petitioner raised and some of the issues Dr. Bodfish was addressing with Mr. Hart. Dr. Bodfish did not report back to Petitioner what if anything was done in order to address matters raised by Petitioner nor those about which he discussed with Mr. Hart. Testimony of James Bodfish (not recorded); T. pp. 113-14; Resp. Ex. 3
17. Some of the issues Petitioner brought to the attention of Dr. Bodfish involved faculty members, who were not under Dr. Bodfish's supervision. This made it difficult for Dr. Bodfish in terms of correcting their behavior. Testimony of James Bodfish (not recorded)
18. Petitioner was not in a job wherein it would have been appropriate or necessary for Dr. Bodfish or anyone else to report back to him about any actions taken to address HIPAA violations.
19. Ms. Martin supervised Petitioner until August 2009. Petitioner did well as the receptionist, and he indicated that he wished to take on more responsibility. In March of 2009, he was promoted to training coordinator. T. pp. 8-9, 142. Mr. Low had encouraged Petitioner to take the training coordinator position and supported his promotion. Dr. Bodfish was also in favor of promoting Petitioner. T pp. 80-81; Testimony of James Bodfish (not recorded)
20. When Petitioner became training coordinator, he acquired additional duties and an increase in pay. Petitioner's duties as training coordinator did not include any duties related to the transitioning of the GE scheduling system. T. pp. 36, 80
21. By the time Petitioner was promoted to training coordinator, he had already begun reporting HIPAA violations and concerns to Dr. Bodfish and Mr. Low.
22. Ms. Martin was Petitioner's supervisor when he moved into the position of training coordinator. Within a couple of months, it appeared that Petitioner was struggling in the new position. Ms. Martin was meeting with Petitioner frequently, and he seemed to be overwhelmed with the duties of his job. T. pp. 11-12
23. Petitioner's performance review for this period was dated May 28, 2009. The overall rating on Petitioner's performance review was "very good." At the time this performance review was prepared, Petitioner had only been in the training coordinator position for a few months. The evaluation was primarily based, though not entirely, on Petitioner's performance as the receptionist, which is reflected in the comments.
24. Ms. Martin met with Petitioner to discuss his performance review on June 16 or 17, 2009.

Petitioner's contention that the evaluation only had glowing and positive remarks and therefore is not in keeping with the events that followed is not an accurate depiction. Petitioner vehemently objected to negative written comments on the evaluation. Petitioner was so upset about the comments that he refused to sign the review and asked about the process for grieving it. It simply does not make sense that Petitioner would refuse to sign a performance evaluation that was only positive.

25. On June 17, 2009, Ms. Martin sent Petitioner a link to the website for the signature policy and the appeals process. Ultimately, in response to Petitioner's reaction, the comments were removed from the evaluation. T. pp. 13-16; Resp. Ex. 2, Pet. Ex. 5
26. On June 18, 2009, the day after his performance review, Petitioner contacted Mr. Hart to bring to his attention certain privacy issues at the CDL. Mr. Hart was already familiar with some of Petitioner's issues. In January or February of 2009, Dr. Bodfish had contacted the University Counsel's office with some issues of concern, which were then referred to Mr. Hart's office. Mr. Hart worked with Dr. Bodfish then, and found him to be open to correcting problems and trying very hard to move in the right direction T. pp. 115-19; Resp. Ex. 3
27. Petitioner continued to struggle as the training coordinator and asked to be returned to his former position as receptionist. During this period, Petitioner began making vague references to a HIPAA report that he was creating. T. pp. 16-17, 88
28. Ms. Martin encouraged Petitioner to focus on his job duties because there were problems with his assigned work not getting done. Petitioner was advised that developing a HIPAA report was not one of his assigned duties, T. p. 17. While it is the province of those working in the health care industry to be mindful of and report HIPAA violations when appropriate, it was never Petitioner's job to prepare a report of any sort for HIPAA violations. He had been reporting violations as he noticed them and they were being addressed, although he was not specifically told that they were being addressed nor any outcome or follow up for those reports. He was being treated the same as anyone else who reported HIPAA violations. T. pp. 47-48
29. Petitioner was seeking out HIPAA issues that were not related to his job as training coordinator. There was an issue raised that Petitioner was seeking information from others during his work hours when he was supposed to be doing other duties. Petitioner did not dispute that assertion.
30. On June 29, 2009, Petitioner submitted a written "report" to Mr. Hart and to Lisa Apple, Mr. Hart's administrative assistant. (Pet Ex. 38). The report consisted of documentation of issues which Petitioner viewed as being HIPAA violations, specifically charts being left on the floor in the front lobby, reports being left in an open office, and using the playroom and front lobby to conduct clinical evaluations and diagnoses. T pp. 120-21, 179-82; Pet. Ex. 38
31. On June 30, 2009, Mr. Hart asked Petitioner to meet with Dr. Bodfish to discuss the

