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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
19 OSP 05732

Josephine Stith

Petitioner,

v.

Dept of State Treasurer

Respondent.

FINAL DECISION

THIS MATTER COMES before the Undersigned on Respondent N.C. Department of State Treasure's ("Department") Motion for Summary Judgment ("Motion"). The Department seeks summary judgment pursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure.

The Undersigned, having considered the Motion, the parties' briefs in support of and in opposition to the Motion, the parties' oral arguments, and other appropriate matters of record, concludes that the Motion should be GRANTED for the reasons set forth below.

The Law Firm of Jennifer Knox by Jennifer J. Knox, Esq. for Petitioner Josephine Stith.

North Carolina Department of Justice by Katherine Adele Murphy, Assistant Attorney General, for Respondent N.C. Department of State Treasurer.

T.S. Jacobs, Administrative Law Judge.

I. PROCEDURAL BACKGROUND

1. Petitioner filed an internal grievance with the Department on 21 June 2019 alleging that the Department engaged in unlawful age discrimination by denying her an in-range salary adjustment. (Pet. Prehearing Statement ¶ 2).

2. The Department, in its 20 September 2019 Final Agency Decision ("Agency Decision"), "concluded that [Petitioner's] allegations of unlawful age discrimination are without merit." (Resp. Prehearing Statement, Letter attached, p. 1-2).

3. On 17 October 2019, Petitioner filed a Petition for a Contested Case Hearing ("Petition") with the Office of Administrative Hearings ("OAH" or "Tribunal") to challenge the Agency Decision.

4. On 7 January 2020, the Department filed the Motion and materials in support thereof, including a Memorandum in Support of the Motion ("R's Brief").[1] The Department contends that there is no genuine issue as to any material fact and that, as a matter of law, it is entitled to summary judgment on Petitioner's age discrimination claims.

5. On 17 January 2020, Petitioner filed a Response to Respondent's Motion for Summary Judgment ("Response") and on 28 January 2020, Respondent filed its Reply.

[1] Respondent's supporting materials also include the Affidavit of Debra Thomas ("Thomas Aff.") and Affidavit of Chris Farr ("Farr Aff.").

6. The Undersigned conducted a hearing on the Motion on 28 April 2020. The hearing was held telephonically in light of the COVID-19 public health emergency.

7. The Motion is ripe for determination and, pursuant to 26 N.C. Admin. Code 03.0118, and in the interests of justice, the Undersigned finds that extraordinary cause exists for issuance of a Final Decision in this case beyond 180 days from the date of filing the Petition.

II. FACTUAL BACKGROUND

The entry of findings of fact is not necessary when granting a motion for summary judgment. *Hyde Ins. Agency, Inc. v. Dixie Leading Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975). Nor do the statutory provisions governing the OAH require the Undersigned to enter such findings when granting a summary judgment motion. N.C. Gen. Stat. § 150B-34(e). The Undersigned nonetheless summarizes the following facts to provide context for her ruling. *See, e.g., Hyde Ins. Agency, Inc.*, 26 N.C. App. at 142, 215 S.E.2d at 165 ("[I]t is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment.")

1. Debra Thomas, Director of Human Resources at the Department, is responsible for hiring, subject to final approval, and supervising the staff in the Human Resources department. (Thomas Aff., ¶ 2) Thomas has served in this position since 1 December 2018. (*Id.*)

2. When the Department hired Thomas, the Benefits and Pay Specialist position ("Benefits/Pay Position") in Human Resources was staffed by a temporary employee who "was not expected to stay long because she had already retired from the position in 2016." (*Id.* at ¶ 4) Hiring a permanent employee for the Benefits/Pay Position "was a high priority" for the Department. (*Id.*)

3. The Benefits/Pay Position is classified as a Human Resources Consultant I with a salary grade of GN11. Petitioner did not apply for the Benefits/Pay Position. (*Id.* at ¶ 5) Thomas ultimately selected Juliette Clemmons to fill the position. (*Id.* at ¶¶ 5, 6)

4. Thomas made an initial offer to Clemmons that was exceeded by Clemmons' then-employer. (*Id.* at ¶ 6) Thomas "received authorization from Chris Farr, the Chief of Staff at [the Department] to make a higher offer." (*Id.*) Farr authorized the higher offer given the "urgency" in hiring for the Benefits/Pay Position. (Farr Aff., ¶ 16)

