

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
16 OSP 01382

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JONATHAN S. ONYENEKWE, )  
Petitioner, )  
 )  
v. )  
 )  
NC DEPARTMENT OF HEALTH AND )  
HUMAN SERVICES, RJ BLACKLEY )  
ADATC )  
Respondent. )

**FINAL DECISION**

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On May 25, 2016, Administrative Law Judge Melissa Owens Lassiter heard this case in Raleigh, North Carolina, pursuant to Chapters N.C.G.S. § 150B and § 126, regarding Petitioner's appeal of his dismissal from employment. On July 5, 2016, the undersigned issued an Order ruling that Respondent had just cause to dismiss Petitioner from employment, and that Petitioner failed to prove that Respondent discriminated against him by dismissing him from employment. The undersigned ordered Respondent to file a proposed Final Decision in accordance with such ruling. On August 1, 2016, Respondent filed its proposed Final Decision with the Office of Administrative Hearings.

**APPEARANCES**

For Petitioner: Jonathan S. Onyenekwe, 2245 Springhill Avenue, Raleigh, NC 27603

For Respondent: Jonathan D Shaw, Assistant Attorney General, N.C. Department of Justice, P.O. Box 629, Raleigh, NC 27602

**ISSUES**

1. Whether Respondent had just cause to dismiss Petitioner from his employment as a Health Care Technician I at RJ Blackley ADATC for engaging in unacceptable job performance and unacceptable personal conduct?
2. Whether Respondent discriminated against Petitioner by dismissing Petitioner from employment as a Health Care Technician I?

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner:

1. April 22, 2015: E-mail to Mr. Onyenekwe from Lisa Haire
2. January 31, 2014: Letter to Human Resources from Mr. Onyenekwe

For Respondent:

1. Documents behind Tab 1-A in notebook of documents, 13 pages
2. R J Blackley First Floor Schematic
3. January 24, 2014 Written Warning
4. Email and Coaching Memo RE: Gas Tank Policy February 2014
5. March 2014: Fresh Air Break Incident with Supporting Emails and Training Documents
6. April 3, 2014: Time and Attendance Violation Reminder
7. March 1, 2014: Documentation of coaching efforts with Mr. Onyenekwe regarding vital sign policy and other vital sign sheets
8. June 6, 2014, August 26, 2014, October 18, 2014: Notes to file re: Cellphone Use on Ward; RJ Blackley Policy AD111 Dress Code Policy
9. 2014-2015: Work Performance Plan
10. December 3, 2014: Note to file re: Escorting Patients; RJ Blackley Policy NU-101, Patient Care Assignment and Supervision
11. January 16, 2015: Notes to file re: Escorting Patients; RJ Blackley Policy CP-128 Levels of Observation
12. 2014/2015: Mid cycle evaluation
13. February 23, 2015: Written Warning
14. April 30, 2015: Suspension without Pay
15. October 31, 2014: Handwritten note signed by Sharon Boyd
16. 25 NCAC 01I.2302 Dismissal For Unsatisfactory Performance of Duties
17. 25 NCAC 01J.0604 Just Cause for Disciplinary Action
18. 25 NCAC 01I.2304 Dismissal for Personal Conduct

**WITNESSES**

For Petitioner: Jonathan S. Onyenekwe

For Respondent: Priscilla Wilson, John Thompson, Kathy Maas

## **FINDINGS OF FACT**

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits admitted into evidence, having weighed all the evidence and assessed the credibility of the witnesses, including but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, and having judged the witnesses' testimony for reasonableness and consistency with all other believable evidence in the case, the undersigned finds:

### **I. Background**

1. On August 24, 2015, Petitioner was a career state employee at RJ Blackley ADATC having been employed with RJ Blackley ADATC as a Healthcare Technician I for nine years.

2. In July and August of 2015, Kathy Maas, ("Maas") (now retired), was the Director of Nursing of RJ Blackley. Maas was also the acting 1<sup>st</sup> shift supervisor, and supervised Petitioner both directly, as the acting supervisor, and indirectly, as the Director of Nursing.

