

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 OSP 0690

John Price,)	
)	
Petitioner,)	
)	
v.)	DECISION
)	
State of North Carolina,)	
Office of The State Auditor)	
)	
Respondent)	

On November 14-18, 2011 and February 15 & 16, 2012, Administrative Law Judge Melissa Owens Lassiter heard this contested case at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

For Petitioner:

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For Respondent:

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ISSUE

Whether Respondent had just cause to terminate Petitioner, a career State employee, from employment for unsatisfactory job performance?

WITNESSES

For Petitioner: John Price

For Respondent: Kenneth Barnette, William Styres, Carla Jacobs

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 23

For Respondent: 1, 2, 2A, 3, 3A, 4, 4A, 5, 5A, 6 - 20, 22 – 25

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony by witnesses present at the hearing, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses, based upon the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, I make the following findings of fact:

Procedural Background

1. On January 18, 2011, Respondent issued a Final Agency Decision dismissing Petitioner from employment for unsatisfactory job performance, after a Grievance Committee recommended Petitioner's dismissal from employment. On October 19, 2010, Respondent issued its initial decision to dismiss Petitioner from employment for unsatisfactory job performance.

2. On January 24, 2011, Petitioner filed a petition for a contested case hearing, appealing Respondent's decision on the grounds that Respondent lacked just cause to dismiss him from employment.

Parties

3. At the time of his dismissal, Petitioner was employed with the Respondent as an Auditor Advanced, with the working title of "Assistant State Auditor II" in the Performance Audit Division.

4. Respondent is responsible under the North Carolina General Statutes for providing an independent audit of all state agencies, and exercises audit oversight over non-state organizations that receive state funds.

Petitioner's Employment History

5. The primary purposes of the Performance Audit Division are to conduct audits, feasibility studies, and program reviews of various State agencies, divisions, and/or programs (1) to provide independent assessments and (2) to make recommendations related to economy, efficiency, and effectiveness issues.

6. The public, the General Assembly, members of the Executive Branch and other interested citizens rely on audits performed by the Performance Division to identify problems regarding state agencies functioning properly. If an audit is flawed, the audit may fail to identify problems that a state agency has in functioning properly.

7. In 1989, Respondent hired Petitioner in a temporary position. Approximately five months or so later, Respondent hired Petitioner in the permanent position of Assistant State Auditor Trainee. One and one-half years later, Respondent promoted Petitioner to the position of Assistant State Auditor I.

8. Over the course of his career, Respondent promoted Petitioner to other positions, including Assistant State Auditor II, Assistant State Auditor III, and Assistant State Auditor Supervisor. Each of these promotions was, per the evidence, accomplished via a competitive selection process.

9. Respondent originally assigned Petitioner to its Financial Division where Petitioner worked for several years. Petitioner rotated through the Fraud Division, and subsequently, was transferred to the Performance Audit Division.

10. From 1993 until 2006, Petitioner worked in the Performance Audit Division. During this thirteen-year period, Petitioner had several supervisors. In 1994, Petitioner was promoted to an Assistant State Auditor III position. In 2000, Petitioner was promoted to a supervisor position in the Performance Division, and served as a supervisor in that Division from 2000 to 2006.

11. In 2006, Petitioner became dissatisfied with changes in management in the Performance Division, and left the Performance Audit Division to join the Non-Governmental Division (“NGO”) of the Respondent. Since there were no Supervisor positions available or open in that Division, Respondent allowed Petitioner to transfer into that Division as an Assistant State Auditor III, a nonsupervisory position.

12. From 2006 through 2009, Petitioner was not required to follow Yellow Book Standards, because the NGO unit did not perform audits that were governed by the Yellow Book Standards.

13. In 2009, after the present State Auditor was elected, Respondent disbanded the Non-Governmental Division. The NGO was moved to NC Department of Administration. Petitioner attempted to transfer to the Fraud Division, but Respondent refused Petitioner’s request.

Performance Division Audits

14. Audits performed by the Performance Division are required to follow standards that are set out in a document titled, “Government Auditing Standards,” issued by the United States Government Accountability Office. These standards are commonly referred to as the “Yellow Book Standards.” This document, among other things, states requirements regarding how an auditor should evaluate and document an auditee’s internal controls. With the exception of the NGO unit and the Investigative Audit Division, Respondent follows the Yellow Book Standards.

15. The planning phase of each audit is the first phase of an audit, and consists of (1) the engagement development segment and (2) the survey segment.

a. The purpose of the engagement development segment is for the auditor to gather preliminary information about the state agency auditee, including determining what the preliminary audit objectives are, what the preliminary scope of the audit will be, determining what rules and regulations are involved in the audit, and what is the mission of the state agency auditee. The auditor performs this segment before the auditor contacts the auditee or performs work in the field. Steps to complete this segment include internet research, reading statutes, rules, and regulations, reviewing the website of the auditee, and taking other similar steps to learn basic information about the auditee.

b. The purpose of the survey segment is to determine the final audit objectives, to contact and engage the auditee, and interview people, including but not limited to employees of the agency auditee, and to gain an understanding of the agency's goals and objectives of the program that is being audited. During the survey segment, the auditor also needs to gain an understanding about the different laws and regulations that apply to the auditee agency's objectives; about the agency's financial resources and human resources to gain an understanding of how the auditee operates; and what internal controls the auditee has in place to achieve the agency's operational goals and objectives.

c. During the survey segment, the auditor is required to identify different internal controls of the auditee in an effort to perform a risk assessment. As part of the risk assessment, the auditor should identify where are the strengths and weaknesses of the auditee.

