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ISSUE

Whether Respondent had just cause to demote Petitioner, a career state employee subject to the State Personnel Act, for unsatisfactory job performance?
EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 - 12
For Respondent: 1 – 9, 11- 22, 24

WITNESSES

For Petitioner: Rhonda Whitaker, Linda Latona
For Respondent: Amanda Dorgan, Diana Younger, Kimberly Jackson, Debbie Thomas, Rhonda Whitaker

FINDINGS OF FACT

Procedural Background

1. On October 6, 2011, Respondent’s Associate Chief Nursing Officer, Diana Younger, demoted Petitioner from the position of Unit Nurse Director at Central Regional Hospital to the position of Professional Nurse for engaging in unsatisfactory job performance. Specifically, Ms. Younger alleged that Petitioner’s “Unit Nurse Director (UND) level performance goals were not consistently met” as (1) Petitioner failed to ensure unit collection system of employees’ timesheets and (2) Petitioner failed to ensure that employees’ performance management plans, competencies, and job descriptions were submitted in compliance with the Human Resources’ deadline. Younger also wrote that Petitioner failed to meet the UND level performance goal for the July 2011 work schedule when Petitioner posted the July 2011 work schedule which:

[S]howed 23 uncovered staffing needs for the days of July 1st and 2nd (all three shifts). This presented a critical stage in trying to procure staff leading into the holiday (July 4th). It also created an unsafe patient care situation.

(See Document Constituting Agency Action) Because of this demotion, Petitioner’s annual salary was reduced from $74,305 to $65,297.

2. On November 16, 2011, Respondent’s Hearing Officer heard Petitioner’s internal appeal of her demotion, and recommended that Petitioner’s demotion be upheld. On January 10, 2012, Respondent’s Secretary issued a Final Agency Decision upholding Petitioner’s demotion to the position of Professional Nurse.

3. On January 20, 2012, Petitioner appealed her demotion by filing a contested case petition with the Office of Administrative Hearings, alleging that
Respondent had demoted her without just cause, and “falsely accused Petitioner of unsatisfactory job performance.” (Petition)

Adjudicated Facts

4. Petitioner is a career state employee of the Respondent in a position subject to the State Personnel Act. From 1996 to 1997, Petitioner was employed as a registered nurse at Respondent’s John Umstead Hospital. In 1997, Petitioner worked as a registered nurse at Respondent’s Dorothea Dix Hospital in the Child and Adolescent Unit.

5. Effective August 2, 2004, Respondent promoted Petitioner to Nurse Manager in the Forensics unit in the Spruill Building at Dorothea Dix Hospital.

6. The Forensics unit consisted of four subunits: (1) F Medium unit (also called “B0”), (2) F Maximum unit (also called “A0”), (3) F Minimum unit, and (4) the pretrial unit. There was approximately 180 nursing staff employed in the Forensics units.

7. Each Forensics subunit was managed by a Unit Nurse Manager, who was assisted by an Assistant Nurse Manager. Unit Nurse Managers directly managed their individual units, and reported to the Forensics Unit Nurse Director. Unit Nurse Managers were responsible:

   for the direct supervision of the actual PCU, making sure scheduling was done, making sure they had adequate staffing, directly see what is going on with the patients, and actively involved with treatment planning to make sure that they have nurses in treatment team.

   (T. p. 24) The Unit Nurse Manager was directly responsible for supervising the nursing staff who directly reported to her, including completing the employees’ performance management evaluations (PMPs), job descriptions, and competency forms for the employees in his/her subunit under her direct supervision.

8. In November of 2010, Respondent hired Sylvia Lesnick as the Unit Nurse Manager for the Forensics Maximum (A0) subunit.

