

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 OSP 04271

<p>Deraunda Hyman Petitioner,</p> <p>v.</p> <p>Disability Determination Services DHHS Respondent.</p>	<p>FINAL DECISION</p>
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THIS CONTESTED CASE came on for hearing before the Honorable Karlene S. Turrentine, Administrative Law Judge, on January 31, 2022, at the North Carolina Office of Administrative Hearings in Wake County, North Carolina, pursuant to N.C. Gen. Stat. § 150B-23 and Petitioner's contested case petition appealing Respondent's discharge for just case pursuant to N.C. Gen. Stat. § 126-34.02 and § 126-35.

APPEARANCES

For Petitioner: Petitioner Deraunda Hyman, *pro se*

For Respondent: Joseph E. Elder
Special Deputy Attorney General

WITNESSES FOR RESPONDENT

Stefanie Tharps, Case Processing Supervisor for Unit 14, NC Disability Determination Services
Mary Kliwer, Case Consultant for Unit 14, NC Disability Determination Services
Stephanie Sanders, Deputy Director of Operations (manages 31 case processing units including Unit 14), NC Disability Determination Services

WITNESSES FOR PETITIONER

Deraunda Hyman, Disability Analyst I, Petitioner

EXHIBITS

For Respondent:

EXHIBIT NO.	RESPONDENT'S EXHIBITS (RX) ADMITTED WITHOUT OBJECTION
1	D. Hyman Dismissal Notice Signed 8-2020
2	Position Description
3	Performance Evaluation 2018-2019
4	Performance Plan for 2019-2020
5	Interim Review 2019-2020
8	Weekly Production Report June 2020
9	Production Reports (quarterly)
11	DDS Coaching Goals
12	Job Aide for Employee Performance
13	Discipline Policy Process for Employee Performance Concerns
14	Documented Counseling 11-26-2019
15	Written Warning 4-1-2020
16	Written Warning 6-11-2020
17	Notice of Pre-Disciplinary Conference 8-13-2020
26	Email from DDS Director re DDS Scoop April-ish sent 5-1-2019
27	Email re Changes to 4th Quarter Statistics 6-26-2020
28	Email 5-30-2019 re Lapsed Development and Cases over 360 Days – Updates to processes
32	Email 7-11-2019 re Feedback Conversation follow up
37	Email 9-6-2019 re Feedback Conversation
38	Email 9-9-2019 re Feedback Conversation
39	Email 10-8-2019 re Coaching Session
41	Email 1-7-2020 re Feedback Conversation-30 Day Performance Review
46	Email 3-9-2020 re Weekly Case Review
48	Email 3-11-2020 re Review Needed
51	Emails 5-1-2020 re Operations Aged Case Plan
52	Email 5-4-2020 re Cases 250+ days old
53	Emails re Weekly Stats 5-11-2020
56	Emails 5-20-2020 re Cases 180+

Exhibits For Petitioner: NONE

ISSUES

1. Did Respondent discharge Petitioner for unsatisfactory job performance without just cause on August 18, 2020, in violation of N.C. Gen. Stat. § 126-35(a).
2. Did Respondent unlawfully discriminate against Petitioner on the basis of her age or race?
3. If the answer to either issue #1 or #2 is affirmative, to what remedy is Petitioner entitled?

STANDARD OF REVIEW

Petitioner's complaint alleges that she was terminated for unsatisfactory job performance without just cause. In personnel cases, pursuant to N.C.G.S. § 150B-25.1(c), the State agency bears the burden of showing by a preponderance (or the greater weight) of the evidence that Petitioner was terminated for just cause. Thus, in the present case, Respondent had the burden of proof to demonstrate by a preponderance of the evidence that it had just cause to terminate the Petitioner for unsatisfactory job performance on or about August 18, 2020.

