

STATE OF NORTH CAROLINA
COUNTY OF JOHNSTON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12OSP00615

<p>Thomas B Warren, Petitioner,</p> <p>v.</p> <p>North Carolina Department of Agriculture and Consumer Services, Forest Services Division, Respondent.</p>	<p style="text-align: center;">FINAL DECISION ALLOWING SUMMARY JUDGMENT FOR RESPONDENT</p>
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THIS MATTER came on for hearing on October 23, 2012 before Beecher R. Gray, Administrative Law Judge presiding, for consideration of Respondent's Motion for Summary Judgment, filed with the Office of Administrative Hearings ("OAH"), under Rule 56 of the North Carolina Rules of Civil Procedure.

APPEARANCES

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For Respondent: Barry H. Bloch
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On or about October 5, 2012, Respondent filed a Motion for Summary Judgment on the grounds that there was no genuine issue of material fact that Respondent had discriminated against Petitioner on the basis of his age, being over forty years old at all times pertinent to this case, when Respondent denied Petitioner's supervisor's request that Petitioner be given an in-range salary adjustment, as alleged in Petitioner's Amended Petition. On the same date Respondent filed a supporting Memorandum of Law and the Affidavit of Valerie Hinton; Respondent filed a second supporting Affidavit, by Ben Harward, on October 11, 2012. Petitioner filed no Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment.

On October 23, 2012, the undersigned Administrative Law Judge conducted a hearing and heard arguments from counsel for the parties on Respondent's Motion for Summary Judgment. At the conclusion of arguments, the undersigned agreed to hear and did hear testimony from Petitioner and his witnesses, Leonard Goff, Michael Crumpler, and Jack Frye, and received documentary evidence before ruling as a matter of law on Respondent's Motion for Summary Judgment.

Upon review of the documents filed in this contested case, including the Affidavits of Valerie Hinton and Ben Harward and the Memorandum of Law submitted by Respondent; the sworn testimony of Petitioner, Leonard Goff, Michael Crumpler, and Jack Frye; the arguments of counsel; the undersigned makes the following undisputed findings of fact which are set forth for the sake of clarity for reviewing tribunals.

FINDINGS OF FACT

- 1) At the time Petitioner filed his Contested Case Petition, he was employed as an aircraft mechanic in the North Carolina Forestry Service's ("NCFS") aircraft maintenance facility in Kinston, NC. At the times pertinent to this matter, NCFS was part of the N.C. Department of Environment and Natural Resources ("NCDENR"), but is now part of Respondent, the North Carolina Department of Agriculture and Consumer Services ("NCDA&CS").
- 2) Petitioner's Contested Case Petition, filed on or about January 26, 2012, contained statements alleging the following:
 - a) Petitioner "fail[ed] to receive priority consideration;"
 - b) "other: Failure to receive the appropriate grade and pay increase based upon [Petitioner's] title as Lead Fixed Wing Mechanic;" and
 - c) "other: Failure to receive the increase from pay grade 68 to 69 as was given to others."
- 3) Respondent filed a Motion to Dismiss asserting that OAH lacked subject matter jurisdiction in that none of these claims came within the scope of G.S. 126-34.1 and that, as a matter of law, Petitioner was not entitled to priority consideration.
- 4) On August 15, 2012, the undersigned granted Petitioner leave to amend his Petition to base the Petition upon alleged age discrimination in the Forestry Service's failure to grant Petitioner the in-range salary adjustment, and Petitioner did so on or about August 18, 2012.
- 5) Petitioner had filed a grievance with the Respondent's Human Resources Division in November 2011 with a two-page list of allegations. This grievance alleged unlawful workplace discrimination based upon age and that Petitioner "fail[ed] to receive title and

money ‘Lead Mechanic’” (Grievant’s Statement of Appeal Form). Petitioner’s “Itemized list of Details for Thomas B. Warren” states, in part:

1. Lead Fixed Wing Mechanic Position was vacated February 2007.
 2. [Petitioner] worked alone through fire season performing Lead Fixed Wing Mechanic position duties and Aircraft Mechanic position (Current Position) duties.

[...]
 5. July 2007 Lynwood Goff (Current Supervisor) requested that [Petitioner] be given a 10% raise since the two (2) previous employees that were promoted within got a 10% raise.

