

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 OSP 02154

<p>Cecil John Russell Petitioner,</p> <p>v.</p> <p>North Carolina Department of Public Safety Respondent.</p>	<p>FINAL DECISION</p>
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On October 8, 2020, Administrative Law Judge Melissa Owens Lassiter heard this contested case in the Office of Administrative Hearings in Raleigh, North Carolina based upon Petitioner's appeal of Respondent's decision to separate Petitioner from employment due to unavailability.

APPEARANCES

For Petitioner: Jennifer J. Knox
The Law Firm of Jennifer J. Knox, PC
Raleigh, North Carolina

For Respondent: Adrina G. Bass
Norlan Graves
Assistant Attorneys General
North Carolina Department of Justice
Raleigh, North Carolina

ISSUES

1. Whether Respondent had just cause to separate Petitioner from employment for being unavailable?
2. Whether Respondent took sufficient action to place Petitioner in a different job under the Office of State Human Resources' Workers' Compensation Administration Policy?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 126-34.02(b)(3)
25 NCAC IC .1001 *et. seq.*

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 and 2

For Respondent: 1 - 7

WITNESSES

For Petitioner: None

For Respondent: Tracy S. Perry, Rebecca Hinton, Cecil J. Russell,
Warden Denise Jackson

PREHEARING MOTIONS

On June 25, 2020, Respondent filed a Motion to Dismiss in Lieu of Prehearing Statement on the grounds that Petitioner had failed to exhaust his administrative remedies and failed to timely file his internal appeal before filing a contested case with the Office of Administrative Hearings. On August 3, 2020, after reviewing the arguments of the parties, this Tribunal denied this Motion.

At the beginning of this contested case hearing, Respondent renewed its Motion to Dismiss on the same grounds. The undersigned denied Respondent's Motion after taking testimony, considering the arguments of the parties, based upon Governor Roy Cooper's Executive Orders and State of Emergency, beginning March 10, 2019, issued in response to the COVID-19 pandemic, Chief Justice Cheri Beasley's March 13, 2020 and March 19, 2020 Orders canceling court proceedings and extending the filing deadlines in court proceedings, the September 14, 2020 Order by Chief Administrative Law Judge Julian Mann, III canceling in-person contested case hearings and extending filing deadlines in the Office of Administrative Hearings beginning March 18, 2020 and continuing as of the hearing date, and based upon the effects COVID-19 has had on the operation of our State government offices since March 2019.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record of this proceeding, the undersigned Administrative Law Judge finds:

1. Petitioner is a career state employee subject to the North Carolina Human Resources Act who began his employment as a Correctional Officer with Respondent in May of 2012. As of the date of his termination, Petitioner was employed in the position of Correctional Officer III at Central Prison in Raleigh, North Carolina. On November 12, 2018, Petitioner suffered a work-related injury to his back while on duty at Central Prison.

Due to his injury in the workplace, Petitioner was placed on a Leave of Absence due to Workers' Compensation.

2. On July 5, 2019, approximately 8 months later, Petitioner returned to work in a light-duty position in accordance with The North Carolina Workers' Compensation Act. In August 2019, Petitioner re-injured his back at work and was again placed on a Leave of Absence due to Workers' Compensation.

3. Petitioner's medical records dated November 26, 2019 state that Petitioner has reached maximum medical improvement. Resp. Ex. 5, p. 4.

4. In December of 2019, Petitioner returned to work at Central Prison and worked in the booth in one of the units. However, Petitioner moved to OC-2 unit after he had trouble performing duties in the booth. Thereafter, the Workers' Compensation judge removed him from work. Petitioner has not worked since December 2019.

5. By letter dated December 13, 2019, Rebecca Hinton, a Human Resources Technician III ("Workers Compensation Coordinator") for Respondent's Workers' Compensation office notified Petitioner that his physician had advised them that he had reached maximum medical improvement with permanent restrictions that prohibited employment in his current position. Petitioner's permanent restrictions prohibited lifting and stooping and thus prevented Petitioner from retaining his job as a Correctional Sergeant III. Ms. Hinton informed Petitioner about alternative employment options and benefits which included job placement, accommodation under the Americans with Disabilities Act, and Short-Term Disability. That letter was not presented or produced during the contested case hearing.

