

STATE OF NORTH CAROLINA
COUNTY OF PITT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 OSP 03213

LARRY F. MURPHY,)	
PETITIONER)	
)	
v.)	DECISION
)	
EMPLOYMENT SECURITY COMMISSION)	
OF NORTH CAROLINA,)	
RESPONDENT)	

Administrative Law Judge Melissa Owens Lassiter heard this contested case on October 25, 26, 27, 28, November 7, 8, 9, 17 and 18, 2011, and February 9, 10, 2012 in Greenville, North Carolina. On March 20, 2012, the undersigned issued an Order ruling for Respondent, and requested Respondent file a proposed Decision. On April 20, 2012, Respondent filed a proposed Decision with the Office of Administrative Hearings.

APPEARANCES

For Petitioner:

Larry F. Murphy
P.O. Box 801
Ayden, NC 28513

For Respondent:

Camilla F. McClain
NC Depart. of Commerce
Division of Employment Security
(formerly Employment Security
Commission of North Carolina)
PO Box 25903
Raleigh, NC 27611-5903

STATUTES, RULES & POLICIES

N.C. Gen. Stat. §§ 126-16, 126-34, 126-34.1, 126-35, 126 -36
N.C. Gen. Stat. Section 150B-23
25 NCAC 1C .0400 et seq
Office of State Personnel, Personnel Manual

ISSUES

1. Whether Respondent discriminated against Petitioner, based on Petitioner's race, religion, color, and political affiliation, when Respondent separated Petitioner from probationary employment without offering Petitioner permanent employment?

2. Whether Respondent retaliated against Petitioner, based on Petitioner's race, religion, color, and political affiliation, when Respondent separated Petitioner from probationary employment without offering Petitioner permanent employment?

WITNESSES

For Petitioner:

Gloria Butler, Glenda Ellerbee, Stephanie Beard, Brenda Clark, Anne Lasley, Robert Gemma, Debra Best, Manfred Emmrich, Lane Dyer, Charlanda Shepard Nadine Daniels, Rufus Wilson, Angela Moore, Tara Weldon, Randolph Griffin, Clayton Jarvis Worsley, Henry Lee Hardison, Donna Stapleford Cannon, Glenda Creech, Alichia McKoy, Laronda Boone, Taylor Lee, Kenneth King, Barbara Bambi" Oliver, Sharon Coleman Jackson, Danny Alston, Anna Barrett, Heidi Tallman, Patsy B. Jones, John C. Smith

For Respondent: None

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 - 4, 6, 8 - 14, 15 (pp. 1 - 23), 17 - 21, 23, 25, 29, 30 - 31, 33, 34, 35 (pp. 9 - 15), 36 (pp. 1, 4 - 31), 37, 38 (pp. 1 - 36, 40-59), 39 - 41, 42 (pp. 1 - 7, 10 - 24, 26 - 35, 38 - 45), 43, 44, 45 (pp. 1 - 7), 47, 51 - 57, 62 - 63, 65, 68, 69, 71, 78, 81, 82 (pp. 1 -16)

For Respondent: 1 - 41

FINDINGS OF FACT

After careful consideration of the witnesses' sworn testimony at hearing, including assessing each witness' credibility, the reasonableness of such testimony, and whether such testimony is consistent with all other competent evidence in the case, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned ALJ finds as follows:

A. Procedural Background

1. On June 2, 2010, Respondent's Chairman issued a Final Agency Decision upholding a Grievance Panel's recommendation not to offer Petitioner permanent employment as a Disabled Veteran Employment Consultant I with Respondent's Greenville local office (hereinafter "Greenville office" or "local office"). Chairman Holmes also accepted the panel's unanimous recommendation that Petitioner failed to provide clear and convincing evidence to support his discrimination claim. (See Document Constituting Agency Action attached to Respondent's Prehearing Statement.)

2. On June 11, 2010, Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings alleging that Respondent had: (1) discharged him from employment without just cause, and (2) discriminated against Petitioner by denying him a promotion and/or terminating him from employment based on Petitioner's race, color, religion, and political affiliation.

3. In his petition, Petitioner alleged that Respondent had harmed him as follows:

As a direct result of alleged discrimination, I have been denied of [sic] promotion to permanent status and ultimately, wrongfully terminated. In addition, ESC's grievance process failed to implement a very vital work required from its EEO in the findings of fact process that would have provided cooperation through its interview of vital witnesses that would have proven my serious allegations to be valid and my discharge without just cause. This failure in ESC EEO investigative process has proven to be detrimental to me and ESC Chairman [sic], wherein, providing her with less than adequate information for making her decision. Also in the hearing of May 13, 2010, Gloria Butler, Employee's Relations Manager continuously intervened with the direction the Grievance Review Panel attempted to obtain information, clearly manifesting undue influence on the direction the panel was attempting to gather information. Patsy Jones, representative for the agency continuously assisted her witnesses in answering questions presented to them by the grievance review panel members and during my cross-examination of her witnesses, I questioned this and the panel's response was that she was just helping them clear things up. There has been a continuous obstruction of the ESC grievance process to ensure my wrongful termination is not reversed. Also, I was not adequately informed by Gloria Butler that I could have gone directly to the Office of Administrative Hearings instead of through ESC's grievance process. It appears I passively trusted in people involved in the grievance process that I should not have trusted.

(Petition)

4. In his petition, Petitioner did not allege that he had been subjected to a hostile work environment as a ground for filing his petition.

5. On August 24, 2010, the undersigned entered an Order staying this contested case until after a decision had been rendered in Petitioner's U.S. Equal Employment Opportunity Commission ("EEOC") charge no. 433-2010-01452.

6. On June 22, 2011, the undersigned issued an Order lifting the stay on this contested case after being notified that the investigation into Petitioner's EEOC charge was complete.

7. On October 19, 2011, the undersigned Granted in part, and Denied in part Respondent's Motion to Quash production of PMPs of certain ESC employees from the Greenville local office. On October 25, 2011, the undersigned Granted in part, and Denied in

part Respondent's Motion to Quash subpoenas issued by Petitioner involving potential witnesses. On October 25, 2011, pursuant to N.C. Gen. Stat. § 126-22, the undersigned issued a Protective Order limiting disclosure of confidential documents, including but not limited to Performance Management Program Work Planning documents ("PMPs") of other employees.

8. On October 25, 2011, the undersigned Dismissed Petitioner's claim of discharge without just cause, as Petitioner was not a "career state employee" as that term is defined by N.C. Gen. Stat. § 126-1.1, and therefore, was not entitled to bring a discharge without just cause claim before the Office of Administrative Hearings under N.C. Gen. Stat. § 126-35.1.

9. On November 7, 2011, the undersigned Denied (1) Petitioner's Motion for Summary Judgment on Petitioner's permanent status, (2) Petitioner's Motion for Conflict of Interest, (3) Petitioner's Motion to declare certain witnesses as hostile witnesses, and (4) Petitioner's Motion to Order Respondent to produce a grievance investigatory file of a former employee. The undersigned advised Petitioner that he could renew his motion to declare and treat certain witnesses as hostile witnesses as each witness testified.

B. Hiring and Probationary Employment Period

10. Petitioner is an African-American male of the Christian faith.

11. Respondent is a state agency that provides employment services, unemployment insurance, and labor market information to workers, employers, and the public of the State of North Carolina.

