

STATE OF NORTH CAROLINA

COUNTY OF ORANGE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
13 OSP 02680

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Beverly J Payne  
Petitioner

vs.

University of North Carolina at Chapel Hill  
Respondent

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**FINAL DECISION**

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On December 19-20, 2013, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Chapel Hill, North Carolina. On March 5, 2014, the parties filed their respective proposed Final Decisions with the Office of Administrative Hearings.

**APPEARANCES**

For Petitioner: Alan M. McSurely, Esq.  
McSurely & Turner, PLLC  
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For Respondent: Katherine A. Murphy  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
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**ISSUES**

1. Whether Respondent, its agents, or employees discriminated against Petitioner, based upon her race, color, national origin, or age when it eliminated Petitioner's position on September 21, 2012 pursuant to a Reduction in Force ("RIF")?

2. Whether Respondent, its agents, or employees retaliated against Petitioner, based upon her race or age, by eliminating Petitioner's position on September 21, 2012 pursuant to a RIF, after Petitioner declined her supervisor's questions about whether Petitioner could retire?

## **EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner:

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	11/23/10	Email exchange between Lynne Kahn and Robin Rooney
2	09/07/12	Email exchanges between Lynne Kahn and Natalie Nelson
3	09/20/12	Various emails
4	05/25/13 05/27/13	Emails between Lynne Kahn and Samuel Odom
5	08/29/13	Email from Robin Rooney to Lynne Kahn
6	08/29/13	Email from Robin Rooney to Lynne Kahn
7	08/29/13	Emails from Robin Rooney to Lynne Kahn
8	06/07/11	Email exchanges between Lynne Kahn and Natalie Nelson
9	08/07/12	Email from Natalie Nelson to Karl Pfister
10	08/07/12	SPA Layoff Request Form
11	08/21/12	Email from Natalie Nelson to Karl Pfister
12	08/28/13	Email exchange between Lynne Kahn and Natalie Nelson
13	09/18/12	SPA Layoff Request Form
14	08/21/12	SPA Layoff Request Form
15	09/18/12	SPA Layoff Request Form
16	06/19/12	Federal Register Volume 77, Number 118
17	09/20/12	Email from Beverly Payne to staff
18	09/20/12	Email from Lynne Kahn to Natalie Nelson
19	11/16/12	Letter from Sean Womack to Beverly Payne; form letter
21	10/26/12	SPA Grievance Step 1 Filing Form
22	N/A	Document entitled "Attachment A"
23	08/28/12	SPA Filled Positions by Department
24	09/17/12	SPA Vacant Position Report

25	08/09/12	Analysis of Layoff v. Pool
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For Respondent: None

### **WITNESSES**

For Petitioner: Lynne Kahn, Robin Rooney, Beverly J. Payne, Greg Burress

For Respondent: Lynne Kahn

### **FINDINGS OF FACT**

#### **Procedural Background**

1. At 5:00 pm on Friday, September 28, 2012, Respondent informed Petitioner that Respondent was eliminating Petitioner's position due to a Reduction in Force. Respondent's department head, Dr. Lynne Kahn, handed Petitioner a Notice of Separation Due to Layoff dated September 21, 2012. In that Notice, Respondent informed Petitioner that:

Due to a loss of funding and after evaluating alternative measures, I must inform you that your employment with the department will end Wednesday, October 31, 2012.

(Document Constituting Agency Action) Respondent advised Petitioner that she must submit her appeal of this action to the Employee & Management Relations Division of Respondent's Office of Human Resources within 30 calendar days of receiving this layoff notification. (Document Constituting Agency Action)

2. On October 26, 2012, Petitioner filed a grievance with Respondent alleging termination based on race, age, sex, and in retaliation for Petitioner declining Dr. Kahn's question whether Petitioner could retire. Petitioner alleged that Respondent failed to provide any reasons for her termination, and she was the only person laid off in her department. Petitioner also alleged that there was no business reason for her layoff, because the department was notified it had received a \$21.8 million grant on October 18, 2012.