5. Clemmons was eventually hired at a salary of $58,000. (Thomas Aff., ¶ 5) This salary "was within the approved and advertised range for the position" and consistent with Clemmons' "experience and current market conditions." (*Id.* at ¶ 9)

6. Petitioner is also employed in the Department's Human Resources department. Petitioner and Clemmons have "the same classification and pay grade (Human Resources Consultant I, GN 11), although the two have different job duties." (*Id.* at ¶ 10) Petitioner's working title is Human Resources Generalist; her salary, at

all times relevant to this case, was $52,785 per year. (*Id.*) This was $5,215 less than Clemmons' salary, a difference of 9.88%. (*Id.*)

7. Thomas "foresaw a potential morale issue" and "wanted to provide an in-range salary increase for [Petitioner]" of "10%, or $5,279 per year." (*Id.*) She "discussed" this with Farr "in February 2019" and "[i]n April 2019, having created a salary reserve, [Thomas] prepared and submitted the formal paperwork to [Farr] for an increase for [Petitioner]" (*Id.* at ¶¶ 10-14) Among the paperwork submitted was a Salary Equity Request Form ("Form") that included Petitioner's age and other demographical information. (*See* Exhibits attached to P's Response) The Form indicates that Petitioner is "60-69" years of age. (*Id.*)

8. Thomas also brought to Farr's attention in April 2019 "that Anna Yount, who is the Executive Assistant to Dale Folwell, the State Treasurer, was being paid less than two other executive assistants within [the Department], who were lower in classification." (Farr Aff., ¶ 11; Thomas Aff., ¶ 18) Yount "was in a critical position" and "was considered an indispensable employee." (Farr Aff., ¶¶ 11-12 (explaining the "difficulty finding a suitable temporary replacement" for Yount when she was out on leave)) Thomas, in bringing this to Farr's attention, recommended that Yount receive a salary increase of $2,780 or 5%. (*Id.*)

9. The Department funds in-range salary increases through the use of salary reserves. (*Id.* at ¶ 7) Based on her "experience with other state agencies," Thomas assumed that "all salary reserves created in Human Resources" were for her use and, that "as the Human Resource Director . . ., [she] had authority to grant

salary increases to Human Resources personnel as long as they could be funded by available Human Resources salary reserves." (Thomas Aff., ¶ 12) Thomas, who, at the time, was relatively new to the Department, later learned that she was mistaken in her assumptions. (*Id.*)

10. Each division within the Department has a separate salary reserve. Human Resources is part of the Office of State Treasurer ("OST"), also known as General Administration. The OST is a division within the Department that consists of Communications, Human Resources, Internal Audit, and Legal, as well as the State Treasurer's and Chief of Staff employees. (Thomas Aff., ¶ 12; Farr Aff., ¶ 3) The OST has its own salary reserve does not have access to salary reserves created in other divisions of DST. (Thomas Aff., ¶ 13; Farr Aff., ¶ 8) As in other divisions, salary reserves within OST are combined across the division's various sections. (*Id.*) Salary reserve funds available in OST are typically limited. (Farr Aff., ¶ 8)

11. Farr, as Chief of Staff, provides direct, daily oversight of all operational and administrative functions of the agency, which includes, among other things, having ultimate authority with respect to all hiring and compensation actions taken within the agency. (*Id.* at ¶2) Farr is also "effectively the director" of OST and, "[i]n this capacity, [she] make[s] and approve[s] decisions regarding hiring and salary adjustments." (*Id.* at ¶¶2-3)

12. Farr tries "to always keep some money in the salary reserves for unforeseen events." (*Id.* at ¶ 9) OST had no salary reserves either at the end of

February 2019 or March 2019. (*Id.* at ¶10) At "the end of April 2019, reserves in the amount of $4,480 had been created [.]" (*Id.*)

13. When presented with the requests for salary increases for Petitioner and Yount, Farr considered "the amount currently available in OST reserves, the need to maintain some funds in the reserves, and the importance of retaining the employee in question." (*Id.* at ¶14) Farr, upon considering these factors, denied an increase for Petitioner and granted an increase for Yount. (*Id.*)

