

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 OSP 06845, 20 OSP 00278

<p>Andrea Y Murphy Petitioner,</p> <p>v.</p> <p>NC DHHS Office of Rural Health Respondent.</p>	<p>FINAL DECISION</p>
--	------------------------------

This contested case came before Administrative Law Judge Michael C. Byrne for hearing on September 30, 2020 through October 1, 2020, at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Abraham P. Jones
Law Office of Abraham P. Jones
P.O. Box 1941
Wendell, NC 27591

For Respondent: William Walton
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, N.C. 27602-0629

ISSUES

1. Whether Respondent illegally failed to give Petitioner promotional priority consideration regarding her application for promotion to Rural Health Operations Manager, Position #60038273.
2. Whether Respondent illegally discriminated against Petitioner because of her race and/or age.

3. Whether Respondent illegally retaliated against Petitioner for actions in opposition to discrimination.

APPLICABLE LAW

N.C.G.S. Chapter 126
N.C.G.S. 1A-1, Rule 41(b)
Section 7 of the State Human Resources Manual
25 N.C.A.C. 01J 0617
25 N.C.A.C. 1H.0801

EXHIBITS

Petitioner's Exhibits 1-17 and Respondent's Exhibits 1-6, 8-12, 14-24, 27-33
were admitted into evidence.

WITNESSES

For Petitioner:	Andrea Murphy Parcheul Harris Maggie Sauer Stephanie Nantz Allison Owen Tracie Miller Tamika Armstrong Teneisha Hardison Linda Washington Tameka Leach Barbara Williams
-----------------	---

BASED UPON careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the undersigned has weighed all the evidence, or lack thereof, 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 witness; any interest, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Respondent North Carolina Department of Health and Human Services (“DHHS”) is an agency of the State of North Carolina. The Office of Rural Health (“ORH”) is a Division operated by DHHS.

2. Petitioner is a career state employee under N.C.G.S. 126-1.1.

3. Petitioner is an African American female over the age of forty.

Petitioner’s Promotional Claims.

4. On or about June 5, 2019, a vacancy for Rural Health Operations Manager Position #60038273 (“the position”) was posted on the NEOGOV website. (Resp. Ex. 27)

5. Petitioner applied for the position. (Resp. Ex. 28).

6. Petitioner met the minimum qualifications as a candidate for the position.

7. Tamika Armstrong (African American female), formerly the Performance Management Consultant and Benefits Manager for DHHS, spoke with Margaret Sauer, the hiring manager, regarding interviewing Petitioner for the position. Sauer had previously supervised Petitioner and was the primary subject of multiple EEO complaints from Petitioner. Armstrong told Sauer that if Petitioner had performance issues Sauer did not have to interview her; however, the issue was ultimately up to Sauer as hiring manager.

8. Sauer is a white female over age 40. She became Director of ORH in June 2017. Sauer considers Petitioner a “wonderful person” who is “very passionate” about the communities served by ORH.

9. Petitioner was not interviewed for the position.

10. Another applicant, Dorothea Brock, was selected. (Resp. Ex. 5). Brock, like Petitioner, is an African American female over the age of forty. At the time of her selection, Brock was not a member of the North Carolina State government workforce.

11. Petitioner offered no evidence tending to show that her job-related qualifications for the position were superior to or equal to Brock’s, nor did she offer evidence tending to show that a substantial equivalency existed between Brock and herself.

12. Petitioner offered no evidence that in the absence of alleged discrimination or retaliation Petitioner would be the most qualified candidate for the position or would have been selected for the position.

13. Petitioner offered no evidence establishing that her non-selection for the position was the result of discrimination based on her age or race, or that her non-selection was based on retaliation for her opposition to discrimination or other protected activity.

Petitioner's Age, Race, and Retaliation Claims.

14. Parcheul Harris (African American female over age 40) was Petitioner's direct supervisor for seven years prior to her retirement in November of 2018.

15. Harris had no issues with Petitioner's work performance and always gave her good performance ratings. Harris was concerned that Petitioner was being treated differently, in her view, from other employees.

16. Management restructured ORH after Harris retired. Harris had supervised three work groups. Management created two additional management positions so that each work group could have its own supervisor.