12. On March 27, 2009, Respondent posted a job posting for the DVOP position for which Petitioner was hired. That posting described the DVOP position as providing "employment-related services to veterans having service connected disabilities, and involves outreach activities through veteran and civic organizations." (Pet. Exh. 41, p. 8)

13. Danny Alston, Manager of the Greenville, NC local office, John C. Smith, local veterans' representative (LVER) of the Greenville office, and Ken Siragusa, Respondent's Director of Veterans Employment Services interviewed Petitioner for the DVOP position. During that job interview, the interviewers reviewed the job description for the DVOP position with Petitioner, and informed Petitioner that if he were hired for the DVOP position, he would be required to have active membership in at least two of four veterans' organizations. Based on the recommendation of Smith, Alston, and Alston's immediate supervisor, Patsy B. Jones, Respondent's Region V Manager, Respondent offered Petitioner the subject DVOP position.

14. By letter dated July 8, 2009, Respondent hired Petitioner to work as a Disabled Veterans Employment Consultant I (hereinafter "DVOP") in Respondent's Greenville office. In this letter, Respondent informed Petitioner that his annual salary would be \$31,622, that he would report directly to Mr. Danny Alston, and that:

All new hires in state government must serve a probationary period. The attainment of permanent status is contingent on the satisfactory performance of

the duties assigned, satisfactory completion of a background check, and appropriate personal conduct in accordance with State personnel policy.

(Resp. Exh. 3)

15. On July 14, 2009, Petitioner began working for Respondent as the DVOP in the Greenville, NC office. (Resp. Exh. 3)

16. During employment, Petitioner's supervisory chain-of-command was as follows: John Smith ("Jack"), Caucasian male, Petitioner's immediate supervisor. Smith reported to Danny Alston, Greenville Office Manager. Mr. Alston is an African-American male of skin color similar to Petitioner. Mr. Alston reported to Patsy Jones, a Caucasian female who was Respondent's Region V Manager. Region V encompasses the Greenville, North Carolina area.

17. Patsy Jones' immediate superiors were Lane Dyer, Deputy Director of Employment Services, and Manfred Emmrich, Director of Employment Services. Jones' duty station was in Wilson, NC, while Dyer and Emmrich worked in Raleigh, NC.

18. In 2009-2010, the Greenville office staff was a racially diverse one, consisting of eight Caucasian full-time employees, six African-American full-time employees, and two African-American intermittent employees. (Pet. Exh. 20)

19. When Petitioner began working in Respondent's Greenville, NC office, the office environment was a hectic, busy, and chaotic environment. (T. pp. 1326, 2170) Since 2008, an economic recession had caused a dramatic increase in employment insurance claims in the Greenville office, thereby, increasing the staff's workload dramatically. Danny Alston had been the manager of the Greenville office since 1999. Alston witnessed the county's unemployment rate increase from approximately 3.5% to over 10% by 2009. Respondent's Greenville office experienced a high volume of walk-in traffic asking for services. Due to the increased requests for services, the telephones were constantly ringing. For these reasons, there was a tremendous amount of workload for all staff. (T. p. 2170)

20. On or about July 2009, the Greenville office became a Job Link Career Center ("Job Link"), in which "partners" from other agencies were assigned workspace in the Greenville office. Respondent's Greenville office also became an operator of the WIA (Workforce Investment Act) program. The WIA program was a brand new program for the office, and involved a lot of time-sensitive paperwork, which had to be completed in a short period. In addition to the usual duties as local office manager, Danny Alston became responsible for managing the Job Link Program and operating the WIA program. Alston felt he was "stretched thin" as he was trying to do three different jobs, or an additional two jobs that he did not have in prior years. (T. p. 1326)

21. Jack Smith had worked in the Greenville office as the office's DVOP representative since January 2008. Beginning in August 2008, Jack Smith was required to perform his job duties as DVOP, as well as the duties of Dennis Mager, after Mager went out of work on sick leave. Dennis Mager was employed as the Local Veterans Employment Representative ("LVER"), and was Smith's immediate supervisor. AS DVOP, Smith helped

with the office's tremendous workload, while fielding calls and assisting veterans as the office interim LVER.

22. Mager did not return to work, but retired. Effective April 1, 2009, Jack Smith was promoted to the position of LVER. Nonetheless, Smith continued to perform the job duties of both LVER and DVOP until Petitioner was hired in July 2009.

23. While there was stress and anxiety in the local office brought on by the heavy workload, the Greenville office staff, for the most part, worked together very smoothly. (T. p. 2170)

24. At all relevant times of this case, Respondent maintained a "Performance Management Program" ("PMP program") for managing each employee's work in its organization. The PMP process is a sequence of actions that supervisors are required to follow when interacting with employees about their performance. It is cyclical in nature, because one part in the process continuously leads to the next. (Resp. Exh. 22) In the PMP program, each employee shall have a work plan established at the beginning of the work cycle on annual basis. The work plan is used to appraise the employee's job performance during a work cycle. A work cycle for the Respondent normally begins on April 1st of the given year, and ends on March 31st. (Resp. Exh. 22)

25. Under Respondent's PMP program, a supervisor is required to review an individual work plan for each employee he supervises (Form HR 18, also referred to "PMP") with his or her manager. Each employee's work plan sets out the primary job responsibilities, results expectations, and dimensions of an employee's job. After the supervisor and manager have concurred on the job performance expectations set forth in a work plan, the work plan is presented to the employee.

26. The goal of Respondent's Human Resources Department is for managers and supervisors be brought into the HR office for PMP program training within the first three months of their appointment in a supervisory capacity.

27. When Jack Smith became Petitioner's supervisor in July 2009, Smith had never worked in a supervisory position. Respondent's Human Resources ("HR") Department did not offer any PMP program training from April 1, 2009 when Jack Smith became a supervisor, and July 2009 when Smith began supervising Petitioner. As a result, Smith had not received any training in the implementing and administering the PMP process.

28. Page 6 of Respondent's PMP policy provides that:

In order to ensure that all ESC employees have the opportunity to qualify for performance increases, Respondent shall adhere to the following:

1. Probationary employees shall have a position description or equivalent and work plan established within thirty (30) calendar days from the date of employment and an appraisal completed at the end of the agency's work

cycle. A review shall be completed before an employee can be moved into permanent status in accordance with the policy on probationary period.

(Resp. Exh. 22, p. 6)

29. Since Smith had not received any PMP training, he was ignorant of the PMP requirement that probationary employees shall have a work plan established within thirty (30) calendar days from the date of employment. (T. pp. 2200-2201) As a result, Smith failed to give Petitioner a work plan (Form HR 18) within thirty (30) calendar days from July 14, 2009, the date Petitioner began his employment with Respondent.