3. On August 19, 2015, Maas placed Petitioner on Investigatory Leave With Pay, and issued Petitioner a Notice to attend a Pre-Disciplinary Conference on August 20, 2015. In such Notice of Investigatory Placement with Pay, Maas noted that Petitioner was being placed on leave with pay while an investigation was conducted into incidents of unacceptable personal conduct and/or "unsatisfactory job performance resulting from an allegation of patient exploitation." (Resp. Exh. 1) On August 20, 2015, Maas conducted a pre-disciplinary conference with Petitioner.

4. In the August 19, 2015 Notice, Maas erroneously stated that she was investigating Petitioner for patient exploitation. There was absolutely no evidence before Maas, or before the undersigned that Petitioner had exploited any patient. Maas did not investigate Petitioner for patient exploitation, and did not find that Petitioner exploited any patient in the August 24, 2015 dismissal letter. Maas included the patient exploitation language in the August 19, 2015 Notice by mistake.

5. On August 24, 2015, Director of Nursing Maas, as the decision-maker, separated Petitioner from employment for engaging in unacceptable personal conduct and unsatisfactory job performance. (Resp. Exh. 1B)

a. Specifically, Maas determined Petitioner engaged in unacceptable personal conduct on July 2, 2015 when he failed to follow "The Razor Protocol", a known work rule, for distributing razors to patients, by initialing entries on the razor assignment sheet that he didn't make, and dispensing and collecting razors when he wasn't assigned that task.

b. Additionally, Maas found that Petitioner engaged in unacceptable personal conduct on July 6, 2015 when he violated Respondent's Patient Care Assignment

and Staffing for Nursing Services Policy (NU101) by leaving a female staff member alone with two male patients. (Resp. Exh. 1B) Maas noted

that Petitioner's "failure to follow correct procedures and work rules jeopardizes our ability to ensure safe, quality patient care." (Resp. Exh. 1B, p. 3)

c. Since Petitioner had three active disciplinary actions at that time, Maas found that Petitioner's:

continued pattern of repeatedly failing to follow policy and procedures in spite of coaching and mentoring indicates inability or unwillingness to follow policy and procedure and to satisfactorily meet the work performance expectations of your position, but most importantly, jeopardizes the care of our patients.

(Resp. Exh. 1B, p. 3)

6. Petitioner appealed his dismissal through Respondent's internal grievance process. On December 30, 2015, Respondent's hearing officer conducted a hearing on Petitioner's appeal of his dismissal. On January 11, 2016, Respondent's hearing officer issued her decision, and upheld Respondent's decision to dismiss Petitioner from employment for engaging in unacceptable personal conduct, and unsatisfactory job performance. On January 19, 2016, Respondent's Deputy Secretary of Behavioral Health/DD/SAS upheld the dismissal of Petitioner from employment.

7. On February 8, 2016, Petitioner filed a petition for contested case with the Office of Administrative Hearings appealing his dismissal from employment, effective August 24, 2015, for engaging in unacceptable personal conduct and unsatisfactory job performance. Petitioner alleged that Respondent discharged him from employment without just cause, and that such discharge constituted discrimination against Petitioner based on his race, and national origin.

8. On April 13, 2016, the undersigned granted Respondent's Motion to Dismiss this case against individual Kathy Maas, as a named Respondent, because the Administrative Procedures Act, Chapter 150B of the North Carolina General Statutes, only authorizes a person aggrieved to file a petition against a state agency for a dispute between that person and a state agency. Chapter 150B does not authorize a person aggrieved to file a petition against an individual. See N.C.G.S. 150B-2 and -23.

9. At the beginning of the May 25, 2016 contested case hearing, the undersigned denied Respondent's Motion to Dismiss Petitioner's claim of discrimination.

## **II. Unsatisfactory Job Performance**

10. "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 NCAC 01J. .0614.

11. After Petitioner's pre-disciplinary conference in August 2015, Ms. Maas reviewed Petitioner's personnel file in making the determination to terminate Petitioner from employment.