16. An auditor must complete each segment of the audit sequentially. That is, the auditor must complete the engagement development segment before proceeding to the survey segment. Once the auditor has completed the planning phase by completing the engagement development segment and survey segment, the auditor may proceed to the next segment of the audit and commence fieldwork. If an auditor fails to complete the planning phase of the audit, the auditor cannot proceed with the next segment of the audit.

17. The planning phase of an audit is the easiest part of the audit to complete. The remaining segments of an audit are generally more difficult to complete.

18. In performing an audit, auditors are required to identify internal controls. Internal controls are measures or processes put into place by management of the state agency that is being audited, i.e. "the auditee," to ensure that the auditee is achieving its mission and objectives.

19. The Yellow Book defines "internal controls" as:

1.30 Internal control audit objectives relate to an assessment of the component of an organization system of internal control that is designed to provide reasonable assurance of achieving effective and efficient operations, reliable financial and performance reporting, or compliance with applicable laws and regulations. Internal control objectives also may be relevant when determining the cause of unsatisfactory program performance. Internal control

comprises the plans, policies, methods, and procedures used to meet the organization's mission, goals, and objectives. Internal control includes the processes and procedures for planning, organizing, directing, and controlling program operations, and management's system for measuring, reporting, and monitoring program performance.

(Resp. Exh.10, p. 394)

20. Understanding and identifying internal controls are the foundation of a successful audit. If an auditor fails to identify internal controls properly, the audit is likely to be fundamentally flawed. The failure to identify internal controls would, among other things, result in the audit failing to identify whether the agency being audited is meeting its objectives and functioning properly. If an audit is flawed, due to the failure to properly identify internal controls, Respondent has failed to produce an audit that conforms to audit standards.

21. An auditor creates work papers to support his audit. The work paper is the auditor's documentation of the evidence he reviews, and the steps he takes to make findings and conclusions in the audit report. Work papers are viewed as the building blocks of an audit report, and are required to be properly documented under audit standards.

22. When an auditor completes a work paper, he electronically submits the work paper to his supervisor for review. The supervisor identifies any problems with the auditor's documentation in a "review note" on the margin of the work paper, and returns them to the auditor to correct or clarify issues raised in the supervisor's review note. Until the auditor resolves these issues, a review note remains "open." When the auditor fully resolves these issues, a review note is "closed."

23. Generally, an auditor in the Performance Division works on only one audit at a time, and therefore, is not able to begin work on a new audit until the auditor completes that audit.

Petitioner's job performance in Performance Division

24. When Petitioner previously worked as a supervisor in the Performance Audit Division, he and the other auditors had been required to use the Yellow Book Standards.

25. In May of 2009, Respondent transferred Petitioner to work in the Performance Audit Division. At that time, Petitioner had more than 20 years of service with Respondent, and had received no prior disciplinary actions.

26. When Petitioner returned to the Performance Division, he received a copy of the Yellow Book Standards. He also received two documents issued by the United States General Accounting Office titled, "Standards for Internal Control in the Federal Government" and "Internal Control Management and Evaluation Tool." Both documents are expressly incorporated into the Yellow Book Standards, and contain in-depth explanations on how auditors should evaluate and document an auditee's internal controls. Petitioner acknowledged that he understood he was required to follow the Yellow Book Standards.

27. Petitioner's job duties were specified in a job description for Assistant State Auditor III- Advanced, and included being assigned "in-charge of audits, reviews, investigations, in whole or in part, as determined by the audit supervisor, with responsibilities for larger, complex auditing of financial, programmatic functions and/or systems." (Resp. Exh. 1)

28. On May 28, 2009, Petitioner's supervisor in the Non-Governmental Division conducted an annual evaluation of Petitioner's job performance for the 2008-2009 year, and gave Petitioner an overall "Meets Expectation" rating. (Resp. Exh. 12)

29. From May 2009 until approximately September 2009, Petitioner was temporarily reassigned to the NGO during the transition closeout of the NGO activities. (T. pp. 37-38)

30. When Petitioner returned to the Performance Division in September 2009, he was concerned, because friends had advised him that management did not want Petitioner to return to the Performance Division. (T. p. 1008) Upon Petitioner's return to work in the Performance Division, there were strained relations between audit manager Bill Styres and Petitioner.

31. During Petitioner's prior 13 years in the Performance Audit Division, he received annual performance evaluations and interim performance evaluations. However, between May 2009 until his termination in October 2010, Petitioner received approximately five or six written performance evaluations. (T. pp. 1015, 1016) Petitioner received written evaluations from a supervisor in February 2010, May 2010, September 2010, and October 2010. (T. pp. 1015-16)

32. In September 2009, Petitioner was assigned to work with a team on the Service Contract Monitoring audit in the Performance Division. Petitioner's immediate supervisor was Sarah Dozier.

