

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 OSP 05480

<p>Wei Wen Gou Petitioner,</p> <p>v.</p> <p>North Carolina State University Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER was heard before the Honorable Stacey Bice Bawtinheimer, Administrative Law Judge, on January 31, and February 4, 2020, at the Office of Administrative Hearings (“OAH”), 1711 New Hope Church Road, Raleigh, North Carolina.

After considering a hearing on the merits held on the above-mentioned date, arguments from counsel for both parties, all documents in support of or in opposition to the Parties’ motions made during the hearing, all documents in the record, including the Proposed Decisions, as well as all stipulations, admissions, and exhibits, the Undersigned **AFFIRMS** the dismissal of Petitioner for unacceptable personal conduct and unsatisfactory job performance.

APPEARANCES

For Petitioner: Michael C. Byrne
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ISSUE

Whether Petitioner Wei Wen Gou was dismissed without just cause from her position as a Research Specialist in the Horticulture Sciences Department at North Carolina State University for unsatisfactory job performance and/or unacceptable personal conduct?

BURDEN OF PROOF

The burden of proof, per N.C.G.S. 126-35, is on the Respondent.

WITNESSES

For Petitioner: Wei Wen Guo, Ph.D., Former Research Specialist

For Respondent: Wayne George Buhler, Ph.D., Interim Department Head
Diane Mays, Teaching Specialist
Ben Andrew Bergmann, Ph.D., Research Specialist
Emily Jean Silverman, M.A., Research Technician
Daniel Anthony O'Brien, III, Assistant Dir. Employee Relations

EXHIBITS

For Petitioner (“Pet’r Ex.”): 2-23, 26, 27 & 28 were admitted.¹

For Respondent (“Resp’t Ex.”): 1-20 were admitted.

Two volumes of Transcripts² were prepared and received into evidence and are referenced as “T vol. __, p. _: _.”

¹ Admission of Petitioner’s Ex. 29 was denied because it was an affidavit by Petitioner submitted in response to a dispositive motion. The affidavit of Petitioner was filed on December 31, 2019 in opposition to Respondent’s Motion for Summary Judgment. Petitioner sought admission after closure of Petitioner’s testimony and Respondent had not had an opportunity to cross-examine. Moreover, pursuant to the rules of evidence under N.C. Gen Stat. § 150B-29(b), “[f]actual information or evidence not made a part of the record shall not be considered in the determination of the case, except as permitted under G.S. 150B-30 [by stipulation]”.

² Emily Silverman is erroneously listed as Emily “Sullivan” on the top of pages 464-509 of transcript volume 2; however, within the text of the transcript she is properly named as Silverman.

STIPULATIONS (“Stips. 1-10”)

The Parties stipulated to facts with respect to the internal procedural protections and completion of the grievance process as follows:

1. Petitioner was a career-status employee of the Respondent agency in a position subject to the State Human Resources Act. (Stip. 1)

2. On October 2, 2018, Petitioner was given a pre-disciplinary conference letter, and a pre-disciplinary conference was held on October 3, 2018. Following the pre-disciplinary conference, Petitioner was given a second notice of pre-disciplinary conference on October 18, 2018. The second pre-disciplinary conference was held on October 22, 2018. (Stip. 2)

3. On October 24, 2018, Petitioner was given a dismissal letter indicating that she was being dismissed for unsatisfactory job performance and unacceptable personal conduct. (Stip. 3)

4. Petitioner timely grieved that discipline through Step One mediation, which reached an impasse. (Stip. 4)

5. Petitioner timely grieved Step 2. The Respondent affirmed its decision to discipline Petitioner. (Stip. 5)

6. Following Step 2, the employee grievance panel decision went to the Secretary/Chancellor and/or that official’s designee, who issued a final agency decision upholding Petitioner’s discipline. (Stip. 6)

7. Prior to issuing a final agency decision, the agency submitted a proposed final agency decision to the North Carolina Office of State Human Resources, which approved issuance of the final agency decision. (Stip. 7)

8. Petitioner timely appealed the final agency decision to the Office of Administrative Hearings. The OAH accordingly has jurisdiction over this appeal. (Stip. 8)

9. The Parties agree and stipulate that the internal grievance process was fully completed by both Parties. (Stip. 9)

10. The Parties accordingly do not need to present evidence on the issues of or regarding the internal grievance process or OSHR review, and this stipulation is intended to represent that this process was duly and timely completed. (Stip. 10)

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, the stipulation, exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge (“ALJ”) makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed the evidence presented and has assessed the credibility of the witnesses by taking into account the appropriate

factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. The Stipulations of Fact are incorporated fully herein in these Findings of Fact. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their 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. rev. den., 366 N.C. 408, 735 S.E.2d 175 (2012); *Watlington v Rockingham Co. Department of Social Services*, COA17-1176 (2 October 2018).

2. An ALJ need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

PARTIES:

3. Petitioner Wei Wen Guo is a citizen and resident of Wake County, North Carolina. At all relevant times, Petitioner was a career status State employee and had been employed by the Respondent, North Carolina State University, from 1994 to 2018. After the grievance process was concluded on October 18, 2018, Petitioner was dismissed from employment by Respondent because of unacceptable personal conduct and unsatisfactory job performance.

4. Respondent North Carolina State University (“NC State” or “Respondent”) is subject to Chapter 126 and was Petitioner’s employer. During the relevant time period, Petitioner worked in the Horticultural Sciences Department of NC State (the “Department”).

5. Petitioner received an undergraduate degree in Horticulture Science from South China Agriculture College. She continued with her academic work at Oregon State University, receiving a master’s degree, again in Horticulture Science. Petitioner then continued at Michigan State University, where she received a doctorate (Ph.D.) degree in Plant Breeding and Genetics.

6. Following receipt of her doctorate, Petitioner worked for the University of Texas Southwest Medical Center in Dallas, Texas, in its Biochemistry Department. She began this work in 1991 and worked at that employer until 1993. She left to take a job at NC State University in Raleigh, NC.

7. In 1994, Petitioner began employment with NC. State in the Genetics Department. (T vol. 2, p. 571) She worked in the Genetics Department doing research for approximately two years. Petitioner left the employ of NC State for ten months at that time for parenting-related

matters. No evidence was presented of any negative circumstances existing regarding Petitioner's first employment with NC State.

8. In 1996, Petitioner returned to employment with NC State, this time in the Horticulture Science Department. Petitioner began this employment by doing research.

9. In 1998, Petitioner received a promotion from Research Technician III to Analyst I. Petitioner continued in that position, though at times with different names, throughout her employment with NC State, a period of 21 years, and ultimately was classified as a Research Specialist at the journey level. (*See* Pet'r Ex. 3)

10. Prior to May 31, 2016, Petitioner had "very good" to "outstanding" performance reviews. Sometime in March 2016, Petitioner's hours and salary were reduced 25% due to an FTE reduction for budgetary reasons. (Pet'r Ex. 23)

11. During that time, Petitioner had been reassigned to Dr. Ashrafi's lab, and for the first documented time, concerns arose about her job performance. Three subsequent managers also raised concerns about Petitioner's job performance and personal conduct, which became the bases for her dismissal.

WITNESSES' CREDITABILITY:

Respondent's Witnesses:

12. Five witnesses testified on behalf of Respondent: Wayne Buhler, Ph.D., Ms. Diane Mays, Ben Bergmann Ph.D., Ms. Emily Silverman, M.A., Ph.D. Candidate, and Mr. Dan O'Brien.

13. For various reasons, except for Dan O'Brien, Petitioner attacked the credibility of all of Respondent's witnesses. (*See* Pet'r Pro. Dec. pp. 8-9, ¶¶ 25-27, (Buhler) (never directly supervised and criticized a peer's prior performance evaluation); pp. 10-11, ¶¶ 31-34 (Mays)(thought she was Petitioner's supervisor); pp. 12-13, ¶¶ 39-46 (Bergmann) (had pre-conceived belief that Petitioner would fail); p. 17, ¶ 59 (Silverman) (uncooperative demeanor towards Petitioner's counsel indicated hostility or bias to Petitioner))

14. The Undersigned, however, found all of Respondent's witnesses credible, as discussed below.

Wayne Buhler, Ph.D.

15. Wayne Buhler, Ph.D. served as the Interim Department Head from March 2016 to August 2018. (T vol. 1, p. 15:6-10) He received his Ph.D. from Purdue University in entomology. Dr. Buhler has worked with NC State since 1998 and is currently the pesticide safety education specialist with the title of professor in the Department of Horticultural Science. (T vol.1, p. 14, 7-17)

16. Dr. Buhler was Petitioner's direct supervisor as of June 2016. Dr. Buhler advised Petitioner that, although he was her direct supervisor, she was to follow the instructions of the various individuals responsible for the day-to-day activities for her assignments at the greenhouse (Mays) and the two research labs (Bergmann and Silverman). Dr. Buhler communicated with Ms. Mays, Dr. Bergmann, and Ms. Silverman both verbally and/or via emails about Petitioner's job performance and conduct. Dr. Buhler had also communicated with Petitioner's previous supervisor's Drs. Williamson, Dole, and Ashrafi.

17. Although Dr. Buhler had not observed Petitioner at work in the greenhouse or labs, he received verbal and/or written communications from Ms. Mays, Dr. Bergmann, and Ms. Silverman. While, perhaps not optimal, third party observations and information were acceptable methods for conducting a performance review. (T vol. 2, pp. 524:18-525:17; Pet'r Exs. 14-18) Moreover, at this time, Dr. Buhler had just been tasked with the role of interim department head, which of itself would have been demanding of his time. (See T vol. 1, p. 15:15-25) (coordinated and oversaw all of her activities of teaching, of research, and extension within the Department; oversaw the budget, administrative and allocation of grants, 35 faculty, and ten staff; acting liaison to the Dean as well as the directors of research, extension, and teaching)

18. Dr. Buhler's actions in support of Petitioner during the Reduction in Force ("RIF") allowed her to keep her job. Likewise, Dr. Buhler proactively sought different assignments for Petitioner within the Department. In addition, Dr. Buhler met with Petitioner and her daily supervisors at various times to attempt a reconciliation of their conflicts. Dr. Buhler advocated for Petitioner to improve her job performance.

19. Petitioner questioned the credibility of Dr. Buhler's supervision of her job performance because he relied on managers to make his adverse determination. However, "[t]he determination that an employee has engaged in unsatisfactory job performance is general [can be] made by the supervisor in consultation with management." (*State Human Resources Manual*; (Resp't Ex. 12, bate stamp 002397) Either the supervisor and/or management can make the determination as long as the determination is "reasonable, consistent, factually supported and made in conjunction with the Human Resources Office." *Id.* Dr. Buhler's direct supervision was not required when he had sufficient, reasonable, and factually supported information from Petitioner's day-to-day managers.

20. The Undersigned finds that during his testimony Dr. Buhler appeared genuinely concerned about Petitioner's welfare and was a credible witness.