17. Harris' work groups were divided between management until the new positions could be filled. Allison Owens, Deputy Director for ORH (white female over age 40) took one work group and Stephanie Nantz, Assistant Director of Operations (white female over age 40) took one work group. Sauer took over operations because she was the only management member with relevant experience to oversee the operations team.

18. Sauer was dissatisfied with the quality of the grants and contracts the operations team was receiving from the facilities they served when she started as Director. Sauer was also dissatisfied with the quality of work with multiple members of the operations team, including Petitioner.

19. Sauer instituted changes to the programs the ORH oversaw that led to significant staff turnover. Multiple employees had negative reactions to Sauer's management style.

20. However, the persons leaving ORH during this time period were of varying races. There was no evidence that Sauer's management issues, which caused negative reactions with multiple ORH employees, were rooted in discriminatory animus.

21. In May 2018, ORH management conducted site visits to facilities served by its Operations team. Staff at those facilities reported Petitioner was inconsistent in responding to their requests and at times was unhelpful. Resp. Ex. 30- 33. This testimony was hearsay and given appropriate weight.

22. Sauer became Petitioner's direct supervisor in September 2018. Sauer had weekly meetings with the operations team, including Petitioner, to discuss goals and progress.

23. Sauer frequently communicated with Petitioner through email regarding her work, expectations, and performance. (Pet. Ex. 3-5; Resp. Ex. 6, 8-9, 11-12, 14, 16, 17-24). Email was Sauer's primary means of communication with all the Operations team members.

24. Petitioner found some emails from Sauer curt and offensive. (Pet. Ex. 3-5). Petitioner believed Sauer copied other employees on the emails to embarrass her. Sauer testified credibly that, by contrast, she copied the employees on the team to coordinate plans or responses.

25. Petitioner's testimony that the emails were copied to other employees for improper purposes is not credible.

26. Sauer's emails were not offensive or discriminatory by the standards of a reasonable person of ordinary sensibilities.

27. In Petitioner's performance evaluation for 2018-2019, completed by Sauer, Petitioner received an overall rating of "Meets Expectations." (Pet. Ex. 14)

28. Sauer evaluated Petitioner as not meeting expectations on some performance subgoals. (Pet. Ex. 14). Despite her overall rating of "Meets Expectations," Petitioner believed that her low sub-ratings were retaliation for filing EEO complaints. The primary evidence supporting this belief was that Petitioner previously received good reviews on her evaluations, including her initial interim review from Sauer.

29. However, as she did not become Petitioner's supervisor until September 2018, Sauer gave the Petitioner the benefit of the doubt with her concerns on Petitioner's job performance for Petitioner's interim review. By the time of Petitioner's annual review, Sauer determined that she needed to document issues with Petitioner's job performance. Sauer's testimony on these points was credible.

30. Tracie Miller (white female) was the Contracts Manager for ORH prior to leaving to take a position with DSS. Miller testified credibly that Petitioner often needed assistance from the contracts team to complete tasks. Miller did not observe Petitioner being treated differently from other employees.

31. Tenisha Hardison (African American female), a Community Development Specialist, assisted Petitioner with her work. She did not assist Petitioner any less once Sauer became director of ORH. Hardison did not corroborate Petitioner's contention that Sauer directed Hardison not to assist Petitioner with her work. Hardison's testimony was credible.

32. After her involvement in a workplace argument, Petitioner received a written warning, which is a formal disciplinary action. ORH management consulted with DHHS Human Resources before issuing the written warning. Human Resources advised ORH that a written warning was a justifiable action for Petitioner's conduct.

33. There was conflicting testimony whether Human Resources told OHR to issue a written warning or merely told OHR that a written warning was justified by Petitioner's conduct. It is found as a fact that ORH management, based on representations from Human Resources, believed that the appropriate action to Petitioner's conduct was issuing Petitioner a written warning.

34. There was no evidence that the written warning was motivated by discrimination based on age or race. While another employee had used language in workplace situations of greater vulgarity than that cited in Petitioner's written warning, the disciplinary action was based on Petitioner's conduct as a whole during the workplace argument, not the specific language attributed to Petitioner.

35. Petitioner filed an EEO claim regarding the written warning. This was one of four separate EEO claims Petitioner filed during the time frame of this case. DHHS' then-EEO/Diversity & Inclusion Director, Mary Molly Taylor (who did not testify), conducted no fact-finding interviews with Petitioner about any of her charges.

