

STATE OF NORTH CAROLINA
COUNTY OF SURRY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13OSP16230

BARBARA HINTON PETITIONER, V. SURRY COUNTY HEALTH AND NUTRITION CENTER RESPONDENT.	FINAL DECISION
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This matter coming on to be heard and being before the undersigned presiding at the January 6, 2014 contested case hearing conducted at the Surry County Judicial Center, Dobson, North Carolina.

APPEARANCES

For Petitioner: Daniel C. Nash, Attorney at Law, High Point, NC
For Respondent: Edwin M. Woltz, Attorney at Law, Mount Airy, NC

EXHIBITS

The following Exhibits were admitted into evidence:

Petitioners:

Exhibit 1 Surry County Employee Performance Appraisal for Petitioner from 9/1/11-9/1/12.

Respondents:

Exhibit 1 Pre-disciplinary Conference notification dated June 4, 2013.
Exhibit 2 Dismissal letter dated June 6, 2013.
Exhibit 3 Coaching Document dated November 19, 2012 and subsequent Facebook posting June 2013 by Ms. Hinton.
Exhibit 4 Digital Recorder Usage Policy and Digital Recorder Usage training documentation.
Exhibit 5 Employee Confidentiality Acknowledgment.
Exhibit 6 Signed affidavit by Tiffany Bullins; related text messages from Ms. Hinton; and text messages as produced from cell phone provider.
Exhibit 7 Surry County Code of Ethics and Professional Conduct.

- Exhibit 8 Appeal letter to County Manager Chris Knopf from Barbara Hinton dated June 10, 2013 and supplement letter dated June 16, 2013.
- Exhibit 9 County Manager Chris Knopf's response letter dated July 1, 2013 to Ms. Hinton's termination of appeal.
- Exhibit 10 Surry County Personnel Ordinance Article VII, Section 8 - Failure in Personal Conduct.
- Exhibit 11 Surry County Personnel Ordinance Article V, Section 7 - Workplace Harassment Policy.
- Exhibit 12 Administrative leave memo from David Stone dated May 25, 2007.

WITNESSES

Tiffany Bullins, Public Health Nurse Supervisor II
Holly York, Social Worker II, imbedded at Mount Airy OB-GYN
Samantha Ange, Health Director
Sandra Snow, Surry County Human Resources Officer
Barbara Hinton, Petitioner

ISSUE

Whether Petitioner was discharged without just cause from her position as a Social Worker II with Respondent.

APPLICABLE STATUTES, ORDINANCES, AND POLICIES

Chapter 126 N.C. Gen. Stat.
Surry County Personnel Ordinance
Surry County Code of Ethics and Professional Conduct
Employee Confidentiality Acknowledgment
Digital Recorder Usage Policy

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the undersigned makes the following findings of fact. In making the findings of fact, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility; including, but not limited to, demeanor of the witness; any interest, 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. From the sworn testimony of witnesses and review of the documents entered into evidence, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner was hired by Respondent on or about the 18th day of May 1998 and worked in various capacities for Respondent, most recently in the position of Social Worker II.

2. That the Surry County Health and Nutrition Center is a unit of Surry County Government and its employees are covered both by the Surry County Personnel Ordinance and by the North Carolina State Personnel Act.
3. That Petitioner's immediate supervisor was Tiffany Bullins, Public Health Nurse Supervisor, II who supervised, in addition to Petitioner, approximately 23 people.
4. That Petitioner worked at the Surry County Health and Nutrition Center and in the course of her employment, worked with Holly York, also an employee of the Health and Nutrition Center, who was "imbedded" to monitor prenatal client care at Mount Airy OB GYN.
5. That Petitioner received an Employee Performance Appraisal from Respondent covering a period from September 1, 2011 to September 1, 2012, which was positive and which reflected upon Ms. Hinton as a good and valued employee of Respondent's organization.
6. Samantha Ange, Surry County Health Director since 2008, became aware of negative Facebook posts compiled and submitted by Petitioner, which came to the attention of various personnel of Respondent, including Holly York. The Facebook postings occurred in October 2012 and became the subject of a personnel action in November 2012.
7. Petitioner's supervisor, Tiffany Bullins, met with Petitioner to discuss the negative Facebook posting on or about November 19, 2012, at which time a Coaching Document was reviewed and signed by Petitioner and Ms. Bullins. Issues discussed included negative comments on Facebook that could be linked to Respondent, and other concerns. The Coaching Document included a discussion that Petitioner's actions could very well have led to a written warning, but administrative staff felt Petitioner understood the point and would refrain from additional negative postings that could be related back to Respondent.
8. Coaching Document recommendations included:
 - A. Refrain from posting any negative comments on Facebook that can be linked back to Respondent by fellow co-workers or the public in general, with the understanding that there will be a zero tolerance; and
 - B. Strive to maintain a positive attitude during all times, even among ever-changing circumstances; strive to make co-workers that have been moved to your area feel welcome; and always share concerns with your supervisor appropriately.