Diane Mays

21. Diane Mays has her bachelor's degree in Horticultural Science and has worked at NC State for 24 years. (T vol. 1, p. 189:2-15) In 2014 she became the Teaching Specialist and now provides 100% teaching support. (T vol. 1, p. 189:18-21) Ms. Mays was responsible for all the plants used in the labs, helped order supplies, set up labs, taught labs, and managed 75% of the 24,000 square feet of greenhouse space. (T vol. 1, pp. 189:22-190:5)

22. Ms. Mays worked with Petitioner in Dr. John Dole's lab from 2000 to 2014. (T vol. 1, p. 190:19-22) There Petitioner helped Ms. Mays and another colleague with some projects of Dr. Dole's, took care of geraniums and impatiens, and help with taking cuttings for experiments. (T vol 1 p. 191:1-4) Ms. Mays described her relationship with Petitioner as "cordial" and "professional" even though she sometimes found Petitioner "irritating" and a "lots of times" Petitioner did not do her work correctly, which she or another colleague would have to later fix. (T vol 1, pp. 191:5-10; 208)

23. In April 2016, Petitioner was assigned to Ms. Mays, and Petitioner's job responsibilities ranged from sanitation to the care of plants, i.e., watering, transplanting seeds, seeding, pruning, grooming, etc. (T vol. 1, pp. 191:21-192:1) Petitioner did not take directions from Ms. Mays; instead, Petitioner took an exorbitant amount of time to do tasks, would leave early, caused more work for Ms. Mays who had to redo the work, would "huff" or roll her eyes when asked to do something, complained about the work, and screamed at Ms. Mays when told about her watering mistakes. (T vol. 1, pp. 194-199; see Resp't Ex. 10 (stating that Petitioner was being "defiant" and "snippy") Petitioner's antipathy towards Ms. Mays was "palpable" to her colleagues (Pet'r Ex. 27)

24. According to Petitioner, Ms. Mays was not her day-to-day supervisor because Ms. Mays was a person of "inferior academic rank." Her assertion is not supported by the record as explained below.

25. Ms. Mays' experience and testimony about Petitioner's job performance and personal conduct were corroborated by Dr. Bergmann and Ms. Silverman. The Undersigned found Ms. Mays to be a credible witness.

Ben Andrew Bergmann, Ph.D.

26. Ben Andrew Bergmann, Ph.D., was employed as a Research Associate at the Horticultural Science Department at NC State, where 100% of his work is research. (T vol. 1, p. 245:8-14) He received his Ph.D. from NC State in forestry. (T vol. 1, pp. 245:20-246:1) He has worked in five different laboratories conducting research and began his current position in September 2015. (T vol. 1, p. 246:2-18)

27. Dr. Bergmann was Petitioner's day-to-day manager from June 3, 2016, to September 2018. (T vol. 1, p. 251:16-18) Dr. Bergmann criticized Petitioner's job performance for various reasons including, but not limited to, that: she was unable to perform as a scientist; lacked basic interpersonal and communication skills; was irresponsible in the lab; had a poor work ethic and purposely worked very slowly when she did not want to do a task; and, refused to follow his directions on many occasions.

28. In addition, Dr. Bergmann, like Emily Silverman, questioned Petitioner's honesty with respect to issues pertaining to her: "banking hours" for leave; representing events that did not happen; ascribing false motives to others, and making agreements and intentionally not following through. (Resp't Ex. 15, bate stamps 010229- 010230)

29. Dr. Bergmann's testimony and his reports, as documented in the Letter of Understanding and First Written Warning, are corroborated by his extensive email documentation of Petitioner's performance and conduct during the relevant time period that he worked with her. (Resp't Exs. 13-15) Like with Ms. Mays, Petitioner argued that Dr. Bergmann was not her daily manager; therefore, she did not have to follow his instructions. Again, Petitioner's assertion was not supported by the record.

30. Petitioner attempted to discredit Dr. Bergmann because of his June 1, 2016 email (Pet'r Ex. 27), which indicated that he had reservations about Petitioner joining his lab. He indicated that he was not as "overjoyed" to have Petitioner in his lab as Dr. Buhler's surmised. This was Dr. Buhler's interpretation of Dr. Bergmann's expression that he was "overjoyed." Dr. Bergmann did not actually say he was. (T vol. 1, p. 122:5-9)

31. On the stand, Dr. Bergmann was factually precise and appeared surprised at Petitioner's statements that she was "afraid" of him. Dr. Bergmann's detailed emails corroborated his testimony. While Petitioner was not shown these emails in "real time" and may not have been aware of them, Petitioner was advised of his concerns during the meeting on October 3, 2016, in the LOU and the First Warning Letter.

32. The Undersigned gave proper weight to Dr. Bergmann's June 1, 2016, email and found that Dr. Bergmann was a credible witness, and his testimony was supported by detailed written documentation.

Emily Silverman

33. Emily Silverman works for NC State in the Horticultural Science Department with Dr. Todd Wehner. She received her bachelor's (horticulture) and master's (plant pathology) degrees from NC State. (T vol. 2, p. 390:8-18) She started a Ph.D. program in 2016. (T vol. 2, p. 390:19-20) Ms. Silverman was employed by the Department from 2016 through 2018 as a Research Technician. (T vol. 2, p. 390:21-23)

34. Petitioner suggested that during her testimony Ms. Silverman was hostile and biased towards Petitioner. (T vol. 2, pp. 498:19-499:10) To the extent that Ms. Silverman may have appeared hostile, it was in response to the tone and baiting of Petitioner's skillful attorney during cross-examination, not because of any hostility or bias towards Petitioner.

35. While working with Ms. Silverman, Petitioner viewed Ms. Silverman as a "real friend" because she helped Petitioner draft her response to the First Written Warning. (T vol. 2, p. 635:6-14) Ms. Silverman also made positive remarks about Petitioner's performance along with the negative. Only when Ms. Silverman came out of the field research and worked more closely with Petitioner, did she begin to notice performance and conduct problems. Ms. Silverman even despaired about having to write negative comments about Petitioner. (Resp't Ex. 16, bate stamp 004615)

36. Ms. Silverman was a credible witness. Her testimony and statements about Petitioner's performance and personal conduct were well documented by her written emails. (Resp't Exs.16-19) She even records the actual dates of incidents documenting Petitioner's misconduct or unacceptable job performance. (Resp't Ex. 17, bate stamps 005799-005807)

Daniel ("Dan") O'Brien, III

37. Dan O'Brien was in the human relations department. He was only peripherally involved in the procedural aspect of the disciplinary matter. His creditability was not contested by either party or the Undersigned.

Petitioner's Witness:

Wei Wen Guo, Ph.D.

38. Petitioner Wei Wen Guo's education and work background are detailed *supra* in paragraphs 5 through 10. For reasons further elaborated upon later throughout this decision, Petitioner was not a credible witness.

39. Although Petitioner did not have the burden of proof, once Respondent met its burden, she did have to respond to the evidence. Petitioner did produce favorable past Performance Reviews that evidenced that she had a "very good" to "outstanding" performance ratings and no prior disciplinary matters. She did not, however, have any of her prior supervisors, Drs. Williamson, Ashrafi, Dole, or Wehner, testify on her behalf as to her current scientific competence, job performance, or conduct.

40. Even though her prior Performance Reviews were admitted for the purpose proving that she had no prior disciplinary matters and had very good/outstanding ratings, the hearsay comments contained within the Performance Reviews were not considered for the truth of the matter asserted because none of the declarants testified at the hearing.

41. When dismissed, Petitioner had been in post-graduate studies or working in the United States for a period of approximately 30 years. Despite this, Petitioner's English was difficult to understand, and her written communications lacked proper grammar, subject-verb agreement, and punctuation.

42. Moreover, during direct examination by her own legal counsel, Petitioner was confused even when asked leading questions which required only a "yes" or "no" answer (T vol. 2, pp. 579:14-580:16) Even considering, her anxiety about testifying, her language deficits were surprising, in light of her educational level, work experience, exposure to the English language, and her previous outstanding ratings in written/verbal communication skills. During the relevant disciplinary period, all of her managers noted that Petitioner lacked basic interpersonal and communication skills.

43. Petitioner admitted at the hearing that she occasionally failed to monitor the eyewash station, which was one of her weekly duties. Otherwise, Petitioner denied that any of the allegations in the First and Second Written Warning letters were true.

44. Petitioner admitted she did not follow protocol at times as instructed because “her goal was to find high [sic] efficient and the low cost [sic] was to maintain the culture.” (T vol. 2, pp. 590:4-592:22) She did not equate this with insubordination.

45. Petitioner made party admissions at her grievance hearing, which were documented in the Substantive Finding of Fact Number 11 in the Final University Decision. Petitioner admitted at the grievance hearing that: “[she] had failed to comply with certain directives and/or standard protocols for various reasons (i.e., [she] did not want to wear a lab coat because of [her] “OCD problem”; [she] had been “casual” with y[her] research notes, [she] did fail to follow proper procedures when working with seed packets, etc.)” (Resp’t Ex. 9, bate stamp 000036) Petitioner’s prior admissions were inconsistent with her testimony at the contested case hearing and further damaged her credibility.

Prior Performance History and Job Responsibilities

46. In Petitioner’s Annual Performance Reviews from 1996 to 2015, Petitioner’s job performance received the overall rating of “outstanding,” the highest possible rating. She received ratings of “outstanding” or “very good” in all subcategories of her job performance. (Pet’r Exs. 2-21)

47. Petitioner had different supervisors over the course of her career at NC State. Her supervisors from 1998-2002 were Drs. Pharr and Monaco. (Pet’r Exs. 4-8) Dr. Williamson supervised her the longest from 2003-2015. (Pet’r Exs. 9, 11, 12, 14-20) Dr. Burton supervised her during the period of her last favorable performance review in 2015-2016. (Pet’r Ex. 21)

48. Although the forms changed over the years, Petitioner’s primary job responsibilities on her 1996-2003 plans were, in priority order, the following:

1. Maintains regents and supply stocks, [sic], and implements all purchasing procedures necessary for the operation of the lab. Maintains files on suppliers.
2. Ensure laboratory meets all applicable Federal, State, and University safety requirements.
3. Conducts requested analytical and preparatory work in the areas of the project leaders’ interests. Assists laboratory personnel in the use of equipment, reagents and supplies.
4. Keeps an accurate record of all purchases by the laboratory and check this against reports from departmental reports.

5. Tabulates and summarizes research data, participate in interpretation of data, and participates with project leader in decisions concerning research program.

(Pet'r Exs. 2, 4, 5, 6, 8, 9)

49. Her performance characteristics on the 1996-2006 performance plans were the following in priority order:

1. Demonstrates understanding of the job and applies that knowledge/skill in a timely manner. Demonstrates the ability necessary for full job responsibilities.
2. Demonstrates the ability to gather and organize information, [sic] and achieve logical conclusions in a timely manner. Weighs alternatives and makes decisions that reflect the facts of a situation.
3. Demonstrates the ability to express ideas, both in writing and verbally, adjusting language or terminology to meet the needs of the audience.
4. Works effectively with others to accomplish organizational goals and identify and resolve problems. Shares knowledge and experience and is cooperate with others.
5. Demonstrates regular attendance, is dependable and punctual, and does not abuse leave.

(Pet'r Exs. 2, 4, 5, 6, 8, 9, 11 & 12)

50. Petitioner's 2004-2005 Performance Plan included the same responsibilities as the previous plans but added this key responsibility to it and subsequent plans:

Supervises undergraduate students and collaborates with graduate students and visiting scientists in the lab to teach and assist with techniques required for their research.

(Pet'r Exs. 11, 12, 14, 15, 16,)

51. In 2012, another key responsibility was added to Petitioner's Performance Plan 2012-2013 which included: plant tissue preparation for biochemical analysis of Arabidopsis (Clouse lab). (Pet'r Ex. 19)

52. During the disciplinary period from 2016-2018, Petitioner was unable to perform most of the same tasks which had been rated "outstanding" on her prior performance plans.