APPLICABLE STATUTES AND REGULATIONS

N.C. Gen. Stat. § 150B *et seq.*
N.C. Gen. Stat. §§ 126 *et seq.*
25 N.C.A.C. 1J.0600 *et seq.*

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the pleadings, all 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 the following Findings of Fact, the Undersigned weighed all the evidence and has assessed the credibility of the witnesses, taking into account the appropriate factors for judging credibility including but not limited to: a) the demeanor of each witness; b) any interest, bias, or prejudice the witness may have; c) the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; d) whether the testimony of the witness is reasonable, and; e) whether the witness' testimony is consistent with all other believable evidence in the case. The Undersigned makes the following:

FINDING OF FACTS

1. The parties stipulated that: a) Petitioner exhausted her administrative remedies prior to filing her petition for a contested case hearing in this matter and that the administrative procedures were proper; b) the filing of the Petition was timely; c) the hearing of this matter is properly before the Undersigned, the Tribunal having subject matter and personal jurisdiction; d)

they each received adequate and proper notice of the date, time, and place of hearing, and; e) that there was no objection to the Undersigned being the judge in this matter.

2. Petitioner was continuously employed as a Disability Analyst I (“DA1”) by the North Carolina Department of Health and Human Services, Division of Disability Determination Services (“DDS” or “Respondent”) from sometime in 2006 until she was terminated on August 18, 2020.

3. Respondent is a state agency within the government of North Carolina and, at all times herein relevant, has been subject to N.C.G.S. § 126-1, *et seq.*

4. Our statutes define a “career State employee” to mean, in pertinent part, “a State employee...who: (1) Is in a permanent position with a permanent appointment, and (2) Has been continuously employed by the State of North Carolina...in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months.” N.C. Gen. Stat. § 126-1.1.

5. At the time of her dismissal, Petitioner was a career State employee having served almost 15 years.

6. Petitioner timely filed her grievance and proceeded through the 2-step grievance process. Following step-2’s grievance hearing, the hearing officer upheld DDS’s decision to demote Petitioner. In the Final Agency Decision issued September 2, 2021, DDS Director Scott Sabatino upheld the decision as well. Petitioner timely appealed to the NC Office Administrative Hearings (“OAH”) from the agency’s final decision.

7. DDS reviews applications and makes medical eligibility determinations for Social Security Disability benefits and for state Medicaid Disability claims. DDS is funded primarily by the federal government’s Social Security Administration (“SSA”).

8. The NC Office of State Personnel’s Position Description Form for Petitioner’s position (Disability Analyst I) states that the primary purpose of the position is “[t]o develop medical and lay evidence, analyze and assess impairment severity, and prepare final determinations on initial level disability claims.” Resp Exh 2, p.1. Importantly, the description form further advises that

“[c]hanges in the medical field, program policy, and advances in technology continue to affect the duties of this position. Listing criteria for the major body systems are updated regularly, with emphasis on function and advances in testing. Program policy continues to increase in complexity and requires analysts to obtain more detailed descriptions of daily functioning to include quality, sustainability and independence of activities. Analysts must assess the creditability of claimants’ alleged limitations, opinions by treating sources, and determine the severity of the impairment as well as residual functional capacity. Electronic software tools allow the analyst to record critical medical, lay and vocational information, complete sequential evaluation, and provide a detailed, comprehensive narrative that is policy compliant. **Changes in software require adaptability. The ongoing changes to**

a complex federal program require a high degree of skills and abilities to function in a demanding production environment.

Id. (emphasis added).

9. In August 2018, Jacqueline Russell became the director of DDS. After evaluating the program along with other management input, she implemented a performance evaluation process purposed to assist employees with performance issues.

10. The first step of the evaluation process involved the feedback conversation where the employee had input into establishing three goals to meet. If the employee met at least two of these goals, the employee would continue in the feedback conversation process until the performance issues had been resolved.

11. If the employee did not meet at least two of the three goals, the employee would advance to a coaching session where management would implement three goals for the employee. These goals were established by management and were consistent for all employees within a job classification such as Disability Analyst I.

12. If the employee failed to meet at least two of the coaching goals, the employee would receive a documented counseling and would then be expected to meet the performance expectations set forth in the employee's annual performance evaluation plan.

13. If performance issues continued, the employee would progress through the traditional employee disciplinary process, including written warnings and to and including dismissal.

14. The Social Security Administration evaluates the DDS program and has production expectations for how long it takes claimant applications to be processed and for how many applications are processed to a determination. DDS' failure to meet these expectations could adversely impact the DDS program.

15. When applications are delayed or take a long period of time to be processed, a claimant is in limbo as to the claimant's status. Claimants cannot receive any disability benefits – even if entitled thereto—until such determination is made. Extensive wait times often cause financial hardship for the claimant that may otherwise be alleviated through receiving disability benefits.

