

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 OSP 3835

BEATRICE T. JACKSON,)
Petitioner,)
)
v.)
)
DURHAM COUNTY)
HEALTH DEPARTMENT,)
Respondent.)

DECISION

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on February 6-7, 2012 in Raleigh, North Carolina, with the final day of hearing concluding the presentation of witnesses and admission of exhibits. The record was left open for the parties' submission of further materials, including but not limited to supporting briefs, memorandums of law and proposals after receipt of the official transcript. After filings by Respondent and Petitioner (the last occurring on April 25, 2012) with the Clerk of the Office of Administrative Hearings (OAH), and receipt by the Undersigned on April 27, 2012, the record was closed on April 27, 2012.

APPEARANCES

For Petitioner: Alan McSurely, Attorney at Law
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For Respondent: Kathy R. Everett-Perry
Assistant County Attorney
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ISSUE

Did Respondent have just cause to dismiss Petitioner from employment with the Durham County, North Carolina Health Department?

WITNESSES

For Petitioner: Beatrice Jackson

For Respondent: Sue Guptill
Hattie Wood
Ponice Moore-Bryant
Gayle Harris

EXHIBITS

For Petitioner: Exhibits 1 through 18, 20 through 24, 27 through 28, and 31.

For Respondent: Exhibits 1 through 4 and 6 through 21.

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 Administrative Law Judge makes the following Findings of Fact. In making these 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 witnesses, any interests, 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.

FINDINGS OF FACT

1. Petitioner is a Registered Nurse with a Master's Degree in Nursing as a psychiatric nurse. She taught nursing at Dillard University in Louisiana and Baylor University in Texas, and North Carolina Central University for more than 20 years. She served as a Lt. Colonel in the Army Reserves in Texas. (Pet. Ex. 1)
2. Petitioner moved to North Carolina in 1986, and was a nurse in Army Hospitals in Fayetteville and Greensboro. She served as a Clinical Specialist in Psychiatric Nursing at John Umstead Hospital in Butner, North Carolina for three years. She was a faculty member in the School of Nursing at NCCU for several years, and served as the Interim Chair of that Department in 2005. Ms. Jackson worked for the Durham Public Schools as the Program Coordinator of the DPS Magnet School called "City of Medicine Academy." (Pet Ex. 1)
3. On October 20, 2008, Respondent hired Ms. Jackson at an annual salary of \$62,900 as a Public Health Nurse I. Petitioner began work with the Durham County Health Department on

November 3, 2008 in the Neighborhood Nursing Program. She remained so employed with the Program until March 23, 2009 when the Program was terminated due to funding.

4. Thereafter, Petitioner applied for and was promoted to a Public Health Nurse III position as a Health Preparedness Nurse with a pay increase to \$66,045. In the position of Public Health Preparedness Coordinator, Ms. Jackson's responsibility was to prepare and coordinate Durham County's responses to public health emergencies.

5. On May 4, 2009, Petitioner received a raise to \$67,696 per year, was removed from probation, and received her first of two performance evaluations, which contained two exceeds expectations and eleven meets expectations. (Pet. Ex. 9)

6. In April 2010, a food borne illness that afflicted some 15 people who ate at Bullock's BBQ restaurant in Durham was reported by Respondent's Director, Gayle Harris.

7. Ms. Jackson coordinated the response team from the Health Department, which was led by Incident Commander Dr. Arlene Sena. Ms. Jackson was the Planning Section Chief. The Public Information Officer for the incident was Ms. Jackson's second-line supervisor, Health Department Director, Gayle Harris. (Pet. Ex. 21)

8. Ms. Jackson wrote in a daily incident report on April 29, 2010 that investigation had determined that salmonella was the cause of the illness. Investigators were looking at food items that might have been the source and whether employee handling might have been an issue. Ms. Jackson wrote that the Health Department expected results of Bullock's employee cultures by May 3, 2010.

9. On or about May 3, 2010, the Incident Command team for the Bullock's BBQ incident met without Ms. Jackson to review the salmonella testing results. A news release issued by Respondent on May 7, 2010 stated that nine persons who were ill from exposure to food prepared at Bullock's had infection from *Salmonella enteritidis*. (Pet. Ex. 23) The final report on the incident was dated July 14, 2010. The report listed the names of Robert Brown, Ponice Moore, Arlene Sena, David Bergmire-Sweat, Nicole Lee and Larry Michael. (Pet. Ex. 31) Ms. Jackson was not consulted in preparing the report. On July 16, 2010, Ms. Harris approved the final news release about the Bullocks salmonella outbreak. (Pet. Ex. 24)

10. During the week of May 3, 2010, Sue Guphill, Director of Nursing and Director of Community Health Division, to whom Petitioner reported, completed her performance review of Ms. Jackson, this one for her work as Preparedness Coordinator. She rated Ms. Jackson as two exceeds expectations and nine meets expectations.

