

STATE OF NORTH CAROLINA  
COUNTY OF BRUNSWICK

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
18 OSP 04894

<p>Iris S Brown Petitioner,</p> <p>v.</p> <p>New Hanover CC/DPS Respondent.</p>	<p><b>FINAL DECISION</b></p>
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On January 5, 2021, Administrative Law Judge Melissa Owens Lassiter heard this contested case in the Office of Administrative Hearings in Raleigh, North Carolina, via Microsoft Teams, based upon Petitioner's appeal of Respondent's decision to separate Petitioner from employment due to unavailability and separate Petitioner from employment due to disability discrimination.

**APPEARANCES**

Petitioner: Ralph T. Bryant, Jr., Attorney at Law  
Newport, North Carolina

Respondent: Norlan Graves, Assistant Attorney General  
N.C. Department of Justice, Public Safety Section  
Raleigh, North Carolina

**ISSUES**

1. Whether Respondent lacked just cause to separate Petitioner from employment due to unavailability under N.C. Gen. Stat. § 126-34.02?
2. Whether Respondent discriminated against and harassed Petitioner based upon her disability and her race by failing to provide a reasonable accommodation?
3. Whether Respondent retaliated against Petitioner by terminating her from employment because she complained about race and disability discrimination?
4. Whether Respondent denied Petitioner a promotion to Assistant Superintendent in Programs?

**GOVERNING STATUTES AND RULES**

N.C. Gen. Stat. § 126-34.02  
N.C. Gen. Stat. §§ 126-16 and -17  
25 NCAC 01C .1001 *et. seq.*

**EXHIBITS ADMITTED INTO EVIDENCE**

Petitioner: Exhibits 1 - 57

Respondent: Exhibits 1 - 5

**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:

Procedural Background

1. On August 8, 2018, Petitioner filed a contested case petition appealing Respondent's August 1, 2018 Final Agency Decision in which Respondent upheld its May 14, 2018 letter separating Petitioner from employment due to unavailability. In her petition, Petitioner alleged that Respondent:

- (1) Discharged her without just cause.
- (2) Discriminated against and intimidated and harassed her in her employment, in her workplace, and in terminating her from employment based upon her race and/or disability.
- (3) Terminated her from employment in retaliation for her complaints of race and disability discrimination.
- (4) Denied her a promotion to Assistant Superintendent in Programs.

(Petition, Prehearing Statements and Amended Prehearing Statement) In her amended contested case petition, filed on August 14, 2018, Petitioner alleged additional issues such as failure to receive priority consideration, bullying, abuse of power, communicating threats, and HIPPA violation based on race, color, and disability discrimination. (Amended Petition)

2. On November 9, 2018, the undersigned entered an Order Staying this contested case, pursuant to and required by N.C. Gen. Stat. § 150B-33(b)(6), until the completion of Petitioner's pending EEOC investigation.

3. On July 10, 2020, the undersigned lifted the Order Staying this case after receiving notice that the EEOC investigation had been completed. On August 7, 2020,

the undersigned issued an Amended Scheduling Order establishing discovery deadlines and a hearing on the merits. Due to the worldwide COVID-19 pandemic in 2020, the undersigned continued the hearing on the merits to January 2021.

4. On January 5, 2021, the undersigned conducted a hearing on the merits via Microsoft Teams. On January 6, 2021, the undersigned ordered the parties to file proposed Final Decisions within 21 days of receiving the transcript of the hearing. On April 6, 2021, the undersigned extended the time for the parties to file proposed Final Decisions after receiving notice from the parties that they had not received the transcripts of the January 5, 2021 hearing.

5. On April 21, 2021, the Office of Administrative Hearings received the transcripts of the January 5, 2021 hearing. The parties filed their proposed Final Decisions on April 20, 2021 and April 30, 2021, respectively.

6. Despite the due diligence of all parties, the time needed for completion of this matter, including the completion of each party's proposed Final Decisions, exceeded the usual, regular, and customary time limit due to (1) the undersigned's Order Staying this case, pursuant to N.C. Gen. Stat. § 150B-33(b)(6), until after the completion of Petitioner's EEOC investigation which was based upon the same facts as this case, (2) the COVID-19 pandemic, and (3) the delay in receiving the transcript of the hearing. Therefore, the undersigned finds extraordinary cause exists for the issuance of this Final Decision beyond 180 days from the commencement of the case.