33. On or about December 29, 2009, Dozier completed a performance evaluation of Petitioner's job performance, giving Petitioner an overall "Below Expectations" rating. Dozier rated Petitioner at either "below expectations" or "unsatisfactory" on every criteria. (Resp. Exh. 2) However, Dozier did not document the work Petitioner had performed from May to September 2009 in the NGO unit in that evaluation. In fact, Petitioner never discussed his work with the NGO unit with Ms. Dozier. (T. p. 1011)

34. Ms. Dozier did not testify at the contested case hearing. At hearing, Respondent failed to explain why Respondent, including Ms. Dozier, did not present and review this evaluation with Petitioner until February 2010, when Mr. Styres issued this evaluation to Petitioner.

35. On or about January 15, 2010, Bill Styres ("Mr. Styres") began supervising and observing Petitioner's work. On or about January 19, and 20, 2010, Mr. Styres reviewed the Yellow Book Standards with Petitioner. Styres showed Petitioner how to use the audit system 2 (known as "AS2") audit program that the Performance Division used in conducting its audits. Styres reviewed that system step by step with Petitioner, and showed Petitioner how that cross referenced to the yellow book standards. (T. pp. 72-74)

36. From January 2010 through February 2010, Styres personally observed Petitioner's work several times a week by meeting with Petitioner, watching Petitioner work at his computer, and through emails with Petitioner. Styres opined that there was a "lack of work" from Petitioner, and that Petitioner "had lost some of the work, and wasn't sure where it was." Petitioner "could not find some of the electronic pieces of work" from the service contract audit he was working on. (T. pp. 70-71)

37. Styres acknowledged at hearing that Respondent's annual performance management cycle begins in May of each year.

38. Yet, on February 10, 2010, Styres issued Petitioner another performance evaluation; the performance evaluation that Sarah Dozier had completed in December 2009, but never given to Petitioner. (T. p. 69) Styres reviewed that evaluation with Petitioner, wherein Petitioner's performance was rated at "Below Expectations" in the areas of determine/design audit procedures, gather/analyze/evaluate evidence, communication skills, leadership/influence, integrity/objectivity, and technical/professional knowledge. Styres' concerns with Petitioner's work included not providing work in a timely manner, not providing feedback or helping others, and the lack of work product being completed.

39. At hearing, Styres explained that Petitioner had charged about 700 hours to the service contract audit, and only produced two work papers. (T. p. 123) However, in the Dozier evaluation of December 2009, the evaluation merely stated, "John fails to complete work in a timely manner." (Resp. Exh. 2, p. 69) The evaluation also made general statements, such as John "has not demonstrated an ability to determine or design audit procedures," or John does not provide direction or training to other team members." No further specificity is provided in that evaluation regarding how Petitioner failed to perform these expectations. (Resp. Exh. 2, p. 66)

40. In February 2010, Styres issued a development plan to Petitioner, requiring Petitioner improve his job performance in the noted areas (Resp. Exh. 2, pp. 73-74), and advised Petitioner that he would reevaluate Petitioner's performance around April 30, 2010. (Resp. Exh. 2, p. 73) The development plan also advised Petitioner that failure to improve his performance may result in disciplinary action, including a written warning, suspension without pay or a demotion. (Resp. Exh. 2, p. 73)

41. On February 15, 2010, Petitioner provided a written response to such evaluation. Specifically, Petitioner noted that while Dozier criticized his team leadership skills, there was already an Auditor in Charge when he was assigned to the service contract audit. While Dozier criticized his professional knowledge, Petitioner noted that he had not worked with the audit programs since 2000. (Resp. Exh. 2, p. 77-79)

42. Between February and April 30, 2010, Styres met with Petitioner regarding Petitioner's job performance, on a weekly basis, and met approximately 10-15 times. (T. p. 135)

43. In mid-February 2010, after completing the Service Contract Monitoring audit, Petitioner was assigned an audit of the North Carolina State Board of Examiners for Nursing Home Administrators. This audit was considered a small audit, and was commonly referred to

“the Nursing Home audit.” The primary function of that Board was to license nursing home administrators.

44. The nursing home audit was the sole audit Petitioner was assigned to work on from February 2010 until Petitioner was terminated in October 2010.

45. Petitioner initially set the time budget for the engagement development segment of the Nursing Home Audit at 25 hours. At hearing, Petitioner admitted that he: had no idea how long it [that segment of the audit] would take. . . Without experience of having done an audit using their new – newly created — well, newly to me created audit program.

(T. p. 1062) After Petitioner and Mr. Styres collaborated to set a time budget for the Nursing Home audit, Styres changed the time budget for the engagement development to 40 hours. (T. p. 145) Styres also set the subsequent phase for 73 hours. The Nursing Home Audit was budgeted for completion within approximately three months. (T. p. 63)

46. On June 8, 2010, Styres reevaluated Petitioner’s performance in an evaluation that Respondent considered an annual performance evaluation. (Resp. Exh. 3) Styres rated Petitioner at either “Below Expectations” or “Unsatisfactory” on every criteria/expectation.

a. Styres rated Petitioner’s planning as unsatisfactory, because Petitioner did not complete the Nursing Home Audit in a timely manner. Petitioner charged 136.5 hours to the engagement development part of the Nursing Home Audit, when the time budget for that segment was 40 hours. (T. p. 145)

b. Styres noted that Petitioner had to make repeated corrections to work papers, and took ten days to develop interview questions. (Pet. Exh. 3, p. 44) Specifically, Styres thought Petitioner’s answers in the work papers lacked clarity, contained omission, or inconsistencies, and thus, did not meet the yellow book standards. (T. pp. 160-61)

c. Styres additionally noted that Petitioner waited to be told what to do, and did not approach Styres to turn in work or make audit suggestions.

