

STATE OF NORTH CAROLINA  
COUNTY OF CRAVEN

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11 OSP 11926

DAVID B. STONE, )  
Petitioner, )  
v. )  
NORTH CAROLINA DEPARTMENT OF )  
CULTURAL RESOURCES, )  
Respondent. )

**DECISION**

**THIS MATTER** came on for hearing before the Honorable Joe L. Webster, Administrative Law Judge, on May 31, 2012, in New Bern, North Carolina. After considering the allegations in the Petition, the testimony of the witnesses, and the documentary evidence and exhibits admitted, the undersigned makes the following **DECISION**:

**APPEARANCES**

**For Petitioner:**

Kirk J. Angel  
The Angel Law Firm, PLLC  
P.O. Box 692  
Harrisburg, North Carolina 28075

**For Respondent:**

Karen A. Blum, Special Deputy Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, North Carolina 27602-0629

**ISSUES**

1. Whether an employee may file a contested case action for discharge without just cause when the employee had no current disciplinary actions taken against him and the employee's position was abolished under a reduction in force plan.
2. Whether the Department discriminated against Petitioner in eliminating his position under a reduction in force plan.
3. Whether the Department failed to give Petitioner priority consideration for reemployment pursuant to as required by G.S. 126 7.1 and G.S. 126 36.2.

## **PRE-HEARING MOTIONS TO DISMISS**

On 21 November 2011, the Respondent North Carolina Department of Cultural Resources [hereinafter “Department”] filed an Amended Motion to Dismiss those portions of Petitioner’s Petition for Contested Case Hearing contending that the Department acted without just cause in eliminating Petitioner’s position, the Department failed to follow its Reduction-In-Force policy, that the Department discriminated or retaliated against Petitioner, and any other issues falling outside the scope of G.S. § 126-34.1. On 4 January 2012, after considering the filings and arguments of counsel, the undersigned dismissed pursuant to N.C. GEN. STAT. § 126-34.1(e), *Jailall v. N.C. Dep’t of Pub. Instruction*, 196 N.C. App. 90, 95, 675 S.E.2d 79, 82 (2009) (quoting *Feinstein*), and *Univ. of N.C. at Chapel Hill v. Feinstein*, 161 N.C. App. 700, 704, 590 S.E.2d 401, 403 (2003), that portion of the petition contending that the Department failed to follow the reduction in force policy. The undersigned continued the hearing on the motion to dismiss as to the remaining issues to allow the parties to pursue discovery. On 3 April 2012, after considering the filings and arguments of counsel, the undersigned deferred judgment on the issue of just cause pending a hearing on the merits.

## **APPLICABLE STATUTES AND RULES**

1. § 126-7.1. Posting requirement; State employees receive priority consideration; reduction in force rights; Work First hiring.
2. § 126-34. Grievance appeal for career State employees.
3. § 126-34.1. Grounds for contested case under the State Personnel Act defined.
4. § 126-35. Just cause; disciplinary actions for State employees.
5. § 126-36. Appeal of unlawful State employment practice.
6. § 126-36.1. Appeal to Personnel Commission by applicant for employment.
7. § 126-36.2. Appeal to Personnel Commission by career State employee denied notice of vacancy or priority consideration.
8. 25 N.C.A.C. 1C .1004. Reduction in Force.
9. 25 N.C.A.C. 1H .0701. Priority Consideration: General Provisions.
10. 25 N.C.A.C. 1H .0901. Policy and Scope.
11. 25 N.C.A.C. 1H .0902. Requirements for Reduction-in-Force Priority Consideration.
12. 25 N.C.A.C. 1H .0904. Agency and Employee Responsibilities.

## CONSENT PROTECTIVE ORDER

On 5 January 2012, the undersigned signed a consent protective order restricting the disclosure of confidential personnel information. After reviewing the exhibits, the undersigned has determined that the following exhibits below are deemed confidential and protected from disclosure pursuant to G.S. § 126-22: Petitioner's Exhibits 15, 27, 31, and 34; and Respondent's Exhibits 1-11.