12. Petitioner's records showed that Petitioner's prior supervisor, Sharon Boyd, issued Petitioner's first written warning on January 24, 2014 for violating the Search and Seizure Policy CP105, Patient Personal Property Inventory and Secured Storage Policy CP159, and Patient Use of Ward Washers and Dryers procedures. (Resp. Exh. 3) In that warning, Boyd determined that Petitioner violated the Search and Seizure policy by failing to ensure the safety and security of patients and staff by allowing a patient access to a cigarette lighter. Boyd found that Petitioner violated the Patient Personal Inventory policy by failing to inventory a patient's belongings appropriately, and securing the items in storage until discharge. Boyd found that Petitioner violated the Washer and Dryer Procedures by putting a patient's clothes in the washing machine, when the procedures specifically prohibited staff from laundering patient's clothes. (Resp. Exh. 3)

13. On February 26, 2014, Petitioner received a documented coaching from his supervisor, Sharon Boyd, for failing to comply with the Gas Tank Policy that required staff to keep 1/2 tank of gas in the van. (Resp. Exh. 4)

14. On March 20, 2014, Petitioner's supervisor, Sharon Boyd, verbally reminded Petitioner of the "fresh air break" rule, after Petitioner was observed failing to comply with the rule. Under that rule, patients are permitted only one "fresh air break" a day in the separate courtyard. (Resp. Exh. 5)

15. On April 3, 2014, Kathy Maas reminded Petitioner that he currently had three time and attendance episodes in a rolling 90-day period, and that a fourth (4) episode would result in a written warning. (Resp. Exh. 6)

16. In April 2014, Petitioner received three documented coaching efforts regarding compliance with specific policy and procedure. (Resp. Exh. 7)

17. On June 6, 2014, August 26, 2014, and October 18, 2014, Maas and Cynthia Tinkham, RNS (Nurse Supervisor) observed Petitioner violating the Dress Code Policy by having his personal cell phone in the patient care areas. Respondent's managers did not issue a formal written warning to Petitioner for either of these violations, but instead conducted coaching efforts with Petitioner. (Resp. Exh. 8)

18. In December 2014, Petitioner received coaching efforts by his supervisor Sharon Boyd for failing to escort patients properly and in compliance with Policy NU101 for Patient Care Assignment and Supervision. Petitioner was observed escorting eight patients alone into the Atrium from the elevator. (Resp. Exh. 10)

19. In January 2015, Petitioner's supervisor, Ms. Boyd, observed another Health Care Technician in the Atrium with his 1:1 patient, along with two patients. Petitioner had left those two patients in the Atrium while he took other patients upstairs. Boyd conducted a coaching session with Petitioner for violating Policy CP128 for Levels of Observation of patients by leaving two patients in the Atrium. (Resp. Exhs. 11, 12)

20. On February 17, 2015, Petitioner was absent for work after being advised, in advance, that the Adverse Weather Procedure had been implemented, and that Petitioner, as essential staff, was required to report to work (Resp. Exh. 13 (A-D)). On February 23, 2015, Kathy Maas issued Petitioner a second written warning for personal conduct for excessive absenteeism in violation of the Time and Attendance Policy, the Adverse Weather Policy, and the Staffing for Nursing Services Policy on February 17, 2015. As part of a corrective action plan, Respondent advised Petitioner that he was not to incur any unexcused absences or tardies for the remainder of the work cycle through June 30, 2015. Petitioner was tardy for work on April 12, 2015 by arriving at work at 7:12 am when his shift began at 7:00 am.

21. Petitioner signed and received the February 23, 2015 written warning on February 23, 2015. However, on February 24, 2015, Petitioner arrived at work at 7:10 am, ten minutes after his shift began at 7:00 am. Petitioner also received a Needs Improvement on his February 2015 Performance Plan for Time and Attendance.

