

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 OSP 04414

Tiffany Efird Petitioner, v. NC DOT/ DMV Respondent.	FINAL DECISION
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THIS MATTER was heard before the Honorable Stacey Bice Bawtinheimer, Administrative Law Judge, on December 18, 2019, 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, all documents in the record, including the Proposed Decisions, as well as all stipulations, admissions, and exhibits, the Undersigned **AFFIRMS** DMV’s decision to hire the Outside Applicant because Petitioner was not entitled to priority consideration.

APPEARANCES

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ISSUE

The Parties stipulated that the contested case issue is:

Did Respondent DMV deny Petitioner Tiffany Efird a promotion to the position of Director of Customer Compliance Services¹ by failing to give her priority consideration as a career State employee over an outside applicant in violation of N.C. Gen. Stat. § 126-7.1(e) and 25 NCAC 01H .801?

(Preh’g Order p. 2, ¶ 13)

RELEVANT STATUTES, RULES, AND REGULATIONS

(including but not limited to)

N.C. Gen. Stat. §§ 126-34.01, 126-34.02; N.C. Gen. Stat. §§ 150B-1 *et seq.*

WITNESSES

For Petitioner: Tiffany Efird (“Efird” or “Petitioner”)

For Respondent: Amanda Olive, DOT Deputy Director Human Resources
Bobby Ray Davis, DMV Safety and Security Manager
Karen Brown, DMV Deputy Commissioner
Scott Parker, DMV Deputy Commissioner
Tiffany Efird, Petitioner and DMV Assistant Director of Customer Compliance Services

EXHIBITS

For Petitioner (“Pet’r Ex.”): Exhibits 1, 2, 4, & 5 (not bated-stamped)

For Respondent (“Resp’t Ex.”): Exhibits 1-17 (bated-stamped)

Respondent’s exhibits are bated-stamped, but the pages are referred to as “p. 279,” not the full bated-stamped number of “p. 000279.”

The Parties stipulated and agreed that each of the exhibits identified by the Petitioner and Respondent are genuine and, if relevant and material, may be received into evidence without further identification or proof. (Preh’g Order p. 2, ¶¶ 6 & 9)

¹ The position was originally posted as the “Director of Processing Services,” but after reorganization of the division, the position was entitled “Director of Customer Compliance” and this title will be used throughout the decision.

No transcript was made of the hearing. In the absence of a transcript, the Undersigned referred to her notes and the tape recording of the hearing to refresh her recollection as needed. Testimony references are noted as “Test. of _____” or “Tests. of ___ and ___”.

VOLUNTARY DISMISSAL OF POLITICAL DISCRIMINATION CLAIM

In her petition, Petitioner Tiffany Efird’s original two issues were the denial of promotional priority consideration and political discrimination. At the onset of the hearing, Petitioner voluntarily dismissed her claim of political discrimination. Therefore, the only issue, in this case, is whether Petitioner Efird was unlawfully denied promotional priority consideration.

STIPULATED UNDISPUTED FACTS (“Stip. Fact.”)

1. Petitioner is a career State employee. (Preh’g Order, Attach. A, p. 4, ¶ 1) (“Stip. Fact 1”)
2. Petitioner applied for another State position which would constitute a promotion for her. (Preh’g Order, Attach. A, p. 4, ¶ 2) (“Stip. Fact 2”)
3. An outside applicant was selected for the position. (Preh’g Order, Attach. A, p. 4, ¶ 3) (“Stip. Fact 3”)
4. The North Carolina Industrial Commission uses video conferencing for some prisoner or inmate hearings. (Preh’g Order, Attach. A, p. 4, ¶ 4) (“Stip. Fact 4”)

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, the Stipulated Facts, 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.

1. 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.

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).

3. Petitioner Tiffany Efird (“Petitioner” or “Efird”) filed this action to contest the decision of North Carolina Department of Transportation, Division of Motor Vehicles (“Respondent” or “DMV”) for failing to give her priority consideration over an outside applicant for the position of Director of Customer Compliance Services.

4. According to DMV, based on the applications and results of the interview process, Efird was not entitled to priority consideration for the position, and it properly awarded the position to the Outside Applicant (hereinafter “Outside Applicant” or “Successful Applicant”).

5. The Outside Applicant was a State employee; however, she was not legible for career status because she was in an exempt position at the time of her application.

6. DMV uses the State of North Carolina’s merit-based hiring system to fill vacant employment positions. (*See Resp’t Ex. 4, p 1*) The merit-based hiring system is designed to ensure that those State of North Carolina positions subject to the State’s Human Resources Act, codified at N.C.G.S. § 126-1 (2017) *et seq.*, are filled with the best-qualified individuals as determined by job related criteria, such as ability and experience.

7. Under this system, promotions are not automatically awarded to the applicant with the most years of service or experience. Instead, applications for a State job are screened and divided into one of three groups: most qualified (those possessing more than the minimum training and experience qualifications for the position); qualified (those meeting only the minimum training and experience qualifications for the position); and unqualified (those applicants who do not possess the requisite training and experience for the job). The merit-based hiring system mandates that the person selected for any State job come from those applicants falling in the most qualified pool.

