

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 OSP 02222

LARRY C. GOLDSTON,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA AT
CHAPEL HILL,
Respondent.

FINAL DECISION

The above-captioned case was heard before the Honorable Joe L. Webster,
Administrative Law Judge, on 28 August 2012, in Raleigh, North Carolina.

APPEARANCES

FOR PETITIONER: Henry Clay Turner
McSurely & Turner
109 North Graham Street, Suite 100
Chapel Hill, North Carolina 27516

FOR RESPONDENT: Brian R. Berman
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, N.C. 27602

EXHIBITS

Admitted for Petitioner:

<u>Exhibit</u>	<u>Date</u>	<u>Document</u>
1	06/07/11	Performance review of Larry Goldston for 06/01/2010 – 05/31/2011
2	06/03/10	Performance review of Larry Goldston for 06/01/2009 – 05/31/2010
3	05/19/09	Performance review of Larry Goldston for 06/01/2008 – 05/31/2009

4	05/23/08	Performance review of Larry Goldston for 06/01/2007 – 05/31/2008
5	05/25/07	Performance review of Larry Goldston for 06/01/2006 – 05/31/2007
7	06/04/11	Callback log from computer assisted dispatch for 06/04/2011
8	06/05/11	Callback log from computer assisted dispatch for 06/05/2011 (at 6:21 a.m.)
9	06/05/11	Callback log from computer assisted dispatch for 06/05/2011 (at 11:00 a.m.)
12	07/14/11	Disciplinary decision of suspension without pay
13	10/18/11	Email from Kurt Squires to Robert Humphreys
14	10/20/11	Disciplinary decision of dismissal
18		UNC-Chapel Hill Facilities Services On-Call Policy

Admitted for Respondent:

<u>Exhibit</u>	<u>Date</u>	<u>Document</u>
A		UNC-Chapel Hill Facilities Services On-Call Policy
B	06/30/11	Email from Steven Lofgren to Robert Humphreys
C	06/30/11	Photographs from email from Steven Lofgren to Robert Humphreys
D	12/01/11	Email from Dennis Pickett to Robert Humphreys
E	06/07/11	Performance review of Larry Goldston for 06/1/2010 – 05/31/2011
F	05/27/11	Weekly callback duty for May 31, 2011 to June 7, 2011
G	06/09/11	Written warning for unsatisfactory job performance
H	07/14/11	Disciplinary decision of suspension without pay
I	09/26/11	Weekly callback duty for October 4, 2011 to October 11, 2011
J	10/17/11	Notice to attend pre-disciplinary conference
K	10/20/11	Disciplinary decision of dismissal
L	06/04/11	Callback log from computer assisted dispatch for 06/04/2011

M	Callback log from computer assisted dispatch for 10/08/2011
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WITNESSES

Called by Petitioner: Larry Goldston

Called by Respondent: Robert Humphreys
Kurt Squires
Amy Oakley
Mari Forbes

ISSUES

1. Whether Respondent had just cause to terminate Petitioner's employment for unsatisfactory job performance.
2. Whether UNC-Chapel Hill discriminated against Petitioner on the basis of his race or color when terminating his employment.
- 3.

ON THE BASIS of 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. At the time of his discharge, Petitioner Larry C. Goldston was a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina (the State Personnel Act), and was a citizen of Chatham County, North Carolina. Petitioner's race is African American.
3. Respondent, The University of North Carolina at Chapel Hill (UNC-Chapel Hill), is subject to Chapter 126 of the North Carolina General Statutes, and was Petitioner's employer.