30. Although Smith did not give Petitioner a formal work plan during his initial thirty (30) day employment period, Smith did give Petitioner a position description and advise Petitioner of his primary job duties within the first 30 days of employment. Smith informed Petitioner of the results he needed to accomplish through his work, and the behaviors and skills Petitioner needed to produce the expected results. (T. pp. 2200-2201)

31. At the beginning of Petitioner's employment, Jack Smith, Danny Alston, and Asst. Office Manager Kent Burns provided one-on-one training to Petitioner. Smith informed Petitioner of the DVOP job expectations and responsibilities, while assisting the day-to-day veterans who visited the Greenville office. (T. pp. 2175-78) During office meetings between 8:00 and 8:30 am, Respondent provided formal training to Petitioner. Petitioner also attended two sessions at the National Veterans Training Institute in Denver, Colorado. In August 2009, Petitioner attended a Veterans Conference, which also provided training to Petitioner. These conferences provided training in the areas of outreach, case management, labor market information, work opportunity tax credit, bonding issues, monthly reports and quarterly reports. (T. pp. 2175-76)

32. During the first couple of months of Petitioner's employment, Smith also took Petitioner to visit each of the veteran organizations and service providers Petitioner would be working with as DVOP, as "outreaching" to disabled veterans was a primary DVOP job responsibility of Petitioner. Smith and Petitioner made such visits approximately 1-2 times a week. Smith did this to insure that Petitioner knew the people at the veteran organizations, would be familiar with those areas, and would know what was expected of him. Smith provided Petitioner the same training that Smith had received when he was a DVOP. (T. pp. 2175-76, 2180)

33. From July through September 2009, Smith thought Petitioner's job performance was marginal. Petitioner's job performance was good in some areas, but Petitioner's performance concerned Smith in other areas. (T. p. 2184) Smith observed that Petitioner was spending an inordinate amount of time on his computer typing manuscripts that Smith felt were unnecessary, and thus, generating an overabundance of paperwork. Smith felt Petitioner was typing manuscripts about matters Petitioner should have known about the computer system, and about core services, such as writing job orders, and referring veterans to these job orders. (T. p. 2184) Smith thought Petitioner was not learning as quickly as he should have. (T. p. 2185)

Smith discussed this issue with Petitioner. When Petitioner indicated that typing was the way he learned, Smith allowed Petitioner to continue. (T. p. 2185)

34. By mid to late August 2009, Smith noticed deficiencies in Petitioner's job performance. Smith observed that Petitioner was not leaving the office to conduct outreach visits to veteran organization on as frequent a basis. Smith spoke with Petitioner about his observations, while acknowledging Petitioner's concern that there was a lot of work to do in the office. Smith told Petitioner that he still expected Petitioner to visit service providers during the workday. Smith particularly talked to Petitioner about the importance of maintaining contact with veteran organizations, because those organizations are where people are referred to the local office. (T. pp. 2183-2184)

35. Petitioner explained that he and his wife had only one car, and that transportation problem limited his visits. Smith thought Petitioner was making excuses why he could not visit the vets' organizations. (T. p. 2183) Smith advised he understood the transportation issue was a hardship, but transportation was Petitioner's responsibility, and that problem did not excuse Petitioner from doing his job. Smith also informed Petitioner that he had a responsibility to find a way to visit the organizations at which he needed to conduct outreach visits. (T. pp. 2183-2184)

36. On October 16, 2009, the deficiencies in Petitioner's performance prompted Smith to issue Petitioner a document entitled "DVOP Performance Expectation, Greenville ESC Veterans' Staff October 2009." In this document, Smith wrote that Petitioner would visit veteran organizations "(in person, if feasible)." In using the term "if feasible," Smith meant that Petitioner should visit vets organization "if possible." At the same time, Smith did not excuse Petitioner from making in-person visits. (Smith hearing testimony; Pet. Exh. 3) The October 16, 2009 document outlined specific performance expectations of Petitioner as DVOP. These expectations were in line with the work that Smith had performed as a DVOP. (Smith hearing testimony) Smith wrote that:

a. Petitioner was expected to conduct outreach visitations, attend regular meetings at veteran organizations' meetings, make and give written reports of all outreach activities and visits to Smith, provide intensive case management and employment services to potential and existing clients, assist office staff with incoming phone traffic, and assist Smith with monitoring VA work-study activities.

b. Smith instructed Petitioner how he should update the information in the computer database for "any Veteran who is given core/services/job referral assistance, whether in person or over the phone."

c. Petitioner was expected to meet weekly with Smith to report on activities and case management progress, and any other information that might positively or negatively affect the veterans' program. Petitioner was also expected to report when he was leaving the office to conduct outreach visits, or for personal matters, and record the specific places to be visited during those outreach visits.

(Pet. Exh. 3; Resp. Exh. 6) Smith and Petitioner reviewed, and signed this document.

37. After October 16, 2009, Petitioner improved his job performance, and conducted more outreach visits, but he did not fully comply with Smith's outreach visitation expectations in performing his job. (T. p. 2188)

38. Ultimately, it was Petitioner's conduct at work, not his job performance, which led to Petitioner's discharge from employment. (T. pp. 2188-89) Between July and December 2009, Petitioner was resistant to Smith's instruction or correction at times, seemed angry a lot of the time, and failed to follow the supervisory chain-of-command. Petitioner frequently had disagreements with Barbara "Bambi" Oliver, the office assistant, regarding how Oliver treated clients and Petitioner. (T. pp. 2188-90) Smith counseled Petitioner about his behavior in these areas.

39. Smith counseled Petitioner about a particular incident involving personnel files being kept in a locked file cabinet in the office's mailroom. The key to the file cabinet was kept in a small box on top of the cabinet. Petitioner discovered where the personnel files were being kept, became agitated and angry, and told Smith that a security breach had occurred. Smith explained to Petitioner that the file cabinet was kept locked in an area inaccessible to clients. (T. pp. 2192-94)

40. After talking with Smith, Petitioner remained concerned about the issue. Instead of addressing his concern to his supervisory chain-of-command, Petitioner called an unspecified individual in Respondent's Raleigh office. Smith did not know what, if anything, happened because of Petitioner's phone call, but the situation regarding the personnel files remained the same. The key to the personnel cabinet was still kept in the same place. To Smith's knowledge, Respondent never had a security violation while Smith was employed, and no one told Smith about another security violation. (T. pp. 2191-92) Smith counseled Petitioner about following the chain-of-command regarding Petitioner's concerns.

41. In January 2010, Mr. Alston advised Smith that he needed to prepare Petitioner's PMP (work plan Form HR 18), because he knew Petitioner had reached or was about to complete six (6) months of employment. Alston understood they needed to have Petitioner's PMP on hand when deciding whether to make Petitioner a permanent employee, to end Petitioner's employment, or extend Petitioner's probationary employment. Alston also knew that it was the standard practice of Respondent's Human Resources ("HR") Department to an email to the local office when it was time to decide the status of a probationary employee. Alston wanted them to be ready when they received that email from the HR department.

42. When Mr. Alston told Smith he needed to prepare Petitioner's PMP, Alston assumed that Smith had already presented a PMP to Petitioner, that Smith would retrieve the previously-prepared PMP, and prepare it for the step of deciding Petitioner's status. As Alston had been very busy with the duties of his job and the increased workload, it did not occur to him that Smith had not received PMP training. He thought that Smith knew what to do in preparing Petitioner's PMP. Smith did not say anything to the contrary to Mr. Alston, when Alston told him to prepare Petitioner's PMP.

43. Respondent's standard agency practice was for management in the Raleigh office to notify Danny Alston regarding training for employees, and Alston would check with the employee, such as Smith, to verify dates for such training. Then, Alston would authorize the employee to attend such training. (T. p. 2196)

44. In this case, from April 1, 2009 when Smith became LVER until January 2010, no one in Respondent's management advised Smith that he was required to attend PMP training, that PMP training was available, or gave Smith permission to take time off from work to attend PMP training. (T. pp. 2196-97) As a result, Smith did not receive any training about completing a PMP. Similarly, neither did Smith know whether PMP training was available in the Greenville local office, in the Raleigh Central Office, or online. (T. pp. 2194-95)

45. After meeting with Alston in January 2010, Smith completed a standard DVOP PMP for Petitioner, and entered ratings on that PMP. Under the PMP program, Smith should not have listed ratings on the PMP that Smith presented to Petitioner. Neither did Smith review the prepared PMP with Alston, before giving it to the Petitioner.

