

STATE OF NORTH CAROLINA

COUNTY OF WAKE

**JANET STARICHA,
Petitioner,**

v.

**THE UNIVERSITY OF NORTH
CAROLINA AT CHAPEL HILL,
Respondent.**

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 19693**

FINAL DECISION

The above-captioned case was heard before the Honorable Craig Croom, Administrative Law Judge, on 24-25 February 2014, in Raleigh, North Carolina.

APPEARANCES

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

FOR PETITIONER: John S. Austin
Attorney at Law
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Raleigh, N.C. 27628

EXHIBITS

Admitted for Respondent:

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	09/04/12	Email from Brandy Barnes to Jan Staricha re: follow up
2	11/30/12	Email from Jan Staricha to Dr. Brandy Barnes re: follow up email
3	01/30/13	Memorandum from Brandy Barnes to Janet Staricha re: Written Warning for Unsatisfactory Job Performance
4	05/16/13	Memorandum from Brandy Barnes to Janet Staricha re: Second Written Warning for Unsatisfactory Job Performance

5	08/02/13	Memorandum from Brandy Barnes to Janet Staricha re: Notice to Attend a Pre-Disciplinary Conference
6	08/05/13	Memorandum from Brandy Barnes to Janet Staricha re: Disciplinary Decision of Dismissal

Admitted for Petitioner:

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	05/08/13	Division of Laboratory Animal Medicine Standard Operating Procedure: Checking Soiled Cages Before Autoclaving

WITNESSES

Called by Respondent:

Randy Allen
Christine Bhirdo
Brandy Barnes
Janet Staricha

Called by Petitioner:

Janet Staricha
Ginger Shaw
Dana Shelton Gates

ISSUE

Whether Respondent had just cause to dismiss Petitioner for unsatisfactory job performance?

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. Petitioner alleged discharge without just cause, discrimination, and retaliation in her Petition, but Petitioner withdrew the discrimination and retaliation claims at the hearing.
3. Petitioner Janet Staricha was a career State employee subject to Chapter 126 of the General Statutes of North Carolina (“the State Personnel Act”).
4. Respondent, The University of North Carolina at Chapel Hill (“UNC-CH” or “University”), is subject to Chapter 126 and was Petitioner’s employer.
5. Petitioner began her employment with the University in May 2011 as a Research Technician. Her working title was animal husbandry technician. Petitioner worked for the Division of Lab Animal Medicine (“DLAM”) in Genetic Medicine tending mice. **T. pp. 18, 21, 82, 220**
6. University policy requires that no animal, neither a dead animal nor a live animal, be left in the cages when they are sent to cage wash. University provided for specific methods for the disposal of laboratory animals. A failure to adhere to policy could jeopardize the University’s accreditation as an animal research institution. In addition, the animals are valuable to the researchers and inadvertently sending animals to cage wash results in a waste of resources. **T. pp. 19-21, 43-46, 68, 83, 172-73, 287-89**
7. The Standard Operating Procedure (“SOP”) governing disposal of animals has been revised. However, every revision has required that no animal be left in a cage which is sent to cage wash. **T. pp. 36-37, 54-55, 67-68**
8. Being an animal husbandry technician requires attention to detail. Attention to detail is necessary to find animals in the dirty cages in order to avoid sending animals to cage wash. **T. pp. 24, 81, 189**
9. Brandy Barnes was Petitioner’s supervisor during Petitioner’s employment with UNC-CH. Ms. Barnes reported to Randy Allen, the Operations Director for DLAM. Ms. Barnes is currently an Assistant Operations Director for DLAM **T. pp. 18-19, 22-23, 79-80**
10. In September 2012, an animal was found in a cage that Petitioner sent to the cage wash area. Ms. Barnes met with Petitioner following the incident for a counseling session. The purpose of the counseling session was to be sure Petitioner understood the SOP. After the counseling session, Ms. Barnes sent Petitioner a follow-up email. **T. pp. 82-84;**