36. On June 13, 2019, Petitioner and ORH held a mediation regarding her EEO claims. This resulted in the written warning being removed from Petitioner's personnel file. (Pet. Ex. 1). Sauer did not wish to remove the warning but agreed to this in hopes of achieving a fresh start with Petitioner.

37. On July 8, 2019, Petitioner filed an EEO complaint alleging discrimination, harassment, and retaliation. (Pet. Ex 6). This was less than a month after the mediation resolving her previous EEO claims. This filing was prompted by Petitioner's continued dissatisfaction over emails from Sauer.

38. Ultimately, Petitioner filed two contested case petitions in the Office of Administrative Hearings, 19 OSP 06845, and 20 OSP 00278. These cases were consolidated for hearing by order of the Chief Administrative Law Judge.

39. At the close of Petitioner's case in chief, Respondent moved for a Rule 41(b) dismissal of Petitioner's case. This motion was allowed as to Petitioner's claim of promotional priority and non-selection and denied as to Petitioner's remaining allegations.

On the basis of these Findings of Fact, the Tribunal makes the following:

CONCLUSIONS OF LAW

1. To the extent that the Findings of Fact contain Conclusions of Law and vice versa, they should be so considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946).

2. An administrative tribunal 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. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 131E and 150B of the North Carolina General Statutes.

4. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.

Petitioner's Promotional Claims

5. Petitioner alleges that she failed to receive promotional priority under North Carolina law.

6. At the time of Petitioner's non-selection for the Rural Operations Manager Position, she was a career status State employee subject to the North Carolina Human Resources Act. As such, when applying for a position that constitutes a promotion, Petitioner was entitled to promotional priority consideration over applicants who is not part of the North Carolina State government workforce.

7. A career status State employee may bring a contested case in the Office of Administrative Hearings on the basis that the employee failed to receive a promotional priority. N.C.G.S. 26-34.02(b)(5).

8. In a promotional priority claim, the burden of proof rests with the Petitioner. N.C.G.S. 126-34.02(d).

9. A current State employee who applies for a position shall receive priority consideration over the applicant who is not a State employee, if the position would constitute a promotion; and if the State employee has substantially equal qualifications as an applicant who is not a State Employee.

10. "Qualifications" consist of training or education; years of experience; and 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.G.S. 126-7.1.

11. “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 another applicant. 25 N.C.A.C. 1H.0801, see Betty M. Jones v. NC DHHS, 10 OSP 00085, 2013 WL 8116011.

12. Petitioner offered no evidence that her job-related qualifications for the position were superior or equal to that of the selected applicant, or that there was a substantial equivalency between her qualifications and those of the selected applicant. Petitioner offered no evidence on her qualifications other than that she met the minimum qualifications for the position.

13. Petitioner failed to establish a claim for denial of promotional priority.

14. Petitioner also alleges that she failed to receive a promotion due to illegal discrimination based on age and/or race, or due to retaliation for protected activity regarding such.

15. A prima facie case for discrimination on the basis of race in the promotional context consists of a showing that: 1) the employee is of a certain age, race and/or gender; 2) the employee failed to win a promotion; and 3) the employee’s age, race and/or gender was a substantial or motivating factor in the failure to win the promotion. Department of Correction v. Gibson, 308 N.C. at 136-137, 301 S.E.2d at 82 (1983).

16. If the employee makes a prima facie case, the burden shifts to the employer to articulate and prove some legitimate, non-discriminatory reason(s) for the employee’s rejection. Id. If the employer meets that burden, the burden shifts back to the employee to show that the employer’s reasons were a pretext for discrimination. The burden of proof remains on the employee to prove that the decision was based upon discrimination. Id. See, e.g., McCleod-Duncan v. NC DPS, 2017 WL 7052537.

17. Petitioner offered no evidence that the reasons articulated and proved by DHHS for not promoting Petitioner were pretexts for racial discrimination. Other than a showing that she met the minimum requirements for the position, Petitioner offered no evidence that her qualifications for the position were superior or even equal to the selected applicant when evaluated absent some discriminatory intent. Finally, the Petitioner is an African American female over the age of 40. An African American female over the age of 40 was selected for the position.