46. At 9:40 am on Thursday, February 11, 2010, Mr. Alston received an email from Brenda Clark of the HR department, requesting Alston complete the necessary paperwork for permanent status (HR9 and HR18) for Petitioner, and submit it through the proper channels for approval. (Resp. Exh. 38)

47. On February 11, 2010, Smith presented and reviewed a PMP with Petitioner. (Resp. Exh. 8) Smith gave Petitioner a rating of "Good" to "Very Good" on most of the areas, such as case management, and preference for target group. Smith gave Petitioner an Overall Rating of "Good." However, Smith rated Petitioner "Below Good" on the areas of "Veteran Outreach" and "Veteran Advocate." (T. pp. 2206-07)

48. After reviewing the PMP, Petitioner became very angry, and told Smith the PMP was unacceptable. Petitioner felt he had accomplished what he was required to do. He also told Smith that never in his career, had he ever received a rating less than outstanding, that he expected to get an outstanding, and that the PMP he received was unacceptable. He advised Smith he would be discussing the matter with Danny Alston. (T. pp. 2205-2206)

49. On Friday, February 12, 2010, Smith met with Alston about Petitioner's PMP. Alston gave Smith a "chewing out" for not reviewing Petitioner's PMP with him (Alston) first. (T. p. 2209) This was the first time that Alston became aware that Smith had not presented the PMP to Petitioner within thirty (30) calendar days from the date of employment. Alston had assumed Smith had performed the initial 30-day presentation of a PMP to Petitioner, and further assumed that Smith knew what he was doing. (T. p. 2209) Alston advised Smith that he had not followed the proper procedure for presenting a PMP. (T. p. 2209) Smith also informed Alston of his concerns regarding Petitioner's job performance deficiencies, and Petitioner's personal conduct. Both Smith and Alston believed that Petitioner's job performance problems could be corrected.

50. Once Smith learned the proper way to complete a PMP, he completed the standard DVOP PMP for Petitioner with Alston's help. (Resp. Exh. 7)

51. On Wednesday, February 17, 2010, Smith and Alston met with Petitioner, and explained that they were extending his probationary period for another two months, to the full nine months probationary period allowed under Respondent's policy. This extension was to provide Petitioner an opportunity to correct any performance deficiencies, and correct his personal conduct in the office so they could make Petitioner a permanent employee. (T. pp. 2213-14) Smith and Alston intended the extension to give Petitioner the chance to become a permanent employee. (T. p. 2214)

52. Later that day, Mr. Alston became ill, and was out of work on medical leave until March 24, 2010.

53. 25 NCAC 01C .0404(a) explains the policy on Probationary Appointments for all employees hired by the State of North Carolina as follows:

(a) Individuals receiving initial appointments to permanent or time-limited permanent positions must serve a probationary period. The probationary period is an extension of the selection process and provides the time for effective adjustment of the new employee or elimination of those whose performance will not meet acceptable standards. The maximum length of the probationary period shall be not less than three or more than nine months of either full-time or part-time employment from the actual date of employment.

54. Effective October 19, 2009, Administrative Issuance, Human Resources Bulletin No. 5 provided that "the standard probationary period with Respondent is six months." Under HR Bulletin No. 5, the employee's supervisor must consult with, and obtain approval from, appropriate administrators for an employee to become permanent. The supervisor is required to submit a completed work plan (Form HR 18), and a completed Certification of Permanent Status, Form HR 9 to Human Resources when recommending an employee for permanent status. The bulletin further declared that:

If a supervisor needs more than six months to evaluate an employee, he/she must submit a memo prior to the employee's six-month expiration to the Human Resources Director requesting an extension of the probationary period.

(Resp. Exh. 19) The memo must state what the employee needs to improve upon, that this has been communicated to the employee, and include a copy of the partially completed Form HR 18. The HR Bulletin No. 5 does not state that an employee automatically becomes a permanent employee if the supervisor fails to submit the required documentation before expiration of an employee's probationary period.

54. While HR Bulletin No. 5 required a supervisor submit a work plan (Form HR 18) and memo justifying extended probation to the HR department before the employee's six-month employment expiration date, in practice, Respondent's HR allowed supervisors to submit the

paperwork justifying an extension of probation late, i.e. after the employee's six-month expiration date.

55. The preponderance of the evidence at hearing showed that where an employee worked for six months as a probationary employee, but Respondent's HR did not receive some kind of memo to extend the employee's probationary period, Respondent's HR did not, on its own volition, automatically change that employee's status to permanent employee status. (T. p. 235)

56. In this case, Mr. Smith failed to submit a partially-completed work plan (Form HR 18) and justifying memo to Respondent's HR to formally request extension of Petitioner's probation. Smith was unaware of HR Bulletin No. 5 and the requirement to submit such to Respondent's HR. Since Danny Alston unexpectedly left work sick on February 17, 2011, Alston did not have the opportunity to comply with the HR Bulletin No. 5, and did not submit the work plan or justifying memo to HR.

57. On March 31, 2010, neither Smith nor Alston had submitted a completed work plan (Form HR 18) or a completed Certification of Permanent Status (Form HR 9) to Respondent's Human Resources requesting Petitioner be made a permanent employee. Nor did management obtain any approval from the appropriate administrators for that purpose.

C. Petitioner's Separation From Employment

58. On March 31, 2010, Danny Alston separated Petitioner from employment for:

[E]xhibiting personal conduct that was not conducive to the operations and standards and failed to demonstrate the ability to take directions from your immediate supervisor. Therefore, it is the decision of management not to recommend you for permanent appointment.

(Resp. Exh. 18) Petitioner was not separated from employment based on his job performance in the Greenville office. (T. p. 1842)

59. From July 2009 through December 2009, both Smith and Alston experienced ongoing problems with Petitioner's personal conduct.

60. Barbara "Bambi" Oliver had worked as the Office Assistant in the Greenville office for 13 years. Petitioner and Oliver did not get along from the first day they began working together. Before Petitioner was hired as DVOP, Petitioner had visited the Greenville local office as a Job Link partner with the Mid-East Commission's Title V program. In July 2009, the Mid-East Commission, for whom Petitioner still worked, moved into office space in the Greenville office. Ms. Oliver gave Petitioner written instructions for setting up the voice mail for the telephone that he was assigned. Oliver gave Petitioner the same set of instructions that she gave to anyone in the local office needing to set up voice mail. However, when Petitioner was unable to set up his voice mail using those instructions, Petitioner blamed Oliver.

61. Around January 28, 2010, Alston conducted a staff meeting to discuss the topic of workplace violence. Approximately ten to fifteen employees, including Bambi Oliver, and Petitioner attended the meeting. During the meeting, Petitioner stood up, raised his voice, and said, "I am so concerned about my safety here. Ms. Oliver [Bambi Oliver] is going to get somebody killed." Petitioner indicated that Oliver's unprofessional behavior toward clients at the reception desk would eventually end with an angry client engaging in violent behavior towards the Job link Center. Petitioner also advised that he had been collecting complaints by staff members and clients against Oliver about Oliver's bad treatment of clients and staff at the receptionist desk. (Resp. Exh. 12, p. 3) Petitioner's comment was unprofessional, inappropriate, and uncalled for. Petitioner's comment caused Oliver to become distressed and upset.

62. The preponderance of the evidence at hearing showed that Oliver was not the only employee in the Greenville office to perform receptionist duties. Part of Oliver's regular job duties required Oliver to work at the reception desk from 8:00 a.m. to 12:45 p.m., Monday through Friday.

