

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 OSP 09759

STEPHEN DALE BROWN,

Petitioner,

v.

NORTH CAROLINA STATE UNIVERSITY,

Respondent.

FINAL DECISION

This contested case was heard before the Honorable Donald W. Overby, Administrative Law Judge, on 23 February 2015, 5 March 2015, and 6 March 2015 in Raleigh, North Carolina.

APPEARANCES

FOR PETITIONER: David G. Schiller
Schiller & Schiller
5540 Munford Rd., Suite 101
Raleigh, N.C. 27612

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

EXHIBITS

Admitted for Petitioner:

Exhibit	Description
1	December 14, 2011 Petitioner Response to Interim Appraisal
2	December 21, 2011 Petitioner Response to Interim Appraisal

Admitted for Respondent:

EXHIBIT	DESCRIPTION
1	Stephen Brown's SPA Career-Banded Work Plan and Appraisal Form with Attachment
2	<p>Letter from Paul McConocha to Stephen Brown serving as a written warning for unsatisfactory job performance and unacceptable personal conduct</p> <ul style="list-style-type: none"> • Attachment 1 (unsatisfactory job performance and inappropriate communication on Partners II utility metering installation) • Attachment 2 (unsatisfactory job performance and inappropriate communication on Partners II utility metering installation) • Attachment 3 (inappropriate internal and external time sheet communications) • Attachment 4 (Datamatic Mosaic Firefly installation project inappropriate communication and inadequate planning)
4	E-mail chain between Stephen Brown and Blake Holmes RE: Partners II Metering Project
5	North Carolina Department of Administration State Construction Office Electrical Inspection Form
7	E-mail chain between Angela Ward and Stephen Brown RE: Position 62087 Submitted for Approval
8	E-mail chain between Angela Ward and Stephen Brown RE: Philip Tabor
9	Job Description and Evaluation Standards for "Electronics Specialist" job position
10	Stephen Brown's letter to Paul McConocha discussing issues concerning the hiring process for Philip Tabor
11	E-mail chain between Paul McConocha, Stephen Brown, and Ewan Pritchard RE: EV for Campus Utility Meter Pilot
12	Paul McConocha's Affidavit on Stephen Brown's behavior during a meeting on 1/6/12
13	Paul McConocha's E-mail to Alan Daeke and Magnolia Lugo, copying Nikki Price RE: Friday 8 AM Weekly Meeting
14	Paul McConocha's E-mail to Alan Daeke RE: Steve Brown Update
15	Energy Management Shop Weekly Progress Meeting Ground Rules
16	Paul McConocha's E-mail to Nikki Price and Alan Daeke RE: Stephen D. Brown's Tape Recording Today, 6/4
18	Alan Daeke's E-mail to Paul McConocha RE: Steve Brown Performance/Conduct
19	Alan Daeke's memorandum to Stephen Brown advising Brown on Daeke's Step 1 Ruling regarding the grievances Brown filed on 6/19/12, copying Alicia Robinson and Paul McConocha

20	E-mail chain between Blain Woods and Stephen Brown RE: GEM Electric Vehicle Purchase
21	E-mail chain between Stephen Brown and Blaine Woods RE: Req for the Electric Car
22	E-mail chain between Stephen Brown and Blaine Woods RE: Is the Club Car Ordered
23	Email chain between Paul McConocha, Stephen Brown, and Alan Daeke RE: Partners II Metering Project
24	E-mail chain from Stephen Brown to Alan Daeke RE: Partners II Sub Metering for Jack Colby
25	E-mail chain between Paul McConocha, Stephen Brown, and Alan Daeke RE: Partners II Greenhouse Electric Meter
29	E-mail from Paul McConocha to Stephen Brown RE: Elster Meter Contact at FREEDOM
30	Letter from Paul McConocha to Ewan Pritchard discussing Elster Electric Meter
31	Time Card Reconciliation Report
32	E-mail chain between Paul McConocha, Barbara Hise, Adrienne Allen, Alan Daeke, and Stephen Brown RE: Timecard and Shop Supervisor Question
33	E-mail from Paul McConocha to Stephen Brown RE: Draft Jan Nederveen Letter
34	Jan Nederveen Memorandum Regarding Job Responsibilities
35	E-mail from Brown to McConocha RE: Jan Personal Safety
36	Memorandum from Paul McConocha to Stephen Brown Re: Jan Personal Safety
37	E-mail from Stephen Brown to Paul McConocha RE: Please process time sheets in AiM
38	E-mail from Paul McConocha to Stephen Brown RE: EM Shop Safety Facts
39	EM Shop Performance Metrics and Work Order Status Reports
40	Updated Brown 2011-2012 Work Appraisal
41	2012-2013 Brown Annual and Interim Appraisal Form
42	Final Written Warning for Unacceptable Personal Conduct and Unsatisfactory Job Performance
43	Step 1 Grievance Ruling
44	Revised Final Written Warning for Unacceptable Personal Conduct and Unsatisfactory Job Performance
45	Notice of Investigatory Status and Notice of Pre-Dismissal Conference
46	Notice of Dismissal for Unsatisfactory Job Performance
47	EM Shop Update 2/27/13
48	Brown Response to Final Written Warning
49	Energy Management Shop Update – November 30, 2012
50	E-mail from Paul McConocha to Stephen Brown cc: Alan Daeke RE: EM Shop Interim Reviews

51	Energy Management Shop Updates
52	E-mail from Alan Daeke to Stephen Brown RE: Suspected Unethical and Possibly Illegal Procurement Practices of the NCSU Purchasing Department
53	E-mail from Paul McConocha to Nikki Price RE: Interim Reports Due
54	Stephen Brown SPA Work Plan and Appraisal Form for 2006-2007
55	E-mail from Marc Okner to Stephen Brown RE: Invitation: Annual Performance Review, take two @ Tue., Jan. 5 2:30pm – 3:30pm

WITNESSES

Called by Respondent:

Mr. Paul McConocha
Mr. Alan Daeke

Called by Petitioner:

Mr. Stephen Dale Brown

ISSUES

1. 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.