#### Adjudicated Findings of Fact

7. On April 1, 1996, Petitioner began her employment with Respondent North Carolina Department of Public Safety, Prisons Division.

8. Petitioner was continuously employed by Respondent until Respondent terminated Petitioner's employment on May 14, 2018.

9. On March 24, 2016, Petitioner held the position of Corrections Programs Supervisor at Respondent's New Hanover Correctional Facility in a permanent career State employee status. (Pet. Exh. 9). Petitioner's essential job functions ("EJF") included, among other duties, coordinating educational programs at New Hanover Correctional, maintaining an inmate caseload, maintaining Criminal Justice Certification, and supervising other programs such as Substance Abuse, AA/NA and Recreation. (Pet. Exhs. 2, 4, 10)

10. Petitioner's Exhibit 28 contains a list of the essential job functions for Petitioner's position as Correctional Programs Supervisor including the following:

1. Effectively communicate with other staff, inmates, and general public in verbal and written form.

2. Defend oneself or another against attack by violent person and defuse dangerous situations.  
...
4. Work under stressful conditions caused by direct contact with incarcerated offenders who can become physically violent and verbally abusive.  
...
10. Perform crisis intervention and routine counseling functions including suicide prevention.
11. Develop, manage, and implement correctional programs including:  
... (5) officiate athletic events for inmates ... (7) order, account for and maintain recreation equipment and facilities ... (9) administer skills/agility tests ...  
...
15. Successfully complete Respondent's in-service training for firearms, unarmed self-defense ...

(Pet. Exh. 28)

11. On March 24, 2016, Petitioner sustained a workplace injury during her recertification and annual training.

12. Respondent accepted Petitioner's injury as a compensable Workers' Compensation claim. (Pet. Exh. 9). As a result of the Workers' Compensation injury, Respondent placed Petitioner on a leave of absence from March 27, 2017 through August 14, 2017. (Pet. Exh. 9).

13. On August 14, 2017, Petitioner returned to work in a light-duty capacity position at the New Hanover Correctional Facility under the supervision of Superintendent Michael Ditta. By being placed on light-duty, Petitioner was placed on no contact with inmates, no firearm, no unarmed self-defense, no overhead lifting, and no pulling, no picking up, and no pushing more than 15 pounds. (T. p. 91) Nonetheless, Petitioner still had contact with inmates as Petitioner's workspace was located in the building's lobby and inmates came into the building where she was working. (Pet. Exh. 9; T. p. 93).

14. On March 5, 2018, Superintendent Ditta issued a Notice of Separation Due to Unavailability to Petitioner. While Superintendent Ditta cited the "Separation Due to Unavailability" rule under which he was recommending Petitioner be separated from employment, he failed to cite the specific rule number upon which he was basing his recommendation. The undersigned notes that 25 NCAC 01C .1007(a)(3)(A) and (B) was the applicable rule for Separation Due to Unavailability.

15. In the March 5, 2018 letter, Superintendent Ditta informed Petitioner that:

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.

...

If you remain unavailable after **March 20, 2018**, I will recommend your separation from employment under the provision of Separation Due to Unavailability. Such a separation is an involuntary separation and not considered disciplinary action.

(Pet. Exh. 9; emphasis in original). Superintendent Ditta also advised Petitioner to notify him by March 20, 2018 if she wanted to meet with him or submit a written proposal by that same date.

16. On March 19, 2018, Petitioner submitted a "Request for Reasonable Accommodation" to Respondent requesting:

I am requesting to be assigned administrative duties. I'm also requesting administrative services. No overhead lifting, no inmate contact, no self-defense training, no firearms, no lifting more than 10 pounds, no pulling excessively, and last alternative continue working as a program supervisor and do all the paperwork, no physical contact with inmates.

(Pet. Exh. 10).

17. On April 2, 2018, Superintendent Ditta sent an "Acknowledgment of Receipt for Reasonable Accommodation" to Petitioner stating:

This is to acknowledge receipt of your request for reasonable accommodation dated March 19, 2018 and to confirm you were provided a copy of the information about the Americans with Disabilities Act document. . . . in order to process your request, it may be necessary to obtain additional documentation from your Health Care provider. Any additional information required will be submitted to Judith Bradshaw, DPS ADA Compliance Coordinator for final review and decision.