63. The preponderance of evidence also established that Bambi Oliver frequently used a sharp tone of voice when speaking with clients and staff at the Greenville local office, and treated clients and staff in a discourteous and rude manner.

64. In January 2010, Smith and Alston met with Petitioner and Oliver to try to stop the constant bickering that occurred between Oliver and Petitioner. However, these efforts were fruitless, and this conference was unsuccessful.

65. The incidents that precipitated Petitioner's separation from employment occurred mainly from February 17, 2010 through March 24, 2010. During the February 17, 2010 meeting with Petitioner, Smith and Alston had advised Petitioner that his personal conduct, including Petitioner's interactions with Bambi Oliver, was part of the reason they were extending Petitioner's probationary period.

66. On February 19, 2010, John Smith sent Petitioner an email that Petitioner's time entry was due that morning. Smith directed Petitioner to make sure that he annotate his time for "Amleg meeting" on Tuesday, and "any comp time taken this week." (Resp. Exh. 10) Petitioner had submitted his time incorrectly, so Smith requested Petitioner resubmit his time.

a. When Smith asked Petitioner if he had read the two emails requesting Petitioner's time entry, Petitioner began to argue loudly that Smith was making him forfeit three hours of compensatory time he had earned. Petitioner complained that Smith was changing the compensatory time policy, and that Smith had not told Petitioner what he wanted from Petitioner. Smith printed out his two email requests for Petitioner's time, placed them on Petitioner's desk, and asked Petitioner if he had a problem with that. Petitioner answered, "Oh, you haven't seen the end of this. Don't you worry. You just wait." (Resp. Exh. 12)

b. Since this conversation was taking place in a public setting where other employees and clients were present, Smith asked Petitioner to speak with him

privately in another room. Petitioner refused to go unless Kent Burns, the Assistant Office Manager joined them. Since Burns was with a client, Smith returned to his desk and helped a veteran from the waiting list. Petitioner continued to talk loudly to Smith about his comp time concerns.

- c. Near the end of the workday, Petitioner announced again that he would not give up his 3 hours of compensatory time. Smith walked to Petitioner's cubicle, and advised Petitioner that he did not have the authority to do that. Petitioner demanded that Smith sit down, stating to Smith, "You WILL treat me with respect." (Petitioner's emphasis) Smith remained standing. Petitioner said, "I'm putting you on notice that I'm filing a grievance against you." Smith replied, "Okay, and I'm putting you on notice that I'm reporting you for insubordination and for communicating a threat." (Resp. Exh. 12)

67. While Petitioner had a legitimate concern about his comp time, there were other options available for him to resolve the concern, other than loudly arguing at his supervisor in the presence of coworkers and the public. Since Burns did not intervene, Petitioner had the option of emailing or otherwise contacting Pasty Jones, Region V Manager.

68. Petitioner's conduct on February 19, 2010 prompted Smith to write Patsy Jones a letter describing the February 19th incident, and recommend Petitioner's dismissal.

69. After Jones received and read the letter, she talked to Smith, but did not act on his recommendation. She believed that Petitioner's employment could still be salvaged. She instructed Smith to document any further problems with Petitioner's behavior.

70. On March 2, 2010, employee Heidi Tallman thanked Smith for "pulling" vets off the schedule who were scheduled to see claims representatives. She asked if Petitioner was doing the same. Smith responded that he did not know, but he would ask Petitioner. When Smith asked Petitioner, Petitioner sharply retorted, "Who's asking you or Heidi. Why does she need to know." Smith replied, "Heidi is asking. You don't have to make an issue about it." Petitioner responded, "Why does she want to know?" When Tallman said she was just asking, Petitioner indicated that he had been pulling vets all along. Smith responded, "So, why didn't you just say so? A simple yes would have sufficed." (Resp. Exh. 13)

71. On March 8, 2010, Smith noticed a client had been waiting since 11:00 a.m. The schedule noted that the client was a veteran, but did not highlight her as a veteran. Smith asked Petitioner to help the client. They determined that the client was not eligible for veterans' services. For that reason, Petitioner started to send the client back to the front waiting area to be helped by another employee. Smith told Petitioner that he could register the client as a "non-vet," and assist the client, because sometimes that is easier to do than passing the client on. As Smith started to walk away, he mentioned to Petitioner that if the client had a DD-214 military service record, the client could be referred to Glenda Creech. Petitioner glared at Smith, and sarcastically said, "I – know—my—job." (Resp. Exh. 13)

72. On March 10, 2010, Bambi Oliver mistakenly scheduled a waiting client as a veteran under "core services," when the client should have been scheduled under "claims." Smith corrected the error, and arranged for Glenda Creech to assist the client. When Smith returned to his desk, Petitioner approached Smith's desk, and shoved a printed copy of a schedule in Smith's face, accusing Smith of placing a notation on the schedule. The notation read, "Larry [Petitioner] forgot to put in a comment after seeing him earlier. He is a mil claim as I had put in." Smith had not made the erroneous entry, did not know when such an entry had been made, and denied making the notation. Smith thought Petitioner was accusing him of lying about something by presenting the schedule to him the manner he did. Smith told Petitioner he would find out who made the notation, and he did. Staff members Heidi and Corrina witnessed the incident. (Resp. Exh. 13; hearing testimony) Smith thought Petitioner treated him disrespectfully.

73. On March 12, 2010, Petitioner's lunch was scheduled from 11:45 am. to 12:45 p.m, while Smith's lunch was scheduled from 12:45pm to 1:45 p.m. At about 12:50 p.m, Smith stopped by Petitioner's desk, and noticed a manuscript with biblical references was open on Petitioner's desk. Thinking that Petitioner's lunch break was over, Smith remarked, "I hope that's work-related." Petitioner angrily responded that he was at lunch. Smith walked to the corner office to eat his lunch. Petitioner followed Smith, and closed the door. Petitioner said to Smith, "You have a problem." Smith responded, "I know I do. You." Petitioner replied that Smith was the problem, and that he was going to get himself into trouble. Petitioner said, "I'm telling you. (pause) You're out of control. I'll leave it at that." (Resp. Exh. 13) Petitioner returned to his desk. After a moment, Smith walked to Petitioner's desk, and told him, "Whatever you're planning to do, you might as will [sic] go ahead and do it. I'm getting tired of your threats." Petitioner responded, "What threats?" (Resp. Exh. 13; Smith hearing testimony)

74. Petitioner's conduct left Smith feeling that he had to face a battle every day that he went to work. He felt burdened, and that he was working through a dark time. (Smith hearing testimony)

75. On March 22, 2010, Smith checked the daily schedule and thought that client D.W. had not been seen. Smith checked to see if there was any data that would confirm whether the client had been seen. When he could not find any evidence that the client had been seen, he called the client's cell phone number. While Smith was on the telephone, Petitioner stated, "I saw him already." Smith attempted to confirm that Petitioner had seen the client by asking Petitioner, "You saw him?" Petitioner answered back in an insubordinate tone, "That's what I told you already." Smith asked Petitioner if he had entered any data into the system, and Petitioner responded with a "smart remark." Smith stepped into Petitioner's cubicle, and asked if they were going to have a problem over this. Petitioner advised that he had not entered any data since he was planning to open a case management file on the client. Smith replied "Okay. But it's better to update the screens while the client is sitting with you." Petitioner replied, "You know what. Maybe you need to do your own job. There's a couple of veterans on the schedule." Smith responded, "Larry, you don't tell me what to do." Petitioner replied, "I'd appreciate it. . . I'd appreciate it if you'd leave my office." (Resp. Exh. 14; hearing testimony)

