

STATE OF NORTH CAROLINA
COUNTY OF AVERY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 OSP 06277

<p>Juanita Cantrell Petitioner,</p> <p>v.</p> <p>Avery County Dept of Social Services Respondent.</p>	<p>FINAL DECISION</p>
---	------------------------------

This matter is before the Office of Administrative Hearings (“OAH”) on the contested case filed by Petitioner Juanita Cantrell after the termination of her employment by Respondent Avery County Department of Social Services, Director Barbara M. Jones.

This matter was heard before the Honorable David F. Sutton, Administrative Law Judge, on March 13, 2020, in Waynesville, North Carolina.

APPEARANCES

For Petitioner: Kristen E. Finlon
Essex Richards, P.A.
1701 South Boulevard
Charlotte, NC 28203

For Respondent: Douglas L. Hall
Hall & Hall Attorneys at Law, P.C.
P.O. Drawer 3148
Morganton, NC 28680

EXTENSION OF TIME DUE TO EXTRAORDINARY CAUSE

Pursuant to N.C. Gen. Stat. §126-34.02(a) a final decision must be filed within 180 days after the commencement of the personnel case. The 180 day deadline in this contested case was May 12, 2020. However, this deadline may be extended upon a showing of extraordinary cause. Extraordinary cause is defined in 26 NCAC 03 .0118(b) as “...out of the ordinary; exceeding the usual, average, or normal measure or degree; not usual, regular, or of a customary kind.” The COVID-19 pandemic and the disruption to everyone’s ordinary and regular work and life activities is unprecedented, and as such, constitutes extraordinary cause.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 126-34.02; N.C. Gen. Stat. § 126-35; N.C. Gen. Stat. § 150B, et.seq.
25 NCAC 11 .2300, et.seq.

WITNESSES

For Petitioner: Juanita Cantrell
 Kay Potter (by affidavit)

For Respondent: Alesia Hutcheson Calloway
 Barbara M. Jones

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner’s Exhibits 1 - 4 were admitted into evidence.

Respondent’s Exhibit, a notebook containing 24 pages, was admitted into evidence.

ISSUE

Did Respondent have just cause to dismiss Petitioner from her employment on the basis of unsatisfactory job performance under N.C. Gen. Stat. § 126-35?

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned 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 witnesses 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.

1. Respondent, the Avery County Department of Social Services (“Respondent”), is subject to Chapter 126 and 150B of the North Carolina General Statutes.

2. Petitioner Juanita Cantrell was employed in the Respondent’s Food Stamps division until her employment was terminated on or about October 15, 2020. (T. p. 137; Respondent Ex. p. 19).

3. Alesia Hutcheson Calloway is employed by the Respondent as the Supervisor of Food Stamps, Work First, Energy, and Program Integrity. (T. p. 12).

4. Barbara M. Jones is employed as the Director of the Respondent Agency. (T. p. 114).

5. Kay Potter was employed by the Respondent's Food Stamps division until her retirement in January 2020. (Petitioner Ex. 4).

6. Petitioner was a career State employee employed by the Respondent for approximately sixteen and a half years. (T. p. 137).

7. In September 2018, Ms. Calloway became the Supervisor of Food Stamps, Work First, Energy, and Program Integrity. (T. p. 12). She was Petitioner's direct supervisor in this role. (T. pp. 138-39).

8. Prior to Ms. Calloway's promotion, she and Ms. Cantrell had experienced a "rocky" relationship. (T. p. 140).

9. Prior to 2019, Ms. Cantrell had never received any performance counseling or disciplinary action during her employment with the Agency. (T. pp. 133-34, 138).

10. On or about February 11, 2019, Ms. Calloway issued Ms. Cantrell a Written Counseling for Unsatisfactory Job Performance ("February Counseling"). (Petitioner Ex. 1; T. p. 143).

11. Ms. Cantrell submitted a written rebuttal concerning the alleged incidents cited in the February Counseling. (Petitioner Ex. 2). However, Ms. Calloway did not read the rebuttal, and testified that she was not interested in Ms. Cantrell's explanation regarding the events. (T. p. 78).