3. On November 16, 2012, Respondent notified Petitioner that Respondent was unable to proceed with her grievance, because the information in her grievance was insufficient. On November 20, 2012, Respondent advised Petitioner she could file an appeal directly with OSP without receiving a Final Agency Decision. (See Respondent's Motion to Dismiss, Attachments)

4. On January 25, 2013, Petitioner filed a contested case petition with the Office of Administrative Hearing appealing her termination from employment. In her petition, Petitioner alleged the following grounds for her appeal:

(1) Respondent discharged Petitioner from her job without just cause based on a Reduction in Force.

(2) Respondent discriminated and/or retaliation against Petitioner based on Petitioner's race, color, national origin, and age when it terminated her from employment through a RIF in which Petitioner was the only employee who lost her job.

(3) Petitioner also alleged that Respondent retaliated against her, by discharging Petitioner from employment due to a RIF, after Petitioner declined her supervisor's question, whether Petitioner could retire, on two occasions. (Petition)

5. On May 15, 2013, the undersigned issued a Final Decision in part, granting Respondent's Motion to Dismiss Petitioner's claim that she was Reduced in Force without just cause as the Office of Administrative Hearings lacked jurisdiction over such an allegation based on *University of N.C. at Chapel Hill vs. Feinstein*, 161 N.C. App. 700, 590 S.E. 2d 401 (2003).

#### Adjudicated Facts

6. At all times relevant to this case, Petitioner was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes. Petitioner had 24 years of state service, and was 57 years old when Respondent terminated her employment by a Reduction in Force.

7. At all times relevant to this case, Respondent UNC-CH was subject to Chapter 126, and was Petitioner's employer.

8. Petitioner is tri-racial, and a member of the Occaneechi Tribe. T. pp. 235-36. Petitioner is a former Chief of the Occaneechi Tribe, and remains an active member of the Occaneechi Band of the Saponi Nation Tribe, one of the Native American Tribes recognized by the State of North Carolina.

9. In 1989, Respondent hired Petitioner as a full-time secretary working in the Frank Porter Graham Child Development Institute ("FPG"). Although Petitioner's title changed, her position did not change. T. pp. 238-39. Petitioner was always paid by grant money, also known as "soft money."

10. Dr. Lynne Kahn (Caucasian female) has worked at FPG since 1983, has a Ph.D., and worked in an area called "Technical Assistance." T. pp. 11, 14-15, 312. Dr. Kahn was the Associate Director for evaluation on the NECTAC project until 2006. In 2006, Kahn became the interim Director of NECTAC. Around 2007, Dr. Kahn became one of Directors of NECTAC. T. pp. 32-33.

11. The NECTAC program was a grant project funded by the federal government, which enabled FPG to establish a national center that has been continuously supported by federal grant money for many years. Each federal grant typically lasts between three and five years. According to Dr. Kahn, NECTAC is just one of many grants in the FPG Institute. "We're not independent from it [FPG]. And we are not managed separately from it. If you look at the FPG website, there's a hundred or more of us." "FPG has many projects and a lot of project directors, and a lot of people like me." T. p. 30.

12. Each time a new federal grant was advertised, it had a different scope of work associated with it. Each time FPG was awarded the grant, it was required to rename the project supported by the grant. T. pp. 15-16. When a grant was about to end, Reductions in Force were planned for the employees supported by the grant in case a new grant was not obtained to cover salaries. T. pp. 75, 78-79, 234-35, 240-41.

13. In 2007, Dr. Kahn promoted Petitioner to the position of Events Coordinator, or Business Services Coordinator with FPG's Child Development Behavioral Services Department. Kahn promoted Petitioner, because Petitioner was a hard worker, well-organized, and smart. At that time, Dr. Kahn was aware that Petitioner was Native American, and over 40 years old. T. pp. 43, 45-46, 239-40, 312-13, 342-43

14. In her new role, Petitioner was primarily in charge of planning large-scale conferences for both NECTAC, and a project supported by a grant from the State known as "NCTA." Petitioner was supported 50/50 by the two grants.