6. On January 17, 2020, Petitioner requested job placement by submitting an application to Ms. Hinton.

7. Respondent's policy was to run two job searches of all current job postings relevant to the Petitioner's education, experience, skills, and medical limitations on two consecutive weeks for jobs located within a fifty mile radius of Petitioner's home. In conducting those job searches, Respondent's staff conducts two job searches one week and one day apart from each other. If Respondent cannot find a job for Petitioner in conducting these two searches, then Respondent moves forward with separation from employment. As a Workers' Compensation Coordinator, Ms. Hinton administers job placement for workers' compensation for Respondent.

8. In this case, Ms. Hinton ran one job search for available jobs on January 17, 2020 and January 28, 2020, respectively, pursuant to Respondent's policy to run job searches one week and one day apart. Ms. Hinton searched for available non-certified or administrative positions within the Department of Public Safety, such as a mail room clerk or administrative assistant, within a fifty-mile radius from Petitioner's residence. Hinton searched for jobs within the fifty-mile radius based upon workers' compensation guidelines or policies from the North Carolina Industrial Commission. Hinton conducted

the job searches for vacant jobs in the Beacon system. (The undersigned takes official notice that Beacon is the State's timekeeping and payroll system for state employees.)

9. Ms. Hinton located only one available job at either Hyde or Hoke Correctional facility. However, that facility was shut down for six months and was not hiring. As a result, Ms. Hinton found no suitable vacant positions for Petitioner during these two searches. Ms. Hinton could have searched for available positions more than fifty miles from Petitioner's home, but she never talked with Petitioner about available jobs. She just talked with Petitioner's employing facility, Central Prison, and the Third Party Administrator who processes a State employee's claim for workers' compensation. At hearing, Hinton explained that Petitioner would have to agree to relocate more than fifty miles, but he did not propose that as an option.

10. On January 28, 2020, Respondent's Job Placement Office advised Petitioner that such Office had searched vacant positions in the Department of Public Safety and determined that there were no suitable vacant positions available for Petitioner given his medical restrictions and qualifications.

11. On February 12, 2020, Mike Ragan, a Business Officer II formerly employed by Respondent, advised Petitioner by letter:

Should you remain unavailable, prior to a recommendation for your separation, you will be given the opportunity to meet with me or propose in writing alternative methods of accommodation to avoid this separation.

Resp. Ex. 6. Mr. Ragan instructed Petitioner that he should contact Ragan if he would like to meet by February 27, 2020 or submit his proposal in writing to Ragan with receipt by Respondent by February 27, 2020. Mr. Ragan informed Petitioner that he would recommend Petitioner be separated from employment under the provision of Separation Due to Unavailability if he remained unavailable after February 27, 2020. Resp Ex 6. Mr. Ragan further informed Petitioner that his Correctional Officer III position is critical to the normal operation of Central Prison and Petitioner's inability to perform all the essential functions of his position was creating an undue hardship on the operation of Petitioner's work unit and fellow employees. Resp. Ex. 6.

12. When Petitioner received Mr. Ragan's letter, he called and spoke with Mr. Ragan by telephone. Petitioner told Mr. Ragan he would like to meet with him. Petitioner wanted to meet with Mr. Ragan because did not know how to submit a written proposal for alternative employment options and needed help with writing a proposal. Mr. Ragan advised Petitioner that he would not meet with him and that it was "pointless" to submit a written proposal. Ragan instructed Petitioner to return to work before the February 27, 2020 deadline or they would separate him from employment.

13. On February 13, 2020, Respondent authorized Petitioner's Leave of Absence for Workers' Compensation from January 27, 2020 through March 27, 2020. This approval was based on Petitioner's first injury on November 12, 2018. (Resp Ex 4, page 4)

14. Petitioner did not know what or how to submit a written proposal and, therefore, did not submit any written alternative methods of accommodations to Mr. Ragan. Petitioner did not return to work before or on February 27, 2020. He received workers' compensation payments while on workers' compensation leave of absence.

