

STATE OF NORTH CAROLINA  
COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11OSP03245

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| Valerie Small<br>Petitioner,<br><br>v.<br><br>North Carolina Agricultural and Technical<br>State University<br>Respondent. | <b>DECISION</b> |
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The above-captioned case was heard before the Honorable J. Randall May, Administrative Law Judge, on February 12-15, 2013, in High Point, North Carolina.

**APPEARANCES**

**FOR PETITIONER:** David W. McDonald, Esq.  
Hicks McDonald Noecker LLP  
100 South Elm St., Suite 510  
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**FOR RESPONDENT:** Katherine A. Murphy  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602

**EXHIBITS**

**Admitted for Petitioner:**

| <u>Exhibit No.</u> | <u>Date</u> | <u>Document</u>   |
|--------------------|-------------|---|
| 1                  | 08/18/06    | PD-102R   |
| 2                  | 11/01/06    | Mediation and Grievance Policy and Procedures for SPA Employees     |
| 3                  | 11/09/06    | Letter from Valerie Small to Pat Chat re: position reclassification |
| 4                  | various     | Documents from Valerie Small's personnel file                       |

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| 5  | 12/01/06 | Email from Loleta Chavis to Lacy Deberry re: reclassification and grievance  |
| 6  | 12/01/06 | Email from Lacy Deberry to Valerie Small re: reclassification and grievance  |
| 7  | 12/01/06 | Email from Valerie Small to Valerie Small, with copies to Lacy Deberry, et al., re: RE: FORMAL ITT/HR GRIEVANCE LETTER Re: Valerie Small ITT/HR Grievance Letter |
| 8  | 12/05/06 | Email from Valerie Small to Lacy Deberry, et al., re: RE: FORMAL ITT/HR GRIEVANCE LETTER Re: Valerie Small ITT/HR Grievance Letter                               |
| 9  | 12/06/06 | Email from Valerie Small to Lacy Deberry re: RE: FORMAL ITT/HR GRIEVANCE LETTER Re: Valerie Small ITT/HR Grievance Letter  |
| 10 | 03/29/07 | Email from Vijay K. Verma to Valerie H. Small, et al., re: Valerie Small ITT/HR Grievance Letter   |
| 11 | 06/11/07 | Letter from Kenneth H. Murray to Mary Mims re: Title III grant support, with various other documents   |
| 12 | 08/03/07 | Employee Grievance and Appeal Filing Form  |
| 13 | 08/08/07 | Email from Valerie Small to Lacy DeBerry re: Grievance: Type of Appointment Conflict   |
| 14 | 08/15/07 | Email from Valerie Small to Lacy Deberry re: Grievance: Type of Appointment Conflict   |
| 15 | 08/17/07 | Letter from Mary Mims to Valerie Small re: Time Limited Appointment ending   |
| 16 | 04/15/11 | Personnel Form for Valerie Small   |
| 17 | 11/01/07 | NOTE TO FILE re: Valerie Small by Sheila Benton  |
| 18 | 10/29/07 | Letter from Dr. Sullivan A. Welborne Jr. to Valerie Small re: Pre-Disciplinary Conference for Unacceptable Personal Conduct                                      |
| 19 | 11/01/07 | Letter from Dr. Sullivan A. Welborne Jr. to Valerie Small re: disciplinary action  |
| 20 | 11/28/07 | Email from Mary Mims to Shirl B. Davis re: FW:FORMAL ITT/HR GRIEVANCE LETTER Re: Valerie Small ITT/HR Grievance Letter   |

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| 21 | 12/13/07 | Transmittal letter from Linda McAbee to Vijay Verma, with documents   |
| 22 | 11/29/07 | Document entitled "Summary of Information on Valerie Small" submitted by Shirl B. Davis   |
| 23 | 11/10/06 | Email from Rodney Harrigan to Valerie Small re: Valerie Small ITT/HR Grievance Letter   |
| 24 | 12/18/07 | Email from Linda McAbee to Vijay Verma re: Valerie Small  |
| 25 | 01/08/08 | Email from Ryan Maltese to Dr. Welborne re: Follow-Up, with handwritten notes   |
| 26 | 01/15/08 | Email from Linda McAbee to Sullivan Welborne, et al., re: Title III   |
| 27 | N/A      | Typed message to Linda from LC enclosing two draft letters related to the RIF situation   |
| 28 | 02/13/08 | Letter from Sullivan A. Welborne Jr. to William Clay re: situation involving Valerie Small  |
| 29 | 02/14/08 | Email from Vijay K. Verma to William Clay re: information you wanted me to put together for you regarding the RMS and the R25 Systems |
| 30 | 05/22/08 | Email from Linda McAbee to Valerie Small re: Question on Career Banding for Technical Employees                                       |
| 31 | 05/28/08 | Email from Valerie Small to Linda McAbee re: Question on Career Banding for Technical Employees, with handwritten notes               |
| 32 | 06/12/08 | Email from Linda McAbee to Valerie Small re: Question on Career Banding for Technical Employees                                       |
| 33 | 06/12/08 | Email from Linda McAbee to Valerie Small re: Question on Career Banding for Technical Employees                                       |
| 34 | 06/26/08 | Email from Valerie Small to Linda McAbee, et al., re: Request copy of HR File ASAP  |
| 35 | 07/09/08 | Letter from Linda McAbee to Leonard Jones re: Position No. 5271, with various other documents   |
| 36 | 07/17/08 | Email from Valerie Small to Dr. Welborne re: July 16, 2008 Incident   |
| 37 | 07/21/08 | Memorandum from Leonard Jones to Valerie Small re: Investigatory Status with Pay  |