47. A review of the June 2010 evaluation showed that Styres “cut and pasted” seven incidents, written by Dozier in her December 2009 evaluation, into his June 2010 annual evaluation of Petitioner, even though Styres had no personal knowledge of those incidents as he was not supervising Petitioner in the fall of 2010. Styres used the same “result comment” to support “unsatisfactory” and “below expectations” ratings of Petitioner’s work on different key responsibilities. For example, Styres wrote that Petitioner was not completing work in a timely manner and/or exceeded the time budget under both key responsibilities of “Planning” and “Auditing: Performing Audit Procedures.” (T. p. 277; Resp. Exh. 3, pp. 44-45)

48. On June 9, 2010, Petitioner submitted a response to his June evaluation. Petitioner strongly disagreed with Styres’ evaluation.

a. Petitioner explained that since the nursing home audit was the first audit where he used the AS2 audit program, he used previous audits, completed by another auditor and approved by Manager Ken Barnette, as guidelines for his current audit. However, Styres disapproved Petitioner's work. Regarding "documenting his audit work" criteria, Petitioner acknowledged that he was not sure of all the correct procedures in deleting pro forma verbiage and rewriting sentences using the AS2 program, since the Nursing Home audit was his first time with AS2 work papers in a pack.

b. Petitioner asserted that Styres failed to consider, in this evaluation, the 10% time Petitioner worked on NGO matters at the beginning of the evaluation period. He consulted the Auditor in Charge, not the supervisor, when working on the service contract audit. When he made audit suggestions, he was told to first research the suggestion, then tell the supervisor.

c. Petitioner indicated that many of Dozier and Styres' comments about Petitioner lacking leadership, and professionalism were subjective in nature.

(Resp. Exh. 3, pp. 61-63)

49. Along with the June 2010 evaluation, Styres issued another development plan to Petitioner, informing Petitioner that he would be reevaluated on August 31, 2010, and that failure to improve his performance may result in disciplinary action, including a written warning, suspension without pay or a demotion.

50. In mid-July 2010, Styres asked Carla Jacobs to review some of Petitioner's work. On July 15, 2010, Styres assigned Ms. Jacobs to be Petitioner's supervisor. (Pet. Exh. 1, 16) At that time, Ms. Jacobs had been employed with Respondent for 1 year and 8 months, as Respondent had hired Jacobs in November 2008 as an Assistant State Auditor Advanced, or ASA3. Jacobs had never, in her employment with Respondent, performed an audit by herself as she had been assigned to work only on large scope and in-scale audits.

51. Before joining Respondent's office, Ms. Jacobs had graduated from college with a Bachelor's degree in Accounting in May of 2004, and had worked for a public accounting firm from January 2005 until November 2008.

52. In January 2010, Ms. Jacobs had started working in a "work against position for supervisor." When Ms. Jacobs began supervising Petitioner, Jacobs had not officially been promoted to supervisor. Kenneth Barnette, the Performance Division Manager, did not recommend Jacobs to be promoted to supervisor until September 13, 2010. Jacobs' official promotion to supervisor occurred on October 13, 2010, six days before Petitioner was dismissed from employment.

53. In September or October of 2009, Ms. Jacobs had served as an Auditor in Charge for a DOT audit. In January of 2010, Jacobs began supervising that audit, including supervising two employees who were also working on that audit. She reviewed the two employees' work papers

and review notes, and discussed any personnel or disciplinary actions regarding those employees with Bill Styres.

54. Between January and October of 2010, Ms. Jacobs issued two written warnings to M.D., one of the employees she supervised in the DOT audit. After discussing M.D.'s performance evaluations with Bill Styres and Ken Barnette, "it was decided that disciplinary action was needed." (T. p. 629) Jacobs acknowledged at hearing that she did not independently issue written warnings to M.D., but issued those warnings to M.D. with the concurrence of Styres and Barnette. (T. p. 629)

55. As of the fall of 2010, 2 or the 3 employees whom Jacobs supervised were terminated from employment with Respondent.

56. On August 2, 2010, Styres issued a written warning to Petitioner for unsatisfactory job performance, even though Styres had stated in the June 2010 development plan that "John will be reevaluated as of August 31, 2010." (Resp. Exh. 3, p. 59; T. p. 288)

57. At hearing, Petitioner's counsel asked Styres why he issued a written warning to Petitioner when he and Petitioner had agreed in the June 2010 development plan that Petitioner's next evaluation date was not until August 31, 2010. Styres explained that "[I]t's fair to evaluate an employee based on their performance at any time," (T. p. 289). "[W]ritten warnings don't have to be based on evaluations of annual or an interim basis. . . Having six months to see Mr. Price's performance gave me the confidence I needed to take such a drastic action." (T. p. 285) He indicated that "I had more examples of poor performance, and it rose to the level that I thought I need to write this up." (T. p. 291)

58. In the August 2, 2010 written warning, Styres restated that Petitioner's most recent overall performance evaluation ratings were Below Expectations, noting that:

The work you have submitted on this audit indicates that you lack basic and fundamental audit skills such as adequately completing audit work papers, documenting purpose, source, methodology, and conclusion on the work papers and requires numerous review notes.