9. Effective November 1, 2010, Petitioner was promoted to Unit Nurse Director over the entire Forensics unit.

10. Unit Nurse Directors do not manage the individual subunits, but manage the Forensics unit as a whole. As the Forensics Unit Nurse Director, Petitioner was directly responsible for time sheets, PMPs, and job descriptions for employees under her direct supervision. Petitioner directly supervised the unit (or clinical) nurse managers, the health care tech preceptor, the nurse aide coordinator, and the clinical nurse specialists.
11. In December of 2010, the Forensics Medium (or “B0”) and Forensics Maximum (or “A0”) units relocated to Central Regional Hospital in Butner, North Carolina, while the Forensics Minimum unit remained at the Dix Hospital location. Both Petitioner and Sylvia Lesnick’s positions moved to Central Regional Hospital.

12. As Unit Nurse Director, Petitioner reported to Diana Younger, Assistant Chief Nursing Officer at Central Regional. Ms Younger reported to Amanda Dorgan, Chief Nursing Officer for Central Regional Hospital.

13. Around December 2010 or January 2011, Ms. Lesnick stepped down from her A0 Unit Nurse Manager position, and asked to work as a regular nurse. Lesnick was willing to assist with some of the “acting” Unit Nurse Manager duties until a new Unit Nurse Manager for the A0/Forensic Maximum subunit could be hired.

14. There was one Nursing Education Coordinator assigned to the Forensics unit. That coordinator was responsible for educating and training the nursing staff in all four Forensics subunits, delivering any new training directives, and keeping up with the job competencies for all staff in the entire Forensics unit, including nurses and health care technicians.

15. In early 2011, the nursing staff, including Petitioner, interviewed and selected a candidate for the vacant A0 Unit Nurse Manager position. After Human Resources advised nursing management that the selected candidate for that position could not be hired, nursing management had to select another applicant to fill the A0 Unit Nurse Manager. Ultimately, the Unit Nurse Manager position for the A0 subunit remained vacant until September or October of 2011.

16. From approximately January 2011 until July 2011, Petitioner had to perform the work of both her position, and the A0 Unit Nurse Manager since the A0 Unit Nurse Manager position remained vacant. Petitioner received no additional salary or other compensation for performing these additional duties. During this time, there also was no one employed in the Forensics unit’s Nursing Education Coordinator position. Ms. Lesnick assisted with some of the A0 Unit Nurse Manager duties.

17. Nursing management at Central Regional understood that Petitioner’s assumption of these unpaid additional duties was intended as a temporary measure until those vacant positions could be filled.

18. During Petitioner’s management of the Forensics Maximum (A0) subunit, from January 2011 through July 2011, she directly supervised approximately 60 employees. Submission of these timesheets ordinarily would be the direct responsibility of the Unit Nurse Manager, rather than the Unit Nurse Director. Petitioner’s system required the A0 submit employees to submit their timesheets to Petitioner, Petitioner would sign the sheets, and submit them to Human Resources. That system worked for 99% of the employees. However, several of the same employees failed to submit their timesheets in a timely manner. Petitioner talked with these employees who had not
submitted their timesheets in a timely manner, and explained to them what they needed to do to correct the timesheet problem. (T. pp. 38-39)

19. According to Respondent's payroll or timekeeping personnel, difficulties with employees submitting their time sheets in a timely manner was not restricted to the A0 subunit managed by Petitioner. However, the Forensics Maximum (A0) subunit appeared to have more trouble than most. The problems with submission of timesheets from the Forensics Maximum subunit involved the same group of employees, rather than the unit as a whole. Documentation indicated that 8 of the 60 A0 subunit employees failed to turn in their timesheets.

20. The preponderance of the evidence showed that Respondent did not discipline any of these employees, in any fashion, for failing to turn in their timesheets in a reasonable fashion, as required by regulations at Central Regional Hospital.

21. On May 27, 2011, Diana Younger issued Petitioner a “documented counseling,” because several employees "had already received pay but their timesheets had not been submitted." Younger advised Petitioner that she needed to see improvement in the:

[T]imeliness of your reports to auxiliary departments. And as a managerial level employee it is expected. It is considered unacceptable and unsatisfactory. I will be monitoring you for improvement in this area.