16. At no time did Petitioner express disagreement with the evaluation process, with the goals she was expected to meet or, with the performance evaluation metrics. Further, she never voiced any disagreement with Respondent or this Tribunal about the accuracy or appropriateness of the production log statistics used to evaluate her performance.

17. Despite continued interventions and assistance by Respondent, Petitioner did not meet the expectations established in her annual performance evaluation plan for 2019-2020. Petitioner was given over a year to show improvement; however, throughout that time period, she did not meet the 70-day, 120-day or processing time metrics set forth in her performance evaluation plan. There was evidence that she did not act in a timely manner with respect to cases that could be reviewed and advanced through the determination process. As a result, Respondent recommended dismissal of Petitioner for unsatisfactory job performance.

18. On August 13, 2020, Petitioner was given a Notice of Pre-Disciplinary conference. This identified the on-going unsatisfactory performance issues that Petitioner had displayed since March 2019 and her continued failure to meet expectations from the week of June 6, 2020 through the week of July 11, 2020.

19. On August 14, 2020, a pre-disciplinary conference was held with Petitioner to review the performance issues raised in the Notice of Pre-Disciplinary Conference notice. Petitioner provided a written response to the Notice of Pre-Disciplinary Conference but did not provide any information that refuted or explained the on-going performance issues she had from March 2019 through July 2020.

20. Petitioner alleged in her response to the Notice of Pre-Disciplinary Conference that the covid-19 pandemic impacted performance, and that DDS discriminated against her.

21. During the onset of the covid-19 pandemic in March 2020, consultative examinations were halted for a period of time—a factor that affected *all* disability analysts (“DAs”). Information and instruction was provided by Respondent to analysts on how to continue moving cases forward despite not being able to schedule consultative examinations. Specific to Petitioner, her managers identified several of her cases that already had sufficient information to be written up and submitted to the medical consultant and ultimately for a determination to be made.

22. Respondent also adjusted the performance evaluation metrics for the fourth quarter to account for the impact of the Covid-19 pandemic. Management reviewed third and fourth quarter data to determine the appropriate adjusted performance metrics for Disability Analyst Is. The following adjustments were made for an analyst to receive a rating of meets expectations: the percentage of cases 70-days or older was adjusted from 45%-55% to 45%-60%; the percentage of cases 120-days or older was adjusted from 25%-35% to 25%-40%; and the processing time was adjusted from 115-135 days to 115-140 days.

23. Despite the adjustment to the performance metrics, Petitioner did not meet expectations. Petitioner’s 70-day, 120-day and processing time numbers fell outside the adjusted performance evaluation metrics each week from June 6, 2020 through July 20, 2020.

24. On August 18, 2020, Respondent hand-delivered a Dismissal Letter to Petitioner (written by Petitioner's immediate supervisor, Stefanie Tharps) specifically outlining that she was being dismissed, effective immediately, for "unsatisfactory job performance as defined in Section 7 of the State Human Resources Manual." Resp. Exh 1, p.1. The dismissal letter alleged that Petitioner did not meet performance expectations in the areas of case management and in meeting the tasks and metrics established in Petitioner's annual performance evaluation plan.

25. The dismissal letter sets out Petitioner's job description as:

"In accordance with your Disability Analyst 1.0 job description, the primary duties of your position are to manage your caseload by avoiding delays on cases and maintaining caseload management, which includes the 70-Day rate, 120-Day rate and processing time. You are expected to summarize medical data according to the Social Security Administration (SSA) and agency policies to minimize returns from consults requesting additional evidence and to complete closure forms correctly to avoid technical returns for correction. You last signed your job description on October 28, 2019."

Id.

26. Ms. Tharps has been a DDS supervisor in case processing, Unit 14 since July 2019. Prior to that, she was a Disability Analyst II ("DA2") for five (5) years and, prior to that a Disability Analyst I ("DA1") for five (5) years. She also worked as a case consultant for eight years, doing agency training and helping new trainees get on-boarded.

27. Unit 14 receives a variety of claims: initial claims, the decisions for which can be appeal such that the unit must reconsider the decisions they make on the initial claims, as well as claims from claimants who are already receiving disability benefits. For those claimants already on disability benefits, the unit must review to confirm the claimants still qualify for benefits.