11. By letter dated July 12, 2010 from Health Director Gayle Harris to Tony Noel, Senior Human Resources Manager, Ms. Harris found that "the skills of a nurse are vastly underutilized in the role of Preparedness Coordinator." She wrote that the Preparedness Coordinator position would be re-written for reclassification at a later date. Ms. Harris transferred Ms. Jackson into a Public Health Nurse I position in the Communicable Disease Program., continuing "to coordinate the Fit Testing Program as part of her new responsibilities." (Res. Ex. 4) Ms. Jackson did not experience a

salary cut. She was not provided a copy of the memo.

12. Petitioner was assigned to the communicable disease program as a case manager. In her position as case manager, she was responsible for making sure patients received the treatment they needed, which included making sure they were re-tested for any diagnosed communicable disease as required, talking to them about any barriers they may have with the re-testing process, if any, and observing them take their medicine. Petitioner was also responsible for giving and reading Tuberculosis (TB) skin tests, documenting her work and entering it into the state computer system, known as the North Carolina Electronic Data System of Surveillance (NC EDSS).

13. All documentation associated with the case management position in which Petitioner worked had to be entered into NC EDSS. “The percentage of the job that is the case management part and entering the documentation is about 75 to 80 percent.” (Tr. pp 34-35) “About 70 percent of the position requires being able to access the North Carolina Electronic Data System of Surveillance.” (Tr. p 121)

14. When Petitioner was transferred to the communicable disease program she was advised of Respondent’s expectation that she be able to enter information into the NC EDSS. Responsible personnel in the communicable disease program have to enter documentation into NC EDSS. In order to access NC EDSS the Petitioner was required to pass a series of classes administered by the State.

15. The NC EDSS training entails a two-day classroom course on communicable disease and sexually transmitted disease data and a tuberculosis online course that occurs after completion of the communicable disease two-day training class. The classroom and online trainings are arranged and graded by the State of North Carolina and the instructors notify Respondent of the participants’ results.

16. Petitioner took the two day classroom training at the North Carolina Department of Public Health in July 2010. Hattie Wood, communicable disease program manager and Petitioner’s immediate supervisor and preceptor (trainer), was later informed that Petitioner had not satisfactorily completed the two day classroom training.

17. In September 2010 Petitioner repeated the two-day classroom training course and in October 2010, Ms. Wood was informed that Petitioner had satisfactorily completed the State's communicable disease course part. However, Petitioner was not ready to enter information into NC EDSS because she required further orientation/training.

18. The TB online training course is training that one does at his or her desktop at his or her assigned work location with instructors at the State level. Homework and other assignments are given during the course of the training and the training is set to last for a specified period of time. The TB NC EDSS cannot be accessed until the TB on-line training course has been successfully completed.

19. Petitioner first took the TB on-line training course in August 2010. Ms. Wood received information from the State instructors that Petitioner had not successfully passed the TB on-line

training course that she took in August.

20. The TB on-line training course was offered again in November 2010 and Petitioner registered to take that course. However, she did not repeat the course at that time and did not inform the State instructors of her decision not to do the required training.

21. On November 30, 2010, Ms. Wood wrote Ms. Jackson to remind her of a scheduled meeting the next week to go over orientation needs. (Pet. Ex. 16) In early December 2010, the two women met and went over the New TB Nurse Orientation Checklist. Ponice Moore-Bryant, a communicable disease nursing supervisor, was made Petitioner's preceptor at that point.

22. Petitioner took the TB on-line training course the second time in January 2011 and on February 16, 2011 Ms. Wood was informed by State officials that Petitioner did not pass the TB training course. In the note Ms. Wood was informed that they were "welcome to enroll Beatrice Jackson in the next TB online class if you wish." (Res. Ex 18)

23. After seven months on the job Petitioner had not been cleared to enter data in the NC EDSS. As Petitioner was not able to enter data into the NC EDSS, she was given other duties to perform within the clinic.