15. On March 3, 2020, Mr. Ragan separated Petitioner from employment as a Correctional Officer III under the provision of Separation Due to Unavailability. In this letter, Mr. Ragan listed the OSHR policy upon which he based his decision to separate Petitioner from employment. Resp. Ex. 7. However, Mr. Ragan failed to list the specific citation for that OSHR policy in his letter to Petitioner. The undersigned takes official notice that the applicable policy cited by Mr. Ragan in such letter is stated in 25 NCAC 1C. 1007(a)(3).

- a. In this letter, Mr. Ragan reiterated how he had allowed Petitioner 15 days to request an ADA accommodation and propose alternative methods of accommodation to avoid his separation, but Petitioner "did not submit any proposals for us to consider." Resp. Ex. 7.
- b. Mr. Ragan also noted in such letter that Petitioner's job was critical to the normal operation of Central Prison and Petitioner's continued absence and inability to perform his job duties caused an undue hardship on his unit and fellow employees. Resp. Ex. 7.
- c. Mr. Ragan is no longer employed with Respondent and did not testify at the contested case hearing.

16. At no time did Respondent ever request that other employees donate their vacation or sick time to Petitioner.

17. In May of 2020, Petitioner had decompression back surgery, which alleviated the pain in both his legs and feet caused by his accident at work on November 12, 2018. Petitioner's surgery was originally scheduled for March 2020 but was delayed. Sitting and walking for long periods, *i.e.*, 45 minutes or longer, still affects his leg and causes it to throb. Currently, Petitioner is not certified as a justice officer/correctional officer.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case, and the parties received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that

the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. *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. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012).

2. For reasons stated in Respondent's August 12, 2020 Motion to Extend Discovery and Motions Deadlines and Continue Hearing Date, and the undersigned's Order Granting such Motion, the time for completion of this matter exceeded the usual, regular, and customary timeline for completion. For that reason, the undersigned finds that extraordinary cause existed, pursuant to N.C. Gen. Stat. § 126-34.01, for issuance of this Final Decision more than 180 days from the commencement of the contested case petition.

3. Petitioner is a career status State employee entitled to the protections of the North Carolina State Human Resources Act, N.C. Gen. Stat. § 126-1 *et seq.* ("The N.C. State Human Resources Act").

4. The N.C. State Human Resources Act outlines the procedures the State must follow in separating an employee such as the Petitioner from employment due to unavailability. N.C. Gen. Stat. § 126-34.02(b)(3) states in pertinent part:

. . . In contested cases conducted pursuant to this section, an employee may appeal an involuntary nondisciplinary separation due to an employee's unavailability in the same fashion as if it were a disciplinary action, **but the agency shall only have the burden to prove that the employee was unavailable.** In cases of such disciplinary action the employee shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee shall be permitted 15 days from the date the statement is delivered to appeal under the agency grievance procedure. However, an employee may be suspended without warning pending the giving of written reasons in order to avoid undue disruption of work, to protect the safety of persons or property, or for other serious reasons. (Emphasis added).

5. 25 NCAC 1C .1007 SEPARATION provides in part:

(a) An employee **may** be separated when: . . .

(3) notwithstanding any unexhausted applicable leave credits and leave benefits, when an employee is on workers' compensation leave of absence, and the employee is unable to return to all of the position's essential duties as set forth in the employee's job description or designated work schedule due to a medical condition or the vagueness of a medical

prognosis, and the employee **and the agency are unable to reach agreement on a return to work arrangement that meets both the needs of the agency and the employee's medical condition, a separation may** occur on the earliest of the following dates:

- (A) after the employee has reached maximum medical improvement for the work related injury for which the employee is on workers' compensation leave of absence **and the agency is unable to accommodate the employee's permanent work restrictions related to such injury;** or
- (B) 12 months after the date of the employee's work related injury. (Emphasis added).

6. 25 NCAC 1C .1007(c) provides in pertinent part:

The burden of proof on the agency in the event of a grievance is not to demonstrate just cause as that term exists in G.S. 126-34.02 or G.S. 126-35. Rather, **the agency's burden shall be to prove that the employee was unavailable, that efforts were undertaken to avoid separation, and why the efforts were unsuccessful.** (Emphasis added).