14. With respect to Petitioner, Farr decided "in late February or early March" to deny the request because there were no funds in OST's salary reserves at this time and because Petitioner was not a critical employee. (*Id.* ¶¶ 10, 14; Thomas Aff., Ex. 3) Farr did not consider the difference in salaries between Clemmons and Petitioner to be an inequity that she was required to address according to the North Carolina Office of State Human Resources' ("OSHR") guidelines since the difference in their salaries was less than 10%. (Farr Aff., ¶¶ 10-11)

15. With respect to Yount, Farr decided to grant the requested increase because "there were enough funds in the salary reserve to cover the recommended increase and still keep some reserves" and "because [Yount] was in a critical position and would not be easy to replace." (*Id.* at ¶ 13)

16. Farr explained that neither her position to deny an increase for Petitioner nor her decision to grant an increase for Yount "were motivated by age" as she did not "look at the demographic information on the information [Thomas]

submitted to [her] as part of the requests for the salary increase" for either employee. (*Id.* at ¶¶ 14-15)

III. ANALYSIS

A. Standard of Review

1. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56. An Administrative Law Judge is authorized to grant summary judgment under the provisions of the North Carolina Administrative Procedure Act. N.C. Gen. Stat. § 150B-34(e).

2. The purpose of summary judgment is not "to resolve disputed material issues of fact but rather to determine if such issues exist." N.C. Gen. Stat. § 1A-1, Rule 56, cmmt. An issue is "material" if:

> [T]he facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail.

McNair v. Boyette, 282 N.C. 230, 235, 192 S.E.2d 457, 460 (1972)

3. The moving party bears "the burden of clearly establishing lack of a triable issue to the trial court." *N. Carolina Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 116 (2011) (internal quotations and citations omitted). In determining whether this burden is met, the moving party's "papers are carefully

scrutinized, and all inferences are resolved against him." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976).

4. Because "[s]ummary judgment is a drastic remedy," the Tribunal must exercise caution before granting such a motion. *First Fed. Sav. & Loan Ass'n of New Bern v. Branch Banking & Tr. Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972).

B. Relevant Law Governing Review of Age Discrimination Claims

5. Both federal and North Carolina law prohibit employers from discriminating against their employees based on age.

6. The Age Discrimination in Employment Act ("ADEA") makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's age. . .." 29 U.S.C. § 623(a)(1).

7. The North Carolina Human Resources Act ("Act"), N.C. Gen. Stat. § 126-1, *et. seq.*, likewise, requires public employers to give equal opportunity without regard to age:

> All State agencies, departments, and institutions and all local political subdivisions of North Carolina shall give equal opportunity for employment and compensation, without regard to race, religion, color, national origin, sex, age, disability, or genetic information to all persons otherwise qualified.

N.C. Gen. Stat. § 126-16; *see also* State Human Resources Manual ("Manual"), § 1 (2019) (recognizing that "current employees" are protected by the State's Equal

Employment Opportunity Policy). The Act creates a right of action to the OAH, upon completion of certain prerequisites, for State employees who believe they have been discriminated against in the terms and conditions of their employment on the basis of age. N.C. Gen. Stat. § 126-34.02(b)(1).

8. "Our Supreme Court has directed that we look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 193, 614 S.E.2d 396, 401 (2005) (*citing N. Carolina Dep't. of Correction v. Gibson,* 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983)).

9. Federal courts reviewing age discrimination claims have held that, in "order to prove a claim for age discrimination, a plaintiff must prove, by a preponderance of the evidence, that the defendant discriminated against [her] 'because of' age; that is, age was the 'but for' cause of the adverse employment action." *Marlow v. Chesterfield Cty. Sch. Bd.*, 749 F. Supp. 2d 417, 427 (E.D. Va. 2010) (internal citation omitted). "Such evidence may be either direct or circumstantial." *Id.* Where it is the latter, federal courts have analyzed the petitioner's age discrimination claim under the burden shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000) (applying the *McDonnell Douglas* framework to analyze the plaintiff's age discrimination action brought under the ADEA); *Westmoreland v. TWC Admin. LLC*, 924 F.3d 718, 725 (4th Cir. 2019) (recognizing that the "burden-shifting framework" set forth in

McDonnell Douglas is applicable when analyzing age discrimination claims "grounded in circumstantial evidence"); *Wood v. Town of Warsaw, N.C.*, 914 F. Supp. 2d 735, 739 (E.D.N.C. 2012) (using the "burden-shifting framework established" by *McDonnell Douglas* where plaintiff presented "no direct evidence that he was discharged because of his age").

