

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 OSP 5387

EMILIE McNAIR,

Petitioner,

v.

WINSTON-SALEM STATE UNIVERSITY,

Respondent.

FINAL DECISION

This contested case was heard before the Honorable Selina M. Brooks, Administrative Law Judge, on 8 December 2014 and 9 December 2014 in Greensboro, North Carolina.

APPEARANCES

FOR RESPONDENT: Matthew Tulchin
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602

FOR PETITIONER: Hunter Hickman
Liza Baron
Legal Aid of North Carolina, Inc.
102 West Third St., Suite 460
Winston-Salem, NC 27101

EXHIBITS

Admitted for Respondent:

Exhibit	Description
1	April 2012 - June 2012 Work Plan and Appraisal Form
2	June 2012 - June 2013 Work Plan and Appraisal Form
3	September 22, 2012 Sexual Harassment and Sexual Violence Policy
4	Resolution Procedures for Sexual Harassment and Sexual Violence Complaints

5	November 2008 Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPPA) to Student Health Records
6	U.S. Department of Education Dear Colleague Letters (Apr. 4, 2011)
7	January 2001 - Revised Sexual Harassment Guidance: Harassment of Students by School Employees, other Students, or Third Parties
8	Questions and Answers on Title IX and Sexual Violence
9	November 30, 2012 - Division of Student Affairs Title IX Training Materials
10	Title IX Training: Preventing Sexual Harassment On The Field, In The Classroom And In the Workplace
11	November 30, 2012 - Title IX Training: Preventing Sexual Harassment On The Field, In The Classroom And In the Workplace - Appendix A
12	Title IX Training - Pre and Post-Questionnaires
13	Dr. Laureano's Investigation Questions to Student Health Services staff
14	Summary of Dr. Laureano's investigation and meetings with Wellness Center-Student Health Services staff
15	December 18, 2013 - Notice of Placement on Investigatory Leave Status with Pay
16	February 10, 2014 - Notice to Attend a Pre-Disciplinary Conference
17	February 20, 2014 - Disciplinary Decision of Dismissal
19	Student Health Services Records
20	December 3, 2013 E-mail from Gloria Laureano to Trae Cotton, copying Natasha Jeter and Silvia Ramos
21	December 6, 2013 Amber Scott signed statement

Admitted for Petitioner:

Exhibit	Description
1	Notice of Placement on Investigatory Leave
2	WSSU Title IX Training Materials
3	Patient Records from Student Wellness Center
4	Petitioner's Handwritten Notes from Staff Meetings
5	Petitioner's Handwritten Notes from Staff Meetings
6	Dismissal Letter
7	Final Agency Decision
8	April 2012 - June 2012 Work Plan and Appraisal Form

9	June 2012 - June 2013 Work Plan and Appraisal Form
10	Petitioner's Final Pay Stubs
11	December 6, 2013 Amber Scott signed statement
12	Summary of Dr. Laureano's investigation and meetings with Wellness Center-Student Health Services staff
13	Grievance Committee Recommendation

WITNESSES

Called by Respondent:

Ms. Silvia Ramos
Ms. Natasha Jeter
Dr. Gloria Laureano
Dr. Trae Cotton
Dr. Wynne Brown
Mr. Calvin Holloway

Called by Petitioner:

Ms. Emilie McNair
Ms. Amber Scott

ISSUE

Whether Respondent had just cause to dismiss Petitioner.

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. In the absence of a transcript, the Undersigned reviewed her notes to refresh her recollection.

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 Emilie McNair was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes.