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| 38 | 08/28/08                   | SPA Employee Grievance Form   |
| 39 | 07/31/08                   | Letter from Leonard Jones to Valerie Small re: pre-disciplinary conference  |
| 40 | 08/01/08<br>to<br>08/15/08 | Employee Time Record (Form PD-113)  |
| 41 | 08/05/08                   | Communication from Valerie Small to Leonard Jones re: Response to Pre-disciplinary Hearing certified letter received on July 31, 2008                                       |
| 42 | 08/19/08                   | Memorandum from Dr. Sullivan A. Welborne, Jr. to Valerie Small re: position reassigned to supervision of Ryan Maltese   |
| 43 | 08/20/08                   | Memorandum from Linda McAbee to Valerie Small re: Career-Banded Position Crosswalk and Legislative Increase   |
| 44 | 09/04/08,<br>09/05/08      | Transmittal from Linda McAbee to Drake Maynard re: Request for Position Analysis, and Memorandum from Ryan Z. Maltese to Linda McAbee re: Change in Position Identification |
| 45 | 03/29/10                   | Email from Lisa Warren to Ryan Maltese re: Security and /userids/passwords Request: Update Division of Student Affairs Departmental Websites with mission statements        |
| 46 | 2010                       | Personnel information of new hires  |
| 47 | 03/18/11                   | Exit Interview Form for Valerie Small   |
| 48 | various                    | State Personnel Manual – various policies   |
| 49 | 03/14/11                   | SPA Layoff Selection Analysis Worksheet   |
| 50 | 03/15/11                   | Memorandum from Ryan Maltese to Valerie H. Small re: Notification of Separation Due to Layoff   |
| 51 | 03/15/11                   | Reduction in Force Plan (first page)  |
| 52 | Oct. 2006                  | Applications / The Division of Information Technology & Telecommunications  |
| 53 | 03/17/11                   | Petition for a Contested Case Hearing   |
| 54 | 03/29/11                   | Email from Todd L. Butler to Valerie Small re: Status on Receiving Requested Information for Employee Relations and Grievance   |

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| 55 | 03/29/11   | Email from Todd L. Butler to Valerie Small re: Request for all evaluations   |
| 56 | 03/31/11   | Reduction in Force Plan (second page)  |
| 57 | N/A        | Performance Evaluation for Valerie Small – September 15, 2003 to April 30, 2004  |
| 58 | 06/22/05   | Performance Evaluation for Valerie Small – May 1, 2004 to April 30, 2005   |
| 59 | 05/24/06   | Performance Evaluation for Valerie Small – May 1, 2005 to April 30, 2006   |
| 60 | 05/25/07   | Performance Evaluation for Valerie Small – May 1, 2006 to April 30, 2007   |
| 61 | 05/27/09   | Performance Evaluation for Valerie Small   |
| 62 | N/A        | Performance Evaluation for Valerie Small   |
| 63 | 01/04/12   | Position Posting   |
| 64 | 12/21/11   | Position Posting   |
| 65 | 06/16/11   | Email from Valerie Small to Lois Norris re: Requesting use of Priority Re-employment Status at North Carolina A&T See Attachment |
| 66 | 01/27/12   | Letter from Rashandra Lowery to Valerie Small re: Public Records Request dated January 18, 2012, with documents                  |
| 67 | March 2007 | Response to Internal Review and Audits   |
| 68 | June 2010  | Performance Audit  |
| 69 | 11/2       | Handwritten Notes: “Valerie Small”   |
| 70 | 05/07/12   | Email from Todd L. Butler to Larry Williams re: Personnel File   |
| 71 | 08/26/03   | Qualification Work Sheet   |
| 72 | 03/14/11   | Fax cover sheet from Dr. Melody C. Pierce to Linda McAbee, with various documents attached                                       |
| 73 | 07/28/09   | Order entered in case of Patrice Bernard v. North Carolina A&T State University, 08 CVS 13385                                    |
| 74 | 09/03/09   | Campus Police Incident/Investigation Report and other documents  |

**Admitted for Respondent:**

| <u>Exhibit No.</u> | <u>Date</u>                | <u>Document</u>   |
|--------------------|----------------------------|---|
| 1                  | 06/24/10                   | Email from Ryan Maltese to Ellis, et al., re: Going Forward Regarding R25 Concerns  |
| 2                  | 02/22/11                   | R25 Support Notes   |
| 3                  | 03/09/11                   | R25 Support Notes   |
| 4                  | 03/14/11                   | Memorandum from Melody C. Pierce to Linda McAbee re: Valerie H. Small – Reduction in Force  |
| 5                  | 09/24/03<br>to<br>10/20/03 | Documentation of temporary appointment of Valerie Small   |
| 6                  | 12/01/04                   | State of North Carolina Salary Plan (excerpt)   |
| 7                  | 08/26/03                   | Position Announcement   |
| 8                  | 01/13/04                   | Documentation of appointment of Valerie Small to Data Base Software Analyst position  |
| 9                  | 02/18/04<br>to<br>09/29/06 | Documentation of extensions of appointments of Valerie Small to Data Base Software Analyst/Applications Analyst Programmer I position       |
| 10                 | 02/01/06                   | Documentation of Crosswalk of Valerie Small's position from Applications Analyst Programmer I to Business & Technology Applications Analyst |
| 11                 | 03/12/07                   | Letter from Vanessa Lawson to Valerie Small re: career-banding  |
| 12                 | 10/01/07                   | Documentation of horizontal transfer of Valerie Small   |
| 13                 | 06/12/08                   | Email from Linda McAbee to Valerie Small re: Question on Career Banding for Technical Employees   |
| 14                 | 08/19/08                   | Memorandum from Dr. Sullivan A. Welborne, Jr., to Valerie Small re: reassigned position responsibilities to the supervision of Ryan Maltese |
| 15                 | 03/15/11                   | Reduction in Force Plan for Valerie Small   |
| 16                 | 11/01/06                   | Mediation and Grievance Policy for SPA Employees  |
| 17                 | 03/30/09                   | Reduction in Force (RIF) Policy   |