10. *McDonnell Douglas* and subsequent decisions have "established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases." *Reeves*, 530 U.S. at 142 (internal citations omitted). As explained by one federal court:

> Generally speaking, under *McDonnell Douglas,* if the employee establishes a prima facie case of illegal discrimination. . ., then the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for its employment decision. If the employer does so, the presumption of discrimination 'drops from the case' and the employee must demonstrate that the employer's stated reason for its action was in fact a pretext for improper discrimination.
>
> The Supreme Court has made clear that the plaintiff at all times 'bears the ultimate burden of proving ... intentional discrimination.'

Lenhart v. Gen. Elec. Co., 140 F. Supp. 2d 582, 591 (W.D.N.C. 2001) (internal citations omitted). "The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff [has her] day in court despite the unavailability of direct evidence." *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121 (1985).

11. North Carolina courts have explicitly adopted the *McDonnell Douglas* evidentiary standards in analyzing a State employee's age dissemination claim. *See*

e.g., N. Carolina Dep't of Crime Control & Pub. Safety v. Greene, 172 N.C. App. 530, 616 S.E.2d 594 (2005) (analyzing an state employee's age discrimination using the *McDonnell Douglas* burden shifting scheme); *Follum v. N.C. State Univ.*, 204 N.C. App. 369, 696 S.E.2d 203, 2010 WL 2163782 (2010) (unpublished) (using the *McDonnell Douglas* burden shifting scheme to review a state employee's age discrimination claim).

C. *Analysis of Petitioner's Age Discrimination Claim Under McDonnell Douglas Framework*

12. Petitioner has raised a claim of age discrimination against the Department; she contends that the discrimination occurred when the Department "denied a pay increase after another employee with less education and experience was hired at rates of pay or given raises." P's Amended Prehearing Statement, ¶ 1.[2] The Department argues that, "even if Petitioner has made a prima facie case for discrimination," it "has articulated a legitimate, nondiscriminatory reason for not providing Petitioner with a pay increase" and "Petitioner has no evidence to suggest that [its] articulated reason is a pretext for discrimination." R's Memorandum, p. 9.

13. Because Petitioner has presented no direct evidence[3] of age discrimination, but, instead, relies on circumstantial evidence in support of her claim, the Undersigned reviews Petitioner's claim under *McDonnell Douglas* burden-

[2] Pleadings at the OAH include both the petition and prehearing statement. *Lee v. N.C. Dep't of Transp.*, 175 N.C. App. 698, 703, 625 S.E.2d 567, 571 (2006).

[3] "Direct evidence is evidence that the employer announced, or admitted, or otherwise unmistakably indicated that age was a determining factor in the particular employment action." *Ramos v. Molina Healthcare, Inc.*, 963 F. Supp. 2d 511, 522 (E.D. Va. 2013), *aff'd*, 603 Fed. Appx. 173 (4th Cir. 2015) (internal citations omitted).

shifting framework. Applying this framework, the Undersigned concludes that Petitioner fails to establish an age discrimination claim against the Department in this case.

i. *Petitioner's Prima Facie case*

14. North Carolina courts have not specifically addressed what is required to establish a *prima facie* case where the petitioner alleges age discrimination with respect to compensation. *See, e.g.*, *Greene*, 172 N.C. App. at 538, 616 S.E.2d at 600 (discussing *prima facie* case for alleged discrimination in a hiring decision); *Follum*, 2010 WL 2163782 at *14 (discussing *prima facie* case requirements for alleged discrimination termination decision). However, in *McDonnell Douglas*, the United States Supreme Court recognized that the elements of a plaintiff's *prima facie* case vary according to the asserted claim. *McDonnell Douglas*, 411 U.S. at 802 n.13. The North Carolina Supreme Court, consistent with *McDonnell Douglas*, has similarly recognized that the "burden of establishing a prima facie case of discrimination is not onerous" and "may be established in various ways." *Gibson,* 308 N.C. at 137, 301 S.E.2d at 82.