### EXHIBITS

The following exhibits offered by the Petitioner were received into evidence:

P3	06/13/2008	State of North Carolina Work Plan—David Stone
P10	06/28/2011	Letter to David Stone
P13	07/18/2011	Internal Vacancy Posting
P15	07/19/2011	Application for Employment—David Stone
P27	09/06/2011	Letter to David Stone
P31	09/09/2011	Letter to David Stone
P32	10/03/2011	Petition for a Contested Case Hearing
P33	10/05/2011	Letter to David Stone
P34	11/03/2011	Letter to David Stone
P35		Historic Interpreter I
P36		<i>David B. Stone v. N.C. Dep't of Cultural Resources</i> Petition
P38	08/02/2011	Form DCR-GR-8-2004—David Stone
P39		Costume Design Assistant Description

The following exhibits offered by Respondent were received into evidence:

R1	06/28/2011	Reduction-in-Force Plan
R2	09/20/2011	Stone Grievance Form
R3	11/03/2011	Letter Donnell E. Adams to David Stone re Grievance
R4	07/19/2011	Richard David Wolf Application for Historic Interpreter I
R5	07/19/2011	Richard David Wolf Application EEO Sheet
R6	08/09/2011	Historic Interpreter I Responses of Richard Wolf
R7	08/09/2011	Historic Interpreter I Responses of David Stone
R8		Applicant Selection Decision Form—Most Qualified
R9	08/11/2011	Memorandum Lafargue to Adams re recommendation to hire
R10	08/11/2011	Hiring Action Request for Richard Wolf
R11	08/11/2011	Attachment to PAR to Hire by Lafargue
R12		Educational Services Branch Meeting—Recurring Calendar
R13		Tryon Palace Fourth of July Activity Map
R14	07/11/2011	E-mail from Anderson to Educational Services

## WITNESSES

Petitioner called as witnesses:

Mr. David B. Stone, Petitioner

Respondent called as witnesses:

Ms. Kay P. Williams  
Mr. Donnell E. Adams  
Mr. Philippe Lafargue  
Ms. Alison L. Rhodes  
Mr. Brandon J. Anderson

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence 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 or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Wherefore, the undersigned makes the following Findings of Fact, Conclusions of Law and Decision, which is tendered to the Office of State Personnel for a final decision.

## FINDINGS OF FACT

1. From January 2000 through July 2011, Petitioner David Benjamin Stone [hereinafter "Petitioner"] was permanently employed by the North Carolina Department of Cultural Resources [hereinafter "Department"]. (T. pp. 9-10)
2. Petitioner was hired as a Costume Design Assistant to sew and make clothes at Tryon Palace. (Pet'r Ex. 39; T. pp. 9-11, 60-61)
3. Tryon Palace is a State historic site in New Bern. (T. pp. 11)
4. Petitioner worked on a daily basis demonstrating blacksmithing for the public, and repairing and making articles for use at Tryon Palace. (T. pp. 9-11) He also gave tours of some of the buildings at Tryon Palace. (T. pp. 10, 58-59).
5. Petitioner sometimes worked in the kitchen wing of Tryon Palace, cooking and interpreting 18th century food. (T. p. 14)

6. On 30 June 2011, Petitioner received a reduction-in-force letter, dated 28 June 2011, from Linda A. Carlisle, Secretary of the Department. (Pet'r Ex. 10; T. pp. 31-32)
7. The letter stated that Petitioner's position was being abolished effective 1 August 2011 due to the budget crisis affecting state government. (Pet'r Ex. 10)
8. On 18 July 2011, a Historic Interpreter I position at Tryon Palace was posted by the Department. (Pet'r Ex. 13; T. p. 33-34)
9. Petitioner applied for the position on or about 19 July 2011. (Pet'r Ex. 15; T. pp. 20-21, 23, 34-35)
10. Petitioner's position was RIF'd effective 1 August 2011. (Pet'r Ex. 10; T. p. 51)
11. After Petitioner's position was RIF'd 1 August 2011, Petitioner received from the Department approximately \$11,000 in severance pay in three monthly payments. (Pet'r Ex. 10; T. pp. 50-51)
12. On or about 2 August 2011, Petitioner filed a grievance with the Department alleging, in pertinent part, that he was improperly RIF'd and discriminated against. (Pet'r Ex. 38; T. pp. 37, 43, 107) Petitioner requested that he be reinstated into his former position or, alternatively, that his former position be reclassified as a Historic Interpreter I. (Pet'r Ex. 38; T. pp. 106-08)
13. Petitioner was interviewed for the Historic Interpreter I position on 9 August 2011. (Resp't Ex. 7; T. pp. 23-24; 138) Two other applicants were interviewed for the position, including Richard Wolf. (Resp't Ex. 4; T. pp. 25-26, 140)
14. On or about 6 September 2011, Philippe Lafargue, Deputy Director of Tryon Palace, informed Petitioner that he was not selected for the position. (Pet'r Ex. 27; T. pp. 25, 36)
15. On or about 20 September 2011, Petitioner filed a second grievance with the Department alleging that he was not given priority consideration for being hired into the Historic Interpreter I position. (Resp't Ex. 2; pp. 109-11)
16. The Department responded to the grievance, stating that Petitioner "did not have priority placement or promotional rights to a higher graded position." (Pet'r Ex. 34; T. p. 112)
17. On 4 October 2011, Petitioner filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings [hereinafter "Petition"]. (Pet'r Exs. 32, 36; T. pp. 43-44, 46) Petitioner alleged in his Petition that he failed to receive priority consideration, was discriminated against on the basis of creed, sex, and age, was discharged without just cause, and the Department failed to follow the RIF policy. (Pet'r Exs. 32, 36; T. pp. 42, 46-48)