7. Here, Respondent proved the first element of its burden by showing that Petitioner was unavailable for work in that he reached the maximum medical improvement for his work-related injury and Petitioner was unable to perform the essential functions of the position of Correctional Officer III due to the physical limitations caused by his work-related injury.

8. Respondent presented evidence of its efforts taken to avoid separating Petitioner from employment regarding the second element of its burden. However, 25 NCAC 1C .01007 requires the employer and employee to work together until "the employee and the agency are unable to reach agreement on a return to work arrangement that meets both the needs of the agency and the employee's medical condition." Under this administrative rule, it is incumbent upon Respondent to make reasonable efforts to attempt to place Petitioner in another job that fits his qualifications and given his physical limitations.

9. Respondent, via Ms. Hinton, claimed that Respondent could not find suitable employment for Petitioner within fifty miles of Petitioner's residence pursuant to the Industrial Commission's guidelines. However, Respondent failed to use or move those guidelines into evidence. (*But see* N.C. Gen. Stat. § 97-2(22) which defines "suitable employment" as ". . . after reaching maximum medical improvement is employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education,

and experience and is located within a 50-mile radius of the employee's residence at the time of injury or the employee's current residence if the employee had a legitimate reason to relocate since the date of injury. No one factor shall be considered exclusively in determining suitable employment.”)

10. Petitioner had the State’s Workers’ Compensation Administration policy, from the State Personnel Manual, admitted into evidence. That policy states:

When an employee has reached Maximum Medical Improvement and has been released to return work by his treating physician but has received a disability which prohibits employment in the previous position, the agency shall:

- a. Attempt to place the employee in another position (with an appointment like that held prior to the injury) that is suitable to the employee’s capacity and is meaningful, productive, and advantageous to the employee and the agency. The agency shall treat reemployment of the employee with priority as described in the Selection Policy, Special Employment and Reemployment Considerations, Recruitment and Selection Section.
- b. During the work placement efforts, the employee shall be appointed to the first suitable vacancy that occurs.
- c. If the employee accepts a position in a lower pay grade than the pre-injury position, the employee’s pay grade must be adjusted, as appropriate, within the range of the lower pay grade.
- d. If a position is not available that is suitable to the employee’s capacity, the employee shall continue on workers’ compensation leave until work placement or separation.
- e. Work placement efforts may be in the form of referral to agency internal vacancies, Office of State Human Resources vacancy listings, third party reemployment services, vocational rehabilitation, etc.

Pet. Ex. 1.

11. The Tribunal concludes that Respondent's two job searches of vacancy listings in the Beacon system, one week and one day apart, were legally insufficient to meet Respondent’s obligations under the relevant rules prior to separating Petitioner from employment for unavailability. It is unreasonable that Respondent was unable to find any appropriate position for Petitioner in an agency the size of the North Carolina Department of Public Safety, especially given that the above-stated Workers' Compensation policy

specifically allows Respondent to make use of multiple other types of work placement efforts such referral to other agencies' vacancies and vocational rehabilitation.

12. Compliance with job placement guidelines from the Industrial Commission would entail considering significantly more options than two electronic job searches conducted eight days apart. N.C. Gen. Stat. § 97-32.2(f) states that return to work options should be considered, with order of priority given to returning the employee to suitable employment with the current employer, returning the employee to suitable employment with a new employer, and, if appropriate, formal education or vocational training to prepare the employee for suitable employment with the current employer or a new employer. See *also* 11 NCAC 23C .0103 and 11 NCAC 23C .0109.

13. Although Mr. Ragan's February 12, 2020 letter to Petitioner ostensibly offered Petitioner a chance to meet and discuss alternative methods of accommodation as an effort to avoid separation, Mr. Ragan later told Petitioner that he would not meet with him because it was "pointless." Mr. Ragan's actions violated State Human Resources policy and 25 NCAC 1C.1007(b) and (c). Lastly, Respondent's placing the sole burden on Petitioner to propose alternative methods of accommodation or employment in order not to be separated from employment was contrary to policy and was arbitrary and capricious. Respondent employs staff who work in workers' compensation and human resources; these persons are far more knowledgeable and experienced in those matters than is Petitioner.

