

STATE OF NORTH CAROLINA
COUNTY OF BLADEN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12OSP06980

<p>Asia T. Bush, Petitioner,</p> <p>v.</p> <p>North Carolina Department of Transportation, Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge, on March 14, 2013, in Fayetteville, North Carolina. After considering the allegations in the Petition, the testimony of all witnesses, and the documentary evidence and exhibits admitted, the undersigned makes the following **DECISION**:

APPEARANCES

PETITIONER: Asia T. Bush, Pro Se
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Elizabethtown, North Carolina 28337

RESPONDENT: Kathryne E. (Beth) Hathcock
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
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ISSUE

Whether Petitioner properly was separated under the Office of State Personnel policy for unavailability, or because of discrimination based on her gender or handicapping condition.

EXHIBITS

Respondent's Exhibits ("R. Exs.") 1-13 were admitted.

WITNESSES

Petitioner testified as her only witness.

Respondent called as witnesses: Amanda Olive, who serves as Classification, Compensation and Policy Manager for the North Carolina Department of Transportation (“DOT”); Administrative Officer Paula Windley; and Director Michael Bryant of the Vehicle Services Unit of the North Carolina Division of Motor Vehicles (“DMV”).

Based upon the official documents in the file, the sworn testimony of the witnesses, and other competent evidence admitted at the hearing, the undersigned makes the following:

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each stipulated that notice of hearing was proper.
2. Respondent Department of Transportation, Division of Motor Vehicles (“DMV”) hired Petitioner to work as a Business Services Coordinator in the Bladen County Call Center on November 17, 2007. Business Services Coordinators more commonly are known as call center representatives or agents.
3. DMV’s Bladen County Call Center is responsible for responding to customer service inquiries involving the agency’s vehicle registration program, financial responsibility and insurance questions, driver’s license concerns, safety and emissions inspections, and DMV’s own policies and procedures. Specifically, call center representatives provide support services to DMV branch offices, driver’s license examiner offices, lending institutions, courts, attorneys, insurance companies, and other parties on complex issues unresolved by automated voice processing equipment. (R. Ex. 11)
4. The Bladen County Call Center where Petitioner worked is extremely busy--averaging 5,500 incoming calls daily and 1.5 million calls each year. The Business Services Coordinator positions are the core of the Bladen County Call Center. Agents are required to answer 8-10 calls each hour with minimal supervision. Agents also frequently leave their assigned workspace to retrieve printouts from centralized printers; to make copies at a centralized copier; to research information using call center resources such as lienholder books, National Automobile Dealers Association books, special mailings books, Official Bulletin books, and the N.C. lawyer listing book; to discuss issues with supervisors; and to follow up with other call center agents who may have assisted the same customer. In 2011, DMV’s Bladen County Call Center answered 1,359,799 calls, with an average wait time of 6:35. From January to October 2012, the call center answered 1,216,419 calls, with an average wait time of 5:45.
5. The chain of command in the Bladen County Call Center is as follows: Paula Windley, Administrative Officer, oversees the Bladen County Call Center with the assistance of Title Examining Supervisor Renee Summerlin. There are six teams of fourteen call

center agents, each led by a supervisor. (R. Ex. 10) Call Center agents work a full-time schedule of forty hours per week. (R. Ex. 11) There are no “light duty” positions at the Bladen County Call Center.

6. On October 15, 2010, Petitioner was granted twelve weeks of leave under the Family Medical Leave Act (“FMLA”) because of pregnancy complications. (R. Ex. 1) At the expiration of her FMLA leave, Petitioner applied for and was granted short-term disability leave, effective March 16, 2011. (R. Ex. 5) Petitioner was advised that, “[w]ith proper documentation, you could be eligible for short term disability benefits until 3/15/2012.” (R. Ex. 5)
7. It is the DOT’s policy that prior to the expiration of an employee’s one year short-term disability leave, the employee is advised--by letter--of the DOT’s recommendation that he or she be separated because of unavailability. Prior to separation, the employee is given the opportunity to propose alternative methods of accommodation before a final decision regarding separation is made. (R. Ex. 12)
8. The DOT follows the Office of State Personnel’s (“OSP”) policy regarding separation, as found in the State Personnel Manual. The policy provides that, “[a]n employee may be separated on the basis of unavailability when the employee becomes or remains unavailable for work after all applicable leave credits have been exhausted and agency management does not grant a leave without pay, or does not extend a leave without pay period, for reasons deemed sufficient by the agency.” Under the policy, the employer must give the employee notification of the proposed separation, the efforts undertaken to avoid separation, and why the efforts were unsuccessful. (R. Ex. 6)
9. By letter dated February 29, 2012, Petitioner was informed that her short-term disability leave was about to expire and advised that she would be separated for unavailability unless she could propose a reasonable alternative method of accommodation. (R. Ex. 12)
10. In response to the letter from management recommending separation, Petitioner submitted two notes from a nurse practitioner, dated March 13, 2012, advising that Petitioner could resume “light duties with assistance as needed” beginning on April 1, 2012. The second note from the nurse practitioner anticipated that Petitioner “should be able to resume duties” after an appointment with a specialist scheduled to occur after April 01, 2012. (R. Ex. 8)
11. This proposed working arrangement was unacceptable to management because Petitioner’s short-term disability leave expired on March 15, 2012, and Petitioner would have been expected to report to work and perform the essential functions of her position immediately thereafter. Because Petitioner was not able potentially to report to work until two weeks later on April 1, 2012, management believed that she was unavailable under the OSP separation policy.
12. Petitioner’s proposed arrangements did not meet the operating needs of the Bladen County Call Center. The Business Services Coordinator position is considered critical to the work flow of the Call Center. The Call Center requires an employee in the Business