4. Petitioner was employed by Respondent as a Facility Maintenance Technician (i.e., a maintenance mechanic) within UNC-Chapel Hill's Facilities Services-Housing Support department. In his job as a maintenance mechanic, Petitioner was expected to perform plumbing, electrical, carpentry, and other general maintenance and repair work for the residence halls and other housing buildings on campus. **T pp. 20-21; Resp.'s Ex. E**
5. At the time of the incidents relevant to this case, Petitioner was supervised by Kurt Squires, who supervised a shop of eleven mechanics and plumbers in the Housing Support department of Facilities Services. Squires had been a supervisor for approximately 12 years, and he had supervised Petitioner for approximately 18 months. Squires was supervised by Robert Humphreys, the superintendent of Housing Support for the Facilities Services division. Humphreys had been in his position for more than 19 years. Humphreys supervised five supervisors, including Squires, and approximately 60 tradesmen, including Petitioner. In turn, Humphreys was supervised by Edd Lovette, the Building Services director within Facilities Services. **T pp. 15-16; 65-66**
6. One of the five "principal functions" of Petitioner's job was to perform on-call or "callback" duty. Callback duty is maintenance work performed after working hours or on weekends, with the mechanic on-call for service requests or emergencies that may arise. **T p. 20, 67-69; Resp.'s Ex. E**
7. With callback duty a principal function of the job, Petitioner was required to be familiar with campus facilities and the residence halls, including the locations of significant mechanical systems, water valves, electrical switchgear, emergency generators, and utility systems. Petitioner was expected to repair or find help in correcting any maintenance problems arising while on-call. He was expected to know the callback process and be familiar with the communication equipment provided by UNC-Chapel Hill for callback duties. Finally, as part of fulfilling this principal function of his job, Petitioner was expected to respond to callbacks in a reasonable amount of time. He was instructed to keep the cell phone and pager provided by UNC-Chapel Hill within arm's-length at all times while on callback duty. **T p. 68, 70-71; Resp.'s Ex. A; Resp.'s Ex. E**
8. A maintenance mechanic on callback duty is on-call for one week at a time, from Tuesday morning to the following Tuesday morning. He is on-call during weekdays from 6:30 p.m. until 8:00 a.m., and all 24 hours a day on weekends or holidays. Depending on the number of mechanics in various departments, a mechanic is only on callback duty once every 20 weeks or so. **T pp. 20-21**
9. Besides their regular salary, mechanics on callback duty are paid \$3.00 per hour for every hour of callback duty regardless of whether they are called in, totaling approximately \$350 per week. If they are called in, maintenance mechanics receive additional pay for their work, at their overtime pay rate. **T pp. 21-22**

10. UNC-Chapel Hill provides maintenance mechanics on callback duty with cell phones and pagers during their week of duty. The UNC cell phones and pagers are rotated to the new maintenance mechanics on-call for each week. **T pp. 22-23, 73, 80**
11. UNC-Chapel Hill's Public Safety Department, which has a twenty-four hour dispatch center, makes the calls and pages to the maintenance mechanics that are on callback duty. The Public Safety Department receives a weekly callback list to contact various tradesmen who are on-call. The Public Safety Department generates a log of each call and page made through its computer-aided dispatch system. **T pp. 22, 111-113; Resp.'s Ex. F; Resp.'s Ex. I**
12. For callbacks, UNC-Chapel Hill's Facilities Services procedure is for the Public Safety Department to call the UNC cell phone first. If there is no response, the Public Safety Department then pages the maintenance mechanic on the UNC pager. If there is still no response, they then call another contact number, such as a home phone or personal cell phone. The dispatchers may try these methods multiple times to reach the on-call mechanic. **T pp. 22-23, 115-116; Resp.'s Ex. F; Resp.'s Ex. I; Resp.'s Ex. L; Resp.'s Ex. M**
13. According to UNC-Chapel Hill's Facilities Services On-Call Policy, the maintenance mechanic on callback duty "must be available" via either phone or pager "at all times." **T p. 26, 59; Resp.'s Ex. A**
14. A maintenance mechanic on callback duty should respond "in a timely manner," generally no more than 15 or 20 minutes after the Public Safety Department tries to reach him. **T pp. 26-27, 120; Resp.'s Ex. A**
15. If the maintenance mechanic cannot be reached while on-call, UNC-Chapel Hill's Facilities Services procedure is for the Public Safety Department to call a supervisor of the maintenance mechanic. Robert Humphreys is designated as the first supervisor to contact for maintenance mechanics in the Housing Support department. If Humphreys cannot be reached, the Public Safety Department contacts Humphrey's supervisor. **T pp. 23, 121; Resp.'s Ex. F; Resp.'s Ex. I**
16. If a maintenance mechanic knows there may be a problem reaching him via the UNC cell phone, the UNC pager, or his third contact number, he can alert his supervisor and the Public Safety Department and designate a different number to reach him. **T pp. 25-26, 120**
17. UNC-Chapel Hill's Facilities Services issued its current on-call policy in September 2007. The policy specifies:

An employee designated for on-call time is not normally required to remain on University premises, but is required to be in fit physical condition in order to respond to any callback received during the period he or she is designated for on-

call duty. If an employee becomes physically unable to respond to a call, it is the employee's responsibility to notify the Public Safety Department and his/her supervisor.

An employee scheduled for on-call duty is subject to callback by the Public Safety Department or appropriate supervisors of the Facilities Services Division. Contact may be made by telephone or by use of the On-Call Pager System. Thus, an employee designated for on-call time must be available by one of these means of communication at all times.

An employee contacted should respond to the Public Safety Department dispatcher in a timely manner by calling 919-962-8100 for further instructions regarding the callback situation. If the on-call person is not within the Chapel Hill telephone district, the call may be placed as a collect call.