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| 18 | 03/15/11                   | Memorandum from Ryan Maltese to Valerie H. Small re: Notification of Separation Due to Layoff  |
| 19 | 01/30/07                   | Email from Vijay K. Verma to Valerie Small re: Follow up to our two conversations – this afternoon and last week                         |
| 20 | 07/31/07                   | Letter from Vanessa Lawson to Valerie Small re: Time-Limited Appointment ending  |
| 21 | 08/08/07<br>to<br>09/14/07 | Email exchange among various people re: Grievance: Type of Appointment Conflict  |
| 22 | 08/08/08                   | Letter from Leonard Jones to Valerie Small re: disciplinary action   |
| 23 | 08/02/07                   | Email from Valerie Small to Lawson, et al., re: Grievance: Type of Appointment Conflict, with attached Grievance and Appeal Filing Forms |
| 24 | 03/01/11                   | State Personnel Manual – Reduction in Force  |
| 25 | 09/04/08                   | Memorandum from Ryan Z. Maltese to Linda McAbee re: Change in Position Identification  |

**WITNESSES**

**Called by Petitioner:**

Valerie Small  
Patrice Bernard

**Called by Respondent:**

Barbara Jean Ellis  
Melody Pierce  
Linda McAbee

**ISSUE**

Whether the selection of Petitioner’s position for elimination pursuant to a reduction in force (“RIF”) was due to discrimination based on race or sex and/or retaliation.

ON THE BASIS of 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 these findings, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to: the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about

which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

### **FINDINGS OF FACT**

1. Petitioner Valerie Small was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes.
2. Respondent North Carolina Agricultural and Technical State University (“NCA&T”) is subject to Chapter 126 and was Petitioner’s employer.
3. Petitioner was hired by Respondent in a temporary appointment, effective September 2, 2003, through December 2, 2003 (later extended to December 31, 2003). The appointment letter to Petitioner reflected a job title of “Data Base Software Analyst,” while the classification title entered on the associated personnel form completed by Respondent was “Applications Analyst Programmer I.” **T pp. 516-18; Resp. Ex. 5**
4. Petitioner’s personnel forms reflect that she was hired into position number 6070-0000-0009-566 (“Position No. 9-566”), which was classified by Respondent as “Applications Analyst Programmer I.” **T pp. 516-18, 523-24; Resp. Ex. 5** The position was advertised, however, as a “Data Base Software Analyst,” with salary grade 76, and salary range of \$39,338 – \$65,370. **T pp. 524-25; Resp. Ex. 7**
5. Petitioner was later offered a “Time-Limited / Grant Funds” position effective January 12, 2004. The letter to Petitioner confirming this appointment referred to the position as a “Data Base Software Analyst,” with an annual salary of \$60,000. Petitioner signed the letter confirming her acceptance of the “Data Base Software Analyst Position” on January 12, 2004. The personnel form entered by Respondent to effectuate the action shows that the time-limited position had the same position number as the temporary position into which Petitioner was first hired, Position No. 9-566, with the classification title “Applications Analyst Programmer I.” **T pp. 315, 528-30; Resp. Ex. 8**
6. On February 18, 2004, Petitioner was sent a communication confirming her appointment from a temporary full-time employee to a probationary time-limited full-time employee in the position of “Data Base Software Analyst” with salary grade 76. The initial period, subject to renewal, was January 1, 2004, through September 30, 2004. The communication also reflected Petitioner’s current status as having the classification of “Applications Analyst Programmer I,” with salary grade 76, and an annual salary of \$60,000. **T pp. 535-37; Resp. Ex. 9**
7. Petitioner received an extension of her time-limited employment in her position for the period from October 1, 2004, through September 30, 2005. The letter confirming the extension, dated November 1, 2004, referred to Petitioner’s position as “Applications Analyst Programmer I.” **T pp. 538-39; Resp. Ex. 9**



8. Petitioner received another extension of her time-limited employment in her position for the period from October 1, 2005, through September 30, 2006. The letter confirming the extension, dated October 27, 2005, referred to Petitioner's position as "Applications Analyst Programmer I." **T pp. 539-40; Resp. Ex. 9**
9. The State of North Carolina Salary Plan, issued by the Office of State Personnel ("OSP"), effective December 1, 2004, lists both the classification title of "Data Base Software Analyst" and the classification title of "Applications Analyst Programmer I." Both have the same salary grade of 76, and both have the same hiring salary of \$40,338 and maximum salary of \$67,004, so in terms of Petitioner's pay, they are equivalent. One of Petitioner's contentions is that she was hired as a Data Base Analyst. According to the Salary Plan, the position with classification title "Data Base Analyst" has a salary grade of 80, a hiring salary of \$48,289, and a maximum salary of \$80,568. This latter position is not equivalent to "Data Base Software Analyst." **T pp. 17, 521-22; Resp. Ex. 6**
10. Although there seems to have been some discrepancies in the way the University initially referred to Petitioner's position, the two titles "Data Base Software Administrator" and "Applications Analyst Programmer I" appear to be refer to classifications of an equivalent level. The University always referred to the position as having salary grade 76, which is a correct attribute of both positions. Furthermore, beginning with the appointment confirmation letter sent to Petitioner in 2005, the University consistently referred to Petitioner's position as an "Applications Analyst Programmer I." Therefore, the undersigned finds that Petitioner was, or should have been aware, that she was hired into a position with salary grade 76, and that she was not hired into a the position of "Data Base Analyst," a position with a salary grade of 80.
11. Respondent began the process of converting positions from the graded classification system to career banding in 2006, beginning with the job families of IT and police and public safety. As part of the conversion process, effective February 1, 2006, Petitioner's position was cross-walked from "Applications Analyst Programmer I" to "Business and Technology Applications Analyst," with no change in the position number, and no change in Petitioner's salary, or the funding duration of her position. The cross-walking of positions was done without regard for any employee in any particular position: It was a mapping, created by OSP, which translated each position in the old classification system to a position in the new classification system. **T pp. 541-50; Resp. Ex. 10**
12. Petitioner's time-limited appointment was extended again from October 1, 2006, through September 30, 2007. The personnel forms for this last extension reflect the change to career banding: Petitioner's position, Position No. 9-566, is shown as having the classification title "Business and Technology Applications Analyst." **T p. 541; Resp. Ex. 9**
13. Petitioner was informed by letter dated March 12, 2007, that her position had been cross-walked from "Applications Analyst Programmer I" to "Business & Technology Applications Analyst," with no change in salary. **Resp. Ex. 11**