15. Generally, federal courts have held that, in order to establish a *prima facie* case of age discrimination, a plaintiff must demonstrate that (1) she is a member of a protected class, (2) who suffered an adverse employment action, (3) despite satisfactorily meeting the employer's legitimate expectations at the time of the adverse action, and (4) the adverse employment decision occurred under circumstances giving rise to an inference of unlawful discrimination. *See, e.g., Ramos,*

963 F. Supp. 2d at 522 (requiring employee to establish a similar); *Freeman v. N. State Bank*, No. 5:03-CV-916-BO, 2007 WL 5745936, at *2 (E.D.N.C. Feb. 20, 2007), *aff'd,* 282 Fed. Appx. 211 (4th Cir. 2008) (explaining the "*prima facie* case for discrimination by disparate pay").

16. Petitioner, citing factors similar to those in *Ramos* and *Freeman*, argues that she has established a *prima facie* case of age discrimination. P's Response, p. 2. It is undisputed that Petitioner is a member of the protected class[4] and was performing satisfactorily during the FY 2018-2019.[5] A review of the record also reveals evidence that could give rise to an inference of unlawful discrimination. Thomas submitted paperwork requesting Petitioner's in-range adjustment that included Petitioner's age and other demographical information. Petitioner argues, and the Undersigned agrees, that there is no apparent reason to include Petitioner's demographics on the paperwork requesting an in-range adjustment on the basis of "*salary equity*." OSHR's guidelines cite "education," "performance level," and "skills" as among the various factors to be considered when determining whether to grant an in-range adjustment to address a salary inequity; they make *no* mention age, race, or gender. *See generally* State Human Resources Manual, § 4 (last revised 7 September 2017).

[4] *See* 29 U.S.C. § 631(a) (limiting the prohibitions in the ADEA to "individuals who are at least 40 years of age)

[5] One court has observed that "[i]t is the employer's point of view that controls whether the employee is satisfactorily meeting expectations." *Ramos*, 963 F. Supp. 2d at 523.

17. With regards to the adverse employment action requirement, Petitioner contends that "she suffered an adverse employment action when her request for a raise was denied." P's Response, p. 2. However, it is not so evident to the Undersigned that the denial of an in-range adjustment, under the circumstances presented in this case, constitutes an "adverse employment action."

18. "Not every unwelcome employment action qualifies as an adverse action." *Fyfe v. City of Fort Wayne*, 241 F.3d 597, 602 (7th Cir. 2001). Rather, it must affect the terms, conditions, or benefits of the plaintiff's employment. *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir. 2004); *Freeman,* 2007 WL 5745936, at *2.

19. The Undersigned cannot find, and neither party has cited, any North Carolina law specifically addressing whether the denial of a pay increase is, in fact, an adverse employment action. Courts that have considered the issue distinguish between pay increases that are a normal and expected component of the employee's salary (*e.g.*, a raise) and those that are more discretionary in nature (*e.g*, a bonus). *Compare Lovell v. BBNT Sols., LLC*, 295 F. Supp. 2d 611, 626 (E.D. Va. 2003) (recognizing "that the denial of a pay increase may constitute an adverse employment action under Title VII") *with Freeman,* 2007 WL 5745936, at *2 (holding the "[n]on-payment of a discretionary bonus is not an adverse employment action"). One court aptly explains the rationale for this distinction:

> [W]e have held that the denial of a raise constitutes a sufficiently material adverse action, but that the denial of a bonus does not. The difference is that raises are a normal and expected

> element of an employee's salary, while bonuses generally are "sporadic, irregular, unpredictable, and wholly discretionary on the part of the employer." Employees therefore act in reliance upon the expectation of receiving a raise and suffer more deeply when it is denied.

Fyfe, 241 F.3d at 602 (internal citations and quotations omitted) (holding that the denial of a reimbursement request was not an adverse employment action because it "is more like the denial of a bonus than raise" as it was "purely discretionary").

20. Ultimately, the Undersigned need not decide today the nature of the in-range adjusted requested on Petitioner's behalf and whether the Department's denial constitutes an "adverse employment action." This is because, even if the Petitioner were able to establish a *prima facie* case of discrimination, Respondent has articulated a legitimate, non-discriminatory reason for its action, and Petitioner fails to show that this reason was pretext for discrimination.

ii. *The Department's Articulated Legitimate, Non-Discriminatory Basis*

21. Once an employee establishes a *prima facie* case of illegal discrimination, the burden shifts to the employer to articulate legitimate, non-discriminatory reasons for its actions. *See supra*. "This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves*, 530 U.S. at 142 (internal citations omitted). Here, assuming without deciding that Petitioner has established a *prima facie* case, the Undersigned concludes that the Department has met its burden of production.