concerns Petitioner had brought to Mr. Hart's attention. Mr. Hart felt that Dr. Bodfish was in the best position to get Petitioner's concerns addressed. Petitioner met with Dr. Hart and Dr. Bodfish soon thereafter. Mr. Hart believed that Dr. Bodfish was very receptive to Petitioner's issues. Mr. Hart did not have any sense that Dr. Bodfish was angry or that he had any negative reaction to Petitioner's concerns. T. pp. 119-23

32. In mid-July of 2009, management decided to move Petitioner to the position of chart room coordinator, which was at the same level as the training coordinator position. July was a critical time for the training coordinator, and Petitioner had not been performing those duties satisfactorily. Management felt the position of chart room coordinator would be a better fit for Petitioner. T. pp. 18-19, 82-83; Resp. Ex. 5 In addition, several employees at the CDL had approached Mr. Low and Dr. Bodfish saying they or others felt intimidated by Petitioner's questioning about possible HIPAA violations. T. pp. 84-85, 95-98; Testimony of James Bodfish (not recorded)
33. Both Mr. Low and Dr. Bodfish wanted Petitioner to succeed at the CDL/CIDD and believed the training coordinator position was just not a good fit for Petitioner. They thought the chart room coordinator position would be a better fit for Petitioner because it was related to HIPAA, and they hoped that Petitioner could succeed in the new position. T. pp. 81-82; Testimony of James Bodfish (not recorded)
34. Petitioner had asked Mr. Hart to maintain his anonymity when he reported the HIPAA violations to Mr. Hart in June 2009 and Petitioner felt that he had not done so. Petitioner felt then and contends now that he was being moved to the chartroom coordinator position in retaliation for his reporting the HIPAA violations. He expressed that concern in an email to Ms. Apple. His contention is without merit in that he was being moved to a new position which seemingly better suited his abilities and because he was not performing adequately in the training coordinator position. T. pp. 205, 199, 202; Pet.'s Ex. 17, 24)
35. The decision was made to reassign Petitioner's duties and he was informed of the upcoming change during the week of July 13, but because of a planned vacation, Petitioner did not resume his new duties until he returned from vacation during the first week of August. Petitioner's new duties as chart room coordinator included keeping track of charts, which allowed Petitioner to address one of his HIPAA concerns. T. pp. 19-21, 142, 148; Resp. Ex. 5; Resp. Ex. 6
36. When Petitioner moved to the position of chart room coordinator, Tom Struchen, who is the operations manager for the CIDD, became Petitioner's supervisor, although Ms. Martin continued to meet with Petitioner regularly. T. pp. 21-22, 51
37. Petitioner told Mr. Struchen that he had a comprehensive report detailing HIPAA violating in the CDL, but Petitioner would not share his report with Mr. Struchen. T. pp. 52-53
38. Petitioner seemed to do well with the new position; however, on September 22, 2009,

Petitioner received a written warning for unacceptable personal conduct. T. pp. 22-23, 55-56; Resp. Ex. 7