8. Both Efird and the Outside Applicant were highly qualified for the position. (Tests of Olive, Brown, and Baker)

9. Although Efird was highly qualified, DMV determined that she was not substantially equally qualified for the position as the Outside Applicant; therefore, DMV was not required to give her priority consideration.

10. In reviewing DMV’s decision, two initial questions must be answered to decide Petitioner’s entitlement to priority consideration. First, what were the qualifications required for the position? And, second, did Efird have substantially equal qualifications as the selected Outside Applicant?

Qualifications Required for the Position

11. From October 30, 2018, through November 9, 2018, DMV sought applications for the DMV Director of Customer Compliance Services position. (*Resp’t Ex. 1, p. 279*)

12. Thirty-nine eligible applications were received. (*Resp’t Ex. 2, pp. 204, 216-217*) Of those eleven were chosen for panel review by Karen Brown, Deputy Commissioner (“Brown”).

13. On November 29, 2018, the candidates, including Efird and the Outside Applicant, were interviewed by Brown and Bobby Davis, DMV Safety and Security Manager (“Davis”). (Resp’t Exs. 7-11) Brown drafted 12 interview questions and each applicant was asked the same questions. (Test. of Brown) Contemporaneous notes were made by both Brown and Davis during each interview. (Tests. of Brown and Davis; Resp’t Exs. 7-11) The unanimous decision after the first round of interviews was that the Outside Applicant was the top candidate and that Efird, although qualified, was not even a close second. (Tests. of Brown and Davis)

14. Of the eleven applicants, three applicants were chosen for second interviews with Brown and DMV Deputy Commission Scott Parker, (“Parker”) on December 11, 2018. (Resp’t Exs. 13-16) Brown also drafted the 4 questions for the second set of interviews and each applicant was asked the same 4 questions while each interviewer took contemporaneous notes of the applicants’ answers. (Tests. of Brown and Parker; Resp’t Exs. 12-16) According to Brown and Parker, Efird was not a close second to the Outside Applicant. (Tests of Brown and Parker). After reviewing the applications and considering the interviews, the panelists unanimously selected the Outside Applicant for the position. (Resp’t Exs. 2 & 17)

15. Although the interview process is important, interviews can be subjective, and the interview responses in this case did not have objective criteria for ranking or scoring. The “Job Bulletin” detailed the requisite qualifications for the Director position. (Resp’t Ex. 1).

16. To determine whether Efird had substantially equal qualifications to the Outside Applicant, the Undersigned will primarily focus on a comparison of the two applicants’ qualifications.

Minimum Education and Training Experience

17. The minimum education and training experience required for the position were:

Graduation from a four year college or university in Business Management, Public Administration or related field and six years of progressively responsible administrative or management experience; or an equivalent combination of education and experience.

(Resp’t Ex. 1, p. 280)

18. Both candidates met the minimum education requirement. Efird received her juris doctorate degree from Florida State University Law School in May 1997. (Resp’t Ex. 6, p. 250) The Outside Applicant received her juris doctorate degree in May 1985 from North Carolina Central University School of Law. (Resp’t Ex. 5, p. 207)

19. According to Efird, she and the Outside Applicant had “substantially equal education and training in the law” because they both graduated from law schools. (Pet’r Proposed Final Decision, p. 11, ¶ 79) Before Efird graduated from law school, the Outside Applicant had already been practicing law for 12 years.

Progressive Responsible Administrative or Management Experience Requirement

Efird's Administrative, Management, and Supervisory Experience

20. After graduation from law school, Efird worked for five private law firms at various times from 1997 to 2005 as an attorney or attorney/human resource generalist/consultant. (Resp't Ex. 6, pp. 255-257) In those positions, she supervised 0-4 employees with a total supervisory experience of approximately 7 years, 8 months. (Resp't Ex. 6, pp. 255-257)

21. When she left the private practice of law, she was unemployed for approximately 3 years as she took time off to start her family.

22. Her first State employment was at the North Carolina Employment Security Commission as a Hearing Officer from October 2008 to January 2012. (Resp't Ex. 6, p. 255) She did not have any supervisory duties in this position.

23. She next worked for the Department of Health and Human Services from January 2012 to October 2012 as an Employee Relations Specialist. Again, she had no supervisory duties in this position. (Resp't Ex. 6, p. 254)

24. From October 2012 to May 2015, she worked as an EEO Officer/Investigator for the North Carolina Department of Public Safety with supervisory responsibilities for 4 employees for a period of 2 years and 8 months. (Resp't Ex. 6, P. 253)

25. Then she was employed as an EEO Investigator for North Carolina Department of Transportation ("DOT") at the Division of Motor Vehicles ("DMV") from May 2015 to June 2017 with no supervisory responsibilities. (Resp't Ex. 6, p. 252)

26. In June 2017, she was then promoted to the Assistant Director of Processing Services for DMV with supervisory responsibilities for 150 employees. (Resp't Ex. 6, p. 251) She is currently in that position and the assistant to the Successful Applicant.

