

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 OSP 05439

<p>Bennifer Pate Petitioner,</p> <p>v.</p> <p>NC Dept of Health & Human Services Division of Health Services Radiation Protection Section Respondent.</p>	<p>FINAL DECISION</p>
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This matter came before Administrative Law Judge Michael C. Byrne for a hearing on the merits on May 5, 2022, through May 6, 2022, in the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

For Petitioner: M. Jackson Nichols
Nichols, Choi & Lee, PLLC
4700 Homewood Court, Suite 220
Raleigh, North Carolina 27609

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

ISSUES

Whether Respondent denied Petitioner, a career status State employee subject to the State Human Resources Act, promotional priority consideration when Petitioner applied for a promotion, in violation of N.C.G.S. 126-7.1.

Whether Petitioner is entitled to have documents she alleges to be misleading and inaccurate removed from her personnel file.

EXHIBITS

Petitioner's Exhibits 1-41 and Respondent's Exhibits 1-22 were admitted into the record.

WITNESSES

For Petitioner:

Bennifer Pate
Travis Cartoski
Tawny Morgan
W. Lee Cox II
Nikki Kessinger
Shaunielle Randall

For Respondent:

James Albright

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. From the sworn testimony of witnesses and the evidence, the undersigned makes the following:

FINDINGS OF FACT

Parties and Witnesses

1. Petitioner Bennifer Pate (“Petitioner”) is an employee of the State of North Carolina. Petitioner works for Respondent NC Dept of Health & Human Services, Division of Health Services (“Respondent”). Petitioner was a credible witness except as otherwise indicated below.
2. Travis Cartoski (“Cartoski”) is an employee of Respondent as was the hiring manager for the employment action at issue in this contested case. Cartoski was a credible witness except as otherwise indicated below.
3. Tawny Morgan (“Morgan”) is an employee of Respondent and was the successful applicant for the position at issue in this contested case. Morgan was a credible witness except as otherwise indicated below.

4. W. Lee Cox II (“Cox”) is a retired employee of Respondent. Cox was a credible witness except as otherwise indicated below. It is emphasized that specific portions of Cox’s testimony in this case are found to be not credible.
5. Nikki Kessinger (“Kessinger”) is an employee of Respondent. Kessinger was a credible witness except as otherwise indicated below.
6. Shaunielle Randall (“Randall”) is an employee of Respondent. Randall was a credible witness except as otherwise indicated below.
7. James Albright is an employee of Respondent. Albright was a credible witness except as otherwise indicated below.

The Employment Action at Issue

8. On December 21, 2021, Petitioner filed a Petition for a Contested Case (“Petition”) with the Office of Administrative Hearings (“OAH”) alleging Respondent NC Dept of Health & Human Services Division of Health Services Radiation Protection Section denied her a promotion because Respondent failed to grant Petitioner promotional priority consideration for her application for the position of Health Physicist II (“the Position”). Additionally, the Petition asked for “removal of all inaccurate and misleading information” from Petitioner’s personnel file.
9. Petitioner had been continuously employed by the State of North Carolina in a permanent, full-time position subject to the North Carolina Human Resources Act from February 2015, until the present. Accordingly, Petitioner is a career-status state employee. Pet. Ex. 1; N.C.G.S. 126-1.1.
10. In her performance evaluations over the past three (3) years, Petitioner had always received an overall rating of Exceeds Expectations. T. 12. Petitioner has never had a negative evaluation. T. 14. She has never been on a performance improvement plan. T. 14, 48.
11. Petitioner is a Health Physicist I, GN (pay grade) 12. The Position was a GN 13. Accordingly, the Position was a higher pay grade than the position Petitioner held at the time she applied.
12. Petitioner’s annual salary at the time of hearing was \$66,712.00. T. 14.
13. Respondent posted the Position on November 2, 2020. The salary range for the Position was listed at \$48,051-\$68,000. T. 17; Pet. Ex. 2.
14. The Position posting is in evidence in this case. Res. Ex. 2. As the evidence (below) demonstrates that (a) the primary reason for Petitioner’s non-selection was poor references, and (b) it is essentially undisputed that Respondent failed to give Petitioner any promotional priority consideration at all, detailed findings regarding the Minimum Qualifications, Knowledge, Skills, and Abilities, and Management Preferences for the

Position, both generally and with respect to Petitioner and the selected applicant, are not necessary. A court, or in this case an administrative Tribunal, 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). To the extent required for comprehension, the Minimum Qualifications, Knowledge, Skills, and Abilities, and Management Preferences for the Position are incorporated into these Findings of Fact by reference.