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 Stephen Dale Brown was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes.
3. Respondent North Carolina State University (“NC State” or “the University”) is subject to Chapter 126 and was Petitioner’s employer.
4. Petitioner has a degree in electrical engineering from NC State. Petitioner worked in a variety of sales positions across several different industries before coming to work at NC State in 2004. Petitioner was hired as an Electronic Technician III to supervise the Energy

Management Shop. The Energy Management Shop is within the University's Utilities and Engineering Department. Petitioner was aware at the time he interviewed and was hired for the position that the position was a supervisory one and that he would be responsible for managing and supervising other employees. Petitioner's contention that he was not in a supervisory position is not credible. **T. pp. 19, 270-71, 406-08, 493-95.**

5. Petitioner was hired by Mr. Edward Sekmistrz. Petitioner reported to Mr. Sekmistrz until 2009, when Mr. Paul McConocha was hired to be the Energy Program Manager. Thereafter Petitioner reported to Mr. McConocha. At all times during the relevant time period, Petitioner reported to Mr. McConocha. **T. pp. 11, 13, 20, 270-71, 406-07, 493-95, 504.**
6. Mr. McConocha has a Master's degree in Environmental Sciences from Miami of Ohio University and previously worked for thirteen years as Vice President of Engineering and Environmental Services for Macy's Incorporated before joining NC State as Energy Program Manager.
7. As Energy Program Manager, Mr. McConocha manages approximately twelve employees, including 6 direct reports. Mr. McConocha's group is responsible for overseeing the diligent use of energy and water on campus. His team monitors the amount of energy the University consumers utilizing over 600 monitoring devices or utility meters. In order to carry out their duties and responsibilities, the employees in the Energy Management Group must interact with other departments at the University. The Energy Management Group's performance is measured by energy use, water use, the completion of preventative maintenance, and fulfillment of assigned work orders. Mr. McConocha reports to Mr. Alan Daeke, Director of Utilities and Engineering. **T. pp. 10-13, 18-20, 267-69, 270-71, 277-79, 406-07.**
8. As Electronic Technician and Shop Supervisor, Petitioner was responsible for the overall management of the Energy Management Shop. A large part of Petitioner's job involved prioritizing and assigning work and repair orders and ensuring that maintenance and repairs are done expeditiously and efficiently. Petitioner's management responsibilities included the management and supervision of electronic technicians and a meter reader. His responsibilities included hiring necessary staff, assigning work, supervising the Shop employees, and evaluating their performance. He was responsible for control operations upkeep and maintenance of the on-campus utility plants, maintenance and monitoring of the meter reading functions for the University's utility billing, and management and maintenance of the University's smart meters. **T. pp. 19-23, 270-71, 278-79, 407-08, 495-96, 615-16; Resp. Exs. 1, 9, 40-41.**
9. Mr. Daeke was the Director of Utilities and Engineering at all times relevant herein. As Director, Mr. Daeke has overall responsibilities for the thermal production and distribution for NC State, including electrical distribution and maintenance of the power and utility systems. His group provides the thermal utilities and the electrical power to the buildings on NC State's various campuses. The group manages the University's energy use and deals with fuel procurement, outreach to campus, streetlight maintenance, generator maintenance, banner installations, and billing for consumed utilities. The group has five central plants and three substations for electrical power that provide service to the University. Mr. Daeke

manages 7 direct reports and has overall responsibility for seventy-seven employees. Mr. Daeke has a mechanical engineering background and is an experienced manager. Mr. Daeke reports to Mr. Jack Colby, Assistant Vice Chancellor for Facilities Operation. **T. pp. 10-13, 18-20, 266-68, 277-78.**

10. Mr. Daeke had an open-door management policy and would communicate regularly with his staff. He held monthly meetings with his direct reports, including Mr. McConocha, to track progress on assignments and to provide feedback on how they were doing, including work in progress, matters that need attention, personnel related items, or anything else that the employees felt merited discussion. Mr. Daeke would also hold weekly staff meetings where the entire group would review various employment-related matters. **T. pp. 268-71**
11. The University used a career-banded work plan and appraisal forms that set forth specific tasks, work orders, and responsibilities and employees were given reviews on an interim and annual basis. As supervisor, Mr. McConocha was responsible for evaluating Petitioner's performance. Performance was measured by metrics, third-party feedback from customers and colleagues, direct observation, actual results, and sampling of work product.
12. Contributing to the appraisals in his role as Mr. McConocha's supervisor and as Director of Utilities and Engineering, Mr. Daeke would provide his feedback to Mr. McConocha based on his observations of Petitioner's performance and behavior. Mr. McConocha interacted daily with Petitioner in-person, over the telephone, and electronically. Both Mr. McConocha and Mr. Daeke personally observed Petitioner's work performance and behavior, as well as received feedback from Petitioner's colleagues and other campus personnel. Mr. Daeke would review and sign Petitioner's appraisal. **T. pp. 13-14, 23-24, 27-28, 271-72, 280-81; Resp. Exs. 1, 40-41.**
13. In addition to Petitioner's day-to-day management responsibilities and the day-to-day job duties detailed in his work plan, Petitioner would be assigned a variety of specific work assignments on a regular basis. These work assignments were assigned through different ways, including direct communication from Mr. McConocha and work orders submitted by campus personnel through the AIM system, the University's computer maintenance management system. AIM is used to open work orders, categorizing the work order in terms of priority, track the progress of the work orders, and track the amount of time worked on the order. The AIM system tracks open work orders and the progress of work being performed. The AIM system also recorded hours worked on specific tasks. **T. pp. 22-25, 27-28, 271**
14. Mr. Daeke and Mr. McConocha had ongoing concerns and issues regarding Petitioner's behavior and work performance. Petitioner had received poor ratings in the past on his annual work evaluations for judgment, communication skills, and relationships with other employees. Mr. McConocha was particularly concerned about Petitioner's poor communication, lack of organization, inability to effectively assign work, and inability to ensure that work was performed satisfactorily and in a timely fashion. The Energy Management Shop had failed to keep up with critical repairs and failed to perform installation projects in a timely manner which were parts of Petitioner's responsibility. Mr. McConocha communicated his concerns to Mr. Daeke and to Petitioner on a regular basis. **T. pp. 29-30,**

65-75, 273-74; Resp. Exs. 1, 54.