(Resp. Exh. 4, p. 2)

59. Styres listed specific examples of Petitioner's performance such as failing to specify agency personnel, program personnel, and stakeholders in the identify stakeholders work paper, failing to provide a general discussion in the team meeting work paper, and failing to include the objective of the goals and objective work paper.

60. Jacobs and Petitioner had difficult relations from the start of her supervision in mid-July 2010. Jacobs kept almost daily, detailed notes on Petitioner's performance, totaling approximately 13 pages. (Resp. Exh. 9) At hearing, Jacobs noted that from August to October 2010, she could not point out one "non-negative" comment she made about Petitioner.

61. On September 8, 2010, Jacobs issued another performance evaluation to Petitioner covering a work period from August 2, 2010 to September 3, 2010. (Resp. Ex. 5)

a. In this review, Jacobs gave Petitioner “Unsatisfactory” ratings, the lowest rating possible, because Petitioner was not able to identify internal controls and differentiate between processes and control activities. Jacobs issued a development plan, giving Petitioner 30 days to improve his performance. In this evaluation, significant verbiage was “lifted” or excerpted directly from previous performance reviews conducted by Styres and Dozier.

b. In this evaluation, Jacobs criticized Petitioner because (1) he “brought his daughter to the office due to school transportation issues,” and failed to notify her in advance, and (2) for failing to follow leave procedures when Petitioner left work early to take his mother to the emergency room.

c. There was no evidence at hearing that Respondent considered Petitioner’s response to this evaluation. Petitioner explained that his daughter came to his office afterschool on 3 days, for approximately 20 minutes each. Respondent’s personnel director Charles Duckett told Petitioner he was unaware of any questions concerning an employee’s children stopping by the office.

d. When Jacobs first issued this evaluation to Petitioner, she used another employee’s name in the evaluation. After Petitioner pointed out this error, Jacobs changed the name in the evaluation to Petitioner, but kept the remaining language. The employee Jacobs named was one of the employees she supervised, and later dismissed from employment. (T. p. 1018-1019)

62. Six days later, on September 14, 2010, Jacobs issued Petitioner a second written warning for unsatisfactory job performance. (Resp. Ex. 6) This was the second written warning for unsatisfactory job performance Respondent issued Petitioner in less than forty days. This written warning was also less than 30 workdays after the first written warning.

a. In this evaluation, Jacobs listed different areas of improvement for Petitioner, than those areas Styres had listed in the August 2, 2010 written warning. Two of the four areas listed for improvement by Jacobs were issues regarding sick leave procedures and scheduling time for personal issues; issues unmentioned by Styres.

b. Jacobs ordered Petitioner to complete work in a timely manner. Her request was based solely a time budget that had been “blown,” or significantly exceeded, well before Jacobs because Petitioner’s supervisor, and which could not be retroactively fixed.

c. Jacobs cited Petitioner for lacking “leadership” by not reviewing others’ work. Yet, Petitioner was the only person working on the Nursing Home Audit, and did not work with any other employees on other audits. She criticized Petitioner’s “leadership” for failing to inform her of vacation leave, and failing to inform her that his daughter would come to the office due to school transportation issues.

d. Jacobs found fault with Petitioner for not demonstrating a “commitment to achieving office goals” by failing to follow leave procedures, and having difficulty recording accurate time in TRS and BEACON, systems that record one’s time.

e. Approximately 50% of this warning faulted Petitioner for matters that appeared tangential to the actual performance of his audit duties.

63. On October 14, 2010, 30 days after the issuance of the second written warning, Jacobs issued Petitioner another performance evaluation. (Resp. Exh. 7) Jacobs cited Petitioner for exceeding the time budget of the Nursing Home Audit, not completing the associated work papers, and having difficulty identifying internal controls and differentiating between what is a “control” and what is an “activity.” (Resp. Exh. 7, p. 6) As of Petitioner’s October 2010 performance evaluation, Petitioner charged 584 hours or 73 days to the survey segment for the Nursing Home audit, thereby being 511 hours over budget, with other work remaining incomplete. The time budget for this audit was 73 hours.

64. As with the previous performance review, much of the language appeared to be “cut and pasted” from, and identical to, the September 14, 2010 performance review and its predecessors.

65. On all performance evaluations, Ken Barnette, the Performance Division Manager, co-signed the evaluation review, thus indicating his approval of the review.

66. On October 15, 2010, Respondent conducted a pre-disciplinary conference with Petitioner regarding a recommendation of dismissal for unsatisfactory job performance.

67. On October 19, 2010, Respondent dismissed Petitioner for unsatisfactory job performance. (Resp. Ex. 8)

68. Kenneth Barnette (“Mr. Barnette”) was the Performance Division Manager since April 2007, including the period that Mr. Styres and Ms. Jacobs supervised Petitioner. During the performance evaluation process from January 2010 through October 2010, Mr. Styres and Ms. Jacobs conferred with Mr. Barnette about Petitioner’s unsatisfactory job performance.

