

STATE OF NORTH CAROLINA
COUNTY OF CARTERET

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 OSP 8548

LAUREN WILSON BURCH,)	
)	
)	
Petitioner,)	
)	
v.)	
)	
NORTH CAROLINA ALCOHOL LAW)	
ENFORCEMENT,)	
)	
Respondent.)	
)	

FINAL DECISION

The contested case of Lauren Wilson Burch, Petitioner herein, was heard before Administrative Law Judge Selina M. Brooks on January 15, 2015, in Goldsboro, North Carolina and on January 16, 2015, in Raleigh, North Carolina.

APPEARANCES

PETITIONER: Glenn Barfield
Bryan King
Haithcock Barfield Huse & Kinsey
231 East Walnut Street
P.O. Drawer 7
Goldsboro, NC 27533

RESPONDENT: Tammera S. Hill
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27609

WITNESSES

The following witnesses testified for the Petitioner:

Petitioner, Lauren Wilson Burch
Diane J. Chapin
Alan Fields
Kendall E. Pike
Samantha Williams

The following witnesses testified for the Respondent:

None.

EXHIBITS

Petitioner's exhibits ("P Exs") A-O were admitted into evidence.

Respondent's exhibits ("R Exs") 1-16 were admitted into evidence.

PARTY REPRESENTATIVES

The Petitioner's party representative was Petitioner, Lauren Burch.

The Respondent's party representative was Kendall E. Pike.

ISSUES

After discussion on the record on December 11, 2014 (T pp 20-21) and as memorialized in the Order entered on December 15, 2014, Counsel for both Parties agreed that the issues are as follows:

The Petitioner has the burden of proof that she was constructively suspended as a result of discrimination because of pregnancy.

If Petitioner prevails in meeting her burden of proof, then Respondent has the burden of proof that its action(s) had just cause, and that there was neither constructive suspension nor discrimination.

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 makes the following Findings of Fact and Conclusions of Law. In making the 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 witness, 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.

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

FINDINGS OF FACT

1. Petitioner has been employed as a Special Agent with the North Carolina Alcohol Law Enforcement (NCALE) since 2006, and currently is assigned to the New Bern district. (T p 216)

2. Respondent is the North Carolina Department of Public Safety of which NCALE was a division.

3. In 2011, Deputy Director of Administration of NCALE Mark J. Senter (Senter) instituted disciplinary proceedings against Petitioner for expense reimbursements and irregularities in her time keeping. (P Ex E p 12) One of the irregularities concerned a report for overnight stay in Raleigh that covered meals and transportation, but not overnight lodging, because Petitioner stayed with family living in Raleigh. (T pp 134-136; P Ex E p 8; R Ex 16 p 17) Initially, Petitioner was suspended for five days without pay which she grieved and eventually resulted in a written warning after the case was settled in February of 2012. (T pp 234-235; P Ex O; R Ex 16 p 34)

4. Assistant Director Alan Fields (Fields) investigated the allegations against Petitioner in 2011. Fields concluded that Petitioner had not intentionally submitted inaccurate records and he recommended that she and her supervisors be given written warnings. (T pp 149, 151; P Ex E) He thought the 5-day suspension initially given to Petitioner in 2011 was “brutal” and he was concerned that her supervisors were not disciplined. (T pp 151-152, 172)

5. During the investigation Petitioner alleged that Senter was unfair to her and she felt abused by him. (T p 147; P Ex E p 8) Fields noted that Petitioner felt Senter was out to get her and singled her out. Fields never questioned the veracity of Petitioner’s feelings, but each of Petitioner’s examples of disparate treatment by Senter had a reasonable explanation. (T pp 173-175; R Ex 16 pp 113, 223-231) Senter was Petitioner’s supervisor in the Hickory district office for less than 45 days in 2008 and other than that brief period of time, Senter never had direct supervision or contact with Petitioner. (T p 219) There was no follow-up investigation into Petitioner’s allegations regarding Senter. (T pp 139-144, 149)

6. In March 2012, Petitioner discovered she was pregnant and, in accordance with NCALE policy, she submitted a Pregnancy Statement confirming her pregnancy and providing her anticipated due date of November 7, 2012. (P Ex D; R Ex 16 p 35)

7. Petitioner’s supervisor was Special Agent in Charge Diane J. Chapin (Chapin) whose duties included providing direction and supervisory control of all assigned NCALE personnel. (R Exs 3 & 16 pp 108-109, 218) Chapin had been the first pregnant agent in the history of NCALE. (T p 218)