14. The grant project that had provided the funding for Petitioner's position was not renewed, so the funding for Petitioner's position did not extend past September 30, 2007. By letter dated July 31, 2007, Petitioner was informed that her employment with Respondent would come to an end as a result of the termination of the funding for her position. **T p. 361; Resp. Ex. 20**
15. Petitioner's position had been funded through Title III funds. Petitioner introduced a letter into evidence showing that the activity which had supported her position had not been included in the most recent Title III application. The letter was written by Kenneth H. Murray, the Associate Vice Chancellor for Academic Affairs & Title III Director, to Mary Mims, Special Assistant to the Provost and Vice Chancellor for Academic Affairs. **Pet. Ex. 11** Other than this letter, there is no evidence to show who made the decision not to include the activity in the application, and Petitioner has not made any allegations that either Dr. Murray or Ms. Mims discriminated or retaliated against her. Therefore, there is insufficient evidence to prove that the end of the funding for Petitioner's position was discrimination or retaliation by Respondent against Petitioner.
16. By email sent on August 2, 2007, Petitioner filed a grievance related to the end of her employment. By email sent on August 8, 2007, Petitioner filed an "upgraded grievance form." **Pet. Ex. 13** Respondent introduced two grievance forms from Petitioner, both dated August 3, 2007. **Resp. Ex. 23**
17. Petitioner stated in one of the grievance forms dated August 3, 2007, that because she had been employed in a time-limited position for more than three years, she was a permanent employee, and she requested as a remedy that the University acknowledge policies and procedures and recognize that it was required to find funding for her position. **Resp. Ex. 23** (NCA&T 00381) Under Respondent's grievance policy, this was not a grievable issue. **Pet. Ex. 2** In the other grievance form dated August 3, 2007, Petitioner added some allegations, including that the University was not recognizing her permanent status in retaliation for her having submitted a list of IT issues to the Chancellor and some of the Trustees. Petitioner added as a requested remedy that the University should recognize that the State does not tolerate retaliation. **Resp. Ex. 23** (NCA&T 00324); **Pet. Ex. 12**
18. Linda McAbee, who is currently the Vice Chancellor for Human Resources for Respondent, testified that in general, an employee in a time-limited position does not have the same rights as a permanent employee (career State employee). For example, if an employee in a time-limited position is reduced in force ("RIFed"), he or she is not entitled to severance pay or priority reconsideration. **T pp. 530-31** However, if a time-limited employee is employed continuously for three years or more, then under OSP rules and regulations, that employee acquires the same rights as a career State employee. Any employee, even a career State employee, can be RIFed, however. The issue is what rights the employee is entitled to in association with the RIF. **T pp. 555-56**
19. At the time the funding for Petitioner's position ran out, she had been employed with the University for more than three years. Thus, Petitioner had the same rights as a career State employee (e.g., severance pay, priority reemployment), but she could still have

been RIFed. Nevertheless, the University created a new position for Petitioner in the Division of Student Affairs. **T pp. 556-59; Resp. Ex. 12**

20. Even though Respondent had the legal right to terminate Petitioner's position when the funding ended, Loleta Chavis, an employee in Respondent's Human Resources Department, sent Petitioner an email dated September 11, 2007, in response to Petitioner's inquiry regarding the status of her grievance, in which Ms. Chavis assured Petitioner that they were working on finding a solution for Petitioner's continued employment. **Resp. Ex. 21** (NCA&T 00306)
21. Effective October 1, 2007, a new position with position number 6070-0000-0005-271 ("Position No. 5-271) was created in the Division of Student Affairs, and Petitioner was horizontally transferred from Position No. 9-566 to the new Position No. 5-271. The newly created position had the same classification as Petitioner's former position (Business & Technology Applications Analyst), and Petitioner experienced no lost time in the transition, nor did her salary change. **T pp. 555-59, 560-62; Resp. Ex. 12**
22. There is nothing in the record to show that Petitioner disagreed with or complained about this response to her August 3, 2007 grievances. In particular, there is nothing to show that Petitioner made any attempt to move forward in the grievance process with respect to these grievances after she was transferred to the new position.
23. On November 1, 2007, Petitioner was disciplined by Dr. Sullivan A. Welborne, Jr., the Vice Chancellor for Student Affairs, for unacceptable personal conduct, and received a one-week suspension without pay. The reason for the disciplinary action was that Petitioner had accessed confidential personnel information outside of her job responsibilities. Petitioner acknowledged her conduct, but stated that she had accessed the information in order to help a co-worker. **T p. 369; Pet. Ex. 19** The unauthorized access of personnel information occurred in August, but the disciplinary action did not begin until October, after Petitioner had been transferred to Student Affairs. **Pet. Exs. 17-19**
24. Petitioner testified that she grieved the disciplinary suspension, but could not recall when she filed a grievance, and did not put a grievance form related to this suspension into evidence. **T p. 368** Petitioner did introduce into evidence an email dated June 26, 2008, which Petitioner sent to Linda McAbee, who was then the Vice Chancellor for Human Resources, and others, in which Petitioner requested that the "reprimand for Breach of Security" be removed from her file and she asked how she should go about doing so. **Pet. Ex. 34** Under Respondent's grievance policy, any grievance Petitioner might have filed at this point, more than seven months after the disciplinary action was taken, would have been untimely. **Pet. Ex. 2**
25. Following her suspension, Petitioner began reporting to Leonard Jones, who was the Director of Housing, in the Division of Student Affairs. **T p. 118**