76. On March 24, 2010, Danny Alston returned to work from sick leave. Smith issued a memorandum to Petitioner requesting him to stop interfering with the processes at the reception desk, especially early in the morning when the first clients arrive. He advised Petitioner that the front desk is a very chaotic environment, and the receptionists do not need any assistance or distractions by staff. It is best for everyone, including the clients, to let the receptionists do their jobs, and to wait until veterans are placed on the schedule before calling clients to their [employees'] desks for service. (Resp. Exh. 15) Petitioner responded by email, noting that Smith's memorandum had accused him of unacceptable behavior practices manifested at the receptionist desk, and he felt such allegations were unfounded, invalid, and "a desperate attempt to defame my character and reputation." Petitioner requested a detailed explanation of what he had done wrong. Mr. Smith responded to Petitioner's email, stating he was not required to explain his request, and that Petitioner may appeal Smith's decision to Alston. (Resp. Exh. 15)

77. On March 24, 2010, Ms. Jones informed Danny Alston regarding the recent office incidents regarding Petitioner's personal conduct. Smith, Alston, and Jones discussed the recent incidents that had occurred with Petitioner, and Petitioner's employment status. They concluded that Petitioner should be recommended for separation from employment, and not made a permanent employee. They sent their recommendation through Jones' supervisory chain-of-command, and subsequently, received approval to separate Petitioner from employment.

78. Once Jones received notification that they could move forward with separating Petitioner from employment, she worked with Gloria Butler, Employee Relations Manager, to develop a letter to notify Petitioner of his separation from his probationary employment.

79. On March 31, 2010, Danny Alston delivered a letter to Petitioner advising him that Respondent was separating Petitioner from probationary appointment for unacceptable personal conduct as Petitioner had "exhibited personal conduct that "was not conducive to the operations and standards" and "failed to demonstrate the ability to take directions from your immediate supervisor." (Resp. Exh. 18)

80. On April 1, 2010, Petitioner went to Respondent's office in Raleigh, NC, where he and others met with Manfred Emmrich, Director of Employment Services, and Stephanie Beard, Deputy Human Resources Director. Petitioner shared his concerns with Emmrich, explaining that he had been working in a hostile workplace and that discrimination had occurred. Emmrich told Petitioner that he would look into what he told him, but he would not be conducting a formal investigation as the Human Resources Department would conduct the official investigation.

81. On April 22, 2010, Petitioner completed an Employee Grievance Form, and submitted it to Stephanie Beard. Petitioner alleged that he had been dismissed, and discriminated against based on race. Petitioner also left evidentiary documents with Beard related to his grievance. (Resp. Exh. 29)

82. Respondent has an Equal Employment Opportunity (EEO) Office that investigates discrimination complaints under Title VII of the Civil Rights act and matters such as claims of unlawful workplace harassment. Respondent also has an Employee Relations Office, which is separate from EEO. Employee Relations handles personnel claims that can include claims of discrimination. These claims are handled through a process that includes a grievance review panel.

83. Beard allegedly left Petitioner's Employee Grievance Form and documents in the EEO office for Glenda Ellerbee, who was the EEO representative at that time. Since Ellerbee was not in her office, Beard could not personally hand any of these evidentiary documents to Ellerbee. Ellerbee left for vacation the next day.

84. While some of Petitioner's documents may have been left in Ellerbee's office, Ellerbee claimed she never received Petitioner's Employee Grievance Form. Had she received it, she would have conducted an investigation.

85. Respondent addressed Petitioner's internal grievance through its Employee Relations Policy. Consistent with the Employee Grievance Form that Petitioner submitted, and as allowed by policy, Petitioner's grievance started at step 2 with Deputy Director Lane Dyer. (Resp. Exhs. 24, 25, 26) On April 19, 2010, Deputy Director Lane Dyer upheld management's decision to separate Petitioner from employment. (Resp. Exh. 27)

86. On May 13, 2010, a grievance panel conducted a Step 3 hearing on Petitioner's grievance. As the employee relations manager, Gloria Butler served as a facilitator and the source of policy and procedure information for the panel, the grievant, and the management representative, Patsy Jones. The panel heard testimony from Petitioner, management representative Patsy Jones, and other employees. (Resp. Exhs. 28, 30, 31, 33) On May 17, 2010, the grievance panel determined that Petitioner failed to present clear and convincing evidence to support his discrimination claim.

87. By decision dated June 2, 2010, Respondent's Chairman notified Petitioner that she was accepting the grievance review panel's report, and upholding the decision not to offer permanent employment to Petitioner as a DVOP I with the Greenville office. (Resp. Exh. 34)

D. Discrimination and Retaliation Claims

88. At hearing, Petitioner alleged that Respondent denied him a "promotion" during employment and/or terminated Petitioner from his job due to discrimination and/or retaliation based on race, religion, color, and political affiliation.

89. At hearing, Petitioner's witnesses described the Greenville local office as an office environment where clients were not happy with the way the receptionist treated them. Witnesses generally described how Bambi Oliver talked to clients in a discourteous manner, and how Oliver gave the impression that whatever she was doing or whomever she was talking with, was more important than the clients waiting to be helped by the receptionist, and waiting for services.

90. Angela Moore is an African-American female who works in Admissions and Registration at Pitt Community College in Greenville, NC. From July 2009 through March 2010, Ms. Moore visited the Greenville office approximately three or four days per month, for about 10-15 minutes each visit. During those visits, Ms. Moore heard and saw some clients in the local office complain about the length of time they waited for services. She also heard clients comment that it looked like the local office needed more help.

91. At hearing, Ms. Moore conceded that she was aware that some clients were just complainers. She thought there may have been fewer client complaints if the receptionist on duty had been more attentive to the clients. Moore described the Greenville office environment as an unpleasant atmosphere, although she did not attribute that atmosphere to racism. Moore spoke with Danny Alston on occasion at the Greenville office, but never told Alston that she thought the atmosphere was unpleasant. Moore described Danny Alston as a “quiet and laid back” person.

92. Tara Weldon is an African-American female who visited the Greenville office in either 2009 or 2010. During that visit, Weldon saw over 15 clients standing in line for services. The clients in line were racially diverse, consisting of African-Americans, Caucasians, and Latinos. Weldon observed and heard a receptionist speak in a nasty manner to a man who was waiting in line for services. At the same time, Weldon acknowledged that the receptionist spoke to all the clients in the same way or tone.

93. Randolph Griffin is an African-American male who visited Respondent’s Greenville office since 1987. He also observed a receptionist talk to clients in a discourteous manner. On at least one occasion, in the last five years, he heard the receptionist use an elevated voice when she asked an African-American male, “Yes, may I help you.” Griffin thought the receptionist addressed the man in a discourteous manner. After the man responded, Griffin heard the receptionist state, “Okay. Just put your Social Security number in.” The next person in line was a Caucasian. Griffin thought the receptionist’s tone of voice changed when she spoke to the Caucasian person.