53. From 2007 until 2011, Petitioner's Competencies, in priority order, changed to:

Laboratory Management

1. Manage compliance with safety measures and guidelines.
2. Plans and monitors resources need to operate the laboratory; maintains in inventory control; coordinates space, equipment and/or facilities; may monitor expenditures.

Conducting Experiments/Procedures:

Coordinates and/or conducts multiple, concurrent assignments or a multifaceted project.

Knowledge-Professional Scientific:

Understand scientific principals [sic] to modify procedures in response to changing conditions; designs and/or operates highly specialized instruments and/or equipment.

Instruction:

Instructs others in the performance of complex tests and procedures and the proper use and care of specialized equipment.

(Pet'r Exs. 14, 15, 16, 17)

54. No competencies were included in the 2012-2013, 2013-2014, and 2014-2015 Performance Plans. (Pet'r Exs. 19, 20 & 21)

55. During the disciplinary period, Petitioner was unable to perform these competencies at the Research Specialist level.

56. Beginning in 2007, the Performance Plans added various "Methods of Evaluation," which included Supervisory Observation, Third Party Feedback, Peer Feedback, Spot Checks, Sampling/Statistics/ Project Results, Self-Report, and Others such as document review. (Pet'r Ex. 14, bate stamp 002270; *see also*, Pet'r Exs. 15-18)

57. Petitioner complained about Dr. Buhler's supervision and performance rating of her because he did not personally observe her work in the lab or greenhouse. Instead, Dr. Buhler used third-party feedback, peer feedback, and project results when completing Petitioner's Annual Appraisal Forms. (Resp't Exs. 3&5) All of which were appropriate according to Dan O'Brien in Human Resources and had been used as evaluation methods in past evaluations. *Id.*; (T vol. 2, pp. 524-525)

58. Starting in 2012 through 2014, Petitioner's position was split between 3 labs (Williamson, Clouse, and Dole labs). In the Dole lab Petitioner worked with Diane Mays. (Pet'r Exs. 19, bate stamp 002237; 20, bate stamp 002231) Even though Petitioner received "outstanding" performance rating during this time, "a lot of times" Ms. Mays and/or a colleague would have to go back and correct Petitioner's mistakes. (T vol 1, pp. 191:5-10; 208)

59. In April 2015, Petitioner was assigned to Dr. Ashrafi's lab. On May 31, 2016, because of Dr. Ashrafi's concerns about Petitioner's job performance and inability to do statistical analysis, Dr. Wayne Buhler became her direct supervisor. (Pet'r Ex. 23; T vol. 2, p. 664:17-20) Tabulating, interpreting, and summarizing research data had been a primary job responsibility in Petitioner's past performance work plans on which she was rated "outstanding," but now she was unable to do statistical analysis.

60. In the non-disciplinary Letter of Understanding addressing her unsatisfactory job performance, Dr. Buhler advised Petitioner:

... there [was] a genuine personality conflict with Dr. Ashrafi ... [he] did voice some concerns about your job performance ... [such as] the refusal to wear a lab coat in the lab and to remove your gloves when not in the lab and your inability or unwillingness to learn more sophisticated computing equipment.

(Pet'r Ex. 23)

61. In her past performance plans, Petitioner received "outstanding" ratings in the key job responsibilities of working effectively with others, being responsible for lab safety, and adapting, executing techniques needed to meet assigned research, and the proper use and case of specialized equipment. Now, Petitioner was having conflict with her direct supervisor and refusing to follow directives.

62. This pattern of behavior continued with Ms. Mays, Dr. Bergmann, and Ms. Silverman until her dismissal.

63. No Performance Plan for Petitioner was introduced for the 2015-2016 annual review period.³ However, according to Dr. Buhler's May 31, 2016 letter, Petitioner's performance appraisal was a "3" which meant she typically met or exceeded expectations based on the 1 to 5 rating scale used during that period. (Pet'r Ex. 23; *see* Pet'r Ex. 21, bate stamp 002226)

64. Her prior two performance ratings had been 4's, which meant that her "performance has demonstrated a consistently high level of accomplishment, meeting and often exceeding expectations for this position's key responsibilities." (*See e.g.* Pet'r Exs. 20, bate stamp 002231; 21, bate stamp 0002226)

³ Petitioner's Proposed Final Decision states that "Petitioner's 2015-2016 annual performance review was admitted as Petitioner's 21." (Pet'r Pro. Final Dec. p. 8, ¶ 24) Contrary to that assertion, Petitioner's exhibit 21 was the Annual Appraisal Form/Performance Review covering the Annual Work Period ending May 31, 2015, not 2016. (Pet'r Ex 21 bate stamp 002222)

65. Petitioner admitted that her job duties stayed basically the same over the 22-23 years she had worked for NC State. (T vol 2, p. 274:12-18) Yet, now, for some reason, Petitioner was unable or unwilling to perform many of her job responsibilities. Petitioner did try to learn the SAS statistical computer program but was unable to accomplish the task. Otherwise, as discussed *infra*, the Undersigned finds that Petitioner was simply unwilling to perform her job responsibilities during the disciplinary period.

66. Dr. John Williamson was Petitioner's supervisor for most of her time at NC State. (T vol. 1, p. 74:12-14) After June 2014, Dr. Williamson was no longer Petitioner's supervisor and later retired in the middle of 2018. (Pet'r Ex. 20, bate stamp 002228) (T vol. 1, pp. 167:25-168:2)

67. Dr. Buhler questioned the accuracy of Dr. Williamson's past performance reviews of Petitioner. His concerns were given some credence based on the fact that in 2016, Dr. Williamson declined to have Petitioner work in his lab under his supervision even when the Department would have covered her entire salary rather than he having to pay for it out of his own research funding stream. (T vol. 1, p. 169:3-10) Research technicians are typically funded either entirely or by a portion of a faculty member's funding. Full professors, like Dr. Williamson, have to provide funding for 50% of the assistant's salary. (T vol. 1, pp. 28:20-29:3) Dr. Williamson's refusal to have Petitioner work in his lab in 2016 was inconsistent with his prior rating of her work as "outstanding" and "exceeding expectations."

68. Dr. Buhler's reservations about Petitioner's past performance reviews were also consistent with Ms. Mays interactions with Petitioner from 2000-2014 in Dr. Dole's lab. During which time, Petitioner often made mistakes and her work had to be corrected by other staff. (T vol 1, pp. 191:5-10; 208)

Reduction-In-Force ("RIF")

69. Near the end of the 2015-2016 review period in March 2016, Dr. Wayne Buhler was named as the Interim Department Head of the Department of Horticultural Science at NC State. He served in this position until August 2018. (T vol. 1, p. 15)

70. At the time Dr. Buhler took the Interim Department Head role, Petitioner was working as a Research Specialist under the supervision of Dr. Hamid Ashrafi, an Assistant Professor within the Department. (T vol. 1, pp. 17-18) Dr. Ashrafi was not paying for any of Petitioner's salary from his funds. (T vol. 1, p. 28:13-19) After assuming his new role, Dr. Buhler became aware of some difficulties between Dr. Ashrafi and Petitioner. (T vol. 1, p. 20)

71. In the spring of 2016, the Horticulture Department was experiencing some budgetary constraints and was considering a reduction-in-force ("RIF") for some of the research positions, including Petitioner's position. (T vol. 1, p. 21) Dr. Buhler wanted to avoid having her lose her position, so he reduced Petitioner's effort from 1.0 (full time) to .75 (3/4 time) so that she could stay employed and remain eligible for benefits. (T vol. 1, p. 21)

72. Although this was not a disciplinary “demotion” as defined by the State Human Resources Manual (*see* Resp’t Ex. 12, bate stamp 002400), it was a reduction in her time and salary and might have been viewed as a demotion by Petitioner.

73. Because of the issues between Dr. Ashrafi and Petitioner, Dr. Buhler decided to move Petitioner into the teaching greenhouse, which was under the aegis of Dr. Helen Kraus and overseen by Ms. Diane Mays, a Teaching Specialist. (T vol. 1, pp. 21-22)

Greenhouse Assignment with Ms. Mays

74. Petitioner’s new work assignment would be working with Ms. Mays. Dr. Buhler believed this adjustment would be a good fit for Petitioner, as she had previous experience with greenhouse work and also had worked with Ms. Mays. (T vol. 1, p. 22)

75. Dr. Buhler spoke with Petitioner in his office with the business services coordinator present and asked Petitioner if she would be comfortable working in the greenhouse assisting the teaching faculty and producing the plant used for greenhouse observation by students. Petitioner agreed to this decision. (T vol. 1, pp. 23:20-24:7)

76. Dr. Buhler’s expectation was that Petitioner would support the teaching faculty in partnership with Ms. Mays, who has been at NC State as a Teaching Specialist for 24 years and was the manager of the conservatory. (T vol. 1, pp. 22:25-23:4; 189:7-8) (Resp’t Ex. 1, bate stamp 002201)

77. Petitioner began working in the greenhouse on April 5, 2016. Unfortunately, as soon as Petitioner started this new assignment, Ms. Mays began having issues with Petitioner’s work performance and unwillingness to follow instructions. Ms. Mays’ issues with Petitioner were wide-ranging and directly affected Ms. Mays’ ability to successfully supervise the greenhouse and to complete her own work. (T vol. 1, pp. 194-97)

78. Petitioner would often respond negatively to Ms. Mays’ suggestions. For instance, Petitioner would complain that she could not stand for long periods of time. In an attempt to help alleviate the issue, Ms. Mays suggested that Petitioner take breaks during the day. Rather than abiding by this suggestion, Petitioner would work throughout the day and then leave early. Petitioner’s self-determined schedule was an issue because Ms. Mays would never know when Petitioner was going to leave early – and Petitioner failed to communicate this information with Ms. Mays – which made it difficult for Ms. Mays to schedule certain activities in the greenhouse. (T vol. 1, pp. 195-98) (Resp’t Ex. 10)

79. Another issue was that Petitioner worked in an unsafe manner. One day, Ms. Mays noticed that Petitioner printed materials in a very large font. Ms. Mays was concerned by Petitioner’s apparent diminished visual acuity, as greenhouse employees often used sharp tools, such as pruners and machetes. However, when Ms. Mays asked Petitioner to wear her glasses when working with pruners, Petitioner angrily refused and said she did not need to wear them. (T vol. 1, pp. 199-200) (Resp’t Ex. 10)

80. Additionally, Petitioner did not feel she needed to listen to Ms. Mays' instructions, yet she lacked the ability to complete her assigned tasks appropriately. As an example, Ms. Mays would attempt to instruct Petitioner on how to properly water plants, and Petitioner would refuse this direction and then water the plants incorrectly. On at least one occasion, rather than listening to Ms. Mays' suggestion, Petitioner began screaming at her. (T vol. 1, pp. 198-99)

81. Because Ms. Mays was not identified as her supervisor⁴, Petitioner believed that she did not have to follow Ms. Mays' instructions. (T vol. 2, pp. 583:25-584:5, 20-22) However, Petitioner admitted that after the first month of working with Ms. Mays, she asked Dr. Buhler for "fixed responsibilities," rather than being assigned duties by Ms. Mays. (T vol. 2, p. 638:3-16)