Resp.'s Ex. A

18. Prompt responses by maintenance mechanics on callback duty are important because, depending on the nature of the problem, a failure to respond could put the health or safety of residents in jeopardy, or could result in damage to the property of the residents or UNC-Chapel Hill. **T p. 24; Resp.'s Ex. A**
19. Because of the potential danger or jeopardy involved for maintenance problems or emergencies, UNC-Chapel Hill's on-call policy states that "[i]t is imperative that employees of the Facilities Services Division comply with the policy and procedures outlined." Accordingly, maintenance mechanics can be subject to discipline for failing to respond while on-call. "Failure to respond to a telephone call or a page and/or refusal to report for duty when called by the Public Safety Department or an authorized Facilities Services supervisor during the period an employee is designated for on-call duty will result in loss of on-call pay for that shift, and may also result in disciplinary action, up to and including dismissal." **T pp. 27-28; Resp.'s Ex. A**
20. The UNC-Chapel Hill Facilities Services on-call policy was reasonable and appropriate. Petitioner made no allegation and presented no evidence that it was unreasonable or inappropriate, nor that it was unevenly or inconsistently applied.
21. It is very rare for maintenance mechanics not to respond to calls or pages when they are on callback duty. Amy Oakley, the communications manager for UNC-Chapel Hill's Public Safety Department, served six years as a police telecommunicator in its police dispatch center and has served as the manager for the past 12 years. She testified that only "very seldom" would employees on callback duty fail to respond to the Public Safety Department's calls, and that she did not recall any instance of it happening other than when Petitioner failed to respond. **T pp. 109-110, 119**

22. Kurt Squires testified that in his 12 years as a supervisor, none of the maintenance mechanics he supervised had ever had more than one failure to respond while on callback duty, except Petitioner. **T p. 91**
23. Robert Humphreys testified that in his 19 years as a supervisor, he has been called only half a dozen times because a maintenance mechanic did not respond to a call or page. Humphreys testified that in those 19 years, no mechanic other than Petitioner had ever failed more than once to respond to the Public Safety Department while on-call. Humphreys further testified he has never had to discipline anyone other than Petitioner for failing to respond to the Public Safety Department. **T pp. 44-45, 47**
24. On 4 June 2011, a Saturday, Petitioner was on callback duty. The Public Safety Department attempted to reach Petitioner to respond to a resident's stopped up kitchen sink and leaking pipe. At 9:43 a.m., the dispatcher called Petitioner's UNC cell phone and left a voicemail message; paged him; called his home phone but no answering machine was set up; and paged him again. At 9:52 a.m., the dispatcher called Petitioner on his UNC cell phone; paged him; and called his home phone. At 10:04 a.m., the dispatcher again called Petitioner on his UNC cell phone; paged him; and called his home phone. **T pp. 28, 73, 75-76, 115-116; Resp.'s Ex. F; Resp.'s Ex. G; Resp.'s Ex. L**
25. Because the dispatcher could not reach Petitioner, she followed the procedure and called Robert Humphreys. Starting at about 10:30 a.m., Humphreys called Petitioner's UNC cell phone and home phone but could not reach Petitioner. He left a message on the UNC cell phone. Humphreys then went to campus to try to respond to the maintenance problem. **T pp. 28-29, 75; Resp.'s Ex. G; Resp.'s Ex. L**
26. Humphreys again called Petitioner's home phone. At around 11:30 a.m., Petitioner's wife answered and said that Petitioner was out running errands and did not have his UNC cell phone on him. Since Petitioner was carrying his own personal cell phone, Humphreys asked Petitioner's wife to call her husband and have him call Humphreys. **T pp. 29, 75; Resp.'s Ex. G**
27. Petitioner finally responded to the Public Safety Department dispatcher at 11:55 a.m. He spoke to Humphreys at approximately 12:00 p.m. Humphreys gave Petitioner a verbal counseling and told him he should have his UNC cell phone with him at all times while on-call. **T pp. 29, 75; Resp.'s Ex. G**
28. Although the UNC cell phone was designated as the primary means of contact for maintenance mechanics while on callback duty, Petitioner admitted he did not have the UNC cell phone with him on 4 June 2011. **T p. 75, 161, 167; Resp.'s Ex. G**
29. The next day, on 5 June 2011, a Sunday, Petitioner was again on callback duty. After receiving a maintenance request at 6:23 a.m. for a malfunctioning disposal, the Public Safety Department attempted to reach Petitioner. The dispatcher called Petitioner's UNC

cell phone; paged him; and called his home phone. Petitioner did not respond. **T pp. 30, 77-78; Pet.'s Ex. 8; Resp.'s Ex. G;**