39. On July 13, 2009, Petitioner had forwarded several emails to Lisa Apple, Mr. Hart's administrative assistant, which contained PHI and which Petitioner had forwarded to an unsecure g-mail account. This constituted a violation of UNC Healthcare's privacy policy. Mr. Hart informed both Petitioner and Harvey Lineberry, the Assistant Dean for Human Resources in the Medical School, that the violation had occurred. T. pp. 25, 53, 115, 123-26; Resp. Ex. 4; Resp. Ex. 7; Resp. Ex. 13
40. Petitioner does not deny having sent PHI to his personal g-mail account. Petitioner contends that he thought using his g-mail account was acceptable because he had sent several emails containing PHI to Mr. Hart using his g-mail account. T. pp. 155,156.
41. Mr. Hart never instructed Petitioner to send PHI using his g-mail account, nor did Mr. Hart know that Petitioner intended to use his g-mail account to store or send PHI. There was nothing in the email string in question to show that Petitioner had encrypted the PHI prior to mailing it to his g-mail account. T. pp. 125-26
42. On July 31, 2009, during the period that Petitioner was away on vacation, Petitioner's WebSys and CIDD passwords were found taped to his computer monitor. The WebSys password would have allowed access to all patient records for all of the UNC hospitals and clinics. The CIDD password would have allowed access to all of the network files for the CIDD, including clinic information and trainee records. Leaving his passwords taped to his computer monitor was a violation of the University's Information Security Policy and Standards. T. pp. 23, 53-55; Resp. Ex. 7; Resp. Ex. 12
43. Petitioner contends that he was given short notice of the transfer just prior to going on his planned vacation. As a result, he hastily cleared his desk and packed in order to move to the new position. In the move, he contends, the password may have dropped from papers he was moving, but he denies actually taping the password or any confidential information to the monitor. T. pp. 207, 209. Petitioner's version of how the password may have been placed on the monitor has changed several times. While there is no "smoking gun" eyewitness that he taped the information to his computer, the believable credible evidence under the totality of the circumstances is that Petitioner taped the information to his computer prior to leaving for vacation.
44. Mr. Lineberry informed Ms. Martin, who was then the human resources manager for CIDD, and Mr. Struchen, who was Petitioner's supervisor, that Petitioner had to receive at least a written warning for his violation of policy regarding sending PHI to an unsecure server. Ms. Martin and Mr. Struchen requested and received approval for combining the two violations into one written warning, rather than issuing two separate written warnings, which would have been an option. It should be noted that Petitioner had been a well-liked employee and Ms. Martin and Mr. Struchen were attempting to help him by combining the two violations into one written warning. T. pp. 8, 21, 25-27, 53, 55

45. The decision to issue a written warning for the first incident, involving confidential patient information, was made in July, soon after the first incident occurred. While Ms. Martin was working with the Office of Human Resources and the Medical School on the written warning for the first incident, the second incident occurred.
46. Regrettably there were a number of things that contributed to a delay in issuing the written warnings to Petitioner. There was a period during which Ms. Martin and Mr. Struchen were attempting to negotiate combining both incidents into one written warning instead of two. There followed a period during which Ms. Martin was extremely busy with other human resources matters, and then there was a period when one or another of the interested parties was out of the office. As a result, Ms. Martin and Mr. Struchen were not able to meet with Petitioner to give him the written warning until September. While it is somewhat disconcerting that it took two months or more to issue the written warning, it is of no real consequence in disposition of the issues herein. T. pp. 29-31.
47. Ms. Martin and Mr. Struchen met with Petitioner to discuss the written warning on September 22, 2009. Ms. Martin and Mr. Struchen began the meeting by complimenting Petitioner on the job he had been doing in the chart room. When they attempted to discuss the policy violations, Petitioner exploded and said "this is bull!" Petitioner was visibly agitated and upset. He began talking about his HIPAA report, said that he had two versions, one with names and one without, and he said that he was going to submit the one with names to the State auditor. Petitioner stated that he had a reputation as someone who was trying to take down the CDL and that he was going to live up to his reputation. Petitioner also said he was going to call meetings with Mr. Lineberry and Bill Roper, the Dean of the Medical School. Finally, Petitioner said that he was not going to do his job in the chart room, that he would no longer advise faculty of what they were supposed to do, and that he was not going to check the charts in and out. T. pp. 23-26, 56-59; Resp. Ex. 8
48. Petitioner over-reacted to receiving the written warning. Ms. Martin stated that Petitioner was ranting. Ms. Martin and Mr. Struchen believed Petitioner's threats. They believed that he would attempt to live up to his perception of his own reputation, whatever that may be. They believed that he would try to take down the CDL, ostensibly by releasing the report he compiled and which he had refused to share with anyone. They believed that he was going to stop enforcing the policies in the chart room.
49. Mr. Struchen had heard that Petitioner had been interviewing people in the CDL in order to try to document HIPAA violations and that people felt intimidated. Ostensibly he was gathering information in creating his report. In particular, one expressed additional concern because Petitioner was also interacting and questioning students. Although Petitioner would not share the report with Mr. Struchen, the issues Petitioner had shared with Mr. Struchen were issues which Petitioner had already raised and were issues which had been addressed or were actively being addressed by Dr. Bodfish in meetings with John Hart. T. pp. 25-27, 57, 59-62; 91-99
50. The next morning, September 23, 2009, Ms. Martin checked in with Petitioner in the

