

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 11966

FINAL DECISION

APPEARANCES

For Respondent: Joseph E. Elder
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

ISSUE

WITNESSES

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EXHIBITS

Exhibits admitted on behalf of Respondent:

1. Letter from Laney-Speller to Charchar dated 1/11/13 re dismissal.
2. Letter from Laney-Speller to Charchar dated 4/9/12 re written warning.
3. Letter from Laney-Speller to Charchar dated 7/10/12 re written warning.
4. Emails between Charchar and Laney-Speller from 12/13/12.
5. Contact Report from Charchar 11/20/12.
6. Contact Report from Blotzer 11/21/12.
7. Letter from Laney-Speller to Charchar dated 1/8/13 re Notice of Pre-Disciplinary Conference.
8. Email from Laney-Speller to advocacy staff dated 2/16/12 re seeing patients.
9. Statement by Woodby dated 12/13/12.
10. List of office dimensions
11. Photograph of cubicles and hallway.
12. Photograph of hallway and doorway to office.
13. Photograph of hallway leading to Hart's office.
14. Statement of Melissa Jones dated 12/13/12.
16. Email from Charchar to McDaniel dated 12/17/12.
17. Central Regional Hospital Administrative Policy Manual, Policy Number APM-D.0010, effective 2/25/13.
18. Acknowledgement of Central Regional Hospital Policies, 5/11/09.
19. Acknowledgement of receipt of Central Regional Hospital Employee Handbook, 5/11/09.
20. Diagram of Hart's office.

Exhibits admitted on behalf of Petitioner:

1. Respondent's Objections and Responses to Petitioner's First Set of Interrogatories and Requests for Production of Documents.
2. Work plans and Competency Assessment Checklists for Charchar, 2009-2012.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge (ALJ) makes the following Findings of Fact. In making these findings of fact, the ALJ 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 witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

1. In addition to any other stipulations contained herein, the parties stipulated and agreed with respect to the following undisputed facts:

(a) Respondent, North Carolina Department of Health and Human Services is an agency of the State of North Carolina, and the Division of State Operated Health Facilities (DSOHF), is an operational division within the Department of Health and Human Services. Central Regional Hospital is a facility operated under the DSOHF;

(b) John Charchar, at all times relevant to this matter, was a “career state employee” within the meaning of N.C. Gen. Stat. § 126-1.1;

(c) Charchar was dismissed on January 11, 2013;

(d) Charchar received all notice required to be given regarding his rights to challenge his dismissal and proceeded through the DHHS grievance procedure pursuant to DHHS Directive III-8. Mr. Charchar appealed through and including a Step 3 hearing.

2. Crystal Hart (formerly Laney-Speller) has been the supervisor of the Advocacy Unit at Central Regional Hospital since December 2011.

3. Brenda Woodby works as the office assistant in the Advocacy Unit and reports directly to Hart. She assists Hart with various office and administrative functions.

4. Wendi McDaniel works in the North Carolina Department of Health and Human Services as a Mental Health Program Manager II. She supervises the advocacy director’s at state operated health facilities. She has worked in this role since 2004. She was Hart’s supervisor at all times relevant to this case.

5. Melissa Luck (formerly Jones) worked with the patient safety and risk management department as an incident coordinator during all times relevant to this case. She worked in the same office suite as Woodby and Hart at Central Regional Hospital.

6. Charchar (hereinafter “Petitioner”) was a Patient Advocate in the Advocacy Unit at Central Regional Hospital.

7. In December 2012, Hart’s office was located in the main administrative building of Central Regional Hospital. It was located in an office suite along with several cubicles. When entering the office space from the hospital corridor, the cubicles are located on the right. From the office suite entrance to the corner of the hallway leading to the left toward Hart’s office was thirty-six feet, five inches. From the corner of the hallway to Hart’s office door was seven feet, five inches. Woodby’s cubicle was sixteen feet from the corner of the hallway leading to Hart’s office.