[...]
 8. October 21, 2008, [Petitioner] received an email from Chip Bowden (Chief Pilot, NC Forestry Service) along with an email that he received August 26, 2008 concerning the 10% increase. Chip Bowden was told to put the request through again when the range adjustment comes through.
- 6) Ben Harward, Respondent’s Human Resources (“HR”) Division Director, investigated Petitioner’s allegations and determined that the information Petitioner provided and the information received from NCDENR, of which NCFS was a part at the time, did not establish a *prima facie* case of age discrimination.
- 7) Ben Harward based this conclusion on the following details derived from e-mail records received from NCDENR and personnel records:
- a) The e-mail records from the Human Resources office at NCDENR showed that Petitioner’s supervisor asked his supervisors to approve a request for an in-range pay adjustment for Petitioner in 2007, but the written request was not completely documented and accepted by NCDENR’s Human Resources Division until July or August, 2008.
 - b) Ben Harward reviewed NCFS Personnel Management Information System (“PMIS”) and Beacon records and found that only two persons ever had received an in-range salary adjustment for changes to their jobs as aircraft mechanics serving as Lead Mechanic with NCFS:
 - 1) Nigel Amos, age 41 at the time the in-range salary adjustment was granted on June 1, 2000, was designated “Lead Fixed Wing Mechanic” in the NCFS’s Kinston aircraft maintenance facility;

- 2) Andrew Templeton, age 38 at the time the in-range salary adjustment was granted on or about June 1, 2000, was designated "Lead Helicopter Mechanic" in NCFS's Hickory aircraft maintenance facility.
- 8) Ben Harward found that Valerie Hinton, who then was employed as a Personnel Analyst I in NCDENR's Human Resources division, informed the HR office at the Forestry Service and NCFS Chief Pilot, Chip Bowden, by e-mail dated August 26, 2008, that the request for an in-range adjustment could not be granted until the reserved amount from an earlier pay grade range revision had been granted. She also informed them that no funds were available at that time to pay Petitioner the money from the range revision and "...once funds are available and the balance has been granted, please resubmit the request."
- 9) Valerie Hinton's Affidavit in support of Respondent's Motion for Summary Judgment affirms that the request for Petitioner's in-range salary adjustment was denied because of the reserved amount from the pay grade range revision and denies that Petitioner's age, years of service, or date of birth were considered in the decision to deny the request.
- 10) While investigating Petitioner's grievance, Ben Harward received copies of an e-mail from Petitioner to NCFS Chief Pilot Bowden, dated July 10, 2008, in which Petitioner informed Chief Pilot Bowden of his "intention to file a formal grievance concerning promises made to me concerning pay and discrimination practices between Andy Templeton and myself. I would appreciate your assistance in resolving these issues in a civil and fair way."
- 11) Ben Harward also received a copy of an October 21, 2008 e-mail from Chief Pilot Bowden to Petitioner, forwarding a memo Chief Pilot Bowden received from Valerie Hinton, informing Petitioner that he was not eligible for the "10 percent increase" (the in-range salary adjustment) "until the range adjustment comes through. This is what I told you I had as far as paperwork. If you want to call Tonya and make an appointment that's fine."
- 12) While investigating Petitioner's grievance, Ben Harward found that there had been two range revisions to the salary grade for Forestry Service's aircraft mechanics:
 - a) The first range revision increased the salary grade from 68 to 69;
 - b) The second range revision increased the salary grade from 69 to 70, effective September 30, 2007.
- 13) Ben Harward also found that none of the NCFS aircraft mechanics received an increase in pay from the second range revision.
- 14) All of the other NCFS aircraft mechanics, as well as Petitioner's supervisor, Leonard Goff, received the first range revision pay increase; among them were three aircraft mechanics who were older than Petitioner.

- 15) In completing his investigation of Petitioner's grievance, Ben Harward concluded that these records and the information Petitioner had provided were not evidence of actual age discrimination.
- 16) Ben Harward informed Petitioner of this conclusion by letter dated January 4, 2012.
- 17) In his January 4, 2012 letter to Petitioner, Ben Harward committed to grant Petitioner the optional reserved salary increase from the range revision that took Aircraft Mechanic from a salary grade 68 to a salary grade 69 retroactively from January 1, 2007, when the other aircraft mechanics received that pay grade range revision.
- 18) Ben Harward also committed to Petitioner that, upon receiving decisions from the N.C. Office of State Personnel and the N.C. Office of State Budget Management on his request for authorization to provide Petitioner with retroactive pay, he would implement the in-range salary adjustment request submitted by Petitioner's supervisors and managers on a current basis.
- 19) Petitioner has received the aforementioned range revision to his pay grade, with back pay to January 1, 2007, and an in-range salary adjustment based upon his assumption of duties relating to the role or title of Lead Fixed Wing Aircraft Mechanic.
- 20) A range revision is a change to the salary grade of a specific employee classification.
- 21) An in-range salary adjustment is not the same personnel action as a promotion, as the latter is defined as "a change in status upward, documented according to customary professional procedure and approved by the State Personnel Director, resulting from assignment to a position assigned a higher salary grade." 25 NCAC 01D .0301.
- 22) The decision to grant an in-range salary adjustment considers changes in a specific employee's job, inequity in the employee's pay relative to other similarly situated employees, and employment market factors such as retention and recruiting problems.
- 23) Requests for in-range salary adjustments can be denied for any one of several reasons, including but not limited to:
 - a) lack of funds in current salary reserve accounts;
 - b) the decision to reserve available funds in payroll accounts for new hires for critically needed positions;
 - c) changes in labor market conditions indicating that an increase in salary is not needed to reduce turnover;
 - d) the employee not having a performance rating of at least Good in his most recent evaluation;

