

STATE OF NORTH CAROLINA
COUNTY OF WASHINGTON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12OSP07443

<p>BONNIE S. RARDIN, Petitioner,</p> <p>v.</p> <p>CRAVEN CORRECTIONAL INSTITUTION, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Respondent.</p>	<p>FINAL DECISION DISMISSING CONTESTED CASE</p>
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This contested case was heard before Administrative Law Judge Beecher R. Gray on January 22, 2013, at the Martin County Courthouse in Williamston, North Carolina. Respondent called Petitioner Bonnie Rardin and Tracy Perry as witnesses as to the issue of whether Petitioner was dismissed without just cause. Petitioner testified on her behalf on the issues of whether Respondent failed to give Petitioner priority consideration, retaliated against Petitioner, and whether Petitioner had been sexually harassed in the workplace. Respondent moved to dismiss Petitioner's appeal for lack of subject matter jurisdiction because Petitioner failed to exhaust her administrative remedies by following Respondent's internal grievance process as required by G.S. 123-34 and for failing to state a claim on the remaining issues.

APPEARANCES

For Petitioner: Bonnie S. Rardin, Appearing *Pro Se*
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For Respondent: Lisa Y. Harper
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EXHIBITS

Respondent offered twelve exhibits which were admitted into evidence:

- R. Ex. 3 Facebook entry to Sharon Walker
- R. Ex. 6 Rardin Witness Statement dated 6/29/12
- R. Ex. 7 Rardin Written Statement dated 7/3/12
- R. Ex. 8 Rardin Addendum to Statement dated 7/4/12
- R. Ex. 10 Dismissal Letter dated 7/31/12
- R. Ex. 14 Notice of Pre-Disciplinary Conference Letter dated 7/17/12
- R. Ex. 16 Letter to Bonnie Rardin from Bonnie Boyette 9/19/2012
- R. Ex. 17 Letter to Bonnie Rardin from Tracy Perry dated 9/24/12
- R. Ex. 18 Copy of Bonnie Rardin's deposition taken 11/28/2012
- R. Ex. 23 Grievance Policy and Procedures effective October 1, 1996, Revised April 1, 2011
- R. Ex. 24 Notice of Mediation dated September 5, 2012.
- R. Ex. 25 Letter to Terry Perry from Bonnie Rardin and Statement from Matthew Rinker dated October 2, 2012.

Petitioner offered one exhibit which was admitted into evidence:

- P. Ex. 1 Email regarding Sergeant Johnson (3 pages)

ISSUES

1. Whether Respondent's dismissal of Petitioner from its employment was for just cause.
2. Whether Petitioner exhausted her administrative remedies.
3. Whether Respondent failed to accord Petitioner priority consideration.
4. Whether Petitioner stated a claim for retaliation or for sexual harassment in the workplace.

Based on the sworn testimony of Petitioner, Bonnie S. Rardin and Respondent's witness, Tracy Perry, and the documentary evidence admitted into the record, I make 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 on the record that notice was proper.
2. Petitioner began working for Respondent in June 2007 as a Correctional Officer at Craven Correctional Institution. (Tr. p. 12)

3. On or about June 25, 2012, Petitioner sent a Facebook message to Correctional Officer Sharon Welker, a person she knew from work, asking Officer Welker “if her husband knew anyone who could do something for \$5,000, no questions asked.” (Tr. pp. 13-16; R. Ex. 3)
4. Petitioner also wrote a statement on June 29, 2012, and another on July 3, 2013, during the course of an internal investigation admitting that she sent a Facebook message to Officer Welker and that she sent Officer Foss a text message inquiring about buying a gun. (Tr. pp. 16-23; R. Exs. 6 & 7)
5. On or about August 9, 2012, Petitioner received a dismissal letter dated July 31, 2012, notifying her that she was dismissed for unacceptable personal conduct because of writing Officer Welker and asking her whether her husband knew anyone who could take care of something for Petitioner--no name, no questions asked--for \$5,000.00 and Petitioner asking Officer Foss if he could get her a gun with a scope. Also attached to the dismissal letter was a copy of the Grievance Disciplinary Policy and Procedures covering disciplinary appeals. (Tr. pp. 24-26; R. Ex. 10)
6. Petitioner appealed her dismissal. Tracy Perry, Mediation Intake Coordinator, sent Petitioner a “Notice of Mediation” informing her that Petitioner’s mediation was scheduled for September 18, 2012, at 9:30 a.m. The Notice stated that “Mediation will not be rescheduled unless due to an unforeseen emergency.” The Notice also state that “You may be asked to provide documentation substantiating the emergency.” Petitioner did not appear at the scheduled mediation because she states that she was sick. Petitioner did not go to the emergency room or to a doctor to be seen because of her emergency sickness so as to obtain valid substantiation of her illness. (Tr. pp. 25-28, 34-35; R. Ex. 24)
7. On September 24, 2012, Coordinator Perry sent Petitioner a letter informing Petitioner that her request to have her mediation rescheduled was denied because Petitioner failed to provide proper documentation for her alleged sickness emergency. (Tr. p. 31; R. Ex. 17)
8. On or about October 2, 2012, Petitioner sent Coordinator Perry a letter with a statement from Petitioner’s male friend, Matthew Rinker, stating that Petitioner was sick on September 17, 2012, and that he took care of Petitioner while she was sick...on the 18th and that he was awakened by Petitioner at 9:45 a.m. on September 18, 2012, and asked to call and “let your office know she was sick and could not make the appointment.” The letter sent by Matthew Rinker on behalf of Petitioner was not considered medical documentation and was not approved as substantial documentation of her emergency illness. (Tr. pp. 31, 37, 42; R. Ex. 25)
9. Respondent’s Grievance Policy and Procedure required that Petitioner participate in scheduled mediation as Step I of the grievance process. (Tr. pp. 46-51)