15. The Position posting included a “supplemental questionnaire” in which applicants were asked to certify their understanding that the budgeted salary for the Position was limited to \$68,000 and the salary offered would be within the posted recruitment range of \$48,051-\$68,000. Id. Petitioner answered this question, “Yes, I understand.” Id.
16. Petitioner applied for the Position in a timely fashion and received electronic acknowledgement of her application.
17. In accordance with State personnel rules, Respondent’s Human Resources personnel conducted an initial screening of Petitioner’s application and determined that she met the minimum qualifications for the Position.
18. Respondent’s Human Resources personnel sent Travis Cartoski, the hiring manager for the Position, a list of candidates to be interviewed. Petitioner was included in that list. The list sent to Cartoski by Human Resources did not indicate any priorities, such as Veterans’ Preference or State Employee Promotional Priority. T. 78. Due to the small applicant pool for the Position, Human Resources sent Cartoski the names of all persons who met the minimum qualifications for the position. T. 181 (Kessinger Testimony).¹
19. On December 9, 2020, Petitioner was interviewed for the Position. Louis Brayboy, James Albright, and Cartoski were on her interview panel. T. 19-20. All members of the interview panel rated Petitioner the highest of the applicants interviewed. Pet. Ex. 4-7. Cartoski testified that “[Petitioner] was our top choice.” T. 62.
20. After the interview, Cartoski checked Petitioner’s references. Petitioner “did not initially have my references on the application. So they weren't already included in the application. I was later requested what my references were, and I provided them at that time.” T. 20 (Petitioner testimony). Notably, Petitioner did not testify that she either asked permission of any person to be a reference for her or informed them in advance that she was listing them as a reference.

¹ OSHR guidelines state, “The potential hiring pool referred to hiring managers shall be those **most qualified** applications [emphasis supplied].” Heminuk v. NC OSHR, 20 OSP 00028. See also 25 N.C.A.C. 01H .0634: “From those applicants who meet the minimum qualifications, **a pool of the most qualified candidates shall be identified**. The pool of most qualified candidates shall be those individuals determined to be substantially more qualified than other applicants pursuant to G.S. 126-14.2. **The individual selected for the position shall be from among the most qualified applicants** [emphasis supplied].” While neither party provides authority for Respondent to ignore this rule because an applicant pool is small, that issue is ultimately not significant in this case.

21. One reference given by Petitioner was W. Lee Cox II, who testified at the hearing. Cox spent approximately 27 years working for Respondent in the Radiation Protection section and is now retired. T. 150. He was section chief of that organization for nine or ten years. T. 150. For some period of time, Cox supervised Petitioner. T. 151.
22. Cox played no role in Petitioner's interview process and initially was unaware that the interview panel rated Petitioner the top choice for the Position. T. 157.
23. Cartoski, after Petitioner's interview, emailed Cox with a list of questions about Petitioner's work performance and asked Cox to respond to it. T. 157-158. Respondent's Exhibits 15-16 contain Cox's responses to Cartoski.
24. Cox wrote, "I have worked with Bennifer for over 20 years and she worked for me in the capacity of an enforcement coordinator for several years." Res. Ex. 15. In describing Petitioner's work, Cox wrote, "My experience with Bennifer has been one of needing a lot of direct supervision in order to perform adequately. Something I really did not have the time to deal with . . . Extremely smart and capable but lacked the motivation to do the work or at times even show up for work." Id.
25. Cox continued that Petitioner needed to improve on her "Organization, communication, motivation, [and] performance." Cox summarized his professional opinion of Petitioner by writing, "I believe that Bennifer is a very capable candidate, but for whatever reason she does not and will not perform to even meet expectations or the minimal standards. This has been an ongoing trait for 20+ years." Id.
26. None of these negative attributes had appeared in Petitioner's performance reviews, including performance reviews either approved or completed by Cox himself, though Cox testified he discussed some of those issues with Petitioner. T. 157-161.
27. Cox responded to questioning regarding why he took no disciplinary action against Petitioner or documented her by stating that, in essence, documenting her deficiencies was simply too time consuming and the disciplinary process was likewise. T. 168-169. That both Respondent and Petitioner were poorly served by a section head who noted years of performance deficiencies by Petitioner yet failed to document or take formal corrective action on them, is, the Tribunal finds, self-evident.
28. No witness testified that the negative references provided by Cox and Rollins were actually placed in Petitioner's personnel file.
29. Cox testified that he did not write the recommendation with the intention of denying Petitioner a promotion, but rather "my recommendation just showed my experience" with Petitioner. T. 162. However, Cox also emailed Cartoski on December 13, 2020, writing, "I spoke to Jenny [Rollins] and believe you need to continue your search. I do not want you to inherit an employee that is disinterested and will require high management direction." (Res. Ex. 16).

