

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 OSP 10339

PATRICIA BURGESS, Petitioner,)	
)	
v.)	DECISION
)	
NORTH CAROLINA COMMUNITY COLLEGE SYSTEM)	
Respondent.)	

On May 8, 2013, Senior Administrative Law Judge Fred G. Morrison Jr. heard this contested case in Raleigh, North Carolina.

ISSUE

Whether the N.C. Community College System's ("Respondent") dismissal of Patricia Burgess ("Petitioner") via a "reduction in force" ("RIF") was a pretext to disguise either disciplinary dismissal without just cause, or retaliation for Petitioner's complaints of illegal employment discrimination.

APPEARANCES

Petitioner: Michael C. Byrne
Law Offices of Michael C. Byrne
150 Fayetteville Street, Suite 1130
Raleigh, North Carolina 27601

Respondent: Stephanie A. Brennan
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

WITNESSES

Petitioner: Patricia Burgess, Angelica Pickett

Respondent: Jennifer Haygood, Sandra Williams, Chris Cline, James "Danny" Gilchrist, and Jane Phillips

EXHIBITS

Petitioner

1. Respondent Request For Production Responses
2. Respondent Requests For Admissions Responses
3. EEOC Charge
4. Respondent's Agency Action Document
5. Respondent's Prehearing Statement
6. Petitioner's Discovery Responses
7. RIF Letter
8. Respondent's Discovery Responses

Respondent

1	25 N.C.A.C. 01C .1004
2	State Personnel Manual, RIF Policy
3	State Personnel Manual, RIF Guidelines
4	NCCCS RIF Policy, Bates 609-12
5	Reduction in Force Plan for NCCCS, June 2011, Bates 340-45
6	Management Template for RIF, Bates 346-53
7	5/24/11 RIF Notice to Burgess, Bates 313-14
8	6/22/07 Offer Letter, Bates 28
9	Petitioner's Deposition Transcript
10	Petitioner's Discovery Responses
11	OSB Memo, Bates 630
12	Scenario 1 and 2, Bates 455
13	10/10 emails from Haygood, Bates 266-68
14	System Office Proposed Reductions, Bates 265
15	10/10 emails re operating reductions worksheet, Bates 280-81
16	Operating Reductions Worksheet, Bates 282-85
17	10/10 emails between Williams and Haygood, Bates 286-87
18	Technology & Workforce Development Division Information for Positions to be Eliminated, Bates 288-91
19	Emails re substitution, Bates 293-95
20	House budget document
21	10/14/10 Cline email and attached chart, Bates 276-78
22	May 1, 2010-April 30, 2011 Work Plan for Patricia Burgess with Addendum to Work Plan
23	June 1, 2011 letter from Pickett, Bates 315
24	Angelica's Review Responses, Bates 316-33 (NOTE: Better Copy Included as 24A)
25	Warnings to P. Burgess from A. Pickett, Bates 166, 219-20, 298-302
26	June 2010 reviews by D. Gilchrist, Bates 199-202
27	June 2010 Memo from Performance Review Rating Panel, Bates 177-179
28	2007-2008 Work Plan, Bates 56-67

FINDINGS OF FACT

Based on the testimony of witnesses, documents in evidence, and the entire record, the undersigned finds the following facts. In doing so, the undersigned weighed appropriate factors for judging credibility, including demeanor and any interests, bias, or prejudice the witness may have. Further, the undersigned carefully considered the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony is reasonable, and whether the testimony is consistent with other believable evidence.

