STATE OF NORTH CAROLINA | IN THE OFFICE OF ADMINISRATIVE HEARINGS
COUNTY OF BUNCOMBE | 15 OSP 05867

RANDALL COLE.
Petitioner,

v.

N.C. DEPARTMENT OF PUBLIC SAFETY,
Respondent.

FINAL DECISION

This matter was heard before the Honorable Donald W. Overby, Administrative Law Judge, on January 12, 2016 at the Haywood County Courthouse in Waynesville, North Carolina.

APPEARANCES

PETITIONER: John C. Hunter
One North Pack Square
Suite 421
Asheville, NC 28801

RESPONDENT: Tamika L. Henderson
Assistant Attorneys General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27609

EXHIBITS

Admitted for Petitioner:

Exhibit	Description
7	Written Warning
14	TAPS for Randall Cole 12/1/2011-11/31/2012
15	State Human Resources Manual, Section 7

Official notice was taken of Petitioner's Exhibit 16, State Human Resources Manual, Section 7.

Admitted for Respondent:

Exhibit	Description
1.	Position Description
2.	Essential Job Functions
3.	2011 Audit Report
4.	2011 Audit Follow-Up
5.	Training Records
6.	Email from Wayne Sasser to Ronald Young
7.	Email from Randall Cole to Ronald Young
8.	Email to Ronald Young
9.	Email from Betty Eller to Ronald Young
10.	Memo to Karen Brown regarding Unsatisfactory Job Performance
11.	Pre-D Notification Letter
12.	Pre-D Letter
13.	Pre-D Acknowledgment
14.	Dismissal Letter
15.	Final Agency Decision
16.	2011 Audit Second Follow-up
17.	First Written Warning
18.	Second Written Warning
19.	Third Written Warning
20.	Craggy Laundry Organization Chart
21.	Broughton Laundry Organization Chart
22.	FMLA Designation
23.	2013 Semi-Annual Inspection Checklist
24.	Petitioner's Response to Respondent's Request for Admissions
25.	Petitioner's Response to Respondent's First Set of Interrogatories and RPD
26.	Work Plan Discussion Form
27.	TAP Performance Logs
28.	Karen Brown Pre-D Notes
30.	Employee Management System Sheet with handwritten notes
31.	Timeline
32.	Petitioner's Responses to Discovery 2015 action
33.	Petitioner's Responses to Discovery 2014 action

Respondent's Exhibits 3, 4, 9, 10 and 16 were admitted over Petitioner's objection, but are given the weight the trier of fact deems appropriate. Respondent's Exhibit 31 was admitted for illustrative purposes only.

WITNESSES

The following witnesses testified for the Petitioner:
Randall Cole

The follow witnesses testified for the Respondent:

Randall Cole
Wayne Sasser
Ronald Young
Karen Brown

ISSUES

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

PRE-HEARING MOTIONS

Prior to the contested case hearing in this matter, on December 14, 2015, Respondent filed a dispositive Motion to Dismiss with the Office of Administrative Hearings ("OAH"). Petitioner filed his response on December 28, 2015. The basis of the motion was that OAH lacked jurisdiction to hear this matter. By separate Order dated December 30, 2015, Respondent's Motion was **DENIED**.

BURDEN OF PROOF

The burden of proof is on the Respondent to show by the greater weight of the evidence that it had just cause to dismiss Petitioner for disciplinary reasons related to unsatisfactory job performance.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact and Conclusions of Law.

In making these Findings of Fact, the undersigned has weighed all of the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging the credibility of witnesses, including but not limited to the demeanor of the witness, and any interests, bias, or prejudice the witness may have. Further, the undersigned has carefully considered the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witness is reasonable and rationale, and whether the testimony is consistent with all other believable evidence in the case. After careful consideration of the sworn testimony present in this hearing, the documents and exhibits admitted in evidence, and the entire record in this proceeding, the undersigned makes the following FINDINGS OF FACT:

1. Prior to his discharge on December 3, 2013 Petitioner, Randall Cole, was an employee of North Carolina Department of Public Safety, Division of Correction Enterprises ("Correction Enterprises"). Petitioner was dismissed by DPS for Unsatisfactory Job Performance;

2. The final agency decision affirming Petitioner's dismissal was issued on March 7, 2014;

3. Petitioner filed a Petition for Contested Case Hearing, (14 OSP 02494), challenging his dismissal with the OAH on April 3, 2014;

4. Petitioner filed a notice of voluntary dismissal of the action captioned 14 OSP 02494 on August 21, 2014;

5. Petitioner filed a second Petition for Contested Case Hearing, (15 OSP 05867), on August 10, 2015.

6. 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.