28. As Petitioner's supervisor from July 2019 through the time of Petitioner's dismissal, Ms. Tharps conducted performance evaluations for Petitioner and the rest of the staff she supervised. Tharps directly reported to Stephanie Sanders for a period of time and then to Annette Valrie.

29. In overseeing the five (5) DA1s she has in her Unit (including Petitioner before she was terminated), Ms. Tharps assesses those working for her. She looks at each DA1's caseload to see how many cases they have. She tracks the number of closures the DA makes each week, how many new cases were received, how each DA is managing their caseload and, how much medical documentation has been received but is still waiting to be opened and reviewed. Caseload management includes case closures but also how long it takes an analyst to open cases, how long cases go without any action, how long consultative exams go unread and when medical evidence summaries are prepared.

30. DDS's computer system (AS400) details what is going on in an analyst's caseload—"break[ing] down into categories how much unread medical evidence there [i]s, how many...new cases...[the analyst] ha[s] received that they ha[ve] not yet opened, cases that ha[ve] been waiting for actions for 15 days or more, [and] cases that have...consultative exams...requested...[and,]" consultative exams that have been received but not read. Tp.23:8-14. This system allows DDS to see each analyst's numbers and to be able to compare them to the other analysts in the unit.

31. Typically, a DA1 receives 2-3 new cases each business day. At the time of the hearing, the cap on the number of new cases each DA1 could be assigned was 10-12 new cases per week. However, Ms. Tharps did not remember what the cap was when Petitioner was working for DDS.

32. Once the medical evidence comes in, it must be reviewed to determine whether: a) there is enough evidence with which the DA can make a decision, or; b) the claimant needs an in-house medical examination (also referred to as a consultative exam). If an examination is needed, the DA schedules the exam for the claimant and submits the file to the doctor. Once the doctor reviews the case, it comes back to the DA, it may appear that there is a vocational issue to be investigated and developed. In such case, the DA1 must call the claimant to obtain the additional information. Afterward, the case is submitted for closure.

33. If the medical information is not reviewed by the analyst in a timely manner, it can become stale and have to be required all over again.

34. To evaluate case management production, DAs are required to meet certain metrics that are established by DDS management. These metrics are the 70-day rate, the 120-day rate and processing time.

35. The 70-day rate relates to the percentage of cases in an DA's caseload that are 70 days old or older. The 120-day rate is the percentage of cases in an DA's caseload that are 120 days old or older. Processing time is the average number of days it takes for a determination to be made on a claim and the case to be closed. The metrics apply to all disability analysts.

36. The performance metrics are determined by DDS executive management. These metrics are established by reviewing data from all analysts as to how many cases are closed on average and how long cases are open. The metrics to meet expectations are lowered slightly from the averages.

37. Petitioner's unsatisfactory performance issues stem from her case production and case management. Petitioner had many aged cases and she failed to regularly close a significant number of cases. For these reasons, Petitioner did not meet expectations in the 70-day, 120-day, or processing time case metrics.

38. For her 2018-2019 performance evaluation, Petitioner's case production was rated "Does not meet expectations." DAs were required to have no more than 55% of cases 70 days or older and not more than 35% of cases 120 days or older. Petitioner's 70-day rate for the 2018-19 performance evaluation period was 61.57%. Petitioner's 120-day rate for the 2018-19 performance evaluation period was 41.31%.

39. For her 2018-2019 performance evaluation, Petitioner's case management was also rated "Does not meet expectations." DAs were required to have an average case processing time of between 65 and 85 days to meet expectations. Petitioner's processing time for the 2018-19 performance evaluation period was 163.3 days, almost double the maximum time allowed.

40. Petitioner struggled with initiating additional case development which caused delays in her case management. Petitioner did not always initiate steps to seek additional information or schedule examinations for claimants in a timely manner which caused delays in her processing time.

41. When a performance concern is recognized by a supervisor, the supervisor and employee engage in a feedback conversation. This consists of the supervisor and employee establishing goals to help the employee improve in the performance area identified as a concern. The employee has an active role in establishing these goals.

42. Petitioner was in the feedback conversation process when Ms. Tharps first began supervising Unit 14 in July 2019.

43. Stephanie Sanders is the Deputy Director of Operations at DDS and was previously an Assistant Chief of Operations. Unit 14 is one of the processing units that she oversees, including while Petitioner was employed.