(Resp Exh 1) While a “documented counseling” is not intended to be formal disciplinary action, Ms. Younger advised Petitioner in this documented counseling that “your failure to meet this expectation of improvement will lead to further disciplinary action.” (Resp Exh 1)

22. On the same date, May 27, 2011, Ms. Younger issued a second documented counseling to Petitioner for failing to correct or address the fact that a patient, who was in restraints, was located behind a closed door. (Resp Exh 2) Testimony at hearing established that a charge nurse on a Forensics subunit directed that a patient be restrained following an attack on a staff member. The nurse and a health care technician placed the patient in the restraint room, but left the door between the health technician and the patient closed. Leaving the door between the technician and the patient violated Central Regional Hospital’s restraint policy. All personnel had been regularly trained on the restraint policy.

23. Petitioner’s sole role in this matter was assisting the attacked staff member with getting medical attention, and then returning to the unit briefly. Petitioner walked into the restraint room where the technician and restrained patient were located, and where the door between the technician and the patient was closed. It did not register with Petitioner that the violation of the restraint policy had been committed by the charge nurse and/or health care technician. During the documented counseling with
Ms. Younger about this matter, Petitioner acknowledged that it was a mistake on her part not to address the closed-door violation.

24. Respondent did not counsel or formally discipline the charge nurse who ordered and enacted the restraint. Respondent counsel did not issue a documented counseling or take formal disciplinary action against the health care technician who was involved in the restraint. Petitioner was the only employee given a “documented counseling” or any disciplinary action regarding the event. In addition, Ms. Younger only reviewed the portion of the patient restraint video that showed Petitioner's involvement in the matter.

25. Similar to the documented counseling regarding the time sheet issue, Ms. Younger noted in this documented counseling that “further disciplinary action” would result in the event of a failure to improve.

26. On June 7, 2011, Chief Nursing Officer, Amanda Dorgan, directed Ms. Younger to issue a written warning to Petitioner regarding the same restraint issue on which Younger had issued a documented counseling to Petitioner ten days earlier. Respondent did not remove or cancel the May 27, 2011 documented counseling from Petitioner’s file.

27. On June 21, 2011, Petitioner advised Amanda Dorgan and Diana Younger that she needed more staff to work in the A0/Forensics Maximum subunit as the patient acuity on A0 was very high. Specifically, Petitioner requested permission to work staff more overtime than the standard allowance, due to the high acuity, in order to fill shift or staff needs. The standard practice required that no staff could work over 24 hours without Dorgan's permission. Petitioner made such request so she would not have to ask Dorgan’s permission for each individual staff willing to work that overtime amount.

28. Dorgan approved Petitioner’s request to allow staff to work 32 hours of overtime temporarily to cover staff needs for the A0 subunit. Dorgan approved Petitioner’s request from June 21st through July 6th. (T. p. 109) Younger notified Petitioner of that approval. (T. pp. 108-110; Resp Exh 9) Younger advised Petitioner that they would re-evaluate the situation on July 6, 2011.


30. On July 1, 2011, there remained 23 unfilled shift positions, specifically health care technician, for the A0/Forensics Maximum unit for July 1st and 2nd.

31. That same day, Ms. Younger and Petitioner were talking in Younger's office, regarding a staff member who had been hurt on the job, when Ms. Dorgan walked in. Ms. Dorgan told Petitioner that she had not been doing her job, and summarily removed Petitioner from her duties as Unit Nurse Director. (T. pp. 49, 182-83, 389) Petitioner became upset about being demoted by Dorgan, and requested time
off from Ms. Younger, beginning that day. (T. p. 47) Petitioner took vacation leave for a few days as she was upset that Dorgan had removed her from her duties.

32. At 2:43 p.m. on July 1, 2011, Ms. Younger advised Collins, via email, to proceed in trying to staff the unfilled shift positions, and to notify another Unit Nurse Manager, Ms. Oby Onuorah, about the matter since Petitioner was on vacation.

33. There is no dispute that Ms. Dorgan removed Petitioner from her management duties as a Unit Nurse Director on July 1, 2011, and that Petitioner never reassumed them. It is likewise undisputed that Respondent did not issue a notice of pre-disciplinary conference to Petitioner, and did not hold a pre-disciplinary conference with Petitioner on or before July 1, 2011. Petitioner’s pay was not reduced on that date either.