15. Dr. Kahn was Petitioner's direct supervisor on the NECTAC grant. Robin Rooney was the director of the NCTA project, and was Petitioner's direct supervisor for Petitioner's work on NCTA. Dr. Kahn was Dr. Rooney's direct supervisor. T. pp. 38-39, 46-47, 196-97, 243-44, 248-49

16. In 2009, the federal funding agency revised the scope of work on the NECTAC grant to remove the national conference planning from FPG. Conference planning had been Petitioner's main responsibility for the NECTAC project, and was approximately 30% to 40% of her job. T. pp. 47, 244. Petitioner used to work almost half of the year preparing for the NECTAC national meeting. Thus, when the federal government removed that duty from FPG, Petitioner lost her main duty, or approximately 30% of her job. T. p. 47. As a result, beginning in 2010, Dr. Kahn had to find new duties to assign Petitioner under the NECTAC grant. T. pp. 46-49, 343.

17. In August 2010, Dr. Vivian James, the funder for NCTA, asked Dr. Rooney to reassign Petitioner's duties on the NCTA project to someone else, because Dr. James was upset by the tone of Petitioner's statements, and felt Petitioner had been disrespectful to James. Based on her interaction with Petitioner, Dr. James no longer wanted to work with Petitioner.

18. At the same time, Dr. Rooney was preparing to submit a new grant proposal to Dr. James for a multi-million dollar contract, on a larger scale than the then-current NCTA project. Dr. James expressed concerns about whether Petitioner had the technical skills to do the work required, and Dr. Rooney shared those concerns. At Dr. James' request, Dr. Rooney did not include Petitioner in the new NCTA grant proposal. The new NCTA grant began in 2011. T. pp. 38-40, 196-202, 205, 207, 219-22, 270-72; (Pet. Exs. 5-7).

19. On August 18, 2010, Rooney wrote to her subordinate, Debbie Cate, that she had:

Talked to bev. I told her that I was going to tell her what someone told me years ago—don't let your mouth get your ass in trouble. Then I gave her the spiel about how things don't always communicate on email that even if you think you are being playful, it can come across as DISRESPECTFUL.

(Pet. Ex. 6, p. 461)

20. On August 26, 2010, Ms. Rooney met with Petitioner, and other employees, to insure everyone knew their new duties. Due to Petitioner's lack of skill with Excel, job duties requiring more developed computer skills were transferred from Petitioner to Matt Coy, a young white male employee for the remainder of the 2010 NCTA grant. T. pp. 166-67, 200-02, 207, 213-14, 249-50. Matt was a Social Clinical Research Assistant, a lower position than Petitioner. T. p. 170. Rooney also removed "other" duties from Petitioner as Rooney "no longer wanted her [Petitioner] involvement in, but that I wasn't sure who would do." (Pet. Ex. 7) Rooney told Dr. Kahn, in May 2013, that the point of that meeting "was to show that responsibilities were being shifted to Matt that had previously been Bev's." (Pet. Ex. 7, pp. 462-3)

21. With Petitioner not working on the NCTA grant, Dr. Kahn rewrote Petitioner's job responsibilities, so that all of Petitioner's duties were under NECTAC.

22. In a November 23, 2010 email, Rooney questioned Kahn whether Petitioner could be reduced to part-time work or RIFed when the NECTAC grant ended in the fall of 2011. In an email titled "Personnel Questions," Rooney asked Kahn:

. . . Do we need to have the info about her roles and responsibilities in some kind of other form before our meeting on 11/29? In the meeting, would it be appropriate to ask what she's [Payne] working on, and get her input as to what she can be doing to contribute positively to the organization? Maybe this is crazy—but what if we encouraged her to go to part time—whatever the minimum is to still get benefits? One other thought—if nectac gets re-configured this fall (assuming there is an RFA and that we respond and get it - is that an opportunity for layoffs for peeps who don't have the needed skills to move forward with the new

organization?? DELETE THIS MESSAGE AFTER READING!! I think these are the kinds of questions you're not supposed to write down....

(Pet. Ex. 1, p 380)

23. Five minutes later, Kahn replied to Rooney by email:

And yet, they are excellent questions. I think my answers are all YES." I think we can encourage her to work part time, but we can't make her go part time. We'll have to talk more later. She took today and tomorrow off saying 'she didn't have anything to do here so she wasn't coming.' She didn't mention anything about getting the email about meeting next Monday. She doesn't really read her email . . .