27. Less than a year after she was promoted to the Assistant Director position, she was appointed in April 2018 as the Acting Director of Customer Compliance Services with DMV and had supervisory authority over 100 employees. (Resp't Ex. 6, p. 250)

28. Efird remained as Acting Director until the Outside Applicant began work on February 6, 2019. (Resp't Ex. 6, p. 250 & Resp't Ex. 17; T of Efird) Efird now assists the Director, along with the Medical Consultant, in the administration and management of the seven units which comprise the customer compliance Directorate at DMV. (Resp't ex, 1, p. 279)

29. Efird had no significant supervisory experience, prior to her position as Assistant Director. Prior to that, Efird has only supervised at most 4 employees for a period of approximately 10 years and 4 months. (See Resp't Ex. 6, pp. 251-259)

30. Regarding her lack of significant supervisory experience, Efird argued that her volunteer service should count toward that experience. Efird wrote on her job application that she had volunteered for a non-profit organization for 3 years (2007-2010) where she “[w]orked with the Board of Directors [for that non-profit] to manage 300+ volunteers.” (Resp’t 6, p. 259)

31. When asked about this volunteer work, Efird did not elaborate on how she “worked with the Board [] to manage” these volunteers. Nor did she testify that she had direct supervisory responsibility for the volunteers, what her job duties were, or her work schedule. At that time, Efird was working full-time as a Hearing Officer (10/2008-1/2012) for the N.C. Security Commission, so at best, Efird volunteered only part-time. (Resp’t Ex. 6, p. 255) While volunteer work can provide some relevant work experience, Efird’s supervision of volunteers, who can quit at any time and are not subject to the State personnel policies, was not the same as the supervision of a large number of subordinates.

32. During her position as Assistant Director and Acting Director (7 months) until the job posting on October 30, 2018, Efird had had supervisory duties for 100-150 employees for 1 year and 6 months.

33. Although the number of employees supervised by Efird was significantly different in her prior positions (4 or less compared to 100-150), Efird’s combined supervisory experience prior to the job posting totaled approximately 11 years, 10 months.

Outside Applicant’s Administrative or Management Experience

34. The Outside Applicant is admitted to both the Texas (May 1988) and North Carolina (March 1995) State Bars. (Resp’t Ex. 5, p. 211)

35. During her entire career, she has been employed in local or State government.

36. She began her career at the State Property Tax Board for Texas in the Office of General Counsel from November 1985 to February 1987, where she was the Administrator of Technical Programs. (Resp’t Ex. 5, p. 211) There was no indication of how many, if any, employees she supervised in that position.

37. From September 1987 to January 1992, the Outside Applicant was an Assistant County Attorney for the Travis County District Attorney’s Office. (Resp’t Ex. 5, p. 210) There was no indication of how many, if any, employees she supervised in that position.

38. After being an Assistant County Attorney, the Outside Applicant was employed by the Texas Ethics Commission as an Assistant General Counsel from January 1992 to January 1993, where she supervised one employee for 1 year. (Resp’t Ex. 5, p. 210)

39. From there, she was employed as the Ethics Advisor for the Speaker of the Texas House of Representatives from January 1993 to January 1995, where she supervised one employee for 2 years. (Resp’t Ex. 5, p. 209)

40. Her next position was as a Policy Analysis for the North Carolina Office of State Planning from July 1995 to September 1996. (Resp't Ex. 5, p. 209) There was no indication of how many, if any, employees she supervised in that position.

41. From October 1996 to January 2002, the Outside Applicant was the Deputy Commissioner of the North Carolina Industrial Commissions and supervised one employee for 4 years, 4 months. (Resp't Ex. 5, p. 206)

42. She was next employed as the Deputy Secretary of Arts and Libraries/Legal Counsel for the North Carolina Department of Cultural Resources from January 2002 to April 2003. There she supervised 200 employees for 1 year, 4 months. (Resp't Ex. 5, p. 208)

43. From May 2003 to June 2014, she was the Chair/Commissioner of the North Carolina Industrial Commission, where she supervised 150 employees for 11 years and 2 months. (Resp't Ex. 5, pp. 207-208)

44. Prior to her employment with the DMV, from September 2014 to February 2018, the Outside Applicant was the Director of External Affairs for North Carolina Central University and an Adjunct Professor of Law for the University's School of Law. (Resp't Ex. 5, p. 207) There was no indication of how many, if any, employees she supervised in that position.

45. The Outside Applicant had 18 years, 10 months of total supervisory experience; 12 years, 6 months of which she had supervised a large number of subordinates (150-200).

46. Efir's supervisory experience was not substantially equal to the Outside Applicant's. Efir had a total of 11 years, 10 months of total supervisory experience of which only 1 year, 6 months was for the supervision of 100-150 employees.

47. The Outside Applicant had overall 7 years more supervisory experience than Efir and 11 years more supervisory experience than Efir for a large number of employees (150-200 employees). Even if the 3 years are added for Efir's supervision of volunteers (300+), the Outside Applicant still had significantly more experience supervising a large number of employees.

48. Both candidates met the minimum requirements, but the Outside Applicant had been an attorney for 12 years more than Efir and had 11 years more supervisory experience than Efir with a large number of employees (150-200). Efir's qualifications were not substantially equal with the Outside Applicant in the number of years practicing law or supervising large numbers of employees.