26. Linda McAbee was hired by Respondent to be its Vice Chancellor of Human Resources, in November of 2007. At the time Ms. McAbee was hired, Petitioner was working as a Business & Technology Applications Analyst, Position No. 5-271, in the Division of Student Affairs, under Mr. Jones. **T pp. 514, 562**
27. In June 2008, Ms. McAbee was copied on some email correspondence between Petitioner and employees in the Human Resources Department concerning Petitioner's belief that her position had been overlooked for market value increases. When Ms. McAbee attempted to clarify for Petitioner that her position was considered for market value, but that Petitioner did not qualify, Petitioner then raised a host of issues related to events that had transpired prior to Ms. McAbee's arrival at the University. Petitioner's new supervisor, Leonard Jones, was supposed to conduct a performance evaluation of Petitioner; however, Petitioner claimed that she could not be properly evaluated by Mr. Jones because her position had been misclassified. **T pp. 562-70; Resp. Ex. 13**
28. The basis for Petitioner's claim that her position was misclassified was her contention that her position had been reclassified in 2006. The evidence regarding Petitioner's alleged reclassification demonstrates the following:
- (a) A PD-102R form, which was used under the former OSP graded classification system by a supervisor to request review of a position classification, had been signed by Sam Harrison, who was the Associate Vice Chancellor for IT, on August 17, 2006, and by Rodney E. Harrigan, who was the Vice Chancellor for IT, on August 18, 2006, as well as by Petitioner. This document is not in the form of a contract; rather, the signatures attest to the signatory's belief that the information provided is accurate. **T pp. 324-26, 571; Pet. Ex. 1**
  - (b) Petitioner claimed that by virtue of this signed PD-102R form, she had been promoted to the position of "Data Base Administrator." **T pp. 27-28**
  - (c) In 2006, the paperwork from a supervisor requesting that a position be reclassified would have had to be approved by Human Resources at the University, and then sent to OSP for approval. Ms. McAbee found no evidence that either of these things had happened with respect to Petitioner's position. On the contrary, all of the University's paperwork reflected that Petitioner had been in Position No. 9-566 from September 2003 until October 1, 2007, and that this position was classified as an Applications Analyst Programmer until it was cross-walked to the career-banded equivalent of Business & Technology Applications Analyst in 2006. **T pp. 572-77; Resp. Exs. 5, 8-10**
  - (d) Petitioner also claimed that Vice Chancellor Harrigan promised that her position would be reclassified. A supervisor, even if that supervisor is a Vice Chancellor, does not have the authority to order a reclassification of a position. Rather, the supervisor's authority and duty is to request a reclassification, document it fully and properly, and submit the request and documentation to Human Resources for review and approval, followed by a request for approval

from OSP. Any promises Mr. Harrigan may have made to Petitioner had no binding effect on subsequent IT leadership or the University. **T pp. 579-80**

(e) Petitioner contended that when a position is reclassified, there is a legislative mandate requiring a 5% salary increase for each level of increase in salary grade, up to a maximum of 25%. **T p. 36** Ms. McAbee testified that even if a position reclassification is requested, properly documented, and approved, there is no guarantee that the employee in the reclassified position will obtain a pay raise. Ms. McAbee also testified that there is no mandate that an employee in a reclassified position receive a particular salary increase. **T p. 580**

(f) On November 9, 2006, Petitioner wrote an email to Pat Chatt, who was the Assistant Vice Chancellor for IT at the time, which Petitioner characterizes as a grievance. This and subsequent emails show that Petitioner and IT Administration differed over the amount of salary increase that Petitioner should receive as a result of the reclassification, and that there was some question about the nature of supervisory authority that Petitioner would have in the reclassified position. The email exchanges suggest that these issues held up, and ultimately prevented, the processing of the reclassification request. In particular, Petitioner introduced into evidence an email in which Vice Chancellor Harrigan stated to her that he did not know Petitioner had been promised a 25% increase by Associate Vice Chancellor Harrison and an email in which Lacy Deberry, an HR professional, wrote that Petitioner had “indicated that some vital information was left off the PD-307 by Vice Chancellor Harrigan.” **T pp. 37-38, 320-24, 327-30; Pet. Exs. 3, 5-8**

(g) According to Respondent’s grievance policy in effect beginning November 1, 2006, neither the failure to reclassify a position, nor the failure to agree on a particular salary increase, are grievable actions. **T pp. 605-06; Pet. Ex. 2** Nevertheless, emails entered into evidence by Petitioner show that employees of the University’s Human Resources Department attempted to work with Petitioner, at least through December 6, 2006, to resolve her complaint, but no evidence was introduced to show that a resolution was ever reached. **Pet. Exs. 5-9** Petitioner testified that she was later told she had not raised a grievable issue. **T pp. 50, 66**

(h) Under Respondent’s grievance policy, the parties must first mediate the grievance, and then, if the attempts at mediation fail, the employee must request review by the SPA Grievance Committee in writing within five days of the parties’ agreement that the mediation did not resolve the grievance. **Pet. Ex. 2** Petitioner did not produce any evidence that her grievance was mediated, that there was an agreement that mediation did not resolve the issue, or that she requested review by the SPA Grievance Committee within five days of the mediation failing to resolve the issue. Therefore, Petitioner did not show that she complied with Respondent’s grievance policy.

