

STATE OF NORTH CAROLINA
COUNTY OF

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12OSP02255

Christine Smith, Petitioner, v. North Carolina Department of Public Safety, Respondent.	FINAL DECISION
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The above-captioned contested case was heard before the Honorable Beecher R. Gray, Administrative Law Judge, on October 12, 2012, and May 7, 2013, in Goldsboro, North Carolina.

APPEARANCES

FOR PETITIONER: Glenn A. Barfield
Haithcock, Barfield, Hulse & Kinsey, PLLC
PO Drawer 7
Goldsboro, North Carolina 27533-0007

FOR RESPONDENT: Yvonne B. Ricci
Assistant Attorney General
NC Department of Justice
PO Box 629
Raleigh, NC 27602-0629

EXHIBITS

Admitted for Petitioner:

Exhibit Number	Description
1	Certified Copy of the Record in Petitioner's Worker's Compensation Case, I.C. No. W73702, Christine Smith v. NC Department of Public Safety

Admitted for Respondent:

Exhibit Number	Description
1	Letter to Petitioner from ADA Compliance Officer Brian A. Murray dated March 13, 2012
2	Letter to Petitioner from Wayne Correctional Center Superintendent Robert E. Hines – Re: Verbal Resignation dated March 19, 2012
3	NCDOC Employment Statements signed by Petitioner dated March 1, 2006
4	Letter to Laura Price from David C. Hogarty, D.O. – RE: Christine Smith Chart #28176 dated December 12, 2011
5	DC-730 Request for Reasonable Accommodation for Petitioner dated November 25, 2011
6	Response from David C. Hogarty, D.O. to specific questions related to Petitioner’s ability to perform the essential job functions of a correctional officer dated January 1, 2012
7	NCDOC Personnel Manual – Subject: Americans With Disabilities Act
8	NCDOC Personnel Manual – Subject: Americans With Disabilities Act – Disability Review Process
9	NCDOC Personnel Manual – Subject: Workers’ Compensation and Salary Continuation Programs
10	Letter to NCDPS from Petitioner’s Attorney – Re: Notice of Appeal dated March 27, 2012
11	Letter to Petitioner from EEO Officer Antonio Cruz – Re: Appeal of Accommodation dated April 12, 2012

WITNESSES

Called by Petitioner: None
Called by Respondent: Laura Price
Brian Murray

ISSUES

1. Whether Petitioner resigned her position as a Correctional Officer with Respondent.
2. If not, whether Respondent terminated Petitioner from that position.
3. Whether Respondent afforded Petitioner her internal grievance rights.
4. Whether Respondent terminated Petitioner without just cause.

5. Whether Respondent failed to make a reasonable accommodation for Petitioner's medical restrictions.

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making these Findings, the Undersigned has weighed all the evidence and has assessed the credibility of witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness testified; whether the testimony of the witness was reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACTS

1. The parties received notice of hearing more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.
2. Respondent, North Carolina Department of Public Safety, is subject to Chapter 126 of the North Carolina General Statutes and is Petitioner's employer.
3. Prior to March 19, 2012, Petitioner was employed by Respondent as a Correctional Officer at Wayne Correctional Institution.
4. Petitioner was a "career state employee" as defined in G.S. 126-1.1.
5. The Undersigned hereby finds as facts and incorporates herein those facts stipulated to by the parties in their "JOINT TRIAL STIPULATIONS" approved and ordered filed by the court on October 12, 2012, a copy of which is attached hereto.
6. On November 25, 2011, Petitioner delivered a form DC-730 "REQUEST FOR REASONABLE ACCOMMODATION" to Respondent's facility ADA coordinator, Ms. Laura Price. (R. Ex. 5)
7. On March 13, 2012, Respondent's ADA compliance officer, Brian A. Murray, mailed Petitioner a letter (R. Ex. 1) informing Petitioner that the request for reasonable accommodation had been denied, and which stated "Assuming, without deciding, that you have a disability as defined by the ADA, there is no reasonable accommodation that will allow you to perform these correctional officer essential job functions. Therefore you cannot be accommodated in your position as a correctional officer."
8. The March 13, 2012, letter from Mr. Murray to Petitioner also indicated that after a search of job postings in the Respondent agency was conducted, "it was determined that there was not an available position for which you are qualified."