34. While there is no dispute that Dorgan removed Petitioner from her managerial duties on July 1, 2011, there is disputed evidence regarding the significance of Petitioner being relieved of her duties that day.

a. At hearing, Dorgan testified that as of July 1st, 2011, no final decision had been made about Petitioner’s status. However, a preponderance of the evidence showed otherwise. At hearing, Ms. Younger admitted that on July 1, 2011, Ms. Dorgan instructed Younger to look for another job for Petitioner. Ms. Younger did not do that, because Petitioner went on vacation that day. (T. p. 428)

b. Shortly before or on July 1, 2011, Ms. Dorgan also talked to Respondent’s Human Resources Manager, Debra Thomas, about removing Petitioner from her position as Unit Nurse Director. During that conversation, Dorgan:

Outlined her concerns [to Thomas] about the issues in the letter of demotion and said that she needed to remove her [Petitioner] from her job. . . . the same issues . . . of time sheets and documentation and competencies and job descriptions and scheduling issues.

(T. pp. 298-301) At hearing, Thomas noted that however, Ms. Dorgan did not do that, i.e. remove Petitioner from her job, because Petitioner went on vacation.

35. Staff job descriptions, PMPs, and competencies were due to Human Resources for all staff by June 8, 2011. On July 8, 2011, Human Resources notified Ms. Younger that it was missing competencies, PMPs, and job descriptions for a list of nurses and health care technicians from the Forensics Maximum/A0 unit. (See Resp Exh 11) As Unit Nurse Director, Petitioner was directly responsible for only three of those employees whose job descriptions/competency/PMPs were missing. The Unit Nurse Manager position, which Petitioner was also performing, was responsible for all remaining employees’ missing documentation.
36. After taking vacation leave, Petitioner took Family Medical Leave, and did not return to work until October 2011.

37. On October 3, 2011, Ms. Younger issued Petitioner a notice for pre-disciplinary conference. That notice directed Petitioner to attend a pre-disciplinary conference on October 4, 2011 regarding a proposed disciplinary action for engaging in unsatisfactory job performance. (Resp Exh 4)

38. Effective October 10, 2011, Ms. Younger demoted Petitioner from Unit Nurse Director to Professional Nurse for engaging in unsatisfactory job performance. (Resp Exhs 4, 5) By letter dated October 12, 2011, Younger advised Petitioner that she was demoting Petitioner for:

(1) Not consistently meeting an Unit Nurse Director performance goal by failing to ensure collection of staff timesheets. Younger recounted timekeeper Kimberly Jackson’s emails how numerous A0 subunit employees had failed to submit their timesheets from February through July 2011. (See list of employees in Resp Exh 11)

(2) Not meeting an Unit Nurse Director performance goal by failing to assure submission of validated staff competencies, PMPs and job descriptions for A0 subunit employees in compliance with Human Resources guidelines. Specifically, several employees’ PMPs, job descriptions, and competencies from the A0 subunit had not been submitted to Human Resources by July 8, 2011.

(3) Not meeting the Unit Nurse Director performance goal of having adequate staffing and scheduling personnel by posting a July 2011 work schedule with 23 uncovered staff shifts for July 1st and 2nd. Younger noted that “[t]his presented a critical stage in trying to procure staff leading into the holiday (July 4th).” “It also created an unsafe patient care situation.” (Resp Exh 5) She also referenced the June 7, 2011 written warning regarding the restraint issue, and the May 27, 2011 documented counseling.