22. On April 30, 2015, Ms. Maas issued Petitioner a third disciplinary action, and placed Petitioner on Suspension Without Pay for violation of the Time and Attendance Policy by (1) being absent one time, and tardy seven times from January 21, 2015 through April 12, 2015, and (2) violating the corrective action plan in the February 23, 2015 written warning, which provided that Petitioner not have any further unexcused absences or tardies for the rest of his work cycle through June 30, 2015. (Resp. Exh. 14)

23. The documentation showed that Maas and her staff were actively involved in coaching and informing Petitioner that his performance needed to improve. (Resp. Exh.: 3 - 14,17) Petitioner's supervisors, including Maas, tried to help Petitioner understand the need for the facility's policies by explaining to Petitioner that the policies are there to protect everyone at the facility. (T p. 66) Maas saw "a continued pattern of Jonathan not being able to follow the rules and the polices and the protocols" despite the supervisors actively coaching Petitioner. Specifically, Petitioner's biggest problems were monitoring patients, leaving patients unattended, and not following the Razor Protocol (T. p. 48).

24. Maas utilized the disciplinary process to help people understand where their performance and their conduct fall short, and was specific as to where it needed to be to reach an acceptable level. (T p. 66)

### **III. Unacceptable Personal Conduct**

**A. July 2, 2015 Violation of the Razor Protocol**

25. 25 NCAC 1J .0614(8) defines unacceptable personal conduct as conduct for which no reasonable person should expect to receive prior warning, conduct unbecoming a State employee that is detrimental to State service, and the willful violation of known or written work rules.

26. In this case, Director of Nursing Kathy Maas dismissed Petitioner for the unacceptable personal conduct of violating Respondent's known work rules of (1) the Nursing Service Policy Nu101 and (2) the Razor Protocol. (Resp. Exh. 1)

27. Kathy Maas routinely reviewed the razor sheets for all wards, including Ward 233. On July 2, 2015, Petitioner was assigned to first shift, Ward 233. First shift is 7:30 am until 3:30 pm, but staff is required to report by 7:00 am. Specifically, Maas, as 1st shift Charge Nurse, assigned the duties for that shift. Maas assigned Petitioner to the Refrigerator Key and the Shift Change Rounds for July 2, 2015. Maas assigned Health Care Technician II Priscilla Wilson assigned the Razor Count, Dispense and Collection for July 2, 2015.

28. After reviewing the razor sheet for Ward 233 for July 2, 2015, Maas discovered that the razor sheet appeared to have been signed by Petitioner. Someone had noted on the razor sheet that a razor was distributed to patient GD at 0850 am, and returned at 0800 am. (Resp. Exh. 1; T pp. 49-51) Maas found this problematic, as razors must be distributed by 07:45 am, and returned by 08:45 am. Furthermore, the razor sheet indicated that the razor had been checked out after it had been returned. (Resp. Exh. 1; T p. 50)

29. Maas contacted Petitioner to discuss the importance of accurate documentation. Petitioner admitted that he initialed the razor sheet as having distributed a razor to patient GD on July 2, 2015. Maas learned that Petitioner was not assigned to distribute razors, but that employee Priscilla Wilson ("Wilson") was assigned to distribute the razors on July 2, 2015. (Resp. Exh. 1A) Maas asked Petitioner why he had signed his name that he had counted and dispensed razors even though he was not assigned to do so. Petitioner told her that they needed to use teamwork on the ward, and that the patient had asked for a razor and was waiting. (T p. 53)

30. Healthcare Technicians Priscilla Wilson and John Thomson ("Thomson") at RJ Blackley testified at the contested case hearing. Wilson explained that under the Razor Protocol, one particular staff member is assigned to count the razors at the beginning of each shift. That assigned staff person counts the razor at the beginning and at the end of the shift, and monitors how long a patient possesses a razor.