30. When the dispatcher could not reach Petitioner, he called Robert Humphreys at 6:29 a.m. Humphreys repeatedly called Petitioner's UNC cell phone and home phone but could not reach Petitioner until approximately 8:00 a.m. **T p. 30; Pet.'s Ex. 8; Resp.'s Ex. G**
31. On 9 June 2011, Petitioner received a written warning regarding his two failures to respond while on-call. As a "required correction" for his performance, the written warning specified that when Petitioner was on callback duty in the future, "you will ensure that you maintain the capability of being contacted by UNC Public Safety." **T pp. 31, 74-75, 79; Resp.'s Ex. G**
32. The written warning further warned that if Petitioner did not "make and sustain these job performance corrections immediately" he could be subject to "further disciplinary action, up to and including dismissal." **Resp.'s Ex. G**
33. Petitioner did not file a grievance challenging his written warning. **T pp. 31, 78**
34. As an excuse for his failures to respond to the Public Safety Department's calls on June 4 and June 5, 2011, Petitioner claimed that his pager did not receive the pages. Kurt Squires took the pager to the university's information technology staff, which found no problems with the pager. Although that same pager had been rotated every week among the various other maintenance mechanics on call, no one else ever reported a problem with the pager. Nevertheless, Squires replaced the pager with a new pager. **T pp. 79-80**
35. Squires held a meeting with the maintenance mechanics and plumbers he supervised and instructed them to keep their UNC cell phone and pager with them at all times when they were on callback duty, and to put the UNC cell phone and pager on their headboard or nightstand at night. **T p. 100; Resp.'s Ex. K**
36. On 30 June 2011, Petitioner was working with another maintenance mechanic, Michael Green, in a campus residence hall. That morning, the assistant director of UNC-Chapel Hill's Department of Housing and Residential Education, Steve Lofgren, was conducting a random check of the residence hall. On the third floor, Lofgren came across a locked room, which differed from all the other rooms, which were unlocked. He made noise trying to enter the room but could not do so, went downstairs to get a key, and returned to the room. Upon unlocking the door, Lofgren found Petitioner and Green. The lights were off and the blinds were closed. Unlike all the other rooms, which had furniture piled on the beds to allow for floor cleaning, this room had the furniture off the beds and on the floor. The beds were rumpled as though they had been slept on. There was no sign of any work tools or materials. Green claimed that he and Petitioner were changing air filters, but there were no filters in the room, and regardless that would not explain the other conditions in the room. **T pp. 31-38; Resp.'s Ex. B; Resp.'s Ex. C; Resp.'s Ex. H**

37. When questioned about their conduct in the locked room, Michael Green claimed that Petitioner was buying a cell phone game. But Petitioner gave a different story in his pre-disciplinary conference on 13 July 2011. Although he gave many excuses for his conduct in the locked room, he made no mention whatsoever of his cell phone, nor of buying or playing a game on it. At the 28 August 2012 OAH hearing, however, Petitioner claimed for the first time that he was learning how to operate his cell phone and learning its controls. On cross-examination, he admitted he could have been buying or playing a game on his cell phone. **T pp. 175, 192-193; Resp.'s Ex. H**
38. Petitioner admitted his conduct in the locked room on 30 June 2011 was mistaken and inappropriate, and that he had done something wrong. **T p. 177, 194; Resp.'s Ex. H**
39. On 14 July 2011, Petitioner received a disciplinary decision of suspension without pay for the week beginning 18 July 2011. **T pp. 38, 81-83; Resp.'s Ex. H**
40. Michael Green, a Caucasian, received the same disciplinary decision of suspension without pay as Petitioner, an African American. **T pp. 39, 83-84**
41. Petitioner did not file a grievance challenging his suspension for a week without pay. **T pp. 38, 83**
42. On 9 October 2011, a Sunday, Petitioner was on callback duty. This was the first time he had been on callback duty since June 2011, when he had received his written warning. The Public Safety Department attempted to reach Petitioner to respond to a maintenance request by a locksmith working on an exterior door to a residence hall that could not close or be secured. At 3:07 a.m., the dispatcher called Petitioner's UNC cell phone and paged him. When Petitioner did not respond, the dispatcher called Robert Humphreys at 3:22 a.m. Humphreys called Petitioner's UNC cell phone and left a message, and called Petitioner's home phone. After several attempts at contacting Petitioner, Humphreys called the locksmith and had the locksmith call another mechanic to provide assistance. **T pp. 40-41, 89-90, 117-119; Resp.'s Ex. I; Resp.'s Ex. J; Resp.'s Ex. K; Resp.'s Ex. M**
43. Almost five hours after the first calls and pages were sent to Petitioner, he finally responded to Humphreys at approximately 7:50 a.m. Petitioner told Humphreys that he didn't hear his phone ring and that his pager did not receive the pages. **T p. 41, 182; Resp.'s Ex. J; Resp.'s Ex. K**
44. Humphreys checked with UNC-Chapel Hill's information technology staff to determine if the pager used by Petitioner was receiving pages. The information technology staff checked with the pager's service provider, USA Mobility, which indicated that the pager received 9 pages during the month of October 2011. The pager was used regularly and received pages in the months prior to and following October 2011. **T pp. 41-42; Resp.'s Ex. D**