3. Respondent Winston-Salem State University (“WSSU” or “the University”) is subject to Chapter 126 and was Petitioner’s employer.
4. Petitioner began her employment with WSSU in 2012. Petitioner was hired as a Nurse Practitioner to work in the University’s A.H. Ray Student Wellness Center (the “Wellness Center”). She initially reported to Nurse Practitioner Ether Joe; however, Nurse Joe retired shortly thereafter and then Petitioner reported to Dr. Anthony Philadelphia, a licensed mental health counselor who was the Interim Director of the Wellness Center.
5. At all times during the relevant time period, Dr. Philadelphia reported to Dr. Gloria Laureano, Associate Vice Chancellor of Student Affairs and Dean of Students. Dr. Laureano has spent her entire career in the higher education field. She joined the University in May 2012 from the University of Central Florida. In her current position, Dr. Laureano oversees Career Development Services, the Wellness Center, Student Conduct, and Interpersonal Violence Prevention. As Dean of Students, she adjudicates all Title IX hearings involving students. Dr. Laureano reported to Dr. Trae Cotton, Vice Chancellor of Student Affairs.
6. The Wellness Center is a campus-based health center that provides health and counseling services to students. As a University-run health clinic that treats only students, its records are governed by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g rather than the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule. **Resp. Ex. 5.** The records maintained by the Wellness Center are either “education records” or “treatment records,” as the terms are defined under FERPA. **Id.** The records may be disclosed to University officials without consent provided there are legitimate educational interests. **Id.**
7. Wellness Center records and student health information are maintained electronically using a software system called Medicat. **Resp. Ex. 19; Pet. Ex. 3.**
8. Prior to working at WSSU, Petitioner was Director of Student Health Services for Fayetteville State University. She has spent almost twenty years in the health care field. She has Bachelor’s and Master’s degrees in Nursing and received her Nurse Practitioner license in 2009. She is currently employed as a Nurse Practitioner for Friendly Urgent & Family Care.
9. As Nurse Practitioner, Petitioner was responsible for treating patients, conferring with the health care staff regarding treatment of patients, and supervising health services staff. **Resp. Exs. 1 & 2; Pet. Exs. 8 & 9.** As Nurse Practitioner and supervisor, Petitioner was responsible for explaining policies and procedures to the staff, reviewing and approving students’ treatment plans, and reviewing students’ records. **Id.; Resp. Ex. 19; Pet. Ex. 3.**
10. When WSSU students visit the Wellness Center, they are generally first seen by the nursing staff. The nurses will assess the situation and obtain the necessary background information for determining treatment. **Resp. Exs. 1, 2 & 19; Pet. Exs. 3, 8 & 9.** The nurses will enter the information obtained from students along with their observations into the Medicat

system and will then electronically sign the notes. **Id.**

11. Signing a note indicates the employee has reviewed the information in the file. Although it is possible to add to a note once it has been signed, the prior information cannot be altered. Electronic signatures are time-stamped and date-stamped.
12. Wellness Center nurses often will confer with a health care provider (either a physician or a Nurse Practitioner) to determine the proper course of treatment, and will provide initial treatment as needed. The nurses send the patient records to the Nurse Practitioner for review and approval. After reviewing the files, the Nurse Practitioner will sign and “lock” the files. **Resp. Exs. 1, 2 & 19; Pet. Exs. 3, 8 & 9.** Locking the file prevents anyone from going in and adding anything to the nurse’s note. Only a provider can unlock a note, and must document the reason for doing so.
13. Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681 *et seq.*, is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. **Resp. Exs. 6-8, 10; Pet. Ex. 2.** Sexual harassment, which includes sexual assault and other acts of sexual violence, is a form of sex discrimination prohibited by Title IX. All universities receiving any federal financial assistance must comply with Title IX. **Id.** WSSU receives federal financial assistance and must comply with Title IX.
14. Once the University has notice of sexual harassment, Title IX requires that WSSU take immediate action to investigate the allegation, eliminate any harassment, prevent its recurrence and address its effects. **Resp. Exs. 6-8.** The University should complete its investigation and take appropriate measures within 60 days of being given notice.
15. The University has notice for Title IX purposes if it knew, or in the exercise of reasonable care should have known, about allegations of sexual assault. **Resp. Exs. 6-8.** The University does not need to receive information of the alleged sexual assault directly from the student or victim in order to have notice. Rather, the University can receive notice of sexual harassment indirectly from other sources, including University employees. **Id.**
16. A Title IX investigation constitutes a legitimate educational interest under FERPA. Moreover, in the event that there is any direct conflict between the privacy or confidentiality requirements of FERPA and the reporting requirements of Title IX, then Title IX controls. **Resp. Exs. 6-8.**
17. The University is required to promptly investigate all allegations of sexual assault and take appropriate steps to resolve the situation. **Resp. Exs. 6-8.** This duty exists regardless of whether the student, his or her parent, or a third party files a complaint. **Id.** The University’s investigation must be completed within 60 days of the University being given notice. **Id.**
18. Multiple witnesses testified to the fact that the University is obligated to investigate even if the student requests confidentiality or does not wish to pursue the complaint. **Resp. Exs. 6-**