## Discrimination

18. Petitioner is a white, Presbyterian male who was 47 years old at the time of the hearing. (T. pp. 68, 151)

19. Katie Brightman Loveless was Petitioner's supervisor until March 2011, when Brandon Anderson took over as director of the education branch. (Pet'r Ex. 3; T. pp. 15, 160) Brandon Anderson was the Curator of Interpretation since October 2010 and, as of March 2011, has been the acting Director of Educational Services at Tryon Palace. (T. p. 160) Aside from ticket sales and the museum store, Anderson oversees all front-line operations, including the Governor's Palace, historic homes, the kitchen office, the North Carolina History Center [hereinafter "History Center"], and the galleries and exhibits. (T. pp. 160-61) Anderson mainly deals with the interpretive staff, but also oversees programming and budgeting. (T. p. 160-61)

20. Anderson became Petitioner's supervisor when he was hired as Curator of Interpretation. (T. p. 161) Petitioner testified that he felt that he had not been treated fairly by Anderson. (T. pp. 37-38; *see* Pet'r Ex. 36) Petitioner testified that, "in the end [Anderson] had not really been polite with me for the last few months that I'd been working there." (T. p. 38)

21. Petitioner testified that "not polite" meant that Anderson excluded Petitioner from certain things at work and did not inform him of things he needed to know. (T. p. 62; *see* Pet'r Ex. 36)

22. Specifically, Petitioner contended that Anderson did not include him in a December 2010 education branch meeting. (T. p. 63; *see* Pet'r Ex. 36) However, the Tryon Palace Calendar in Microsoft Outlook indicates that a recurring Educational Services Branch Meeting was automatically scheduled from 4 pm to 5 pm the first Wednesday of every month between 1 September 2010 and 4 May 2011. (Resp't Ex. 12; T. pp. 167-68) A calendar invitation was sent to 10 employees, including Petitioner and Anderson, in December 2010. (Resp't Ex. 12; T. pp. 167-68) The calendar was set up by Katie Lovelace before Anderson was employed at Tryon Palace. (T. p. 168) Anderson testified that he received the invitation. (T. p. 168)

23. Petitioner also testified that "not polite" meant that Anderson told all of the other employees on July 4, 2011 that they could leave early but count it as a full day. (T. pp. 63, 66-67; *see* Pet'r Ex. 36) Petitioner was working from 9:00 to 5:00 that day. (Resp't Ex. 13; T. p. 64) He testified that the people who got to go home early were scheduled to work on the grounds until 3:00 or 4:00. (T. p. 64)

24. Anderson testified that, because July 4 was a staff holiday, employees could leave after their events were over and they cleaned up. (T. p. 171) On 11 July 2011, Anderson sent an e-mail to Educational Services employees reminding them to submit accurate hours of work for July 4. (Resp't Ex. 14; T. pp. 172-73) None of Anderson's employees who left early reported that they worked a full day. (T. p. 173)

25. Petitioner also testified that Anderson was not polite to him because Anderson scheduled Petitioner to work outside of the blacksmith shop on days that Petitioner had scheduled apprentices to train there. (T. p. 71-72; *see* Pet'r Ex. 36) In January 2011, Anderson took over scheduling duties from Lovelace. (T. pp. 176-77) Anderson would schedule permanent employees, including Petitioner, to work in the kitchen no more than two times per week. (T. p.