82. Petitioner denied Dr. Buhler or Mays told her anything about their concerns about her job performance. However, according to both Dr. Buhler and Ms. Mays, Petitioner had been reminded on several occasions that she was expected to follow basic instruction and standard operating procedures. (Resp't Ex. 1, p. 002201)

83. On April 21, May 2, and May 3, 2016, Ms. Mays emailed her concerns about these issues to Dr. Buhler's attention. (T vol. 1, p. 200) (Resp't Ex. 10)

84. In May of 2016, Dr. Buhler held a meeting with Petitioner and Ms. Mays to try and see whether he could help facilitate some resolution of the ongoing problems. (T vol. 1, pp. 25-26, 204-205)

85. At May 2016 meeting Dr. Buhler asked Petitioner about Ms. Mays' concerns and why Petitioner refused to follow Mays' instruction. Petitioner responded that "it was difficult to work with Diane [Mays] because the work was either beneath her or was not of the nature where she felt she could express her scientific skills and background." (T vol. 1, p. 26:14-19) (Resp't Ex. 1)

86. Dr. Buhler advised Petitioner while Petitioner could "provide opinion and feedback about certain aspects of [her] job it is not acceptable for [her] to demonstrate an unwillingness to complete duties and sometimes not perform job duties." (Resp't Ex. 1)

87. However, it was clear to Dr. Buhler by the end of the meeting that the two could not continue to work together. (T vol. 1, p. 26)

88. On June 2, 2016, just two months after Petitioner began working with Ms. Mays, Dr. Buhler ended Petitioner's assignment with her. (Resp't Ex. 1)

⁴ This was the same excuse Petitioner used throughout her testimony to justify her insubordination with her day-to-day managers. (T vol. 2, p. 585:13-16 (Bergmann); 466:1-18 (Silverman))

Assignments to Dr. Bergmann and Emily Silverman

89. Although Petitioner had outstanding past job performances and her salary was being funded through the Department's general funds, not through faculty funding sources, none of the faculty appeared to be clamoring to have her in their labs. Dr. Buhler "fortuitously" found her another position. (T vol. 1, pp. 29:4-8; 161:14-21)

90. After exploring other options for reassigning Petitioner out of the greenhouse, Dr. Buhler was able to reassign Petitioner to work in Dr. John Dole's lab under Dr. Ben Bergmann as her day-to-day manager. (T vol. 1, p. 29) Dr. Buhler's perception was that Dr. Bergmann seemed very excited with this arrangement because it appeared to be a good match of Petitioner's skills and filled a need within the Department. (T vol. 1, p. 29) However, based on an email during this time, Dr. Bergmann was not as excited as he first appeared after he had discussions with Petitioner's past supervisors, Drs. Williamson and Ashrafi, and co-worker Ms. Mays about Petitioner's past work history. (Pet'r Ex. 27)

91. In June 2016, Dr. Buhler was able to identify another opportunity for Petitioner and decided to split her time between servicing Dr. Dole's lab and working at another location. Her other assignment would be in Dr. Todd Wehner's laboratory, under the day-to-day management of Emily Silverman. (T vol. 1, pp. 29-30)

92. As of June 6, 2016, Petitioner was told that she would "be involved in special lab projects as directed by the Department head." (Pet'r Ex 23) At that time, she was assigned to Dr. Ben Bergmann. They both had Ph.D.'s and worked in the same capacity as a Research Specialist at the journey level. *Id.*

93. While Petitioner was assigned to work in Drs. Dole and Wehner's labs, the day-to-day lab and experiment management was done by Dr. Bergmann in Dr. Dole's lab and Ms. Silverman in Dr. Wehner's lab. (Resp't Ex. 1)

94. Petitioner did not comply with Dr. Bergmann or Ms. Silverman's instructions because Petitioner said that she was never told that she was under the day-to-day management of them. (T vol 2, p. 285:13-16) Even if this were true, by October 3, 2016, during a meeting with Drs. Buhler and Bergmann, Petitioner "stated that [she] understood the concerns and parameters." (Resp't Ex. 1)

95. Moreover, this was reiterated in the October 24, 2016, Letter of Understating ("LOU") in which Dr. Buhler stated that:

[b]oth Dr. Dole and Dr. Wehner agreed to have you work with them to support their research programs but made it clear that they left the day to day lab and experiment management to others. In Dr. Wehner's case, that person is Emily Silverman and in Dr. Dole's case, the person is Dr. Ben Bergman.

(Resp't Ex. 1)

96. Based on the meeting on October 3, 2016, and the LOU issued on October 24, 2016, Petitioner's assertions, that she did not know Dr. Bergmann and Silverman were her day-to-day managers, were not credible.

97. Dr. Buhler hoped Petitioner would "feel more comfortable and productive in the familiar environment of the laboratory" and advised her to come to him with any concerns that "[his] door is always open, and [he was] always willing to listen to help." (Pet'r Ex. 23) There was no evidence that Petitioner took advantage of Dr. Buhler's offer, although she did communicate with Human Resources at times.

98. Petitioner's key responsibilities during the 2016-2017 review period were:

Serve as a departmental floating research specialist to assist two programs: Dole floriculture program and Wehner breeding program. Report to research heads on a daily basis as requested and perform specific tasks as identified for you.

Care for experiments in greenhouse. Work with technicians and graduate students to assist them with their research. Perform labs [sic] tasks as requested and help technical and graduate students with research.

Conducting a variety of experiments and techniques, including but not limited to sampling, cultures, harvest of spores, extraction of solutes from tissue, RNA analysis.

Participate in lab cleanliness, orderliness, and organization. Performs weekly testing of eye-wash stations and ensures proper labeling and organization of substance and experiments.

(Resp't Ex. 3, bate stamp 002165)

99. Prior to 2016, Petitioner had purportedly performed outstandingly in all of these job responsibilities.

100. Petitioner's work plan and performance expectations as a Research Specialist during the 2016-2017 review period were: conducting experiments that met research objectives and procedures; data analysis including statistical analysis; clearly communicating verbally and in written form; and a high level of professional/scientific skill and knowledge of scientific principles, methods, and processes, including conducting systematic and objective study design, method of data collection and analysis, interpreting g results, operating instruments and equipment, and knowledge of related information technology. (Pet'r Ex. 22, bate stamp 002176)

101. All of these performance expectations were ones that Petitioner had received outstanding ratings in the past and were expected for a Ph.D. researcher in her position.

Work Performance and Personal Conduct While Working with Dr. Bergmann

102. Given her position as a Research Specialist, Dr. Bergmann expected, among other things, that Petitioner would be able to design, implement, and conduct an experiment. Additionally, someone in Petitioner's role would be able to follow instructions for performing an experiment, as well as be able to problem-solve. (T vol. 1, pp. 251-52) Further, as he would expect from anyone working in the lab, Petitioner was expected to clearly communicate with him, be on time for work, and be a team player. (T vol. 1, p. 252)

103. Initially, while working with Dr. Bergmann, Petitioner was asked to take data on a few experiments, conduct eyewash checks, and perform other tasks around the lab. These were the type of responsibilities that Dr. Bergmann would assign to anyone in Petitioner's position, including himself. Dr. Bergmann expected Petitioner, as a Research Specialist, to be able to work independently, quickly, and efficiently, and to keep accurate records. (T vol. 1, pp. 252-53) Unfortunately, she was unable to meet these performance expectations. (T vol. 1, p. 254)

104. At first, Dr. Bergmann would provide Petitioner's assignments to her verbally, but this method was not effective. Therefore, when providing assignments and other information to Petitioner, Dr. Bergmann began to use email or hand-written instructions, in addition to the verbal instructions. (T vol. 1, pp. 254-55)

105. Nearly from the beginning of her time working in Dr. Dole's lab with Dr. Bergmann, there were some problems with Petitioner's work. She would continually fail to follow directions. For instance, Petitioner would fail to keep a lab notebook, which is standard protocol for a scientist. (T vol. 1, p. 255) Another example was her failure to consistently test the eyewash stations, which was a safety requirement, and something she was already doing in Dr. Wehner's lab. Prior to her arrival, this was a task completed by Dr. Bergmann. As he did with other issues, Dr. Bergmann approached Petitioner to discuss the problems with her performance and conduct. (T vol. 1, pp. 256-257)

106. Petitioner denied that Dr. Bergmann ever discussed with her any problems with her work performance or conduct.

107. After a period of time, Dr. Bergmann began to share verbally and by emails some of these issues with Dr. Buhler. (T vol. 1, p. 258) (Resp't Ex. 13) As one would expect with a scientist, Dr. Bergmann's emails were very precise and listed the dates, events, and specific details from June 27, 2016 through September 14, 2018. (See Pet'r Ex. 26 bate stamps 002586-002590, 009508, 009560-009561, 009648-009650, 002887-002888, 002955, 009791, 0030730003074, 010226) (Resp't Exs. 13, 14, 15)

108. In his September 7, 2016 email to Dr. Buhler, Dr. Bergmann informed Dr. Buhler that he was not comfortable with Petitioner being involved in research, as she was making too many mistakes. (T vol. 1, pp. 258-59) (Resp't Ex. 13) Additionally, Petitioner's unexplained absences directly affected Dr. Bergmann's ability to do his job, as he was often forced to plan experiments two ways: one way if Petitioner came to work and another way if she did not. (T vol.

1, pp. 259-260) Petitioner's self-scheduling had been problematic when she worked with Ms. Mays and continued while she worked with Ms. Silverman.

109. In the same email, Dr. Bergmann alerted Dr. Buhler about other issues, specifically that:

[t]here are too many things she cannot or will not do too many things she complains about having to do, and too many things I'm left wondering whether they were done properly. She takes an inordinate amount of my time and mental energy for the work we get from her.

(Resp't Ex. 13)

110. Petitioner complained that she was not made aware of Dr. Bergmann's emails, and later Ms. Silverman's, in "real-time" and was not given sufficient information about her work performance and conduct prior to the beginning of disciplinary action. These assertions were discredited by the fact she attended an October 3, 2016 meeting with Drs. Bergman and Buhler to discuss these issues and was given a pre-disciplinary Letter of Understanding ("LOU") for Unsatisfactory Job Performance on October 24, 2016. The LOU detailed Ms. Mays reports about Petitioner's poor job performance and failure to follow instructions. (Resp't Ex. 1, bate stamp 002201)

On October 3, 2016, Petitioner met with Dr. Bergmann and Dr. Buhler to discuss some of her ongoing problems. (T vol. 1, p. 262) (Resp't Ex. 1) Dr. Bergmann viewed the meeting as a way to constructively "restart" Petitioner's role in the lab. Specifically, he focused on working with Petitioner on her communication with him and setting up a plan so that she could better communicate with him and Ms. Silverman. (T vol. 1, p. 265) One aspect of the plan was that Petitioner would check-in with Dr. Bergmann or Ms. Silverman every day when she arrived at the office. (T vol. 1, p. 266) The first of these meetings with Dr. Bergmann was to occur the following day. (T vol. 1, pp. 267-68) (Resp't Ex. 14) Petitioner was supposed to meet Dr. Bergmann in his office at 7:45 a.m. (T vol. 1, p. 268) (Resp't Ex. 14) However, she failed to come to the meeting. Around 9 a.m., Dr. Bergmann emailed Petitioner, but rather than coming to his office, Petitioner told Dr. Bergmann to come and meet her where she was working. (T vol. 1, p. 268) (Resp't Ex. 14) This incident was just one example of Petitioner missing scheduled meetings.