30. When asked by Petitioner's counsel, "So do you think that e-mail was pretty much intended that [Petitioner] not be hired?" Cox responded, "Yes." T. 162. Cartoski testified that "I did not take it [Cox's email] as a specific order that I had to re-advertise and find someone else, but it is highly influential on my decision as a hiring manager." T. 72. The Tribunal finds that Cox's negative recommendation, along with the negative recommendation from Rollins, "effectively blocked" Petitioner from being hired for the Position. T. 71.
31. The Tribunal does not find credible Cox's testimony (T. 168) that he played no role in the hiring decision in this case. Obviously, Cox did.
32. This finding is enhanced by Cox sending an additional email to Cartoski (Res. Ex. 16) on December 14, 2020, stating, "Be aware that I believe Kahee [Kim Kahee] and Jenny [Rollins] would love to have [Petitioner] be someone else's problem." Cartoski responded, "I spoke to Jenny [Rollins] on Friday and I asked her a bunch of questions all of which pointed to an employee that needs deadlines to stay on track. I find it hard to have anyone operate as expected without deadlines in place. Jenny also indicated that she felt Bennifer was burnt out working with that program and that she was a good inspector when she was in the field. I still have not heard back from Kahee, who was another reference." Id.
33. Kahee and Rollins were the other two persons listed as employment references by Petitioner. T. 50. Both had supervised Petitioner. T. 20. Neither testified at the hearing, and any statements attributed to them are inadmissible hearsay. See N.C.G.S. 150B-29. Cartoski, however, testified without objection and wrote at the time (Res. Ex. 16) that Rollins' view of Petitioner's abilities was also not positive, and that Rollins told Kahee not to respond to the reference request. These statements are given appropriate weight under N.C.G.S. 150B-29.
34. At the time of the hiring decision at issue in this case, Cartoski, the hiring manager, did not know that Petitioner's negative references were not reflected by her performance ratings. T. 55. "About that time the hiring decision had already been made, so it was not part of the original hiring data, if you will." T. 70.
35. On December 14, Cartoski emailed Albright and Brayboy, his interview panel members, writing: "So, the reference checks for Bennifer have not panned out well at all. For the second candidate . . . I am not comfortable hiring her as a home-based inspector with what little we know about her. I would rather get to know someone's work ethic and find out if they are reliable or not before granting that. I emailed HR this morning, I've requested that the [position posting] be reopened so that we can increase our candidate pool and possibilities." (Res. Ex. 14).
36. Thus, Petitioner went from being the "top choice" prior to her references being checked to a practical non-candidate afterwards. Despite no performance deficiencies being noted in Petitioner's personnel record, none of the three persons Petitioner listed as references spoke positively regarding her work performance or recommended that she be hired. The Tribunal finds that these negative responses (and, from Cox, outright advocacy against Petitioner's

hiring), all from supervisors and colleagues of Petitioner, are the actual reason Petitioner did not receive the position after the first interview process.