8. Hart was Petitioner’s immediate supervisor in the Advocacy Unit. She had been supervising him since she became acting director of the unit in December 2011. As supervisor, Hart manages the day-to-day functions of the advocacy department which includes providing patient advocacy for smaller facilities that are around Central Regional Hospital. Hart manages the advocate caseloads and directly supervises the advocates. Hart carries a small patient

advocate caseload and supervises seven patient advocates including Petitioner. She reports to Wendi McDaniel, the State facility team advocacy leader.

9. The advocacy unit ensures the safety of the patients at the Central Regional Hospital and the other smaller facilities it serves. This includes making sure that staff members follow proper procedures and protocols and do not violate policies related to patient care.

10. Prior to becoming Advocacy Unit Director, Hart worked with Petitioner as a Patient Advocate. Patient advocates investigate allegations of abuse, neglect, and exploitation and ensure that patients' rights are protected. This includes taking simple requests for calls and information from family members, external stakeholders to the more serious allegations of abuse and neglect and exploitation.

11. The advocacy unit becomes involved in patient matters when it receives a report either from a patient, a staff member, a guardian or through some type of documentation review that involves patient rights.

12. The unit has an internal line where it receives calls. These calls are received on an internal voice mail line, which are reviewed by the director or a designee. The unit also has an on-call cell phone which is operated every day around the clock in which those calls can be received, and those calls are taken in person. Hart, as director, makes a determination as to which advocate will follow up on a call.

13. The assigned advocate conducts an investigation into the patient incident and Hart assists by reviewing the investigation findings and with making determinations about an incident. The advocate creates an internal report from their investigation which is submitted to Hart for review. Hart consults with the advocate on their investigation findings and reports.

14. An investigated incident can be substantiated or unsubstantiated depending on the evidence gathered during the investigation.

15. Advocates are expected to resolve complaints within five business days from the time a complaint is received in the advocacy unit.

16. Hart interacts with the advocates daily. This interaction includes assigning calls and reviewing all of the documentation that is completed in the department. She also provides feedback and advice on the advocates' cases.

17. Through their investigations, advocates may interact with patients, staff at the hospital, and supervisors. They may interact with external agencies as well as surveyors that come to inspect the facility.

18. Because of the people patient advocates may come into contact with and the nature of the work they perform investigating patient rights issues, a high level of professionalism and credibility is required of the advocates.

19. Hart was an advocate for approximately two years prior to becoming supervisor of the advocacy unit. She worked with Petitioner during this time. The two had a good working relationship as advocate colleagues.

20. Their working relationship began to change when Hart became supervisor of the advocacy unit. Efforts were made to repair this relationship, including but not limited to communication with Wendi McDaniel. Nevertheless, their working relationship remained acrimonious on December 13, 2012.

21. Petitioner had two active written warnings as of December 13, 2012. These were for time and attendance issues and cited as unacceptable personal conduct. Both written warnings notified Petitioner that dismissal was an available means of discipline for future employment related issues.

22. December 13, 2012 was a normal work day. Hart had usual workday interactions with Petitioner. Woodby had reviewed some documentation submitted by Petitioner. Woodby routinely conducted an initial review of the paperwork submitted by the advocates. Woodby noticed an inconsistency between a report submitted by Petitioner and the report of another advocate, Mark Blotzer. According to Blotzer's report, Petitioner failed to follow up with a patient in the time frame consistent with what Petitioner had told the patient.

23. Hart and Petitioner had an email exchange about the inconsistency during which Hart reminded Petitioner of the importance of following up with patients in a timely manner. Hart regularly communicated with the advocates either by email or by writing them a note about issues in their reports.

24. Hart had communicated with the advocates about the need to timely follow up with patients. This was done routinely in staff meetings. The expectation was that an advocate would make patient contact within one business day of receiving a complaint and that advocates would follow up with patients at the time they told the patient they would. Hart also set forth this expectation in an email to the advocacy unit dated February 16, 2012. Petitioner was a recipient of that email.

25. In her December 13, 2012 email to Petitioner, she reminded him to meet with patients within the time he told them he would meet with them. She informed him he could come speak with her about the situation if he wished.

26. Petitioner indicated that he wanted to meet with Hart. Hart informed Woodby to place the meeting on her calendar for that day, December 13, 2012. Hart's practice was to have Woodby put an entry on Hart's calendar whenever she was meeting with Petitioner.