(i) Effective January 2, 2007, Vijay Verma became the interim Vice Chancellor for IT, replacing Rodney Harrigan in that position. Mr. Harrigan left the University amidst charges of financial improprieties. Prior to his departure, Mr. Harrigan had dismissed Mr. Harrison, who was the Associate Vice Chancellor, resulting in a turnover in the leadership of the IT Department at the beginning of 2007. **T pp. 67, 295, 337-40; Pet. Ex. 67**

(j) In an email dated January 30, 2007, Mr. Verma responded to conversations he had had with Petitioner by stating that he was not going to make any organizational changes or personnel decisions right away. Mr. Verma also informed Petitioner that he could not be bound by any promises that his predecessor may have made to Petitioner, and that he would rely on the documentation. Finally, Mr. Verma informed Petitioner that he did not expect her to work outside her job description. **T pp. 342-47; Resp. Ex. 19** In response to further emails from Petitioner, on March 29, 2007, Mr. Verma again reiterated in an email to Petitioner that she should not work outside of her job responsibilities, and that he could not be bound by promises she stated had been made by former Vice Chancellor Harrigan and former Associate Vice Chancellor Harrison. Mr. Verma also stated that the position which Petitioner claimed she had been promised did not appear to exist. **Pet. Ex. 10**

29. In June 2008, Ms. McAbee arranged a meeting for Petitioner with Ms. McAbee, Vice Chancellor Welborne, Leonard Jones, who was Petitioner's direct supervisor at the time, Loleta Chavis, who was a Compensation Analyst in Human Resources, and Sheila Benton, who had been the interim Director of Human Resources, prior to Ms. McAbee being hired. The purpose of the meeting was to address Petitioner's contention that her position was not properly classified. It was determined by the University administrators that Petitioner's title and classification were correct. **T pp. 580-84, 677-79; Resp. Ex. 13**
30. The undersigned finds as a fact that the process of reclassifying Petitioner's position, which began in August 2006, was never completed, and Petitioner remained employed for the remainder of her career with Respondent in a position with salary grade 76. The reclassification process that was begun by IT leadership late in 2006 was never completed, and Mr. Vijay Verma, who came in as the new leadership for IT in January 2007, elected not to proceed with it.
31. When the reclassification procedure failed, Petitioner could have sought a promotion by applying for a higher-level position. **T pp. 731-33** Petitioner testified, however, that she did not apply for the database administrator position that was advertised in 2010, when Gary Burns was hired. **T pp. 375-76**
32. On August 8, 2008, Petitioner was disciplined for unacceptable personal conduct, following an altercation between her supervisor, Mr. Jones, and herself over Petitioner's job responsibilities and description. Petitioner received a one-week suspension without pay. **Resp. Ex. 22**

33. Petitioner did not file a timely grievance of her disciplinary suspension. Petitioner did file a grievance related to the suspension, but not until August 28, 2008. **Pet. Ex. 38** Under Respondent's grievance policy, a grievance must be filed within 15 calendar days of date when the employee learned of the action being contested. **Pet. Ex. 2** Furthermore, Petitioner did not grieve the disciplinary action on its merits; rather, she claimed that her supervisor failed to follow policy by omitting required information from the letter placing her on investigatory leave, which is not a grievable issue under Respondent's grievance policy. **T p. 738; Pet. Ex. 2; Pet. Ex. 38**
34. In fact, Petitioner filed three grievances on August 28, 2008. **Pet. Ex. 66** The other two grievances which Petitioner filed on August 28, 2008, were also untimely. One identified the incident being grieved as having occurred on July 1, 2008, and stated that when she reviewed her personnel file she saw that her position title was incorrect. The other identified the incident being grieved as having occurred on July 16, 2008, and purported to allege unlawful workplace harassment by Leonard Jones; however, the allegations involved Petitioner's work plan, position title, and "ability to do job" and did not describe unlawful harassment. **T pp. 386-87, 734-38; Pet. Ex. 2; Pet. Ex. 66**
35. By letter dated August 19, 2008, Petitioner was informed by the Vice Chancellor for Student Affairs that she was being reassigned to work under Ryan Maltese in the University Event Center. She was informed that, other than the change in supervisor and office location, there were no changes being made to any other aspect of her employment. **T pp. 584-87; Pet. Ex. 42; Resp. Ex. 14**
36. Gary Burns was hired by Respondent as an Information Technology Manager on June 1, 2010. **T pp. 225-26; Pet. Ex. 46** Petitioner did not apply for the position when it was advertised. **T pp. 375-76**
37. In April 2010, Barbara Ellis was hired to be the interim Vice Chancellor for Information Technology ("IT") at the University. Ms. Ellis became the Vice Chancellor for IT in April 2011. **T pp. 415-16**
38. Dr. Melody Pierce was hired June 1, 2010, to be the Vice Chancellor for Student Affairs. **T p. 465**
39. One of the things the Chancellor brought to Ms. Ellis' attention when she first interviewed for the position as interim Vice Chancellor of IT was the need for the University to have an e-calendaring system. Ms. Ellis did some research and learned that the campus had an e-calendaring system, the R25 application which Petitioner was then supporting in Student Affairs. The servers supporting the R25 application were in IT, so Renee Martin, the Director of Applications in IT, had been working with Petitioner to maintain the R25 system. **T pp. 422-24**
40. Soon after being hired, Ms. Ellis met with Ryan Maltese, who was Petitioner's direct supervisor, to discuss the R25 system. There had been problems with the R25 systems, and there were discussions among Vice Chancellor Ellis, Vice Chancellor Pierce, and

others, about how to proceed with supporting the R25 system including, as one possibility, outsourcing the support to an outside vendor. **T pp. 424-28, 468, 475; Resp. Ex. 1**