12. In May 2019, Ms. Jones and Ms. Calloway presented Ms. Cantrell with a Written Warning ("May Written Warning"), regarding alleged untimely work and failure to promptly check voicemails and emails. (T. p. 28).

13. The issues that Respondent's representatives testified to, during the contested case hearing, that they had with respect to Petitioner's job performance which lead to the May Written Warning included a single day in either April or May 2019 when Petitioner did not check her voicemail or e-mail. On this particular day, Ms. Calloway e-mailed Petitioner and had a third party leave a voicemail for Petitioner regarding the necessity of Petitioner taking a particular action on either an application or recertification for one of Respondent's clients (T. pp. 87 - 88). Also, Petitioner did not return client phone calls in a timely manner (T. p. 116).

14. Petitioner testified about a sentence in the May Written Warning that alleged other people did Petitioner's work. Petitioner disputed this allegation with Ms. Jones asserting that this allegation was something that had already been addressed (T. pp. 163 - 164).

15. The specific content of the May Written Warning is unknown to the Undersigned as the same was not introduced or offered into evidence at the hearing of this contested case.

16. After being presented with the May Written Warning, Ms. Cantrell met with Ms. Jones to have a private conversation with her about the issues raised therein. (T. pp. 163-65).

17. After the meeting, Ms. Jones sent Ms. Cantrell an email confirming that the May Written Warning would not be placed in her personnel file, though she would "continue to hold [Ms. Cantrell] responsible for checking [her] email and voice mail." Ms. Jones also stated in the e-mail that, "Other areas mentioned in the letter will be disregarded unless there are repeated documented instances" (Petitioner Ex. 3; T. pp. 165-66). The May Written Warning was, in fact, never added to Ms. Cantrell's personnel file. (T. p. 122).

18. On or about August 27, 2019, Ms. Jones issued Ms. Cantrell a formal Written Warning ("August Written Warning"). (Respondent Ex. p. 5).

19. The August Written Warning identified three particular issues regarding Ms. Cantrell's performance: (1) two cases allegedly uncovered by a recent state audit in which she had not properly followed the Agency's checklist for processing; (2) her purported failure to timely complete some eight hundred and eighty-eight tasks outstanding in the NC FAST system prior to a deadline of June 28, 2019; and (3) an alleged incident of discouragement of a client applying for benefits. (Respondent Ex. pp. 5-8).

20. On Friday, October 11, 2019, Ms. Jones issued Ms. Cantrell a letter instructing her to attend a pre-disciplinary conference at 8:00 a.m. on Monday, October 14. (Respondent Ex. p. 10). The letter identified three specific performance issues:

1. On August 27, 2019, you were issued a written warning in which you were instructed to check your TASKS weekly and work those designated as high priority. You have let more than a week pass since working your tasks.
2. In at least one case, an 8650 was not issued timely. This was also discussed on August 27th.
3. Case # 195395261 recertification was untimely as of October 1, 2019 although you had all evidence needed prior to September 30.

Id.

21. On October 15, 2019, the Agency issued Ms. Cantrell a Severe Disciplinary Action Letter terminating her employment. (Respondent Ex. p. 19).

22. In the Severe Disciplinary Action Letter, Ms. Jones noted that Ms. Cantrell had been given a Written Warning in May 2019 for job performance based on untimely work and failure to check voicemails and emails. See id. She also noted that Ms. Cantrell had received a second Written Warning in August 2019, and that a pre-disciplinary conference had been conducted on October 14, 2019. See id.

23. Ms. Jones testified that the inclusion of the May Written Warning in the Severe Disciplinary Action Letter was an “oversight,” and confirmed that the May Written Warning had never been placed in Ms. Cantrell’s file. (T. pp. 130-31).

24. On October 25, 2019, Ms. Cantrell submitted a Grievance Letter internally appealing her dismissal. (Respondent Ex. p. 24). In a letter dated October 28, 2019, Ms. Jones denied the internal appeal. See id.