15. In June of 2011, Dr. Ewan Pritchard, a mechanical engineer and principal member of the FREEDM Center, asked the Energy Management Group to help evaluate a new smart meter the Center had developed. The FREEDM Center is a research unit within NC State's College of Engineering that is funded by the National Science Foundation to develop smart grid technology and resilient electrical distribution of electricity. A smart meter is basically a utility meter with a computer that is capable of recording, tracking, and analyzing data that can be read via the internet.
16. Mr. McConocha instructed Petitioner to evaluate the meter, provide constructive feedback, and let him know whether the group might be interested in deploying those types of meters in the future. Petitioner was told that the evaluation needed to be completed by July 15, 2011 because the unit needed to be returned to the FREEDM Center by that date. Petitioner failed to perform the assigned task and did not provide Mr. McConocha with constructive feedback. The meter was returned to the FREEDM Center with a letter of apology from Mr. McConocha. **T. pp. 45-49, 55, 282; Resp. Exs. 1, 29, 30.**
17. In spring 2011, Mr. McConocha and the Energy Management Group arranged with the FREEDM Center to use the Center's modified plug-in Toyota Prius for meter reading. Aside from the plug-in modifications that were made by the FREEDM Center, the Prius was no different than any other model Prius being driven on the roads today. The parties agreed that the Energy Management Shop's dedicated meter reader employee would use the plug-in Prius for running the meter route on NC State's campus. It was a mutually beneficial arrangement because the regular usage of the Prius would allow the Center to evaluate the car's performance and the Energy Management Shop got a free, energy efficient vehicle to use. The arrangement began as a pilot program for a couple of weeks, but was later made a more formal and permanent arrangement. The Prius would be available to the Energy Management Shop and in return the Shop would use the car during the normal course of business to transport the meter reader around campus. Petitioner was responsible for seeing that the Prius was used accordingly by his team. **T. pp. 49-55, 549-56; Resp. Exs. 1, 11.**
18. The Shop used the Prius at first, but soon stopped using it for meter reading. Petitioner informed Mr. McConocha that the meter reader did not like using the Prius, contending that the visibility was different from the Shop's truck. According to Petitioner, the meter reader preferred using the Shop's truck for his meter route. Mr. McConocha informed Petitioner that he expected Petitioner to see that the Prius was used in accordance with the agreement. Petitioner failed to do so and the Prius was not used consistently in accordance with the agreement. **T. pp. 49-55, 213-15, 549-56; Resp. Exs. 1, 11.**
19. Petitioner testified that he did not recall what the arrangement was with the FREEDM Center regarding the Prius. After his memory was refreshed, Petitioner testified that the Shop used the Prius until the meter reader said the car was not safe for him to drive. Although Petitioner was the meter reader's supervisor, he failed to take any steps to ensure that the car was utilized in accordance to the agreement, even after being directed to do so by his supervisor. **T. pp. 49-55, 549-56; Resp. Exs. 1, 11.**

20. As supervisor part of Petitioner's job responsibilities was to hire electronic technicians and other staff members. In October 2011, Petitioner recommended that Mr. Philip Tabor be hired as a permanent employee. Mr. Tabor had been working in the Energy Management Shop under Petitioner's supervision for the past several months. Mr. Tabor went through the interview process and both Mr. McConocha and Mr. Daeke gave their approval. Petitioner submitted Mr. Tabor to Human Resources for permanent hire and informed Mr. Tabor that he had done so. After submitting Mr. Tabor for employment, Petitioner abruptly changed his mind and informed Mr. McConocha that he wanted to withdraw the offer to Mr. Tabor because he no longer believed Mr. Tabor had the technical capability to perform the job. Because Petitioner had already interviewed Mr. Tabor, recommended him for employment, and informed him that he was being submitted for permanent employment, Mr. McConocha and Mr. Daeke did not believe it would be appropriate to withdraw the offer to Mr. Tabor at that point in time. Petitioner never articulated the reasons for the abrupt change in his recommendation or provided any justification for not hiring Mr. Tabor. Mr. Tabor continues to be employed by the Energy Management Group and is meeting all expectations. **T. pp. 56-64, 282-83, 573-75; Resp. Exs. 1, 40, 7-8**
21. As part of his job, Petitioner was responsible for managing the installation and integration of new meters on campus. A new electric smart meter had been installed at the Terry Small Animal Hospital and Petitioner was tasked with completing the installation and integrating the meter. A fully-integrated smart meter is one that is connected to the internet and can be monitored remotely, instead of having to be manually read by a meter reader. To complete the integration, a communications cable needed to be installed to the device. Petitioner failed to complete the assigned task. **T. pp. 71-72, Resp. Ex. 1.**
22. Mr. McConocha documented Petitioner's work performance issues in Petitioner's 2011-2012 interim appraisal and review, which was conducted in December 2011. Mr. McConocha informed Petitioner of the specific issues with regard to his performance and that Petitioner would be given every opportunity to improve his performance during the next review cycle. Petitioner was extremely upset at receiving less than satisfactory ratings in his review and submitted several written responses to be included in his personnel file. **T. pp. 32-35 , Resp. Exs. 1, 10, 14, 17, 40; Pet. Exs. 1-2.**
23. After the interim review in December 2011, Mr. Daeke suggested and approved for Mr. to meet weekly with Petitioner to review Petitioner's work, discuss outstanding issues, and monitor progress. The goal of the meetings was to improve communication between Mr. McConocha and Petitioner and to rehabilitate Petitioner's performance and get the Energy Management Shop's performance back on track. The hope was that the meetings would help Petitioner improve his organization and management of the Shop so that they could get the necessary work done and improve customer service. **T. pp. 30, 33-35, 70, 284-86, 290; Resp. Exs. 2, 13-14.**
24. Petitioner was resistant to the idea of meeting regularly with Mr. McConocha and behaved in a disrespectful and unprofessional manner during the first meeting on January 6, 2012. As a result of Petitioner's behavior, Mr. McConocha established specific ground rules for the meetings. **T. pp. 37-44; Resp. Exs. 12-13, 15.**