69. Ken Barnette recommended that Petitioner be dismissed from his job, primarily, because Petitioner failed to understand and identify internal controls, failed to follow audit standards, and he failed to complete work, as well as the ramifications of these failures. Petitioner spent approximately 8 months working on the planning phase of the Nursing Home audit, when the time budget for the entire audit was 3 months. He noted that substantial work in the planning phase remained incomplete. Mr. Barnette explained that while Petitioner exceeding the budget was a factor in why Petitioner was terminated, the combination of him going so far over budget without completing work was a key issue in his continuing unsatisfactory job performance.

70. In this case, Respondent argued that given Petitioner's prior supervisory experience in the Performance Audit Division, and based on the number of years of experience, Petitioner was not performing his job in a satisfactory manner.

71. At hearing, the preponderance of the evidence established that around 2004 or 2005, the Performance Division changed its approach in conducting audits, and started conducting its audits with a more narrow focus. Styres explained that in Petitioner's first time with the Performance Division, "the audits weren't as focused and the teams would go out and just write everything or look at everything." (T. p. 37) Whereas, now, we start with a narrower objective of what we're trying to look at." (T. p. 37) "Rather than consider and learn everything, the focus is usually on one area." (T. p 39)

72. Petitioner explained that even though the yellow book standards were the same as when Petitioner worked in the Performance Division previously, the audit procedures were different. "When I was there previously, we would not have everything broken into different sections like they did." (T. p. 1063) He elaborated that:

When I was there the first time, we had a generic audit program that just had you do – obtain certain information, and then you developed your own programs for the different aspects you wanted to look at, at the state agency.

(T. p. 1063) In contrast, in 2009-2010, the Performance Division had a computer audit pack [AS2] that spelled out everything in numerous steps, so there were a lot more steps to document, and required you to provide more detail. Petitioner agreed that, "You didn't have the freedom to create the information to enter into the program; they told you . . . you needed to find out and you budget it in there." (T. p. 1063)

73. Mr. Styres criticized Petitioner for his "lack of work." However, Styres also admitted that he knew that Petitioner had not been exposed to AS2 before returning to the Performance Division. He acknowledged:

When I was helping him find files and locate files, it became clear to me that John was not sure where he was within the different computer systems. So I sat down with him and explained that functionality of AS2 with him at his desk. . . . to show him the basic functionality of how to pass files, how to open review notes. . . . [I] also assigned him to go to a class, a beginner's class in AS2 so that he would receive the same training as anyone else would have that was a brand new user of AS2.

(T. pp. 74-75)

74. Styres acknowledged that all the auditors in the Performance Division were required to use, and were already using AS2. (T. p. 75) Styres decided to enroll Petitioner in a class to learn AS2, but learned that February 2010 was the first AS2 class Styres could enroll Petitioner. (T p. 75) Styres enrolled Petitioner in AS2 training to be held on February 18, 2010, and Petitioner took that class. (Resp. Exh. 17, last page)

75. Styres conceded that once Petitioner was assigned the subsequent nursing home audit, Petitioner started using AS2 then, and showed that he could manage and maneuver within AS2. (T. p. 76)

76. In one evaluation, Styres criticized Petitioner for not advising Styres that the service contract audit team had changed their approach to their audit. Yet, Petitioner was never the Auditor in Charge of that audit team, and there was no evidence that Petitioner was in a position with that audit team that required him to notify Styres about the team's changed approach to the service contract audit.

77. Styres asserted that Petitioner failed to complete another assignment by failing to enter his "time into the worksheet where we record our time charged to the audit within the audit work papers themselves." (T. p. 77) Styres explained that there was an expectation that Petitioner would enter his own time under his prior supervisor, Ms. Dozier. "He was very inefficient in recording his time." (T. p. 77)

78. Yet, Styres also conceded that he did not think Petitioner had used the Excel worksheet [for such time recording] before, as Petitioner "seemed to be lost within the spreadsheet, and not understanding where he was." Styres sat down with Petitioner, and showed him how to record time worked into the spreadsheet. (T. pp. 77-78)

79. In her evaluations, Jacobs similarly criticized Petitioner for not entering his work time and leave into BEACON. BEACON is a time management system used by numerous state employees statewide. It is widely known among State employees that BEACON is neither the most efficient, expedient, or easiest system to manage one's working time, nor do many users of that system like using the BEACON system. Yet, Jacobs found fault with Petitioner in the September 14, 2010 written warning for having "difficulty recording accurate time" in BEACON. (Resp. Exh. 6, p. 199)

80. In preparation for the internal grievance hearing, Respondent prepared Respondent's Exhibit 9 to support its decision to dismiss Petitioner from employment before its internal grievance panel. Respondent's Exhibit 9 consisted of 108 pages. There were five work papers included in this 108-page exhibit, including 24 review notes by Respondent's management that criticized Petitioner's work. The majority of these 108 pages were very detailed, personal notes by Styres and Jacobs of every meeting with Petitioner from January through October 2010.

81. There is no dispute that Petitioner exceeded the time budgets of the service contract audit and the planning phase of the Nursing Home audit. Some evidence at hearing showed that some of the time that Petitioner charged to the planning phase of the Nursing Home audit was spent on numerous coaching discussions and other job performance related discussions with his supervisors. The extensive personal notes kept by Styres and Jacobs certainly lends credence to Petitioner's explanation.