14. Therefore, Respondent failed to prove by a preponderance of the evidence that it exhausted its efforts to continue the employment of Petitioner, a career State employee injured during the course of his employment. Even if Respondent made that showing, 25 NCAC 1C .01007 and the OSP regulations provide only that such employees "may", not "shall," be separated due to unavailability, with such separation being a last resort.

15. The Tribunal has considered whether Respondent's violations of the North Carolina Administrative Code with respect to Petitioner's separation are "procedural violations" not justifying retroactive reinstatement and concludes as a matter of law that they were not. Failure to follow the State Human Resources separation policy with respect to unavailability is not listed as a procedural violation under 25 NCAC 1J .1316. Further, the violation was not merely procedural. There is a substantial chance that had Respondent followed the policy, the results of Petitioner's case would have been different. *Skinner v. N. Carolina Dep't of Correction*, 154 N.C. App. 270, 280, 572 S.E.2d 184, 191 (2002); see *also Wright v. N. Carolina Office of State Human Res.*, 264 N.C. App. 641, 824 S.E.2d 925 (2019) (agency failure to follow notice provisions resulting in illegal separation not mere procedural violation).

16. For the reasons stated above, Respondent failed to prove it had just cause to separate Petitioner from employment due to unavailability.

17. Respondent deprived Petitioner of property and substantially prejudiced Petitioner's rights and acted erroneously, failed to use proper procedure, failed to act as required by law or rule, and abused its discretion in separating Petitioner from employment without just cause.

18. N.C. Gen. Stat. § 126-34.02(a) provides in pertinent part:

In deciding cases under this section, the [ALJ] may grant the following relief:

- (1) Reinstatement any employee to the position from which the employee has been removed.
- (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
- (3) **Direct other suitable action to correct the abuse** which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

See Harris v. N. Carolina Dep't of Pub. Safety, 252 N.C. App. 94, 98, 798 S.E.2d 127, 131–32, *aff'd per curiam*, 370 N.C. 386, 808 S.E.2d 142 (2017).” “Indeed, the statute outlines several alternative actions the ALJ may take to rectify an agency decision it deems erroneous.” *Davis v. NC Dep't of Health & Human Servs.*, 836 S.E.2d 344 (N.C. Ct. App. 2019).

19. Pursuant to 25 NCAC 1J .1311, Respondent shall retroactively reinstate Petitioner, including provision of service credit, sick leave restoration under 25 NCAC 1D.1006, and sick and vacation leave credit accrued during the period of Petitioner's separation from employment, to the most same or similar position, as required by 25 NCAC 1J .1311, for which Petitioner meets the minimum qualifications and is able to perform the essential functions of the job (including via any reasonable accommodation based upon disability) based upon Petitioner's current physical limitations and/or restrictions as ordered by his physicians.

20. Respondent shall additionally award back pay under 25 NCAC 1J .1306 to Petitioner from the date of Petitioner's separation from employment up to and including the date Petitioner is retroactively reinstated to employment as ordered above.

21. Under the authority of N.C. Gen. Stat § 150B-33(11), and as the Undersigned has ordered reinstatement and back pay, Respondent shall pay Petitioner's reasonable attorneys' fees. 25 NCAC 1J .1319. Petitioner's attorney shall file an affidavit for attorneys' fees reasonably incurred during the handling of this contested case, within thirty (30) days from the date of this Final Decision.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **REVERSES** Respondent's decision to separate Petitioner from employment due to unavailability. Respondent shall retroactively reinstate Petitioner to the same or similar position held prior to his separation from employment, with all back pay, benefits, and attorneys' fees. Respondent shall remove any and all references to this separation from employment from all personnel files relating to Petitioner. Petitioner's attorney shall file an affidavit for attorneys' fees reasonably incurred during the handling of this contested case, within thirty (30) days from the date of this Final Decision.

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.

This the 23rd day of December, 2020.



Melissa Owens Lassiter
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 23rd day of December, 2020.



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