11. That in late May or early June 2013, Petitioner again posted on Facebook in a manner that Respondent's management deemed to be a violation of the zero tolerance policy outlined in the Coaching Document from November 2012.
12. Petitioner contended the posting occurred on her personal time and was in conflict with the Coaching Document, but was in response to a newspaper article about the potential merger of Respondent with another County department.
13. The 2013 Facebook posting included many personal complaints by Petitioner about her working conditions, furnishings and having to use her own phone and car for work purposes.
14. That in the course of her employment, Petitioner received ongoing education and training on Surry County's Policies and Procedures concerning the Health and Insurance Portability Accountability Act (HIPAA), including: Privacy concerns, protected health information, and the consequences of a HIPAA violation. All of Respondent's employees, including Petitioner, received ongoing training on HIPAA concerns.
15. All of Respondent's employees, including Petitioner, reviewed and executed an Employee Confidentiality Acknowledgment, a component of which acknowledged that she would never remove confidential and/or sensitive and/or PHI (Protected Health Information) from the work area without authorization.
16. Public Health nurses, social workers, and other staff employed by Respondent, including Petitioner, received ongoing training; and executed and agreed to be bound by the Surry County Health and Nutrition Center Digital Recorder Usage Policy and Procedure. It prohibited recording of telephone conversations except on specially designated, Respondent-owned devices; and its use was limited to incidences of threatening or harassing phone calls, and required permission, or consent of, Petitioner's supervisor.
17. Petitioner recorded a client telephone conversation on her cell phone in order to provide evidence to her supervisor of disruptive background noise. That Petitioner failed to delete the recording of the telephone conversation with the client and caused her telephone, including the un-erased client recording, to be surrendered to a telephone company in connection with the trade-in of her phone for another model.
18. Petitioner and all other County employees received ongoing training and executed a document entitled Surry County Code of Ethics and Professional Conduct where, among other things, Petitioner agreed to maintain a respectful attitude toward fellow employees, public officials, colleagues, and associates.

19. All Surry County employees, including Petitioner, are subject to a Personnel Ordinance adopted by Surry County Board of Commissioners. Article VII, Section 8 of the ordinance deals with failure of personal conduct. In accordance with that ordinance, an employee may be reprimanded, suspended, demoted, or dismissed for causes relating to personal conduct detrimental to County service: (1) in order to avoid undue disruption at the workplace; (2) to protect the safety of persons or property; or (3) for other serious reasons.
20. Employees of Respondent are covered by the North Carolina State Human Resources Act (NCSHRA).
21. Section 25 NCAC 011.2304 of the North Carolina Annotated Code states that employees covered by NCSHRA may be dismissed for a current incident of unacceptable personal conduct including: (1) conduct for which no reasonable person should expect to receive prior warning; or ... (4) the willful violation of known or written work rules; or (5) conduct unbecoming an employee that is detrimental to the agency's service... .
22. Petitioner was subject to Article V, Section 7 of the Surry County Personnel Ordinance regarding Workplace Harassment which prohibits, among other things, an employee engaging in conduct that falls under the definition of creating a hostile work environment.
23. That on or about June 3, 2013, around midnight, beginning at approximately 12:07 AM, Petitioner texted her supervisor, Tiffany Bullins, 37 times over approximately a one-hour period with a combination of work-related and personal grievances, which caused alarm and discomfort to Petitioner's supervisor.
24. That on or about June 3, 2013, Petitioner's supervisor, Tiffany Bullins, provided notice to Samantha Ange, Health Director, of receipt of 37 text messages from Petitioner after midnight. One of the texts included Petitioner's assertion that she had recorded a client telephone conversation on her cell phone, a violation of the Digital Recorder Usage Policy.
25. On or about June 4, 2013, Samantha Ange compiled a letter to Petitioner notifying her of a pre-disciplinary conference on Wednesday June 5th at 8:30 AM. The letter provided notice that the purpose of the conference was to discuss a recommendation of disciplinary action, up to and including dismissal, due to Petitioner's personal conduct. The following personal conduct issues were outlined in the letter:
 - A. Blatant disregard for the County 11/19/12 Coaching Document instructions that state: "Refrain from posting any negative comments on Facebook that can be

linked back to SCHNC by fellow co-workers or the public in general with the understanding that there will be a zero tolerance”.