1. Respondent North Carolina Community College System (“Respondent”) is an Article III agency for N.C. Gen. Stat. § 150B purposes.
2. Petitioner Patricia Burgess (“Petitioner”) worked in Respondent’s Technology and Workforce Development Division (the “Division”) from June 29, 2007 to June 30, 2011. Her position title was Business and Technology Applications Analyst. (“BTA Analyst”)
3. Because of budget requirements, Respondent eliminated eleven vacant and eight filled positions via a reduction-in-force (the “RIF”) effective June 30, 2011. The RIF included four filled and five vacant positions in Petitioner’s Division.
4. When the RIF was implemented, Petitioner was a career status employee of Respondent in a position subject to the State Personnel Act.
5. The RIF eliminated two filled BTA Analyst positions. Petitioner was one of the eight people whom the RIF separated from employment.
6. Petitioner believes that certain managers within the Division selected her for the RIF to retaliate for the civil rights claims Petitioner had filed or to circumvent a lack of just cause for disciplinary dismissal.
7. From January 2010 to June 2011, Petitioner reported directly to Angelica Pickett (African-American female). Danny Gilchrist (white male) and Bruce Humphrey (African-American male) were, respectively, Petitioner’s second and third-line supervisors.
8. As the senior vice president of the Division, Saundra Williams (African-American female), was Petitioner’s fourth-line and ultimate supervisor.
9. In the two and a half years Petitioner worked for Respondent before coming under Pickett’s supervision, Petitioner did not grieve any performance reviews, file any civil rights charges, or receive any formal discipline.
10. After Pickett became Petitioner’s supervisor in January 2010, Petitioner received generally lower performance reviews than she had under her previous supervisor. While Petitioner’s supervisor, Pickett did not give any employee worse ratings than those she gave to Petitioner.

11. In April 2010, Petitioner filed a charge of national origin discrimination against Respondent concerning Pickett's behavior and management's response—or perceived lack thereof—to Petitioner's complaints about Pickett. Petitioner is Hispanic and from Colombia.

12. Pickett issued a written warning to Petitioner in July 2010.

13. Petitioner filed two civil rights charges against Respondent in August 2010, one alleging continued harassment and a second alleging retaliation for her initial complaint.

14. Petitioner filed another civil rights charge in January 2011, alleging that she did not get a job for which she interviewed out of retaliation for her previous activity.

15. Pickett issued a second written warning to Petitioner in March 2011, less than two months before she learned of the RIF. Pickett did not issue written warnings to any other employee while serving as Petitioner's supervisor.

16. Both warnings concerned unacceptable personal conduct, such as issues about leave time, rather than unsatisfactory job performance. Petitioner saw the warnings as unjustified and arbitrary.

17. Petitioner's overall performance rating for May 1, 2010-April 30, 2011 was "good." Petitioner filed Step 1 and Step 2 grievances to challenge her 2010-11 rating, which was upheld by agency superiors.

18. When Petitioner learned of the impending RIF in May 2011, both her most recent civil rights filing and her most recent performance review were unresolved.

19. Pickett supervised two other employees besides Petitioner. A second employee working under Pickett's supervision had also filed a civil rights charge against her, likewise citing national origin discrimination. As planned in October 2010, the RIF would have eliminated that employee's position along with the Petitioner's. As implemented, the RIF did cut his position, then vacant because he had quit in the meantime.

20. The other BTA Analyst who lost his job under the RIF was later rehired. Petitioner interviewed with the Respondent three different times after the RIF, and had priority employment rights, but was not rehired.

21. As a lower-level manager, Pickett did not attend meetings to plan the RIF or provide any direct input concerning it.

22. Petitioner learned that she was selected for the RIF through a letter from Williams in May 2011. The notice was timely.

23. Williams was aware of the civil rights charges that Petitioner filed, the grievances

against her performance rating, and the discipline that she had received.

24. Petitioner found a job with Campbell University within a couple weeks of the RIF that she has continued to hold.

25. In September 2010, the State Budget Director asked Respondent to plan for substantial budget reductions for fiscal year 2011. After identifying opportunities to shift costs, reduce non-personnel expenses, and eliminate vacant positions, the senior management team met to discuss functions that could be eliminated.

26. At Williams's request, Chris Cline worked with her direct reports, mainly staff under Bruce Humphrey (Petitioner's third-line supervisor), to identify potential cuts, starting with operating expenses. That group—Cline, Arthur Hohnsbehn, Danny Gilchrist (Petitioner's second-line supervisor), Annette Busby, and human resources director Jane Phillips—turned to job function, specifically those that, if eliminated, could be reasonably covered by remaining employees assuming additional duties.

27. The group specifically looked at the BTA Analyst classification first when considering personnel reductions. That designation, considered to have roughly the same skill set, was the largest, distributed across the three groups led respectively by Gilchrist, Hohnsbehn, and Busby.