22. Farr explained that she "decided in late February or early March" after Thomas "first told [her] that she wanted to provide an increase to [Petitioner]" that she would not grant the salary increase for the following reasons: (i) there were no available salary reserves during this period; (ii) she did not believe the pay disparity between Petitioner and Clemmons to be an inequity per OSHR guidelines that she was required to address because it was less than 10%; and (iii) Petitioner "was an acceptable employee but was not exceptional" and she was "willing to risk the possibility that [Petitioner] might leave if [the Department] did not provide her with an increase." Farr. Aff., ¶¶ 10-14,16.

iii. *Pretext*

23. Given that the Department has met is burden of production, the presumption of discrimination disappears, and Petitioner must demonstrate that the Department's stated reason for its action was in fact pretext for improper age discrimination. *Reeves*, 530 U.S. 142-43. Pretext is evaluated under a two-part approach: Petitioner "must prove *both* that the reason was false, and that discrimination was the real reason." *Greene*, 172 N.C. App. at 539-40 (internal quotations and citations omitted) (emphasis added).

24. Petitioner argues that the Department's "reasons given for the denial are false." P's Response, p. 4. Petitioner's evidence of pretext can be summarized as follows: Petitioner was over 60 year of age at the time Farr denied her in-range adjustment; Thomas requested the in-range adjustment to address the disparity between Petitioner and Clemmons, a "much younger employee;" Farr was aware of

Petitioner's age because it was included on the paperwork Thomas submitted requesting the adjustment; "there is no valid reason for age demographics to have been provided to the decisionmaker other than discrimination;" Farr's proffered reason of reliance on OSHR guidelines in denying the in-range adjustment is unpersuasive; and there are "genuine issues of material fact" regarding the availability of salary reserves at the time Thomas requested Petitioner's in-range adjustment. *See generally* P's Response.

25. The Department offers two primary arguments in response. The Undersigned finds each one persuasive. First, the Department contends that it did not consider Petitioner's demographic information in deciding her in-range request. It cites Farr's testimony explaining that Petitioner's age was not a consideration in her decision to deny Petitioner's increase. Petitioner has presented no evidence contradicting the testimony of Farr – the ultimate decisionmaker with respect to Petitioner's request – on this point.

26. Second, the Department argues that "Petitioner has not created a genuine issue of material fact with regard to whether Ms. Farr's testimony is a pretext[.]" R's Reply, p. 4. The "ultimate" question in discrimination cases "is whether the employer intentionally discriminated[.]" *Reeves,* 530 U.S. at 146–47 (internal citations omitted). To overcome the Department's summary judgment, Petitioner "must produce direct evidence of a stated purpose to discriminate and/or [indirect] evidence of sufficient probative force to reflect a genuine issue of material fact." *Lenhart*, 140 F. Supp. 2d at 590. Petitioner fails to make such a showing in this case.

27. Petitioner primarily challenges the persuasiveness of the Department's explanation relating to its reliance on the OSHR guidelines and the lack of available salary reserves. P's Response, p. 4. "While "[p]roof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination," it will not always be adequate to justify a finding of intentional discrimination. *Reeves*, 530 U.S. at 134. As explained in *Reeves*, it is "not enough to . . . *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination:"

> Certainly, there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. at 147, 148 (internal citations omitted) (emphasis in original).

28. With regards the OSHR guidelines, Petitioner argues, in essence, that Farr's explanation is unworthy of credence because it "misinterprets" OSHR guidelines as the 10% rule "is not a bright-line rule" but a "general guide." P's Response, p. 4.

29. Farr explained that she "relies heavily on the policies and guidelines of the OSHR;" she believed the guidelines defined a "salary inequity" as "a salary

difference of greater than 10% in the salaries of similarly situated employees;" and that, if there "is not an inequity as defined by OSHR, then [she did] not feel that [she was] required to address a perceived inequity." Farr Aff., ¶ 9.