(Id.)

24. At this time, Dr. Kahn also asked Natalie Nelson, HR person for FPG, what were the different options regarding Petitioner's employment, and the consequences of taking those options regarding Petitioner's position.

a. One path would be to take disciplinary action against Petitioner regarding her below good work, and not meeting her job expectations, if Petitioner did not improve her skills and help out with things that needed to be done. The other path would involve determining what employees to RIF, including Petitioner. T. pp. 64, 92-94.

b. Kahn and Nelson also talked about the order of laying off about 30 employees. Kahn understood from their HR person that letting Petitioner go for not performing her work would have implications for Petitioner's ability to find future jobs. Kahn chose to work with Petitioner until she was sure there wasn't work that Petitioner "did that was contributing." T. pp. 64, 92-94.

25. On June 7, 2011, Nelson advised Kahn that even though Kahn had removed some responsibilities from Payne's duties:

If there are training opportunities (such as professionalism, etc.) that may benefit her in whatever duties she currently has, I would strongly recommend you document that in Section VI-Performance Action Plan on the Work Plan. This is all part of the documentation process should you need to escalate disciplinary action in the coming cycle year.

(Pet. Ex. 8, 402) Nelson also informed Kahn that she needed to include a detailed action plan on Petitioner's 2011 performance evaluation, because Kahn had given Petitioner a below good rating on her 2011 performance evaluation. Based on that recommendation, Kahn included an action plan in Petitioner's 2011 performance evaluation that Petitioner would improve her skills at using Excel, so Petitioner would be

equipped to handle more complex and independent Excel tasks. T. pp. 183-183. (Resp. Motion for Summary Judgment, Ex. 4)

26. Around August 2011, Respondent learned the federal government had extended the NECTAC grant, at the same levels, for one additional fiscal year of September 2011 to the end of September 2012. Due to that renewal, Dr. Kahn did not need to consider RIFing 30 employees, including Petitioner. T. pp. 57-62, 207-08, 218-22 (Pet. Ex. 1) Petitioner's job was then funded 100% by NECTAC through the expiration of that grant. T. pp. 58-59, 62, 340.

27. With the loss of the national conference duties under NECTAC, Dr. Kahn struggled to find work for Petitioner to do under NECTAC. During the extra year of NECTAC funding, from September of 2011 to the fall of 2012, Dr. Kahn encouraged Petitioner to improve her computer skills. Kahn tried to assist and motivate Petitioner to work on improving those skills, but was unsuccessful.

28. Dr. Kahn specifically asked Petitioner to work with Matt Coy to learn how to produce reports analyzing each state's data on programs for children birth to three, and programs for children three to twenty-one. "That's a huge job, and a lot of people work on it. Every year, it takes about four months of the year." T. p. 50. The staff in their offices pulls each report, divide it into chapters, build a file, and write a national summary. Dr. Kahn asked Petitioner to work with Matt on last year's work to learn how to do the work, so she would be part of that team the next time it came around. T. p. 51.

29. When Kahn met with the team about preparing these reports, Kahn learned that Petitioner had decided to wait until there was real data to learn how to do the job, and had not learned how to do the job requested. When the real data came, Petitioner could not perform the work, because she didn't have the required software, Adobe Acrobat, installed on her computer, and FPG wasn't able to install the software in time for her to work on that team. T. pp 52-53. Dr. Kahn was angry and really disappointed that Petitioner chose not to do what Kahn asked, and that the situation hadn't worked out the way Kahn hoped it would. T. pp 53-54.

30. Dr. Kahn warned Petitioner that she needed to find something to do, because she could not be employed if there was no work for her. T. pp. 49-53, 61-62, 72, 81, 102, 106-08, 110-11, 168-72, 184, 250, 252, 324-26, 344-45.

31. Kahn also thought that Petitioner's lack of skills with computer software, such as Excel, was a detriment. For example, Petitioner had kept track of contact information for NCTA in notebooks, but NCTA was moving towards using an Excel database.