111. Petitioner's excuse for missing meetings was that "[it] is not a big deal because the faculty member all know research, it's much more important than attending a meeting. So if like ten, 15 minutes, they all understand." (T vol. 2, p. 651:16-21)

October 24, 2016 Interim Performance Review and Letter of Understanding

112. Despite the meeting on October 3, 2016, Petitioner continued to show that she was not able to complete her work assignments in an acceptable manner. (T vol. 1, p. 32)

113. As a result, on October 24, 2016, Dr. Buhler issued her a Letter of Understanding for Unsatisfactory Job Performance ("LOU"). (T vol. 1, pp. 32-33) (Resp't Ex. 1) At the time, this

document was not required by any policy or regulation, but Dr. Buhler saw the LOU as an opportunity to provide guidance to Petitioner about unsatisfactory job performance, her unwillingness to take basic instruction, and her refusal to do some task because she holds a Ph.D. (T vol. 2, p. 519) (T vol. 1, p. 33) (Resp't Ex. 1)

114. The LOU outlined the problems that Petitioner had working with Dr. Ashrafi, Ms. Mays, and Dr. Bergmann. Specifically, for Dr. Bergmann, it noted that Petitioner would ignore basic requests from him and would often fail to attend meetings and experiments. It also provided examples of her being unprofessional and disrespectful, as well as her continued unwillingness to complete necessary duties at work, such as washing dishes because she "has a Ph.D." (Resp't Ex. 1, pp. 1-2)

115. The LOU ended by saying that:

[a]t present your job performance is unacceptable and unsatisfactory. Moving forward, I expect you to collaborate in word and deed with the Dole and Wehner research programs [and] I expect you to follow basic instructions, lab protocol, and carry it out to the best of your professional ability.

(Resp't Ex. 1, p. 2)

116. Petitioner refused to sign her Interim Appraisal review. (Resp't Ex. 3, bate stamp 002164)

117. After the LOU was issued, Petitioner went to Ms. Silverman's office and asked Ms. Silverman to help her with a response to the LOU which Ms. Silverman did. (T vol. 2, p. 398)

118. Around this time, Dr. Buhler asked Dr. Bergmann to continue to document any additional issues with Petitioner, and Dr. Buhler also asked Ms. Silverman to begin documenting any problems she had with Petitioner. (T vol. 1, p. 36)

119. After the LOU was issued, Dr. Bergmann continued to have problems with Petitioner's job performance. (T vol. 1, pp. 279, 287) (Resp't Ex. 14) She continued to unexpectedly miss work and meetings, which affected Dr. Bergmann's ability to plan experiments. (T vol. 1, pp. 280-281) (Resp't Ex. 14, bate stamp 009648) She was late to work, failed to listen to instructions, failed to follow protocol with experiments, and failed to use a lab notebook. (T vol. 1, pp. 282-285) (Resp't Ex. 14, pp. 002887-002888; 002955; 009790-009791) (*see* Resp't Ex. 20)

120. This pattern continued for a number of months, and throughout this time, Bergmann continually updated Dr. Buhler about the ongoing issues. (T vol. 1, pp. 287-288) (Resp't Ex. 14)

Job Performance and Personal Conduct Before the First Warning Letter

121. Also during this time, Ms. Silverman began having issues with Petitioner's work. In her first few months with Ms. Silverman, Petitioner had been the lab researcher working on tissue culture. Beginning in November 2016, Ms. Silverman had Petitioner work on a tissue culture project. However, Ms. Silverman soon became aware that Petitioner was completing this experiment in an inconsistent manner that was not reproducible, which made the research unusable. (T vol. 2, pp. 399-400) Ms. Silverman discussed this problem with Petitioner, but Petitioner continued to conduct the experiment in an inconsistent manner. Petitioner also continually failed to make consistent data recordings and would use scrap paper (Resp't Ex. 20) for recording data and other information rather than her lab notebook, which was a problem because scrap paper can easily go missing, and it is hard to connect the information to a particular experiment. Ms. Silverman communicated these performance problems to Dr. Buhler. (T vol. 2, pp. 400-03) (Resp't Ex. 16)

122. Ms. Silverman's emails detailed her issues with Petitioner's work from June 2016 through July 25, 2018. (Resp't Exs. 16, 17, 18 & 19)

123. Initially, in June 2016, Ms Silverman wrote that Petitioner had maintained well the stevia selection used for the Pepsi Co research and that she "picked up the techniques quickly, asked good questions, and followed instruction very well." (Resp't Ex. 16, bate stamp 004614)

124. Things appeared to go well until the beginning of 2017, when Ms. Silverman began working more closely with Petitioner in the lab. (Resp't Ex. 16, bate stamp. 004614) Ms. Silverman noticed "some bad lab habits over the past several weeks of close observation and [she had] talked to Wei wen directly about them to try to correct the issues." (Resp't Ex. 16, bate stamp 004614)

125. In a May 19, 2017 email to Petitioner, Ms. Silverman advised Petitioner that:

[t]he main areas to do better on are organization, record keeping, and following instructions. Use your lab notebook to write down [sic] what you do at work, take notes of observation, ... label everything completely and consistently so that anyone looking at the material and supplies knows what it is. Follow instruction when conducting [sic] experiments and conduct research in a consistent, repeated, scientific manner that can be reported in a report for Pepsi or academic publication. Let me know if you need clarification on any of these points.

(Resp't Ex. 17, bate stamp 004871)

126. According to Petitioner, although she thought that Ms. Silverman was her friend, Ms. Silverman never showed her or told her about the emails she was sending to Dr. Buhler (T vol. 2, p. 577:4-16). Ms. Silverman also did not tell Petitioner that she continued to make mistakes after the First Warning Letter. (T vol. 2, p. 610:8-22)

127. Ms. Silverman did not show any personal animosity towards Petitioner. Instead, at the conclusion of her February 5, 2017, email to Dr. Buhler, Ms. Silverman wrote:

I really like Wei[]wen as a person. I feel we get along working together and that we can communicate even if we don't agree on things, but she can be frustrating to supervise because she does things her way which is not always the way they need to be done. I think she does [a] great job maintaining our clones, but I won't be assigning more research to lead because she has shown me that she doesn't know how to consistently design and conduct repeatable experiments

(Resp't Ex. 16, bate stamp 004615)

First Written Warning

128. After their time working together, Dr. Bergmann emailed Dr. Buhler about his experience working with Petitioner. Among other things, Dr. Bergmann noted that Petitioner's job performance was shockingly poor; working with her was incredibly challenging, stressful, and wasteful, in terms of time, money, and resources; she lacked basic interpersonal and communication skills; she often refused to keep lab notes, and when she did, they were sloppy, disorganized, and sometimes written on scrap paper; she had a poor work ethic and was dishonest; and overall, she failed to perform anywhere close to minimally acceptable standards for someone in her position as a Research Specialist. (T vol. 1, pp. 292-295) (Resp't Ex. 15, bate stamps 010229-010230)

129. As Petitioner's work for Dr. Bergmann and Ms. Silverman continued to be woefully inadequate, on May 10, 2017, Dr. Buhler issued the First Written Warning for Unsatisfactory Job Performance ("First Written Warning") which included a Performance Improvement Plan ("PIP"). (Resp't Ex. 3, bate stamps 002170-002173)

130. The First Written Warning listed eight examples of Petitioner's inability to satisfactorily complete her job. The First Warning Informed Petitioner that these actions were not in accordance with the responsibilities of a Research Specialist, and it listed seven competencies that were expected of a Research Specialist. The First Written Warning also informed Petitioner that she was being put on a Performance Improvement Plan ("PIP"), which listed five different areas where she needed to show improvement. The First Written Warning indicated that if Petitioner failed to make and sustain improvement in these areas, it could lead to additional discipline, up to and including dismissal. Dr. Buhler discussed this document with Petitioner. (T vol. 1, pp. 38-42) (Resp't Ex. 2)

131. Soon after issuing the First Written Warning, Dr. Buhler completed Petitioner's annual performance review. The review was for the period ending on May 31, 2017, and as the reviews are normally completed during the month of May, Dr. Buhler attached the First Written Warning to the review. (T vol. 1, pp. 43-45, 154-56)

132. For her 2017-2018 performance review period, Petitioner had four individual goals added to her Performance Appraisal Form (dated 04/01/17 to 03/31/18). They were: adhere to all workplace processes; utilize your lab notebook by recording data and other relevant notes about experiments; pay attention to detail when organizing media and supplies, processing and recording data; and meet all performance expectations with respect to conducting experiments, data analysis, verbal and written communication, and achieve a high level of professional/scientific skill or knowledge. (Pet'r Ex. 22, bates stamps 002175-002176)

133. At that time, Petitioner had not successfully completed her job responsibilities and did not meet any of her individual goals.

Job Performance and Personal Conduct After the First Written Warning

134. Throughout this time, Petitioner was also working under Ms. Silverman's supervision. When Petitioner began, she was tasked with, among other things, maintaining the eyewash station, recording data, and implementing experiments, specifically, at that time, an experiment on tissue culture. (T vol. 2, pp. 393-95) During this time of year – specifically April through October – Ms. Silverman was spending much of her time in the field, rather than on campus. (T vol. 2, pp. 470-71)

135. In the summer of 2017, just a few months following the First Written Warning, stopped working for Dr. Bergmann and began working exclusively for Ms. Silverman. (T vol. 1, pp. 45, 291)

136. At this point Petitioner had had personal conflicts with three of her prior managing colleagues, Dr. Ashrafi, Ms. Mays, and Dr. Bergmann, and was beginning to have difficulties with her fourth manager, Ms. Silverman.

137. Following the First Written Warning, Ms. Silverman shifted Petitioner's responsibilities, but she continued to have problems with Petitioner. Due to personnel changes in the greenhouse, Ms. Silverman had Petitioner working more in the greenhouse and also counting seeds. Seed counting was very important to ensure that there was consistent, viable data. While Petitioner was counting seeds, a significant issue arose when she failed to notify Ms. Silverman after Petitioner observed cigar beetles in the seeds. Insects are a serious problem in the greenhouse, especially with the seeds, and there was a concern that the University would need to report the beetles to the Animal, Plant and Human Inspection Services, so they could properly document the importation of pests from other countries. (T vol. 2, pp. 409-12, 415-16) (Resp't Ex. 17, bates stamp 005298)

138. Throughout the fall of 2017 and into 2018, Ms. Silverman continued to have problems with Petitioner, and she communicated these issues to Dr. Buhler. (T vol. 2, pp. 418) (Resp't Ex. 17, bates stamps 005578-005580) These problems included Petitioner mislabeling plants and failing to follow proper protocol, improperly keeping data and not using a lab notebook, failing to follow directions, not working well with other people in the lab, and not using critical thinking or problem-solving skills. (T vol. 2, pp. 418-424) (Resp't Ex. 17, bates stamps 005578-005580)

139. Ms. Silverman provided Dr. Buhler with an email that listed various dates where she had problems with Petitioner. (T vol. 2, pp. 424-25) (Resp't Ex. 17, bate stamps 005799-005807) In that email, she listed events throughout February and March 2018 that exemplified some of her ongoing problems with Petitioner, which included Petitioner's long-standing problems with, among other things, following lab protocol, properly collecting data, and performing the expected tasks of a Research Specialist. Additionally, it noted an event in March 2018 when Petitioner once again failed to alert Ms. Silverman about a potential issue in the greenhouse. This time, Petitioner failed to tell Ms. Silverman about white flies in the Stevia greenhouse. This failure to immediately notify Ms. Silverman about the white fly issue could have jeopardized the entire experiment, which would have been catastrophic, as Pepsi was funding the experiment with a yearly donation of \$1,000,000. (T vol. 2, pp. 424-25) (Resp't Ex. 17, bate stamps 005799-005807)