178) When Lovelace was making the schedule in December 2010, she scheduled volunteers, temporary, and permanent employees, including Petitioner, in the kitchen. (T. pp. 178-79)

26. Petitioner also testified that Anderson was not polite to him because Anderson questioned why Petitioner did not work on a Saturday night when Petitioner was not scheduled to work. (T. p. 73) Petitioner was only verbally disciplined for failing to show up at work. (T. p. 73) During his employment, Petitioner never received a written warning or disciplinary action. (T. pp. 51-52)

27. Petitioner did not know of any reason why Anderson was not polite with him. (T. p. 38) He never asked Anderson why he was not being polite with him. (T. p. 38)

28. Petitioner received two evaluations per year by his supervisors. (Pet'r Ex. 3; T. p. 27) Petitioner's Work Plans from 2008 through 2010 indicate his position as "Blacksmith/Tailor/Tradesperson." (Pet'r Ex. 3; T. pp. 28-30)

29. On his 14 May 2009 performance appraisal, Petitioner's combined Key Responsibilities and Results were VG. (Pet'r Ex. 3; T. pp. 74-75) The Combined Dimensions Rating was VG. (Pet'r Ex. 3; T. p. 75) Katie Brightman was the supervisor performing the appraisal. (Pet'r Ex. 3; T. p. 75)

30. On his 19 May 2010 performance appraisal, Petitioner's combined Key Responsibilities and Results were G. (Pet'r Ex. 3; T. p. 75) The Combined Dimensions Rating was G. (Pet'r Ex. 3; T. pp. 75-76) Katie Brightman was the supervisor performing the appraisal. (Pet'r Ex. 3; T. p. 76)

31. On his 12 May 2011 performance appraisal, Petitioner's Combined Key Responsibilities and Results were G. (Pet'r Ex. 3; T. p. 76) The Combined Dimensions Rating was G. (Pet'r Ex. 3; T. p. 76) Brandon Anderson was the supervisor performing the appraisal. (Pet'r Ex. 3; T. p. 76) Petitioner did not write any comments on the performance evaluation performed by Anderson. (Pet'r Ex. 3; T. p. 76)

32. On his 2010 and 20011 performance appraisals, Petitioner's Combined Dimensions Ratings were the same under supervisors Katie Loveless and Brandon Anderson. (Pet'r Ex. 3; T. p. 76)

33. At the end of the fiscal year in 2011, the budget for Tryon Palace was \$4.2 million. (T. p. 96) In June 2011, the General Assembly cut Tryon Palace's budget by \$966,067, or over 23 percent. (T. pp. 83, 91-92) The budget bill eliminated 10 maintenance positions funded by appropriations and moved them to positions funded by admission receipts. (T. pp. 92, 126, 128-30) The budget bill also eliminated seven vacant positions at Tryon Palace, for a total of 25 positions. (T. pp. 92, 129-30) Petitioner's position was not eliminated by the General Assembly. (T. p. 93) The remainder of the \$966,067 was to be cut by Tryon Palace. (T. pp. 92-93)

34. Due to previous budget cuts, Tryon Palace had operating funds to pay only for utilities, telephone service, and insurance. (T. pp. 83, 126) Tryon Palace staff began working in the third or fourth week of June 2011 to implement the Department's reduction-in-force [hereinafter

“RIF”] plan. (T. p. 82) In identifying areas to cut, Tryon Palace staff looked at efficiencies where duties could be combined to accomplish the same thing. (T. pp. 82-83)

35. Kay Williams, Director of Tryon Palace, testified that they evaluated “what programs were kind of stand-alone programs and would not dramatically affect the overall program if it were eliminated.” (T. p. 83)

36. Philippe Lafargue, Deputy Director of Tryon Palace, testified that they started looking for “a program that we can let go that would have the least impact.” (T. p. 131) Williams met with Philippe Lafargue, Deputy Director, and Nancy Perlman, Director of Business Services and Human Resources, to develop a list of stand-alone programs. (T. pp. 86-87) They identified four stand-alone programs to eliminate: a full-time permanent employee handling all of the telephone business, a membership coordinator of the Council of Friends, an assistant accounting position dealing primarily with the cash counting role, and the blacksmith program consisting of Petitioner’s position. (T. pp. 86-87, 94)