8. An investigation conducted by law enforcement does not relieve the University of its obligations under Title IX.
19. The failure to investigate and respond to reports of sexual assault and harassment on campus is a serious issue in this country and has prompted the federal government in recent years to launch numerous investigations of universities over concerns about how they handled sexual assault cases on campus.
20. All WSSU employees receive training regarding Title IX. During training, employees learn about Title IX, the school's sexual harassment policy, and how to identify and report sexual harassment and violence. **Resp. Exs. 10-12; Pet. Ex. 2.**
21. Petitioner and other members of the Wellness Center staff, including Nurse Amber Scott, attended the University's Title IX training on November 30, 2012. **Resp. Ex. 9.** Training lasted more than two hours and was led by Ms. Silvia Ramos, the University Title IX Coordinator and Equal Employment Opportunity/Affirmative Action & Diversity Officer. Ms. Ramos was assisted by Ms. Natasha Jeter, Deputy Title IX Coordinator & Special Assistant to Vice Chancellor of Student Affairs; Ms. Patricia Eaddy, Director of Interpersonal Violence Prevention; and Mrs. Camille Kluttz-Leach, General Counsel of WSSU. **Resp. Ex. 10; Pet. Ex. 2.**
22. Training materials included a PowerPoint presentation, case studies, a list of frequently asked questions, and pre-training and post-training questionnaires. **Resp. Ex. 10; Pet. Ex. 2.** Attendees were instructed that WSSU policy and federal regulation required University employees to report all allegations of sexual harassment or sexual assault to the University Title IX Coordinator or Deputy Title IX Coordinator. **Id.** Attendees were told that the only employees exempt from this reporting requirement are licensed mental health counselors. Attendees were also informed that the best way to maintain confidentiality is to limit disclosure of sexual harassment to the appropriate University officials. **Id.**
23. Attendees of the Title IX training were provided opportunities to ask questions both during and at the end of the training session. Petitioner did not ask any questions during or after the training. On her post-training questionnaire, Petitioner indicated she understood that if someone reported an allegation of sexual harassment to her she needed to report it to either Ms. Ramos or Ms. Jeter. **Resp. Ex. 12; Pet. Ex. 2.** At no point did Petitioner raise the potential issue of patient confidentiality under HIPAA and reporting sexual assaults as required by Title IX with Ms. Ramos, Ms. Jeter, or any other appropriate University administrator.
24. On the morning of November 11, 2013, a female student visited the Wellness Center in order to get a pregnancy test. **Resp. Ex. 19; Pet. Ex. 3.** The student was seen by Nurse Amber Scott. **Id.** During her visit, the student told Nurse Scott that she had been raped on campus the month before, during Homecoming weekend. **Id.** Nurse Scott informed the student that she could still report the incident and told the student about the University's counseling services. **Id.** The student indicated to Nurse Scott that she did not want to report the incident. **Id.**