31. Both Wilson and Thomson explained that an employee is only permitted to distribute razors if they are assigned to do so. If the employee who is assigned to distribute razors must leave the ward during the assigned razor distribution time period, the Charge Nurse must

reallocate the duty of distributing razors to a new employee and under no circumstances may an employee distribute razors until assigned. (Thompson testimony)

32. When Thomson is assigned to razor duty, he counts the razors, issues them to a patient, and advises the patient he has 15 minutes to use and return the razor. If the patient can't return the razor in the 15 minutes, then Thomson locates the patient, waits for the razor, and collects the razor. He also noted in the patient's chart that he was late returning the razor, why he was late returning the razor, and that Thomson collected the razor. (T. p. 36)

33. Maas, Wilson, and Thomson all indicated that employees are trained and aware of the Razor Protocol, and understand the severity of adhering to its rules.

34. Although the Razor Protocol is not an RJ Blackley policy, it is a known work rule. Furthermore, the Razor Protocol is further explained on the backside of the razor assignment sheet. (Resp. Exh. 1A)

35. RJ Blackley is a psychiatric hospital and adhering to the Razor Protocol is necessary to ensure the safety of patients and staff. Deviating from the Razor Protocol could result in dangerous, even deadly events, and therefore, adhering to the Razor Protocol is very important. John Thompson stressed that razors are very, very important in the psych ward where they work. "Issuing them is probably more important than anything we ever do on that ward." (T. p. 36)

36. On July 2, 2015, Petitioner failed to follow the Razor Protocol when he distributed razors to patient GD, because he was not assigned to do so. Petitioner created a dangerous work environment by his failure to comply with the Razor Protocol.

37. The necessity and importance of complying with the Razor Protocol outweighs any benefits of assisting a fellow coworker as a team member. Maas' assertion that it is a serious and potentially dangerous breach in protocol for an employee who is not assigned to distribute razors to do so was persuasive.

### **B. July 6, 2015 Tracking Incident**

38. On July 6, 2016, Kathy Maas walked through two sets of locked doors from the Nursing Mailroom to the Treatment Tracking area. (Resp. Exh. 2) (T p. 57) As Maas entered the corridor of the Tracking Area, she observed Petitioner walking through a separate set of locked doors that were leading to, among other places, the Staff Break Room. (Resp. Exh. 2, T p. 59) Petitioner was carrying a few personal items.

39. At that time, Petitioner was assigned to a treatment team, and was assigned to the observation room, indicated as Office 1721 on the RJ Blackley schematic, to monitor a treatment team that was working in Treatment Track room 3. (Resp. Exh. 2) The observation room was adjacent to the Track room 2. The treatment team consisted of one female staff member and two



male patients. (T p. 60) From the observation room, Petitioner could see into the treatment room while not being in the room during the treatment. (Resp. Exh. 2, T. p. 59)

40. Upon seeing Petitioner enter the corridor, Maas asked Petitioner the location of the patients. Petitioner told Maas that they were located in Treatment Room 3, (T p 61) and indicated that he was only gone for a minute or a few seconds. At the hearing, Petitioner acknowledged that he was not in the observation room when he encountered Maas, but stated that he had not left the building, even though his shift was coming to an end shortly.

41. It is impossible for Petitioner to monitor the patients and conduct his assigned duties if he left the treatment area.

42. RJ Blackley Policy NU101 titled, "Patient Care Assignment and Supervision" indicates that:

G. Many of the RJ Blackley Center patients have experienced previous abuse/trauma. In view of this, all staff must be aware of their behavior when relating to patients. When making patient assignments, the RN must ensure that assignments are made so that the following expectations are followed:

1. Staff members are not allowed to be alone in a ward, room or area where patients of the opposite gender are present without a staff member of the opposite present.

(Resp. Exh. 1)

43. In this case, on July 6, 2015, Petitioner was assigned to observe a treatment room session in accordance with Respondent's Policy NU101. That day, Petitioner violated RJ Blackley Policy NU101 when he chose to leave his assigned area, and when he ceased to observe patients. Petitioner willingly left his assigned duty station, and created a potentially dangerous environment for patients and staff.