(Pet. Exh. 15).

18. An ADA position classification worksheet completed at the request of the ADA compliance coordinator identified the following positions for which Petitioner was qualified to perform within the requested restrictions: Accounting Clerk III, Accounting Clerk IV, Accounting Clerk V, Administrative Assistant I, Administrative Assistant II, Administrative Assistant III, Administrative Secretary I, Administrative Secretary II,

Administrative Secretary III, Administrative Services Assistant V, Lead Worker IV, Medical Records Assistant III, Medical Records Assistant IV, Medical Records Assistant V, Office Assistant III, Office Assistant IV, Office Assistant V, Personnel Assistant III, Personnel Assistant IV, Personnel Assistant V, Processing Assistant III, Processing Assistant IV, Processing Assistant V, Program Assistant III, Program Assistant IV, Program Assistant V, Security Guard, Juvenile Court Counselor, Parole Case Analyst. (Pet. Exh. 24)

19. The ADA position classification worksheet also identified positions for which Petitioner was qualified, but which may not have fit within the Petitioner's work restrictions. For instance, the Correctional Case Manager position was listed, but a handwritten notation, "certified" appears next to it. A Correctional Admissions Technician Position was listed, but a handwritten notation next to it states, "contact with inmates." A Transfer Coordinator I position was listed, but a handwritten notation next to it states, "works in prisons." (Pet. Exh. 24).

20. On April 11, 2018, at 2:09 PM, Rebecca Hinton, Respondent's Workers' Compensation Program Assistant, notified Debra Miller, Office Assistant at New Hanover Correctional, and Judith Bradshaw, Respondent's ADA coordinator, that:

I have spoken with Tracy about this employee's case and based on the doctor's note stating that Ms. Brown reached MMI [Maximum Medical Improvement] on 3/13, she will need to go through our job placement process.

...

Judith, a letter will need to be sent to Ms. Brown letting her know that the ADA process will be stopped and she will go through job placement . . . .

(Pet. Exh. 16)

21. Subsequently, at 2:26 PM on April 11, 2018, Ms. Bradshaw notified Ms. Miller by email that "Since Ms. Brown has reached MMI she will go through the Worker's Comp job placement process, not ADA. I will send a closeout letter for your records by the end of the week. Thanks." (Pet. Exh. 17) At that point, Ms. Bradshaw and her Associate Director decided to close Petitioner's ADA request and not conduct any further review of Petitioner's request. (T. pp. 18-19) Ms. Bradshaw did no further review of [Petitioner's] medical condition or under the ADA process as "it was determined Ms. Brown had not fully exhausted the benefits under the workers' compensation program." (T. p. 23)

22. Bradshaw and her Associate Director made that decision even though there was no written ADA policy requiring the ADA Compliance Department stop or terminate processing an ADA request for reasonable accommodation because an employee also has a pending workers' compensation claim. (T. p. 29)

23. Had Bradshaw continued processing Petitioner's request for a reasonable accommodation through the ADA process, she would have determined if Petitioner had a disability and if she is substantially limited in one or more major life activities. If medical documentation supported that, then Bradshaw would have determined if Petitioner was a qualified individual with a disability by examining Petitioner's impairments based on her medical conditions and whether she could perform the essential job functions with or without an accommodation. (T. pp. 22-23) If Bradshaw determined that Petitioner was a qualified individual, and there was a reasonable accommodation that would help Petitioner perform her job, then Bradshaw would look for such accommodation. However, if Petitioner could no longer perform her essential job functions with or without accommodation, then Petitioner would no longer be qualified for her job. At that point, Bradshaw would then look for a "reassignment opportunity if there was a vacant position that she was qualified for." (T. pp. 22-23)

24. By letter dated April 16, 2018, Rebecca Hinton informed Petitioner that her reported job-related injury that occurred on March 24, 2016 had been covered under the Workers' Compensation Act. Hinton also informed Petitioner that her treating physician had advised Respondent that she had reached MMI with permanent restrictions that prohibit employment in her current position. Those restrictions were no inmate exposure, no self-defense qualification, and no firearm qualification. Ms. Hinton advised Petitioner of the Workers' Compensation Policy which outlined a Return-to-Work Policy including alternative employment options and benefits such as job placement, request for accommodation under the Americans with Disabilities Act ("ADA"), and Short-Term Disability ("STD"). (Resp. Ex. 2, Bates stamp pages 000550-000563). Ms. Hinton also requested Petitioner submit an updated employment application to Respondent's Central Human Resources Workers' Compensation Section so Respondent could complete a job search to determine if Petitioner qualified for a vacant position within her medical restrictions. (Pet. Exh. 18) Petitioner had submitted an updated application to Respondent on April 10, 2018. (Resp. Ex. 2, Bates stamp pages 000565-000575)