25. Nurse Scott provided the student with a pregnancy test, an HIV test, and a venereal disease screening. **Resp. Ex. 19; Pet. Ex. 3.** The student returned that afternoon to get the results of the tests. **Id.** Nurse Scott again suggested that the student seek counseling and provided her with educational materials and handouts regarding pregnancy and sexually transmitted infections prevention. **Id.** The student declined to report the incident or to speak with a counselor. **Id.** Nurse Scott told the student that she would follow up in a couple of days to see how she was doing. **Id.**
26. Nurse Scott sought Petitioner's guidance on what to do about the student's report of the sexual assault. Petitioner told Nurse Scott that if the student did not want to report the incident, there was nothing they could do.
27. Petitioner testified that she based her guidance on information she received from Campus Police during the summer of 2012, shortly after she started working at the University. Petitioner admitted, however, that she received this information from Campus Police prior to attending the University's Title IX training.
28. The guidance Petitioner provided to Nurse Scott was inaccurate, contrary to University policy, and contrary to Title IX regulations.
29. After she finished seeing the student, Nurse Scott sent to Petitioner her detailed notes which documented pregnancy screening and counseling, test results, and the patient's allegation that "she had unwanted sex ... on campus". **Resp. Ex. 19; Pet. Ex. 3.** Petitioner reviewed Nurse Scott's notes and agreed with the plan of care prescribed by her. **Id.**
30. Nurse Scott followed up with the student on November 13, 2013, and again on November 18, 2013. **Resp. Ex. 19; Pet. Ex. 3.** On both occasions, Nurse Scott sent notes from her sessions with the student to Petitioner for review. Both times, Petitioner reviewed, signed and locked Nurse Scott's notes in the student's record. **Id.**
31. Petitioner testified that there were times, particularly when the Wellness Center was busy, when it would take her several days to review all the files that were sent to her. The student record in this case shows that on two occasions Petitioner signed and locked the file the same day Nurse Scott sent it to her and on two other occasions Petitioner signed and locked the file within two days of it being sent to her. **Resp. Ex. 19; Pet. Ex. 3.**
32. Dr. Wynne Brown, the current Director of the Wellness Center, testified that health care providers, including Nurse Practitioners, were expected to review the electronic records prior to signing and locking them.
33. Neither Nurse Scott nor Petitioner ever reported the alleged sexual assault. While Petitioner did not see the student, she was made aware of the alleged sexual assault by Nurse Scott on the day of the student's visit to the Wellness Center, and she subsequently reviewed, signed, and locked Nurse Scott's notes documenting the student's allegations as well as the plan of care on four different occasions. **Resp. Ex. 19; Pet. Ex. 3.**

34. On December 3, 2013, Dr. Laureano received a call from the parent of a female student who wished to withdraw from WSSU. **Resp. Ex. 20.** The student wanted to leave the University because she had been raped the weekend of Homecoming. **Id.** Dr. Laureano took down the student's information and immediately notified her boss, Dr. Cotton, of the Title IX case.
35. As Vice Chancellor of Student Affairs, Dr. Cotton oversees all aspects of student life on campus. This includes Student Activities (student government, student organizations, Greek life, etc.); the Student Centers; Housing and Residence Life; Career Services; the Wellness Center; Student Conduct; and University Recreation (intramural sports, club sports, athletic facilities, etc.). Dr. Cotton reports to WSSU's Chancellor, Dr. Donald Reaves.
36. Dr. Laureano also notified Ms. Ramos and Ms. Jeter. **Resp. Ex. 20.** As the University's Title IX Coordinator, Ms. Ramos handles all aspects of gender equity issues, sexual discrimination, and sexual harassment, including all Title IX reporting and investigations involving faculty and staff. She also oversees the Title IX investigations involving students, which are done by Ms. Jeter, the Deputy Title IX Coordinator. Ms. Ramos reports to Provost Brenda Allen. Ms. Jeter reports to both Dr. Cotton and Ms. Ramos.
37. Ms. Jeter immediately initiated a Title IX complaint in the University case management system and opened an investigation of the incident. She contacted the student and arranged for a meeting.
38. Ms. Jeter met with the student on December 6, 2013. The meeting was recorded and transcribed. Ms. Jeter explained her duties as a Deputy Title IX Coordinator to the student and provided a brief overview of Title IX and the University's obligations under Title IX. Ms. Jeter obtained the student's consent to conduct an investigation of the alleged sexual assault.
39. During her interview of the student, Ms. Jeter learned that the student had visited the Wellness Center the prior November and had reported the sexual assault incident to Nurse Scott. Ms. Jeter was surprised to learn this because neither Nurse Scott nor anyone else at the Wellness Center had reported the alleged sexual assault to her or Ms. Ramos as required by University policy and federal regulation.
40. Ms. Jeter informed Ms. Ramos, Dr. Laureano, and Dr. Cotton that members of the Wellness Center staff might have failed to report a Title IX incident. **Resp. Exs. 15-17; Pet. Exs. 1, 6.**
41. On December 6, 2013, Ms. Jeter sought to interview Nurse Scott as part of her Title IX investigation. Nurse Scott refused to answer any of Ms. Jeter's questions and refused to participate in the Title IX inquiry. **Resp. Ex. 21; Pet. Ex. 11.** Nurse Scott believed that providing any information to Ms. Jeter regarding the investigation would violate HIPAA. **Id.**
42. Ms. Jeter informed Ms. Ramos that Nurse Scott refused to cooperate with the investigation. Ms. Ramos then met with Nurse Scott and tried to convince her to cooperate. She reminded