44. Kathy Maas believed that the disciplinary process is in place to help employees understand where their performance and their conduct fall short, and how to improve their performance to meet acceptable levels. Ms. Maas had personally addressed the importance of following procedures, protocol, and rules with Petitioner several times. Staff members routinely attempted to make Petitioner understand the importance of hospital policies, and that they are intended to protect patients and staff. Despite multiple attempts by hospital staff to coach and mentor Petitioner, Petitioner engaged in a continued pattern of failing to follow policies and procedures.

45. The close proximity in time between the Razor Protocol incident and the Tracking Team incident is evidence that Petitioner actively chose not to follow rules and protocol at RJ Blackley. Petitioner committed two very serious violations, both involving patient and staff safety,

and both after multiple attempts by staff to have Petitioner understand the importance of safety. Petitioner did not commit a misstep or accident, but acted willfully and deliberately.

46. While Petitioner alleged that no other supervisors wrote him up for disciplinary action, the preponderance of the evidence at hearing established that Petitioner's prior supervisor, Sharon Boyd, issued Petitioner's first written warning on January 24, 2014, and conducted several coaching sessions with Petitioner about his conduct, and failure to follow policies. Petitioner claimed that Maas granted leave for a new employee, but denied his request for leave after his mother died. Yet, the documentation presented at hearing showed that although Respondent denied Petitioner's request for 60 days leave, after Petitioner's mother died, Respondent granted Petitioner 30 days of leave.

47. A preponderance of the evidence at hearing proved that Respondent had just cause to terminate Petitioner from employment for unacceptable job performance and unacceptable personal conduct.

#### **IV. Discrimination Allegation Based on Race and National Origin**

48. In his petition, Petitioner alleged that Respondent discriminated against him, based upon his race and national origin, by terminating Petitioner from employment. In his petition, Petitioner wrote that he had been harmed by “accusation of patient exploitation, unsatisfactory job performance, conduct unbecoming that is discrimination and prejudices.” (Petition) He specifically alleged that Kathy Maas exhibited hostility towards him during work, and targeted and disciplined him without investigation, and without evidence of wrongdoing.

49. At hearing, Kathy Maas explained that Respondent did not consider Petitioner's race, or national origin when deciding to separate Petitioner from employment.

50. Petitioner failed to present sufficient evidence at hearing to substantiate his claim that Respondent discriminated against him, based on his race and national origin, by terminating him from employment. Petitioner failed to present any written documentation, witness testimony, or any other documentation that corroborated his claim of discrimination.

51. By failing to present sufficient evidence at hearing that Respondent terminated Petitioner's employment based on Petitioner's race or national origin, Petitioner failed to meet his burden of producing evidence to meet a prima facie case for discrimination.

#### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the parties and this contested case, under N.C. Gen. Stat. § 150B-1 et seq. and 26 NCAC 03 .0100 et seq. to hear this contested case appeal, and issue a Final Agency Decision. There is no question as to misjoinder or nonjoinder, and the parties received proper notice of the hearing 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.

**I. Respondent had Just Cause to Separate Petitioner from Employment**

3. At the time of his termination from employment, Petitioner was a career state employee, and as such, was entitled to the protections of the North Carolina State Personnel Act, Chapter 126 of the North Carolina General Statutes.

4. Pursuant to N.C. Gen. Stat. § 126-35(d)(2005) and N.C. Gen. Stat. § 150B-29(a), Respondent has the burden of proving by a preponderance of the evidence that it had just cause to dismiss Petitioner for unacceptable personal conduct and unsatisfactory job performance.

5. N.C.G.S. § 126-35(a) provides that “No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” In a career State employee’s appeal of a disciplinary action, the department or agency employer bears the burden of proving that “just cause” existed for the disciplinary action. N.C.G.S. § 126-35(d) (2007).

6. Although N.C. Gen. Stat. §126-35(a) does not define “just cause,” the words are to be accorded their ordinary meaning. Amanini v. Dep’t of Human Resources, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining “just cause” as, among other things, good or adequate reason).