45. On 18 October 2011, Kurt Squires conducted a pre-disciplinary conference with Petitioner. Also present at the pre-disciplinary conference was Mari Forbes, Manager of Employee and Management Relations in UNC-Chapel Hill's Office of Human Resources. **T pp. 86-87, 138-139; Resp.'s Ex. J; Resp.'s Ex. K**
46. At his pre-disciplinary conference, Petitioner admitted that his UNC cell phone was not with him in the bedroom while he was asleep during the night of 9 October 2011, but instead he had left the UNC cell phone in his kitchen. Petitioner stated he did not hear the UNC cell phone ring. He also claimed he did not receive pages on his pager. **T pp. 86, 139, 178, 180, 182; Resp.'s Ex. K**
47. Petitioner also stated that he had taken a pain pill for his leg. Petitioner said the pain pill had not previously made him sleepy when he had taken it during the day. Petitioner had not indicated to anyone at the University that he had any kind of health condition, nor informed anyone at the University that he was taking any pills which could interfere with fulfilling his callback responsibilities. **T pp. 86-87, 139, 178, 182; Resp.'s Ex. K**
48. On 20 October 2011, UNC-Chapel Hill discharged Petitioner for unsatisfactory job performance. Petitioner had failed a principal function of his job to respond to the Public Safety Department while on callback duty on three separate occasions. He had received a prior written warning for the first two failures while on callback duty, and he had a separate suspension without pay for unacceptable personal conduct regarding his conduct in the locked dorm room with Michael Green. **Resp.'s Ex. K**
49. After his discharge on 20 October 2011, Petitioner appealed through UNC-Chapel Hill's grievance process. Petitioner argued he was discharged without just cause, and also argued his discharge was a result of race or color discrimination. The university grievance committee heard testimony from UNC-Chapel Hill's and Petitioner's witnesses. At the hearing, Petitioner presented no evidence of any kind relating to race or color discrimination. On the issue of just cause the grievance committee found, among other things, that Petitioner was unable to provide a valid explanation for his failure to respond to pages. The grievance committee unanimously affirmed the discharge of Petitioner for unsatisfactory job performance. **T p. 200; Document Constituting Agency Action**
50. At the 28 August 2012 OAH hearing, Petitioner admitted it was his responsibility to keep the UNC cell phone and pager with him at all times while on callback duty. **T p. 196**
51. At the 28 August 2012 OAH hearing, Petitioner made various assertions for why he was unable to be reached while on callback duty via his home phone, pager, or UNC cell phone, or pager. He claimed his home phone worked "intermittently" and would "ring sometimes but not all the time." For the pager, Petitioner claimed he did not receive pages on each of the three occasions he failed to respond to the Public Safety Department's attempts at reaching him, though he also claimed that "the best way to reach me would be to page me because, you know, that had been working for me since

I've been working -- since I've been on call-back for years even before they had cell phones." Petitioner claimed he did not receive pages on only those three instances, in spite of the evidence that UNC-Chapel Hill made repeated pages to him on those occasions, that he claimed this same problem occurred on two different pagers, that he received pages at all other times, that the information technology staff found no problem with the pagers, and that the many other workers who used those same pagers had no problems with them. As for his UNC cell phone, Petitioner gave conflicting answers regarding his cell phone service. At first he testified he could neither make nor receive calls on his UNC cell phone when he was at his house. However, Petitioner later testified he told Humphreys that the cell phone service at his house was "spotty" and that he did not get "good reception" though he did not claim he got no reception. In cross-examination, he admitted his cell phone service was "spotty," contradicting claims that he received no reception. He further stated on redirect examination that to be "reachable in the call-back process," he needed to make sure "the cell phone stayed charged, and to keep it in open view. If I've got it in open view, I should be able to hear it, you know, because I don't live in a great big house. So if it went off at any time, it should -- I should be able to hear it." He also acknowledged that he received messages and indications of missed calls on his UNC cell phone. **T pp. 159, 160, 167, 168, 178, 180, 182, 189, 190, 195, 196, 203**