30. It is undisputed in this case that the salary difference between Clemmons and Petitioner was less than 10%. Thomas Aff., ¶ 9. Section 4 of the Manual states that employees "may be granted in-range adjustments to establish equitable salary relationships among employees performing the *same type* and level of work" considering factors such as education, skills, and performance level (collectively "Equity Factors"). State Human Resources Manual, § 4 (last revised 7 September 2017) (emphasis added). However, the Manual clearly defines a "salary inequity" as "a situation where the salaries of employees in positions of the same classification *differ by more than 10%*" when considering the Equity Factors. *Id.* (emphasis added). The Guidelines for Internal Equity Analysis, which Petitioner cites, also define "salary inequity" in a similar manner.[6] The Undersigned therefore is not persuaded that this reason given by the Department is "false."

31. As for the availability of salary reserves, Petitioner, citing Farr's explanation that she denied Petitioner's increase in "late February or early March" and Thomas' submission of the formal paperwork for Petitioner's salary increase in April 2019, argues that there are "factual differences between the parties" on this

[6] The Guidelines state that a salary inequity occurs when there are salary differences "greater than 10%" between similarly situated employees. P's Response, pp. 3-4; Thomas Aff, Ex. 1 (Guidelines defining "internal equity" as "when and employee's salary is significantly above or below" that of other similarly situated employees and noting that, generally, "differences greater than 10% would be considered significant")

issue. (Pet.'s Response, p. 4) The Undersigned finds this argument equally unavailing.

32. Petitioner has offered no evidence showing that Farr did not in fact make the decision to deny Petitioner's salary increase in "late February or early March" when there were no salary reserves. Instead, Petitioner only speculates as to why this could not have occurred. P's Brief, p. 3 (asking "[i]f the decision was already made by [Farr] in February or March, the why did [Thomas] go the trouble of submitting a request for something that had already been denied?) Speculation, however, is not enough to create a material issue of fact. *France v. Winn-Dixie Supermarket, Inc.*, 70 N.C. App. 492, 493, 320 S.E.2d 25 (1984).

33. The evidence in this case is not inconsistent: Thomas discussed Petitioner's raise increase with Farr in February. Farr explained that, after discussing it with Thomas, she denied the raise in late February early March. Thomas did not learn of Farr's decision to deny raise prior to submitting formal paperwork in April, when she mistakenly thought that the salary reserve created within Human Resources were at her disposal for use toward a salary increase for Petitioner.

34. But even if it were, summary judgment may still be granted where there is nothing to show that discrimination was the real reason for the employer's action. *See, e.g.*, *Holland,* 487 F.3d at 216 ("Once an employer has provided a non-discriminatory explanation for its decision, the plaintiff cannot seek to expose that rationale as pretextual by focusing on minor discrepancies that do not cast doubt on

the explanation's validity, or by raising points that are wholly irrelevant to it. The former would not create a 'genuine' dispute, the latter would fail to be 'material.'")

35. Assuming *arguendo* Farr did not make the determination until April 2019, the month in which Thomas submitted the formal paperwork, it does not necessarily follow that, *but for* Petitioner's age, she would have received the pay increase.

36. Farr, as pointed out by the Department, "would have been confronted with two requests for increases" in April 2019, the "total of which far exceeded the amount in the reserve." R's Reply, p. 3. Farr's deliberative process for reviewing the requests not only included the availability of salary reserves, but also the need to maintain reserves and the importance of retaining the employee in question; it did not include age. *See* Farr Aff. ¶¶ 8-10,14-15. This is not sufficient evidence of pretext to create a triable issue of fact on age discrimination based on the record in this case.

37. In sum, the Department has articulated legitimate, non-discriminatory reasons as to its decision not to approve an in-range adjustment for Petitioner and, as explained, Petitioner has not created a material issue of fact with respect to Department's rationale. It is not the Tribunal's province to decide whether the reasons articulated by the Department for denying Petitioner's salary increase were "wise, fair, or even correct, ultimately, so long as it truly was the reason" for the Department's action. *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (internal citations omitted). Accordingly, the Motion should be GRANTED.

IV. FINAL DECISION

38. For the reasons explained above, the Undersigned GRANTS the Department's Motion for Summary Judgment and enters judgment in favor of the Department in this contested case.

V. NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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

SO ORDERED this the «Day» day of «Month», «Year».

Tenisha S Jacobs
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 20th day of May, 2020.

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