Analysis

39. Between 1996 and May 27, 2011, Petitioner received no prior disciplinary actions from Respondent based on unsatisfactory job performance. The only formal disciplinary action Petitioner received from Respondent was the May 27, 2011 written warning for unacceptable personal conduct. (T. p. 119)

40. A preponderance of the evidence at hearing proved that before July 1, 2011, Diana Younger never documented, cited, or disciplined Petitioner for being deficient in her job performance in maintaining employee PMPs, competencies, or job descriptions, or in submitting employee timesheets to Human Resources. (T. pp. 424-426)
41. A preponderance of the evidence established that before July 1, 2011, Diana Younger did not document, or cite, or discipline Petitioner for any performance deficiencies in scheduling adequate staff on the Forensics units. (T. pp. 423-428) On June 11, 2011, Ms. Younger rated Petitioner's job performance on "supervision and evaluation of staff performance as "90%-100%. No deficiency reports in PMP compliance." (T. pp. 424-426; Resp Exh 7, p 3)

42. At hearing, Ms. Dorgan acknowledged that at no time before July 1, 2011, did Ms. Dorgan discuss issues surrounding the July 2011 work schedule, employee PMPs, competencies, or job description with Petitioner in a “negative or fault-finding fashion.” (T. pp. 165, 195)

43. In the demotion letter, Younger reasoned that some employees were not being paid for time they had worked, because their timesheets had not been submitted to Human Resources. Yet, in the May 27, 2011 documented counseling letter to Petitioner, Younger advised Petitioner that employees had already been paid, but their timesheets had not been submitted. (Resp Exh 1)

44. In the demotion letter, Younger criticized Petitioner for failing to meet her Unit Nurse Director goals. Nowhere in the demotion letter did Younger cite that the majority of employees whose timesheets were missing were employees who directly reported to the vacant Unit Nurse Manager position. (T. p. 154) Nowhere in the demotion letter did Younger reference that Petitioner had been performing the duties of her job and the duties of the A0 Unit Nurse Manager for approximately 6-7 months. Only 3 of the 32 employees whose documents had not submitted to Human Resources, reported directly to Petitioner.

45. At hearing, Ms. Dorgan explained that if staff competencies and job descriptions were not completed, then the hospital could face possible consequences from regulatory agencies. Yet, she acknowledged on cross-examination that no regulatory agency had taken any action against Central Regional Hospital because of any act or omission by Petitioner regarding the missing competencies, and job descriptions.

46. In the demotion letter, Respondent did not indicate that none of the missing competencies for the A0 staff would have expired as of July 8, 2011. (T. p. 163) In fact, a preponderance of the evidence proved that the employees in the Forensics units had completed annual job descriptions and competencies the year before, and that staff job descriptions and competencies had not changed from the year. (T. p. 303) Evidence at hearing also proved that the employees’ personnel files containing these documents would have moved along with the Forensics units when they moved to Central Regional Hospital from Dix Hospital.

47. Dorgan conceded at hearing that before she demoted Petitioner, she made no effort to investigate whether the A0 employees’ existing job descriptions or competencies were in their personnel files at Central Regional. (T. pp. 164, 165)
48. In the demotion letter, Younger also demoted Petitioner for posting the July 2011 schedule with 23 uncovered shifts in the A0 Forensics Maximum subunit before going out on vacation. However, the demotion letter failed to reflect, accurately, the actual situation concerning Petitioner and the July 2011 work schedule.

   a. The July 2011 work schedule was required to be completed by June 15, 2011. The preponderance of the evidence established that Petitioner actively attempted to remedy the staff shortage in the A0 unit, and staff the July 2011 schedule during the month of June. On June 21, 2011, Petitioner acquired permission to work staff more than the standard overtime due to the “very high” patient acuity. Dorgan approved that request through July 6, 2011.

   b. On July 1, 2011, Petitioner asked staffing coordinator Collins, “I need 23 health care technicians to work this weekend. Please provide them.” (T. pp. 46-47; Resp Exh 9) Petitioner was also prepared to work July 1, 2, 3, and 4th, 2011 to fill any uncovered shifts.

   c. Respondent failed to present any other evidence, either in the demotion letter or at hearing, that any shifts during the remainder of the July 2011 schedule were uncovered.

49. The preponderance of the evidence also established that neither Younger nor Dorgan had previously disciplined Petitioner for failing to provide adequate staffing.