25. On November 14, 2019 Petitioner appealed the denial of her appeal by filing a Petition for a Contested Case Hearing.

Based on the foregoing Findings of Fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes. Petitioner timely filed the petition for a contested case hearing. The parties received proper notice of the hearing in this matter.

2. Respondent is subject to Chapter 126 of the North Carolina General Statutes.

3. At the time of her dismissal, Petitioner was a career state employee subject to the provisions of the North Carolina Human Resources Act. N.C. Gen. Stat. § 126-1-1

4. As a career state employee, the Petitioner may be terminated only for “just cause.” N.C. Gen. Stat. § 126-35(a).

5. The North Carolina Human Resources Act permits a career State employee to assert a contested case against an Agency where she “was dismissed, demoted, or suspended for disciplinary reasons without just cause.” N.C. Gen. Stat. § 126-34.02(b)(3).

6. The burden of proof in such cases rests upon the Respondent to show by a preponderance of the evidence that the career State employee was discharged for just cause. N.C. Gen. Stat. §§ 126-34.02(d), 150B-25.1(c).

7. Pursuant to regulations promulgated by the Office of State Personnel, there are two bases for termination of an employee for “just cause”: (a) dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance; or (b) dismissal imposed on the basis of unacceptable personal conduct. See 25 NCAC 11.2301. Here, the Agency

contends that Ms. Cantrell was dismissed on the basis of unsatisfactory job performance. (Respondent's Exhibit at 19).

8. "In order to be dismissed for a current incident of unsatisfactory job performance, an employee must receive at least two prior disciplinary actions: First, one or more written warnings, followed by a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal." 25 NCAC 1I .2302(c).

9. Further, agencies are required to apply the rule set forth in the preceding paragraph consistent with the requirements of 25 NCAC 1J .0605. 25 NCAC 1I .2302(b).

10. 25 NCAC 1J .0605(a) states:

The intent of this Section is to assist and promote improved employee performance, rather than to punish. This Rule covers all types of performance-related inadequacies. This Section does not require that successive disciplinary actions all concern the same type of unsatisfactory performance. Disciplinary actions related to personal conduct may be included in the successive system for performance-related dismissal *provided that the employee receives at least the number of disciplinary actions, regardless of the basis of the disciplinary actions, required for dismissal on the basis of inadequate performance.* Disciplinary actions administered under this Section are intended to bring about a permanent improvement in job performance. Should the required improvement later deteriorate, or other inadequacies occur, the supervisor may deal with this new unsatisfactory performance with further disciplinary action.

Id. (emphasis added).

11. The Administrative Code also sets forth requirements of a written warning.

The written warning shall:

(1) Inform the employee that this is a written warning, and not some other non-disciplinary process such as counseling;

(2) Inform the employee of the specific issues that are the basis for the warning;

(3) Tell the employee what specific corrections, if applicable, must be made to address these specific issues;

(4) Tell the employee the time frame allowed for making the required corrections. Immediate correction is required for grossly inefficient job performance or unacceptable personal conduct;

(5) Tell the employee the consequences of failing to make the required corrections; and

(6) Tell the employee of any appeal rights provided by agency policy.

25 NCAC 11 .2305

12. In this matter, Respondent must prove, by a preponderance of the evidence, that prior to dismissing Petitioner from her employment in October 2019 for unsatisfactory job performance, that Petitioner received one or more written warnings, followed by a warning or other disciplinary action prior to her dismissal.

13. The February Counseling was not a formal written warning.

14. The Respondent relies on the May Written Warning and the August Written Warning to satisfy the requirements of 25 NCAC 11 .2302(c), and as such, Respondent must show that both the warnings contained the information required by 25 NCAC 11 .2305.

15. The August Written Warning contained the formalities required by 25 NCAC 11 .2305. (Respondent ex. p. 5)

16. Respondent did not introduce or move to enter the May Written Warning into evidence during the hearing of this contested case. Petitioner acknowledged that she received the May Written Warning, however, acknowledging receipt does not prove that it contained the requisite formalities.