- B. Self-admitted HIPAA violation and violation of the Digital Recorder Usage Policy and Procedure.
 - C. Creation of a hostile workplace.
 - D. Violation of Surry County Code of Ethics and Professional Conduct.
26. That a pre-disciplinary conference was conducted on June 5, 2013, at which time the Health Director, Petitioner’s supervisor, and the Surry County Human Resources Officer were in attendance with Petitioner.
27. At the pre-disciplinary conference, Petitioner admitted making negative comments on her Facebook page regarding her employment, notwithstanding receipt of the Coaching Document from November 19, 2012, stating a zero tolerance for further negative Facebook postings.
28. At the pre-disciplinary conference, Petitioner acknowledged ongoing training on the Digital Recorder Usage Policy, and admitted recording a client’s telephone conversation on her personal cell phone to demonstrate background noise. Petitioner also admitted that the phone was surrendered with the recording in place to her cell phone carrier and she made a trip back to the telephone company to retrieve the phone or erase the call, but was unsuccessful.
29. Petitioner admitted that the texting to Tiffany Bullins, and the 2013 Facebook posting, were her efforts to “vent” as a result of stress and other matters, including financial difficulty and health problems.
30. A violation of a written Coaching Document subjects a Surry County employee to disciplinary action, up to and including dismissal.
31. A violation of HIPAA Policies and Procedures by a Surry County employee subjects the employee to disciplinary actions, up to and including dismissal.
32. A violation of the Digital Recorder Usage Policy by an employee of the Surry County Health Department subjects the employee to disciplinary action, up to and including dismissal.
33. It is a violation of the Surry County Personnel Ordinance for an employee to engage in conduct that falls under the definition of unlawful workplace harassment, which subjects the employee to disciplinary action, up to and including dismissal.

34. At the pre-disciplinary hearing, Petitioner was presented with a copy of the Surry County Code of Ethics and Professional Conduct and admitted to a violation of item #7, which states “I will maintain a respectful attitude toward fellow employees, public officials, colleagues and associates.”
35. That the letter of termination compiled by Samantha Ange provided notice to Petitioner of a right to appeal her dismissal under the Surry County Personnel Ordinance, Article VIII, Section 3.
36. That Petitioner appealed her termination to the Surry County Manager by letters dated June 10, 2013, and June 16, 2013, in which she admitted to recording a conversation with a client and that she may have disrespected her supervisor. The County Manager found Petitioner’s dismissal to be consistent with the criteria of “failure in personal conduct” as outlined in the Surry County Personnel Ordinance.
37. The Surry County Manager provided written notice to Petitioner that employees subject to the State Human Resources Act may appeal grievances to the Office of State Personnel (Personnel Commission) in accordance with “Personnel Policies, State of North Carolina, Local Government Employees Subject to the State Personnel Act.”
38. Petitioner presented evidence of a positive Surry County Employee Performance Appraisal; that she did not intend to use the recording of the client’s phone conversation for any purpose but to demonstrate the level of background noise she was required to endure at work; and that she was a good, dedicated employee.

CONCLUSIONS OF LAW

1. That the Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. The parties are properly before this tribunal and they received adequate notice of the hearing and all parties have been correctly designated and there is no question as to misjoinder or nonjoinder.
3. Petitioner’s termination was justified as a dismissal for failure in personal conduct consistent with Article VII, Section 8 of the Surry County Personnel Ordinance and Section 126-35 of the North Carolina General Statutes.
4. Petitioner’s conduct complained of by Respondent occurred substantially as alleged and that given the totality of the circumstances, Petitioner’s conduct constituted just cause for the disciplinary action taken.

5. Petitioner is a career state employee as defined by N.C. G.S. § 126-1.1.
6. Administrative regulations provide two grounds for discipline or dismissal based on just cause: Unsatisfactory job performance; and unacceptable personal conduct. 25 NCAC 1J .0604.
7. Unacceptable personal conduct includes, *inter alia*, "conduct for which no reasonable person should expect to receive prior warning;" "the willful violation of known or written work rules;" and "conduct unbecoming a state employee that is detrimental to state service." 25 NCAC 01J .0614.
8. In determining whether a public employer has just cause to discipline its employees requires two separate inquiries: Whether the employee engaged in the conduct the employer alleges; and secondly, whether that conduct constitutes just cause for the disciplinary action taken. See *Early v. County of Durham Dept. of Social Services*, 172 N.C. App. 344, 616 S.E.2d 553 (2005) (quoting *N.C. Dep't of Env't & Natural Res v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004)).
9. A single act of unacceptable personal conduct can constitute just cause for any discipline, up to and including dismissal. *Hilliard v. N.C. Dep't of Correction*, 173 N.C. App. at 597, 620 S.E.2d 17 (2005).
10. In analyzing unacceptable personal conduct, *Warren v. N.C. Dep't of Crime Control and Pub. Safety*, 726 S.E.2d 920, 924 (N.C. App. 2012) holds, "the proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. 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: Whether that misconduct amounted to just cause for the disciplinary action taken."
12. In this case, the greater weight of the testimony and admitted exhibits supports the conclusion that Respondent met its burden of proof, and established by a preponderance of the evidence in the record that it had just cause to terminate its employment of Petitioner for unacceptable personal conduct.
13. Respondent complied with the procedural requirements for dismissing Petitioner from employment with the Surry County Health and Nutrition Center.

FINAL DECISION

Based on the Findings of Fact and Conclusions of Law, the undersigned finds and holds that the Respondent has carried its burden of proof by a greater weight of the evidence that the

Petitioner's dismissal from employment with Respondent for unacceptable personal conduct should be and is UPHELD.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 where 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. Admin. Code 03.0102, 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 11th day of March, 2014.

J. Randall May
Administrative Law Judge