8. Supervisors have discretion to change subordinates’ work assignments without approval of others higher in the chain of command even in situations where an agent is pregnant. (T p 311; P Ex O pp 49-50; R Ex 16 pp 108, 115-116) It is the practice of NCALE to accommodate pregnant agents by allowing them to participate in less hazardous assignments upon request, remaining on duty for all purposes with their badge, gun and state vehicle, including law enforcement action, whenever it was needed. (T p 311; R Ex 16 pp 62-63) Pregnant agents are not to be treated any differently than any other agent as long as she and her doctor agree that she can still perform her job functions. (T pp 312-313)

9. Chapin told Petitioner that she would work with her regarding her duties and when Petitioner was “too pregnant” to work enforcement activities, Chapin would work with her to

modify her assignments. (T pp 399, 401, 408-409) Chapin identified various assignments within the district for Petitioner. (P Ex I)

10. While Petitioner was still in the early stages of her pregnancy, Chapin felt that Petitioner attempted to pick and choose assignments because of her pregnancy: Petitioner didn't do her undercover inspections at ABC-licensed establishments; she did not want to work during the evening because she got tired; she did not want to work at a prom party on a Saturday evening because she tired easily and, alternatively, refused to work a drug interdiction operation the following Sunday morning; she rejected the offer of hours to do evidence destruction because she was dressed nicely. (T pp 411-414) Petitioner wanted to continue to do the work related to confidential informants but did not want to do enforcement duties. (T pp 418-419) Chapin told Petitioner that she needed to do the entire scope of her work. (T p 419)

11. On April 30, 2012, Petitioner gave a Work Excuse Note completed by her doctor, dated April 30, 2012, to Chapin that stated she "was seen on 4/23/2012" and "regular duties-not to lift more than 25 lbs. not to be subjected to the possibility of physical altercations, must be able to ambulate on a regular basis." (T p 244; P Ex D; R Ex 5)

12. Chapin asked Petitioner why she obtained the Work Excuse Note even after she had promised to work with her. Petitioner replied that she was unsure what Headquarters would do with her. (T p 417; P Ex D; R Ex 5)

13. Kendall E. Pike has been the Assistant Director for Professional Standards at NCALE since 1989. (T p 304; P Ex O p 6) He is familiar with Petitioner through various investigations he has conducted concerning her on issues such as insubordination, mislabeling of evidence, damaged property, timekeeping and reimbursement errors, which resulted in written warnings or counseling. (P Ex O, pp 8-9, 23-25)

14. The Work Excuse Note submitted by Petitioner contained some restrictions that Pike had never seen before for a pregnant agent. (P Ex P p 10)

15. Pike understood the language in the Work Excuse Note to prohibit Petitioner not only from engaging in physical altercations but also from any situation that would place her at the risk of such an altercation. (T pp 327, 332) NCALE had an obligation to follow the note's restrictions. (T p 319)

16. Command staff reviewed Petitioner's Work Excuse Note and were specifically concerned about the language "I feel that it is appropriate for us to avoid any situation that would put her at risk for physical altercations." (P O pp 11, 49)

17. The command staff sought both medical and legal opinions, and were concerned about liability if Petitioner was hurt on the job. (T p 366; P Ex O pp 44-44, 56-57; R Ex 16 p 110)

18. DPS legal staff concurred that the Work Excuse Note required placing Petitioner on limited duty. (R Exs 14 & 16 p 110)