25. Mr. McConocha met with Petitioner on a weekly basis. Mr. McConocha would prepare an agenda for the meetings and would provide Mr. Daeke with regular updates. During the meeting, the men would establish priority lists for work orders and projects. These lists would be reviewed on a weekly basis. **T. pp. 70, 286-87, Resp. Exs. 2, 18, 47, 49, 51.**
26. As a result of the meetings, Petitioner's performance improved for a limited period of time, but Petitioner was unable to sustain the improvement. Specifically, he failed to procure an electric club car for meter reading activities in a professional manner that was compliant with State and University procurement policies and procedures. Petitioner failed to properly plan for and oversee the installation of a wireless utility meter reading system on campus as previously discussed and assigned. He failed to perform in a satisfactory manner as project lead for the installation of utility sub-meters at the Partners II greenhouses. He was unable to complete outstanding work orders in a timely manner and failed to update plant priority lists as required. In addition, Petitioner failed to comply with time keeping requirements. As a result, Petitioner received less than good ratings on his annual appraisal. **T. pp. 70, 290-96; Resp. Exs. 1, 2, 18, 39-40.**
27. In spring 2012, Petitioner was asked to take the lead on procuring an electric club car for the Energy Management Shop. The club car would be a replacement for the FREEDM Center Prius and would be a dedicated vehicle for the campus utility meter reader. Mr. McConocha and Petitioner had discussed purchasing one in the past, but it was not until 2012 that the funds became available to purchase the vehicle. **T. pp. 75-77, 299, 410-15, 505-09; Resp. Exs. 1, 2, 20-22.**
28. Petitioner was supposed to identify the proper vehicle, obtain quotes and pricing, and follow University procurement procedures to acquire the car by the end of the fiscal year. Petitioner did not have prior experience with procuring an item like the club car or equipment of such value. Petitioner researched the club cars, obtained pricing from several vendors, and made his recommendation to Mr. McConocha and the University's Purchasing department. University Purchasing informed Petitioner and Mr. McConocha that they needed to use a North Carolina term contract and purchase the vehicle using an approved vendor. Mr. McConocha instructed Petitioner to follow University procurement guidelines and to use the State term contract and approved vendors. **T. pp. 75-83, 218, 299-301, 410-15, 511-13; Resp. Exs. 20-22, 52**
29. Petitioner failed to comply with Mr. McConocha's instructions. He persisted in sending accusatory and confrontational emails to employees in the University Purchasing department. Petitioner objected to the University's purchasing process because the State's approved vendor did not have the lowest bid. Petitioner had already informed an unapproved vendor that it had submitted the lowest bid, although that was beyond his authority.
30. Petitioner accused the University Purchasing department of acting unethically and possibly illegally. Personnel in the University Purchasing department complained to Mr. Daeke about Petitioner's conduct. As a result of Petitioner's unprofessional communications with the University Purchasing department, Mr. Daeke had to meet with Ms. Sharon Loosman, Director of Purchasing, and Mr. Blain Woods, Assistant Director of Purchasing, to apologize

for Petitioner's conduct. Petitioner's refusal to comply with University procedures also resulted in a subsequent delay in procuring the car. Eventually, the University Purchasing department assisted in acquiring the car in compliance with State and University procedures, but the purchase did not occur until the next fiscal year. **T. pp. 75-83, 235-36, 299-305; 509-11; Resp. Exs. 20-22, 52**

31. In November 2011, Petitioner was assigned to be the Energy Management team representative for the installation of utility sub-meters at three research greenhouses attached to the Partners II building on NC State's Centennial Campus. Associate Vice Chancellor Jack Colby had directed that all the utility meters for the three greenhouses be separated from the Partners II building. This was so the University could meter separately the utility/energy usage of the greenhouses and not have the usage be part of the main building billing. This was a large project that began in November 2011 and required the coordination and communication of several groups on campus. Mr. Blake Holmes from the Repair and Renovation group was the project lead and project manager. His group looked to Petitioner and his team for assistance with installing the new utility meters on the greenhouses. **T. pp. 84-89; 306-13, 416-18; Resp. Exs. 2, 4-5, 23-25.**
32. In March 2012, Mr. Holmes informed Petitioner that the three utility meters were installed and that he needed Petitioner to validate the power meter and complete the installation. Petitioner was supposed to make sure the meters were installed properly, met specifications, and were integrated into the building systems and data management systems. Petitioner and Mr. McConocha discussed this project during their weekly meetings and it was made a priority on March 23, 2012. Despite being a priority, Petitioner did not take immediate action regarding the project. **T. pp. 85-86, 305-07, 520-22; Resp. Exs. 2, 4-5, 23-25, 51.**
33. On or about April 27, 2012, Petitioner presented a concept of the project to the Energy Management Shop. Mr. Al Ball, an engineer with the Power Systems Group who was not involved in the project, saw the concept and mentioned that the electric meter should be UL listed. On May 3, 2012, Mr. Holmes asked Petitioner for an update on the installation project. Mr. Holmes asked Petitioner for a detailed analysis of everything that was still needed in order for Petitioner to complete the project. Petitioner raised two possible concerns, including Mr. Ball's comment that the meter may require a UL listing. Petitioner confirmed with Mr. Holmes that there were no additional concerns. **T. pp. 86-92, 308-13, 517-30; Resp. Exs. 2, 4, 23-25.**
34. On May 17, 2012, Mr. Holmes informed Petitioner that the two issues he had raised had been addressed and that there were no electrical issues regarding the installation. Despite these assurances, Petitioner continued to insist that there was a potential issue with the electrical work. Petitioner is not an electrician, had never handled the installation of a high-voltage meter before, and was not qualified to provide advice regarding electrical issues. Ultimately, Petitioner failed to complete the assigned task. **T. pp. 86-92, 308-13, 517-30; Resp. Exs. 2, 4-5, 23-25.**
35. Six months after the beginning of the project, Petitioner informed to Mr. McConocha that the Partners II project was not part of his group's core mission and that the group was not qualified

