

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 OSP 06762

Kimberly F Loflin,)
Petitioner,)
vs.)
NC Department of Transportation Division of)
Motor Vehicles,)
Respondent.)

DECISION

This contested case was heard before Administrative Law Judge Beecher R. Gray on January 18 & 19, 2012, in the Office of Administrative Hearings, Raleigh, North Carolina. Closing arguments were heard on June 26, 2012, after the parties were unsuccessful in attempting to reach a settlement of the case. Respondent filed a proposed decision on June 28, 2012.

APPEARANCES

For Petitioner: Michael C. Byrne, Esq.
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For Respondent: Neil Dalton, Esq.
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ISSUE

Whether Petitioner's non-selection for promotion was because of discrimination by Respondent based upon her sex.

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.

2. Kimberly Loflin (hereinafter "Petitioner") filed a Petition for Contested Case Hearing in the Office of Administrative Hearings on or about May 24, 2011, alleging that her non-selection for two Assistant Supervisor positions in the Department of Transportation (hereinafter "DOT") Division of Motor Vehicles (hereinafter "DMV") License and Theft Bureau was based upon discrimination because of her sex.
3. Respondent DMV's License and Theft Bureau is organized into eight Districts. Each District has a Supervisor and two Assistant Supervisors.
4. In December of 2009, the License and Theft Bureau put into place a new process for promotion of License and Theft Bureau Assistant Supervisors.
5. Petitioner entered the promotional process in December 2009. As part of the "Assessment Center" process, the applicants were required to take a multiple choice test and a written Practical Exercise consisting of two essay questions. Both tests were graded anonymously, meaning the test graders did not know and had no way of knowing whose tests they were grading.
6. Petitioner received a failing score on the written Practical Exercise portion of the Assistant Supervisor test. Notwithstanding her failure on the Written Practical Exercise, Petitioner applied for the two Assistant Supervisor positions at issue. The postings included the statement that "Preference will be given to applicants who pass the promotional assessment." Petitioner had not passed the promotional process by virtue of her failure on the written Practical Exercise for Assistant Supervisor. By written policy, "a failing score on the [written] examination shall disqualify the candidate for the particular promotional process." Petitioner took and passed the exam for district supervisor, a higher level position, at the same time that she took the assistant supervisor test. She was not given credit for passing the higher level test during this evaluation process.
7. Petitioner was interviewed for the two positions by a panel of three License and Theft Bureau Managers. Her interview scores were added to her test scores and weighted to give her a final score of 64.51. The interview score was weighted 60%, and each of the two aforementioned tests were weighted 20%.
8. Notwithstanding her interview, Petitioner was not near the top scorer for either position. For position # 60030973, her overall score ranked her 5th in point totals out of 11 candidates.
9. For position # 60031066, Petitioner's overall score was 64.51, making her 6th of 11 candidates.
10. By written policy, the Director of the License and Theft Bureau considers only the top three overall scorers for each position; Petitioner, therefore, was not selected for either position. Also, Petitioner was not selected for either position because she had failed one of the written tests for Assistant Supervisor.

11. The License and Theft Bureau has approximately has 183 sworn personnel, of which 20 (10.9%) are female.
12. The promotional process for Assistant Supervisor had 62 applicants. Of these, 57 applicants were male (91.94%) and 5 applicants were female (8.06%).
13. Of the 57 males applicants, 35 (61.40%) passed all components of the promotional process and 22 (38.60%) failed one or more component. Of the 5 female applicants, 3 (60%) passed all components and 2 (40%) failed one or more components
14. In 2010 and 2011, 10 promotions to Assistant Supervisor resulted from the promotional process, including the two positions at issue. Nine were filled by males and 1 by a female. Therefore, 8.06% of the applicants in the Assistant Supervisor promotional process were female and 10% of those promoted were female.
15. During this contested case hearing, Petitioner did not present evidence of intentional discrimination by Respondent.

CONCLUSIONS OF LAW

1. This case properly is before the Office of Administrative Hearings.
2. In *Dept. Of Correction v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983), the Supreme Court of North Carolina adopted the Federal Guidelines for examining discrimination cases.
3. In discrimination cases the following standards apply: (1) The petitioner carries the initial burden of establishing the *prima facie* case of discrimination. (2) The burden 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. However, at all times, the burden of persuasion is on the Petitioner to prove intentional discrimination. *Id.*
4. Petitioner established a *prima facie* case for discrimination by showing that (1) she was a member of a protected class; (2) she was qualified for the position; (3) she was not selected for the position; and (4) the person selected was not a member of the protected class. See *Id.*
5. Petitioner did not meet her burden of showing that her non-selection by Respondent for the positions at issue was a pretext for intentional discrimination.
6. Petitioner did not meet the "ultimate burden of persuading the trier of fact that the [Respondent] intentionally discriminated against the [Petitioner]." *Gibson*, 308 N.C. at 138.

DECISION

Petitioner has not shown by the evidence that Respondent's legitimate nondiscriminatory reasons for its failure to promote Petitioner amounted to a pretext to conceal intentional discrimination against her on the basis of her gender.

ORDER AND NOTICE

It hereby is ordered that the agency serve a copy of the FINAL DECISION on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in now-repealed G.S. 150B-36(b). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written arguments to those in the agency who will make the final decision.

The agency making the final decision is the North Carolina State Personnel Commission.

This the 10th day of July, 2012.

Beecher R. Gray
Administrative Law Judge