49. When Efir was hired at DMV as the Assistant Director, Deputy Commissioner Brown did not know that Efir had no previous significant supervisory experience. (Test. of Brown) Not surprisingly, Efir's lack of supervisory experience for a large number of subordinates affected her performance as the Acting Director.

50. Although Efird was generally successful as Acting Director (Tests. of Brown and Baker), according to Brown, there were significant challenges because of morale problems and “feuding” between employees which Efird had a difficult time solving. (Test. of Brown) At that time, DMV was described as a “viper’s pit” and was in the middle of a Reduction in Force (“RIF”). (Tests. of Brown and Efird) Because of the internal strife within the section, Efird was tasked with “keeping the section afloat” which she did, but Efird could not and “did not move the organization forward.” (Test. of Brown)

51. Based on her extensive high-level managerial and supervisory experience, the Outside Applicant had the capacity to be the change-agent and problem-solver that DMV needed. (Tests. of Brown, Davis & Parker; Resp’t Ex. 10)

Allegations of Undue Influence

52. During the hearing, Petitioner alluded to several actions of the Outside Applicant’s husband. (*See* Pet’r Ex. 4, p. 4)

53. All applicants were required to disclose if they are “related by blood or marriage to any person now working for the State.” (Resp’t Ex. 5, p. 212; Ex. 6, p. 260) Both Efird’s and the Outside Applicant’s husbands worked for the State at that time. (Resp’t Exs. 5, p. 212; 6, p. 260)

54. After the job was posted, the Outside Applicant’s husband contacted Brown to inquire about the position. (Test. of Brown) After the interviews, he also hand-delivered “thank you” notes from the Outside Applicant to Deputies Commissioner Brown and Parker. (Tests of Brown and Parker) At that time, there were no discussions with him about his wife’s interview, the hiring process, or the other applicants. (Pet’r Ex. 4, p. 4; Tests. of Brown and Parker)

55. According to Brown, Davis, and Parker, the Outside Applicant’s husband interactions did not influence their decision-making process. (Tests. of Brown, Davis, and Parker) Efird failed to proffer any evidence, other than innuendo that her husband’s behavior was inappropriate or otherwise benefited the Outside Applicant.

The Job Description and Knowledge, Skills and Abilities/Competencies (“KSAs”)

56. In addition to the minimum requirement, the job posting listed the job description; “Knowledge, Skills and Abilities/Competencies” (“KSAs”); and additional job expectations. (Resp’t Ex. 1, pp. 279-280)

Job Description

57. The posting contained the following job description:

The DMV team and the Processing Services Directorate [Directorate of Customer Compliance Services] delivers high quality motor vehicle services, promotes highway safety, and furnishes timely and accurate information in response to inquiries from various sources. The Directorate conducts fair and impartial

hearings, enforces motor vehicle laws, and maintains the integrity of official records.

The Processing Services Directorate [Directorate of Customer Compliance Services] is comprised of 7 units: Administrative Support, Field Hearings, Ignition Interlock, Liability Insurance/Safety Responsibility, Merge & Transfer, Records Integrity and the Medical Review Section. Processing Services provide[s] both customer facing and non-customer contact services to ensure that driving records are up to date and accurate. In addition, the Directorate conducts administrative hearings on behalf of the Commissioner of the Division of Motor Vehicles related to North Carolina motor vehicle laws and related rules, regulations and other requirements under the charge of the North Carolina Division of Motor Vehicles.

The administrative and managerial responsibilities of these units are provided by an Assistant Director and Medical Consultant, both of whom report to the Director. The Director of Processing Service[s] provides overall direction, planning, and leadership to the Processing Services Directorate. This position is responsible for creating, controlling, and improving opportunities and developing plans and programs to support the units. It develops, coordinates, and implements local, state and federal programs and services for the purpose of regulating the mo[toring] public.

(Resp't Ex. 1, pp. 279-280)

Knowledge, Skills, Abilities, and Competencies (“KSAs”)

58. The following top five “Knowledge, Skills, Abilities and Competencies” (“KSAs”) were necessary for the job:

- Experience determining short-and long-term goals and strategies to achieve them, including coordination with other organizations or parts of the organization to accomplish goals. [referred to herein as “KSA 1”]
- Thorough knowledge of management principles, techniques, and practices, experience managing, supervising, evaluating, training, coaching, overseeing development and motivating staff. [referred to herein as “KSA 2”]
- Thorough knowledge of State and Federal Laws, especially Chapter 20 (NC Motor Vehicle Laws) as well as personnel policies and procedures. [referred to as KSA 3]
- Experience directing others to resolve business problems that affect multiple functions or disciplines. [referred to herein as “KSA 4”]

- Experience with meeting deadlines with paying attention to detail and accuracy while independently or as part of a team and has the proven ability to handle a high-volume workload and multi-tasking projects. [referred to herein as “KSA 5”]

(Resp’t Ex. 1, p. 280)

Additional expectations

59. Additional expectations included:

- (i) Demonstrated ability to prioritize and handle multiple tasks;
- (ii) Demonstrated ability to communicate effectively verbally and in written format;
- (iii) Experience in planning/organizing and time management; and
- (iv) Demonstrated ability to promote a customer centric culture, both internal and external.