140. Ms. Silverman also documented the following rough estimates of the monetary losses actually caused by Petitioner's inability to perform conduct research on the tissue culture project assigned to Petitioner's leadership:

- Media Ingredients \$1200
- Tissue Culture Containers \$1200
- Ziplock Bags \$200 for cutting transport
- Tape \$100 to label cultures
- Space Use Fees for use of the Growth Chamber (amount unknown)
- Labor of FWS students \$865
- Electricity to operate the growth chamber \$2,000
- Infested Plants thrown away \$1600
- ELISA kits \$900
- 1.5 ml tubes \$100+
- 24 hours + labor for lab work \$500
- 4+hours to collect samples \$100

(Resp't Ex. 17, bate stamps 005799-005807)

141. In addition, because of Petitioner's incompetence and refusal to follow instructions, numerous man-hours were lost because her need of supervision, seeds were unusable for field research, plants were thrown out, cigar beetles in seed bags potentially could have caused the loss of all the seed bank, and 25% of the greenhouse stevia section was infested with whiteflies, and clone production at risk for the next field season. The whitefly infestation could potentially have cost NC State \$1,000,000.00 in stevia research funding for Pepsi Co., NC State's longstanding relationship with Pepsi Co., and NC State's reputation for research excellence. (Resp't Ex. 17, bate stamp 005806)

142. Moreover, Ms. Silverman questioned whether she could trust Petitioner because of conflicting information Petitioner provided her about Petitioner's purported health issues and limitations for doing specific tasks. (Resp't Ex. 17, bate stamp 005805) At one-point Petitioner would tell Ms. Silverman that she could not perform a task, such as moving bags of potting soil,

then later changed her mind and said she could do the task. Ms. Silverman concluded that she could not trust Petitioner to be honest with her. (Resp't Ex. 17, bate stamp 005801)

Second Written Warning

143. At this point, Petitioner had failed to comply with the requirements of the PIP. (T vol. 2, pp. 427) According to Dr. Buhler, Petitioner had not demonstrated a consistent and sustained correction of her work, which led him to issue the Second Written Warning on March 21, 2018 ("Second Written Warning"). (T vol. 1, pp. 46-47) (Resp't Ex. 4)

144. In the Second Written Warning dated March 21, 2018, based on the consistent documentation from Ms. Silverman, Dr. Buhler listed eleven (11) incidents in which Petitioner had failed to sustain improvement in her performance, as required by the PIP and the First Written Warning. Additionally, the document stated that Petitioner was failing to meet the minimum performance expectations for someone in her position and then listed the expected competencies for a Research Specialist. As Petitioner had been unable to correct her deficient work performance, she was placed on a Corrective Action Plan ("CAP"). Similar to the PIP, the CAP listed five (5) areas where she was required to improve. A failure to improve in these areas would lead to additional discipline, including dismissal. After it was issued, Dr. Buhler explained this document to Petitioner. (T vol. 1, p. 53) (Resp't Ex. 4, bate stamps 002189-0021192)

145. In April 2018, Dr. Buhler completed Petitioner's annual performance review. Based on her continued unsatisfactory job performance, Petitioner received a 1 in every category of her review, which was the lowest possible score and indicated that she was not meeting expectations. (T vol. 1, pp. 54-58) (Resp't Ex. 5)

Job Performance and Personal Conduct After the Second Written Warning

146. After the Second Written Warning, Ms. Silverman tried to find something that Petitioner could do, so she ultimately had Petitioner return to counting seeds. However, despite doing a similar task the previous year, Petitioner continually asked the same questions repeatedly. Notwithstanding Ms. Silverman's consistently reiterating the same instructions, Petitioner continued to mislabel packets and tape scraps of paper to the seed packets. Thus, once again, Ms. Silverman was forced to change Petitioner's responsibilities. (T vol. 2, pp. 435-437) (Resp't Ex. 18, bate stamps 008103-008104)

147. As listed in the First and Second Written Warning, one of the expected competencies for a Research Specialist is data analysis. (Resp't Exs. 2 and 4) Petitioner admitted that one competency for a Research Specialist was to perform statistical analysis. (T vol. 2, p. 664:7-9) However, even though she had outstanding past performance ratings on data analysis, Petitioner said that she "totally don't know anything about analytical. [Her] background is not that." (T vol. 2, p. 664:11-16)

148. So, in May 2018, Ms. Silverman assigned Petitioner to work on analyzing a set of statistics. In order to help Petitioner, understand the program, Ms. Silverman provided her with data that had already been analyzed and asked her to use the code file to practice entering a code

that already worked. Ms. Silverman had done the same analysis the previous fall. Ms. Silverman provided Petitioner with various resources, and Petitioner was given three weeks, which was until June 1, 2018, to complete the practice run. Ms. Silverman's hope was that Petitioner could then use these skills to analyze new data sets. (T vol. 2, pp. 437-41) (Resp't Ex. 18, bate stamps 010715-010718)

149. Petitioner did attempt the assignment but was unable to complete it within three weeks. Instead, she turned in the practice data three weeks late, and when it was submitted, it was not done correctly. Data analysis had been one of Petitioner's prior job responsibilities. Petitioner stated that she was not aware that conducting data analysis was a Research Specialist's job responsibility even though Dr. Ashrafi had expected her to do statistics, and it was a competency listed on the LOU. (T vol. 1, pp. 664-665:1; 668:6-16) Moreover, data analysis was a job responsibility on her past performance plans on which she had performed "outstandingly." (Pet'r Exs. 2, 4, 5, 6, 8, 9)

150. Throughout the summer of 2018, Ms. Silverman continued to communicate with Dr. Buhler about her ongoing issues with Petitioner. (T vol. 2, pp. 441-42)

151. As Petitioner was unable to properly complete her assigned tasks, Ms. Silverman again altered Petitioner's responsibilities. Petitioner was assigned to do some cleaning around the lab, which included bleaching some items in the lab. Previously, Petitioner had received a safety training PowerPoint in August 2016 and completed a safety quiz. Additionally, Ms. Silverman had provided her with verbal instructions on how to bleach in August 2017, as well as going through a safety checklist in July 2018, and then on July 11, 2018, Ms. Silverman verbally instructed Petitioner on how to bleach pots and walked through the lab with Petitioner and showed her what needed to be cleaned. Ms. Silverman reminded Petitioner to wear her proper protective equipment, including gloves, lab coat, and goggles. Yet, on the afternoon of the day when Petitioner was working with bleach, Ms. Silverman received an email from Petitioner informing Ms. Silverman that Petitioner's eye was all red and that Petitioner was having a problem with it. This incident would have been avoided if Petitioner had complied with the safety protocol. (T vol. 2, p. 444) (Resp't Ex. 19)

152. Throughout the summer of 2018, Ms. Silverman continued to have problems with Petitioner following lab protocol. Petitioner continued to refuse to use her lab notebook to keep track of data.(Resp't Ex. 20) Ms. Silverman also discovered that Petitioner had incorrectly completed a chemical inventory. (T vol. 2, pp. 447, 449) (Resp't Ex. 18, bate stamps 011118-011119)

153. Ms. Silverman continued to communicate with Petitioner about these ongoing issues, but rather than correcting the problems, Petitioner would just become defensive. (T vol. 2, p. 450)

154. By August 2018, Ms. Silverman had supervised Petitioner for over two years. During this time, Ms. Silverman had been forced to change Petitioner's responsibilities several times. By this point, Ms. Silverman just had Petitioner counting seeds, as it was one of the few

assignments where Petitioner could not hurt herself or do something that would have a negative effect on the lab's research. (T vol. 2, p. 452)

155. As Petitioner had failed to comply with the LOU, the PIP in the First Written Warning, and the CAP in the Second Written Warning, Dr. Buhler reached out to University Employee Relations to discuss Petitioner's dismissal. Over the course of two and a half years and under the supervision of three different people, Petitioner had consistently shown an unwillingness or inability to comply with the bare minimum required for her position. Dr. Buhler tried his best to put Petitioner in various situations that he believed would allow her to be successful, i.e., working with people with similar interests or doing work that she had done previously in the Department. Yet, despite his efforts, she failed to take advantage of those opportunities, and Dr. Buhler had no other resort but to consider dismissal. (T vol. 1, pp. 59-60, 67-68)

156. In reaching the decision to dismiss Petitioner, Dr. Buhler considered Petitioner's past favorable performance reviews and lack of any prior disciplinary matters during her previous 21 years at NC State. As a result, NC State did suspend Petitioner "with pay" prior to her pre-disciplinary conference. Demotion was not practical because Petitioner's work assignments had already been adjusted over a long period of time in order to try and accommodate the ongoing challenges she was having with the intention to avoid, if possible, her dismissal. Petitioner's job responsibilities had been basically "demoted" over the past two years to the point that counting seeds were her primary assignment as a Ph.D. Research Specialist. Demotion was not an appropriate disciplinary action based on the sound and considered judgment of Dr. Buhler after consultation with the Human Resources Office. Dismissal was also determined to be consistent with past practices and similar disciplinary actions at NC State. (T vol. 1, pp. 67-68, 71-72; T vol. 2, pp. 530-31)

157. Additionally, at NC State, especially in the area of research, it was common for Dr. Buhler, as Petitioner's supervisor of record, to rely on Petitioner's day-to-day managers, such as Ms. Mays, Dr. Bergmann, and Ms. Silverman, in evaluating Petitioner. It was also permissible for Dr. Buhler to evaluate and discipline Petitioner based on information that he acquired from her day-to-day managers. (T vol. 2, pp. 524-25)

158. On October 2, 2018, Dr. Buhler issued a Notice of Placement on Investigatory Leave with Pay and Notice of Pre-Disciplinary Conference for Unsatisfactory Job Performance and Unacceptable Personal Conduct. In this document, Dr. Buhler discussed many of the incidents listed above and informed Petitioner that due to her failure to comply with the requirements of either Written Warning and her ongoing inability to meet the minimum expectations for her position, there would be a meeting to hear her response to the items of concern and to determine whether she should be dismissed. (T vol. 1, pp. 61-62) (Resp't Ex. 6)

159. The initial Pre-Disciplinary Conference occurred on October 3, 2018. (Resp't Ex. 6) Following the meeting, Dr. Buhler issued a Notice of Second Pre-Disciplinary Conference for Unsatisfactory Job Performance and Unacceptable Personal Conduct. (Resp't Ex. 7) The second notice was issued to reflect Petitioner's responses at the first meeting and to include additional information. The second notice included all of the events listed in the first notice and added an incident that occurred in August and September 2018. The incident occurred when Dr. Buhler

determined that Petitioner had failed to properly record the protocol for an experiment that she had conducted in 2016-17. Petitioner's inability to follow proper protocol prevented other researchers from replicating this experiment, and this significantly delayed the project. (T vol. 1, p. 65) (Resp't Ex. 7)

160. A second Pre-Disciplinary Conference was held on October 22, 2018. Following the conference, on October 24, 2018, Dr. Buhler issued a memo to Petitioner notifying her that she was being dismissed from her position as a Research Specialist due to her unsatisfactory job performance and unacceptable personal conduct. (Resp't Ex. 8) The dismissal letter listed the same incidents as the Notice of Second Pre-Disciplinary Conference as specific incidents supporting dismissal. Additionally, it referenced the LOU and the First and Second Written Warnings and noted that Petitioner had been informed that she could be disciplined, up to and including dismissal, for failing to comply with the PIP and the CAP. (T vol. 1, p. 66-67) (Resp't Ex. 8) At each of the Pre-Disciplinary Conferences, Petitioner was provided the opportunity to the allegations against her. (T vol. 2, pp. 527-28)

161. The Parties stipulated that the internal grievance process was fully completed by both Parties and Petitioner timely appealed the Final Agency Decision to the Office of Administrative Hearings. (Stips. 8 & 9; *see* Stips. 1-7, 10)

162. Based on the foregoing facts, the Undersigned finds that: 1. NC State complied with the procedural requirements for the disciplining action taken; 2. NC State had just cause to dismiss Petitioner for both unsatisfactory job performance and unacceptable personal conduct; and, 3. no lesser degree of disciplinary action would have been appropriate in light of these specific circumstances.