37. Petitioner presented ample evidence that the reference responses for Petitioner were inconsistent with those same persons' prior reviews of Petitioner's work performance (and, in Cox's case, amounted in practical terms to sabotaging Petitioner's candidacy). However, no witness testified, nor did either party present evidence or authority, that consideration of employee-provided references in and of itself is not a fair and valid selection criterion in making a hiring decision – including, as here, cases where the hiring manager was not made aware of underlying inconsistencies in those references at the time of the hiring decision.
38. Respondent ended up posting the Position two additional times. In these subsequent postings, Respondent “laxed” (eased) the Position's posted Knowledge, Skills, and Abilities requirements (“KSA”) to “cast a wider net” and “bring in more candidates.” T. 58 (Cartoski Testimony).
39. Eventually, Cartoski held additional interviews. Despite the loosening of the position requirements, the interview questions remained unchanged from the first round of interviews. T. 63.
40. Albright was unable to participate in those later interviews, so Cartoski replaced him with Kahee. Kahee was one of the persons listed as a reference by Petitioner when she originally applied, and who did not respond to Cartoski's reference request. T. 63. Petitioner was not interviewed in this later round of interviews. T. 63. Cartoski was told by an unspecified person in Human Resources, per his testimony, that there was no need to interview Petitioner again. T. 64.²
41. As with the first interviews, Respondent's Human Resources personnel did not inform Cartoski of any priorities attaching to each candidate, such as Veterans' Preference or State Employee Promotional Priority. T. 79.
42. In fact, throughout the entire hiring process in this matter, no one from Human Resources discussed promotional priority considerations with Cartoski at all. T. 78. Nor did Human Resources ask Cartoski to provide a justification memo for hiring a non-State government workforce applicant over an applicant (Petitioner) with State employee promotional priority. T. 81, 182. This was despite Human Resources being aware that Cartoski's selected applicant from the final round of interviews, Morgan, was a non-State government workforce applicant. See Res. Ex. 20 (“Ms. Morgan . . . is currently working for South Carolina's DHEC in the Radioactive Materials Licensing & Compliance Section.”); see also T. 182 [cleaned up] (“That [a justification memo] is typically what should happen when there's priority candidates that had been interviewed, and they're not the chosen candidate.”).

² Randall, Respondent's Human Resources employee, testified that she would have advised Cartoski to interview Petitioner again. T. 193.

43. Randall, Respondent's Human Resources employee, testified that "[t]here wasn't a case of having promotional priority [here] because the two applicants were not neck and neck. And that's the case when you can use the promotional priority. And this was not a case of that." T. 194. Randall cited a one-point difference in the interview scores of Petitioner and Morgan as evidence that promotional priority supposedly did not apply: "One point difference is still a one-point difference. That's not the same." T. 197.
44. In response to these statements, the Tribunal questioned Randall on her understanding of State promotional priority Rules and policies. When asked whether the job-related qualifications of the non-State government workforce applicant had to be substantially better suited as opposed to "neck and neck," Randall replied, "Mm-hm." T. 200. When asked again whether the process was not "neck and neck," Randall replied, "I mean it depends on how you look at it." T. 201. Only asked a third time whether she was stating that "substantially better suited" means "neck and neck" did Randall answer, "No." T. 201. As discussed in the Conclusions of Law, Randall's understanding of promotional priority for State government workforce members is simply wrong.
45. The evidence shows that Respondent, due to inaction on the part of its relevant Human Resources personnel, failed to ensure that Cartoski gave any promotional priority consideration to Petitioner. This is thus not merely a case of an agency applying promotional priority consideration incorrectly, but also one of an agency not providing a highly qualified internal applicant priority consideration at all.
46. Respondent hired Morgan for the position at an annual salary of \$64,000. T. 82. As Petitioner's salary in her current position is \$66,712, Morgan's salary in the promotional position is \$2,712 less than Petitioner's salary in her current job. As found previously, and as specifically acknowledged by Petitioner in her application, the maximum budgeted salary for the Position was \$68,000.
47. Though technically Petitioner was considered in the final round of interviews, Cartoski, with the assistance of the interview panel, concluded that Morgan had "more specific training and experience to do exactly what we do" despite having significantly fewer years of experience as an inspector than Petitioner. T. 95. Morgan also had inspection qualifications, due to her work in South Carolina, that Petitioner did not, and in Cartoski's opinion it would take a "year and a half, two years" for Petitioner to obtain those qualifications in her own right. T. 98. In reality, the Tribunal finds that Petitioner had been for practical purposes eliminated from consideration prior to these final interviews due to her poor references.
48. While Cartoski during the hiring process had some awareness of a promotional preference for State government workforce applicants, his understanding was that "if the State employees applying, if they have equal qualifications, they are given that preference." T. 101. This also applied, in Cartoski's view, to interview scores: "Q. So and for you, [would] the raw total scores need to be equal for the promotion [priority] to apply? A. I believe that's how it reads." T. 102.