7. Prior to his dismissal, Petitioner was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes.

8. Petitioner was hired as the Assistant Director of the Craggy Laundry in November 2003. During his 7 years as the Assistant Director for Craggy Laundry, Petitioner received Very Good Overall Job Performance Ratings.

9. Petitioner was promoted from the Assistant Plant Manager at Craggy Laundry to the Plant Manager (Correction Enterprises Manager III) in December 2010 following the retirement of its longtime Director.

10. The primary purpose of the Petitioner's position was to provide management to the laundry plant operation. (R. Ex. 1)

11. Petitioner's direct supervisor was Ronald Young ("Young"), Correctional Enterprise's Laundry Director. (R. Ex. 20).

12. When a facility transitions to new management, Respondent performs a change of command audit. That audit is a functioning report of the condition of that particular facility under the prior management. It is, in essence, a statement of what new management is inheriting, not a litany of problems created by the new manager.

13. After Petitioner was promoted, an audit was conducted at Craggy Laundry from January 18 through January 19, 2011. That audit found no exceptions in the areas Manufacturing Inventories, Incentive Wage Fund and Travel Reimbursements. The audit found "some improvement needed to strengthen controls or minimize risks" in the areas of Accounts Payable and Procurement and Fixed Assets. The audit found "below expected performance level, significant improvement needed "in the area of Telephones." (Respondent Exhibit 3)

14. There is no evidence of how long those problems had existed under the prior manager or what if anything had been done to address the problems in the past. What is known is that those conditions existed when Petitioner began his duties as manager of Craggy.

15. A conference was held on February 3, 2011 where the results of the audit were discussed with Petitioner. Due to the significance of the audit findings, Petitioner was told that a follow-up audit would be conducted to verify corrective action was implemented. (R. Ex. 3)

16. On February 10, 2011, Young created a "cheat sheet" for Petitioner which outlined what issues needed to be corrected and what steps Petitioner needed to take to correct the noted issues. Petitioner acknowledged that Young created the "cheat sheet" and even gave him advance notice as to when the follow-up audit was to occur in order to ensure that Craggy successfully passed the follow-up audit inspection.

17. On March 1, 2011 Young sent Petitioner a follow-up email regarding abatement of the audit issues. On March 1, 2011 Petitioner sent an email back to Young indicating that he had resolved all of the identified issues. However, Petitioner conceded that he in fact had not corrected the issues.

18. On June 7, 2011 a follow-up audit was conducted with advance notice to Petitioner. The follow-up audit report was delivered to the Petitioner and his Supervisor, Ronald Young, on June 16, 2011. (Respondent Exhibit 3) Two of the four previously identified issues had not been corrected. (R.Ex.4).

19. An unsatisfactory rating was entered into Petitioner's employee appraisal, The Appraisal Process ("TAP"), for July 2011 indicating Petitioner's failures to fully correct the audit issues which were found in January 2011. (R.Ex. 27, 000235). It must be remembered that at this point Petitioner had been the manager for approximately six months and the problems were those he inherited from the prior manager, not of his own creation; however, Petitioner was the assistant director for seven years but was *de facto* manager of Craggy for some extended period of time at the end of his predecessor's tenure.

20. On August 24, 2011 the Petitioner was issued an Employee Action Plan which included correcting "all violations set forth in the command audit." (Respondent Exhibit 27, p. 239)

21. In September 2011, Petitioner still had not properly updated his subordinate employees' TAPs and Young sent him a note to remind him to do so. The note stated, "no excuses." (R.Ex. 30) Young's note was an example of Petitioner's supervisor trying to help him and giving him an opportunity to improve his performance.

22. On December 15, 2011 Petitioner was issued a Written Warning for Unsatisfactory Job Performance "for not satisfactorily implementing or correcting actions prescribed on your action plan dated and signed by [Petitioner] on August 24, 2011." Thus the written warning was not solely about correcting the issues raised in the change of command audit. The written warning also notified Petitioner that if the Unsatisfactory Job Performance continued he may be subject to further discipline up to and including dismissal. (Respondent Exhibit 17)

23. The action plan cited in the written warning required all violations set forth in the Change of Command Audit from January 2011 to be corrected, insure employee TAPS were updated,

insure all bills and invoices were submitted in a timely manner and improve communications with administration. Petitioner was directed to take immediate corrective measures. (R.Ex.17).