18. An employee may establish a prima facie case of age discrimination by showing (1) the employee is a member of the protected class, or over forty years old; (2) the employee applied or sought to apply for an open position with the employer; (3) the employee was qualified for the position; and (4) the employee “was rejected for the position under circumstances giving rise to an inference of unlawful discrimination.” Evans v. Technologies Applications & Service Co., 80 F.3d 954, 959–60 (4th Cir.1996).

19. An inference of unlawful discrimination arises when an employee is replaced by a “substantially younger” worker. N. Carolina Dep’t. of Crime Control & Pub. Safety v. Greene, 172 N.C. App. 530, 538, 616 S.E.2d 594, 600–01 (2005). No inference of unlawful age discrimination exists in this case. The selected applicant was, like Petitioner, a female over the age of 40.

20. Further, other than establishing that she met the minimum qualifications for the position, Petitioner made no showing that her qualifications were superior to or even equal to the selected applicant, such as to show that in the absence of some discriminatory animus based on her age she would have been selected for the position.

21. “Retaliation” means adverse action taken against an individual for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit related to discriminatory employment practices based on race, religion, color, national origin, sex, age, disability, political affiliation or genetic information; or because of opposition to employment practices in violation of the unlawful workplace harassment policy. 25 N.C.A.C. 1J.1101(b)(3)

22. For her retaliation claim, Petitioner’s prima facie case consists of a showing that: (a) the employee engaged in protected activity; (b) Respondent took adverse employment action against the employee; and (c) there is a causal connection between the protected activity and the adverse action. Ziskie v. Mineta, 547 F.3d 220, 229 (4th Cir. 2008).

23. Petitioner’s subjective belief that the decision to not promote her was motivated by unlawful discriminatory (or retaliatory) intent is insufficient to prove discrimination and/or retaliation. See, e.g., Tinsley v. First Union Nat’l Bank, 155 F.3d 435, 444 (4th Cir. Va. 1998). See also, Schultz v. General Electric Capital Corp., 37 F.3d 329, 334 (7th Cir. Ill. 1994).

24. While Petitioner did receive adverse employment action in being denied the position, and Petitioner engaged in protected activity by filing multiple EEO claims, Petitioner failed to show any causal connection between her protected activity and the adverse employment action. Petitioner thus failed to make a prima facie case for retaliation.

25. Even if Petitioner had made a prima facie case, DHHS articulated and proved reasonable non-discriminatory reasons for its decision by showing Petitioner was not interviewed due to prior performance deficiencies. Petitioner presented no evidence that this explanation was a pretext for illegal retaliation.

26. Petitioner failed to meet her burden of showing that Respondent’s failure to select her for the position was based on her race or her age, or in retaliation for opposition to discrimination or other protected activity.

27. A motion to dismiss under Rule 41(b) both tests the sufficiency of Petitioner's proof to show a right to relief and provides a procedure whereby the Tribunal may weigh the evidence, determine the facts, and render judgment on the merits against the Petitioner, even though the Petitioner may have made out a prima facie case. O'Grady v. Bank, 296 N.C. 212, 250 S.E.2d 587 (1978); Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

28. As a fact-finder, the Tribunal must find the facts on all relevant issues raised by the pleadings, and state conclusions of law based thereon, in order that an appellate court may determine from the record the basis of the Tribunal's decision. Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980); Helms v. Rea, supra.

29. In deciding a motion under Rule 41(b), the Tribunal does not weigh the evidence in the light most favorable to the Petitioner, as on a motion for directed verdict in a jury trial. Barnes v. McGee, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974).

30. Considering the governing law applied to the established facts, Petitioner's promotional claims for promotional priority, age, race, and retaliation were properly dismissed on a motion pursuant to N.C.G.S. 1A-1, Rule 41(b).

Petitioner's Other Age, Race, and Retaliation Claims

31. A career status State employee may bring a contested case in the Office of Administrative Hearings on the basis that the employee faced retaliation for opposition to discrimination. N.C.G.S. 126-34.02(b)(2).

32. Retaliation means adverse action taken against an individual for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit related to discriminatory employment practices based on race, religion, color, national origin, sex, age, disability, political affiliation or genetic information; or because of opposition to employment practices in violation of the unlawful workplace harassment policy. 25 N.C.A.C. 1J.1101(b)(3).