49. As with Randall, Cartoski's understanding of promotional priority for members of the State government workforce is wrong. However, understanding and interpretation of State personnel/human resources policies and rules is not Cartoski's job. It was the job of Respondent's Human Resources personnel to identify and advise Cartoski to ensure conformance with these rules – a job they failed to do.
50. Kessinger, from Respondent's Human Resources staff, testified that when a current employee is promoted, "It's not required, but it is common" for the employee to receive a raise in pay. T. 178. Kessinger claimed that this raise was "[t]ypically, it's usually like five, five to 15 [percent]. Five to 12" depending on various factors, including how much was budgeted for the position. T. 178. Randall, for her part, stated that a promotion did not always mean employees get more money.
51. Kessinger's testimony, and Randall's, are not consistent with OSHR policy at the time. Respondent's Exhibit 36, "Salary Administration," provides under the heading "Minimum Salary Increase," the following in pertinent part: When an employee is promoted, except when the employee has had a previous reduction in pay grade, increases shall be given as follows: If an employee's current salary is above the minimum of the old range [which Petitioner's was], **it shall be increased by 5%**. Res. Ex. 36, State Human Resources Manual, Section 4, Page 102 (July 1, 2005) (emphasis supplied). The policy provides for "optional" increases of more than five percent under certain circumstances, but under the facts of this case, Salary Administration policy provides a five percent raise as a minimum.
52. The parties do not cite, and the Tribunal does not find, a currently active Rule echoing the pertinent provision of OSHR's Salary Administration policy.³

CONCLUSIONS OF LAW

1. All parties are properly before the Tribunal, and there is no question as to joinder or misjoinder.
2. Notice of hearing was provided to all parties in accordance with N.C.G.S. 150B-23(b).
3. 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).
4. A court, or in this case an administrative Tribunal, 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). In this case, due to the Tribunal's finding that Petitioner was not accorded any kind of promotional priority consideration, the usual process of comparing Petitioner's job-related qualifications with Morgan's is not necessary

³ Local government rules for promotional salary rates hold the opposite: that an employee's salary upon promotion may be adjusted or left unchanged at the discretion of management. 25 N.C.A.C. 011 .2103(b). The Tribunal finds no corresponding Rule for State employee promotions.

to resolve this case, contrary to most promotional priority cases. See Michael Heminuk v. North Carolina Office of State Human Resources, 20 OSP 00028.

5. In this contested case, subject to Article 3 of N.C.G.S. 150B, the Administrative Procedure Act, the facts must be established upon consideration of the entire record by a preponderance of the evidence. The burden of proof in this case is on the Petitioner. N.C.G.S. 150B-25.1(a).

Removal of “Inaccurate and Misleading” Information From Personnel File

6. The Petitioner seeks “removal of all inaccurate and misleading information” from Petitioner’s personnel file.
7. No witness testified that the negative references regarding Petitioner were actually placed in Petitioner’s personnel file.
8. However, under State law, “Personnel file” means “**any employment-related** or personal information **gathered by an employer** or by the Office of State Human Resources. Employment-related information contained in a personnel file includes **information related to** an individual’s **application, selection, promotion**, demotion, transfer, leave, salary, contract for employment, benefits, suspension, performance evaluation, disciplinary actions, and termination.” N.C.G.S. 126-22(b)(3) (emphasis supplied).
9. Accordingly, the reference materials to which Petitioner apparently objects are, by statute, considered a part of her personnel file.
10. “An employee, former employee, or applicant for employment who objects to material in the employee’s file because he or she considers it inaccurate or misleading may seek the removal of such material from the file in accordance with a grievance procedure approved by the State Human Resources Commission.” N.C.G.S. 126-25(b). However, N.C.G.S. 126-25 itself does not provide State employees with appeal rights beyond the agency (internal) level for denial of such a request.
11. Under the former N.C.G.S. 126-34.1(6), “Denial of an employee’s request for removal of allegedly inaccurate or misleading information from the employee’s personnel file as provided by G.S. 126-25” was a ground to file a contested case petition in OAH.
12. However, “[i]n 2013, our General Assembly significantly amended and streamlined the procedure governing state employee grievances and contested case hearings, applicable to cases commencing on or after 21 August 2013.” Harris v. N. Carolina Dep’t of Pub. Safety, 252 N.C. App. 94, 97, 798 S.E.2d 127, 131, aff’d per curiam, 370 N.C. 386, 808 S.E.2d 142 (2017). N.C.G.S. 126-34.1 was repealed. See Session Laws, 2013-382. § 6.1. It was replaced with N.C.G.S. 126-34.02.
13. N.C.G.S. 126-34.02(b) lists the agency personnel actions which may be appealed to OAH. An agency’s failure to remove allegedly inaccurate or misleading information from a State

employee's personnel file is not one of them. Further, "[a]ny issue for which an appeal to the Office of Administrative Hearings has not been specifically authorized by this section shall not be grounds for a contested case hearing." Id. at (c); see also Quinton M Ashe v. NC Department of Transportation, 2021 WL 2457973 (no OAH jurisdiction of appeals not "specifically authorized" under N.C.G.S. 126-34.02).