7. *N.C. D.E.N.R. v. Clifton Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004) states that the fundamental question in determining just cause is whether the disciplinary action taken was just. That Court stated, “Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” Our Supreme Court has said that there is no bright line test to determine “just cause” as it depends upon the specific facts and circumstances in each case. Furthermore, “not every violation of law gives rise to ‘just cause’ for employee discipline.” *Id.*

8. In *Warren v. NC Dept. of Crime Control & Public Safety*, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012), the Court of Appeals crystallized the *Carroll* analysis as follows:

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. Just cause must be determined based ‘upon an examination of the facts and circumstances of each individual case.’

*Warren v. N.C. Dep't of Crime Control & Pub. Safety*, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012).

9. 25 NCAC 1J .0604(b) provides that an employer may discipline or dismiss an employee for just cause based upon (1) unacceptable personal conduct, including grossly inefficient job performance, or (2) unsatisfactory job performance.

**A. Unsatisfactory Job Performance**

10. Pursuant to 25 NCAC 01J .0614(8), 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.

11. 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 the employee that failure to make the required performance improvements may result in dismissal. 25 NCAC 01J. 605(b).

12. 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).

13. At the time of his dismissal, Petitioner had three active disciplinary actions. Petitioner received his first written warning on January 24, 2014. Petitioner received his second written warning on February 23, 2015. Petitioner received his third disciplinary action on April 30 2015, when he was placed on a three-day Suspension without pay.

14. During the course of his employment, management attempted to improve Petitioner's performance by conducting multiple documented counseling sessions and multiple coaching efforts from staff. Despite management's best efforts, Petitioner continued to have performance issues.

15. Kathy Maas considered Petitioner's actions, the severity of the violations, and Petitioner's employment history in making her determination whether to separate Petitioner from employment for unsatisfactory job performance.

16. Despite multiple attempts of coaching and mentoring, Petitioner continued to display a pattern in failing to follow policies and procedures at RJ Blackley.

17. Upon consideration of the preponderance of the evidence presented at hearing, and the official record in this case, the undersigned determines that Respondent had just cause to dismiss Petitioner from employment for unsatisfactory job performance.

**B. Unacceptable Personal Conduct**

18. Pursuant to 25 N.C.A.C. 1J .0608(a) (2005), an employer may dismiss an employee without warning or prior disciplinary action for a current incident of unacceptable personal conduct.

19. 25 NCAC 1J.0614(I) defines unacceptable personal conduct to include:

- (1) conduct for which no reasonable person should expect to receive prior warning; or . . .
- (4) the willful violation of known or written work rules; or
- (5) conduct unbecoming a state employee that is detrimental to state service.

20. The Razor Protocol at RJ Blackley was a known work rule.

21. RJ Blackley Policy NO NU101 was a written work rule.

22. Both policies were in effect in July 2015, and were to be followed by Petitioner during the course and scope of his employment.

23. The preponderance of the evidence at hearing showed that Petitioner was aware of both the Razor Protocol and Policy NU101.

24. A preponderance of the evidence at hearing established that Petitioner willfully and knowingly violated the Razor Protocol when he chose to distribute a razor to patient GD on July 2, 2015 even though Petitioner was not assigned to distribute razors.

25. The preponderance of the evidence at hearing showed that Petitioner willfully and knowingly violated Policy NU101 when he chose to leave the patient observation area, thus leaving a female member of staff alone with two male patients on July 6, 2015.

26. The preponderance of the evidence at hearing proved that both the Razor Protocol and Policy NU101 were in place to ensure the safety of patients and staff at RJ Blackley. A failure to adhere to either policy could result in grave consequences for patients and staff.

27. Petitioner's failure to comply with the Razor Protocol and Policy NU101 constitute very serious violations. The violations were not missteps or mistakes, but deliberate actions taken by Petitioner. Petitioner's failures constituted violation of known or written work rules, and constituted violations in which no employee should expect to receive a prior written warning before being dismissed.

28. Based on the foregoing, allowing Petitioner to continue to be employed in direct patient care areas would be very unsafe, and would put patients and staff at risk.