24. By the time the Written Warning was issued on December 15, 2011, Petitioner's Supervisor, Ronald Young, had documented in Petitioner's TAP for the appraisal period 12/1/2010 to 11/31/2011, that Petitioner had abated all of the audit violations. That TAP expressly states in the Performance Log for the month of November 2011, "All violations noted in original change of command audit have been abated." (Respondent Exhibit 27, p. 234) However, those were not all of the violations listed in the written warning.

25. The credible evidence tends to show that all of the violations in the original change of command audit had not been corrected; however, Petitioner' supervisor Young entered in Petitioner's personnel file that indeed they had, satisfying 25 NCAC 1J. 0614(6)(a)

26. For the next yearly appraisal period, 12/1/2011 to 11/31/2012, Petitioner received a Final Evaluation Overall rating of "Good" and received no "Unsatisfactory" ratings on any of his "Key Responsibilities (KRRS)" or "Dimensions (DIM)" sections which make up the Overall Rating. (Petitioner's Exhibit 14)

27. KRRS #2 and #4 were changed to BG ("Below Good") and are admittedly initialed by Young. Petitioner contends those ratings were changed after he had signed and received a copy of the TAP. Petitioner did not initial the changes.

28. It was undisputed that upon Petitioner's acceptance of the promotion it was understood and documented in his work plans under section B (training) in 2010, 2011, & 2012 that he would become certified as a Laundry Manager under the Association of Linen Management Program.

29. Respondent required all of their laundry managers to obtain the certification. A reminder email was sent to him on September 26, 2012 and also documented in his work plan under Section A (goals) on 12/3/2012. Petitioner was issued an action plan on 12/21/2012 and given until January 31, 2013 to obtain the certification. That deadline was extended at least two more times. (R. Ex. 26; R.Ex.27)

30. On March 20, 2013 Petitioner was issued a second written warning for Grossly Inefficient Job Performance for not achieving the Certification for Laundry Linen Manager (CLLM) within the timeframe designated by management. (R.Ex.18). The written warning notified Petitioner that if he failed to achieve his certification by April 20, 2013 he would receive further disciplinary action up to and including dismissal.

31. The second written warning was issued within 18 months of Petitioner's first written warning which had not yet expired and remained active. 25 N.C.A.C. 1J.0614

32. The second written warning incorrectly labeled the Petitioner's conduct as "Grossly Inefficient Job Performance." Petitioner's conduct failed to meet the definition as recited on the written warning itself, as well as the definition in the State Human Resources Manual.

33. The Laundry Linen Manager Certification is not a legally required certification for the position of Director of the Craggy Laundry nor is it listed in the State of North Carolina Position Description Form for a Correction Enterprise Manager III position as a required certification or license for the position. (Respondent Exhibit 1)

34. There is no evidence that Petitioner's failure to get the certification created the "potential for death or serious bodily injury" to anyone, or "the loss of or damage to state property or funds that result in a serious impact on the State or work unit," as required by the State Human Resources Manual. Section 7, Page 2, Revised: February 1, 2011. Disciplinary/Appeals/Grievances.

35. The written warning for failing to maintain the credentials was incorrectly treated as Grossly Inefficient Job Performance. However, to the extent that the warning arguably should have been issued for unsatisfactory job performance or unacceptable personal conduct, "no disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly." 25 NCAC 1J. 0604(c)

36. Respondent contends that a written warning can be continued in effect because the agency does not remove the warning from the Petitioner's personnel file. That is not the full recitation of the State Human Resource Manual, and, if such were the case, then the agency could hold a written warning open into perpetuity simply by not removing the warning from the individual's file. First of all, the Manual is not a rule or statute and is not controlling. Secondly, the manual correctly points out that, alternatively, a written warning becomes inactive after eighteen months if there are no further disciplinary actions. (P.Ex. 16, Pg. 4). Respondent's contention is without merit.

37. Petitioner does not dispute that management had the right to mandate the training and corresponding certification (P.Ex. 16, pg. 4).