52. Petitioner's testimony regarding his home phone, pager, and UNC cell phone was not plausible or credible. According to Petitioner, he was unable to be reached on three separate occasions when he was on callback duty because of simultaneous failures of his home phone, pager, and UNC cell phone. For his 9 October 2011 failure to respond to calls and pages from both the Public Safety Department and Robert Humphreys, Petitioner failed to respond for nearly five hours. Petitioner asserts that his claimed intermittent home telephone did not ring any of the times it was called. At the same time, he claims that his UNC cell phone did not ring on any of the times it was called, though the phone registered calls and a voicemail message and Petitioner admits the cell phone was in his kitchen and he was in his bedroom asleep. Simultaneously, Petitioner claims his pager received none of the pages sent to it despite working at all other times, the same as he claimed with the previous pager, even though none of the numerous other people using the pager had any problems and the information technology staff found no problems with either pager. Petitioner's self-serving claims must be weighed against the testimonial and documentary evidence presented by UNC-Chapel Hill of numerous calls and pages to his home phone, UNC cell phone, and pager, as well as weighed against his own inconsistent and contradictory testimony described above. At hearing, Petitioner testified he had problems with his home phone; that it had been broken and would ring sometimes and not at other times. He also testified they had small children would mess with it. Petitioner offered no plausible reason as to why he did not simply buy a new home telephone. **T. p. 159**
53. By letter dated 6 March 2012, UNC-Chapel Hill issued its final agency decision to discharge Petitioner on the basis of unsatisfactory job performance. **Document Constituting Agency Action**

54. As explained in the above findings of fact, from the hearing testimony of Robert Humphreys, Kurt Squires, Amy Oakley, and Mari Forbes, as well as the presentation of its exhibits, Respondent UNC-Chapel Hill demonstrated with substantial evidence that Petitioner was properly discharged with just cause for unsatisfactory job performance.
55. Petitioner, who is African American, contends his discharge was discriminatory on the basis of race and color. However, Petitioner presented no evidence of any kind of race or color discrimination. He produced no testimony from any witness showing race or color discrimination. He presented no testimony that any of the people directly or indirectly involved in his several disciplinary actions—including Robert Humphreys, Kurt Squires, Edd Lovette, Steve Lofgren, Amy Oakley, Mari Forbes, or others—were discriminating against him. He presented no documents of any kind indicating or showing discrimination. Even in his own testimony, Petitioner made no allegation of race or color discrimination, providing only his vague recollections of the waxing and waning of numbers of African Americans working in his department over the course of 21 years. Moreover, Petitioner’s counsel indicated prior to opening statements that Petitioner viewed his discharge “primarily as a just-cause case.”
56. Furthermore, the evidence showed that when Petitioner was suspended without pay for a week for his conduct in the locked dorm room, his white co-worker received an identical punishment. In addition, UNC-Chapel Hill presented testimony that when a white tradesman (a “life safety technician”) failed to respond while he was on-call, he received for his first offense a suspension of a week without pay, in contrast to Petitioner who received a written warning for two failures to respond while on callback duty.
T pp. 39, 83-84, 143-144
57. Petitioner did not present sufficient evidence to make a prima facie case of race or color discrimination.
58. UNC-Chapel Hill provided a legitimate, non-discriminatory rationale for discharging Petitioner for his unsatisfactory job performance.
59. Petitioner did not present evidence to show UNC-Chapel Hill’s stated rationale was a pretext for discrimination.
60. At the close of evidence during the 28 August 2012 hearing, the undersigned granted UNC-Chapel Hill’s motion to dismiss Petitioner’s claim of race and color discrimination.
T p. 217
61. The undersigned finds as a fact that UNC-Chapel Hill dismissed Petitioner because of his unsatisfactory job performance and not because of his race or color.
62. The undersigned finds as a fact that UNC-Chapel Hill complied with all procedural requirements in dismissing Petitioner.

63. Portions of Petitioner's testimony were not credible.
64. Robert Humphreys, Kurt Squires, Amy Oakley, and Mari Forbes were all credible witnesses. Furthermore, crucial parts of their testimony were supported by documentation. All of Respondent's exhibits were admitted into evidence.
65. Petitioner had in excess of 20 years employment with the University of North Carolina and there is no evidence of record that prior to the incidents giving rise to Petitioner's termination, that Petitioner had not previously been cited for failing to respond to emergency callbacks. Petitioner's Annual Performance Review dated June 1, 2010-May 31, 2011 indicates he received a "good" relating to emergency callback service orders.