41. Ms. Ellis became aware that there were growing problems with R25 environment because the application was outdated, and a decision had to be made about whether to host the environment through an outside vendor, or invest in the system to bring it up to date and support it on campus. **T pp. 429-30**
42. After discussions among employees in IT and Student Affairs, the decision was made to move support of the R25 system into the IT Division. Ms. Ellis, as the Vice Chancellor of IT, and Dr. Pierce, as the Vice Chancellor of Student Affairs, made the decision to move the system entirely to IT and agreed that IT would develop a detailed plan for transitioning the application. Such a plan was drafted by Renee Martin, an IT employee. **T pp. 430-33, 471; Resp. Ex. 2; Resp. Ex. 3**
43. Ms. Ellis determined that the support for the R25 system could be absorbed by current employees in IT. Once the decision was made to move the support for the R25 system to IT, with existing IT personnel, there was no longer a need for the position occupied by Petitioner. Therefore, a RIF was proposed for Petitioner. **T pp. 434-35, 468-71; Resp. Ex. 4; Resp. Ex. 15**
44. Consistent with the University's RIF policy, Dr. Pierce, as the Vice Chancellor for Student Affairs, requested approval from Human Resources for the RIF of Petitioner. Dr. Pierce's memorandum requesting approval was accompanied by a worksheet, which was prepared by Mr. Maltese, Petitioner's direct supervisor. **T pp. 469-70, 588; Resp. Ex. 4; Resp. Ex. 17**
45. Linc Butler, who is the Assistant Vice Chancellor for Human Resources, reviewed the request and Human Resources created a Reduction in Force Plan. On March 15, 2011, Mr. Butler approved the RIF. The Chancellor does not approve the RIF, but his signature is included on the RIF Plan as an acknowledgment that he has been informed of it. **T pp. 588-90; Resp. Ex. 4; Resp. Ex. 15; Resp. Ex. 17**
46. There were some errors in the worksheet that accompanied the request for the RIF, including an incorrect employee position number. Part of the purpose of having Human Resources review the request is to correct any errors. The correct position number is included in the RIF Plan completed by Human Resources. There was never any confusion about which employee was being RIFed. **T pp. 493, 504-05, 590-92; Pet. Ex. 70; Resp. Ex. 15**
47. Support for the R25 system was taken over by the IT Division without the hiring of any additional employees. The transition has been successful. **T pp. 435-38, 471-72**
48. Petitioner was the only Business and Technology Applications Analyst in the Student Affairs Division. She was notified of her upcoming reduction in force on March 15,



2011, and the RIF took effect on April 15, 2011. The particular position which had been occupied by Petitioner was abolished. **T pp. 243, 471, 496; Resp. Ex. 15; Resp. Ex. 18**

49. Petitioner filed a grievance with Respondent on March 17, 2011, the same day she filed the Petition in OAH which gave rise to this contested case hearing. **T pp. 286-87; Pet. Ex. 66** Petitioner was later informed that because she had filed a petition in OAH, the University would not proceed with her grievance. **T p. 385**
50. With respect to matters of State rules, regulations, and policies concerning position classifications, the undersigned finds the testimony of Linda McAbee, who is the Vice Chancellor of Human Resources for Respondent, credible. Petitioner's testimony in this area often contradicted that of Ms. McAbee. Petitioner did not establish that she has any background in human resources, however, and Petitioner did not corroborate her testimony with documentation.
51. The undersigned found Petitioner's testimony to be passionate and well-intentioned. However, regarding the important allegations at issue here, Petitioner did not provide corroborating evidence for her testimony, and in many cases, Petitioner's testimony was contradicted by the testimony of Respondent's witnesses, much of which was corroborated by documentation.
52. The undersigned finds as a fact that Petitioner was RIFed because Vice Chancellor Melody Pierce and Vice Chancellor Barbara Ellis determined that the University's resources would be more efficiently used by transferring Petitioner's duties to existing personnel in the IT Department, with the result that Petitioner's position in Student Affairs was no longer necessary.
53. The undersigned finds as a fact that the decision to RIF Petitioner was made by Dr. Pierce, in consultation with Ms. Ellis. Both are women. The races of these two women, as well as most of the identified individuals and the Petitioner, were not entered into evidence. However, Dr. Pierce and Ms. Ellis appeared to be of the same race as Petitioner.
54. Petitioner produced no evidence of animus by either Dr. Pierce or Ms. Ellis against Petitioner, on any grounds.
55. In particular, there was no evidence that Dr. Pierce or Ms. Ellis discriminated against Petitioner on the basis of her race or sex.
56. The undersigned finds as a fact that neither Dr. Pierce nor Ms. Ellis had any reason or motivation to retaliate against Petitioner.
57. The undersigned finds as a fact that Vice Chancellor McAbee did not make the decision to RIF Petitioner. Furthermore, Petitioner produced no evidence of animus by Ms. McAbee against Petitioner, on any grounds. In particular, there was no evidence that Ms.

McAbee discriminated against Petitioner on the basis of her race or sex or had any reason to retaliate against Petitioner.

58. The undersigned finds as a fact that Petitioner's RIF was not the result of discrimination on the basis of race or sex.
59. The undersigned finds as a fact that Petitioner's RIF did not constitute retaliation.