50. At hearing, both Younger and Dorgan emphasized how they allowed Petitioner to handle the A0 Unit Nurse Manager vacancy in her own way. Dorgan and Younger implied that Petitioner had assumed the duties of the A0 Unit Nurse Manager by her own choosing, and that Petitioner refused their alternative ways to handle that vacant position. Ms. Younger explained that she suggested Petitioner place another employee, Veronica McClain, in the A0 Unit Nurse Manager position, but that Petitioner did not want McClain in the job.

   a. However, evidence showed that Petitioner rejected Younger’s suggestion as she did not think that McClain was qualified for the A0 Unit Nurse Manager position.

   b. Petitioner further explained that Ms. Younger could have overruled her and placed someone in the A0 Unit Nurse Manager position. For example, on another occasion, Ms. Younger had advised Petitioner to issue a warning to another employee regarding that employee’s performance.

   c. Similarly, Dorgan acknowledged at hearing that she was authorized to appoint a new Unit Nurse Manager for the A0 unit, but she did not. (T. pp. 151-152)
51. Given the testimony of Ms. Dorgan and Ms. Younger, and the preponderance of evidence at hearing, the undersigned finds that Dorgan and Younger were not credible witnesses.

a. First, Ms. Dorgan told Younger to issue the June 7, 2011 written warning to Petitioner regarding the same patient restraint issue for which Younger had already issued a May 27, 2011 document counseling to Petitioner. At hearing, Dorgan reasoned that Petitioner should have been disciplined for the patient restraint incident, although she was not directly involved in the incident, because Petitioner should be held to a higher level of responsibility as a manager. However, at hearing, Respondent’s Human Resources representative, Debra Thomas, opined that it was not proper to issue a disciplinary action to someone merely because she was a manager, as opposed to being [employed as regular] nurse. (T. p. 286)

b. Second, Petitioner asserted that Ms. Dorgan told another employee that she wished to have Petitioner removed from her position, because Petitioner was not a “cheerleader” for Dorgan. While Ms. Dorgan denied making this statement, Linda Latona corroborated Petitioner’s assertion. Linda Latona is a former Unit Nurse Director and Associate Chief Nursing Director at Central Regional. In June or July 2011, Ms. Latona overheard Ms. Dorgan state that if Petitioner was not a cheerleader for her, then she did not need to be on her team. (T. p. 445)

c. On or about July 1, 2011, after Dorgan removed Petitioner from her job, Dorgan walked into Latona’s office, slammed her hands very loudly on Latona’s desk, and stated, “Now I need you to do your job.” Latona was puzzled and alarmed, because she thought she had not done her own job correctly. Dorgan then told Latona, “I just demoted Rhonda, and you need to go next door to Ms. Younger’s office and give . . . tell Rhonda what her options are on the units that you run.”

d. At hearing, Ms. Younger frequently provided general, vague and inconsistent answers to questions by Petitioner’s counsel and the Court. Younger often would answer questions before Petitioner’s counsel or the Court had finished asking a question. Younger also had difficulty recalling specific dates, details, and reasons for demoting Petitioner. During Younger’s testimony, the Court asked Ms. Dorgan to leave the courtroom, after the undersigned observed Ms. Dorgan nodding her head “yes” or “no” to questions asked of Ms. Younger. After Dorgan nodded her head, Younger answered a question in the manner Dorgan had indicated.

**CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 126 and 150B of the North Carolina General Statutes and all parties had notice of the hearing. The Office of Administrative Hearings has personal
and subject matter jurisdiction over this contested case, and the parties received proper notice of the hearing in this matter. 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.

2. Petitioner is a career State employee subject to the State Personnel Act, N.C. Gen. Stat. § 126-1 et seq.

3. N.C. Gen. Stat. § 126-35(a) provides, in pertinent part, that “No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” Although N.C. Gen. Stat. § 126-35 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).

4. 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.

5. In NC Dept’t. of Env’t & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004), the Supreme Court explained that the fundamental question in a case brought under N.C.G.S. § 126-35 is whether:

   the disciplinary action taken was ‘just.’ Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.

   ‘Just cause,’ like justice itself, is not susceptible of precise definition. . . . It 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. . . Thus, not every violation of law gives rise to ‘just cause’ for employee discipline.