32. Petitioner's 2011-12 Performance Management and Competency Assessment showed that Petitioner's Position Competencies were: 30% Business and Records Administration, 30% Financial Management, 20% Info Processing and



Decision-making, and 10% Communication. According to Petitioner's 2011-12 Performance Management and Competency Assessment, Petitioner's principal job functions as a Business Services Coordinator were: 50% providing support for NECTAC technical assistance, 40% administrative support to staff on AR evaluation project, and 10% contributing to NECTAC organizational functioning and collaboration on activities. Petitioner's primary job functions as a Business Services Coordinator included administrative support such as duplicating and organizing materials, coordinating conference events, and collaborating with hotels and participants regarding registering for conferences. (Respondent's Motion for Summary Judgment, Exh. 5)

33. The deadline for submitting the new NECTAC applications was July 19, 2012. (Pet. Ex. 16) Kahn submitted the new proposal on or before July 7, 2012. T. p. 101. In the old NECTAC, there was five support staff or administrative assistants with various roles. In the new NECTAC proposal, there were one and one-half full-time staff positions left, and the new NECTAC was cut by \$1 million. T. p 107.

a. When Dr. Kahn wrote Respondent's new NECTAC proposal, she saw what the work was, how much money they had, figured out who could do the work and how much of their time they could support. None of the jobs required conference coordination, and there were no jobs that did not require use of technology and software. T. pp. 88, 92-94, 101-02, 105-08, 111-12, 140, 176, 315-16, 324-26, 332; (Pet. Ex. 2) "There was not money in it for several people's positions." Kahn acknowledged that she had "money for people who could do the work." T. p. 147.

b. Dr. Kahn did not include Petitioner in the new NECTAC proposal, because Petitioner was not able to contribute to the scope of work required by the grant. "In my best judgment, there was not work in the proposal that matched what she [Petitioner] was good at doing." T. p. 93. Kahn thought that Petitioner didn't do the tasks in a way that was acceptable, or that Kahn was hoping Petitioner would do. T. p 107. "Petitioner was the only one that didn't have a role in this proposal nor other backup proposals." T. p.102. Kahn chose to lay off Petitioner with layoff benefits and high-priority status, and was willing to write a letter [of recommendation] for Petitioner if she needed it. T. p. 94.

c. Petitioner had not developed the advanced computer skills that would have made her useful in other ways to the new NECTAC or other projects.

34. In meetings with Petitioner, Dr. Kahn asked Petitioner several times "Are you sure?" During the summer of 2012, Dr. Kahn asked Petitioner if she could retire. When Petitioner objected to this question, and told Kahn she could not retire, Kahn replied, "Are you sure?" Dr. Kahn was trying to help Petitioner explore her employment options given that she was going to be RIFed. T. pp. 151-52, 264-65.

35. Dr. Kahn asked Petitioner if she could retire, but she also asked every employee, who had been there as long as Kahn had, that question in exploring their options in case they were RIFed from their jobs with Respondent.

36. In August 2012, Dr. Kahn verbally informed Petitioner that she had not included Petitioner in the proposal for the new NECTAC grant, and that Petitioner would be RIFed from employment. T. pp. 141, 254. Khan also identified eight NECTAC employees, including Petitioner, to be reduced in force from employment.

37. Dr. Kahn worked with FPG HR Manager Natalie Nelson to get approval for the RIF of Petitioner. Dr. Kahn provided Ms. Nelson with the information and her reasons for Petitioner's RIF. Dr. Kahn advised Ms. Nelson that they were ending the current contract so Petitioner's current job, as would everyone else's, would be gone. She also informed Nelson that Kahn had not included Petitioner in any new proposal, because her skills as event coordinator were not required. After Kahn communicated that to Nelson, Nelson "made up the words to match how she fills out forms." T. p 98, 100.

38. Greg Burress, FPG Associate Director of Administration and Finance, supervised Nelson. At hearing, he verified that the HR manager provides the purpose, intent, or reasons for a RIF on the Layoff Request form, and that it was not unusual for HR facilitator to help with the phrasing in completing that form. T. p. 297.