44. As Ms. Tharps' supervisor, Ms. Sanders informed Ms. Tharps of Petitioner's status so that Ms. Tharps could continue the process and work with Petitioner.

45. There were two (2) other DA1s in Unit 14 also in the feedback conversation process at that same time.

46. Mary Kliever works as a case consultant with DDS. She began working as the case consultant for Unit 14 in April 2019 and remained so through the time of Petitioner's termination. A case consultant provides unit training and assists analysts with managing their cases, including identifying cases that may need work or can be moved toward closure.

47. Ms. Kliever provided information to Ms. Tharps about the goals established for Petitioner's feedback conversation.

48. When a DDS employee fails to meet two (2) of the three (3) goals established in the feedback conversation process, the employee moves to a coaching session phase. Through the coaching session, management provides established goals for the employee to help the employee improve her performance.

49. If a DDS employee fails to meet two (2) of the three (3) goals established by management in the coaching session, the employee is then returned to the normal performance evaluation goals and must meet the metrics established in the annual performance evaluation plan.

50. Petitioner initially met the goals established through the feedback conversation process; however, in September 2019, Petitioner failed to meet two of three established goals and was moved to a coaching session.

51. For the 2019-2020 performance evaluation period, DAs were required to meet the following metrics in order to receive a score of “meets expectations” in their performance reviews, specifically: cases 70 days or older should be between 45-55%; cases 120 days or older should be between 25-35%.

52. To assist Petitioner’s case production and management, Petitioner was placed on an Individual Performance Plan for the 2019-2020 year for which she was instructed:

“...that [she must] meet performance expectations to achieve annual decisional/documentation accuracy as measured by the SSA; independently manage [he]r caseload to ensure [he]r cases do not become aged and [he]r priority caseloads are handled timely; and ensure [he]r cases are processed to ensure timely service is delivered in accordance with SSA, DHHS, and Division policies and procedures. The tasks and metrics outlined in [he]r VIP support these requirements in being met. [Petitioner] signed [he]r FY 2019-2020 NCVIP Performance Plan on September 4, 2019.”

Respondent’s Exh 1, p.1-2.

53. Petitioner failed to meet the goals established in the coaching session and was then required to meet the metrics and expectations set forth in her annual performance evaluation plan.

54. Ms. Kliewer also attempted to assist Petitioner. She often would identify cases that had medical evidence ready to be reviewed or consultative examinations that could be written up to move a case toward closure.

55. In August 2019, to assist Petitioner and give her opportunity to “catch up” and get her caseload properly managed, Petitioner was assigned no new cases for an entire month. During that month, Petitioner also was allowed (and paid) to work overtime to work on her caseload. Even more, management granted and other analysts worked overtime to assist Petitioner in working on

her caseload. This was all to no avail. Petitioner still failed to meet the required metrics and timelines for her case production and case management.

56. On November 26, 2019, Petitioner received a documented counseling for unsatisfactory job performance. Petitioner failed to meet the 70-day, 120-day and processing time requirements established in her performance evaluation plan. Tharps conducted regular reviews of Petitioner's 70-day, 120-day and processing time metrics. At no time from May 2019 until the documented counseling was issued, did Petitioner meet the 70-day, 120-day or processing time metrics.

57. Ms. Tharps received weekly production reports which showed the number of cases closed as well as the percentage of cases 70 days or older, the percentage of cases 120 days or older and the average processing time. Ms. Tharps reviewed this weekly report for each of her analysts.

58. In addition to reviewing the production reports, Ms. Tharps would review the AS400 system for any changes in caseload, medical evidence reviewed, outstanding consultative examination reports and the number of cases with no action. These are the same categories that all analysts are expected to use in managing their caseload.

59. Tharps met with Petitioner regularly to review her caseload and progress. She made suggestions of ways Petitioner could improve her case metrics and close more cases. This included recommending that Petitioner close a variety of cases of different ages.

60. However, Petitioner testified that she "already knew based on AS400 what categories [she] needed to work with to –which were priorities, [but she] could only do so many per day." Tp.195:12-23.