19. According to Senter, no other pregnant agent had produced a note with such restrictive language. He sent the note to Dr. Griggs, NCALE Medical Director, and asked for direction concerning the meaning of the Work Excuse Note who responded to Senter that the restrictions were consistent with limited duty. (R Exs 7 & 16 pp 109-110)
20. Limited duty is granted at the discretion of the NCALE Director and is never guaranteed. Agents on limited duty must be able to perform meaningful work for the agency. (T p 284; R Exs 1, 4 & 16 p 107) “The Division may provide work suitable to the employee’s capacity that is meaningful, productive, and advantageous to the employee and the Division.” (R Exs 4 p 7 & 16 p 61)
21. NCALE policy states, to wit: “An employee assigned to limited duty may not drive or ride as a passenger in an assigned ALE vehicle and he/she must provide personal transportation to the work place. ... Employee limited duty assignments shall not include enforcement actions. ... If it appears an employee will be on limited duty for 90 calendar days or more, the issued Division vehicle and firearms shall be surrendered to his/her immediate supervisor.” (R Ex 4 pp 7-8)
22. An agent on limited duty doesn’t have to lose the badge, gun and state vehicle unless the agent is on leave for an extended period of time. (R Ex 16 p 119)
23. Because of her pregnancy, Petitioner was technically a Class C status agent, one whose physical condition can cause significant risk to her safety pursuant to Medical Services Program Directive and, as such, policy required that she be dismissed or reassigned. (R Ex 4 p 3; T p 366)
24. Command staff felt that they had no choice but to place Petitioner on limited duty due to the restrictions in the Work Excuse Note. (T p 340; R Ex 16 pp 116-117)
25. Petitioner was given the option of limited duty or no duty. (P O Ex p 58; R Ex 16 pp 50, 85, 124-125)
26. On April 30, 2012, after receiving Dr. Griggs’s response, Senter ordered Chapin to take away Petitioner’s weapon and state vehicle and take her home. (T pp 248-252; R Ex 8)
27. Petitioner testified that Chapin told her that she could not return to work unless she sent a memo to Senter and requested limited duty. (T p 252)
28. Petitioner sent a memorandum, dated April 30, 2012, to Ledford, stating that “I am no longer able to perform duties with NCALE, due to being pregnant, I am requesting to work limited/light duty.” (P Ex D)
29. On May 1, 2012, Senter inquired of Chapin whether there was sufficient limited duty available for Petitioner within the confines of the note at the New Bern district office and advised that there may be duties at headquarters in Raleigh so that she would not have to use leave time. Chapin identified some limited duty work available in Petitioner’s district. (R Ex 9)
30. Petitioner testified that she then contacted her doctor’s office, explained the situation, and

a letter dated April 23, 2012 was provided to her. (P Ex D; R Ex 6)

31. On May 1, 2012, the letter from Petitioner's doctor, dated April 23, 2012, was faxed to Respondent which stated that she should "avoid any situations that would put her at risk for physical altercations. She states that she will often be in a patrol car and I feel that is reasonable for her. I would avoid any high speed pursuits or other activities that would be high risk for her. If she is going to be in a vehicle for more than three-four hours, I would recommend that she have the opportunity to get out and stretch her legs for a few minutes." (T pp 247, 286-287; P Ex D; R Ex 6)

32. On May 2, 2012, Director C. John Ledford approved Petitioner for "limited duty with the restrictions of 'not lifting more than 25 lbs, not subjected to the possibility of physical altercations, and must be able to ambulate on a regular basis' [i]n order to comply with these restrictions as indicated by your doctor" and informed Petitioner that she should report to Fields in the Boxing and Lottery Section at Headquarters in Raleigh on May 3, 2012. (T pp 154, 290; P Ex K; R Ex 11)

33. The Boxing and Lottery Section of NCALE is a high volume paperwork intensive section, and the work must be done onsite because of the sensitive nature of the documents. The section always has work available for limited duty. (T pp 155, 167-168; R Ex 16 pp 58-69, 111)

34. Chapin "was thrilled" with Petitioner's assignment in Raleigh because it showed NCALE's attempt to accommodate her and Petitioner had family in Raleigh. (T p 416)

35. The decision to offer limited duty at the Boxing and Lottery office in Raleigh was made with the knowledge that Petitioner had family in the area that could assist her. The Raleigh assignment was a way to help Petitioner save her leave time. If Petitioner was interested in the assignment, she was to figure out the best way to make it work for her. (T p 326; P Ex O pp 27-29; R Ex 16 pp 54, 112)

36. Petitioner testified that no one told her that her family's residence in Raleigh was a part of the consideration. (T pp 265-266)

37. The Director has the discretion to reassign an agent from one district to another. (R Exs 1 p 1 & 16 p 120) An agent has the option of reporting for duty at the new assigned station or resigning. Limited duty is not guaranteed and an agent may accept it or take leave. (R Ex 16 pp 84, 106-107)

38. At least two other ALE agents on limited duty were sent to headquarters in Raleigh. In both cases, the agents resided in the Fayetteville district and were required to drive their personal vehicles to report for work. (P Ex O pp 29, 107-108; R Ex pp 107-108)

39. Raleigh headquarters was a three-hour drive from Petitioner's home. (T p 255)

40. Petitioner testified that she did not report to work in Raleigh on May 3, 2012, because she thought that she was being treated unfairly. (T pp 257-258) Petitioner never contacted Fields about

making a schedule in Raleigh with which she would be comfortable. (T p 291)