14. The existence of subject matter jurisdiction is a matter of law and "cannot be conferred upon a court by consent." In re T.R.P., 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). Any court (here, Tribunal) must "have subject matter jurisdiction, or [j]urisdiction over the nature of the case and the type of relief sought Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." Harris v. Pembaur, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citing N.C. Const. art. I, § 18).
15. OAH does not have subject matter jurisdiction over State employee claims under N.C.G.S. 126-25, and Petitioner's claim for removal of allegedly inaccurate and misleading documents from her personnel file must be **DISMISSED**.

Promotional Priority

16. The Office of Administrative Hearings has subject matter jurisdiction over appeals of failure to provide promotional priority consideration to State employees. N.C.G.S. 126-34.02(b)(5).
17. Petitioner is a career status State employee subject to the North Carolina Human Resources Act. Along with that status comes various rights created by the Constitution of North Carolina, State statutes, and rules. Among those rights is the right to priority consideration for promotion over outside (non-State government workforce) applicants. N.C.G.S. 126-.1; 25 N.C.A.C. 01H .0631(c) (outside applicants).
18. Here, Petitioner was a career status State employee who applied for a promotion. "Promotion is an advancement from one position to another with a higher pay grade as described in 25 N.C.A.C. 01D .0102, within the same pay plan, or an advancement from one position to another with a higher market rate in a different pay plan. For a promotion, an employee shall possess at least the minimum qualifications for the position, or their equivalent, as set forth in the class specification. "Market rate" means the average market value for a particular job." 25 N.C.A.C. 01D .0301.
19. Petitioner is paid \$2,712 per year more than Morgan, the successful applicant for the Position. While neither party cites authority on point, the Tribunal concludes that a situation where the non-promoted employee is paid measurably more in her current position than the person in the "promotional" one is, at least, unusual. See Peggy Anderson v. Whitaker School, NC DHHS, 2005 WL 3946397, 05 OSP 0427.
20. However, as the Position was a higher pay grade than the position held by Petitioner, it is nonetheless a "promotion" under State law. 25 N.C.A.C. 01D .0301; see also State Human Resources Manual, "Salary Administration," Section 4, p. 101 (July 1, 2005) ("Promotion

is a change in status upward resulting from assignment to a position assigned a higher salary grade.”).

21. For employing State agencies, in turn, there is a legal duty to comply with various statutes and rules in the hiring process.
22. N.C.G.S. 126-7.1(c) requires: “If a State employee subject to this section: (1) Applies for another position of State employment; and (2) Has substantially equal qualifications as an applicant who is not a State employee then the State employee shall receive priority consideration over the applicant who is not a State employee.”
23. “Qualifications” within the meaning of subsection (e) of N.C.G.S. 126-7.1 consist of: (1) Training or education; (2) Years of experience; and (3) Other skills, knowledge, and abilities that bear a reasonable functional relationship to the abilities and skills required in the job vacancy applied for. Id.
24. 25 N.C.A.C. 01H .0801 requires that (b) “If it is determined that an eligible employee and an outside applicant have ‘substantially equal qualifications,’ then the eligible employee shall receive the job offer over an outside applicant.” Most importantly, the same rule states, (c) “Substantially equal qualifications” occur when the employer cannot make a reasonable and justifiable 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.” Johnson v. E. Carolina Univ., 260 N.C. App. 456, 816 S.E.2d 539 (2018).
25. In short, in competition with an outside applicant, the State employee need not show that his or her job-related qualifications are better than the outside applicant. The reverse, in fact, is true. If the qualifications are largely the same, or even if the outside applicant’s qualifications are better, the State employee with promotional priority still gets the job. Only when the outside applicant’s job-related qualifications are **significantly** better suited than the State employee’s does the outside applicant win out. See Jack Mason v. N.C. Wildlife Resources Commission, Division of Wildlife Management, 2005 WL 3879158: “Petitioner Mason is not required to demonstrate qualifications superior to those of Brad Howard; he must possess and demonstrate qualifications only substantially equal to Brad Howard, the non-State employee candidate.”
26. This matter involves a career status State employee who was entitled to promotional priority consideration, and simply failed to receive it. See Michael Karr v. NC Department of Health and Human Services, Division of Vocational Rehabilitation Services, 2010 WL 3283845 (failure to give veterans’ preference). The actual appealable issue for State employees with respect to promotional priority is, “Failure to post **or give priority consideration.**” N.C.G.S. 126-34.02(5) (emphasis supplied).
27. The Tribunal has no difficulty concluding that Respondent failed to give Petitioner any kind of priority consideration, either through simple inaction on the part of Human Resources personnel or, as in Randall’s and Cartoski’s cases, misunderstanding of

promotional priority rules. Petitioner has thus met her burden of proof that Respondent failed to give her promotional priority consideration with respect to the Position.