to do the work even though his group is responsible for supporting the installation of meters and meter equipment. Assuming *arguendo* that such were true, he had a responsibility to inform his supervisor well in advance of 6 months. He should have been able to figure that out within a week of two of getting the assignment.

36. In accord with University policy and Petitioner's position, Petitioner was required to submit monthly time sheets. Throughout the entire time Petitioner was employed at NC State, he would correctly keep track of his time using a monthly time sheet and submit these monthly time reports to Mr. Daeke's assistant. In May 2012, Petitioner began entering his time into the AIM system on a daily basis. As shop supervisor, Petitioner should not have been charging his time to a work request in AIM. By doing so, it amounted to double entry of his work time. His time is reported via a monthly time sheet and included in the overhead portion of the charge back rates. Mr. McConocha instructed Petitioner on more than one occasion to stop entering his time into AIM, but Petitioner failed to comply. Ultimately Mr. Daeke held a meeting in his office with Petitioner and Mr. McConocha and ordered Petitioner to cease recording his time in AIM. Only then did Petitioner stop. Petitioner's conduct and refusal to follow Mr. McConocha's directives constituted insubordination. **T. pp. 97-103, 187-88, 313-18, 418-21; Resp. Exs. 2, 18, 31-32**
37. On February 10, 2012, the Energy Management Group met to discuss potential metering projects that could be completed before the end of the fiscal year. The group discussed installing a wireless Datamatic Mosaic Firefly utility meter reading system on campus. Datamatic is the vendor that distributes the meter. **T. pp. 104-05; Resp. Exs. 2.**
38. On March 16, 2012, Petitioner and Mr. McConocha discussed the planned procurement and installation of that system and Petitioner was tasked to lead the project. Over the next two months, Mr. McConocha and Petitioner discussed the project several times during their weekly meetings. However, Petitioner never presented a work plan or schedule for the project as directed. **T. pp. 104-09, 318-19; Resp. Ex. 2.**
39. Mr. Erik Hall, Plant Engineer, was responsible for running the University's five district utility plants, reported to Mr. Daeke, and was a peer of Mr. McConocha. Early on the morning of May 30, 2012, Petitioner issued a detailed task assignment via e-mail to Mr. Hall. The subject line of the e-mail was in all capital letters and stated "MANAGEMENT MUSCLE REQUIRED IMMEDIATELY – Datamatic Mosaic Firefly Installation 5/30." Petitioner informed Mr. Hall of what needed to be done on the project that very day and requested immediate assistance from Mr. Hall and his group. Although Mr. Hall's group had provided funding for the project, there had been no prior communication from Petitioner regarding the project to Mr. Hall or Mr. McConocha. Petitioner was well aware prior to May 30, 2012 that the Datamatic representative was coming to campus on that date to help with the project. Petitioner's actions demonstrated a lack of planning and his e-mail communication constituted an improper upper-delegation of responsibility. **T. pp. 106-110, 319-25, 424-29, 533-39; Resp. Ex. 2.**
40. On June 5, 2012, Petitioner received a written warning for unsatisfactory work performance and unacceptable personal conduct. The reason for the disciplinary action was that Petitioner

failed to perform his job in a satisfactory manner and engaged in disruptive and unprofessional personal conduct that was counterproductive and detrimental to the Energy Management Group's mission. Assigned work was still not being completed satisfactorily in a timely manner. Specific reasons for the warning as discussed above included Petitioner's failure to procure the electric club car in a professional, expeditious, and efficient manner, his unsatisfactory job performance regarding the Partners II utility meter installation, his unsatisfactory job performance and unprofessional conduct regarding the Datamatic Mosaic Firefly installation project, and his entering his daily time into the AIM system. Also given as a reason for the written warning was his attempting to record his scheduled annual review meeting with Mr. McConocha despite Mr. McConocha's clear instructions not to record the meeting. Petitioner had been told by Human Resources that it is within Mr. McConocha's rights to require Petitioner not record the meeting. **T. pp. 75-83, 97-103, 111-13, 299-301, 313-18;; Resp. Exs. 2, 4-5, 16, 18, 20-22, 23-25, 31-32, 52, 55**