Services Coordinator position to work on a full-time basis, answering numerous calls in order to respond to the constant inquiries of the public.

13. Allowing Petitioner to return to work on “light duty with assistance” would place an undue hardship and be unduly burdensome on the Bladen County Call Center. In her four years and four months of employment as a call center agent, Petitioner had worked less than two years. The Call Center needed someone in the position to perform all of the requirements of the Business Services Coordinator position. With regard to approval of sick and vacation leave in the Call Center, office policy allows only a maximum of seven agents to be out of the office each day. When seven agents are out of the office for any reason, including FMLA and short-term disability leave, other employees are denied vacation and sick leave. In addition, when agents are out of the office, the Call Center is still responsible for answering the tremendous volume of customer calls each day. In order to respond to the calls, other agents and supervisors are required to increase their workload, putting additional stress and pressure on them.
14. By letter dated March 20, 2012, Petitioner was informed that she was being separated because of unavailability. The basis of that decision was that the Business Services Coordinator position is considered critical to the workflow of the Bladen County Call Center and Petitioner’s proposed return to work arrangements did not meet the operating needs of the agency. (R. Ex. 13)
15. N.C. Admin. Code tit. 25 r. 1C.1007 (“Unavailability When Leave is Exhausted”) provides in pertinent part: “(a) [a]n employee may be separated on the basis of unavailability when the employee becomes or remains unavailable for work after all applicable leave credits and benefits have been exhausted and agency management does not grant a leave without pay.”
16. “Unavailability” is defined as the employee’s inability to return to all of the position’s essential duties and work schedule due to a medical condition or the vagueness of a medical prognosis; or the employee and the agency cannot reach agreement on a return to work arrangement that meets both the needs of the agency and the employee’s medical condition.” N.C. Admin. Code tit. 25 r. 1C.1007(d)(1).

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings under Chapters 126 and 150B of the North Carolina General Statutes, each having received a proper notice of hearing in this matter.
2. At the time of her separation, Petitioner was a career state employee, as defined under the provision of Chapter 126 of the North Carolina General Statutes, and is entitled to the protections of the North Carolina State Personnel Act and the administrative regulations promulgated thereunder.

3. The burden of proof for separation because of unavailability is not the just cause standard, as described in N.C. Gen. Stat. § 126-35. Rather, the agency has the burden to prove that the employee was unavailable and that the agency considered the employee's proposed accommodations or other reasonable accommodations. N.C. Admin. Code tit. 25 r. 1C.1007(c).
4. A preponderance of substantial evidence demonstrated that Respondent met its burden in proving that Petitioner was unavailable for work. After Petitioner's one year short-term disability leave expired on March 15, 2012, Petitioner was not able to return to work until April 1, 2012 and even then could only possibly perform "light duty with assistance as needed," as opposed to the essential functions of her position. Respondent considered Petitioner's requests; the proposed accommodations, however, were not feasible because of the critical operating needs of the Bladen County Call Center. Accordingly, Respondent followed all requirements for separating Petitioner because of unavailability in accordance with N.C. Admin. Code Tit. 25 r. 1C.1007.
5. Petitioner presented no credible evidence of discrimination by Respondent on the basis of her gender or a handicapping condition.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent met its burden of proving 1) that Petitioner was unavailable to return to work at the expiration of her short-term disability leave and 2) that it considered Petitioner's proposed accommodations. Petitioner failed to prove that she was separated on the basis of her gender or a handicapping condition.

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 23rd day of June, 2013.

Beecher R. Gray
Administrative Law Judge