Remedies – Promotional Priority Consideration

28. “In deciding cases under this section, the Office of Administrative Hearings may grant the following relief:

- (1) Reinstate 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.”

N.C.G.S. 126-34.02(a).

29. Petitioner at no time was given promotional priority with respect to the Position. Respondent’s personnel making the hiring decision (Cartoski) and performing Human Resources functions (Randall) either misunderstood or misapprehended promotional priority laws and/or rules, with the effect that Petitioner was denied a promotional priority right conferred by statute on her as a career status employee of the State of North Carolina.

30. However, Petitioner was not promoted because of misapplied promotional priority rules. Petitioner was not promoted because her references, to the extent they responded, were universally negative. It is emphasized that until those references came in, the evidence is undisputed that Petitioner was Cartoski’s “top choice” for the Position, supported by his interview panel. After those poor references came in, Petitioner was for practical purposes foreclosed from consideration for the Position.

31. While the Tribunal is aware of promotional priority cases where the employer either ignored or simply failed to check references, see Anna M. Hamburg v. North Carolina Department of Health and Human Services, 2014 WL 7226543, it is not aware of another case involving an obviously well-qualified candidate whose candidacy was undone by employment references she herself selected, from among her own supervisors.

32. No blame attaches to Cartoski, the hiring manager, for checking and reacting to references Petitioner chose to provide. Neither party argues that consideration of references in itself is illegal or unfair in an employment application process. At least one Federal court has found that superior references were a factor in an employer showing a “legitimate, non-discriminatory reason” for hiring one applicant over another. See Pierce v. Owens-Corning Fiberglas Corp., 1982 WL 413, at *3 (1982).

33. Moreover, current State Human Resources policy (as of February 4, 2021) mandates, “Prior to extending an offer of employment it is required that reference check(s) be completed on the selected candidate. The candidate’s signed application authorizes the State to request

information pertinent to the candidate's work experience, education, and training." State Human Resource Manual, Employment and Records, Applicant Reference Checks Policy (February 4, 2021).

34. While this policy was in effect after the employment action at issue in this case, reference checks have long been part of the State employment process, including promotional decisions. See Betty R. Holman v. Broughton Hospital, 2000 WL 33952952, 99 OSP 0580; Cynthia Michelle Guess-Godwin v. Winston-Salem State University, 2003 WL 22948467, 02 OSP 1255; Anna M. Hamburg v. North Carolina Department of Health and Human Services, 2014 WL 7226543, 14 OSP 00867.
35. Petitioner provided ample evidence that the poor references she received from her managers and supervisors were not reflected in her performance evaluations. However, the North Carolina Human Resources Act provides no appeal rights (barring circumstances involving additional considerations such as racial discrimination) to employees because they were surprised by an unexpectedly negative reference.
36. Nor is it reasonable to expect a hiring manager to ignore universally poor references in making a hiring decision – particularly as Cartoski was unaware of the underlying unfairness in those references not reflecting Petitioner's performance reviews. References are part of the employment process, and promotional priority does not require agencies to turn a blind eye when the employee's selected references return universally negative responses.
37. Teague v. W. Carolina Univ., 108 N.C. App. 689, 691, 424 S.E.2d 684, 686 (1993), affirmed a ruling against a State employee seeking promotional priority consideration, noting that the employee failed to include significant pertinent information on her application. The hiring manager "had to make his decision based on the qualifications he found in the applications and elicited during the interviews." Id. Petitioner's failure to present her qualifications thoroughly was fatal to her claim. See also Heminuk: "Petitioner conceded that it was his responsibility to include all relevant information for consideration by the hiring manager. Her other errors notwithstanding, Gardner (and her employer) cannot be faulted for Petitioner doing a less than thorough job on his application."
38. Here, as in Teague and Heminuk, it was Petitioner's responsibility to ensure that her application, including references, presented her qualifications in the best possible light. There is no evidence that Petitioner took what seems the basic step of asking Cox, Rollins, and Kahee if they were willing to serve as references prior to Petitioner listing them as such. That such references turned out quite contrary to what Petitioner anticipated, or even might have reasonably expected based on her performance reviews, does not invalidate Respondent's hiring decision in this case.
39. Petitioner's non-promotion was based in primary part on her own failure to ensure appropriate references, or at least references that would not torpedo her otherwise promising candidacy. "Promoting" Petitioner is not an appropriate remedy due to Petitioner's contributing role in her non-selection.