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal jurisdiction over the issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. Petitioner framed the issue in her Prehearing Statement as "The principal issue to be resolved is whether the RIF complies with substantive and procedural requirements, and whether it constitutes unlawful discrimination on the basis of gender, race and/or retaliation."
3. The Office of Administrative Hearings does not have subject matter jurisdiction over the issue of whether a RIF complied with substantive and procedural requirements. N.C. Gen. Stat. § 126-34.1; University of N.C. v. Feinstein, 161 N.C. App. 700, 590 S.E.2d 401 (2003). Accordingly, the undersigned has not considered this issue.
4. The Office of Administrative Hearings does have jurisdiction over the issue of whether a RIF constitutes unlawful discrimination on the basis of gender, race and/or retaliation. N.C. Gen. Stat. § 126-34.1(a)(2); Feinstein, 161 N.C. App. at 703, 590 S.E.2d at 403.
5. With regard to Petitioner's discrimination claim, the North Carolina Supreme Court has adopted the burden-shifting scheme used by federal courts, which was articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See North Carolina Dep't of Corr. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983). Federal courts use the same burden-shifting scheme for retaliation claims. E.g., Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4th Cir. 2011).
6. Under the McDonnell Douglas burden-shifting scheme, a petitioner must first establish a prima facie case of discrimination/retaliation. If a petitioner establishes her prima facie case, the burden then shifts to the respondent to articulate a legitimate, non-discriminatory/retaliatory reason for its decision. If the respondent articulates a legitimate, non-discriminatory/retaliatory reason for the decision, then the burden shifts back to the petitioner to prove that the reason given by the respondent was a pretext for discrimination/retaliation. Hoyle, 650 F.3d at 337.
7. Even if Petitioner at this juncture had made a prima facie case of discrimination and/or retaliation, Respondent has articulated a legitimate, non-discriminatory and non-retaliatory reason for the RIF; namely, Vice Chancellors Pierce and Ellis determined that

the University's resources would be more efficiently used by transferring Petitioner's duties to existing personnel in the IT Department, with the result that Petitioner's position in Student Affairs was no longer necessary.

8. Thus, assuming *arguendo* that Petitioner has made a *prima facie* case, the Respondent has satisfied the shifting burden by explaining what it has done, manifesting a legitimate nondiscriminatory reason. Gibson, 308 N.C.131, 301 S.E.2d 78 (1983).
9. Petitioner has not met her burden of proof that Respondent's reasons for the RIF were a pretext for discrimination and/or retaliation. In particular, there is no evidence of a discriminatory animus or retaliatory motive on the part of the decision makers involved.
10. Petitioner appears to believe that there were acts of discrimination and/or retaliation which occurred in the past and resulted in her being vulnerable to the RIF in 2011. However, such acts are barred from hearing now because any such claims would be untimely. See N.C. Gen. Stat. § 126-38 ("Any employee appealing any decision or action shall file a petition for a contested case with the Office of Administrative Hearings as provided in G.S. 150B-23(a) no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal.").
11. Even if Petitioner's allegations of prior discriminatory or retaliatory actions were properly before OAH, Petitioner did not produce evidence sufficient to prove an earlier act of discrimination or retaliation.
12. Petitioner claims Respondent refused to acknowledge her promotion, but as found above, the reclassification of Petitioner's position was never approved and finalized.
13. Petitioner argued that Respondent intentionally allowed the funding supporting her position to run out so that she could be RIFed. As found above, Petitioner did not sufficiently support this allegation with evidence.
14. Petitioner argued that her transfer to Student Affairs was retaliatory. Respondent's evidence showed that Petitioner could have been RIFed when the funding for her position ran out, but she was not. Petitioner claimed that because her appointment had changed after three years from "time-limited" to "permanent," the University was required to find continued funding for her position. However, as Ms. McAbee correctly testified, the difference between an employee with a permanent appointment and one with a time-limited appointment is that the permanent employee is entitled to severance pay and priority reemployment, while the time-limited employee is not. See 25 N.C.A.C. 1C.0402(c), (d). The change in status of Petitioner's position to permanent did not protect her against a RIF.
15. The University could have RIFed Petitioner when her funding ended, but it did not. Instead, the University created a position for her at the same classification level and with the same salary in Student Affairs. The transfer to Student Affairs was not retaliatory; it

allowed Petitioner to remain employed with the University, which Petitioner did for over three more years.

16. Petitioner argued that she was subject to retaliation in the form of discipline on two separate occasions for unacceptable personal conduct, once on November 1, 2007, and then again on August 8, 2008. In both cases, Petitioner received a one-week suspension without pay. Petitioner could have been dismissed on either occasion for unacceptable personal conduct, *see Hilliard v. North Carolina Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005) (one instance of unacceptable conduct constitutes just cause for dismissal), but she was not dismissed.
17. Petitioner claimed that Respondent ignored all of her grievances, but that claim is controverted by the findings above. In particular, there are emails in the record showing that Human Resources tried to work out a resolution of Petitioner's grievance about the reclassification in 2006, and that Human Resources worked on finding continued employment for Petitioner after the Title III funding ended in 2007.
18. Finally, Petitioner asserted that male employees were doing the same work as she was, but were being paid more for it. The only male employee Petitioner identified as doing the same work for more pay was Gary Burns, who was hired in June 2010. Petitioner did not produce sufficient evidence to show that Mr. Burns and Petitioner were doing the same work.

ON THE BASIS of the above Conclusions of Law, the undersigned issues the following:

### **DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Petitioner's RIF was not the result of discrimination on the basis of gender, race and/or retaliation. Respondent's action is therefore AFFIRMED.

### **ACKNOWLEDGMENT**

It is acknowledged that whenever, in this document, reference is made to the Undersigned, the undersigned Judge, or the Court, reference is being made to the undersigned Administrative Law Judge with the Office of Administrative Hearings.

### **ORDER**

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, N.C. 27699-6714, in accordance with N.C.G.S. § 150B-36(b).

**NOTICE**

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to Decision and to present written arguments to those in the agency who will consider this Decision. N.C.G.S. § 150B-36(a).

The agency is required by N.C.G.S. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings. The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 17th day of July, 2013.

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J. Randall May  
Administrative Law Judge