41. Included in the written warning was a six-point Performance Improvement Plan informing Petitioner that he was expected to communicate professionally and appropriately with all NC State personnel and to take greater ownership with regard to his group's productivity and improve the shop's performance. **T. pp. 75-83, 97-103, 111-13, 299-301, 313-18, 540-48; Resp. Exs. 2, 4-5, 16, 18, 20-22, 23-25, 31-32, 52, 55**
42. Petitioner filed an administrative grievance regarding his annual appraisal and the June 5, 2012 written warning, alleging both contained false, inaccurate, or misleading information. As part of the grievance process, Mr. Daeke met with Petitioner to discuss his grievance and to determine whether there was any merit to it. Mr. Daeke determined that both the annual appraisal and written warning were accurate. **T. pp. 325-27, 539; Resp. Ex. 19.**
43. Petitioner's job performance improved slightly after the written warning, but the improvement did not last. Petitioner consistently failed to successfully complete assigned work in a timely manner. Petitioner was late in providing a detailed action plan for central utility plant related repairs and utility meter related repairs, a majority of urgent and routine work orders remained late and overdue, and necessary warranty tracking information had not been put into the AIM system. Petitioner was also consistently late with submitting his monthly time sheets. **T. pp. 113-15, 328-29, 336-39; Resp. Exs. 41, 44.**
44. Mr. McConocha continued to work with Petitioner to try and improve his job performance. Mr. McConocha would identify specific work orders that needed to be done in terms of priority, communicate that on a regular basis, and follow up with regard to progress. However, despite Mr. McConocha's efforts, Petitioner's performance did not improve. **T. pp. 116-17; Resp. Exs. 41, 44, 47, 49.**
45. During a Shop training session on November 6, 2012, Petitioner observed Mr. Jan Nederveen, the meter reader, nodding off. Petitioner is Mr. Nederveen's supervisor. Petitioner clapped his hands in the direction of Mr. Nederveen's face to wake him up.
46. Mr. Nederveen and the other employees who were there, including Mr. Tabor, Mr. James Fenske, and Mr. Makr Welsh, reported the incident to Mr. McConocha. Mr. McConocha

conducted an investigation. As part of his investigation, Mr. McConocha spoke with Petitioner, who admitted that he clapped his hands at Mr. Nederveen. Mr. McConocha instructed Petitioner not to discuss the matter with his employees or take any retaliatory reaction against them. Petitioner was upset that his employees had reported the incident to Mr. McConocha. He disregarded Mr. McConocha's directions and told the Shop employees that there were "rats" among the staff. Petitioner's conduct during the meeting was unprofessional, and his behavior during the subsequent investigation of the incident, including the remarks he made to his employees, was inappropriate and insubordinate. **T. pp. 119-22, 336, 432-37, 556-62; Resp. Ex. 44.**

47. Petitioner acknowledged clapping his hands at the direction of Mr. Nederveen's face in order to wake him up, but adamantly contended he did not clap his hands "near" Mr. Nederveen's face. However, Petitioner admitted that he was upset that his staff had gone behind his back and reported the incident to Mr. McConocha. He admitted that he had called his staff "rats." He believed that his staff had told lies about him and he wanted that reflected in their performance appraisals. **T. pp. 432-37, 556-62, 565-66.**
48. During 2012, Petitioner submitted his monthly time sheets late in July, August, September, October, and November. Monthly time sheets were to be submitted to Mr. Daeke's assistant at the end of each month so that she could review them for accuracy, verify leave and sick time, make a copy for the files, and send them to payroll for processing. Petitioner was not adhering to the department's process or timeline. **T. 115-16, 336-39; Resp. Ex. 44**
49. Petitioner failed to conduct monthly safety training sessions as required in March, April, May, June, July, August, and September of 2012. Supervisors are required to conduct safety training sessions every month with their staff, during which they are supposed to review training material prepared by Mr. Edward Elliot, the Facilities Operations safety officer, distribute relevant training material, and review various job safety issues with the employees. Petitioner failed to conduct the training sessions until Mr. McConocha intervened and ordered Petitioner to conduct the sessions. **T. pp. 123-26, 339-41, 441-42; Resp. Exs. 38, 44.**
50. On July 27, 2012, Mr. McConocha directed Petitioner to develop an action plan to address outstanding work orders at the University's Central Utility Plant. The University has five district energy plants that generate chilled water and working steam for building HVAC systems on campus. One of the plants also generates electricity used to power the campus. Mr. McConocha had worked with the plant staff to prioritize open repairs and meter-related repairs that needed to be done and Petitioner was expected to come up with a plan to complete the necessary repairs. Petitioner's plan was due by September 21, 2012. Petitioner failed to provide a plan by the due date and did not submit his plan for review until November. **T. pp. 128-29, 341-42; Resp. Exs. 41, 44.**
51. As Energy Management Shop Supervisor, Petitioner was responsible for assigning work to his staff, prioritizing the work that needed to be done, and ensuring that work orders and repairs were completed in a timely fashion. When work orders, customer requests, and repairs are entered into AIM, they are provided with a priority code. "Urgent" work orders indicate a response is required within 24 hours and repairs completed within 48 hours, if possible. All

urgent work orders in the AIM system should reflect at least some activity on them. “Routine” work orders are generally addressed within 30 days. As of November 28, 2012, 13 of 14 “urgent” work orders were overdue (93% late) and 25 of 32 “routine” work orders were overdue (78% late). Of those 38 overdue work orders, nine did not have any work hours charged, which indicated that no action had been taken and that absolutely no work had been done on those orders. **T. pp. 129-37, 199-202, 343-46; Resp. Exs. 41, 44, 49.**