Nurse Scott of the requirements of Title IX and the University's policy regarding the reporting of sexual assaults. Ms. Ramos explained to Nurse Scott that FERPA, not HIPAA, controlled in this situation. Nurse Scott would not answer any questions or provide any information regarding the student.

43. As a result of Nurse Scott's refusal to cooperate with the Title IX investigation, Dr. Cotton directed Dr. Laureano to obtain the student's file from the Wellness Center.
44. Dr. Cotton reviewed the student's file which confirmed that the student had visited the Wellness Center in November and reported the alleged sexual assault to Nurse Scott. **Resp. Ex. 19; Pet. Ex. 3.** Dr. Cotton also discovered that Petitioner had signed and locked the student's file. **Id.**
45. Dr. Cotton asked Dr. Laureano to investigate and determine (i) if members of the Wellness Center staff had failed to comply with Title IX regulations; and (ii) if there had been a failure to comply, the reasons for the failure. **Resp. Exs. 13, 14; Pet. Ex. 12.**
46. As part of her investigation, Dr. Laureano prepared a list of questions to ask. **Resp. Ex. 13; Pet. Ex. 12.** She then met individually with members of the Wellness Center staff, including Petitioner. **Resp. Ex. 14; Pet. Ex. 12.**
47. Petitioner confirmed to Dr. Laureano that she had attended the University's Title IX training in the Fall of 2012. **Resp. Ex. 14; Pet. Ex. 12.** However, Petitioner told Dr. Laureano that she could not recall specifics of the training, and that when it came to reporting sexual assaults, she was guided by HIPAA. She told Dr. Laureano that she did not recall reviewing the student's records at the time of the student's visit to the Wellness Center, but believed the student indicated she was "okay," and that the sexual assault had occurred "months" before the student's visit to the Wellness Center. **Id.**
48. Dr. Laureano informed Dr. Cotton of the results of her investigation. **Resp. Ex. 14; Pet. Ex. 12.** She noted that while there was some confusion among the Wellness Center staff regarding their reporting obligations under Title IX, none of the staff had sought clarification from the appropriate administrative officials, or had otherwise taken any steps to raise the possibility of an issue of patient confidentiality requirements from HIPAA for health care practitioners as it may relate to the reporting of a sexual assault from a student. **Id.** Dr. Laureano concluded that there had been a failure to comply with Title IX regulations.
49. Dr. Laureano consulted with Dr. Cotton and Mr. Calvin Holloway, Employee Relations Manager, regarding possible next steps of the investigation. In part because of the University's upcoming Winter Break, it was decided that Petitioner would be placed on investigatory leave status with pay to allow management more time to investigate the allegations and consider if disciplinary action was appropriate.
50. On December 18, 2013, Nurse Scott was notified that she was being placed on investigatory leave status with pay for her failure to report the alleged sexual assault as required by