38. The action plan prior to the second written warning indicated that follow-up would occur in April 2013 and directed Petitioner to obtain certification by April 2013, which Petitioner failed to do. Although not before the deadline set by Respondent, Petitioner obtained the CLLM.

39. Petitioner's receipt of the CLLM was documented by Young in the Petitioner's TAP Performance Log for the month of July 2013. (Respondent Exhibit 27, p. 242) By so doing, the second written warning became "inactive."

40. Petitioner was also having an ongoing problem reconciling P-Card receipts and sending the information and invoices to Raleigh for payment. In July 2013, Young reached out to Petitioner Cole when informed and inquired why the information requested wasn't being forwarded. Cole's reply was he would get it to Raleigh on Monday. However, he failed to do so. (R.Ex. 8)

41. On September 24, 2013 Petitioner received a third written warning for Unsatisfactory Job Performance. At the time Petitioner received the third written warning, both the first and second written warnings were inactive as discussed above.

42. The third written warning was based in large part on an audit conducted on August 15, 2013, related to specific subject areas: Purchase Order Documentation, Procurement Card, Direct

Processing Forms and Incomplete Control Register for Blank DC-702s. (Respondent Exhibit 19) Two of the four were noted to have been cited in a prior audit.

43. The third written warning also relied upon Petitioner's failure to correct actions addressed in an employee action plan given to him in August 2011, which continued to be problematic. These included failing to ensure that he completed and updated TAPS for his subordinate employees, failing to ensure all bills and invoices were submitted in a timely manner and failing to improve communications between he and administration.

44. Petitioner was advised that he was expected to take immediate corrective measures to ensure that this behavior did not continue. Petitioner was put on notice a third time that if his Unsatisfactory Job Performance continued, it may result in further disciplinary action up to and including dismissal. (R.Ex. 19)

45. With the Third Written Warning, Respondent issued to the Petitioner an Employee Action Plan Form dated September 23, 2013 which instructed him to correct the matters included in the Written Warning.

46. Two different versions of this Employee Improvement Plan Form exist. Both were produced from the Personnel File Respondent maintained on Petitioner. One contained no date for a Follow-Up Discussion as to the matters in the Improvement Plan, and one set 12/20/2013 as the date for the Follow-Up Discussion concerning this improvement. (Petitioner Exhibits 7, p. 249) It cannot be determined by whom and when the follow-up date of 12/20/2013 was added to the one copy. In written warnings, if there is no specified time, then the employee has 60 days within which to correct the deficiencies.

47. It is noted that Petitioner was terminated on 12/03/2013, prior to the 12/20/2013 follow-up date set out on one the Employee Improvement Plan Form.

48. Approximately a week and a half after the third written warning, on October 3, 2013 Wayne Sasser conducted a semi-annual safety inspection at Craggy and noted several violations. Sasser discussed the violations with Petitioner's assistant manager as Petitioner was not present. (R.Ex. 23)

49. Sasser documented 7 action-needed items out of a checklist of over 100 separate items inspected. (Respondent Exhibit 23) Sasser testified that it was not uncommon for there to be action-needed items of this extent for Facilities within the Division following a Semi-annual Safety Inspection.

50. Several safety reports were not available; therefore, Sasser emailed Young notifying him that Craggy was missing several months of safety reports. (R.Ex. 6)

51. Young again reached out to Petitioner and asked for an explanation as to why the monthly safety reports weren't being submitted and requested that Petitioner send them Monday. (R. Ex. 7). Petitioner conceded that, in fact, he did not mail the reports on Monday as promised.

52. According to Young, he asked Petitioner numerous times if he could provide assistance to help Petitioner get matters under control. At each instance, Petitioner told Young that he did not need the help.

53. It is also very troubling that the safety inspection showed staff had not been trained on safety programs for over a year. (R. Ex. 27, 000242)

54. Young ostensibly was concerned about the ongoing administrative problems at Craggy. On October 8, 2013, five days after Sasser's safety inspection, Young sent Betty Eller ("Eller"), a processing assistant at Broughton Hospital Laundry, to Craggy to "assist with administrative support and audit follow-up."

55. Logic would dictate that if Young was really concerned about the backlog of work and reports, he would have sent more assistance than for one day. It seems that Ms. Eller's task was more to follow up on Sasser's audit, observe and report back to Mr. Young than to help actually address the backlog.