(Resp’t Ex. 1, p. 280)

60. Efird did not seriously contest that the Outside Applicant’s employment experience met the job description, the additional job expectations, and KSA’s 1, 2, 4, & 5, except for KSA 3 (knowledge of Chapter 20). (*See* Pet’r Proposed Final Decision, pp. 7-11)

61. Efird contends that she and the Outside Applicant had substantially equal experience conducting hearing since Efird “had been an appeals referee with the Employment Security for about 4 years [Resp’t Ex. 6, p. 255] and [the Outside Applicant] had been a deputy commissioner with the Industrial Commission for about five years.” (Pet’r Proposed Final Decision, p. 11, ¶ 80)

62. In actuality, the Outside Applicant had conducted hearings with the Industrial Commission for approximately 17 years (May 2003- June 2014 and October 1996 – January 2002). (Resp’t Ex. 5, pp. 207-208) Efird’s hearing experience was not substantially equal to the Outside Applicant, who had 13 more years of experience than Efird.

63. With respect to State personnel policies and procedures, Efird contends that based on “her experience as an EEO officer and investigator [for approximately 5 years], [she] had substantially equal knowledge of State personnel policies and procedures as the [Outside Applicant]. (Pet’r Proposed Final Decision, p. 11, ¶ 83)

64. The Outside Applicant had over 18 years of experience in State personnel policies and procedures in her capacities with the Industrial Commission and NC Department of Cultural Resources. (Resp’t Ex. 5, pp. 207-208) Efird’s knowledge of State personnel policies and procedures was not substantially equal to the Outside Applicant who had 13 more years of experience in this area than Efird.

65. A comparison of the two applicants’ qualifications demonstrates that their qualifications were not equal. Instead, there were significant discrepancies between their qualifications:

Category	Outside Applicant	Efird
KSA 1	20 years, 2 months ²	18 months
KSA 2	20 years, 2 months (management)	18 months
Supervisory Experience	18 years, 10 months (overall supervisory) 12 years (supervision 100+ employees)	11 years, 10 months 18 months
KSA 3	25 years, 2 months (State and federal laws) unknown (Chapter 20)	20 years 18 months
KSA 4	25 years, 2 months	18 months
KSA 5	25 years, 2 months	18 months
Personnel Policies Procedures	18 years	5 years
Practicing Law:	33 years	21years ³
Hearings	17 years	4 years
Experience Credits	275 credits (+203)	199 credits (+127)

(See Resp’t Ex. 2, p. 205; Resp’t Exs. 3 p. 249; Exs.5 & 6)

66. Efird was not equally qualified as the Outside Applicant in any area except that she was more qualified than the Outside Applicant in her knowledge of Chapter 20, the NC Motor Vehicle Laws.

NC Motor Vehicle Laws – Chapter 20

67. Efird’s main criticism of the Outside Applicant’s qualifications focused around her lack of knowledge of the NC Motor Vehicle Laws (KSA 3). According to Efird, the Outside Applicant was not equally qualified because: 1. the Outside Applicant did not know “how to ‘adjudicate a driving record’ which is a unique process conducted only by DMV;” 2. Efird was “a subject matter expert on all seven units that comprised the Processing Services Section”; and 3. Efird had a “thorough knowledge of North Carolina Motor Vehicle law [required by KSA 3],” whereas the Outside Applicant “had no such or only cursory knowledge of Chapter 20.” (See Pet’r Proposed Final Decision, pp. 10, ¶¶ 66, 74; 11 ¶ 82)

² These numbers did not include the years of experience that the Outside Applicant’s accumulated during her State and local government employment in Texas. (Test. of Olive)

³ If the 3 years, that Efird took off to start her family, are removed from this number, she would have practiced law for only 18 years.

68. On her job application, the Outside Applicant had noted that she had an “advanced” level of knowledge of State and federal laws, including Chapter 20. (Resp’t Ex. 5, p. 214) During her interview, the Outside Applicant also told the interviewers that she was knowledgeable about Chapter 20 and Ignition Interlock laws. (Resp’t Ex. 10, p. 243) Efird proffered no evidence to refute these assertions by the Outside Applicant.

69. The Outside Applicant had been an Assistant District Attorney in Texas for 5 years, so she would have had some familiarity with motor vehicle laws, just not specifically Chapter 20 of the North Carolina General Statutes.

70. When Efird was hired by DMV, she admitted that she was not a “subject matter expert” in Chapter 20 but had to become one within a couple of months. (Test. of Efird) Efird also admitted that knowledge of Chapter 20 was not the only qualification for this position. (Test. of Efird) To the extent that the Outside Applicant was an adjunct Professor of Law during the four years she was employed by NC Central University and practiced law for 33 years, she like Efird could readily become familiar with Chapter 20. (Resp’t Ex. 5, p. 207)

71. Moreover, the Director is assisted with the administrative and managerial responsibilities of the unit by the Assistant Director and Medical Consultant. (Resp’t Ex. 1, p. 279) The Director was responsible for the overall direction, planning, and leadership for the section, not the daily application of the motor vehicle laws.