82. Likewise, there is no dispute that Petitioner failed to complete work papers relating to those audits. For example, Petitioner failed to document the objective of the Goals

and Objective work paper, and the Audit approval work paper of the Nursing Home audit. (Resp. Exh. 9) Certainly, Petitioner exhibited some deficiencies in his performance in his job.

83. However, a review of these five work papers, and the attached review notes, demonstrated that in a majority of these review notes, Styres and Jacobs' disapproved Petitioner's work because Petitioner did not complete the work papers to Styres' and/or Jacobs' satisfaction. Respondent focused on matters such as semantics, grammar, awkwardness, and spelling rather than fundamental audit principles. (Resp. Exh. 4; T. pp. 295-306) Respondent was dissatisfied with the specific wording, sentence structure, language or style of Petitioner's writing. (Resp. Exh. 9, pp. 318-321, 302-305)

a. In the Team Meeting work paper, Styres told Petitioner that, "The first sentence is not written well. . . The way I framed it is..." (Resp. Exh. 9, p. 316), and "I'd rather see a (hyper) text reference when you refer to other work papers. Get in the habit of doing it that way....You need to rewrite this." (Resp. Exh. 9, p. 321) "I showed John multiple instances where sloppy data (e.g. wrong purpose, incorrect names) were left on the worksheet." (Resp. Exh. 9, p. 353)

b. Throughout this exhibit, Respondent included multiple copies of the same work paper to show Petitioner's "errors," and throughout its case, Styres and Jacobs used one example of Petitioner's "errors" to support multiple unsatisfactory or below expectation ratings of Petitioner's work.

c. Even after Petitioner corrected a work paper to Jacobs' satisfaction, Jacobs further criticized that same section of Petitioner's work paper on a different point. (See Goals and Objective work paper, review notes Comment W (C)(1), then W(O)2, and W(C)(3).

84. Respondent, through Jacobs and Styres, issued two written warnings to Petitioner within one month apart, directing Petitioner to improve in different areas in each written warning. Yet, Respondent presented no credible testimony demonstrating the reasonableness of requiring Petitioner to improve those areas of performance within the 30 day time frame, as opposed to the 60 day timeframe required in 25 NCAC 01I .2305. Neither did Respondent show that Petitioner failed to make reasonable efforts to improve or to meet those expectations.

85. Respondent claimed that Petitioner's responses to his performance evaluations generally failed to address the substantive issues identified in the performance evaluations directly. However, Styres' and Jacobs' testimony during their cross-examinations, and a review of Respondent's Exhibit 9, proved that Respondent's management team gave little to no consideration to the substance of Petitioner's written responses to his performance evaluations. Instead, Respondent continued its personal dissatisfaction with Petitioner's writing, but did not address the validity or substance of Petitioner's responses. (T. pp. 253-254; Resp. Exh 9, pp. 300-306, 317-320)

a. In Styres' personal notes of his February 9, 2010 meeting with Petitioner, Styres characterized Petitioner's February 2010 rebuttal/response as, "generally explain

situations, and then ask rhetorical questions. Some of the responses are awkward to read, and contain omission of words, typos, and/or errors in grammar.”

b. In Styres personal notes of his February 5-15, 2010 meetings with Petitioner, Styres criticized Petitioner’s “poor writing” in Petitioner’s self-assessment, stating, “The awkward wording and grammar errors still existed.” (Resp. Exh. 9, p. 352)

86. Most telling is the testimony of Ken Barnette during cross-examination by Petitioner’s counsel. Mr. Barnette explained twice that Respondent expected Petitioner to fulfill [job] tasks to the complete satisfaction of his supervisors, Styres and Jacobs, and to comply with their directives to the fullest extent.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings and the Office of Administrative Hearings has subject matter jurisdiction over this case.

2. Petitioner was a career State employee at the time of his dismissal, and thus is subject to the provisions of Chapter 126 of the North Carolina General Statutes.

3. N.C. Gen. Stat. Section 126-35 provides, in part:

No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.

4. Pursuant to N.C. Gen. Stat § 126-35(d), Respondent bears the burden of proving that “just cause” existed to demote Petitioner.

5. 25 NCAC 11.2301(c) enumerates two grounds for disciplinary action, including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct. Here, Respondent alleges unsatisfactory job performance. Unlike a personal conduct situation, which requires only one unresolved act of conduct, dismissal for unsatisfactory job performance requires a progressive disciplinary system.

6. State Personnel Manual, “Disciplinary Action, Suspension, and Dismissal,” Section 7, Page 3 - 4, provides, in part:

Unsatisfactory Job Performance - Work-related performance that fails to satisfactorily meet job requirements as set out in the relevant job description, work plan, or as directed by the management of the work unit or agency.

7. In *N.C. D.E.N.R. v. Clifton Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), the Court stated that the fundamental question in determining just cause is whether the disciplinary action taken was just:

Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” There is no bright line test to determine ‘just cause’—it depends upon the specific facts and circumstances in each case. Furthermore, “not every violation of law gives rise to ‘just cause’ for employee discipline.

8. In this case, Petitioner was an employee of longstanding service who had multiple promotions under many supervisors. Petitioner had no prior disciplinary action for poor job performances, and the last supervisor before returning to the Performance Division rated Petitioner as meeting the expectations of his job. Petitioner received multiple promotions as a member of the Performance Audit Division, the same division from which he was dismissed just months after returning to that Division.