chart room and found that Petitioner was still very angry and hostile and did not seem to have calmed down much from the meeting the previous afternoon. There was no indication that he was not performing his assigned duties in the chart room. Petitioner asked Ms. Martin why he was only written up for these two HIPAA violations because he had committed violations by photographing patients in the CDL waiting room in order to document HIPAA violations. He stated again that he was going to send his HIPAA report to the auditor, that he was going to live up to his reputation and try to take down the CDL, and that he was not going to do the HIPAA part of his duties in the chart room. T. pp. 27-28, 32; Resp. Ex. 8; Resp. Ex. 10

51. Following Ms. Martin's interaction with Petitioner on September 23, Mr. Struchen placed Petitioner on investigatory leave with pay. T. p. 63; Resp. Ex. 9
52. Petitioner was notified on October 20, 2009, that he was to attend a pre-disciplinary conference on October 21, 2009. The letter notifying Petitioner of the pre-disciplinary conference informed him of the conduct that was being considered regarding whether disciplinary action up to and including dismissal was warranted, including Petitioner's threats to turn over his HIPAA report to the State auditor; reports that Petitioner had been interviewing people at the CDL about HIPAA violations, which some found intimidating; the written warning for unacceptable personal conduct, which Petitioner had received on October 22, 2009; inappropriate statements made by Petitioner at the meeting on October 22, 2009; and Petitioner's stated refusal to enforce the policies and procedures of the chart room. Resp. Ex. 10
53. Mr. Struchen and Ms. Martin held a pre-disciplinary conference with Petitioner on October 21, 2009. Petitioner did not deny the conduct for which he received the written warning. His only defense against possible disciplinary action was that his threatening comments were taken out of context. T. pp. 63-65
54. Petitioner was dismissed from his employment effective October 22, 2009, for unacceptable personal conduct, specifically, his unprofessional and inappropriate statements and insubordinate behavior. T. pp. 31-33, 65-67; Resp. Ex. 11
55. The final decision to dismiss Petitioner was made by Dr. Bodfish and Mr. Low, with input from Ms. Martin and Mr. Struchen, as well as from the Office of Human Resources. The reason for Petitioner's dismissal was his conduct and the disruption to the workplace which his conduct had caused and threatened to cause if he remained employed. Ms. Martin concurred with the decision because Petitioner's behavior had grown so erratic and had begun to affect the CDL's business operations and ability to run the clinic. Mr. Struchen agreed with the decision because Petitioner threatened that he would not do his job duties and that he was going to try to take down the CDL. T. pp. 31-32, 65-66, 84-85; Testimony of James Bodfish (not recorded)
56. Neither Dr. Bodfish nor Mr. Low had any reason to fear Petitioner's HIPAA report, nor was there any reason for them to worry that Petitioner had sent his report to Mr. Hart. Petitioner's report had no bearing on his dismissal. Based on his interactions with Dr.

Bodfish, Petitioner, and the CDL/CIDD, Mr. Hart did not believe that Petitioner was dismissed in retaliation for his concerns regarding HIPAA. T pp. 89-91, 127; Testimony of James Bodfish (not recorded)