Resp. Ex. 1

11. In November 2012, Petitioner had a second incident, in which she sent an animal to the cage wash area. Ms. Barnes had another counseling session with Petitioner and again reviewed the SOP with her. Ms. Barnes considered issuing a written warning to Petitioner, but decided against it. Ms. Barnes believed this was an isolated incident and that Petitioner understood the importance of finding all animals in the dirty cages before sending the dirty cages to the cage wash area. **T. pp. 85-87; Resp. Ex. 2**
12. Petitioner had a third incident in January 2013. On this occasion, two animals were found in two cages that Petitioner had sent to the cage wash area. Ms. Barnes again held a counseling session with Petitioner, and later, Ms. Barnes issued a first written warning for unsatisfactory job performance. At this time, Petitioner raised the issue with Ms. Barnes that possibly the cages containing the mice were not hers. There are video cameras in the area where the technicians leave the racks containing the dirty cages. Because of Petitioner's concerns, Ms. Barnes reviewed the tapes from the cameras to see if anyone else had approached the racks containing Petitioner's dirty cages. Ms. Barnes ascertained that no one had approached the racks. **T. pp. 87-90; Resp. Ex. 3**
13. Petitioner had a fourth incident in April 2013. On this occasion, a partial pup was found in a cage that Petitioner sent to the cage wash area. Although a partial pup is small, it was Petitioner's responsibility to ensure that no animals or parts of animals remained in the dirty cage. Petitioner received a second written warning for unsatisfactory job performance. Again, in response to concerns raised by Petitioner, Ms. Barnes reviewed the tape from the camera to ensure that no one had tampered with Petitioner's cages. **T. pp. 92-94; Resp. Ex. 4**
14. A fifth incident occurred on July 26, 2013. Ms. Barnes was out on that day, but she was informed of the incident when she returned. **T. pp. 94-95**
15. Christine Bhirdo is an Assistant Operations Director for DLAM. Among other duties, Ms. Bhirdo supervises the cage wash area for Genetic Medicine, where Petitioner worked. **T. pp. 56-57**
16. When a cage wash technician found two pups in a cage identified as coming from Petitioner on July 26, 2013, Ms. Bhirdo was called. Ms. Bhirdo summoned Petitioner and had her come to the cage wash area to see the two pups left in the cage. The pups were approximately four days old. They were on top of the feed and easy to see. It was unlikely that they would have moved much, given their young age. **T. pp. 61-63; Resp. Ex. 5**
17. When Ms. Barnes learned of this latest incident, she scheduled a pre-disciplinary conference for Petitioner. The pre-disciplinary conference took place on August 2, 2013. **T. pp. 94-95; Resp. Ex. 5, 6**

18. Petitioner raised several issues at the pre-disciplinary conference, including complaints that she had not received sufficient training and she was overworked. Ms. Barnes looked into these concerns and determined that Petitioner had received sufficient training and that Petitioner's workload was not unreasonable or higher than other technicians, yet Petitioner's error rate was significantly higher than other technicians. **T. pp. 97-101; Resp. Ex. 6**
19. Mr. Allen agreed with Ms. Barnes' recommendation of dismissal as the appropriate level of discipline for Petitioner's poor performance, as did the Director of DLAM, Dr. Fletcher, who was Mr. Allen's direct superior. Mr. Allen did not think a suspension would be effective, because Petitioner had been counseled, warned, and retrained several times already with no improvement. Mr. Allen did not think a demotion would be effective, because the problem appeared to be a lack of attention to detail, which would have been a problem in a lower-level position as well. **T. pp. 23-25, 286-88.** Petitioner was dismissed effective August 5, 2013. **Resp. Ex. 6**
20. Mr. Allen had given a training in May 2013 on the cage cleaning policy, which Petitioner had attended. In that training, Mr. Allen reviewed the policy and potential ways a technician could check the cage to be sure to locate all animals. **T. pp. 37-38**
21. Mr. Allen worked for three or four years in a position comparable to Petitioner's position, and he never sent an animal to cage wash. **T. p. 25** Ms. Bhirdo was employed as an animal husbandry technician for two to three years before being promoted. During her time as an animal husbandry technician, she never sent an animal to cage wash. **T. p. 63** Ms. Barnes worked in a position which was the equivalent of Petitioner's position for approximately 10 years. Ms. Barnes never sent an animal to cage wash. **T. p. 81**
22. Ms. Bhirdo currently supervises about forty animal husbandry technicians in several buildings. Of those forty, thirty-seven have never sent an animal to cage wash. Ms. Bhirdo currently supervises six animal husbandry technicians in Genetic Medicine. Of those six, four have never sent an animal to cage wash. **T. pp. 64-65, 273**
23. Ms. Bhirdo estimated that over the course of a year, animals reached cage wash approximately five times. She testified that the percentage of cages coming through cage wash each day with animals left in them would be "extremely low." **T. pp. 70, 77**
24. Ms. Barnes supervised about sixteen animal husbandry technicians in Genetic Medicine at the time Petitioner was employed there. Of those sixteen technicians, only five had sent an animal or animals to cage wash. Two of those technicians were counseled and had no further problems. Three received written warnings and two of those, one of whom was Petitioner, were dismissed due to their failure to correct their unsatisfactory performance. **T. pp. 98-100**