25. By letter on April 19, 2018, Judith Bradshaw notified Petitioner that her March 19, 2018 Request for Accommodation under the ADA had been:

[F]orwarded to the Workers' Compensation program for further review. As a result, this office will not further process your request for reasonable accommodation under ADA and your case will be administratively closed.

(Pet. Exh. 20). Ms. Bradshaw's letter also advised Petitioner of her right to appeal that decision. There was no evidence presented at hearing that Petitioner filed an appeal of this written decision.

26. In conducting the job placement process, Respondent's Workers' Compensation staff runs two job searches for all current job postings for vacant positions within Respondent's Department that are located within a fifty-mile radius of the employees' residence, unless the employee indicates she/he is willing to relocate. Staff will expand the job search to statewide job postings if the employee agrees to relocation.

The job searches are relevant to the employee's education, experience, skills, and medical limitations. Respondent's staff conducts these two job searches, one week and one day apart from each other. If Respondent cannot find a job for the employee in conducting these searches, then Respondent moves forward with separating the employee from employment due to unavailability.

27. The Workers' Compensation job placement process of conducting two job searches one week and one day apart is not an actual written policy. Ms. Hinton explained that the Workers' Compensation job placement process is instead:

[J]ust the DPS protocol that we've always followed for the job placement, 'cause we technically made the – we made that process from scratch and we had to just kind of run with it and we got – we worked with OSHR regarding the process and got approval for it, and so we weren't really given any policy or written policy as regarding as to when we could run the job searches.

(T. p. 53)

28. In this case, Becky Gresham, Job Placement Coordinator for Respondent's Workers' Compensation Division, ran one job placement search for vacant jobs on May 8, 2018, within the State's time management system known as BEACON, within Respondent's Department relevant to Petitioner's education, experience, skills, and medical limitations. Pursuant to the Workers' Compensation requirements, Ms. Gresham limited the job search to a fifty-mile radius of Petitioner's home, to wit: Bladen, Brunswick, Pender, and Columbus Counties. Ms. Gresham also narrowed the job search to pay grades 57-65. (Pet. Ex. 31, T. pp. 44-45)

29. Based upon the permanent restriction by Petitioner's doctor that Petitioner have no inmate exposure, Ms. Gresham "deleted all certified positions" from the job search within Respondent's Department for Petitioner. (Pet. Exh. 31).

30. Certified positions within Respondent's Department require direct inmate contact. To work in a certified position, an employee is required to be certified by Criminal Justice Standards on physical inmate contact procedures and techniques. There are various positions within DPS that require that certification be maintained such as probation officers, law enforcement and a number of positions within the prison. (T. pp. 36, 61)

31. During the May 3, 2018 job search, Ms. Gresham identified a vacant Administrative Assistant V position in New Hanover County, but her handwritten notation on the documentation of such search stated that "candidate had already been selected." (Pet. Exh. 31, p. 5)

32. On May 10, 2018, Ms. Gresham ran a second job search for vacant jobs within Respondent's Department of the same type and scope. Ms. Gresham again limited

the job search to Bladen, Brunswick, Pender, and Columbus counties and to pay grades 57-65. (Pet. Exh. 31, p. 5).

33. Based upon the two job searches, Ms. Gresham and Respondent determined that “no suitable position was found” for Petitioner. (Pet. Exhs. 29, 30, 31)

34. By letter dated May 10, 2018, Ms. Gresham notified Petitioner that “No suitable vacant position was identified within your medical restrictions and qualifications.” Pet. Ex. 31, p. 4)

35. On May 14, 2018, Superintendent Ditta hand-delivered a letter titled “Re: Separation Due to Unavailability” to Petitioner. The letter stated:

The purpose of this letter is to inform you that you have been separated from employment with the Department of Public Safety effective May 14, 2018, under the provision of Separation Due to Unavailability.