- e) where granting the request will cause inequitable salary relationships among the salaries of employees in the work unit in the same or closely-related classes; or
 - f) where other management alternatives are feasible, such as occupational reclassification, promotion, salary range revision, or performance increase.
- 24) Promotions involve the process of offering a vacant position, interviewing applicants, identifying the most qualified applicant, offering that applicant the position and hiring the applicant; if the applicant is currently employed in a position with a lower salary grade, the hiring would constitute a promotion.
 - 25) Michael Crumpler was hired as an aircraft mechanic working alongside Petitioner in the NCFS Kinston aircraft maintenance facility in 2008 at a starting salary of approximately \$47,000.00. He learned that his annual salary was about \$4,000 more than Petitioner's annual salary.
 - 26) Michael Crumpler was less than forty years old when he began employment with NCFS and, to his knowledge, he had never worked as the "Lead Fixed Wing Aircraft Mechanic" nor received an in-grade salary adjustment after being hired by NCFS, even after transferring to the NCFS Hickory aircraft maintenance facility where he presently serves as Lead Helicopter Aircraft Mechanic.
 - 27) Leonard Goff was Petitioner's supervisor at the time that Petitioner began performing duties as "Lead Fixed Wing Aircraft Mechanic" in February 2007.
 - 28) Leonard Goff prepared the request that Petitioner receive the in-range salary adjustment and submitted it in April 2007 and again in 2008 when it was returned for revisions.
 - 29) Jack Frye testified that he replaced Leonard Goff as aircraft maintenance supervisor in 2009 after working as a crew chief on one of the NCFS' aircraft.
 - 30) Jack Frye testified that he knew that Petitioner was not earning as much as the previous Lead Fixed Wing Aircraft Mechanic, Nigel Amos, and that the request for an in-range salary adjustment had been turned down by Raleigh.
 - 31) Leonard Goff, Jack Frye, and Petitioner all testified that they were not trained in Human Resource Management or management of payroll accounts under N.C. law, rules or policies.
 - 32) Petitioner thought that he should have received an in-range salary adjustment in 2007 because he was doing the work of the first Lead Fixed Wing Aircraft Mechanic, who had received the same pay increase when he assumed those duties in 2000.

- 33) Petitioner admitted that he had not participated in the decision setting the salary amount offered to Michael Crumpler, as that had happened in Raleigh in NCDENR's Human Resources Division and he was not present there when that decision was made.
- 34) Petitioner admitted that he had no personal knowledge of what considerations went into the decision to offer Michael Crumpler his starting salary or any personal knowledge upon which to conclude that Michael Crumpler had received an in-range salary adjustment after joining NCFS.

Based on the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

- 1) Petitioner is a career State employee subject to the provisions of the State Personnel Act codified at N.C. Gen. Stat. § 126-1 et seq.
- 2) Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. N.C. R.C.P. 56(c)
- 3) In considering a motion for summary judgment, the evidence is viewed in the light most favorable to the non-movant. *Hodge v. North Carolina DOT*, 137 N.C. App. 247, 253, 528 S.E.2d 22, 27 (2000)
- 4) The party moving for summary judgment bears the burden of persuasion on the relevant issue. The non-moving party may survive a motion for summary judgment by producing evidence from which a fact finder might return a verdict in his favor. In considering the evidence, all reasonable inferences are to be drawn in favor of the non-moving party. However, the mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient; there must be evidence on which the fact finder could reasonably find for the non-moving party. *Candillo v. N.C. Dep't of Corr.*, 199 F. Supp. 2d 342 (MDNC 2002)
- 5) The United States Supreme Court has established a scheme by which employees may prove discrimination in employment. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *see also Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142, 147 L. Ed. 2d 105, 116, 120 S. Ct. 2097 (2000) (applying the *McDonnell Douglas* framework to an age discrimination case); and *Dep't of Correction v. Gibson*, 308 N.C. 131, 136-37, 301 S.E.2d 78, 82-83 (1983).
- 6) Under this framework, an employee must first establish a *prima facie* case of discrimination. *Reeves*, 530 U.S. at 142, 147 L. Ed. 2d at 116.