358 N.C. at 669-669. E.g., Kelly v. NC Dept. of Env’t & Natural Res, 664 S.E.2d (N.C. App. 2008)

6. Further, in Carroll, the NC Supreme Court held:

Determining whether a public employee had just cause to discipline its employee requires two separate inquiries: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken.

358 N.C. at 649, 665.
7. In 2012, our Supreme Court amended the just cause determination in *Carroll* under N.C. Gen. Stat. § 126-35. That Court stated that:

[T]he proper analytical approach to determine whether ‘just cause’ exists is to first determine whether the employee engaged in 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; 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, and must base its determination upon an examination of the facts and circumstances of each individual case.


8. In this case, Respondent demoted Petitioner for engaging in unsatisfactory job performance. Pursuant to 25 NCAC 01J .0612, “an employee may be demoted for unsatisfactory job performance after the employee has received at least one prior disciplinary action.” 25 NCAC 01J .0614(9) defines “unsatisfactory job performance” 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.

9. In *Walker v. North Carolina Dep’t of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), *review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991), the Court described the standard by which an agency employer is bound in disciplining a state employee. The Court specifically held that:

The standard of employee conduct implied in every contract of employment is one of reasonable care, diligence and attention. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964); *McKnight v. Simpson’s Beauty Supply, Inc.*, 86 N.C.App. 451, 358 S.E.2d 107 (1987). We cannot say that a state employee undertakes any greater duty. In attempting to establish that it had just cause to terminate an employee, then, an agency is bound to make a showing that the employee has not performed with reasonable care, diligence and attention. Failure to fulfill certain quotas and complete certain tasks to the complete satisfaction of a supervisor is not enough. The agency must show that these quotas and job requirements were reasonable, and if so, that the employee made no reasonable effort to meet them.
10. Applying the just cause principles enunciated in the above cases to this case, the undersigned concludes that Respondent failed to prove it had just cause to demote Petitioner from her Unit Nurse Director position.

11. Respondent proved the first prong of the just cause analysis. There was no dispute that employees in the Forensics Maximum/A0 subunit failed to submit their timesheets to Human Resources in a timely manner. There was no dispute that PMPs, staff competencies, and job descriptions for 32 employees in the Forensics Maximum/A0 subunit were not submitted to Human Resources by Human Resources' deadline. Since there was no one employed as the Unit Nurse Manager for the Forensics Maximum/A0 unit from January to July 2011, Petitioner assumed and performed the duties of that position, while also performing her own job duties as Unit Nurse Director for that time. As the acting A0 Unit Nurse Manager, and ultimately as the Unit Nurse Director, Petitioner was responsible for ensuring all A0 employees submitted their timesheets, and for ensuring employees' PMPs, job descriptions, and competencies were submitted in compliance with Human Resources' deadline. Based on the evidence, Petitioner engaged in the conduct Respondent alleged by failing to ensure these documents were submitted in compliance with Human Resources' deadline.

12. Respondent failed to prove the second prong of the just cause analysis that Petitioner's job performance failed to satisfactorily meet the job requirements in her job description, or as directed by the management of the agency.

a. Respondent failed to present sufficient evidence that any employee's failure to submit timesheets had any effect on that employee being paid. The May 27, 2011 documented counseling indicated that employees had been paid even though they hadn't submitted their timesheets, but Petitioner's demotion letter indicated that employees weren't paid, because their timesheets weren't submitted. Respondent failed to present any other evidence clarifying this dispute.

b. Respondent failed to prove that the nonsubmission of employees' PMPs, job descriptions, and competencies adversely affected the operation of the Forensics Maximum/A0 subunit or the provision of care in that subunit. Ms. Dorgan did not examine any employees' personnel files before demoting Petitioner to determine if those files were missing any job descriptions, PMPs, or competencies from the year before. Annual job descriptions, PMPs, and job competencies were completed the year before, and included in employees' personnel files, which were relocated from Dix to Central Regional.

c. In addition, there was no evidence that employees' competencies had expired before July 2011, or that Petitioner's failure to submit competencies endangered Central Regional Hospital's accreditation or any nursing staff's licenses.
d. Before July 2011, neither Ms. Dorgan nor Ms. Younger counseled, cited, or formally disciplined Petitioner for failing to ensure employees’ timesheets were issued, or for failing to ensure employees’ PMPs, competencies, and job descriptions were submitted to Human Resources.