9. On March 19, 2012, Petitioner telephoned Ms. Price to inquire about the effect of the March 13, 2012, letter on her job status.
10. During the telephone conversation, Petitioner never stated that she was resigning and never used the word “resign;” Petitioner did not say that she was quitting.
11. Ms. Price made it clear to Petitioner that the March 13, 2012, letter meant that Petitioner could not continue working.
12. Nothing Petitioner said to Ms. Price during the March 19, 2012, telephone conversation could be reasonably understood to be an indication that Petitioner was voluntarily resigning or voluntarily separating from state service.
13. On March 19, 2012, Robert E. Hines, Superintendent of Respondent’s Wayne Correctional Center wrote to Petitioner “to accept your verbal resignation that you gave to Ms. Laura Price, Administrative Officer, this morning, March 19, 2012.” (R. Ex. 2)
14. On March 27, 2012, Petitioner through counsel sent to Respondent a letter denying that Petitioner had resigned and notifying Respondent that Petitioner would contest her dismissal. (Joint Stipulation 33)
15. At Wayne Correctional Center, there were then 15 mandatory posts to be filled by correctional officers; all of those posts are rotating posts where no officer is permanently assigned to a post, unless they are recuperating from some type of injury. (Joint Stipulation 40) (Testimony of Lt. Mallard in I.C. matter)
16. On January 1, 2012, Petitioner’s treating physician, David C. Hogarty, D.O. responded to specific questions regarding Petitioner’s ability to perform the essential job functions of a correctional officer; Dr. Hogarty’s responses indicated Petitioner could perform 18 of the 21 listed “ESSENTIAL JOB FUNCTIONS,” but that Petitioner could not perform 3 of the essential job functions. (R. Ex. 6)
17. As of March 19, 2012, Respondent had been accommodating Petitioner’s physical restrictions for approximately 3 years by assigning Petitioner to surveillance duty in the monitoring room at Wayne Correctional Center. Petitioner was assigned that duty for all of her regular work shifts from early in 2009 through the date of her separation from state employment on or about March 19, 2012. (Joint Stipulations 23 and 24)
18. Based on the information provided by Petitioner’s doctor, her restricting medical conditions are likely permanent in nature, and the accommodation which had been provided to Petitioner through March 19, 2012, and which is requested by Petitioner, would be a permanent accommodation, as opposed to a temporary accommodation. Where Petitioner is not reasonably expected to ever be able to perform all of the essential job functions of a correctional officer, accommodation on a permanent basis would not be reasonable.

19. Respondent could have given Petitioner notice of “separation due to unavailability,” but because Respondent took the position that Petitioner had resigned her position, it did not notify Petitioner of separation due to unavailability, nor of any of the appeal rights Petitioner would have had in that circumstance.
20. Petitioner did not resign her position; rather, Respondent terminated Petitioner on or about March 19, 2012.
21. Petitioner and her attorney agreed on \$250.00 per hour for his fees. Her attorney billed for 41.8 hours. \$200.00 per hour for a total of \$8,360.00 is found to be reasonable and consistent with a recent case involving the same attorney. Petitioner is entitled to recover the \$20.00 filing fee in this case.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings. Because Petitioner, a career state employee, did not resign but was in fact terminated, Respondent was required to show just cause for her termination.
2. G.S. 126-34.02(b)(3) (2013) provides that in an involuntary non-disciplinary separation due to an employee’s unavailability, the agency shall not have the burden of proving just cause, but only the burden of proving that the employee was unavailable. This statute has no application to the present case as it did not become effective until August 21, 2013, and applies only to grievances and contested cases filed on or after that date.
3. Respondent failed to show by a preponderance of evidence that it had just cause to terminate Petitioner.
4. In the alternative, Respondent failed to properly notify Petitioner of her termination and of her appeal rights accruing upon termination.
5. Respondent did not fail to offer Petitioner a reasonable accommodation, in that the only accommodation requested was not reasonable, because it was requested as a permanent accommodation, meaning Petitioner would be excused from performing three of the 21 essential job functions.
6. Based upon the evidence and the experiences of the presiding Administrative Law Judge, I find that Petitioner is entitled to \$20.00 in costs and \$8,360.00 in attorney’s fees.

On the basis of the above Findings of Fact and Conclusions of Law, the Undersigned issues the following:

FINAL DECISION

The use of the term “shall” in this Final Decision is a mandatory term and not a directory term. The Undersigned finds and holds that there is sufficient evidence in the record to properly

and lawfully support the Findings of Fact and Conclusions of Law cited above, and that the Findings of Fact properly and sufficiently support the Conclusions of Law. The Undersigned enters this Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. Based on those conclusions and the proved facts in this case, the Undersigned holds that Respondent has failed to carry its burden of proof by a greater weight of the evidence that there was just cause to dismiss Petitioner from her position as a correctional officer at Wayne Correctional Institution, and the Undersigned holds that Respondent failed to afford Petitioner her appeal rights upon that termination.

Because the evidence indicates that Petitioner is unable to perform all of the essential job functions of a correctional officer, reinstatement is not an appropriate remedy. Petitioner is entitled to an award of back pay and reimbursement of her reasonable attorney's fees and costs.

Back pay shall be awarded to Petitioner for the period beginning with March 19, 2012, concluding May 7, 2013. The award of back pay should include any difference in contributions into the state retirement system and any and all other benefits Petitioner would have obtained prior to May 7, 2013, had she not been dismissed.

Petitioner shall be reimbursed her reasonable attorney's fees and costs as follows:

Costs: \$20.00

Attorney's Fees: \$8,360.00

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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 03.0102, 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 8th day of January, 2014.

Beecher R. Gray
Administrative Law Judge