39. On August 7, 2012, Ms. Nelson sent the first version of a SPA Layoff Request Form for Petitioner to Mr. Karl Pfister, Respondent's Office of Human Resources Employment Consultant. (Pet. Ex. 9, p. 754) The Layoff Request Form was signed with FPG Director Sam Odom's electronic signature and dated 8.7.12. The "Reason for RIF" was "New work scope, reduction/elimination of role." Steps taken to avoid RIF were listed as: "Employee given the encouragement to gain new skills for changed role." Beverly Payne was the only employee proposed for the RIF. (Pet. Ex. 10, pp. 755-757)

40. On August 20, 2012, Mr. Pfister emailed Ms. Nelson his feedback on the Layoff Request for Petitioner, hoping that "this will help clarify the information we need for this request." He asked Nelson for more detail on the "Reasons" for the layoff such as:

Was funding taken away? Did a grant expire? . . .

What is the new work scope? . . .

What actual steps were taken to avoid laying [off] Petitioner? For instance, did the department apply for more funding? Were other positions outside the subunit looked into for possible transfer situations so Mrs. Payne didn't have to be let go? . . . What does it mean that "Employee given the encouragement to gain new skills for changed role?" Did the department try to cut costs so she could remain? . . .

. . . [T]he most important question for this section is where are [sic] the duties of this position going when Mrs. Payne is gone?

(Pet. Ex. 11)

41. Ms. Nelson forwarded Mr. Pfister's questions to Dr. Kahn, who answered such questions on August 21, 2012 as follows:

We have applied for a new project that we will hear about in September. Even if we are successful in getting the new project, the scope of work is different, and there is not a role in the new work scope for Ms. Payne Betts' position. . . .

We did not include Beverly Payne in the proposal, because the combination of tasks did not require anyone with her skills or her role/position. . . .

I encouraged Ms. Payne to take courses in Word, Excel, PowerPoint.... to gain skills needed to back up professional staff with supports in those areas. She did not choose to do so. . .

[i]n the proposals that we wrote for new business, we needed personnel as research assistants with Microsoft Office Suite software expertise.

There will not be any such duties. We can say that her job is eliminated due to loss of funding.

(Pet. Ex. 12, pp. 432, 433)

42. On September 18, 2012, a second version of the SPA Layoff Request Form was sent to Respondent's HR Office. Director Odom's signature was electronically affixed to that version, and dated 8.7.12. (Pet. Ex. 13, p. 679) The "Justification for RIF" section of this form contained a much longer reason for Petitioner's RIF than the justification on the first draft. That justification read:

The funding for this project will end in September, 2012. We have no funds to extend Beverly Payne's position beyond October 31, 2012. We have applied for a new project that we will hear about in September. Even if we are successful in getting the new project, the scope of work is different, and will not require the duties found in this position. This position is primarily responsible for the coordination and planning of national conferences, event planning, and negotiating conference venues for Technical Assistance Center events. Our new project does not require these responsibilities.

(Pet. Ex. 13, p. 677)

43. A third version of the Layoff Request Form for Petitioner had Mr. Odom's electronic signature affixed, and was dated 8.21.12. (Pet. Ex. 14, 781) This version's "Reason for RIF" included the explanation from the prior draft of this Form, plus the additional information:

The new work scope is a proposal we wrote in response to Applications for New Awards: Technical Assistance and Dissemination To Improve Services and Results for Children with Disabilities; Early Childhood Technical Assistance . . . The Center is required to perform about 20 specific tasks for the Office of Special Education Programs. We proposed how we would conduct the task, and what personnel would be needed. We did not include Beverly Payne in the proposal because the combination of tasks did not require anyone with her skills or her role/position. . . .

Steps taken to avoid RIF: . . . we needed personnel as research assistants with Microsoft Office Suite software expertise. Beverly Payne was given the encouragement to gain new skills of a changed role. I encouraged Beverly Payne to take courses in Word, Excel, PowerPoint (either online or in person) to gain skills needed to back up professional staff with supports in those areas. She did not choose to do so. She has been inquiring about employment with other FPG projects.

(Pet. Ex. 14)

44. Respondent created a fourth version of the SPA Layoff Request Form. That version of the Form was not signed by anyone approving the Form. (Pet. Ex. 15, p. 798) It contained a shorter "Reason for the RIF" stating:

The elimination of this role: The funding for the project will end in September 2012. We have no funds to extend Beverly Payne's position beyond October 31, 2012. We have applied for a new project that we will hear about in September. Even if we are successful in getting the new project, the scope of work is different, and there is not a role in the new work scope for Beverly Payne's position.