10. Petitioner alleges that she was denied priority consideration because she was employed for five years and she had a good record as an employee. Petitioner believes that her records as an employee should have been considered as it related to her discharge. (Tr. pp. 54-55)
11. Petitioner's retaliation claim is based on her filing an EEO charge against Assistant Superintendent Ross at Craven Correctional Institution, who was present at Petitioner's pre-disciplinary conference. Petitioner believes that Superintendent Ross' presence at Petitioner's pre-disciplinary conference and her participation in Petitioner's unemployment hearing constituted retaliation against Petitioner by Assistant Superintendent Ross. (Tr. pp. 56-57, 75-76)
12. Petitioner never filed a written complaint with Superintendent Dale or the EEO office alleging that she was sexually harassed by her sergeant or any other person at her workplace. (Tr. pp. 81-85)
13. One of the two bases for "just cause" is "unacceptable personal conduct," 25 NCAC J .0604(b)(2), which includes, among other things, "conduct for which no reasonable person should expect to receive prior warning," "the willful violation of known or written work rules," and "conduct unbecoming a state employee that is detrimental to state service. 25 NCAC 01J .0614(8)(d), and (8)(e). Respondent afforded Petitioner notice that unacceptable personal conduct is grounds for termination. In this case, the termination letter specified that Petitioner was being discharged for unacceptable personal conduct.
14. North Carolina General Statute §126-34 provides, in pertinent part:

[u]nless otherwise provided in this Chapter, any career State employee having a grievance arising out of or due to the employee's employment and who does not allege unlawful harassment or discrimination because of the employee's age, sex, race, color, national origin, religion, creed, handicapping condition as defined by G. S. 168-A-3, or political affiliation, shall first discuss the employee's problem or grievance with the employee's supervisor and follow the grievance procedure established by the employee's department or agency.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. At the time of her discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, G.S. §126-1, et. Seq. Petitioner, therefore, could only be warned, demoted, suspended, or dismissed by Respondent "for just cause." 25 NCAC 01J

3. Respondent complied with the procedural requirements for Petitioner's dismissal for unacceptable personal conduct under 25 NCAC 01J .0608 and .0613.
4. Petitioner failed to follow Respondent's grievance procedure for appealing her termination for just cause in that she failed to appear for the scheduled mediation without presenting substantiation that she had a sickness emergency.
5. Petitioner has failed to state a claim for which relief can be granted under G.S. A-1, Rule 12(b)(6) on her claims of (1) failure to receive priority consideration, (2) retaliation, and (3) sexual harassment.

FINAL DECISION

As orally rendered at the hearing of this matter, Respondent's Motion to Dismiss is granted because the Office of Administrative Hearings does not have subject matter jurisdiction in this contested case appeal because Petitioner, a career State employee, has not followed Respondent's grievance appeal procedure as required by G.S. 123-34. Petitioner's remaining claims are dismissed for failure to state a claim and lack of evidence. Respondent's Motion to Dismiss this contested case petition for lack of subject matter jurisdiction under G.S. 1A-1, Rule 12(b)(1) and failure to state a claim under G.S. 1A-1, Rule 12(b)(6) is **ALLOWED**. This contested petition is **DISMISSED** with prejudice.

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 19th day of June, 2013.

Beecher R. Gray
Administrative Law Judge