24. On one occasion Ms. Wood noted that Petitioner demonstrated a degree of difficulty in her understanding of the difference between active disease and latent TB infection, as well as the disease process and the treatment regimen for each. Ms. Wood determined that Petitioner had difficulty in making a distinction between active and latent TB infection because Petitioner was asked to provide a list of patients who had been treated for latent TB infection to the State Consultant during Respondent's State TB audit and the list of clients that Petitioner developed contained patients who had been treated for the actual disease. Petitioner was counseled on October 10, 2010. (Res. Ex. 8)

25. In a November 17, 2010 coaching session, Ms. Wood noted that Petitioner was unable to successfully gather TB data in response to a 2009 audit request and even though the documentation was returned to her approximately five times, document accuracy was never achieved until the morning of the audit when Ms. Wood and the department's program manager entered the last data on the document. During that session, Ms. Wood informed Petitioner that there had been "some reports from veteran TB Nurses that she had been experiencing a degree of difficulty with her med start appointments with patients." (Res. Ex. 10)

26. On December 10, 2010 Ms. Wood met with Petitioner to discuss further orientation needs and at that time she discussed with Petitioner the difference between the skills needed to function in the clinic as a clinic nurse and the skills needed to function as a nurse educator. Ms. Wood informed Petitioner that "developing education tools was a good skill to have, but at this time she needed to focus on her role as a TB clinic nurse and direct her focus to acquiring the clinical skill to provide nursing care to the population group we serve in the TB Clinic." (Res. Ex. 11)

27. During a meeting on December 16, 2010 Ms. Wood conveyed to Petitioner that her clinical performance as of that date did not meet the expectations of the job. She relayed to Ms Jackson that "after receiving direct one-on-one teaching and education on investigation and reporting of

Streptococcal Group A” from Ms. Wood, that she (Petitioner) “did not follow the investigation steps appropriately per state communicable disease guidelines.” Ms Wood also told Petitioner that she “was noted by other team members as not participating in the care of all patients.” (Res. Ex. 12)

28. On January 6, 2011 Petitioner did a medication start for two children who were infected with TB and she failed to obtain parental consent for the dependent children to receive the medication. Petitioner allowed the refugee case manager for the children to sign the consent form even though he was not the children’s guardian. Additionally, Petitioner gave medication dosage administration and possible medication side effects information to the elder of the children, who was twelve at the time. Thereafter, one of the children had a reaction to the medication and was treated at the local emergency room.

29. On February 16, 2011, Ms. Wood informed her two up-line supervisors that she had prepared a written warning for Ms. Jackson about the performance problem involving minor children in the clinic. The written warning included corrective actions. Ms. Jackson received the written warning on 25 February, since she was sick. Ms. Jackson was terminated before the corrective action conference, scheduled for 18 April 2011. (Res. Ex. 15)

30. Also on February 16, 2011, Ms. Woods received notification that the NC Department of Public Health had decided that it was unable to grant Petitioner access to the NC EDSS at that time because “after two classroom trainings, two TB on-line trainings, and on-site assistance from the help-desk attendant, [she was] still unable to adequately perform basic NC EDSS tasks, as well as TB-specific tasks.” (Res. Ex. 18) The note went on to provide “a list of selected items where performance [was] not adequate,” which included linking events, searching for events and persons, and entry of drug dosage. Further the note stated that Petitioner created multiple duplicates of the same person or event (up to 3-4 times) as well as failed to enter or did not correctly enter laboratory reports. The note also stated that Petitioner’s entry of TST results was either not done correctly or not entered at all.

31. Ms. Wood informed her two up-line supervisors, Ms. Guptill and Ms. Harris, that the State had informed her that Ms. Jackson could not be granted access to the NC EDSS system. The note from the Department of Health and Human Services stated that the decision was made after multiple consultations including meeting with the Lead Epidemiologist for NC EDSS.

32. The general timeframe for case managers to be cleared for use on the NC EDSS in the communicable disease clinic is usually one month. All other employees who have taken the required State classes to enter documentation into NC EDSS have passed all of them on the first attempt. After seven months on the job Petitioner had not been allowed to enter data in the NC EDSS as she could “not demonstrate a command of the use of NC EDSS for guiding and documenting a TB investigation.” As stated in the note from the Department of Health and Human Services, “inappropriate data entry can impact multiple events in the system,” and “that risk creates the potential for data integrity issues even beyond Durham County.” (Res. Ex. 18)

33. Petitioner cites a section under Scope of Work and Deliverables in the Division of Public Health Agreement Addendum, FY 10-11, which states that “within one (1) year of employment, the Public Health Nurse who is responsible for the Communicable Disease Program will have completed

the on-line course, "Introduction to Communicable Disease Surveillance and Investigation in North Carolina," so long as it is offered," as a showing of Petitioner having additional time to complete her TB course. However the next line of the section cited by Petitioner states that the referenced program "is a fifteen week, web-based, distance learning program," which is not a reference to the required training to be granted access to the NC EDSS. (Pet. Ex. 12B)