28. The Respondent considered and applied the factors set forth in its RIF policy, including (1) the needs of the agency to deliver services; (2) employee performance; (3) length of service; and (4) adverse impact on protected groups.

29. In mid-October 2010, Cline sent Williams a spreadsheet outlining the team's proposed budget reductions. It identified nine positions for RIF, based on job function, then 2009-10 work plan evaluations, then length of state service. Petitioner's position was on that list.

30. Williams was ultimately responsible for the Division's recommendations. The chart titled "Technology and Workforce Development Information for Positions to be Eliminated" that Williams submitted to Haygood on October 27, 2010 differs some from the recommendations that Williams had received from her team two weeks earlier but still includes the Petitioner's position.

31. Those recommendations included real names, on the justification that specific salary and benefit data was needed to calculate savings from the cut. Those employees were not necessarily those actually affected by the RIF, as the model was based on the previous year's evaluation.

32. Between the RIF planning fall 2010 and its implementation in spring 2011, Respondent designed a template for documenting the RIF selection process. The template begins by identifying functions for redistribution or elimination, which in this case were: Tier 3 help desk tickets and associated documentation, software change requests, and request for change analysis and implementation.

33. The Petitioner described her duties as implementing updates and applying customizations to software, resolving help desk tickets that have escalated to Tier 3, and toward the end of her tenure, working in the ARCR module. Respondent represented that those particular functions were subject to reassignment because they could be performed by remaining analysts, once trained.

34. The template's next step listed by position number all employees who performed those duties (yielding 18 results) and expanded the list to include all who shared that position classification (23 results).

35. Within the 23 BTA Analysts considered for RIF, Petitioner was one of the two employees with the lowest performance rating and least state service.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter under N.C. Gen. Stats. § 126 and 150B.

2. In retaliation claims, a burden-shifting scheme applies: first, the petitioner must establish a prima facie case. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). See e.g., Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4th Cir. 2011). If a petitioner can do so, the burden then shifts to the respondent to articulate a legitimate reason—one not fueled by discrimination or retaliation—for its decision. If the Respondent makes such a showing, then the burden shifts back to the Petitioner to prove that the Respondent's purported reason was a pretext for discrimination or retaliation. Hoyle, 650 F.3d at 337.

3. Petitioner's prima facie case comprises showing that 1) she engaged in protected activity; 2) Respondent took adverse action against her; and 3) a causal connection exists between the protected activity and the adverse action. Ziskie v. Mineta, 547 F.3d 220, 229 (4th Cir. 2008).

4. Petitioner made a prima facie case: she filed civil rights claims, she was involuntarily separated from employment not too long thereafter, and she produced some evidence that the former influenced the latter.

5. Respondent showed legitimate, non-discriminatory reasons for its actions. It conducted the RIF that eliminated Petitioner's position, along with others, because of reduced funding from the General Assembly. Its senior management, when faced with the potential of severe budget reductions, first looked to reduce operating expenses, use alternative sources of revenue, and eliminate vacant positions before resorting to cutting filled posts.

6. When cutting filled positions, Respondent applied its RIF policy and used facially objective criteria to determine which specific individuals would be subject to the RIF.

7. The RIF's very occurrence, also affecting seven others of varying backgrounds, was not a pretext just to retaliate against the Petitioner, nor was its methodology.

DECISION

Petitioner is not entitled to any relief from Respondent.

NOTICE

Under N.C. Gen. Stat. § 150B-45, any party wishing to appeal the Administrative Law Judge's decision 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 **within 30 days of being served with a written copy of the final decision**. Conforming to the Office of Administrative Hearings' rules, 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 as indicated by the date on the attached certificate of service**. 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. § 150-47, the Office of Administrative Hearings must file the official record in the contested case with the Clerk of Superior Court within 30 days of receiving the petition for judicial review. Consequently, a copy of the petition for judicial review must be sent to the Office of Administrative Hearings when the appeal begins to ensure that the record is timely filed.

This the 9th day of August 2013.

Fred G. Morrison Jr.
Senior Administrative Law Judge