56. Eller sent Young an email detailing several issues she observed while at Craggy. Many of the issues identified by Eller were issues that had been found during the initial Change of Command Audit in 2011 which still had not been corrected years later.

57. Ms. Eller did not appear and testify in this contested case hearing, and, therefore, her report is given little to no weight.

58. Karen Brown ("Brown") is the Director of Correction Enterprises of which the laundry operation is a part, and is Young's immediate supervisor. Young informed Brown of both Sasser's report and Eller's email, and she ordered an internal investigation.

59. Jamie G. Parker ("Parker"), Correction Enterprises Human Resources Manager, conducted the investigation and submitted a report to Brown. The investigation determined that Petitioner failed to ensure that safety procedures were followed, conduct safety inspections and perform staff safety training. Moreover, the report noted that Craggy's requisition logs had no entries since May 2013 and failed to keep P-Card receipts as required. Parker recommended to Brown that Petitioner be dismissed for his continued unsatisfactory job performance. (R.Ex. 10)

60. According to Brown, Petitioner's failures relative to the P-Card management nearly resulted in Craggy's delivery trucks not having access to gas because the gas invoices were not being paid.

61. Brown felt disciplinary action was warranted because of Petitioner's continued unsatisfactory job performance. Brown was especially alarmed that the staff and inmate safety training had not been conducted. Petitioner did not dispute that he had not conducted the required safety training in over a year.

62. Accordingly, on November 5, 2013, Brown held a pre-disciplinary conference with Petitioner, and attended by Young, wherein the specific reasons supporting the recommendation

for discipline were discussed and Petitioner was given an opportunity to explain his side of the story. (R. Ex. 11-13).

63. During the pre-disciplinary conference, and at this contested case hearing as well, Petitioner attributed his performance issues to the fact that in early 2011 Respondent changed the custody level from medium to minimum for inmates allowed to work at all Correction Enterprises facilities, including Craggy, which resulted in higher inmate staff turnover; that he did not have a processing assistant; that he had a high number of staff vacancies and that he had to take intermittent Family Medical Leave to care for his wife from September 3-November 20, 2013. (R.Ex. 22)

64. Brown investigated all of the mitigating factors presented by Petitioner and determined that dismissal was appropriate. Brown noted that Petitioner's performance issues spanned a two year period and occurred well before the three month period that Petitioner took intermittent leave to care for his wife. Brown personally calculated how much time Petitioner worked during his intermittent leave which was 66% of that three month period. The problems Petitioner was having far exceeded the time he was out on FMLA. The fact that Petitioner was out on intermittent FMLA leave was considered as a mitigating factor, but was not a factor for dismissing Petitioner.

65. Craggy has never employed a processing assistant and yet operated successfully. Furthermore, the preponderance of the evidence demonstrated that the laundries operated by Correction Enterprises either had a processing assistant or an assistant manager but not both. Craggy has an assistant manager. While that position was vacant at times, and perhaps problematic even while filled, Petitioner did not reach out to Young for help.

66. Beginning in April 2011, the Division of Adult Correction changed the custody level for the inmates allowed to work at the Craggy Laundry from medium to minimum; thus, only inmates who were within 6 months of finishing the custodial portion of their sentences were eligible to work in the Laundry. This perhaps resulted in a more rapid turnover rate among the inmates working in the Laundry Facility, which in turn may have required more training and supervision. According to Young, this should not have been a significant problem.

67. Even at the contested case hearing the Petitioner testified that he could not sufficiently perform his administrative tasks, which were part of his essential job functions, because of the change in inmate control status. Petitioner conceded at hearing that he was "not too good with paperwork." (R. Ex. 15)

68. Brown also noted that Young had worked with Petitioner to improve his performance, including asking Petitioner if he needed help, to no avail. Petitioner received several coachings, numerous action plans, numerous email reminders from his direct supervisor Young over a three year period all in an effort to improve his performance.

69. Young and Brown were credible witnesses. Crucial parts of their testimony were supported by documentation including handwritten notes made during the pre-disciplinary conference where Brown contemporaneously noted that Petitioner stated that he never reached out, never asked for help and never discussed with "Ron" (i.e., Young) that he was overwhelmed. (R. Ex. 28).