25. Petitioner was similarly situated to other animal husbandry technicians, whether in Genetic Medicine or elsewhere in DLAM. There would be only minor differences, for example, in her job as compared to technicians who did not work in a sterile environment. In addition, Petitioner was not at a disadvantage as compared to technicians who broke down cages. Petitioner did her cage changes under a hood, which was essentially the same the thing as breaking down cages. **T. pp. 70-71, 147-48**
26. Petitioner had to comb through bedding, nest material and food to find all sizes of mice, including the baby mice known as “pinkies”. Even the smallest animals, or parts thereof, had to be found before sending a cage to cage wash, so they could be disposed of properly. It was not unreasonable to expect Petitioner to find the small animals because the cage washers found them. The cage washers were not better able to find Petitioner’s animals than Petitioner was. **T. pp. 76-77, 92-93**
27. The animal husbandry technicians in Genetic Medicine were responsible for inspecting the cages of the principal investigators (“PIs”) working in the research labs. Thus, it is irrelevant whether the cages Petitioner sent to cage wash with animals in them were cages from a PI. **T. pp. 102-03**
28. Petitioner called Ginger Shaw as a witness. During the six months that Ms. Shaw worked with Petitioner, Petitioner met her standards, criteria, and expectations. However, Ms. Shaw did not work for DLAM and was not Petitioner’s supervisor. Furthermore, Ms. Shaw did not know about the first three incidents of Petitioner sending animals to cage wash. **T. pp. 162-63, 165-66, 181**
29. Petitioner also called Dana Gates as a witness. Ms. Gates was the other employee who had been dismissed by Ms. Barnes after continuing to send animals to cage wash after several counselings and warnings. Ms. Gates recalled that Petitioner could be talkative and that Ms. Gates had to be careful not to let Petitioner distract her. **T. pp. 186, 190-91, 194, 202-04**
30. Petitioner had a heavy workload in Genetic Medicine. Petitioner also voluntarily took on responsibilities outside her job duties, such as getting more tables and chairs in the break room, getting a recycling program started in Genetic Medicine, helping someone with her English, and volunteering to set up snacks for staff meetings. She also took continuing education courses. **T. pp. 228, 240, 244-45, 260-62**
31. Respondent did not impose unreasonable standards on Petitioner. Although there was testimony that animals occasionally got through to cage wash, most animal husbandry technicians never sent any animals to cage wash. Of the few technicians who did send an animal to cage wash, most were able to correct their performance after being counseled or receiving a written warning.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the just cause issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. A career State employee may be dismissed only for just cause. N.C. Gen. Stat. § 126-35(a). The State employer has the burden of proving that there was just cause for the dismissal. N.C. Gen. Stat. § 126-35(d).
3. Pursuant to regulations promulgated by the Office of State Personnel, there are two bases for the dismissal of an employee for just cause: (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 25 N.C.A.C. 1J.0604(b).
4. An employee must receive at least two prior disciplinary actions before being dismissed for a current incident of unsatisfactory job performance. In addition, the employee must be given a pre-disciplinary conference and written notice of the reasons for dismissal. 25 N.C.A.C. 1J.0605.
5. Unsatisfactory job performance is “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). It includes “careless errors, poor quality work, untimeliness, failure to follow instructions or procedures, or a pattern of regular absences or tardiness.” *Amanini v. North Carolina Dept. of Human Resources, Special Care Ctr.*, 114 N.C. App. 668, 679, 443 S.E.2d 114, 121 (1994).
6. In attempting to establish that it had just cause to terminate an employee, then, an agency is bound to make a showing that the employee has not performed with reasonable care, diligence and attention. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 504, 397 S.E.2d 350, 355 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).
7. On the sole issue to be heard, Respondent met its burden to show that it had just cause to dismiss Petitioner.
8. Petitioner’s repeated failures to find all mice in the cages before sending the cages to the cage wash area constituted “work-related performance that fail[ed] 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).
9. Respondent did not impose unreasonable standards on Petitioner. Petitioner was expected to remove all animals and animal remains from the cages before sending the cages to the cage wash area.

10. Using reasonable care, diligence, and attention, an animal husbandry technician should be able to find all the mice in a cage. Most animal husbandry technicians were able to find all animals in the cages before sending the cages to the cage wash area and had no incidents of sending animals to cage wash.
11. Petitioner was informed of her unsatisfactory job performance on multiple occasions and was given ample opportunity to correct her unsatisfactory job performance.
12. Petitioner was given two written warnings on January 30, 2013, and May 16, 2013. Furthermore, she was warned that her failure to make the required improvements in her performance could result in her dismissal. The third incident of unsatisfactory job performance, which occurred on July 26, 2013, therefore provided justification for Petitioner's dismissal.
13. Respondent followed the procedures required before dismissing Petitioner for unsatisfactory job performance.
14. Respondent had just cause to dismiss Petitioner for unsatisfactory job performance based on Petitioner repeatedly sending animals to cage wash in dirty cages. *See, e.g., Skinner v. North Carolina Dept. of Correction*, 154 N.C. App. 270, 280-81, 572 S.E.2d 184, 191-92 (2002) (affirming demotion for unsatisfactory job performance where employee failed to supervise inmate workers and keep kitchen in a clean and orderly fashion); *Gainey v. North Carolina Dept. of Justice*, 121 N.C. App. 253, 465 S.E.2d 36 (1996) (affirming dismissal for unsatisfactory job performance where employee repeatedly failed to file reports within five days and employee had received two written warnings and a pre-disciplinary conference).
15. Petitioner's continued failure to find all animals in the cages, after receiving two oral counselings and two written warnings, warranted dismissal.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent has sufficiently proved that it had just cause to dismiss Petitioner based on her unsatisfactory job performance. Respondent's action is therefore **AFFIRMED**.

NOTICE

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29 (a). The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This, the 6th day of June, 2014.

Craig Croom
Administrative Law Judge