94. From May 2008 through April 2009, Clayton Jarvis Worsley, an African-American male, worked for the Mid-East Commission’s Title V program in office space in Respondent’s Greenville office. During that time, Petitioner also worked for the Mid-East Commission’s Title V program, and supervised Worsley. Worsley performed receptionist duties while working in the Greenville local office. Worsley felt Caucasian staff members “scorned” him by making derogatory looks or comments towards him. Worsley advised Danny Alston about these concerns. Alston explained to Worsley that that treatment comes with the job. As a receptionist, you are going to get people that are not happy, and that are not nice. (T. pp. 1376-77) While Worsley complained to Alston how clients walking in the door were not nice to him, Worsley never told Alston that he was having a problem with any of the staff. (T. pp. 1376-77)

95. From July 2009 through March 2010, Henry Lee Hardison, an African-American male, visited Respondent’s Greenville office. On one occasion, Hardison visited the office after he had received a letter, from which he understood, that he was eligible for emergency

unemployment benefits. He took the letter with him when he visited the Greenville office. He met with a woman who told him that he was not eligible for benefits. Later, Hardison received another letter that caused him to believe that he was eligible for emergency unemployment benefits. He again visited the Greenville local office. An elderly man at the reception desk directed him to staff member Heidi Tallman. Ms. Tallman is Caucasian. Tallman reviewed the letter, and told Hardison that he was not eligible for unemployment benefits. When Hardison asked if he could talk to someone else, Tallman told him to get out of the office. Instead of returning to the elderly man at the reception desk, Hardison “lost [his] cool,” “raised a ruckus,” and was escorted out of the office.

96. Alichia McKoy is an African-American female who worked in Respondent’s Greenville office from August 26, 2008 through February 25, 2011. On or about October 2009, employee Heidi Tallman became frustrated while trying to help an African-American male client. Ms. McKoy stepped in to assist. Tallman remarked to McKoy, “Maybe you can speak ignorant better than I can.” McKoy felt Tallman’s remark could have been racially motivated. McKoy spoke to her claims supervisor Glenda Creech, coworker Nicole Needham, and possibly Petitioner about the incident. Eventually, McKoy also spoke with Tallman about the remark. Tallman explained that she had not meant anything racial by her remark, and apologized to Jackson for making the remark. After that, Tallman and McKoy moved on in their relationship as coworkers.

97. On another occasion at work, Ms. McKoy became concerned that Heidi Tallman was trying to get McKoy into trouble, and attempting to display supervisory authority over her. Tallman had helped train McKoy for her job. Ms. Tallman advised Glenda Creech, McKoy’s supervisor, about errors McKoy had made in her work, instead of addressing the matter with McKoy. McKoy told Creech that she was concerned that Tallman was trying to get her into trouble. Creech explained that it is natural for anybody who is training another person to come to her (Creech) if there is an error, so that Creech can address it. Ultimately, McKoy understood that Tallman treated McKoy a certain way, because Tallman was older than McKoy, and was taking McKoy “underneath her wing.”

98. At hearing, McKoy acknowledged that her initial concerns about the presence of racism in the Greenville local office were at least, in part, attributable to Petitioner. At the beginning of her employment in the Greenville office, Petitioner advised McKoy to be careful what she learned, and not to learn too fast, as she would be treated a certain way if she showed she was smart. Petitioner shared with McKoy his belief that Caucasians showed a superior attitude, and wanted to belittle her. He brought non-work related material to work that he encouraged her to read. Petitioner asked McKoy whether what she read showed Caucasians with a superior attitude.

99. McKoy described how Petitioner interfered with McKoy’s ability to get her work done. Since Petitioner was an older man, McKoy wanted to show Petitioner respect. As time went on, McKoy realized that some of the tension she had been under at work stemmed from her own feelings of insecurity about her new job, and were not due to racism.

100. One Halloween before Petitioner was employed with Respondent, some employees came to work dressed in Halloween costumes. Danny Alston participated, and reported to work in a Halloween costume. During the workday, someone taped a picture of a black devil to the front of employee Sharon Coleman Jackson's cubicle. Jackson is an African-American female who did not dress up for Halloween that day. Jackson was offended by the black devil picture. Danny Alston removed the picture from Jackson's cubicle, and threw the photo away. He questioned others in the office to determine who left the picture in Jackson's cubicle, but was unable to determine who was the offender. He thought the action was inappropriate, and an isolated incident that he did as much as he could, and within his control, to remedy. (T. pp. 1391-92)

101. At hearing, Ms. Jackson described an incident in the office where employees felt afraid to sign a petition to resolve an ongoing telephone problem. The office's telephone system was outdated, and consisted of eight (8) telephone lines. Staff who answered the phones, sent phone calls directly to the employees' direct telephones, which interrupted employees trying to do their work. A committee was formed to come up with a solution to the telephone problem. Glenda Creech and Petitioner were among the employees on the committee. Since the committee could not agree on resolution of the telephone problem, and tabled the issue. The evidence at hearing showed that the committee disbanded, because they could not agree on a resolution of the telephone problem, not because employees were afraid to sign a petition.

102. At hearing, Ms. Jackson alleged that she had been the victim of racial discrimination involving another job offer in the Greenville office. Danny Alston was instructed to start a sort of re-employment initiative program, known as REA program, to help unemployed people go back to work. Alston needed someone to start the program immediately. He offered Jackson the opportunity to operate the program, but advised Jackson that she would be required to attend training the next week. Jackson declined the opportunity. After Jackson declined the job, Alston offered the job to a Caucasian female employee who accepted the job.

103. Jackson claimed that Alston discriminated against her, because Alston arranged for the Caucasian employee to get a travel advance that would enable her to go take the training necessary to run the program, but did not offer Jackson the same advance that would have allowed her to take the training. (T. pp. 1396-97) However, a preponderance of the evidence established that the travel advance was not the reason that Jackson declined the opportunity to operate the program. Jackson told Alston that she was declining the job, because she would have a problem arranging childcare, so that she could attend the required training out of town. (T. pp. 1396-97)

104. As Region V manager, Patsy Jones was responsible for the management of eleven (11) local offices and three (3) branch offices in 24 counties in the northeastern part of the State.

105. Jones had a "No Eating" at your desk policy for all of her offices. Jones thought it was unprofessional for an employee to eat at his or her desk with customers in the building. Jones also thought that eating at the desk posed a health concern of spreading germs. She thought that it was better for employees to go to the break room for meals, and that by doing so, it also gave staff the opportunity to regroup, and refresh. (T. p. 1816-17)

106. Alston had allowed employees to stray from the “No Eating” at the desk policy. He allowed people to eat a biscuit at their desk while reading their email from 8:00am to 8:30 am. In addition, other employees surreptitiously ate at their desks during the day.

107. At one point during Petitioner’s employment, Jones visited the local office, and spotted both Petitioner and Bill Byrd, a Caucasian male employee, eating at their desks. Jones told Byrd that he could not eat at his desk. Jones also addressed the matter with Alston. After that, management reminded employees about the “No Eating” policy during a staff meeting, and management sent an email to all employees regarding the policy. (T. pp. 1398-1399, 1816-17) The policy applied to all staff in the Greenville office, including Mr. Alston, and in every office in Region V. (T. p. 1399, 1816-17) Jones did not change the employees eating at their desk policy, because Petitioner was allegedly “smacking” at his desk.

108. At some point, the Greenville local office lost the contract to operate the WIA program. The Greenville office had operated a dislocated workers program, and a stimulus program under the WIA contract. Both programs served dislocated workers. While the Greenville office met the goals that had been established under the program, it lacked compliance with policy when a participant was authorized to go to school under the program, before all the necessary information was keyed into the system. The problem that caused the Greenville office to lose the contract was not an unusual problem among the operators of WIA programs. The Greenville office did not lose the WIA contract due to discrimination based on race, color, religion, or anyone’s political affiliation occurring in the Greenville office. Nor did the problems with the WIA program, or loss of the WIA contract, involve Petitioner.