72. However, assuming that knowledge of the NC Motor Vehicle Laws is crucial since the Outside Applicant had little or no familiarity with the NC Motor Vehicle Laws, this would be the only category were the Outside Applicant’s qualifications were not substantially equal or higher than those of Petitioner.

Appointment as “Acting Director” Did Not Mean Efird Was the “Heir Apparent”

73. Efird admitted that her being the Acting Director, for only 7-8 months prior to the interviews, did not mean she was the “heir apparent” for the position. (Test. of Efird) However, according to the interviewers, Efird appeared to assume that she deserved the job because she had been the Acting Director. (Tests. of Brown, Davis, and Parker).

74. Efird acknowledged that she had not been employed in the “high level leadership position[s]” as the Outside Applicant who had been both a Commissioner and Chair of the Industrial Commission. (See Pet’r Proposed Final Decision, p. 10, ¶ 64)

75. Even as Acting Director, Efird had had to grow in that position, and she was not ready for the responsibilities. (Test. of Parker) Despite this, Efird argued that she “had gained relevant subject matter expertise as the assistant director and acting director of processing services at DMV for approximately 18 months.” (See Pet’r Proposed Final Decision, p. 10, ¶ 64)

76. Subject matter expertise is not the equivalent to high-level managerial experience, nor does it equalize Efird’s qualifications in comparison to the Outside Applicant’s.

Interview Process

First Interviews

77. During the first set of interviews, Efird seemed nervous, and her responses seemed rehearsed. (Tests. of Brown and Davis) The Outside Applicant on the other hand, presented herself as confident and comfortable; her answers were thoughtful and responsive to the questions being asked. Brown and Davis believed her to be a “natural leader.” (Tests. of Brown and Davis)

78. At the conclusion of the first round of interviews, Brown and Davis agreed that the Outside Applicant had performed the best and that the other ten candidates had” in no way compared” to the Outside Applicant’s interview. Specifically, the Outside Applicant had over thirty years of progressively responsible managerial roles in both Texas and North Carolina State governments that well exceeded the minimum requirements of the Director position and provided impressive answers to the interview questions. (Resp’t Ex. 1, pp. 279-280; Tests. of Brown and Davis)

Second Interviews

79. Three candidates were chosen for second interviews with Brown and Deputy Commissioner Scott Parker (“Parker”). Prior to the second round of interviews, Parker reviewed and agreed with the 4 questions prepared by Brown. (Test. of Parker)

80. Like Brown, Parker also reviewed the job posting and the applications of the three candidates prior to the interviews. Parker was impressed by the Outside Applicant’s high-level and well-rounded positions in State government; her lifelong commitment to public service; and her lengthy supervisory experience of hundreds of subordinates.

81. With regard to Efird’s application, Deputy Commissioner Parker observed that she did not have a long tenure in State government and had no significant supervisory experience other than her one year at DMV. (Test. of Parker)

82. During the second round of interviews, Brown and Parker found the Outside Applicant poised and comfortable. (Tests. of Brown and Parker) Her responses to the interview questions emphasized how her thirty years plus of previous work experiences and her proven ability to resolve challenges would be a good fit for the needs of the DMV Customer Compliance Section. (Resp’t Exs. 13, p. 247; Ex. 15, p. 248; Tests. of Brown and Parker)

83. Brown and Parker did not consider Efird’s interview even a close second to the Outside Applicant’s, as Efird’s responses referred generally to her one year of experience at DMV and her government jobs that began in 2008. (Resp’t Exs. 14, p. 236; Ex. 16, p. 237; Tests. of Brown and Parker)

84. At the conclusion of the second round of interviews, Brown and Parker unanimously agreed that the Outside Applicant was undoubtedly the best fit for the position. According to them, DMV was lucky to be able to recruit a candidate of her extensive governmental

experience and education to be able to lead the Customer Compliance Section. (Tests. of Brown and Parker)

85. Neither Brown nor Parker considered Efird a close second for the Director position because the Efird simply did not have the quantity or quality of work experiences of the Outside Applicant, which far exceeded the minimum qualifications for the Directorate position. (Tests. of Brown and Parker)

86. As Hiring Manager, Brown noted her reasons for the panelists' recommendation of the Outside Applicant on the DOT Human Resources Candidate Selection Form ("CSF") stating in part that:

[The Outside Applicant] is currently employed as the Director of External Affairs [at] North Carolina Central University. [The Outside Applicant] has twenty-five years and two months of high-level management experience. [The Outside Applicant] possesses a variety of experience providing strategic management oversight to multiple disciplines. [The Outside Applicant] has twenty-two years and two months of management experience with the [S]tate of North Carolina. [The Outside Applicant] has three years of management experience with the [S]tate of Texas. [The Outside Applicant] has twenty-five years and two months experience interpreting, applying, and providing legal advice for application of state and federal laws. [The Outside Applicant] possesses a Juris Doctor[ate] degree and a Bachelor's degree in psychology.