52. As supervisor, Petitioner was responsible for performing interim and annual reviews of all employees who directly reported to him. Petitioner had been performing evaluations and reviews as part of his supervisory duties ever since he began his employment at NC State. The University’s Human Resources department provides supervisors with all the necessary forms and establishes a timeframe in which the reviews needed to be completed and submitted. Per direction of Human Resources, employee interim reviews were to be completed by December 14, 2012. Petitioner failed to complete the interim reviews by the proscribed deadline. **T. pp. 137-43, 346-54, 408, 565-71; Resp. Exs. 41, 44, 50, 53.**
53. On December 20, 2012, Mr. McConocha asked Petitioner for a status update regarding the Energy Management Shop’s employee interim reviews. Petitioner told Mr. McConocha that he was not going to do the interim reviews. Petitioner believed that the University’s Employee Relations group would be investigating the Shop as a result of the incident involving Petitioner clapping his hands to wake up Mr. Nederveen during the Shop meeting in November and did not consider it appropriate to do the interim appraisals at this time. Contrary to Petitioner’s assertion, Employee Relations was not conducting an investigation into the incident, and even if it was conducting an investigation, Petitioner was still required to provide interim appraisals of his employees. **T. pp. 137-43, 348-54, 565-71; Resp. Exs. 44, 50, 53.**
54. On January 2, 2013, Mr. McConocha again directed Petitioner to complete the interim reviews. On January 4, 2013, Petitioner submitted draft interim reviews for three of the four Shop employees. On the reviews for Mr. James Fenske and Mr. Phil Tabor, Petitioner included the comment that “NCSU employee relations has been asked to investigate why the employee and other employees report on shop activities directly to Mr. McConocha.” The inclusion of this comment on the interim reviews did not relate to employee performance was thus improper. The comment was both unfounded and retaliatory. Mr. McConocha asked Petitioner to remove that comment from the reviews, but Petitioner refused. **T. pp. 137-43, 348-54, 565-71; Resp. Exs. 44, 50, 53.**
55. On September 6, 2012, Petitioner and Mr. McConocha met with Mr. Nederveen to discuss his job responsibilities and expectations. Petitioner had been assigning another Shop employee to accompany Mr. Nederveen and to help him perform his work as the meter reader. Petitioner’s actions prevented Mr. Nederveen from being able to perform his job duties independently and redirected manpower away from other work orders.
56. Mr. Nederveen was presented with a formal memorandum outlining his job responsibilities and the University’s expectations for his work, which he signed. The purpose of the memorandum was to ensure that Mr. Nederveen worked independently to complete his meter reading and data recording activities without daily assistance from any other employee. **T.**

pp. 143-52, 236, 354-61, 579-82; Resp. Exs. 33-36, 44

57. Petitioner objected to the memorandum because he did not think Mr. Nederveen could safely and independently perform his duties. Petitioner's concern stemmed from an injury Mr. Nederveen suffered on the job when he fell off a ladder. Petitioner was involved in the hiring of Mr. Nederveen, participated in the interview process during which Mr. Nederveen had a job coach participate with him, agreed with the initial decision to hire Mr. Nederveen, and believed that Mr. Nederveen was qualified for the position. Mr. Nederveen has never asked the University for an accommodation. The University reviewed Mr. Nederveen's situation and determined that he could perform the essential functions of his job.
58. Despite clear direct instructions from his supervisor, Petitioner refused to issue and refused to comply with the memorandum. With the assistance of Human Resources and the University's American with Disabilities Act Coordinator, Mr. McConocha, wrote the memorandum. Although Petitioner did not write it, the memorandum was issued in his name because he was Mr. Nederveen's supervisor. **T. pp. 143-52, 192-93, 354-61, 579-82; Resp. Exs. 33-36, 44**
59. Although Petitioner was given a clear directive that Mr. Nederveen was to be allowed to work independently, Petitioner continued to assign other employees to perform Mr. Nederveen's job duties. Mr. Nederveen is still employed at NC State as a meter reader and is satisfactorily performing his job. **T. pp. 143-52, 190, 354-61, 579-82; Resp. Exs. 33-36, 44**
60. Mr. McConocha documented Petitioner's work performance issues in Petitioner's 2012-2013 interim appraisal and review, which was conducted in December 2012. Mr. McConocha informed Petitioner of the specific issues with regard to his performance and that documented performance improvement would be expected during the remaining performance period. Petitioner was expected and instructed to take ownership of his shop, develop and execute plans to reduce AIM work order backlogs, and work professionally and courteously with Shop employees. **T. pp. 116-17; Resp. Exs. 41, 47, 49.**
61. On January 30, 2013, Petitioner received a Final Written Warning for Unacceptable Personal Conduct and Unsatisfactory Job Performance. Despite regular coaching, mentoring, clear direction and guidance, and a prior written warning for unsatisfactory work performance, Petitioner failed to demonstrate sustained improvement in his work. He consistently failed to satisfactorily complete assigned tasks in a timely manner. Petitioner's conduct in the hand clapping incident involving Mr. Nederveen was unprofessional, inappropriate, and insubordinate. His failure to allow Mr. Nederveen to complete his work independently without daily assistance, despite clear instructions to the contrary, constituted insubordination. Petitioner had been warned that failure to make immediate and sustained improvement in his job performance could result in his dismissal. **T. pp. 117-52, 335-66; Resp. Exs. 42, 44.**
62. The January 30, 2013 Final Written Warning included a Performance Improvement Plan. The Plan required Petitioner to, among other things, reduce AIM open and overdue urgent work orders to no more than 4 urgent work requests by April 30, 2013; reduce AIM open and overdue routine work order to no more than 7 requests by April 30, 2013; complete shop

interim reviews by February 1, 2013; maintain decorum in the workplace; communicate professionally and appropriately with University personnel; and not retaliate against any University employees. **T. pp. 152-55, 362-64; Resp. Ex. 42.**