70. During his pre-disciplinary conference, when given the opportunity to produce safety training reports in Findings of Fact #51 and #53 above, Petitioner failed to do so. Moreover, Petitioner initially testified that he did not produce the reports. However, after Sasser testified that he received the safety reports in the mail on a later date, Petitioner changed his earlier testimony and said he had in fact submitted the reports to the Respondent but he could not recall when. The Petitioner's inconsistent testimony in this instance is merely illustrative of much of his testimony. At times he would testify to a particular fact only to refute or contradict that fact later. At times he seemed confused.

71. The undersigned finds that the testimony of Petitioner was less credible and crucial parts of his testimony were not supported by documentation. Admittedly, he did not have access to some of the information and documentation, as did the Respondents.

CONCLUSIONS OF LAW

1. All parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. The Office of Administrative Hearings has jurisdiction to hear this appeal and issue the final decision in this matter.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

3. At the time of his dismissal, Petitioner was a Career State Employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the just cause provision of N.C. Gen. Stat. §126-35.

4. N.C. Gen. Stat. § 126-35(a) provides that "No career State employee subject to the State Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause."

5. Pursuant to N.C. Gen. Stat. § 126-35(d), in an appeal of a disciplinary action, the employer bears the burden of proving that "just cause" existed for the disciplinary action. N.C. Gen. Stat. § 126-35(a),

6. N.C. Gen. Stat. §126-35 does not define "just cause," however the words are to be accorded their ordinary meaning. *Amanini v. North Carolina Dep't of Human Resources, Special Care Ctr* 114 N.C. App. 668, 678 – 679, 443 S.E.2d 114, 120 (1994) (defining "just cause" as, among other things, good and adequate reason).

7. Just cause is a "flexible concept embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." *NC Dep't. of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). In other words, a determination of whether disciplinary action taken was "just" requires "an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.

8. Pursuant to 25 N.C.A.C. 01J .0604(b), there are two bases for dismissal of an employee for just cause: (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 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, no disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly. Id.

9. The dismissal letter specified that the Petitioner was being dismissed for Unsatisfactory Job Performance. Unlike an Unacceptable Personal Conduct violation, dismissal for unsatisfactory job performance requires a progressive disciplinary system.

10. 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. 01J.0605.

11. Section 7, Page 2 of the State Human Resources Manual contains the following Definition for "Inactive Disciplinary Action":

> A disciplinary action taken after October 1, 1995 becomes inactive, <u>i.e. cannot be counted towards the number of prior disciplinary actions that must be received before further action can be taken for unsatisfactory job performance when:</u>
>
> - The manager or supervisor notes in the employee's personnel file that the reasons for the disciplinary action has been resolved or corrected; or
> - for performance related disciplinary actions, the performance evaluation process documents a summary rating that reflects an acceptable level of performance overall and satisfactory performance in the area cited in the warning or other disciplinary action, or
> - eighteen (18) months have passed since issuance of the warning or disciplinary action, the employee does not have another active warning or disciplinary action which occurred within the last 18 months.
>
> (Emphasis added)

12. In an "Advisory Note," the Personnel Manual restates the premise that the disciplinary actions must be active in order to be counted for any further discipline. Section 7, Page 4 of the State Human Resources Manual.

13. The language that there must be two active disciplinary actions in order to terminate an employee is not found in the promulgated rules nor the General Statutes.

14. This raises the question of what effect if any the State Human Resources Manual has. The issue specific to the State Human Resources Manual has not been addressed directly by our appellate courts. The appellate courts have issued some opinions which cite the Manual as a basis for disciplinary action taken, but generally those cases are dealing with "unacceptable personal conduct" as opposed to job performance. *See, for example,* <u>N.C. Dep't of Correction v. McNeely</u>, 135 N.C. App. 587, 593, 521 S.E.2d 730, 734 (1999)

15. In other cases, however, the Court of Appeals has addressed a similar manual:

> Although the provisions of the Medicaid Manual are clearly entitled to some consideration in attempts to understand the rules and regulations governing eligibility for Medicaid benefits, we have previously stated that the Medicaid Manual "merely explains the definitions that currently exist in federal and state statutes, rules and regulations" and that "[v]iolations of or failures to comply with the MAF [Medicaid] Manual [are] of no effect" unless the act or omission in question amounts to a "failure to meet the requirements set out in the federal and state statutes and regulations [.]" *(Internal citations omitted)* Joyner v. N. Carolina Dep't of Health & Human Servs., 214 N.C. App. 278, 288-89, 715 S.E.2d 498, 506 (2011)

16. There is no question that the State Human Resources Manual has not been promulgated as a formal "rule." The Manual is an attempt to explain and define the current state statutes and promulgated rules applicable to being a state employee, similar to the Medicaid Manual, and is not controlling.