(Pet. Exh. 34). Ditta further explained in the letter that:

On March 19, 2018, you submitted a Form HR 800 (Request for Reasonable Accommodation) under the Americans with Disabilities Act (ADA). In a letter dated April 19, 2018, from ADA Compliance Officer Judith Bradshaw, you were advised that your request for reasonable accommodation had been forwarded to the Workers’ Compensation Program for further review. As a result, the ADA office would not further process your request for a reasonable accommodation under ADA and your case would be administratively closed.

(Pet. Exh. 34).

36. On August 1, 2018, Respondent’s Secretary Reuben F. Young advised Petitioner that he was upholding the recommendation to separate her from employment due to unavailability. (Resp. Exh. 5)

37. At hearing, Superintendent Ditta testified there would be an undue hardship on the New Hanover Correctional facility without a certified employee in Petitioner’s Correctional Program Supervisor position as the facility would be at a disadvantage security-wise and safety-wise. (T. p. 131)

#### Analysis

38. A preponderance of the evidence established that the ADA accommodation process and the Workers’ Compensation job placement process are separate, independent processes.

a. Respondent's ADA compliance office conducts an extensive search to determine whether the employee has a disability, if the employee can perform his or her job's essential functions, if there was a reasonable accommodation available, or if the employee can be accommodated through reassignment to another job within Respondent's Department, or any other State agency. The ADA process is a statewide search for potential vacant jobs to which the employee may be reassigned as an accommodation to a job he or she no longer can perform.

b. In contrast, the Workers' Compensation job placement process is limited to potential jobs located within a 50-mile radius of the employee's residence, unless the employee agrees to a broader or statewide search. That search consists of two computer searches based upon a limited range of pay grades and types of positions. See N.C. Gen. Stat. § 97-2(22)

39. In this case, Respondent's ADA compliance office did not conduct any investigation into Petitioner's request for an accommodation. Respondent claimed that it "administratively closed" its processing of Petitioner's request for accommodation in her job because Petitioner had reached her MMI, and because Petitioner had not exhausted her job placement options through the Workers' Compensation Division. However, Respondent failed to identify or produce any policy, law, or legal authority that authorized, or otherwise permitted, the ADA compliance office to stop processing Petitioner's request for ADA accommodation and "administratively close" Petitioner's ADA request because Petitioner had a pending workers' compensation case.

40. In explaining the Workers' Compensation job placement process, Rebecca Hinton was asked at hearing, "Isn't it true that Ms. Brown had indicated she was willing to work anywhere in North Carolina?" Ms. Hinton responded, "Not to our knowledge, she didn't." (T. p. 60) Yet, the evidence at hearing showed that Petitioner had notified Respondent that she would relocate and work anywhere in North Carolina. Petitioner "made it no secret to anyone involved I was willing to relocate anywhere." (T. p. 208)

a. On April 10, 2018, Petitioner submitted an updated Employment Application to Respondent's Workers' Compensation Division on April 10, 2018. In that application, Petitioner indicated she would be willing to relocate for work. (Resp. Ex. 2, Bates stamp pages 000565-000575) On April 19, 2018, Ms. Hinton sent Petitioner's April 10, 2018 Employment Application to Daniel Hill and asked Hill to review Petitioner's application for a possible Workers' Compensation Job Placement and provide a list of positions that Ms. Brown would qualify. (Pet. Exh. 21; T. p. 208)

b. On May 3, 2018, Petitioner met with Program Director Dan Frizelle and Respondent's Central Regional Director J.C. Huggins to discuss Petitioner's job concerns and see if they could help resolve those concerns. (T. pp. 100-102) During that meeting, Petitioner advised Frizelle and Huggins about her pending ADA and workers' compensation claims, and "the only thing I wanted to do was to complete my last five years and then retire." (T. pp. 197-199, 228) Petitioner

informed them she was willing to travel wherever there was an open position and she would relocate wherever they sent her. (T. pp. 197-198)

41. Respondent claimed that Petitioner's medical restrictions of no inmate contact or exposure prevented it from placing Petitioner in a noncertified position with Respondent because there was no guarantee that Petitioner wouldn't have any contact with inmates anywhere in its Department. (T. pp. 36-37, 61, 74, 77, 121). Inmates perform various functions throughout Respondent's prison facilities and office facilities statewide, such as cleaning, cooking, and moving furniture, where noncertified employees work.