34. In accordance with the Division of Public Health Agreement Addendum, FY 10-11, signed by Gayle Harris on March 4, 2010, "Within one (1) month of receiving notification of a reportable disease or condition, the LHD [Local Health Department] will assure investigation and reporting to the NC Division of Public Health (DPH) via the North Carolina Electronic Disease Surveillance System (NC EDSS) is complete." The Agreement goes on to state that the Local Health Department "agrees to enter into NC EDSS, in a timely manner, all paper laboratory reports and physician reports it receives," further stating that "reports for patients outside the jurisdiction of the LHD should be entered into NC EDSS then transferred electronically to the appropriate jurisdiction," adding that "reports will not be mailed, faxed or e-mailed." (Pet. Ex. 12B)

35. Petitioner's position description cites that the "primary purpose of the Public Health Nurse I in the TB Clinic is to take a participatory role in the day-to-day operations of the clinic." It goes on further in the description to cite that "it has become necessary to increase the responsibilities of this position due to the increasing numbers of active TB cases and the tremendous follow-up required for each patient," adding that "the decision-making and assessment skills of the registered nurse have become necessary in order to meet the needs of the TB Clinic." Under accuracy required in Petitioner's job description, it is stated that the "RN must obtain information accurately since clinic decisions about patient care and treatment will be based on the sharing of this information," going on to provide that "failure to correctly gather pertinent data would change the plan of care and may result in significant discomfort for the patient." Petitioner's job description cites that "consequences of error include death, injury, or disability of patients and Health Department employees, spread of tuberculosis in the community; development of tuberculosis disease resistant to antibiotic therapy; and lawsuits." (Pet. Ex. 12C)

36. Petitioner's inability to enter data into NC EDSS increased the case load for active TB disease and case management for other nursing staff. It also increased the work load for the nurses in investigating and reporting communicable diseases in the Durham County community.

37. On March 2, 2011 Petitioner participated in a pre-disciplinary conference with Gayle Harris, Director of Durham County Public Health, during which time Petitioner acknowledged that she was not able to successfully pass the training classes, attributing her failure to her inability to transfer the information from one place into another place.

38. On 4 March 2011 Petitioner was given a Notice of Dismissal letter that terminated her employment with the Durham County Health Department on that date. She was found to have engaged in "Grossly Inefficient Job Performance". (Pet. Ex. 18). The letter listed several tasks that Ms. Jackson was unable to perform because she could not input data in the NC EDSS. Petitioner was discharged because her inability to complete the required training and be granted access by the State to the NC EDSS had a financial impact on Respondent in that Respondent was unable to comply with the contract agreement with the State of North Carolina that specified how cases were

to be handled.

39. Petitioner's inability to enter data into NC EDSS resulted in a failure of her to perform her job. By the very nature of her work in the TB Clinic, such failure carried not only critical individual health ramifications but public safety implications as well. Moreover, Petitioner's failure to be granted access to NC EDSS by State officials resulted in an increased case load for the other nurses in the department, potentially having serious consequences to their individual client effectiveness. Additionally, Petitioner's failure to be granted access to the NC EDSS as found by the Respondent had brought about an overall negative impact on the agency since it drastically increased other employee workloads, created an "inefficient use of resources," and resulted in a "misuse of county funds." (Pet. Ex. 18)

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in the matter. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. At the time of the termination of her employment, Petitioner was subject to the State Personnel Act in accord with N.C.G.S. § 126-5(a)(2)(c). N.C.G.S. §126-35 provides that no career State employee subject to the State Personnel Act shall be discharged, suspended or demoted for disciplinary reasons, except for just cause.

3. At the time of this termination, Petitioner and all employees of Respondent were subject to the State Personnel Act pursuant to N.C.G.S. § 126-5(a)(2)(c). Respondent was subject to the State Personnel Act as codified in N.C.G.S. § 126-1 *et seq.* and all applicable regulations. Notice is taken that Respondent presented no evidence that either Respondent Department nor the Board of County Commissioners had applied for "substantial equivalency" designation from the State of North Carolina's Office of State Personnel as to its employment policies regarding the matters in this case and they had not otherwise received a substantial equivalent exemption different from Chapter 126 pursuant to N.C. Gen. Stat. § 126-11. As Respondent was not exempt from the provisions of Chapter 126 for purposes of this hearing, the Undersigned is guided by the law, regulations, guidelines and/or policies established by the Office of State Personnel.

4. N.C.G.S. §126 states that in contested cases pursuant to Chapter 150B of the General

Statutes, the burden of showing that a career employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer.