BASED UPON the foregoing Findings of Fact, stipulations, sworn testimony, relevant laws, legal precedent, and upon the preponderance or greater weight of the credible evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The Parties are properly before the undersigned Administrative Law Judge and jurisdiction, and venue are proper. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. (Stip. 8) The Parties received proper notice of the hearing in this matter.

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

3. Respondent NC State is subject to Chapter 126 of the North Carolina General Statutes and is the former employer of Petitioner.

4. A "career State employee" is defined as a State employee who is in a permanent position appointment and continuously has been employed by the State of North Carolina in a non-exempt position for the immediate 12 preceding months. N.C. Gen. Stat § 126-1.1 (2019).

5. At the time of her dismissal, Petitioner was a career State employee subject to the provisions of the State Human Resources Act, N.C. Gen. Stat § 126-1, *et seq.*

6. A career State employee may be dismissed only for just cause. N.C. Gen. Stat. §126-35(a) (2019). The State employer has the burden of showing by a preponderance of the evidence that there was just cause for dismissal. N.C. Gen. Stat. § 126-34.02(d) (2019); *see also*, *Teague v. N.C. Dep't of Transp.*, 177 N.C. App. 215, 220, 628 S.E.2d 395, 399 (2006).

7. The Party with the burden of proof in a contested case, must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).

8. The burden of proof for demonstrating that the employing agency had just cause to dismiss Petitioner is on Respondent. N.C.G.S. 126-34.02(d): "In contested cases conducted pursuant to this section, the burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer."

9. This Tribunal owes no deference to the agency conclusion of whether just cause exists to discipline an employee, and is free to substitute its judgment for that of the agency in imposing lesser disciplinary action. *Harris v. DPS*, 798 S.E.2d 127. 2017 N.C. App. LEXIS 130, *affirmed per curiam*, 2017 N.C. LEXIS 1020. "There are likely scenarios in which the employer meets its burden to show just cause exists to impose a disciplinary action, but just cause does not exist to support dismissal of the employee." *Harris* at 139.

10. Pursuant to State law and regulations promulgated by the Office of State Human Resources, there are two bases for the dismissal of an employee for just cause: (1) unsatisfactory job performance, and (2) unacceptable personal conduct. 25 N.C.A.C. 01J .0604(b) (2019).

11. However, "[t]he [two] categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case." 25 N.C.A.C. 01J .0604(c) (2019).

12. This case involves allegations of both unsatisfactory job performance and unacceptable personal conduct. While the equity and fairness requirements are the same in each case, the specific legalities are analyzed differently.

A. UNSATISFACTORY JOB PERFORMANCE

13. Unsatisfactory job performance is "work-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency." 25 N.C.A.C. 01J .0614(9) (2019). It

includes "careless errors, poor quality work, untimeliness, failure to follow instructions or procedures, or a pattern of regular absences or tardiness." *Amanini v. N.C. Dep't of Human Res., Special Care Ctr.*, 114 N.C. App. 668, 679, 443 S.E.2d 114, 121 (1994).

14. Any work-related performance problem may establish just cause to discipline an employee for unsatisfactory job performance. Successive disciplinary actions do not have to concern the same type of unsatisfactory performance. 25 N.C.A.C. 01J .0605(a).

15. Disciplinary actions related to personal conduct may be included in the successive system for performance-related dismissal provided that the employee receives at least two prior disciplinary actions, regardless of the basis of the disciplinary actions. 25 N.C.A.C. 01J .0605(a)&(b). Even though Petitioner received two written warnings for unsatisfactory job performance, incidents of personal misconduct were also noted in the warning letters and discussed at the pre-dismissal conference.

16. Determining whether a public employer 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 the conduct constitutes just cause for the disciplinary action taken. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

17. Just cause for unsatisfactory job performance is defined by the State Human Resources Manual ("*SHRM*") as:

[a]ny work-related performance issue may establish just cause to discipline an employee for unsatisfactory job performance. Just cause for a warning or other disciplinary action for unsatisfactory job performance occurs when an employee fails to satisfactorily meet job requirements.

(*SHRM*, Resp't Ex. 12, bate stamp 002396)

18. "The determination that an employee has engaged in unsatisfactory job performance is generally made by the supervisor in consultation with management. The supervisor's and/or management's determination should be reasonable, consistent, factually supported, and made in conjunction with the Human Resources Office." (*SHRM*, Resp't Ex. 12, bate stamp 002397)

19. The factors that a manager/supervisor may consider in determining whether an employee's job performance is unsatisfactory may consider any one or a combination of the factors include, but are not limited to:

1. Failure to produce work of acceptable quality, accuracy, quantity, promptness, work habits, or by established deadlines;
2. Deficiencies in performance as required in the work plan or as noted in the performance evaluation;

3. Inability to follow instructions or procedures, appropriateness of work performed, or demonstrated poor judgment, analysis or decision-making;
4. Insufficient or inappropriate customer service, service delivery, or teamwork;
5. Misuse/abuse of fiscal resources, including a wasteful use of State resources;
6. Absenteeism, tardiness, or other abuses of work time;
7. Any other factors that, in the opinion of the supervisor or manager, are appropriate to determine whether an employee's performance constitutes unsatisfactory job performance.

(*SHRM*, Resp't Ex. 12, bate stamp 002397)

20. Respondent's determination that Petitioner job performance was unsatisfactory was based on most, if not all, of these factors. Petitioner was: unable to produce the quality work expected of a Research Specialist; unable to perform in accordance with the PIP or her work plan; unable to follow instructions and proper lab protocols; and unable to demonstrate appropriate teamwork. Moreover, Petitioner's inadequate work performance wasted State resources; she was frequently absent/tardy to the lab and abused her leave time; as well as many other factors in her managers' opinions which constituted her unsatisfactory job performance.

21. In cases alleging just cause for dismissal for unsatisfactory job performance, "the agency must show that the employee has not performed with reasonable care, diligence, and attention. Failure to fulfill quotas and complete tasks to the complete satisfaction of a supervisor is not enough; the agency must show [a] that these quotas and job requirements were reasonable and [b] that the employee made no reasonable effort to meet them." *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991); *Price v. State Office of the State Auditor*, 2014 N.C. App. LEXIS 1256, 237 N.C. App. 617, 767 S.E.2d 705, 2014 WL 6901840; *motion for review denied*, 368 N.C. 258, 771 S.E.2d 296, 2015 N.C. LEXIS 270 (2015).

22. Petitioner's repeated failures to satisfy the bare minimum of what was expected of a Research Specialist constituted "work-related performance that fail[ed] to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency." 25 N.C.A.C. 01J .0614(9).

23. The supervisor's and/or management's determination should be reasonable, consistent, factually supported, and made in conjunction with the Human Resources Office. (*SHRM*, Resp't Ex. 12, bate stamp 002397)

24. Respondent did not impose unreasonable standards or work conditions on Petitioner. Petitioner was expected to consistently be at work and meetings on time, provide notice when she would miss work, comply with lab protocols, properly document data while conducting experiments, follow directions from her supervisors, and be professional with her supervisors and fellow employees. These expectations were the same for all employees in her position.

25. An employee must receive at least two prior disciplinary actions before being dismissed for a current incident of unsatisfactory job performance. 25 N.C.A.C.01J .0605(b) (2019). In addition, the employee must be given a pre-disciplinary conference and written notice of the reasons for dismissal. 25 N.C.A.C. 01J .0605(c) (2019).

26. As required for disciplinary action under this category, NC State provided Petitioner with two written warnings and feedback regarding the need for her to improve her performance. (*SHRM*, Resp't Ex. 12, bate stamp 002398) Dr. Buhler and her managers also met with Petitioner to discuss each written warning.

27. Both written warnings complied with the *SHRM* and included that it was a disciplinary written warning, the specific issues which were the basis of the warning, the specific improvements Petitioner had to make to address the specific issues, the time frame allowed for improvements, and the consequences of failing to make the required improvements. (*SHRM*, Resp't Ex. 12, bate stamp 002399)

28. Petitioner's job requirements and her unsatisfactory job performance were addressed with Petitioner on multiple occasions through various methods over the course of nearly two and a half years.

29. In addition to a number of meetings with Dr. Buhler and with the individuals who were responsible for overseeing her daily work, Petitioner was given a Letter of Understanding on October 24, 2016, which was intended to address her unsatisfactory job performance and to outline expectations for improvement. (Resp't Ex. 1)

30. Following the Letter of Understanding, Petitioner received two Written Warnings. The First Written Warning was issued on May 10, 2017, and she was warned that her failure to make required improvements could lead to dismissal. (Resp't Ex. 2) Her performance did not improve.

31. Her second Written Warning was issued on March 21, 2018, and she was again warned that her failure to make required improvements could lead to dismissal. (Resp't Ex. 4) After the Second Written Warning, Petitioner's job performance did not improve. Petitioner's unacceptable personal conduct in July 2018 and her continued unwillingness and/or inability to improve her job performance provided justification for Petitioner's dismissal.

32. Respondent properly followed the procedures required before dismissing Petitioner for unsatisfactory job performance. (*See Stips. 1-10*)

33. Respondent proved by a preponderance of the evidence that Petitioner's engaged in the conduct as alleged by Respondent and that Petitioner's conduct fell within the category of unsatisfactory job performance. *Warren v. N.C. Dep't of Crime Control & Pub. Safety*, 221 N.C. App. 376, 382-83, 726 S.E.2d 920, 924-25 (2012).

34. Petitioner's job performance was unsatisfactory based on Petitioner's failure to consistently be at work and meetings on time, provide notice when she would miss work, comply with lab protocols, properly document data while conducting experiments, follow directions from her supervisors, and be professional with her supervisors and fellow employees. Petitioner's failings included those detailed extensively in the record presented by NC State. *See, e.g., Skinner v. N.C. Dep't of Corr.*, 154 N.C. App. 270, 280-81, 572 S.E.2d 184, 191-92 (2002) (affirming demotion for unsatisfactory job performance where employee failed to supervise inmate workers and keep kitchen in a clean and orderly fashion); *Gainey v. N.C. Dep't of Justice*, 121 N.C. App. 253, 259-60, 465 S.E.2d 36, 41-42 (1996) (affirming dismissal for unsatisfactory job performance where employee repeatedly failed to file reports within five days and employee had received two written warnings and a pre-disciplinary conference).