42. However, the preponderance of the evidence established that when inmates work in Respondent's offices and/or facilities where employees in noncertified positions work, those inmates are accompanied by certified [correctional] officers. (T. pp. 38-39, 61-61). In addition, while Petitioner worked in the light-duty capacity from August 2017 until the date she was separated from employment, inmates regularly worked in the administration building where Petitioner worked. Whenever inmates worked in Petitioner's building, Respondent arranged for Petitioner to either leave the building and/or stay in a locked office. For those reasons, Respondent's claim that it could not place Petitioner in a noncertified position lacked merit.

43. Respondent separated Petitioner from employment due to unavailability because Respondent's Workers' Compensation Division could find no *suitable* positions within Petitioner's medical restrictions and qualifications. However, a preponderance of the evidence at hearing showed that from approximately September 2017 through February 2018, Respondent had nine vacant Office Assistant and Processing Assistant positions located statewide, between pay grades 57-63, the same pay grades Ms. Gresham searched for available positions for Petitioner. (Pet. Exhs. 42-50). In February 2018, Respondent posted a vacant Processing Assistant III position, salary grade 57 in Stanley County, and posted a vacant Office Assistant IV, salary grade 59 in Respondent's Western Region Office, for which Respondent could have placed Petitioner. (Pet. Ex. 42).

44. While working in the light-duty position within the administrative offices at New Hanover Correctional, Petitioner was cross-trained by Raylene Soles and Deborah Boose on the duties and responsibilities of the administrative positions which those two employees held. During the time relevant to Petitioner's request for reasonable accommodation to perform administrative positions, Ms. Soles and Ms. Boose ceased employment with New Hanover Correctional Facility and their positions remained vacant. Ms. Boose left employment in March 2018, while Ms. Soles left employment in early May 2018.

45. A July 18, 2018 email from Deborah Miller, administrative staff at the New Hanover County Correctional Facility, to Superintendent Michael Ditta confirmed that both the Soles position and the Boose position were still vacant and that the New Hanover Correctional Facility needed someone to fill those positions. (Pet. Ex. 38)

46. Respondent did not hire a replacement for Ms. Boose's position until approximately 1 ½ years before this hearing [on January 5, 2021]. (T. pp. 167-169).

47. There is no indication that Respondent ever considered placing Petitioner in either of these vacant positions as part of reasonable accommodation to Petitioner and/or as part of the Workers' Compensation job placement process. (Pet. Exh. 38).

#### Retaliation and Discrimination

48. Petitioner failed to produce sufficient evidence at hearing that Respondent terminated her from employment in retaliation for her complaints of race and disability discrimination.

49. Petitioner failed to produce sufficient evidence that Respondent discriminated against her, based on her disability, by terminating her from employment.

#### Remaining Claims

50. Petitioner failed to produce any evidence that Respondent denied her a promotion, bullied, harassed and intimidated her, failed to give her priority consideration, created a hostile work environment, or discriminated against her based on her race or color.

### **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. Despite the due diligence of all parties as noted in the Findings of Fact, the time needed for completion of this matter exceeded the usual, regular, and customary time for completion and has presented a situation of a kind other than what ordinary experience or prudence would foresee. As such, extraordinary cause exists for the issuance of this Final Decision beyond 180 days from the commencement of this contested case pursuant to N.C. Gen. Stat. § 126-34.02(a).

2. 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); and *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).

3. A court need not make findings as to every fact that 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, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

4. Petitioner is a Career State Employee entitled to the protections of the North Carolina Human Resources Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the provisions found in N.C. Gen. Stat. § 126-34.02(b).

Separation Due to Unavailability

5. The North Carolina State Human Resources Act in Chapter 126 of the North Carolina General Statutes 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:

[I]n 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.

6. 25 NCAC 01C .1007 SEPARATION provides more specifically that:

(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.

7. 25 NCAC 01C .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.

8. In this case, Respondent proved that Petitioner was "unavailable" as she could no longer perform the essential functions of her job due to her medical restrictions of no inmate exposure, no firearm qualification, and no self-defense qualification. Second, Respondent showed evidence of the efforts undertaken to avoid separating Petitioner from employment regarding the second element of its burden. However, 25 NCAC 01C .1007 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 her qualifications and given her physical limitations.