27. Petitioner arrived in Hart's office to discuss the issues raised in their email exchange.

28. If standing in her office doorway, Hart's desk faces the right wall with a chair placed at the end of the desk closest to the door. There was open floor space behind where she would sit behind her desk and then a bookcase on the wall opposite her desk.

29. When Petitioner arrived in her office, he sat in the chair at the end of her desk and she sat at the corner of her desk. They were only a few feet apart. Hart had Petitioner's and Blotzer's reports out in order to discuss them with Petitioner.

30. When she pointed out the issue with him failing to follow up with the patient at the time he stated he would, Petitioner became visibly upset, turning red, and denied having told the patient he would follow up with her on November 21, 2012.

31. Hart explained what was revealed in the two reports was consistent in that he informed the patient he would follow up on November 21, 2012. At that point, Petitioner became very red in the face and yelled at Hart that he could not believe she would believe Blotzer over him. He pounded on Hart's desk. Of note, Hart was approximately eight months pregnant at the time.

32. Hart became concerned about the way in which Petitioner was interacting with her. She had never seen Petitioner this angry. She contacted her administrative assistant, Brenda Woodby, who responded by saying she heard Petitioner yelling and was on her way to Hart's office. Hart was unaware of anyone being in the work space other than Woodby.

33. Woodby was in her cubicle when Petitioner entered the office suite a few minutes after she was contacted by Hart to place the meeting on her calendar. A few minutes after Petitioner entered Hart's office, Woodby was able to hear Petitioner yelling. At one point, she overheard what sounded to be banging on a desk. Woodby became concerned. She walked to a copy area closer to Hart's office. She heard Petitioner continuing to yell, and she returned to her cubicle. Hart called Woodby on her phone to request Woodby to come to her office. Woodby remarked to Hart that she could hear Petitioner yelling.

34. Before Woodby arrived in Hart's office, Petitioner continued to yell at Hart accusing her of attacking him by talking to him about the report discrepancies.

35. Woodby arrived in Hart's office. The door was pulled nearly shut but was not latched completely closed. Hart informed Petitioner that she wanted Woodby in the office as a witness that she was not attacking him. Petitioner stood to leave; however, Woodby shut the door behind her and was standing between Petitioner and the door. Petitioner sat back down.

36. Hart explained what the exchange was about and handed Woodby the email between Hart and Petitioner. This email detailed the discrepancies in the reports and served as the purpose of the meeting. Petitioner asked Woodby to read the email out loud. After Woodby completed reading the email, Petitioner asked her to keep reading. Woodby informed him that she had read the entire email.

37. Petitioner snatched the email from Woodby. He appeared to read the email to himself and then set the paper down. Petitioner began to exit the office and turned to state that he had contacted Hart's supervisor about a documented counseling session they had. Hart expressed that she was not concerned by that and Petitioner exited the office.

38. Hart and Petitioner had no further interactions on December 13, 2012.

39. Melissa Luck (formerly Jones) was working in her cubicle on December 13, 2012 and was unaware of any other staff working in the area other than Woodby. Between Luck's cubicle and Woodby's cubicle was a small walkway and then another cubicle. Luck's cubicle was immediately on the right when entering the office suite through the door from the hospital hallway. Hart's office was beyond the bank of cubicles, then to the left down a small hallway.

40. Shortly after lunch time, Luck noticed Petitioner walk into the office area and proceed toward the back in the direction of Hart's office. This was the usual path for the advocates to come in to see Hart.

41. Moments later, Luck heard Petitioner yelling from the direction of Hart's office. Luck also heard Woodby, who was in her cubicle; answer her phone and state, "I can hear him yelling." Luck's cubicle is at the entrance to the office suite – thirty six feet five inches from the corner of the hallway to the left leading to Hart's office. It's an additional seven feet from the corner to Hart's office door.

42. By his own admission, Petitioner was angry even before meeting with Hart on December 13, 2012. He acknowledged that he had a choice in the way that he behaved during his meeting with Hart including choosing to treat her disrespectfully and yelling at her. He further acknowledged that he would not want to be treated the way he treated Hart during the meeting.