9. 25 NCAC 01I .2305 WRITTEN WARNING provides in pertinent part that:

(a) The supervisor shall monitor and promote the satisfactory performance of work assignments and acceptable standards of personal conduct. All types of performance-related job inadequacies may constitute unsatisfactory job performance under this Section. When the supervisor determines that disciplinary action is appropriate for unsatisfactory job performance, a written warning is the first type of disciplinary action that an employee must receive. The supervisor may elect to issue a written warning for grossly inefficient job performance or unacceptable personal conduct. The written warning must:

- (1) Inform the employee that this is a written warning, and not some other non-disciplinary process such as counseling;
- (2) Inform the employee of the specific issues that are the basis for the warning;
- (3) Tell the employee what specific improvements, if applicable, must be made to address these specific issues;
- (4) **Tell the employee the time frame allowed for making the required improvements/corrections. Absent a specified time frame, 60 days is the time frame allowed for correcting unsatisfactory job performance. Immediate correction is required for grossly inefficient job performance or unacceptable personal conduct;**
- (5) Tell the employee the consequences of failing to make the required improvements/corrections.

(Emphasis added)

10. While management may designate a shorter time for improvement under 25 NCAC 01I .2305 , 60 days for improvement is the “default time” to allow an employee time to improve his performance.

11. In Walker v. North Carolina Dep't of Human Resources, 100 N.C. App. 498, 397 S.E.2d 350 (1990), review denied, 328 N.C. 98, 402 S.E.2d 430 (1991), the Court stated:

The standard of employee conduct implied in every contract of employment is one of reasonable care, diligence and attention. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964); McKnight v. Simpson's Beauty Supply, Inc., 86 N.C. App. 451, 358 S.E.2d 107 (1987). We cannot say that a state employee undertakes any greater duty. In attempting to establish that it had just cause to terminate an employee, then, an agency is bound to make a showing that the employee has not performed with reasonable care, diligence and attention. **Failure to fulfill certain quotas and complete certain tasks to the complete satisfaction of a supervisor is not enough.**

12. Walker requires a showing by the Respondent agency “that these quotas and job requirements were *reasonable*, and if so, that the employee made no reasonable effort to meet them.” Id. at 504 [court emphasis].

13. In this case, Respondent failed to show that Petitioner did not perform his job duties with reasonable care, diligence, and attention. Instead, the preponderance of the evidence showed that Respondent dismissed Petitioner from his job, because Petitioner failed to complete his job related duties, ie. the work papers, to the complete and personal satisfaction of his supervisors, Styres and Jacobs. A preponderance of the evidence demonstrated that Petitioner’s supervisors criticized Petitioner’s work in the audit work papers for his poor grammar, awkward wording, spelling issues, and writing style, not the basic elements of auditing. Respondent appeared to use a substantial amount of “cut and paste” in reviewing Petitioner’s performance, particularly in Ms. Jacobs’ evaluations.

14. One of the employees in Walker was dismissed approximately a year and half after first being warned for poor job performance. In this case, Respondent dismissed Petitioner from employment three months after the first written warning in August 2010. Respondent issued Petitioner’s first written warning on August 4, 2010, even though Respondent had agreed, in Petitioner’s June 2010 performance evaluation, that it would not reevaluate Petitioner’s performance until August 31, 2010.

15. Here, Respondent technically complied with 25 NCAC 01J .0605 by giving Petitioner two written warnings for poor job performance before Respondent dismissed Petitioner from employment. However, Respondent failed to explain why it gave Petitioner only 30 days to improve his job performance in two different written warnings that required improvement in different areas of responsibility, when the basis for that September 14, 2010 warning, had only tangential relevance to Petitioner’s job performance as an auditor. Neither did Respondent show that Petitioner made no reasonable effort to meet his job expectations.

16. Taken in concert, Respondent’s actions suggest an effort to simply remove Petitioner from the workplace under the banner of poor job performance at the earliest possible opportunity, instead of a deliberate, good faith process where the Petitioner was given a reasonable chance to improve.

17. Based on foregoing factual circumstances, Respondent failed to offer sufficient evidence to support its decision that Petitioner should be dismissed from employment for engaging in unsatisfactory job performance.

18. Based on the foregoing facts and conclusions, Respondent lacked just cause to dismiss Petitioner from employment for unsatisfactory job performance.

19. Pursuant to N.C. Gen. Stat. § 126-37(a), Petitioner is entitled to reinstatement as in a similarly situated position, awarded all back pay, front pay, and any salaries increases instituted by the General Assembly during this contested case. Respondents shall remove all references to such dismissal from Petitioner's personnel file. Pursuant to 25 N.C.A.C. 1B.0414, Petitioner should be awarded reasonable attorney fees, based upon Petitioner's attorney's submitting an itemized statement of the fees and costs incurred in representing the Petitioner, in a Petition to the North Carolina State Personnel Commission.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's decision to terminate Petitioner's employment should be **REVERSED**. Petitioner should be retroactively reinstated with back pay and attorney's fees, as well as all other remedies available under N.C. Gen. Stat. § 126-37(a), and 25 N.C.A.C. 1B.0414.

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this Decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 26th day of July, 2012.

Melissa Owens Lassiter
Administrative Law Judge