29. A willful violation of known or written work rules occurs when an employee "willfully takes action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule." *Teague v. N.C. Dept. of Correction*, 177 N.C. App. 215, 628 S.E.2d 395, 400 (2006), citing *Hilliard v. N.C. Dept. of Correction*, 173 N.C. App. 594, 620 S.E.2d 14, 17 (2005).

30. Upon consideration of the preponderance of the evidence presented at hearing, and the official record in this case, the undersigned determines that Respondent had just cause to dismiss Petitioner from employment on August 24, 2015 for engaging in unacceptable personal conduct.

### **C. Respondent did not Discriminate Against Petitioner**

31. Petitioner has the burden of proving that Respondent discriminated against Petitioner when it separated Petitioner from employment. N.C.G.S. § 126-34.02(d)(2013).

32. A State employee may bring a case before the OAH on the basis of discrimination. N.C.G.S. § 126-34.02(b)(1)(2013).

33. The courts of North Carolina look to decisions of the courts of the United States for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases. The ultimate question in a discrimination case is whether the plaintiff was the victim of intentional discrimination. *North Carolina Department of Correction v. Gibson*, 308 N.C. 131, 136-47, 301 S.E.2d 78, 82-88 (1983).

34. The *McDonnell Douglas* scheme requires that Plaintiff prove, by a preponderance of the evidence, a *prima facie* case of discrimination. *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420, 429 (4th Cir. 2000). To prove his *prima facie* case, Plaintiff must establish the following four basic elements:

- (1) he is a member of a protected class;
- (2) he was qualified for his job and his job performance was satisfactory;
- (3) he was fired; and
- (4) other employees who are not members of the protected class were retained under apparently similar circumstances.

*Bryant v. Bell Atlantic Maryland, Inc.*, 288 F.3d 124,133, 133 n.7 (4th Cir. 2002); *Karpel v. Inova Health Sys. Serv.*, 134 F.3d 1222, 1228 (4th Cir. 1998). See *Gibson*, 308 N.C. at 137, 301 S.E.2d at 82-83; *Alvarado v. Bd. of Trustees of Montgomery College*, 928 F.2d 118, 121 (4th Cir. 1991); *Enoch v. Alamance Co. Dep't of Soc. Servs.*, 164 N.C. App. 233, 242, 595 S.E.2d 744, 752 (2004).

35. If Petitioner establishes a *prima facie* case, Respondent must respond with evidence that it acted with a legitimate, nondiscriminatory purpose. *Stokes*, 206 F.3d at 429. If Respondent

meets this burden of production, the presumption of discrimination created by the *prima facie* case vanishes, requiring Petitioner to prove that Respondent's proffered reason is a pretext for discrimination to recover. *Id.*

36. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against an applicant remains at all time with the applicant. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S.133, 143, 147 L.Ed. 2d 105, 117 (2000); see also *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83.

37. Petitioner proved the first prong of discrimination that he is a member of a protected class in that he is a black male, but failed to prove what is his national origin. Petitioner failed to meet the second element in establishing his *prima facie* case, in that he failed to show that his job performance was satisfactory. He also presented no evidence to the 4<sup>th</sup> prong of the *Bryant* test, in that he failed to present any evidence that other members not in a protected class were retained under apparently similar circumstances.

38. *Arguendo*, had Petitioner established a *prima facie* case for discrimination, Respondent presented a legitimate, non-discriminatory reason for his termination, that Petitioner was separated from employment with just cause due to unacceptable job performance and unacceptable personal conduct.

39. Petitioner presented no evidence that Respondent's stated reason for separation was pretextual.

40. Petitioner failed to prove by a preponderance of the evidence that Respondent discriminated against him by dismissing him from employment.

### **FINAL DECISION**

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge hereby **AFFIRMS** Respondent's dismissal of Petitioner for just cause, and hereby **DISMISSES** Petitioner's claim of discrimination.

### **NOTICE**

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

This 5<sup>th</sup> day of August, 2016

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Melissa Owens Lassiter  
Administrative Law Judge