43. Hart participated in a meeting with Employee Relations Specialist Ken Thomas, Human Resources Manager Debbie Thomas, McDaniel, and Petitioner on December 17, 2012. During this meeting, Petitioner expressed that he was angry on December 13, 2012 and should not have gone to Hart's office.

44. Following the meeting on December 17, 2012, Petitioner sent an email to McDaniel that stated he should not have acted the way he did when meeting with Hart on December 13, 2012. He admitted that no one should be treated in the workplace the way that he treated Hart on that occasion. He expected that termination may result from the incident and requested McDaniel not terminate him.

45. Hart, McDaniel, human resources and the facility director consulted about the matter. The ultimate determination was made to dismiss Petitioner from his employment with Central Regional Hospital for unacceptable personal conduct for which no state employee should expect prior warning, for violating known or written work rules, and for conduct unbecoming a state employee which is detrimental to state service.

46. Petitioner was dismissed by letter dated January 11, 2013.

CONCLUSIONS OF LAW

1. The parties received proper notice of the hearing.

2. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes and has the authority to issue a Final Decision.

3. At the time of his dismissal, Petitioner was a career State employee subject to all provisions, protections and appeal rights contained in N.C.G.S. § 126-35 and Section 7 of the State Personnel Manual.

4. Respondent complied with, as stipulated to by Petitioner, all of the pre-dismissal requirements contained in N.C.G.S. § 126-35 and Section 7 of the State Personnel Manual.

5. N.C.G.S. 126-35 (a) has been interpreted to require that the acts or omissions be described "with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation." *Employment Security Commission v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981).

6. Petitioner was given proper statutory notice of the reasons for his dismissal and the dismissal letter met the requirements of the law. There is nothing ambiguous in the dismissal letter concerning the specific acts committed by Petitioner which led to his dismissal. Petitioner was clearly notified of the specific acts which led to his dismissal allowing him to respond to the charges and prepare an effective representation, which he did. The dismissal letter was sufficiently specific. The dismissal letter included as reasons for dismissal that Petitioner's conduct was unbecoming a State employee that is detrimental to State service, conduct for which no reasonable person should expect to receive prior warning, and the willful violation of a known or written work rule.

7. Disciplinary actions are those actions taken in accordance with the disciplinary procedures adopted by the State Personnel Commission and specifically based on unsatisfactory job performance, unacceptable personal conduct or a combination of the two. N.C. Gen. Stat. § 126-35(b) (2012).

8. Pursuant to N.C. Gen. Stat. § 126-35(d) and N.C. Gen. Stat. § 150B-29(a), Respondent has the burden of proof by a preponderance of the evidence on the issue of whether it had just cause to dismiss Petitioner for unacceptable personal conduct.

9. An employer may discipline or dismiss an employee for just cause based upon unacceptable personal conduct or unsatisfactory job performance. 25 N.C.A.C. 1J .0604(b).

10. Pursuant to 25 N.C.A.C. 1J .0608(a), an employer may dismiss an employee without warning or prior disciplinary action for a current incident of unacceptable personal conduct.

11. In pertinent part “Unacceptable personal conduct” is defined by 25 N.C.A.C 1J .0614 (8) as any of the following:

- (a) conduct for which no reasonable person should expect to receive prior warning; . . .
- (d) the willful violation of known or written work rules;
- (e) conduct unbecoming a state employee that is detrimental to state service.

12. Determining whether a public employer had just cause to discipline its employee requires two separate inquiries. The first determination is whether the employee engaged in the conduct the employer alleges. The second determination is whether that conduct constitutes just cause for the disciplinary action taken. *North Carolina Department of Environment and Natural Resources, Division of Parks and Recreation v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004). While just cause is not susceptible of precise definition, our courts have held that it is “a flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case.” *Id.* at 669, 599 S.E.2d at 900.