13. A preponderance of the evidence established that before July 1, 2011, Diana Younger did not document, or cite, or discipline Petitioner for any performance deficiencies in scheduling adequate staff to work on the Forensics units. A preponderance of the evidence showed that Petitioner made reasonable efforts, and used due diligence to complete the July 2011 schedule for the A0 submit during the month of June until July 1, 2011. She received approval to work staff overtime, requested extra staff from the staffing coordinator, and was willing to work to cover unfilled shifts for July 1 and 2, 2011. Respondent failed to establish there were any other uncovered shifts for the remaining July 2011 schedule. In addition, Respondent failed to prove that Petitioner intentionally left on vacation without filling 23 uncovered shifts. Instead, evidence showed that Petitioner took vacation because Dorgan removed Petitioner from her duties on July 1, 2011.

14. Respondent failed to present any evidence that Petitioner’s inability to fill 23 shifts on July 1 and 2, 2011 adversely affected the Forensics Maximum/A0 subunit in any way.

15. The preponderance of the evidence proved that while Ms. Dorgan and Ms. Younger had the authority, they did not issue a documented counseling or take any formal disciplinary action against any of the employees who failed to submit their timesheets. By disciplining Petitioner because she was the Unit Nurse Director, but not disciplining the employees who failed to submit the timesheets, Respondent acted “whimsical” in that it demonstrated “a lack of fair and careful consideration or reasoning.” Rector v. North Carolina Sheriff’s Education and Training Standards Commission, 103 N.C. App. 527, 406 S.E.2d 613 (1991).

16. The undersigned concludes that Respondent’s issuance of the June 7, 2011 written warning to Petitioner was also arbitrary and capricious. By issuing a written warning and a documented counseling to Petitioner for the same restraint issue, Respondent effectively punished Petitioner twice for same matter. Respondent did so, while taking no disciplinary action against the employees whom actually committed the violation of having a closed door between a health care technician and a restrained patient. (See, e.g., Bulloch v. N.C. Dep’t of Crime Control & Pub. Safety, 05 O.S.P. 1178, 2010 WL 690232 (N.C.O.A.H. Jan. 15, 2010)

17. The manner in which Ms. Dorgan summarily removed Petitioner from her job on July 1, 2011, without first allowing Petitioner an opportunity to correct the reasons for the demotion, further showed that Respondent lacked just cause to demote Petitioner for the reasons stated in the demotion letter.

18. Assuming Petitioner’s actions constituted “unsatisfactory job performance,” Respondent failed to prove the third prong of the just cause analysis.
The preponderance of the evidence showed that Petitioner attempted to perform and satisfy the job requirements of the A0 Unit Nurse Manager and Unit Nurse Director for seven months with reasonable care, diligence and attention.

19. The preponderance of the evidence established that Respondent acted erroneously, failed to act as required by the applicable just cause law of Chapter 126, and acted arbitrarily and capriciously in demoting Petitioner for engaging in unsatisfactory job performance.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby REVERSES Respondent’s decision to demote Petitioner from Unit Nurse Director to Professional Nurse. Respondent is hereby ORDERED to reinstate Petitioner to the same or a substantially similar position as Unit Nurse Director, and to pay Petitioner's back pay. Pursuant to 25 N.C.A.C. 1B.0414, Petitioner should be awarded reasonable attorney fees, based upon Petitioner's attorney submitting an itemized statement of the fees and costs incurred in representing the Petitioner.

ORDER AND NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge’s Final Decision. In conformity with the Office of Administrative Hearings’ rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 17th day of May, 2013.

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Melissa Owens Lassiter
Administrative Law Judge