61. On March 11, 2020, Ms. Tharps provided Petitioner an email with a list of Petitioner's cases that had consultative exams that had not been reviewed and needed summarizing. The consultative exams were becoming aged to the point that they would no longer be useful. This would result in the need to redevelop the case, including additional consultative examinations. Ms. Tharps requested that Petitioner take action on the cases identified.

62. Consultative examinations are often the last piece of information needed to advance a case to a determination. Consultative examinations that are six months old are at risk of no longer being useful. This could result in the need for additional exams which increases the cost to the SSA and further delays a decision on a claimant's disability application.

63. On April 1, 2020, Petitioner was issued a written warning for unsatisfactory job performance. The written warning addressed December 2019 through March 2020. During this

time period, the interim report covering the first half of the performance evaluation cycle was issued, from June 30, 2019 through December 27, 2019.

64. Ms. Tharps reviewed the interim report, the weekly reports and the third quarter report for Petitioner's 70-day, 120-day and processing time metrics. On the interim production report, Petitioner had 65.3 percent of her cases 70 days or older, 47.32 percent of cases 120 days or older and a processing time of 182.6. None of these metrics were in the range for meeting expectations on Petitioner's performance evaluation plan.

65. Ms. Tharps identified a number of cases that were not being developed in a timely manner. Medical evidence was not consistently being reviewed and Petitioner failed to move her cases to the next step in the process, whether ordering additional evidence or scheduling exams for claimants. Petitioner's caseload showed significant delays in development.

66. In May 2020, a DDS-wide initiative to address cases 250 days or older was undertaken. All cases that were *at least* 250 days old were reassigned to a special unit which was solely established to handle these older cases. Petitioner had 36 cases in this category—which was the majority of these cases existing in Unit 14. All 36 cases were reassigned from Petitioner to the special unit. Still, Petitioner's statistics did not improve.

67. On June 11, 2020, Ms. Tharps issued a second written warning to Petitioner for unsatisfactory job performance. The written warning addressed the time period of April 2020 through May 2020. Based on audits conducted by Ms. Tharps of Petitioner's caseload in the AS400 system and the weekly production reports, Petitioner failed to meet expectations for the 70-day, 120-day and processing time metrics established in her performance evaluation plan.

68. On June 15, 2020, when Ms. Tharps audited Petitioner's caseload from July 1, 2019 through June 12, 2020, the audit revealed that: Petitioner's 70-Day rate was 62.97%, while performance metrics required ("the expectation") 45%-55%; Petitioner's 120-Day rate was 44.5%, while the expectation was 25%-35%; and, Petitioner's processing time was 172.5 days, with the expectation being 115-135 days. Respondent's Exh 1, p.2.

69. Following the June 15, 2020 audit, Ms. Tharps and Ms. Kliewer held a teleconference with Petitioner to discuss her weekly statistics and her lack of closures for the week. Petitioner had previously requested to have a "receipt free week" which was approved so that she had no cases assigned to her for a week. According to DDS' Dismissal letter, Ms. Tharps advised Petitioner of

"...the importance of using [the extra time] to [he]r advantage[and] directed [her] to look for and close as many cases as possible from [he]r caseload. As a way to find closures, [Ms. Tharps] directed [Petitioner] to 1) review Ms. Kliewer's emails that alert [he]r [to] cases with all medical evidence in file; and

2) seek out aged cases that had updated evidence in them and may be ready to close. Additionally, [Petitioner] agreed to continue focusing on reviewing three older (120-Days and older) and three younger (under 120-Days) cases a day.”

Id.

70. The fourth quarter production report covering March 28, 2020 through June 26, 2020 showed that Petitioner did not meet expectations for her 70-day, 120-day and processing time metrics established in her performance evaluation plan. For the quarter, Petitioner had a caseload with 63.59 percent of cases 70-days or older, 43.5 percent of cases 120 days or older and a processing time of 151.7 days.

71. On June 26, 2020 Shannon Goodson, Assistant Chief of Operations, sent an agency-wide email to staff announcing an adjustment of the Division’s fourth quarter statistics for the timeframe of March 28, 2020 to June 26, 2020. In the email, Ms. Goodson indicated that the adjustments were based on staff feedback, system issues, adjustment of staff to teleworking, and impact of COVID-19, specifically in relation to the challenges during the fourth quarter with inability of staff to schedule Consultative Exams (CEs) for claimants. Ms. Goodson described that the average of analysts was used to determine the revised metrics in place for Quarter 4 as follows:

- The processing time expectation would increase from 115-135 days to 115-170 days.
- The 70-Day Case rate expectation would increase from 45%-55% to 45%-60%.
- The 120-Day Case rate expectation would increase from 25%-35% to 25%-40%.