13. The proper analytical approach in just cause cases dealing with unacceptable personal conduct requires a three-step analysis. The first inquiry is whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee’s conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee’s act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry of whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based “upon an examination of the facts and circumstances of each individual case.” *Warren v. N.C. Dep’t of Crime Control & Pub. Safety*, ____ N.C. App. ____, 726 S.E.2d 920, 925 (2012), *review dismissed, as moot*, 734 S.E.2d 867, 2012 N.C. LEXIS 1064 (2012),

14. With respect to the first inquiry of whether the employee engaged in the conduct the employer alleges, Petitioner did become angry with Hart. He yelled at her and banged on her desk.

15. With respect to the second inquiry of whether the employee’s conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code, his conduct falls within the purview of the three enunciated categories under 25 N.C.A.C. 1J .0614 (8).

16. Petitioner’s angry outburst at Hart, eight months pregnant at the time, included yelling at her, banging on her desk, and becoming red faced was conduct so unprofessional for

the workplace that Petitioner should not expect any prior warning before being dismissed for the behavior. Petitioner acknowledged as much by admitting in an email that no one should be treated in the manner that he treated his supervisor during the December 13, 2012 meeting. Petitioner was aware that his behavior during the December 13, 2012 meeting was of such a serious nature that dismissal was a possible outcome.

17. The specific rule at issue was Central Regional Hospital policy on professional conduct APM-D0010 Disruptive Behavior. This policy states:

Disruptive behavior includes, but is not necessarily limited to the following actions toward colleagues, hospital personnel, patients, families, or visitors: abusive or threatening language; degrading or demeaning comments regarding patients, families, hospital employees, staff or the hospital; inappropriate physical contact that is threatening or intimidating; inappropriate expressions of anger such as destruction of property or throwing items; intimidation of staff, patients, or families, whether verbal or physical; public derogatory comments about the quality of care being provided by physicians, nursing personnel or the hospital.

18. A willful violation of known or written work rules occurs when an employee "willfully takes action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule." *Teague v N.C. Dept. of Correction*, 177 N.C. App. 215, 222, 628 S.E.2d 395, 400 (2006) citing *Hilliard v. N.C. Dept. of Correction*, 173 N.C. App. 594, 620 S.E.2d 14, 17 (2005).

19. Petitioner's behavior during the December 13, 2012 meeting violated Central Regional Hospital's Disruptive Behavior Policy as referenced in the January 11, 2013 dismissal letter. Specifically, his yelling, banging on the desk, and snatching the email from Woodby constituted inappropriate expressions of anger.

20. Petitioner yelled loudly to the recognition of other staff members outside of Hart's office. His yelling could be heard as far away as the entrance area of the office suite. Petitioner's behavior was inconsistent with the Advocacy Unit's purpose of investigating complaints related to patient rights. In such a position, Petitioner is required to maintain a high level of professionalism and credibility as Petitioner interacted with a number of different individuals including physicians, hospital management, patients and patients' family members. The behavior he exhibited on December 13, 2012 was inconsistent with his professional duties and thus was conduct unbecoming a state employee that is detrimental to state service.

21. There is substantial, credible evidence in the record showing that Petitioner's outburst in Hart's office on December 12, 2012 constituted conduct for which no reasonable person should expect to receive prior warning, was a willful violation of known or written work rules, and conduct unbecoming a state employee that is detrimental to state service.

22. Petitioner had two active instances of discipline at the time of his dismissal: a written warning for unacceptable personal conduct issued March 30, 2012 and a written warning

for unacceptable personal conduct issued July 10, 2012. These warnings notified Petitioner that dismissal was a possible means of discipline for future employment related issues.

23. Based on the preponderance of the evidence, Respondent met its burden of proof that it had just cause to dismiss Petitioner for unacceptable personal conduct without prior warning or disciplinary action.

24. Respondent met its burden of proof that it did not substantially prejudice Petitioner's rights, exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act in violation of Constitutional provisions, fail to act as required by law, act arbitrarily or capriciously, and/or abuse its discretion when Respondent dismissed Petitioner for just cause.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge makes the following:

DECISION

The undersigned Administrative Law Judge finds that Respondent's dismissal of Petitioner for just cause should be **UPHELD**.

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 the county in which the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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.A.C. 03.0102, and the North Carolina 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 18th day of March, 2014

Craig Croom
Administrative Law Judge