109. A preponderance of the evidence established that several of Respondent’s employees, especially Jack Smith and Petitioner, exhibited poor, disrespectful, and unprofessional behavior towards each other in the Greenville office. Bambi Oliver and Jack Smith did not get along with Petitioner due to their strong personality conflicts with Petitioner. Although Petitioner presented specific complaints showing Bambi Oliver’s unprofessional and sometimes rude treatment of clients and other staff members, Petitioner failed to prove by a preponderance of the evidence proved that Ms. Oliver treated him differently due to his race, color, religion, or political affiliation.

110. Based on Petitioner’s demeanor, tone of voice, and the manner by which Petitioner conducted himself during the contested case hearing, it is unreasonable and not believable that Petitioner was harassed or intimidated by anyone in the Greenville local office.

111. Petitioner failed to prove by a preponderance of the evidence that Respondent’s management discriminated against him or retaliated against him, based on his race, color, religion, or political affiliation when it decided to separate him from probationary employment.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings as the Office of Administrative Hearings has subject jurisdiction over this case, and over the parties.

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 considered without regard to the given labels.

3. Under N.C. Gen. Stat. § 126-34.1(a), a State employee may file a contested case petition in the Office of Administrative Hearings on the grounds that a state agency has discriminated and/or retaliated against him based on one's race, color, political affiliation, or religion.

4. In this case, Petitioner alleged that Respondent (1) discharged him from employment without just cause, and (2) discriminated against Petitioner by denying him a promotion and/or terminating him from employment based on Petitioner's race, color, religion, and political affiliation.

A. Discharge Without Just Cause Claim

5. The undersigned dismissed this claim in open Court as Petitioner was a probationary employee, and not a "career State employee," as that term is defined in N.C. Gen. Stat. § 126-1.1, when Respondent separated Petitioner from employment. Since Petitioner was not a "career state employee," Petitioner's just cause claim was not properly before the Office of Administrative Hearings, and the Office of Administrative Hearings lacked subject matter jurisdiction over such claim.

B. Discrimination and Retaliation Claims

6. The courts of North Carolina look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases. The United States Supreme Court has held that the "when the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' Title VII is violated." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)(quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)).

7. In a racial discrimination case, the North Carolina Supreme Court set forth the following standards: (1) The claimant carries the initial burden of establishing a prima facie case of discrimination; (2) The burden then shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection; (3) If a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination. *Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 686-87 (1998)(citing *North Carolina Dep't of Correction v. Gibson*, 308 N.C. 131, 137 (1983)).

8. In the typical race discrimination case, however, direct evidence of discriminatory motive is not present, and the employee must rely on circumstantial evidence to prove

discriminatory intent, using the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

9. Under *McDonnell Douglas*, a plaintiff establishes a prima facie case of race discrimination by showing: (1) he belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly-situated employees outside his classification more favorably; and (4) he was qualified to do the job. *Id.* at 802. Likewise, our NC Supreme Court has held that the burden of establishing a prima facie case of discrimination may be accomplished by a variety of means, including showing that (1) a claimant is black, (2) he was qualified for the position, (3) he was discharged, and (4) a white employee was retained under apparently similar circumstances. *Gibson*, 308 N.C. at 137.

10. The ultimate question in a discrimination case is whether the plaintiff was the victim of intentional discrimination. *North Carolina Department of Correction v. Gibson*, 308 N.C. 131, 136-47, 301 S.E.2d 78, 82-88 (1983)

11. To prove a prima facie case of retaliation based on discrimination, Petitioner must show that: (1) he engaged in a protected activity, (2) his employer took an adverse employment action against him, and (3) a causal connection existed between the protected activity and the asserted adverse action, *King*, 328 F.3d at 150-151.

12. In this case, Petitioner failed to establish by a preponderance of the evidence that Respondent discriminated or retaliated against him, based on his race, and color, when Respondent separated Petitioner from employment. Specifically, Petitioner failed to prove Respondent treated Petitioner differently than similarly-situated employees who were not of Petitioner's same race, and color. Petitioner presented no evidence that Respondent discriminated or retaliated against him based on Petitioner's political affiliation, and based on Petitioner's religion.

13. The preponderance of the evidence proved that Respondent separated Petitioner from his probationary employment as Petitioner engaged in unprofessional, disrespectful conduct that rose to the level of being "unacceptable personal conduct" as that term is defined in 25 NCAC 01J .0614.

C. Remaining Claims

14. Pursuant to N.C. Gen. Stat. § 126-34.1 and -36, a State employee may file a contested case petition with the Office of Administrative Hearings alleging harassment in the workplace whether the harassment is based on the creation of a hostile work environment or upon a quid pro quo.

15. In filing a contested case petition with the Office of Administrative Hearings, Petitioner is required to state in his petition, the claims, grounds and facts tending to establish how the state agency named as the Respondent has harmed the Petitioner.

16. In this case, since Petitioner did not allege harassment via hostile work environment or quid pro quo in his petition, that claim is not before the Office of Administrative Hearings.

17. However, given the inordinate amount of time spent at trial on harassment or hostile work environment allegations, the Court will address such claims. In this case, Petitioner failed to prove by a preponderance of evidence that he was subjected to an unlawful workplace harassment through a hostile work environment or quid pro quo, based on his religion, color, race or political affiliation, while employed as a probationary employee in Respondent's Greenville office. Specifically, Petitioner failed to prove by a preponderance of evidence that he was subjected to harassment or a hostile work environment that was sufficiently severe or pervasive as to create an abusive working environment. (See *White v. Federal Exp. Corp.*, 939 F.2d 157 (4th Cir. 1991); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986))

18. 25 NCAC 1C .0404, and the Office of State Personnel, Personnel Manual, Employment and Records, Section 3, Page 1 provide:

Probationary Appointment

Individuals receiving initial appointments to permanent or time-limited permanent positions must serve a probationary period. The probationary period is an extension of the selection process, and provides the time for effective adjustment of the new employee or elimination of those whose performance will not meet acceptable standards. The maximum length of the probationary period shall be not less than three or more than nine months of either full-time or part-time employment from the actual date of employment.

19. 25 NCAC 1C .0402, and the Office of State Personnel, Personnel Manual, Employment and Records, Section 3, Page 2 provide:

Permanent Appointment

A permanent appointment is a permanent full-time appointment to a permanently full-time established position when the incumbent is expected to be retained in the position on a permanent basis. A permanent appointment shall be given when (1) the requirements of the probationary period have been satisfied, (2) an employee in a trainee appointment has completed all training and experience requirements, or (3) a time-limited permanent appointment extends beyond three years.

20. Under the above-cited regulations, the probationary period of an employee's employment is an extension of the agency's selection process in determining whether that agency will give that employee permanent status. In this case, since Petitioner was a probationary employee when he was separated from employment, and had not attained permanent status, he lacked standing to bring a claim that he was denied a promotion under N.C.

Gen. Stat. § 126-34.1. As such, the Office of Administrative Hearings lacked subject matter jurisdiction to hear that claim.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent did not discriminate or retaliate against Petitioner based on Petitioner's race, color, religion, or political affiliation.

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This 4th day of June, 2012.

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

Larry F Murphy
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Ayden, NC 28513
PETITIONER

Camilla F. McClain
Employment Security Commission
PO Box 25903
Raleigh, NC 27611
ATTORNEY FOR RESPONDENT

This the 5th day of June, 2012.

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