(Pet. Ex. 15, p 796) This unsigned version was sent to OHR on 9/18/12.

45. In the fourth SPA Layoff Request Form, Respondent explained that:

The new project work scope does not have a role for this position. It is a different set of tasks that we are proposing to do for the federal Office of Special Education Programs (OSEP).

(Pet. Exh. 15, p. 2)

46. Ms. Nelson worked with UNC-CH's central Office of Human Resources, and completed the SPA Layoff Request Forms, including using one factor to justify the reason Petitioner was RIFed. (Pet. Ex. 10, 13 – 15) Ms. Nelson didn't testify at hearing. Kahn had no knowledge about the number of drafts of the SPA Layoff Request Forms, which Ms. Nelson completed, the stated reason for each successive draft, the order in which the drafts were prepared, or which version of the form was the final version. T. pp. 104-05, 318-22. (Pet. Ex. 12) Dr. Kahn never saw the forms until after the petition in this matter was filed. T. pp. 95-105, 112-18, 296-97.

47. On September 19, 2012, Ms. Kahn e-mailed the whole NECTAC staff that they had been awarded the new NECTAC grant. Kahn stated that, "Yes. The rumors are true. All is wee (sic) and the new NECTAC is ours. Yay and OPA to all." (Pet. Ex. 17)

48. At 10:34 am on September 20, 2012, Petitioner sent the following email to her NECTAC coworkers:

This is GREAT news! Yyyyyyyyyyyyyy! Thanks to all that put their greatness into getting it accomplished, and particularly thanks to you Lynne.

(Pet. Ex. 17) At 12:12 pm that same day, Ms. Nelson informed Dr. Kahn that "OHR has approved the layoff of Beverly Payne," and Kahn should give the letter and packet "to Beverly by the end of the day tomorrow, if at all possible." (Pet. Exs. 18, 21)

49. On Monday, September 24, 2012, Kahn received the separation of employment notice, dated September 21, 2012, to give Petitioner. Kahn signed the letter that day, but did not give it to Petitioner until Friday, September 28, 2012. Kahn knew when she signed that letter that Respondent was getting a new contract with work in it that "completely covered the people who were proposed in it, to do the job which did not include" Petitioner. T. p. 139.

50. Kahn waited until Friday, September 28, 2012 to give Petitioner the separation notice, because she thought it was better to give the letter to Petitioner before the weekend. T. p. 139. Nelson had told Kahn the date to comply was September 28, 2012.

51. At the close of the September 28, 2012 work day, Dr. Kahn handed the September 21, 2012 letter to Ms. Payne advising her that her position was terminated due to layoff and "to a loss of funding." (Pet. Ex. 20)

52. Dr. Kahn encouraged Petitioner to look for other positions over at least a 90-day period, but she "didn't look very hard to help her find another position." T. p. 141. Kahn did not ask FPG Director Sam Odom, or anyone else, other than informally, to help Petitioner remain employed at FPG. T. pp. 109-110. Kahn didn't do that because she "couldn't recommend her [Petitioner] for anything that required the use of

technology that was advanced.” T. p. 110. “Everyone else in our department is able to sue Microsoft Office Suite, and the Adobe Suite.” T. p. 112.

53. Petitioner met with FPG layoff coordinators on Tuesday, October 9, 2012. T. p. 274. Petitioner’s RIF from Respondent was effective October 31, 2012. (T. pp. 138, 264) At that time, Ms. Payne earned \$45,878 annually. (Pet. Ex. 23, p. 740) After her termination, Petitioner applied for as many as 12 positions with UNC. T. p. 267.