35. Respondent met its burden of proof by a preponderance of the evidence that Petitioner routinely demonstrated unsatisfactory job performance, and there was just cause for disciplinary action.

B. UNACCEPTABLE PERSONAL CONDUCT

36. Just cause to take disciplinary action for unacceptable personal conduct may be created by intentional or unintentional acts. Factors relevant to unacceptable personal conduct in this particular case include, but are not limited to, the following:

1. the willful violation of known or written work rules;
2. conduct unbecoming a State employee that is detrimental to State service;
3. serious disruption in the workplace; and/or,
4. insubordination.

25 N.C.A.C. 01J .0614(7); (8)(d)&(e) (*See SHRM*, Resp't Ex. 12, bate stamp 002397-98)

37. When the basis for disciplinary action is unacceptable personal conduct, an employee may be disciplined without any prior warning or disciplinary action. 25 N.C.A.C. 01J .0608(a).

38. One instance of unacceptable personal conduct can constitute "just cause." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

39. Although no prior warning is necessary to support disciplinary action for unacceptable personal conduct, Petitioner, in this case, received a Letter of Understanding and two prior written warnings for unacceptable personal conduct.

40. For unacceptable personal conduct, under the three-part test in *Warren v. NC Dept. of Crime Control & Public Safety*, 726 S.E.2d 920; 2012 N.C. App. LEXIS 770 (2012), the agency must prove that (a) Petitioner engaged in the conduct alleged, (b), that the proven conduct amounted in law to unacceptable personal conduct, and (c) that the proven unacceptable personal conduct justified the disciplinary action concerned. *See Harris v. DPS*, 798 S.E.2d 127. 2017 N.C. App. LEXIS 130, *affirmed per curiam*, 2017 N.C. LEXIS 1020 (December 22, 2017). The *Warren*

test was developed as an analytical tool to follow the Supreme Court's reasoning in *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), which among other critical findings, established that not every act of unacceptable personal conduct constituted just cause to dismiss or even discipline (*Carroll* was a demotion case) a career status State employee subject to the State Human Resources Act.

1. Petitioner Engaged in Unacceptable Personal Conduct

41. Based on the Findings of Fact, testimony, and admissions, Respondent has established by a preponderance of the evidence that engaged in the conduct alleged. Petitioner willfully and repeatedly failed to follow instructions from her day-to-day managers; failed to comply with assigned tasks; failed to adhere to her schedule; routinely failed to attend meetings; failed to act collegially and collaboratively with her colleagues; failed to follow lab safety protocol; and created more work for her colleagues who had to correct her work.

2. Her Misconduct Fit One of the Categories of Unacceptable Personal Conduct

42. Unacceptable personal conduct includes "the willful violation of known or written work rules," "conduct unbecoming a state employee that is detrimental to state service," and "insubordination." 25 N.C.A.C. 01J .0614(7) &(8)(d)&(e).

a. *Willful Violation of Known or Written Work Rules*

43. Based on her years of working as a Research Specialist and as a Ph.D. researcher, Petitioner knew about the standard operating procedures and work rules in the lab, many of which were part of her work plan. Petitioner knew that: protective equipment was required, standard lab procedures regarding the gas chromatographer must be followed; eyewash stations must be tested weekly; proper lab protocols must be followed, lab notebooks must be used to record data instead of scraps of paper or paper towels (Resp't Ex. 20); collaboration was needed on experiments; work schedules must be adhered to; banking time for trips was not allowed; lab supplies for tissue culture must be kept in the lab; improper test and scientific data affected research validity; specimens must be collected and labeled correctly; cultigen names must be properly documented; as well as numerous other rules regarding the transplanting, cutting, labeling of plants. Despite knowing these laboratory work rules, Petitioner willfully ignored and violated them.

b. *Insubordination*

44. Insubordination is defined as: "[t]he willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning." 25 N.C.A.C. 01J .0614(7); (Resp't Ex. 12, bate stamp 002409).

45. Based on a preponderance of the evidence, Petitioner was routinely insubordinate with her authorized day-to-day managers (Mays, Bergmann, and Silverman). She claimed not to even know that they were her supervisors. She also argued that Mays and Silverman were of "inferior academic rank" to her without doctorate degrees, so she did not have to follow their

instructions. Regardless of their academic standing, Dr. Buhler instructed Petitioner both verbally and in writing to follow Mays and Silverman's instructions, and Petitioner willfully refused. (See Resp't Exs. 1, 2&4) Petitioner's repeated failure to follow Dr. Buhler's verbal and written instructions was also insubordination to her direct supervisor.

46. With respect to her refusal to follow Dr. Bergmann, a Ph.D. level manager, Petitioner argued that he was "very rude," "yelled," and she was "afraid" of him, so she did not know how to respond and, therefore, did not respond. (T vol. 2, pp. 580:18-25; 581-583) Even if Petitioner was intimidated by Dr. Bergmann as she claims, she still had to follow his instructions as her day-to-day manager.

47. Since 1996, one performance expectation was working effectively and cooperatively with others to accomplish organizational goals and identify and resolve problems. Petitioner was aware that "collegiality" was a professional expectation in the university research setting, especially for a Ph.D. researcher. Petitioner's interactions with her colleagues were disruptive and impaired the effective and efficient operation of the Horticultural Science Research Department. Even if Petitioner was not insubordinate to her managers, her lack of collegiality is a legitimate alternative ground for her dismissal. See *Bernold v. Board of Governors of University of North Carolina*, 200 N.C. App. 295 (2009) (deciding that lack of collegiality was a legitimate ground for terminating a tenured professor because it was a professional expectation).

48. Respondent met its burden of proving that, at a minimum Petitioner's conduct demonstrated her lack of collegiality with her colleagues, and at worst, her personal conduct met the definition of insubordination.

c. Conduct Unbecoming a State Employee that is Detrimental to State Service

49. In addition to the other categories, Petitioner's conduct fell within the third category of conduct unbecoming a State employee that is detrimental to State service. 25 N.C.A.C. 01J .0614(8)

50. In the case of "conduct unbecoming a state employee that is detrimental to State service," the State employer is not required to make a showing of actual harm, "only a potential detrimental impact (whether conduct like the employees could potentially adversely affect the mission or legitimate interest of the State employer)." *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17.

51. While Respondent was not required to show actual harm, only the potential for detrimental impact, Respondent showed both potential and actual harm. *Hilliard*, 173 N.C. App. at 597.

52. On May 10, 2017, Dr. Buhler issued Petitioner the First Written Warning advising her that she had "failed to attend meetings, remain collegial, follow direction," and "repeatedly refused to communicate in a respectful manner in situations that require simple civility." (Resp't Ex. 2, bate stamp 000004)

53. Subsequently, on March 21, 2018, Dr. Buhler issued a Second Written Warning that Petitioner's failures to follow instructions resulted in a "loss of research specimens," "affected field research," and "resulted in added work for your colleagues and delayed research progress and results." (Resp't Ex. 4, bate stamp 002190). Petitioner's behavior "jeopardized the integrity of the research programs and client relationships" as well as "created lost work time due to colleagues having to go back and make corrections." (Resp' t Ex. 4, bate stamp 002190) In addition, to the lost man-hours necessary to correct her work, Ms. Silverman documented actual damages incurred by Petitioner's failure to follow lab protocols and instructions.

54. Based on her own admissions and testimony of her colleagues, Petitioner violated known and written rules. Petitioner failed to maintain a professional, civil, and respectful manner with her colleagues was to their detriment and jeopardized the integrity of the research programs and client relationships.

55. Respondent proved by a preponderance of the evidence that Petitioner's misconduct falls into at least one, if not all, of the categories for unacceptable personal conduct.

C. The Disciplinary Action of Dismissal Was Appropriate

56. The final inquiry in the just cause analysis asks whether Respondent met its burden of establishing that the discipline imposed for Petitioner's conduct was "just." Just cause must be determined based "upon an examination of the facts and circumstances of each individual case," that is, the "balancing of equities." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (citation omitted).

57. In *Wetherington*, the North Carolina Supreme Court articulated other matters to be considered in unacceptable personal conduct cases not previously articulated with such specificity in *Carroll* and *Warren*. The Supreme Court stated that in discipline up to and including dismissal, factors should be considered "such as the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations ... consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

58. In determining whether disciplinary action taken for unacceptable personal conduct was just, this Tribunal considers "factors such as the severity of the violation, the subject matter involved, the resulting harm, the [employee's] work history, or discipline imposed in other cases involving similar violations." *Wetherington*, 368 N.C. at 592, 780 S.E.2d at 548.

59. Petitioner had been employed at Respondent for more than 22 years, and Petitioner received no prior disciplinary action before 2016.

60. Prior to issuing a disciplinary warning, NC State gave Petitioner a Letter of Understanding to address her unsatisfactory job performance and her supervisor's expectations for improvement. (Resp't Ex. 1) The LOU documented Petitioner's difficulty collaborating with and supporting the teaching faculty. Petitioner was given an opportunity to comply with assigned tasks

and expected to maintain collegial and collaborative relationships with faculty and staff. (Resp't Ex. 1, bate stamp 002201)

61. After Petitioner received this non-disciplinary LOU and a series of written warnings, performance plans and corrective actions ensued. However, Petitioner showed no immediate and sustained improvement from the LOU issued on October 24, 2016 through her dismissal two years later on October 24, 2018.

62. As stated in the Findings of Fact, Respondent considered the *Wetherington* factors. Other forms of discipline were considered; however, due to Petitioner being either unable or unwilling to satisfactorily perform her job, Respondent was left with no other options. Petitioner's responsibilities had already been decreased far below what was expected of a Research Specialist, and she was still unable to satisfy those expectations. Further, suspension was deemed not appropriate, and numerous lesser strategies and sanctions had been used to try and correct the unsatisfactory job performance and errant behavior without success. But the time of her dismissal, because of her unsatisfactory job performance, Petitioner had been delegated to counting seeds and sanitizing pots. After two and a half years of attempting to salvage Petitioner's job, Respondent had exhausted its options, and it could no longer justify retaining Petitioner.

63. Respondent met its burden of proof that it did not substantially prejudice Petitioner's rights, exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act in violation of Constitutional provisions, fail to act as required by law, act arbitrarily or capriciously, and/or abuse its discretion when Respondent dismissed Petitioner for "just cause."

64. The Respondent met its burden of proof by a preponderance of the evidence that the Petitioner engaged in the alleged conduct of unsatisfactory job performance and unacceptable personal conduct.

65. Having given due regard to factors in mitigation, including "*Wetherington* factors," and based on the preponderance of the evidence, Respondent met its burden of proof that it had "just cause" to dismiss Petitioner for unsatisfactory job performance and for unacceptable personal conduct. Under the facts and circumstances of this contested case, and having "balanced the equities," the "just," or "right thing," to do was to terminate the Petitioner's employment with Respondent; therefore, Respondent disciplinary decision to dismiss Petitioner was appropriate.

FINAL DECISION

BASED ON THE FOREGOING, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above and it is hereby ordered, adjudged, and decreed that: Respondent's decision to dismiss Petitioner from her employment with Respondent due to unsatisfactory job performance and unacceptable personal conduct is **AFFIRMED**.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby **DISMISSES** this contested case petition **WITH PREJUDICE**.

NOTICE OF APPEAL RIGHTS

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.

IT IS SO ORDERED.

This the 1st day of April, 2020.



Stacey Bice Bawtinheimer
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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This the 1st day of April, 2020.



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