63. Petitioner's work performance did not improve after the issuance of the Final Written Warning and he failed to achieve the actions outlined in the Performance Improvement Plan. Petitioner had been assigned six (6) priority repairs that had aged more than a year and been given one month to complete the repairs. Only one (1) repair had been completed. Moreover, as of June 4, 2013, there were twelve (12) open urgent work orders and thirty (30) open routine work orders. Pursuant to Petitioner's work plan, scheduled preventive maintenance tasks were to be completed level every month. Since January 2013, the completion level for these PMs had only been 73%. Petitioner had also failed to update the PMs schedule and meter warranties in AIM as provided for in his work plan. In addition, Petitioner had been instructed in February 2013 to complete employee time sheet reviews and approve time sheets in AIM on a weekly basis. Petitioner failed to do so. **T. pp. 159-69; 376-88; Resp. Exs. 45-46.**
64. Mr. McConocha consulted with Mr. Daeke and Human Resources regarding possible next steps in the disciplinary process. Because of Petitioner's continuing unsatisfactory job performance, the decision was made further discipline was warranted, including possible dismissal. On June 4, 2013, Mr. McConocha issued Petitioner a Notice of Investigatory Status and Notice of Pre-dismissal Conference due to his unsatisfactory job performance. **T. pp. 155-57, 374-76; Resp. Exs. 45-46.**
65. On June 6, 2013, Petitioner attended the Pre-disciplinary Conference conducted by Mr. Daeke, Mr. McConocha, and a representative from Human Resources. Petitioner was provided with an opportunity to respond, but declined the opportunity. Ultimately Mr. McConocha was responsible for the decision to dismiss Petitioner. He arrived at the decision to dismiss Petitioner after discussing it with Mr. Daeke and Human Resources. Ms. McConocha, Mr. Daeke and Human Resources all agreed that Petitioner's continued unsatisfactory job performance warranted dismissal. On June 7, 2013, Petitioner was dismissed from employment due to unsatisfactory job performance. **T. pp. 169-73, 388-91; Resp. Ex. 46.**
66. Petitioner contends that Mr. McConocha did not provide him with the support necessary to perform his job. Petitioner acknowledged, however, that Mr. McConocha had informed him that he could hire temporary employees or authorize overtime if needed in order to get the jobs completed. Petitioner also admitted that Mr. McConocha approved the hiring of an additional technician. **T. pp. 577-79.**
67. Mr. McConocha and Mr. Daeke were credible witnesses. Crucial parts of their testimony were supported by documentation.
68. The Undersigned finds that the testimony of Petitioner was less credible and crucial parts of his testimony were not supported by documentation.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over 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 North Carolina 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 his 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). 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. 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 insubordination, “conduct for which no reasonable person should expect to receive prior warning,” and “conduct unbecoming a state employee that is detrimental to state service.” 25 N.C.A.C. 01J .0614(8). Insubordination is defined as the “willful failure or refusal to carry out a reasonable order from an authorized supervisor.” 25 N.C.A.C. 01J .0614(7)
11. 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 Dep’t of Human Resources, Special Care Ctr., 114 N.C. App. 668, 679, 443 S.E.2d 114, 121 (1994). Any work related performance problem may establish just cause to discipline an employee for unsatisfactory job performance.
12. In Carroll, the Supreme Court explained that the fundamental question is whether “the disciplinary action taken was ‘just’”. Further, the Supreme Court held that, “Determining whether a public employee 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 that conduct constitutes ‘just cause’ for the disciplinary action taken.” NC DENR v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).
13. In Carroll, a personal conduct case, the Court went on to say that “not *every* violation of law gives rise to ‘just cause’ for employee discipline.” In other words, not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline. *Id.* at 670, 599 S.E.2d at 901.
14. Petitioner’s repeated failure to perform the duties set out in his job description and work plan in a satisfactory and timely manner and to follow management directives 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).
15. Respondent did not impose unreasonable standards or work conditions on Petitioner. Petitioner was expected to supervise his staff in a professional manner, assign and prioritize work as appropriate, deliver effective customer service, take ownership of his work, and complete assigned tasks in a satisfactorily and timely manner. He was also expected to follow directives of management.
16. Petitioner’s job requirements and his unsatisfactory job performance were addressed with Petitioner on multiple occasions through various methods such as his work plan, written warnings, performance reviews, counseling, performance improvement plans, and direction of supervisors. Petitioner was given ample opportunity to correct his unsatisfactory job performance.
17. Petitioner was given two written warnings, on June 5, 2012, and on January 30, 2013, and he was warned that his failure to make the required improvements in his performance could

result in his dismissal. Petitioner's work performance did not improve after the issuance of the second written warning and he failed to achieve the actions outlined in his Performance Improvement Plan. This third incident of unsatisfactory job performance provided justification for Petitioner's dismissal.

18. The Respondent has met its burden of proof by showing that the employee engaged in the conduct the employer alleges, and, secondly, that conduct constitutes 'just cause' for the disciplinary action taken
19. The two-prong test of the Carroll case was expanded in the case of Warren v. N. Carolina Dep't of Crime Control & Pub. Safety sets forth what this tribunal must consider as to the degree of discipline. It states:

We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. 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. (Internal cites omitted)

Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) review denied, 735 S.E.2d 175 (N.C. 2012)

20. Having found the two prongs of the Carroll case have been met, then the next inquiry is whether or not the punishment is appropriate as established in Warren.
21. Determining "just cause" rests on an examination of the facts and circumstances of each individual case. The facts of a given case might amount to just cause for discipline but not dismissal.
22. The final inquiry in the Warren analysis is determining whether the discipline imposed for that conduct was "just". Just cause must be determined based "upon an examination of the facts and circumstances of each individual case." The Warren Court refers to this process as "balancing the equities."
23. In "balancing the equities" and trying to determine what is just, or the "right" thing to do, one must look at the totality of the facts and circumstances as opposed to just looking coldly and blindly at whether or not Petitioner violated rules or policy.

24. Mitigating factors in the employee's conduct should be considered in this third prong. See Warren, citing Roger Abrams and Dennis Nolan, TOWARD A THEORY OF "JUST CAUSE" IN EMPLOYEE DISCIPLINE CASES, 1985 Duke L.J. 594 (September 1985).
25. Having given due regard to factors in mitigation, including Petitioner's work history while employed with Respondent, and 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 and unsatisfactory job performance. Because of the particular facts of this case, the punishment of termination was appropriate.
26. Petitioner's insubordination alone would have been sufficient for termination; however, Respondent continued to give Petitioner chance after chance to improve.
27. 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".
28. Respondent had "just cause" to dismiss Petitioner for his unacceptable personal conduct and his unsatisfactory job performance.
29. Respondent followed the procedures required before dismissing Petitioner for unacceptable personal conduct and unsatisfactory job performance.

On the basis of the above Conclusions of Law, the undersigned issues the following:

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 and Petitioner's dismissal 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 appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This, the 25th day of June, 2015.

Donald W. Overby
Administrative Law Judge