5. The State Personnel Act permits disciplinary action against career employees for “just cause.” N.C. Gen. Stat. § 126-35. Although “just cause” is not defined in the statute, the words are to be accorded their ordinary meaning. *Amanini v. Dep’t of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining “just cause” as, among other things, good or adequate reason).

6. 25 N.C.A.C. 1J.0606 (a) (2012) authorizes the dismissal of an employee without prior warning for grossly inefficient job performance.

7. 25 N.C.A.C. 1J.0614 (5) (2012) states that “Gross Inefficiency (Grossly Inefficient Job Performance) means “a type of unsatisfactory job performance that occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency; and, that failure results in (a) the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) over whom the employee has responsibility; or b) the loss of or damage to state property or funds that result in a serious impact on the State or work unit.”

8. As a nurse responsible with preventing the spread of dangerous communicable diseases, Petitioner was required as an essential function of her position to obtain and share information regarding care and treatment of TB. This highly sensitive information could not be shared by mail, fax, or e-mail and could only be gathered and disseminated by entry into NC EDSS. The Petitioner’s denial of access to NC EDSS by State officials created an inability to adequately perform her job thereby compromising individual patients and exposing the public to tuberculosis. She was aware that the consequences of error included “death, injury, or disability of patients and Health Department employees, spread of tuberculosis in the community; development of tuberculosis disease resistant to antibiotic therapy; and lawsuits.”

9. Petitioner’s failure to pass the required online and classroom training for tuberculosis and to be granted access to the NC EDDS resulted in a loss of State funds as she was receiving compensation for a job that she was unable to perform resulting in substantial hardship for her work unit. Moreover, other employees were required to perform Petitioner’s work duties, which impacted the Respondent’s ability to efficiently serve the targeted population.

10. In determining whether a public employer has just cause to discipline its employees requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken. See *Early v. County of Durham Dept. of Social Services*, 172 N.C. App. 344, 616 S.E.2d 553 (2005) (quoting *N.C. Dep’t of Env’t & Natural Res v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004)).

11. The preponderance of the evidence supports Respondent’s finding that Petitioner’s unsatisfactory job performance met the elements for grossly inefficient job performance which is just cause for dismissal pursuant to N.C. Gen. Stat. § 126-35.

12. Petitioner alleged in her Petition that her termination occurred due to discrimination and/or

retaliation for the opposition to alleged discrimination based on race and age. However, Petitioner has not provided any evidence other than these declarations that she was discriminated against based on her race and/or age. Courts have recognized that an employee's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate, nondiscriminatory reasons for an adverse employment action. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 456 (4th Cir. 1989); *Gairola v. Commonwealth of Va. Dep't of Gen. Services*, 753 F.2d 1281, 1288 (4th Cir. 1985).

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above.

Based on those conclusions and the facts in this case, the Undersigned holds that the Respondent has carried its burden of proof by a greater weight of the evidence that the Petitioner's dismissal from employment with the Durham County Health Department based on grossly inefficient job performance was not erroneous, was not arbitrary or capricious, and was in accordance with the applicable laws and State standards.

NOTICE

As this matter was filed with the Office of Administrative Hearings prior to January 1, 2012, the North Carolina State Personnel Commission in this contested case is required to give each party an opportunity to file exceptions to this decision issued by the Undersigned, and to present written arguments to the Commission. The State Personnel Commission shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the Commission, the Commission shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the Commission in not adopting the finding of fact. For each new finding of fact made by the Commission that is not contained in the Administrative Law Judge's decision, the Commission shall set forth separately and in detail the evidence in the record relied upon by the Commission in making the finding of fact. The State Personnel Commission shall adopt the decision of the Administrative Law Judge unless the Commission demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record.

In so far as this matter involves a local government employee subject to Chapter 126 pursuant to North Carolina General Statute §126-5(a)(2), the decision of the State Personnel Commission is guided by North Carolina General Statute §126-37. State Personnel Commission procedures and time frames regarding appeal to the Commission in this matter (filing prior to January 1, 2012) are in accordance with Appeal to Commission, Section 0.0400 *et seq.* of Title 25, Chapter 1, SubChapter B of the North Carolina Administrative Code (25 NCAC 01B .0400 *et seq.*). Further requirements of or inquiries regarding rights and notices to the Parties should be directed to the State Personnel Commission and/or the local appointing authority as the circumstances and/or stage of the process may dictate.

ORDER

It is hereby ordered that the agency making the final decision in this matter serve a copy of the final decision to the Office of Administrative Hearings in accordance with N.C. Gen. Stat. § 150B-36.

IT IS SO ORDERED.

This is the 7th day of June, 2012.

Augustus B. Elkins II
Administrative Law Judge