17. We, therefore, must look at the properly promulgated rules and statutes for guidance. Rule 25 NCAC 01J .0605, titled "Dismissal for Unsatisfactory Performance of Duties" sets out the parameters for terminating an employee for job performance issues. It states:

> (b) In order to be dismissed for a current incident of unsatisfactory job performance an employee must first receive at least two prior disciplinary actions: First, one or more written warnings followed by a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal. (Emphasis added)

18. The requirement that the "employee must first receive at least two prior disciplinary actions" is not defined by time nor whether the prior disciplines are "active." Additionally, the rule requires "First (there is no Second), one or more written warnings" is merely an acknowledgement that, when read *in pari materia* there must be at least one written warning as well as some other permissible form of discipline. Likewise, there is no requirement in this language of being "active" nor any timeframe.

19. The inquiry does not stop there, however. We must also look at the definitions section of Rule 25 NCAC 01J .0614, especially subsection (6). This section defines "inactive disciplinary action," and reads verbatim the same as the Section 7, Page 2 of the State Human Resources Manual cited above, with the exception of the noted questioned section.

20. Subsection (6) states that a disciplinary action becomes inactive "for the purpose of this Section" if one of the three enumerated conditions exist. If this section is to have any meaning at all, then it must apply to the sanctions and disciplines as provided in 25 NCAC 01J. Otherwise, it is mere surplusage. Again, reading *in pari materia* with 25 NCAC 01J .0605, it is only logical that the two prior disciplinary actions must be "active." To hold to the contrary, that it is not required to have two active disciplinary actions, means the entire process of finding a prior discipline inactive has no applicability or effect; i.e., a meaningless exercise in futility.

21. As set out in the Findings of Fact above, at the time Petitioner received the First Written Warning dated December 15, 2011, the Respondent had already documented in Petitioner's TAP Performance Log dated November 2011 that, "All violations noted in original change of command audit have been abated," even though they apparently had not. Also, as set forth in the Findings above, there were more job performance violations by Petitioner than just those in the command audit which remained unresolved.

22. As set out in Findings of Fact above, the Petitioner received the Second Written Warning on March 20, 2013, less than 18 months from the issuance of the first warning. The Second Written Warning was for Petitioner not having received his Certification for Laundry Linen Manager. The Respondent documented in the Petitioner's TAP Performance Log dated July 2013 that Petitioner had completed and received this Certificate.

23. These entries in the Petitioner's TAP file constitute notes by the Petitioner's Supervisors in Petitioner's personnel file "that the reasons for the disciplinary action has been resolved or corrected" (25 NCAC 01J .0614(6)(a)). Once the second written warning abated, then there were no grounds for the first warning to continue as "active" because more than 18 months had elapsed. 25 NCAC 01J .0614(6)(c). Both of these Warnings were, therefore, inactive and ineligible to support Petitioner's termination for unsatisfactory job performance in December 2013. In the absence of these two Written Warnings, Petitioner did not have the required two active warnings at the time of his termination.

24. On September 24, 2013 Petitioner received a third written warning for Unsatisfactory Job Performance. The third written warning was based in large part on an audit conducted on August 15, 2013.

25. The third written warning also relied upon Petitioner's failure to correct actions addressed in an employee action plan given to him in August 2011, which continued to be problematic.

26. With the Third Written Warning, Respondent issued to the Petitioner an Employee Action Plan Form dated September 23, 2013 which instructed him to correct the matters included in the Written Warning. Petitioner failed to make the corrections timely.

27. Wayne Sasser's semi-annual safety inspection at Craggy on October 3, 2013, noted several violations. Among the troubling reports, the safety inspection showed staff had not been trained on safety programs for over a year. (R. Ex. 27, 000242)

28. Karen Brown ordered an internal investigation based upon Sasser's report and Eller's email. Jamie G. Parker conducted the investigation and found numerous serious violations. Parker recommended to Brown that Petitioner be dismissed for his continued unsatisfactory job performance. (R.Ex. 10)

29. Brown felt disciplinary action was warranted because of Petitioner's continued unsatisfactory job performance.

30. Unsatisfactory job performance is “work-related performance that fails to satisfactorily meet job requirement 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. 01J.0614(9). *See also, 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).