37. Williams felt it important to get input from the heads of all of the departments. (T. p. 87) She held a branch meeting and asked each branch head to identify programs that could be eliminated and still allow them to carry on all of their other functions. (T. pp. 87-88; 130-31) Williams did not share with the branch heads the list of programs she identified with Lafargue and Perlman. (T. pp. 87-88) The next day, Williams met with each branch head to listen to their independent choices. (T. pp. 88, 93)

38. Anderson identified Petitioner’s position as one to be eliminated. (T. p. 94) He did not know that Petitioner’s position was on the list contemplated by Williams, Lafargue, and Perlman. (T. p. 94)

39. Williams, Lafargue, and Perlman met again to compare their choices with those of the branch heads. (T. p. 88) The branch heads confirmed what Williams, Lafargue, and Perlman had identified. (T. pp. 88, 131)

40. Donnell Adams, Human Resources Director for the Department, testified that, once a facility manager or director has identified a position to be considered for a RIF, Human Resources [hereinafter “HR”] “conduct[s] an analysis to see what the demographics are and how it affects the workforce . . . .” (T. pp. 99-100) HR uses demographics to determine if the individuals being RIF’d are in one classification, such as gender, ethnicity, and age. (T. pp. 101-02)

41. In June 2011, HR created a RIF plan that identified the age and gender of individuals affected by RIFs. (Resp’t Ex. 1; T. pp. 102, 104) Adams did not identify any demographic areas that needed to be addressed in the June RIF plan. (T. p. 105)

42. HR also tries to identify a comparable position in the same salary grade that a RIF candidate with the right skill set could laterally transfer into to minimize the impact a RIF would have on the workforce. (T. p. 100, 101) Adams testified that a lateral move is within the same salary grade. (T. p. 100) Adams testified that one of the problems in 2011 was that there was nowhere to move employees because vacant positions had been eliminated by the General Assembly. (T. p. 102)



43. If no skill set is identified, then HR generates a RIF notification letter and information to present to the employee to be RIF'd. (T. p. 100)
44. Three positions were RIF'd at the end of July and one at the end of December. (T. p. 89)
45. Lafargue testified that he was not familiar with the RIF plan and was unsure about the information contained in the plan, T. p. 152, but that he believed one employee was a white female between the ages of 60 and 69. (T. pp. 150, 152) Petitioner was a white male between the ages of 40 and 49. (T. p. 151) One was a white female between the ages of 50 and 59. (T. pp. 151-52)
46. Petitioner testified that he thought Wolf is a male of unknown creed or age, but approximately in his fifties and older than Petitioner. (T. pp. 68-69) Wolf indicated on the demographic sheet he submitted with his application for the Historic Interpreter I position that he was a 59-year-old white male at the time of the application. (Resp't Ex. 5; T. pp. 114-15)
47. Petitioner testified that Anderson is a male of unknown creed or age, but approximately in his late twenties. (T. p. 69) Petitioner testified that Philippe Lafargue is a male of unknown creed or age, but approximately Petitioner's age. (T. pp. 69-70)

#### **Failure to Receive Priority Consideration**

48. Petitioner's position as a costume design assistant was a salary grade 56. (T. pp. 60-61) The Historic Interpreter I position was a salary grade 58. (Pet'r Ex. 13; T. pp. 61, 111)
49. Petitioner testified that he did not feel that the Costume Design Assistant position description fully described his daily work because he spent only a couple of weeks annually sewing and designing costumes. (T. pp. 44-45) Petitioner also testified that the duties of the Historic Interpreter I position were substantially the same as the duties he had been performing as a Costume Design Assistant, with the exception of selling tickets at the History Center. (T. pp. 21; 34)
50. Since being hired as a Costume Design Assistant in 2000, Petitioner never requested that his salary grade be reallocated upward from a 56 to a 58 because he was doing the job of a Historic Interpreter I. (T. pp. 60-61, 122)
51. The Historic Interpreter I position posted in July required the following knowledge, skills and abilities: "Must be able to communicate to a variety of audiences, and be dedicated to good customer service. Must possess knowledge of North Carolina history & use basic research skills. Must have knowledge of or willingness to learn 18th and 19th century crafts and trades. Should have knowledge of or willingness to learn first-person interpretation and theatrical skills. Knowledgeable and skilled in the use of computerized ticketing systems, and able to balance and reconcile figures and adhere to procedures for safe guarding cash. Must be able to lift 50 pounds and work in unheated, un-air conditioned spaces." (Pet'r Ex. 13)
52. Candidates were interviewed by a committee of three employees, Philippe Lafargue, Brandon Anderson, and Alison Rhodes, who asked the same questions of all candidates. (Resp't