72. On June 29, 2020, Ms. Tharps audited Petitioner’s caseload from July 1, 2019 through June 26, 2020, which revealed that Petitioner’s 70-Day rate was 63.13%, while the expectation was 45%-55%; her 120-Day rate was 44.56%, while the expectation was 25%-35%; and her processing time was 173.1 days, with the expectation being 115-135 days. The audit indicated Petitioner’s performance was below the metrics required by her performance goals and the expectations outlined in her performance work plan.

73. Ms. Tharps reviewed the production reports for each week from June 6, 2020 through the week of July 11, 2020. Petitioner failed to meet expectations each of these weeks with respect to the 70-day, 120-day and processing time metrics established in her performance evaluation plan. Petitioner’s processing time for the timeframe of July 1, 2019 through June 19, 2020 was 172.6 days, which increased from 172.5 days from the audit data of June 15, 2020. Petitioner’s 70-Day Case Average for the timeframe of July 1, 2019 through June 19, 2020, was 63.01%, which increased from 62.97% from the audit data of June 15, 2020.

74. Ms. Tharps met regularly with Petitioner throughout her time supervising Petitioner. She frequently shared information with Petitioner about her caseload and whether she was meeting expectations. Both Ms. Tharps and Ms. Kliewer provided information to Petitioner about cases that may be able to be closed, cases that need action, and cases that had medical evidence or consultative exams that could be reviewed and summarized to advance the case.

75. Petitioner's statistics reveal she failed to meet the performance expectations of the goals and organizational values of her performance plan by failing to meet the required metrics and processing times for some eighteen (18) months. Despite the many and varied interventions tried by management, Petitioner's performance did not improve but instead (in several months) actually worsened.

76. At hearing, Petitioner offered no evidence to rebut Respondent's assertions that she consistently failed to meet expectations by failing to properly manage her caseload and case production. Petitioner also failed to offer any explanation for why she did not correct the deficiencies outlined in each of her written warnings.

77. When asked whether, from the warnings, she understood that she was at risk of losing her job by not following the instructions given directly to assist her with her numbers, Petitioner stated she understood her numbers would go up if she only focused on really old cases but she thought what she was doing was best.

78. Petitioner argued that after "25 years"¹ of working in the same job, the processing time was too varied for each case and she should not be penalized if she could not speed up the process.

79. Petitioner offered no reasoning as to why she was unable to meet the requirements of her job description and the expectations of job performance. She stated she did the best she could. When asked whether she requested an accommodation of any kind, Petitioner said no—not beyond that of not being assigned new cases for a time—which request was granted more than once but which did not help her get her statistics up.

80. Although Petitioner alleged in her Petition that Respondent had discriminated against her on the basis of her race and age, Petitioner offered no evidence to support the claim and admitted she had none.

81. Petitioner also argued that she believed Respondent was dismissing black employees instead of demoting them which was different from the way Respondent treated white employees. However, Petitioner admitted she had no names of such employees and no evidence of any discriminatory treatment by Respondent.

¹ There was evidence that Petitioner had worked for Respondent for some years prior to 2006, left for some time and then returned. All the time Petitioner worked for Respondent was as a Disability Analyst I.

82. Due to Respondent's counsel's need for extensions of time, which the Undersigned granted based on extraordinary cause, this matter could not be heard and a final decision entered within the required 180-day period required pursuant to N.C.G.S. § 126-34.02(a).

BASED ON the foregoing Findings of Fact, the Undersigned makes the following

CONCLUSIONS OF LAW

1. This Tribunal has subject matter and personal jurisdiction and the parties received proper notice of the hearing. Moreover, extraordinary cause exists for the issuance of this Final Decision beyond 180 days from the commencement of this contested case, pursuant to N.C. Gen. Stat. § 126-34.02(a).

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. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011); *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012).

3. The burden of proof is on Respondent to show by a preponderance of the evidence that it had just cause to terminate Petitioner's employment for unsatisfactory job performance.