CONCLUSIONS OF LAW

Based on: the sworn testimony of witnesses, including assessment of the witnesses' credibility, demeanor, interest, bias, and prejudice; assessment of the reasonableness and consistency of each witness's testimony; consideration of the documents admitted into evidence; and the entire record in this proceeding; the undersigned makes the following conclusions of law, as follows:

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the issues in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. For the issue of just cause termination, Respondent met its burden of preponderance of evidence to show it had just cause to discharge Petitioner. Petitioner's arguments to the contrary are without merit.
3. The undersigned finds no pre-hearing procedural errors which violate NCGS 150B-23.
4. For the issue of race or color discrimination, Petitioner failed to meet his burden of preponderance of evidence to show discrimination. Petitioner's arguments to the contrary are without merit.
5. A career State employee may be discharged only for just cause. N.C.G.S. § 126-35(a). The State employer bears the burden of demonstrating just cause. N.C.G.S. § 126-35(d).
6. "Unsatisfactory job performance is defined as "work-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency." 25 N.C.A.C. 1J.0614(9). While Petitioner attorney's argument that discipline for unsatisfactory job performance "is to assist and promote improved employee performance, rather than to punish, (citing 25NCAC 01J .0605 (a), it is well settled that unsatisfactory job performance may constitute just cause for dismissal. 25 N.C.A.C. 1J.0604(c).

7. To be dismissed for unsatisfactory job performance, an employee must have a current unresolved incident of unsatisfactory job performance and at least two prior active warnings for unsatisfactory job performance or unacceptable personal conduct, as well as a pre-disciplinary conference. 25 N.C.A.C. 1J.0605(b) and (c); State Personnel Manual, § 7, page 6.
8. Prior to his discharge for unsatisfactory job performance on 20 October 2011, Petitioner had a written warning for unsatisfactory job performance on 10 June 2011; a suspension for a week without pay on 14 July 2011 for unacceptable personal conduct; and a pre-disciplinary conference on 17 October 2011.
9. Petitioner did not file a grievance regarding either his written warning or his suspension for a week without pay.
10. The UNC-Chapel Hill Facilities Services on-call policy was reasonable and appropriate. Petitioner did not allege it was unreasonable or inappropriate, or that it was unevenly or inconsistently applied.
11. Petitioner's job performance, summarized in the 20 October 2011 disciplinary decision of dismissal and the final agency decision dated 6 March 2012, and detailed above in the Findings of Fact, constituted unsatisfactory job performance.
12. Petitioner had three separate instances of failing to respond to calls and pages from the Public Safety Department and his supervisor while he was on callback duty, violating one of the "principal functions" of his job. For the last instance that led to his discharge—after a verbal counseling from Humphreys, a written warning, and a shop meeting repeating expectations—Petitioner failed to respond for nearly five hours. UNC-Chapel Hill's policy explicitly set forth that "[f]ailure to respond to a telephone call or a page and/or refusal to report for duty when called by the Public Safety Department or an authorized Facilities Services supervisor during the period an employee is designated for on-call duty will result in loss of on-call pay for that shift, and may also result in disciplinary action, up to and including dismissal." In addition to his unsatisfactory performance, Petitioner had a separate disciplinary suspension for a week without pay for unacceptable personal conduct. Petitioner's job performance was work-related performance that failed to satisfactorily meet his job requirements as specified in the relevant job description, in his annual reviews, and as directed by the management of UNC-Chapel Hill. 25 N.C.A.C. 1J.0614(9).
13. UNC-Chapel Hill demonstrated with credible and substantial evidence that it had just cause for discharging Petitioner.
14. UNC-Chapel Hill had just cause for discharging Petitioner.
15. Petitioner bears the burden of proof on claims of race or color discrimination.