University policy and Title IX. **Resp. Ex. 15; Pet. Ex. 1.**

51. The Notice of Placement on Investigatory Leave Status with Pay states, in pertinent part:

Purpose of Notification

This letter is formal notification that you were placed on Investigatory Leave Status with Pay ... The purpose of this investigatory status is to allow management time to investigate these reports and to consider if disciplinary action, up to and including dismissal, may be appropriate.

Resp. Ex. 15

52. After further investigation, Dr. Laureano consulted with Mr. Holloway and Dr. Cotton regarding Petitioner's conduct and they decided that disciplinary action was warranted.
53. On or about February 11, 2014, Petitioner was notified to attend a Pre-Disciplinary Conference scheduled for February 14, 2014. The Notice to Attend a Pre-Disciplinary Conference states, in pertinent part:

Purpose of Notification

This is formal notification that you are to attend a Pre-Disciplinary Conference ... [t]he purpose of the Conference is to determine if your alleged involvement in recent events specifically, violation of Title IX law, may warrant disciplinary action, up to and including dismissal.

Resp. Ex. 16.

54. The notice also informed Petitioner of the incidents resulting in the conference; specifically, that Petitioner was aware that a student had shared with Nurse Scott in November 2013 that she had been sexually assaulted and Petitioner had failed to report that information to the proper University authorities. **Id.** Due to the weather, the Pre-disciplinary Conference was rescheduled for February 17, 2014.
55. On February 17, 2014, Petitioner attended the Pre-Disciplinary Conference conducted by Dr. Laureano and Mr. Holloway. **Resp. Ex. 17; Pet. Ex. 6.** Petitioner was provided with information regarding the allegations against her and was provided an opportunity to respond. **Id.**
56. When asked by Mr. Holloway to provide her understanding of HIPAA, and whether there were any exceptions that might apply to the reporting of a sexual assault, Petitioner replied that the only exceptions were in suicidal or homicidal situations. **Resp. Ex. 17; Pet. Ex. 6.**
57. Petitioner testified that she did not fully respond to the allegations against her during her Pre-Disciplinary Conference because Dr. Laureano was behaving in a hostile manner.

58. Mr. Holloway testified that Dr. Laureano was both calm and professional throughout the meeting and that Petitioner was hostile.
59. Petitioner testified that she was not aware that the University was contemplating dismissing her or that dismissal was a possibility. **Resp. Exs. 15-16.**
60. Following the Pre-Disciplinary Conference, Dr. Laureano consulted with Dr. Cotton and Mr. Holloway and made the decision to dismiss Petitioner for her failure to comply with University policy and Title IX because Petitioner's refusal or failure to comply with University policy and Title IX posed a threat to student safety and was detrimental to the University.
61. On February 20, 2014, Dr. Laureano sent Petitioner a dismissal letter detailing the reasons for Petitioner's dismissal; specifically, unacceptable personal conduct for failing to report an alleged sexual assault as required by Title IX. **Resp. Ex. 17; Pet. Ex. 6.**
62. On February 26, 2014, Petitioner was dismissed from employment due to unacceptable personal conduct. **Resp. Ex. 17; Pet. Ex. 6.**
63. The Undersigned finds that Ms. Ramos, Ms. Jeter, Dr. Cotton, Dr. Laureano, Dr. Brown, and Mr. Holloway were credible witnesses and crucial parts of their testimony were supported by documentation.
64. The Undersigned finds that the testimony of Petitioner was less credible and crucial parts of her testimony were not supported by documentation.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal jurisdiction over the issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. The parties are properly before the Office of Administrative Hearings and there is no issue of improper procedure.
3. Respondent Winston-Salem State University is subject to Chapter 126 of the North Carolina General Statutes and is the former employer of Petitioner.
4. A "career state employee" is defined as a state employee who is in a permanent position appointment and continuously has been employed by the State of North Carolina in a non-exempt position for the immediate 24 preceding months. N.C. Gen. Stat. § 126-1.1.
5. At the time of her discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1, *et seq.*