- 7) Once an employee establishes a *prima facie* case of discrimination, the burden shifts to the employer to prove a legitimate, non-discriminatory basis for the employer's action. *McDonnell Douglas*, 411 U.S. at 802, 36 L. Ed. 2d at 678.
- 8) If the employer succeeds, the burden shifts back to the employee to show that the employer's reason for the action is a mere pretext for discrimination. *Id.* at 804, 36 L. Ed. 2d at 679. However, "the ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [employee] remains at all times with the [employee]." *Reeves*, 530 U.S. at 143, 147 L. Ed. 2d at 117 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 215, 101 S. Ct. 1089 (1981)); *see also Gibson*, 308 N.C. at 138, 301 S.E.2d at 83.
- 9) Petitioner's complaint was that, in the pay he received, he was treated differently from other aircraft mechanics that performed the same work because they were younger when they began performing that work. When an employee alleges that employer treated him or her in particular less favorably than other employees, the employee raises claim of "disparate treatment." [*North Carolina Dep't of Cor. v. Hodge*, 99 N.C. App. 602, 394 S.E.2d 285 \(1990\)](#).
- 10) Our State Court of Appeals has also stated that to present a *prima facie* case, Petitioner in an age discrimination claim must show "(1) that he is a member of a protected class, (2) that he was subject to an adverse employment decision, (3) that he was qualified for the position, and (4) that he was treated differently than a similarly situated individual outside the protected class." [*Follum v. N.C. State Univ.*, 204 N.C. App. 369, 696 S.E.2d 203 \(2010; citing *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 762 \(6th Cir. 2006\)\)](#).
- 11) The record shows that this Petitioner is in the same occupational classification (aircraft mechanic) as two other State employees who received in-range salary adjustments because they assumed additional duties as "lead" mechanics in their assigned place of work. One of these employees, Nigel Amos, was the mechanic Petitioner replaced as "lead" mechanic in Kinston when Nigel Amos left State employment. The record shows that Nigel Amos also was more than forty years old when he became "lead" mechanic in 2000; the other "lead" mechanic, Andrew Templeton, was thirty-eight years old when he assumed that title and duties at the NCFS helicopter maintenance facility in Hickory, also in 2000.
- 12) Nigel Amos was not a similarly situated individual outside the protected class for purposes of this case because he was also a member of the protected class, being more than forty years old, when he became the "lead mechanic" in Kinston in 2000.
- 13) Likewise, Andrew Templeton was not a similarly situated individual outside the protected class for purposes of this case because his work was devoted to the maintenance of helicopters, not fixed-wing aircraft, at a different location and due to the passage of seven years from when he received his in-range salary adjustment to when Petitioner's

supervisor submitted the application for Petitioner to receive an in-range salary adjustment.

- 14) Petitioner asserted that because Michael Crumpler started his employment with NCFS as an aircraft mechanic at a higher salary than Petitioner's salary, Michael Crumpler received an in-range salary adjustment. Petitioner's witnesses offered no testimony or other evidence tending to show that Michael Crumpler had received an in-range salary adjustment.
- 15) The mere fact that Michael Crumpler was offered a higher starting salary when he was offered employment as an aircraft mechanic in the NCFS Kinston aircraft maintenance facility does not make him a similarly situated employee outside the suspect class.
- 16) As a matter of law, Michael Crumpler was not a similarly situated employee outside the protected class who received a benefit denied to Petitioner.
- 17) Respondent presented uncontroverted evidence tending to show that other aircraft mechanics in the protected class received pay grade revisions and increases in pay in 2007.
- 18) Respondent presented uncontroverted evidence that NCDENR's Human Resources Division had a reason unrelated to Petitioner's age for denying the request for the in-range salary adjustment. Although both parties agreed that this "unrelated reason" was a mistake made by DENR at the time Petitioner was under that Department, that unrelated reason was not the product of unlawful discrimination based upon Petitioner's age.
- 19) Petitioner has presented no evidence that he was treated differently from a similarly situated employee outside the protected class arising from the denial of his supervisor's request that Petitioner receive an in-range salary adjustment.
- 20) Petitioner has failed to present any evidence of the type demanded by Rule 56(e) of the North Carolina Rules of Civil Procedure regarding the existence of a similarly situated individual outside the protected class who received an in-range salary adjustment.
- 21) Petitioner has failed to present any evidence of the type demanded by Rule 56(e) of the North Carolina Rules of Civil Procedure regarding the decision made in the Human Resources division of NCDENR to disapprove the request that Petitioner receive an in-range salary adjustment.

Based on the foregoing Findings of Fact and Conclusions of Law, I make the following:

DECISION

Having considered Respondent's Motion for Summary Judgment, together with

supporting affidavits, documents of record, testamentary and documentary evidence offered at the motions hearing by Petitioner, all viewed in the light most favorable to the non-movant, I find that Respondent's Motion for Summary Judgment should be, and the same hereby is, ALLOWED in accordance with N.C. Gen. Stat. § 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 27th day of May, 2013.

Beecher R. Gray
Administrative Law Judge