Ex. 6, 7; T. pp. 133-34, 141) Rhodes is the Visitor Services manager and oversees ticketing operations and the museum store. (T. pp. 153-54)

53. Interviewers documented answers on a log. (Resp't Exs. 6, 7; T. pp. 133-34) After the interviews, the interview committee met to discuss the candidates and rank them on an Applicant Selection Decision Form—Most Qualified. (Resp't Ex. 8; T. pp. 137, 139-41, 158, 164-65)

54. All three of the interviewers independently selected Wolf as the first choice and Petitioner as the second choice. (Resp't Ex. 6, 7; T. pp. 137, 139, 141, 146, 155-56, 159, 162, 163-64, 165)

55. Rhodes testified that Wolf had more of the needed skills and knowledge than the other candidates. (T. p. 157) Rhodes also testified that Wolf "had experience at ticket-selling operations, and he was already knowledgeable in the system that we used." (T. p. 157)

56. Tryon Palace uses a computerized point of sale system to sell tickets. (T. p. 157) Specifically, Tryon Palace used Vista software for ticket sales and ICVerify for credit card machines, and Keystroke for the History Navigators that visitors rent to tour the site. (T. pp. 157-58)

57. Anderson testified that Wolf was the best candidate to fill dual roles of working with ticketing software and as a historic interpreter because he already had the skills and knowledge in those areas. (T. pp. 165-66) Wolf also had knowledge of all the historic buildings at the site and the History Center. (T. p. 166) Wolf worked as a historic interpreter as a temporary employee before accepting a full-time position as a ticket seller in December 2010. (Resp't Ex. 4; T. p. 166, 181) Wolf was a permanent employee at the time of his application. (T. p. 122)

58. Petitioner had experience in customer service and in orienting visitors. (T. p. 78) Although Petitioner had some experience in giving tours, his experience was limited to only certain buildings and tasks. (T. pp. 58-60)

59. Petitioner never sold tickets at Tryon Palace. (T. p. 22) He did not have any experience in point of sale systems. (T. p. 79) Petitioner sold tickets using an electric cash register at a museum he worked at approximately 20 to 25 years ago. (T. p. 22) It did not require the use of software. (T. pp. 55-56) Petitioner testified that he was not aware of what was entailed in ticket selling. (T. p. 56)

60. On 11 August 2011, Lafargue wrote a letter to Adams documenting the interview process for the Historic Interpreter I position. (Resp't Ex. 9; T. pp. 142-44) The same day, Lafargue also wrote a justification for hiring Wolf because of the hiring freeze. (Resp't Ex. 11; T. pp. 145-46) The Department had implemented a hiring freeze so that vacant positions could not be filled except in cases where there were special needs. (T. pp. 92, 95) A packet of information, including the interview logs, applicant selection form, and personnel action request, was also sent to the Department's HR office in Raleigh for review. (Resp't Exs. 6, 7, 8, 10; T. pp. 134-35, 142, 145, 146, 165)

61. HR in Raleigh approved the hiring of Wolf as a Historic Interpreter I, T. pp. 146-47, and Richard Wolf was ultimately hired into the position of Historic Interpreter I. (Resp't Ex. 10; T. pp. 26, 146-47)

### **CONCLUSIONS OF LAW**

1. The parties are properly before the Office of Administrative Hearings on a Petition pursuant to Chapter 126 of the General Statutes, and the Office of Administrative Hearings has jurisdiction over both the parties and the subject matter as such.