6. 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 showing by a preponderance of the evidence that there was just cause for dismissal. N.C. Gen. Stat. § 126-34.02(d); see also Teague v. N.C. Dep't of Transp., 177 N.C. App. 215, 628 S.E.2d 395, disc. rev. denied, 360 N.C. 581 (2006).
7. On the issue of just cause, Respondent has met its burden of proof to show it had just cause to dismiss Petitioner.
8. 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. 01J .0604(b). However, “the categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case.” 25 N.C.A.C. 01J .0604(c). Furthermore, “[n]o disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly.” Id.
9. An employee must receive at least two prior disciplinary actions before being dismissed for a current incident of unsatisfactory job performance. 25 N.C.A.C.01J .0605(b). However, an employee may be dismissed without any prior warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 N.C.A.C. 01J 0608(a). One instance of unacceptable conduct constitutes just cause for dismissal. Hilliard v. North Carolina Dep't of Corr., 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).
10. Unacceptable personal conduct, as defined by the Office of State Personnel, includes “conduct for which no reasonable person should expect to receive prior warning,” “job-related conduct which constitutes a violation of state or federal law,” “the willful violation of known or written work rules,” and “conduct unbecoming a state employee that is detrimental to state service.” 25 N.C.A.C. 01J .0614(8).
11. In the case of “conduct unbecoming a state employee that is detrimental to state service,” the State employer is not required to make a showing of actual harm, “only a potential detrimental impact (whether conduct like the employee’s could potentially adversely affect the mission or legitimate interests of the State employer).” Hilliard, 173 N.C. App. at 597, 620 S.E.2d at 17.
12. In the case of “willful violation of known or written work rules,” the State employer’s “work rules may be written or ‘known’ and a willful violation occurs when the employee willfully takes action which violates the rule and does not require that the employee intend his conduct to violate the work rule.” Hilliard, 173 N.C. App at 597, 620 S.E.2d at 17.
13. Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether the conduct constitutes just cause for the disciplinary action

taken. N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004).

14. Title IX and Respondent's policy with regard to reporting allegations of sexual harassment or sexual violence require all University employees (except for licensed counselors or members of the clergy) to report all such allegations to the proper authorities. Petitioner was required to report all such allegations to Ms. Ramos or Ms. Jeter.
15. Petitioner provided inaccurate and misleading instructions to Nurse Scott when asked for guidance on what to do with information of an alleged sexual assault that was reported to her by a student visiting the Student Wellness Center.
16. Petitioner was aware that a student had provided information regarding an alleged sexual assault to Nurse Scott and willfully failed to report or refused to report the allegations to the proper authorities as required by federal law and University policy.
17. Petitioner's conduct in failing to report or refusing to report the allegation of sexual violence constituted unacceptable personal conduct which justified dismissal.
18. Moreover, Petitioner's failure or refusal to report the allegation of sexual violence constituted conduct "for which no reasonable person should expect to receive prior warning," interfered with the University's obligations with regard to Title IX, threatened the health and safety of the University's students, was detrimental to the University, and was unbecoming of a state employee.
19. Similarly, Petitioner's failure or refusal to report the allegation of sexual violence violated Title IX and the University's policy with regard to reporting allegations of sexual harassment or sexual violence.
20. Respondent followed the procedures required before dismissing Petitioner for unacceptable personal conduct.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that Respondent has met its burden of proving by a preponderance of the evidence that it had just cause to dismiss Petitioner based on her unacceptable personal conduct and Respondent's decision is therefore **UPHELD**.

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 7th day of January, 2015.

Honorable Selina M. Brooks
Administrative Law Judge