41. On May 3, 2012, a nurse practitioner sent a note stating that Petitioner should not travel more than one and a half hours to and from work. (T pp 256-257; P Exs D & I; R Ex 13)

42. The note from the nurse practitioner did not change the decision of command staff as stated in the May 2, 2012 letter. (T p 282; R Ex 14)

43. In a series of emails on May 4 and 7, 2012, Petitioner advised Chapin and Senter that she would be out on sick leave May 7 through 11, 2012. (R Ex 13)

44. On May 7, 2012, Chapin informed Senter and Fields of several administrative activities available on specific dates in the New Bern district for Petitioner. (R Ex 10)

45. It was determined that Petitioner could not do any activity at an ABC-permitted business, including grocery stores, because of the inherent danger associated with intoxicated people and illegal activities, such as drugs, at bars which results in physical altercations. The only ALE agent killed in the line of duty was killed one night after leaving a bar after a BARS program. (T p 169-170) Inspections are enforcement activities that are inherently dangerous. (T pp 263-265, 371)

46. Petitioner was not allowed to attend court. Fields did not believe it safe for Petitioner to attend court without her weapon and referred to the recent shooting of a federal agent in a courthouse in Atlanta. (T pp 170, 262-263)

47. It is in the nature of law enforcement work to encounter situations involving physical altercations and high-speed chases. NCALE could not avoid the potential for these situations without assigning duties in a protective environment. (P Ex P pp 14-16; R Ex 16 pp 116-118)

48. District offices are not a “protective environment” because they are open to the public. The headquarters office in Raleigh is the only place with NCALE where the risk of physical altercations could be eliminated. (P Ex P p 69)

49. In an email on May 24, 2012, Petitioner informed Fields that “I will be continuing to take sick leave until my next doctors [sic] appointment on June 15, 2012 (other than the dates we discussed I would be reporting to New Bern.)” (R Ex 13)

50. Several times during her pregnancy, Petitioner worked duties in her home district of New Bern that were consistent with her restrictions. The activities were individually reviewed by Fields and Senter and either approved or disapproved for Petitioner. (T pp 160-161) For the remainder of her pregnancy, Petitioner utilized leave time until it was exhausted. (T pp 157-159, 287, 291-292; R Ex 13)

51. Although Petitioner never reported to Raleigh Headquarters, Fields remained her supervisor while she was pregnant with her first child and allowed Petitioner to complete some duties at her district office that were consistent with her restrictions. (T pp 157-159, 178; R Ex 13)

52. Petitioner filed the within Petition for a Contested Case Hearing with the Office of Administrative Hearings on October 9, 2012.

53. On October 10, 2012, Respondent's Human Resources Director sent a letter to Petitioner, confirming her employment status, informing her that all accrued leave and voluntary shared leave time would be exhausted as of October 12, 2012, and directing her to report for duty at NCALE Headquarters on October 15, 2012. (T p 269; R Ex 15)

54. Petitioner needed to submit a request for leave of absence or else her failure to report would be considered a voluntary resignation. (R Ex 16 pp 89-90, 94)

55. Also on October 10, 2012, Petitioner requested reassignment to the New Bern district office due to her impending delivery.

56. On October 12, 2012, Petitioner began leave without pay status. As a result, Petitioner was no longer eligible for state sponsored health insurance. (R Ex 15) Petitioner was able to obtain health insurance through her husband's employer. (T pp 258-259, 266)

57. On October 18, 2012, Respondent sent a letter to Petitioner informing her that her duty station assignment to the New Bern district had not changed but her limited duty assignment remained available in Raleigh. (T p 268, R Ex 12)

58. Petitioner was not disciplined for refusing her limited duty assignment to Raleigh Headquarters. (T p 278)

59. On October 23, 2012, a letter was sent to Petitioner confirming her leave of absence status and reviewing her benefit options, including her ineligibility for state sponsored health insurance after her family medical leave time was exhausted. (R Ex 15)

60. Petitioner gave birth on October 28, 2012 and returned to work without restrictions eight weeks later. (T p 278)

61. Petitioner returned to work after the birth of her child and resumed her normal duties. She became pregnant a second time, provided a doctor's note markedly different from the first note, worked until she delivered her second child, and never went on limited duty. (T pp 272-273, 280)

62. During the course of the administrative hearing held on January 15-16, 2015, evidence was received concerning the duty assignments given to other pregnant agents at NCALE.