9. In Ms. Hinton's April 16, 2018 letter to Petitioner, Hinton specifically advised Petitioner that her reported job-related injury that occurred on March 24, 2016 had been covered under the Workers' Compensation Act. (Pet. Exh. 18) Chapter 97 of the North Carolina General Statutes is the applicable Workers' Compensation Act.

10. 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.

11. N.C. Gen. Stat. § 97-2(22) defines "suitable employment" as:

The term "suitable employment" means employment offered to the employee or, if prohibited by the Immigration and Nationality Act, 8 U.S.C. § 1324a, employment available to the employee that:

. . . (i) prior to reaching maximum medical improvement is within the employee's work restrictions, including rehabilitative or other noncompetitive employment with the employer of injury approved by the employee's authorized health care provider or (ii) 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.

12. This Tribunal concludes that Respondent's two job searches for current job postings, or vacant positions, one week and one day apart, were legally insufficient to meet Respondent's obligations under N.C. Gen. Stat. § 126-34.02(b)(3) and 25 NCAC 01C .1007 prior to separating Petitioner from employment for unavailability. It is unreasonable that Respondent was unable to find any suitable position for Petitioner in an agency the size of the North Carolina Department of Public Safety, especially given that the 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.

13. This Tribunal also concludes that Respondent's job searches one week and one day apart were also legally insufficient efforts to meet the requirements enumerated in N.C. Gen. Stat. § 97-32.2 and the Workers' Compensation Act. Compliance with job placement guidelines from the Workers' Compensation Act would require Respondent to exert significantly more effort than two electronic job searches conducted eight days apart.

14. 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 25 NCAC 01C .1007 regarding unavailability is not listed as a procedural violation under 25 NCAC 01J .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 Dept 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).

15. There was no dispute that Respondent's ADA and Workers' Compensation programs involved separate processes. Ms. Bradshaw and her Associate Director decided to stop reviewing Petitioner's request for a reasonable accommodation under the ADA process after learning that Petitioner's benefits had not been exhausted under Workers' Compensation. (Pet. Exhs. 16, 17) At that point, Bradshaw "administratively closed" Petitioner's ADA request for accommodation. In so doing, the ADA compliance office abandoned its responsibility to process Petitioner's request for accommodation. Bradshaw made no determination whether Petitioner had a disability, if Petitioner could perform her job's essential functions, if there was a reasonable accommodation available, or if Petitioner could be accommodated through reassignment to another job within Respondent's Department, or any other State agency.

16. Respondent never identified or produced any written policy, law, statute, or administrative rule explaining or justifying why Respondent was required to stop its ADA accommodation process because Petitioner had not exhausted the benefits under the Workers' Compensation process. In the end, Respondent's cessation of processing Petitioner's request for accommodation exacerbated Respondent's lack of success in finding suitable employment for Petitioner within Respondent's Department.

17. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent failed to prove by a preponderance of the evidence that it made the required efforts, under 25 NCAC 01C .1007 to avoid separating Petitioner, a career State employee injured during her employment, from employment and find her suitable employment within Respondent's Department. In other words, Respondent failed to satisfy its burden of proof that it had cause to separate Petitioner from employment based on unavailability.

18. Even if Respondent made that showing, 25 NCAC 01C .1007 provides that such employees "may" be separated, not "shall" be separated, due to unavailability, with such separation being a last resort.

19. For the foregoing reasons, 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, due to unavailability, without cause.

#### Disability Discrimination

20. N.C. Gen. Stat. § 126-34.02(b)(1) provides:

Discrimination or harassment. – An applicant for State employment, a State employee, or former State employee may allege discrimination or harassment based on race, religion, color, national origin, sex, age, disability, genetic information, or political affiliation if the employee believes that he or she has been discriminated against in his or her application for employment or in the terms and conditions of the employee's employment, or in the termination of his or her employment.

21. N.C. Gen. Stat. § 126-16 provides:

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.

22. To establish a prima facie case for failure to accommodate under the Americans with Disabilities Act, Petitioner must show that:

- (1) she was an individual who had a disability within the meaning of the statute,
- (2) the employer had notice of her disability,
- (3) with reasonable accommodation she could perform the essential functions of the position, and
- (4) the employer refused to make such accommodations.

*Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013). See also *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 579 (4th Cir. 2015); and *Crabill v. Charlotte Mecklenburg Bd. of Educ.*, 423 Fed. Appx. 314, 322 (4th Cir. 2011) (quoting *Rhoads v. F.D.I.C.*, 257 F.3d 373, 387 n. 11 (4th Cir. 2001)).

23. The ADA requires that an employee be able to perform his/her essential job qualifications with or without a reasonable accommodation. 42 U.S.C. § 12111(8); *Blackburn v. Trustees of Guilford Technical Cmty. Coll.*, 822 F. Supp. 2d 539, 551 (M.D.N.C. 2011). Respondent is not required to exempt Petitioner from an essential function of the position in order to accommodate her. *Brickers v. Cleveland Bd. of Educ.*, 145 F.3d 846, 850 (6th Cir. 1998) (finding that “[t]he ADA does not demand that an employer exempt a disabled employee from an essential function of the job as an accommodation”); see *Clement v. Bojangles’ Restaurants, Inc.*, No. 1:99CV1010, 2001 WL 66317, at \*4 (M.D.N.C. Jan. 4, 2001), *aff’d*, 10 Fed. Appx. 237, 2001 WL 617179 (4th Cir. 2001) (finding that exempting the plaintiff from performing many of his essential functions was clearly not reasonable, and thus was not required by the ADA).

24. The ADA also provides that a “‘reasonable accommodation’ may include . . . job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position.” 42 U.S.C. § 12111(9)(B). The ADA does not require an employer to assign an employee to “permanent light duty,” (*Carter v. Tisch.*, 822 F.2d 465, 467 (4th Cir. 1987)), nor does it require an employer to reallocate job duties in order to change the essential functions of a job, 29 C.F.R. Pt. 1630, App. at § 1630.2(o), or “hire an additional person to perform the essential . . . function of a disabled employee’s position,” *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 687 (4th Cir. 1997). See also *Laurin v. Providence Hosp.*, 150 F.3d 52, 60-61 (1st Cir. 1998); *Milton v. Scrivner. Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995) (“An accommodation that would result in other employees having to worker [sic] harder or longer hours is not required.”).

25. Here, Petitioner proved she was an individual who had a disability within the meaning of the statute, and that her employer had notice of her disability. However, Petitioner did not prove that she could perform the essential job functions of a Correctional Programs Supervisor with reasonable accommodation. Petitioner’s failure to prove the third prong of a prima facie case of disability discrimination prevents her from prevailing under a claim of disability discrimination.

#### Remaining Claims

26. Petitioner failed to produce sufficient evidence at hearing demonstrating

that Respondent terminated her from employment in retaliation for her complaints of race and disability discrimination.

27. Petitioner failed to produce any evidence demonstrating that Respondent denied her a promotion, bullied, harassed and intimidated her, failed to give priority consideration, created a hostile work environment, or discriminated against her race or color.

### Remedies

28. Given the undersigned's ruling that Respondent lacked cause to separate Petitioner from employment due to unavailability, Petitioner is entitled to the remedies provided in N.C. Gen. Stat. § 126-34.02(a). That statute provides:

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); *Davis v. NC Dep't of Health & Human Servs.*, 836 S.E.2d 344 (N.C. Ct. App. 2019).

29. Respondent shall retroactively reinstate Petitioner to the same or similar position, as required by 25 NCAC 01J .1311, for which Petitioner meets the minimum qualifications and is able to perform the essential functions of the job based upon Petitioner's current physical limitations and/or restrictions as ordered by her physicians including any reasonable accommodation based upon her disability. Such reinstatement may be in a different location than the prior assigned duty station including a location more than 50 miles from the prior assigned duty station. 25 NCAC 01J .1311. Respondent shall reinstate any applicable provisions of service credit, and sick leave due under 25 NCAC 01D .1006, and sick and vacation leave credit accrued during the period of Petitioner's separation from employment.

30. Respondent shall additionally award back pay under 25 NCAC 01J .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.

31. 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 01J .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 for which Petitioner meets the minimum qualifications and is able to perform the essential functions of the job based upon Petitioner's current physical limitations and/or restrictions as ordered by her physicians including any reasonable accommodation based upon her disability. Respondent shall reinstate Petitioner with all back pay, benefits, and attorneys' fees. Respondent shall remove 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 26th day of May, 2021.



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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 26th day of May, 2021.



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