40. Nevertheless, in failing to accord Petitioner promotional priority consideration, Respondent denied Petitioner a substantive statutory right as a career-status State employee and violated State law. Even in cases where it was found that the ultimate agency action was justified, or that the Petitioner did not demonstrate a right to full relief, OAH has awarded back pay and attorney's fees for agency violations of both statutory rights and procedural rights conferred by rule. See Heminuk; see also Lisa A Tomlin v. Haywood Cnty. Haywood Cnty. Health and Human Services Agency, 2021 WL 4304916, 20 OSP 00944; Tammy Cagle v. Swain County Consolidated Human Services Board, 2013 WL 8116178. Further, State Human Resources rules provide relief even for procedural violations (as opposed to the statutory violation here) in some instances. See 25 N.C.A.C. 01B .0432(b).
41. Based on the above considerations, the most suitable action "to correct the abuse" in this contested case is to award Petitioner back pay from the date of Petitioner's non-selection in favor of Morgan to the date of this Order, due to Respondent's failure to provide Petitioner promotional priority consideration as required by law. See N.C.G.S. 126-7.1.
42. Back pay is a further complication in this case. The issue is normally simple: back pay is the difference between (a) the petitioner's salary, and (b) the salary of the successful applicant. Here, Petitioner is paid more than the successful applicant. Moreover, the maximum pay for the Position, as Petitioner acknowledged at the time she applied for it, was \$68,000 annually.
43. OSHR's Salary Administration policy at the time of the hiring decision, to which Respondent is subject, see Amanini v. N. Carolina Dep't of Hum. Res., N.C. Special Care Ctr., 114 N.C. App. 668, 678-79, 443 S.E.2d 114, 120 (1994), provided that persons in Petitioner's position receive a minimum five percent (5%) raise upon promotion.
44. Petitioner is thus entitled to back pay from Respondent from the date of the Morgan hiring decision to the date of this Order, at a rate of five percent above her salary of \$66,712, as limited by the Position's maximum annual salary of \$68,000. Petitioner knew when she applied for it that the Position was capped at \$68,000 annually; the Tribunal will not award Petitioner a windfall.
45. This award of back pay also permits awarding Petitioner, to be paid by Respondent, her reasonable attorney's fees obtained in pursuing this contested case, upon submission of appropriate filings. See N.C.G.S. 150B-33(b)(11), N.C.G.S. 126-34.02(e).
46. Further, for next promotional opportunity with Respondent for which Petitioner applies, Respondent shall provide full and accurate promotional priority consideration to Petitioner with respect to her application for that position. This is no more than the law requires, but is noted here to emphasize that career-status State employees have this statutory right, and agencies are required to provide it.

FINAL DECISION

The agency action is **REVERSED** to the extent that Petitioner is awarded back pay and may petition for reasonable attorney's fees as stated herein. Further, Respondent shall provide Petitioner priority consideration as provided by law and rule on the next promotional position with Respondent for which Petitioner applies. The agency action in this case, including Morgan's selection to the Position, is otherwise **AFFIRMED**. Petitioner's claim for removal of documents from her personnel file is **DISMISSED** in its entirety for lack of subject matter jurisdiction.

Pursuant to N.C.G.S. 126-34.02(a) and 26 N.C.A.C. 03 .0118(b), the Tribunal determines that extraordinary cause exists to issue the Final Decision in this matter more than 180 days from the commencement of this matter.

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.

SO ORDERED.

This the 14th day of September, 2022.

A handwritten signature in blue ink that reads "Michael C. Byrne". The signature is written in a cursive style and is positioned above a solid blue horizontal line.

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.

M. Jackson Nichols
Nichols, Choi & Lee, PLLC
Jack@ncl-law.com
Attorney For Petitioner

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

This the 14th day of September, 2022.



Jerrod Godwin
Law Clerk
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850