63. Special Agent Kelli Lawrence (Lawrence) was employed by NCALE from 2005 to 2013. She was assigned to the Hickory district at the same time as Petitioner and Senter. (P Ex M p12)

64. At some point during her pregnancy in 2010, Lawrence did not do outside enforcement work. She was allowed to keep her badge, gun and state vehicle. (P Ex A & M pp 20, 23, 25)

65. Samantha Williams (Williams) was a NCALE agent who was pregnant in 2011. She

submitted a doctor's note that specifically restricted her from combat, taser and pepper spray training. Williams was not restricted from using her weapons, but rather could not have them used on her during training. She was allowed to wear her gun and badge which gave her law enforcement authority. (T pp 190-193; P Ex B) Williams was not allowed to qualify with her rifle due to doctor's restrictions and NCALE took her rifle from her as a result. (T p 193-94)

66. Williams continued to work enforcement until her sixth month of pregnancy when she presented her doctor's note limiting her to office duty after which she worked at the Raleigh district office and at Headquarters in Raleigh. (T pp 195, 207-208; P Ex B) She used her state vehicle, carried her weapon and badge, and was paid for drive time until her doctor ordered her on bed rest. She used her vacation and sick leave time. (T pp 196-199; P Ex O pp 43-49)

67. Meredith Shoaf (Shoaf) began employment with NCALE in 2009 and became pregnant in 2013. Shoaf submitted a doctor's note with the restriction "not to lift anything greater than 10-15 pounds". (P Ex C)

68. At Shoaf's request, her duties were restricted to office work and she was not allowed to use her state vehicle. (P Ex N pp 21, 29-30) Her badge and gun were not taken away but she was directed to store them in the trunk of her car. (P Ex N p 31)

69. None of these prior pregnant agents produced a note as restrictive as the note Petitioner submitted. (R Ex 16)

70. The Undersigned hereby finds the testimony of Chapin, Fields and Pike to be credible and to carry the greater weight and the testimony of Petitioner to be less credible and to carry the lesser weight.

CONCLUSIONS OF LAW

1. All parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. 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. Petitioner was continuously employed as a State employee since 2006. At the time she went on Leave Without Pay status, she was a Career State Employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the just cause provision of N.C. Gen. Stat. §126-35.

3. Petitioner has alleged that Respondent constructively suspended her without pay and without just cause. Therefore, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue the final decision in this matter.

4. Pursuant to N.C. Gen. Stat. § 126-35(d), in an appeal of a disciplinary action, the employer bears the burden of proving that "just cause" existed for the disciplinary action, if any. Here, the Respondent denies imposing any disciplinary or otherwise adverse employment action and,

therefore, Petitioner bears the burden of proving the existence of a disciplinary action or adverse employment decision, to wit: constructive suspension.

5. Petitioner has failed to meet her burden of proof that she was constructively suspended without pay. The credible evidence is that Respondent acted reasonably when it followed the restrictions in Petitioner's doctor's note and letter, and placed Petitioner on limited duty status. Respondent had no obligation to grant limited duty and Respondent had no obligation to create a limited duty assignment in Petitioner's home district. Petitioner was offered a limited duty assignment in Raleigh that she refused. Petitioner was given some limited duty work in her home district when it was available and the choice to either accept the limited duty assignment in Raleigh or use leave time was hers alone.

6. The Undersigned finds that Petitioner voluntarily exhausted her sick, vacation and donated leave time and, therefore, was not constructively suspended.

7. Respondent's actions were in compliance with its policy concerning limited duty assignment.

8. Petitioner has not met her burden of establishing an adverse employment decision and therefore, the just cause provisions and protections of N.G. Gen. Stat. § 126-35 do not apply and judgment for the Respondent is appropriate.

BASED UPON the above-noted Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

The Undersigned finds that Petitioner has failed to meet her burden of proving she was constructively suspended as a result of discrimination based on her pregnancy and enters Judgment in favor of Respondent.

NOTICE

This Final Decision is issued under the authority of N.C. Gen. Stat. § 150B-34. Pursuant to N.C. Gen. Stat. § 150B-45, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing 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 party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order.

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. N.C.G.S. § 150B-47 requires the Office of Administrative Hearings 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. To ensure the timely filing of the record, the appealing party must send a copy of the Petition for Judicial Review to the Office of Administrative Hearings when

the appeal is initiated.

This the 14th day of April, 2015.

Selina M. Brooks
Administrative Law Judge