The best candidate selected for the position is not a promotional priority candidate. This candidate has significantly more directly related experience than the promotional priority candidates. [The Outside Applicant] has served as the Commissioner of the Industrial Commission, where she le[d] 150 professional and line level employees. She managed the budget and all personnel matters, which is critical in the position of Director of Customer Compliance, where a percentage of the budget is receipt supported. [The Outside Applicant] has extensive experience in all aspects of Customer Compliance including medical review/settlements, hearings and adjudications. She also has experience with leading federal and state legislative engagement which is necessary for this position for required bill analysis. [The Outside Applicant] has several years of experience in developing short and long-range departmental goals and implementing strategic plans. [The Outside Applicant] has also served as a hearing officer for contested workers compensation claims and is a licensed attorney. [The Outside Applicant] is a current state [exempt] employee with 23 years of [NC] state government experience. [The Outside Applicant] directly related experience far and above exceeded all of the other candidates.

(Resp't Ex. 2, pp. 204-205)

87. Amanda Olive has been the Director of Human Resources for DOT for 2 years and in human resources for 20 years. (Test of Olive) She reviewed the hiring package and the Human Resources Action Form for the Outside Applicant. (Resp't Ex. 2)

88. Overall, the Outside Applicant's had 33 years of combined employment experience in State and local government in both Texas and North Carolina. (Resp't Ex. 5) Efir had 8 years⁴ of employment in the private sector and only 10 years of employment experience in State government. (Resp't Ex. 6, pp. 250-255)

89. When completing the Human Resources Action Form, Olive did not give the Outside Applicant credit for her 11 years of prior experience outside of North Carolina while she was General Counsel for the Texas State Property Tax Board (1985-1987), Assistant County/District Attorney, Travis County, Texas (1987-1992), Assistant General Counsel for the Texas Ethics Commission (1992-1993), and Policy Analyst at the Texas Office of State Planning (1995-1996). (Test. of Olive; Resp't Exs.2, pp. 202-203; 5, pp. 209-211)

90. Even without this credit, the Outside Applicant had a "Total Experience Credit" of 275.00. (Resp't Ex. 2, p. 203) The "Required Experience" for the position was only 72 credits. The Outside Applicant's "Experience Above Minimum" was 203 credits higher than the minimum requirement. (Resp't Ex. 2, p. 203)

91. At 199 credits, Efir's "Total Experience Credit" was also higher than the minimum requirement by 127 credits but not as high as the Outside Applicant's. (*Compare* Resp't Ex. 3, p. 249 to Resp't Ex. 2, p. 203)

92. The Candidate Selection Form (Resp't Ex. 2, pp. 204-205) is based on the information which comes from either the interview process or application. (Test. of Olive) Olive admitted that she does not verify the information which comes from the interview process. (Test. of Olive)

93. The contemporaneous notes taken by all the interviewers and their testimonies corroborated the information on the Candidate Selection Form. (Tests. of Brown, Parker and Davis; Resp't Exs 8, 9, 10, 11, 13, 14, 15, & 16)

94. At the time of the Outside Applicant's selection for the Director position, she had over thirty years of high-level public service experience. When Efir entered public service in 2008, the Outside Applicant had already been supervising 200 employees at Cultural Resources for almost 7 years.

95. The Panelists recommended the Outside Applicant for the Customer Compliance Director position, and it was approved by DMV Commissioner Torre Jessup, Acting DMV Human Resources Manager Pamela McKelvy, DOT Human Resources Salary and Qualification Manager

⁴ This number excluded Efir's part-time Research Assistant's employment from 1995-1997 (Resp't Ex. 6, p. 258) because at that time she had not graduated from law school. The Outside Applicant's work experience was also calculated after law school graduation.

Laura Oakley, and Deputy DOT Human Resources Director Amanda Olive. Following the necessary approvals, the Successful Applicant began work in the position on February 6, 2019. (Resp't Exs. 2, p. 202; 17)

96. The Successful Applicant's salary is \$102,000, 68.51% above the minimum, based upon her Doctorate degree, 275 months credited of directly related experience, and 203 months of credit above the minimum requirements. (Resp't Ex. 2, pp. 202-203)

97. Efird's experience above the minimum was 127⁵ months, which was 76 months less than the successful candidate. (Resp't Ex. 3, p. 249; Test. of Olive)

98. According to the Salary Qualification Worksheet, if Petitioner had been selected for promotion, she would have qualified for a salary of \$101,639.⁶ (Resp't Ex. 3, p 249)

99. Based on a comparison of Efird's and the Outside applicant's various positions held in State government, their work histories, years in State government and public service, years practicing law, years of supervisory experience with a large number of employees (100-200), and performance at the two interviews, the Undersigned finds that DMV made a reasonable and justifiable determination that the job-related qualifications held by the Outside Applicant were significantly better suited for the position than the job-related qualifications held by Efird.

100. Moreover, even though Efird was highly qualified, DMV's conclusion that Efird did not have substantially equal qualifications as the Outside Applicant was justifiable.

101. Because Efird's job-related qualifications were not substantially equal to the Outside Applicant's, Efird was not entitled to priority consideration for the position.