31. Petitioner’s repeated and admitted failure to perform the duties set out in his job description and work plans in a satisfactory and timely manner and failure to follow management directives constituted “work-related performance that failed 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” in violation of 25 N.C.A.C. 01J .0614(9).

32. Respondent did not impose unreasonable standards or work conditions on Petitioner. Petitioner was expected to supervise and train his staff, complete administrative tasks and reports, take ownership of his work and complete tasks as expected in a satisfactorily and timely manner. He was also expected to follow directives of management. Respondent had a legitimate expectation that Petitioner would fulfill the essential job functions of his position.

33. 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 and direction of supervisors. Petitioner was given ample opportunity to correct his unsatisfactory job performance.

34. Petitioner was given three written warnings, and he was warned each time that his failure to make the required improvements in his performance could result in dismissal. Yet Petitioner’s work performance did not improve after the issuance of the warnings, and he failed to take full corrective action as outlined in numerous action plans.

35. Petitioner was terminated on 12/03/2013. The fourth incident of unsatisfactory job performance following the third written warning would have been sufficient justification for Petitioner’s dismissal.

36. The case law supports the Respondent's right to dismiss Petitioner for conduct during an FMLA leave period, so long as the Petitioner's assertion of FMLA leave is not the reason for the dismissal. *See Gipson v. Vought Aircraft Industries,* 387 Fed. Appx. *548* (6th Cir. Term. 2010, *Right v. SCM Corp of America*, 632 F. 2d 404 (7th Cir. Ill. 2011), *Thompson v. Century Tel Central Arkansas,* 403 Fed. Appx. 114 (8th Cir. Ark. 2010*)*, *Branch v. City of Richmond,* 10 Fed. Appx. 50 (4th Cir. Va. 2001*)* and *Wright v Southwest Airlines,* 319 Fed. Appx. 232 (4th Cir. Md. 2009*)*. There is no evidence that the termination of this Petitioner was because he was intermittently out on FMLA leave.

37. The Respondent has met its burden by showing that the employee engaged in the conduct the employer alleges, and secondly, that conduct constitutes “just cause” for the disciplinary action taken.

38. Mitigating factors in the employee’s conduct should be considered in assessing discipline.

39. Having given due regard to factors in mitigation, including Petitioner's work history while employed with Respondent, Respondent submitted substantial and credible evidence to meet its burden of proof that it had "just cause" to dismiss Petitioner for unsatisfactory job performance.

40. Because of the particular facts of this case, in particular the over three year period that Petitioner was given to improve his performance, termination would be appropriate.

41. It should be remembered that Petitioner was the assistant director for seven years, but also the *de facto* manager of Craggy for some extended period of time at the end of his predecessor's tenure.

42. Although just cause existed for terminating Petitioner, Respondent failed to meet its burden of proof that it did not act erroneously or fail to use proper procedure, fail to act as required by law when Respondent dismissed Petitioner for "just cause" because Petitioner did not have two active warnings at the time he was disciplined and terminated.

43. It is clear to the undersigned that Petitioner failed to perform his duties as manager at Craggy. But for the fact of Respondent's procedural error, committed in good faith, it is clear that Petitioner should have been terminated.

44. While Respondent thus lacked "just cause" to dismiss Petitioner for unsatisfactory job performance; there is still sufficient evidence to support a demotion for unsatisfactory job performance as Petitioner had one active written warning at the time he was disciplined.

DECISION AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that the Respondent acted erroneously, failed to use proper procedure and failed to act as required by law when Respondent dismissed Petitioner for "just cause;" however, Respondent has sufficiently proven that it had just cause to demote Petitioner based on his unsatisfactory job performance. The Respondent's Final Decision <u>terminating</u> Petitioner's employment is therefore **REVERSED**; however, it is ORDERED that Petitioner shall be demoted to a position comparable to his position of assistant manager at Craggy and at the same pay grade he had while in that position. Petitioner shall be retroactively reinstated to this position of employment with the Respondent, with all back pay and benefits. Respondent shall pay to Petitioner and his attorney all reasonable attorney fees and costs incurred in this Contested Case.

NOTICE

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

IT IS SO ORDERED.

This the 9th day of February, 2016.

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Donald W Overby
Administrative Law Judge