#### **Discrimination**

2. In *Dep't 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 non-discriminatory reason for the applicant's rejection. (3) If a legitimate non-discriminatory 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. *See id.*

4. “[T]he prima facie case in an age discrimination reduction-in-force case requires proof that the claimant who is in the protected age group was discharged or demoted, was performing his job at the time of discharge at a level that met his employer's expectations, and that either persons outside the protected class were retained in the same position, or that [the employer] did not treat age neutrally in selecting the claimant for layoff.” *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 234 (4th Cir. Md. 1991) (citing *EEOC v. Western Elec. Corp.*, 713 F.2d 1011, 1015 (4th Cir. 1983)).

5. The substantial and competent evidence of record supports a conclusion that Petitioner failed to establish a prima facie case for discrimination based on age, sex, or creed. Petitioner offered no evidence that persons outside these protected classes were retained. Petitioner also failed to offer evidence that the Department did not treat age, sex, or creed neutrally in selecting Petitioner's position for a RIF. At hearing, Petitioner showed only that the four employees whose positions were RIF'd were white and above the age of 40. He offered no evidence that the Tryon Palace employees whose positions were not RIF'd were anything other than white and above the age of 40.

6. Petitioner's reliance on a sample size of four employees is insufficient to support his contention that the Department did not treat age neutrally in selecting Petitioner's position for a RIF. “[A]bsent an appropriate basis for comparison, statistical evidence of . . . disparity alone cannot establish any element of a discrimination claim. *United States v. Venable*, 666 F.3d 893, 903 (4th Cir. 2012) (citing *United States v. Olvis*, 97 F.3d 739, 745 (4th Cir. 1996)). “There is not ‘a presumption that unexplained statistical evidence of racial disparity proves racial animus.’

Instead, it is the [Petitioner] who bears the burden of making a credible showing that the statistical evidence amounts to some evidence of discriminatory intent.” *Id.* (citations omitted).

7. Even if Petitioner had established a prima facie case of discrimination, the substantial and competent evidence of record supports a conclusion that Petitioner failed to meet his burden of showing that the RIF of his position was a pretext for intentional discrimination.

8. The substantial and competent evidence of record supports a conclusion that the RIF was necessitated by funding cuts and that the blacksmith program was a stand-alone program that could be eliminated without affecting other operations at Tryon Palace.

9. 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.

### **Failure to Receive Priority Consideration**

The substantial and competent evidence of record supports a conclusion that Petitioner signed for and dated his RIF letter on 30 June 2011, Pet’r Ex. 10; therefore, G.S. § 126-7.1 as it was written prior to the 1 July 2011 amendment applies. *See* 2011 Sess. Laws 512-13.

10. G.S. § 126-7.1(c1) provides in pertinent part that if an employee who has been given notice of imminent separation due to RIF: 1) applies for a position “equal to or lower in salary grade than the position held by the employee at the time of notification or separation”; and 2) is qualified for that position; then the employee receives priority consideration over all other applicants but receives equal consideration when other applicants are current State employees not affected by the RIF. N.C. Gen. Stat. § 126-7.1(c1) (2010).

11. The substantial and competent evidence of record supports a conclusion that Petitioner was a salary grade 56 when he applied for the Historic Interpreter I position, which was a salary grade 58.

12. The substantial and competent evidence of record supports a conclusion that Petitioner did not have a RIF priority as an applicant for the Historic Interpreter I position.

### **Just Cause**

13. Having concluded that the Petitioner’s position was RIF’d, the issue of just cause is not properly before the Office of Administrative Hearings and is dismissed. N.C. Gen. Stat. § 126-34.1 (2011); *Jailal v. NC Dep’t of Pub. Instruction*, 196 N.C. App. 90, 675 S.E.2d 79 (2009); *UNC-CH v. Feinstein*, 161 N.C. App. 700, 590 S.E.2d 401 (2003).

On the basis of the above-noted Findings of Fact and Conclusions of Law, the undersigned makes the following:

**DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner has not established a prima facie case showing that the Department discriminated against him in eliminating his position. Even if Petitioner had established a prima facie case, Petitioner has failed to show by the evidence that Respondent's legitimate nondiscriminatory reasons for eliminating Petitioner's position amounted to a pretext to conceal intentional discrimination against him on the basis of his sex, age, or creed.

**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 \_\_\_\_ day of August, 2012.

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Joe L. Webster  
Administrative Law Judge