33. In a retaliation claim, the burden of proof rests with the Petitioner. N.C.G.S. § 126-34.02(d)

34. Petitioner's evidence of emails she found curt and or offensive and comments regarding poor performance in her annual review do not support a retaliation claim. (Pet. Ex. 3-5, 14). That Petitioner found the emails offensive does not make them retaliatory. That Petitioner previously received good performance reviews does not make subsequent reviews with less complimentary language retaliatory, especially given the overall "Meets Expectations" rating on the review at issue.

35. Petitioner failed to meet her burden that Respondent retaliated against her.

36. A career status State employee may bring a contested case in the Office of Administrative Hearings on the basis that the employee was subject to illegal discrimination because of race. N.C.G.S. 126-34.02(b)(1)

37. In a racial discrimination claim, the burden of proof rests with the Petitioner. N.C.G.S. 126-34.02(d)

38. Under North Carolina law, a prima facie case for racial discrimination is a showing that: 1) the employee is of a certain race; 2) the employee experienced adverse employment action; and 3) the employee's race was a factor in the adverse employment action. Department of Correction v. Gibson, 308 N.C. at 136-137, 301 S.E.2d at 82 (1983). The burden of a prima facie case is not onerous, but it requires some evidence of discriminatory animus.

39. If the employee makes a prima facie case, the burden shifts to the employer to articulate and prove legitimate, non-discriminatory reason(s) for the employment action. Id. If the employer meets this burden, the employee must show that the employer's stated reason(s) were a pretext for discrimination. The burden of proof remains on the employee to prove that the decision was based upon discrimination.

40. Petitioner is a member of a protected class (African American). For purposes of a prima facie case, Petitioner's written warning constitutes adverse employment action. See 25 N.C.A.C. 1J.0604(1).

41. However, Petitioner's evidence that her written warning was motivated by racial animus is for practical purposes non-existent, barring Harris' subjective opinion that Petitioner was in a general sense "treated differently" than other employees. As with the promotional claims, Petitioner's subjective belief that she was subjected to racial discrimination is not sufficient to carry her burden of proof.

42. Assuming Petitioner established a prima facie case of racial discrimination, DHHS articulated and proved legitimate, non-discriminatory reasons for issuing Petitioner a written warning. The Tribunal notes that the written warning was removed from Petitioner's personnel file to resolve the Petitioner's multiple EEO filings and provide a "fresh start" to the employment relationship.

43. Petitioner's claims that emails from Sauer constitute racial discrimination or are otherwise evidence of illegality are without merit. Nothing in these emails is reasonably perceived as discriminatory by a person of ordinary sensibilities, nor are they adverse employment action.

44. Petitioner presented no evidence that reasons given by DHHS for sending emails to Petitioner and issuing Petitioner a written warning were a pretext for racial discrimination. Accordingly, Petitioner's racial discrimination claim fails.

45. The analysis of age discrimination above is incorporated by reference. It is not necessary to analyze this issue further; Petitioner presented no evidence of any issue of age discrimination on issues other than her non-selection for the position.

46. Ultimately, the Tribunal concludes that Petitioner failed to establish that Respondent took any adverse employment action against Petitioner based on Petitioner's age or race, or in retaliation for Petitioner's opposition to discrimination.

47. Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

Petitioner failed to meet her burden to show that she was denied promotional priority or was denied a promotion for reasons of discrimination based on her age or race, or in retaliation for Petitioner's opposition to discrimination. Therefore, those claims are **DISMISSED** with prejudice.

Petitioner failed to meet her burden to show that Respondent undertook other adverse employment action against her based on her age or race, or in retaliation for Petitioner's opposition to discrimination. Therefore, those claims are **DISMISSED** with prejudice.

NOTICE OF APPEAL RIGHTS

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

IT IS SO ORDERED.

This the 28th day of October, 2020.



Michael C. Byrne
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:

Abraham Jones
Law Office of Abraham P. Jones
legalaffairs@abejoneslaw.com
Attorney For Petitioner

William Walton
N.C. Department of Justice
wwalton@ncdoj.gov
Attorney For Respondent

This the 28th day of October, 2020.



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