17. The testimony produced during the hearing is that the May Written Warning stated that Petitioner had a problem with checking e-mails and voicemails, and that her work was untimely. Respondent's witnesses described one particular instance when Petitioner needed to do something on a client file by the end of the day, and that Petitioner failed to check an e-mail and voicemail expressing the urgency of her action. There was no evidence presented that that particular instance was specifically set forth in the written document.

18. There was no evidence presented that the document contained any specific information as to what constituted untimely work.

19. There was some evidence that Petitioner was told to check her e-mails and voicemails, but no evidence that the document specifically contained that corrective action. There was no evidence that the document contained any specific corrections that the Petitioner must take to address her alleged untimely work.

20. There was no evidence that the document contained any information about the time

frame allowed for Petitioner to make the required corrections, nor was there any evidence presented that the document contained any information as to what the consequences would be if Petitioner failed to make required corrections.

21. Additionally, the May Written Warning was never placed in Petitioner's personnel file. Moreover, Respondent's witness admitted in testimony that the reference to the May Written Warning in the Severe Disciplinary Action Letter dismissing Petitioner was an "oversight." This fact alone is not determinative of whether or not the May Written Warning could satisfy the requirements of one of the two written warnings that must be issued prior to dismissal for unsatisfactory job performance, however, it is additional evidence of the lack of Respondent's understanding of the process required by the Administrative Code in order to dismiss an individual for unsatisfactory job performance.

22. The Respondent has failed to meet its burden that Petitioner received one or more written warnings, followed by a warning or other disciplinary action prior to her dismissal. The Respondent has only shown, by a preponderance of the evidence, that Petitioner was issued one disciplinary action, the August Written Warning, prior to the termination of her employment. The Respondent failed to prove that the May Written Warning satisfied the requirements for a written warning under Administrative Code.

23. Because the Respondent has only proven that it properly issued the Petitioner only one disciplinary action prior to the termination of her employment, the Respondent has failed to prove that it had just cause to dismiss Petitioner from her employment due to unsatisfactory job performance.

24. The Undersigned has the authority to order that Petitioner be reinstated to her former position from which she was removed and to order other suitable action to correct the abuse by Respondent. See § 126-34.02(a). The Undersigned may award attorney fees to an employee where reinstatement or back pay has been ordered. See § 126-34.02(e).

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following Final Decision.

FINAL DECISION

The undersigned hereby finds proper authoritative support of the Conclusions of Law noted above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned holds that the Respondent has failed to carry its burden of proof by a preponderance of the evidence that it acted with just cause to dismiss Petitioner from employment based upon unsatisfactory job performance, and the Respondent's Decision to terminate Petitioner's employment is therefore **REVERSED**.

It is hereby **ORDERED** that Ms. Cantrell shall be retroactively reinstated to her position of employment with the Respondent, with all back pay and benefits; and

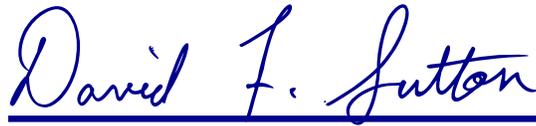
It is **FURTHER ORDERED** that the Respondent is to pay Ms. Cantrell and her attorney all reasonable fees and costs incurred in this Contested Case.

NOTICE OF APPEAL

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

IT IS SO ORDERED.

This the 12th day of June, 2020.



David F Sutton
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:

Kristen E. Finlon Esq.
Essex Richards, PA
1701 South Blvd
Charlotte NC 28203
Kfinlon@essexrichards.com
Attorney For Petitioner

Douglas L Hall
Hall and Hall Attorney's at Law, P. C.
PO Drawer 3148
Morganton NC 28680
dhall@hallandhallattorneys.com
Attorney For Respondent

This the 12th day of June, 2020.



Judith M Lupa-Johnson
Paralegal
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 919-431-3000