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

CONCLUSIONS OF LAW

1. The Parties are properly before the Office of Administrative Hearings ("OAH") and that OAH has personal and subject matter jurisdiction over this contested case. (Preh'g Order p. 1, ¶ 1 – Stipulation 1)

⁵ Efird's "Salary Qualification Worksheet" incorrectly stated that the "Required Experience" was 48 credits when it was actually 72 credits. This mistake inadvertently gave Efird a total 151 credits above minimum (Total 199 – 48 = 151) when in fact Efird had only 127 credits above minimum (199 – 72 = 127). While Petitioner had over the minimum requirements for the position, the successful candidate had significantly more experience over the minimum with 203 credits (275 – 72 = 203). (Compare Resp't Ex. 2, p. 203 with Resp't Ex. 3, p. 249)

⁶ The Salary Qualification Worksheet for Efird contained an inadvertent mathematical calculation error in the months of experience above the minimum. (Test. of Olive) Thus, Efird would not have qualified for a salary of \$101,639 but some lesser amount.

2. The Parties received proper notice of the hearing in this matter, and the venue is proper. (Preh'g Order p. 1, ¶ 2 – Stipulation 2)

3. The Parties have been correctly designated, and there is no question as to misjoinder or non-joinder of parties. (Preh'g Order p. 1, ¶ 3 – Stipulation 3)

4. To the extent that the Conclusions of Law contain findings of facts or Findings of Fact are conclusions of law, they should be so considered without regard to the given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012); *Watlington v Rockingham Co. Department of Social Services*, COA17-1176 (October 2, 2018).

5. 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).

6. The burden of showing just cause for a career State employee's discharge, demotion, or suspension rests with the employer. In all other cases, the burden rests with the employee. N.C. Gen. Stat § 126-34.02(d). Efird has the burden of proof, by a preponderance of the evidence, that DMV unlawfully failed to give priority consideration to her. (*Accord* Resp't Pro. Final Dec. pp. 10-11, *Concl. of Law* ¶ 2; Pet'r Pro. Final Dec. p. 13, *Concl. of Law* ¶ 10)

7. A career State employee, after completion of the agency grievance procedure and the Office of State Human Resources review, can bring a claim of failure to receive priority consideration before the Office of Administrative Hearings. N.C. Gen. Stat § 126-34.02.

8. Efird was a career State employee at the time she applied for the Position and entitled to the protections of the North Carolina State Human Resources System, including the provision that provided her with promotional priority rights under N.C. Gen. Stat. § 126-7.1. The Outside Applicant was also a State employee, but her position was an exempt position not entitled to career status.

9. The State Human Resources Act specifically holds that career State employees shall be granted certain preferences when seeking promotional opportunities in State employment:

If a State employee subject to this section: (1) applies for another position of State employment that would constitute a promotion; and (2) *substantially equal qualifications* as an applicant who is not a State employee; then the State employee shall receive priority consideration over the applicant who is not a State employee. This priority consideration shall not apply when the only applicants considered for the vacancy are current State employees.

N.C. Gen. Stat. § 126-7.1(e) (emphasis added).

10. The term “qualifications” as used in N.C. Gen. Stat. § 126-7.1(e) is defined as follows: “(1) training or education; (2) years of experience; and (3) other skills, knowledge, and abilities that bear a reasonable functional relationship to the abilities and skills required in the job vacancy applied for.” N.C. Gen. Stat. § 126-7.1(g).

11. If the “substantially equal qualifications” requirement is met, under the regulations implementing N.C. Gen. Stat. § 126-7.1(e), an employee with promotional priority rights must be selected for promotion over an outside applicant when it is practical and feasible:

Promotion is a change in status upward, documented according to customary professional procedure and approved by the State Personnel Director, resulting from assignment to a position assigned a higher salary grade. When it is practical and feasible, a vacancy shall be filled from among eligible employees; a vacancy must be filled by an applying employee if required by 25 NCAC, Subchapter 1H, Recruitment and Selection, Section .0600, General Provisions, Rule.0625, Promotion Priority Consideration for Current Employees. Selection shall be based upon demonstrated capacity, quality, and length of service.

25 N.C. Admin. Code 01D .0301.

12. “Substantially equal qualifications” occur when the employer cannot make a reasonable determination that the job-related qualifications held by one applicant are significantly better suited for the position than the job-related qualifications held by an outside applicant. 25 N.C. Admin. Code 01H .0801. DMV could and did make a reasonable determination that the job-related qualifications of the Outside Applicant were significantly better suited for the position than Efird’s qualifications.

13. Efird was a career State employee, but she did not meet her burden of proving that she had substantially equivalent job-related qualifications as the Outside Applicant for the position of Director of Customer Compliance Services.

14. Moreover, although Efird made suggestions of undue influence in the hiring process, substantial evidence supporting Petitioner’s case must be more than a scintilla of evidence or a permissible inference, unsupported innuendos did not meet this standard and will be considered. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977); *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E.2d 98 (1975).

15. Since Efird has not proved, by a preponderance of the evidence, that she had had substantially equal qualifications as the Outside Applicant, Efird is not entitled to priority consideration under N.C. Gen. Stat. § 126.7.1(e) and DMV did not err in hiring the Outside Applicant.

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: the decision of Respondent to hire an Outside Applicant over Petitioner did not violate N.C. Gen. State § 126.71(e); therefore it is **AFFIRMED**. The contested case petition is hereby **DISMISSED WITH PREJUDICE**.

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 29th day of January, 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 29th day of January, 2020.



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