4. There are specific requirements which an employer must follow before it can be considered to have had just cause to terminate a career state employee:

“(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**.

(c) Prior to the decision to dismiss an employee, a management representative must conduct a pre-dismissal conference with the employee in accordance with the procedural requirements of this Section.

(d) An employee who is dismissed must receive written notice of the specific reasons for the dismissal, as well as notice of any applicable appeal rights.

(e) Failure to give specific written reasons for the dismissal, failure to give written notice of applicable appeal rights, or failure to conduct a predissmissal conference constitute procedural violations with remedies as provided for in 25 NCAC 1B .0432. Time limits for filing a grievance do not start until the employee receives written notice of any applicable appeal rights.”

25 NCAC 1J .0605(b) – (e) (emphasis added).

“Termination for “just cause” due to unsatisfactory job performance requires the employer to issue prior warnings before termination. *Parks v. Dept. of Human Resources*, 79 N.C.App. 125, 132, 338 S.E.2d 826, 829, *disc. review denied*, 316 N.C. 553, 344 S.E.2d 8 (1986). The agency must give the employee at least “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.” 25 NCAC 1J.0605(b) (2002).”

Leeks v. Cumberland Cnty. Mental Health Developmental Disability And Substance Abuse Facility, 154 N.C. App. 71, 77, 571 S.E.2d 684, 689 (2002).

5. In the case at bar, Petitioner was given documented counseling (which is not considered discipline) in November 2019. When her work product did not improve, pursuant to 25 NCAC 1J .0605(b), Petitioner received two (2) prior written warnings: a) the first, on April 1, 2020, which outlined her unsatisfactory job performance for the period of December 2019 through March 2020, and; b) the second, on June 11, 2020, which outlined her unsatisfactory job performance for the period of April and May 2020.

6. Both written warnings advised Petitioner that: “Failure to make improvements as indicated above or any other incidents of unacceptable personal conduct and/or unsatisfactory job performance will result in additional disciplinary action up to and including dismissal.” RX 15, p.5 and Exh 16, p.6.

7. Respondent conducted a pre-disciplinary conference with Petitioner on August 13, 2020, pursuant to 25 NCAC 1J .0605(c). *See* RX 17, p.1.

8. Petitioner was thereafter terminated due to her failure to make the required performance improvements—outlined in each of the prior written warnings—by meeting the metrics and process timelines in handling her caseload production and caseload management. In fact, Petitioner’s performance got worse over the time audited.

9. Respondent gave Petitioner a nine (9) page dismissal letter which outlined not only what she was being terminated for but also included her specific statistics, obtained from numerous weeks and months over the year and a half, which fell outside of the acceptable parameters. Attached to the dismissal letter was Respondent’s grievance policy which outlined Petitioner’s right of appeal, per 25 NCAC 1J .0605(d). *See* RX 1.

10. Therefore, having met the requirements of 25 NCAC 1J .0605, Respondent had just cause to terminate Petitioner for unsatisfactory job performance.

“A career state employee subject to the North Carolina Human Resources Act may only be ‘discharged, suspended, or demoted for disciplinary reasons’ upon a showing of ‘just cause.’ N.C. Gen. Stat. § 126-35(a) (2015). Pursuant to the Administrative Code, ‘just cause’ for the dismissal, suspension, or demotion of a career state employee may be established only on a showing of ‘unsatisfactory job

performance, including grossly inefficient job performance,’ or ‘unacceptable personal conduct.’ 25 NCAC 01J .0604 (2015).

Unsatisfactory job performance is defined as ‘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(9) (2015). The Administrative Code sets out the requirements for a career state employee to be dismissed for unsatisfactory job performance:

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.

25 NCAC 01J .0605(b) (2015).”

Cole v. N. Carolina Dep’t of Pub. Safety, 253 N.C. App. 270, 277-78, 800 S.E.2d 708, 714 (2017).
See also, *Heard-Leak v. N.C. State University Center for Urban Affairs*, 250 N.C. App. 41, 798 S.E.2d 394 (2016).

FINAL DECISION

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Respondent’s decision to discipline the Petitioner by termination is hereby **AFFIRMED**.

NOTICE OF APPEAL

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.

SO ORDERED. This the 26th day of May, 2022.



Hon. Karlene S. Turrentine
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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Petitioner

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This the 26th day of May, 2022.



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