57. The testimony of Ms. Martin, Mr. Struchen, Mr. Low, Dr. Bodfish, and Mr. Hart was credible.
58. Petitioner never denied that he sent patient information to an unsecured email account. Petitioner never denied, prior to the hearing, leaving his password taped to his computer monitor. T. pp. 32-33, 55
59. Petitioner was dismissed because of his unacceptable personal conduct, not due to any reports of HIPAA violations nor any form of retaliation.
60. Respondent had just cause to dismiss Petitioner for his unacceptable personal conduct.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the just cause issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. On the first issue to be heard, Respondent met its burden to show that it had just cause to dismiss Petitioner.
3. A career State employee may be dismissed only for just cause. N.C. Gen. Stat. § 126-35(a). The State employer has the burden of proving that there was just cause for the dismissal. N.C. Gen. Stat. § 126-35(d).
4. Pursuant to regulations promulgated by the Office of State Personnel, there are two bases for the dismissal of an employee for just cause: (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 25 N.C.A.C. 1J.0604(b).
5. An employee may be dismissed without any prior warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 N.C.A.C. 1J.0608(a). One instance of unacceptable conduct constitutes just cause for dismissal. Hilliard v. North Carolina Dep't of Corr., 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).
6. In order to prove just cause based on unacceptable personal conduct, Respondent must prove (1) Petitioner engaged in the conduct Respondent alleged; and (2) the conduct constitutes just cause for dismissal. North Carolina Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).
7. Insubordination is unacceptable personal conduct "for which any level of discipline, including dismissal, may be imposed without prior warning." 25 N.C.A.C. 1J0614(h). "Insubordination" is defined as the "willful failure or refusal to carry out a reasonable

order from an authorized supervisor.” Id.

8. Petitioner stated on two separate occasions that he was not going to perform his duties. Refusing to carry out one’s assigned duties constitutes a “willful refusal to carry out a reasonable order from an authorized supervisor.”
9. “Unacceptable personal conduct” also includes “conduct unbecoming a state employee that is detrimental to state service.” 25 N.C.A.C. 1J.0614(i). In the case of “conduct unbecoming a state employee that is detrimental to state service,” the State employer is not required to make a showing of actual harm, “only a potential detrimental impact (whether conduct like the employee’s could potentially adversely affect the mission or legitimate interests of the State employer).” Hilliard v. North Carolina Dep’t of Corr., 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).
10. Mr. West’s disrespectful and disruptive behavior on September 22 and 23, constitute conduct unbecoming any employee. His manner in interviewing other employees for the HIPAA report he was compiling was confrontational and intimidating to them. Even if unintentional, his confrontational and intimidating interviews was “conduct unbecoming a state employee that is detrimental to state service.” The disruption caused both by his attitude and disrespectful behavior, his refusal to carry out his duties, and his intimidating behavior, is potentially, if not actually, detrimental to state service.
11. Petitioner’s conduct constituted unacceptable personal conduct, which justified his dismissal.
12. Respondent followed the procedures required before dismissing Petitioner for unacceptable personal conduct.
13. On the second issue to be heard, whether Petitioner was dismissed in retaliation for reporting HIPAA violations, Petitioner has the burden of proof. In order to prevail on a retaliation claim, a petitioner must first establish a prima facie case of retaliation.
14. To establish a prima facie case of retaliation, a plaintiff must prove “the following three essential elements: (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.” Demurry v. North Carolina Dep’t of Corr., 195 N.C. App. 485, 495-96, 673 S.E.2d 374, 382 (2009) (internal quotation marks omitted).
15. If the petitioner makes out a prima facie case, then the respondent must come forward with evidence of a non-retaliatory reason for the adverse action. Once the respondent articulates a non-retaliatory reason for the adverse action, the petitioner must prove that the respondent’s articulated reason was a pretext for retaliation.
16. Petitioner failed to establish a prima facie case of retaliation. Assuming *arguendo* that Petitioner made out a prima facie case of retaliation, Respondent had just cause to

dismiss Petitioner based upon other grounds. Petitioner failed to meet his burden to show that the reason given by Respondent for his dismissal was a pretext for retaliation.

On the basis of the above Conclusions of Law, the undersigned issues the following:

DECISION

It is hereby ordered that Respondent has sufficiently proved that it had just cause to dismiss Petitioner based on his unacceptable personal conduct, and that Petitioner did not sufficiently prove that his dismissal was in retaliation for reporting HIPAA violations. Petitioner's dismissal is therefore **AFFIRMED**.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, N.C. 27699-6714, in accordance with N.C.G.S. § 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to Decision and to present written arguments to those in the agency who will consider this Decision. N.C.G.S. § 150B-36(a).

The agency is required by N.C.G.S. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings. The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 26th day of November, 2012.

Donald W. Overby
Administrative Law Judge