16. North Carolina courts “look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases.” North Carolina Dep’t of Correction v. Gibson, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983).
17. The United States Supreme Court has established a burden-shifting framework by which employees may prove employment discrimination. North Carolina Dep’t of Crime Control & Pub. Safety v. Greene, 172 N.C. App. 530, 537-38, 616 S.E.2d 594, 600 (2005). Under this federal scheme, the employee is required to establish a prima facie case of discrimination. Id. Once the employee establishes a prima facie case of discrimination, the burden shifts to the employer to provide a “legitimate, non-discriminatory” rationale for its employment decision. Id. If the employer provides a “legitimate, nondiscriminatory” rationale for its employment decision, the burden shifts back to the employee to provide evidence that the employer’s stated rationale is a “mere pretext” for discrimination. Id. However, the “ultimate burden” of proving that the employer intentionally discriminated against the employee remains with the employee at all times. Gibson, 308 N.C. at 138, 301 S.E.2d at 83.
18. To establish a prima facie case of discrimination, Petitioner must show the following: “(1) that he is a member of a [protected] class . . . (2) that the prohibited conduct in which he engaged was comparable in seriousness to misconduct of employees outside the protected class, and (3) that the disciplinary measures enforced against him were more severe than those enforced against other employees.” Cook v. CSX Transportation, 988 F.2d 507, 511 (4th Cir. 1992); see also Moore v. City of Charlotte, 754 F.2d 1100, 1105-06 (4th Cir. 1984).
19. Furthermore, Petitioner must raise any allegation of discrimination “within 30 days, either in a direct appeal to the State Personnel Commission or within the departmental grievance procedure, of the date of the action that is alleged to be discriminatory. Failure to raise such an allegation within 30 days shall be cause to have such allegation dismissed.” 25 N.C.A.C. 1B.0350; see also N.C.G.S. § 126-38.
20. The only allegation of discrimination raised by Petitioner was in his grievance regarding his discharge. Accordingly, Petitioner cannot allege his written warning or suspension without pay were discriminatory, and only his discharge is subject to review for discrimination.
21. Although Petitioner raised an allegation of discrimination on the basis of race or color when filing his grievance at UNC-Chapel Hill, he admittedly presented no evidence of any kind in the grievance hearing showing discrimination.
22. At his OAH hearing, Petitioner did not affirmatively attempt to prove a prima facie case, nor did he succeed in meeting his burden for a prima facie case. He did not present evidence to meet the second prong to show that his failure to respond while on callback duty was comparable to misconduct of employees outside his protected class. He

presented no evidence that the disciplinary measures enforced against him were more severe than those enforced against other employees.

23. Even if Petitioner met his burden on the prima facie case, UNC-Chapel Hill provided a legitimate, non-discriminatory rationale for discharging Petitioner for failure to respond while on callback duty, which constituted a failure to meet a “principal function” of his job and thus was unsatisfactory job performance
24. Petitioner did not rebut UNC-Chapel Hill’s legitimate, non-discriminatory rationale by providing any evidence that UNC-Chapel Hill’s reasons for discharge were a mere pretext for race or color discrimination.
25. Petitioner did not meet his ultimate burden of proving that UNC-Chapel Hill discriminated against him on the basis of race or color. He presented neither direct nor indirect testimonial evidence of discrimination. He presented no testimony from any witness showing race or color discrimination. He presented no documents of any kind showing discrimination. Petitioner’s own testimony did not make any allegation of race or color discrimination against any of the individuals involved in his discharge. Petitioner presented no evidence of any racial or color animus on the part of any employee of UNC-Chapel Hill, or any other evidence that would give rise to a reasonable inference that any UNC-Chapel Hill employee made his decision based on Petitioner’s race or color.
26. UNC-Chapel Hill moved at the close of evidence to dismiss Petitioner’s claim of race or color discrimination. The undersigned granted UNC-Chapel Hill’s motion.
27. Petitioner’s testimony was not credible relating to why he did not respond to emergency callback.
28. Robert Humphreys, Kurt Squires, Amy Oakley, and Mari Forbes were all credible witnesses.
29. Respondent followed all the required procedures required to dismiss Petitioner for unsatisfactory job performance.
30. Based on all foregoing Findings of Fact and Conclusions of Law, Petitioner’s actions constituted unsatisfactory job performance. Respondent UNC-Chapel Hill had just cause to discharge Petitioner. Respondent did not discriminate against Petitioner on the basis of race or color.
31. Petitioner’s long past exemplary work history with the University of North Carolina has been considered by the undersigned; however, it alone is not sufficient to rebut Respondent’s production at hearing of overwhelming evidence regarding Petitioner’s recent unsatisfactory job performance proven by a preponderance of the evidence.

32. Counsel for Petitioner argues that the undersigned should find that the conduct of Petitioner giving rise to his dismissal should have been categorized as “unacceptable personal conduct” rather than “unsatisfactory job performance, and that “just cause requires commensurate discipline citing an “unacceptable conduct” case, Warren v. N.C. Dept. of Crime Control, N.C. Ct. of Appeals No. COA11-884 (June 19, 2012). While the undersigned finds no reason not to extend the commensurate discipline analysis to “unsatisfactory job performance” discipline cases, extending that principle in the instant case does not affect the decision reached herein.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned finds that Respondent has sufficiently proved it had just cause to discharge Petitioner based on his unsatisfactory job performance, and UNC-Chapel Hill’s decision to discharge Petitioner is **AFFIRMED**. It is further ordered that Petitioner’s claim of discrimination on the basis of race or color is **DISMISSED**.

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

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge’s Final Decision.** In conformity with the Office of Administrative Hearings’ rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 26th day of September, 2012.

Joe L. Webster
Administrative Law Judge