54. Dr. Kahn did not “RIF” the 7 other employees, she had initially identified to be RIFed, because those RIFs were rescinded. T. p. 96. In essence, Kahn included these 7 other employees in multiple budgets for multiple proposals where their skills matched, either through projects Kahn wrote, or through those employees’ own initiatives. A couple of people chose to work part-time. T. pp. 179-180. The end result was that “everybody is either employed at full-time or part-time except for Petitioner.” T. pp. 179-180. (Pet. Ex. 23, p. 743)

55. In May 2013, Dr. Kahn acknowledged that she met with FPG Director Sam Odom, and Ms. Nelson to discuss Petitioner’s appeal. Kahn advised Odom about the sequence of events, how she tried to come up with a job for Petitioner that would work out, how the NCTA funder asked that Petitioner not be included on a grant, and about Kahn’s inability to get Petitioner engaged in other work. T. p. 121. Mr. Odom advised Kahn that “this isn’t what the case is about. Do you have the money for a position that Beverly has the skills for?” Kahn replied, “No.” T. p. 121. Odom told Kahn that this is a layoff based on a project with different roles and responsibilities than the old projects, and you need not make it so complicated. T. p. 122.

56. On May 25, 2013, Kahn sent an email to Odom, thanking him for clarifying for her “the appropriate response.” She informed him that “None of the proposals we wrote last spring and summer required conference or meeting coordination. If that works for you two, that’s a much simpler explanation.” (Pet. Ex. 4) By a May 27, 2013 email, Odom reiterated his understanding that Petitioner’s position was terminated because Petitioner’s prior responsibilities with NECTAC were no longer a part of the new center proposal, and no longer funded by OSEP. He noted that:

This seems clear and stating it for the record in an email seems appropriate, since emails can be accessed and become public information in any court proceedings.

(Pet. Exh. 4)

57. In August of 2013, Kahn asked Rooney to look for emails involving Petitioner in response to Petitioner’s discovery requests. Rooney located and forwarded several emails from 2010 to Kahn. In forwarding this emails, Rooney commented to Kahn, “This is a good one,” and:

Great example of inappropriate communication with our clients. . . . It's also a good example of not being able to do a pretty simple task . . . We haven't had any problems with this – at all- since Matt took over.

(Pet. Ex. 5). In another email, Rooney noted that, "I was glad Vivian reacted the way she did and gave bev feedback." "I told her [Petitioner] that I was going to tell her what someone told me years ago – don't let your mouth get your ass in trouble." (Pet. Ex. 7) In the last email, Rooney remarked "This email exchange below. . . provides a good example of not being able to do the most basic of tasks for NCTA." (Pet. Ex. 7)

58. At hearing, Petitioner did not dispute that she unintentionally offended Vivian James, that her duties under NECTAC associated with conference planning disappeared, or that she did not have significant skills using Excel or other software programs. After Dr. Kahn asked Petitioner to learn Excel, Petitioner did a self-study and did work on Excel "a little bit." T. p. 277. However, Kahn noted on Petitioner's 2012 performance review that she couldn't see any improvement in Petitioner's Excel skills and other computer applications.

59. According to a document created by the University called "Analysis of Layoff v. Pool", created on August 9, 2012, (Pet. Ex. 25, p. 729), Petitioner was in a pool of one (1). In that document, Petitioner was designated as a female, minority, but not as an American Indian or any other racial category.

62. When Kahn terminated Petitioner from employment, 5 of 32 employees under Kahn's supervision were people of color; two African-American employees, one African employee, one Asian employee, and one Native American employee. T. p. 153.

63. As of August 28, 2012, FPG Institute employed 133 SPA employees whose salaries ranged from the mid \$20,000s to an Executive Assistant who earned \$112,349. (Pet. Ex. 23, p. 741)

64. As of September 17 2012, the FPG Child Development Institute had 44 vacant SPA positions (Pet. Ex. 24, 744-748). Several of these vacancies had "Position Rates" similar to Ms. Payne. Specifically, a Business Services Coordinator at FPG, position no. 60843, had been vacant since April 12, 2012. (Pet. Ex. 24)

65. In its September 21, 2012 Notice of Separation due to Layoff, Respondent cited "loss of funding and after evaluating alternative measures" as the reason for Petitioner's RIF or layoff. However, the preponderance of the evidence proved that "loss of funding" was not the real reason for Petitioner being laid off from employment due to a RIF.

a. On September 19, 2012, the day before Natalie Nelson notified Dr. Kahn that OHR had approved Petitioner's layoff, Dr. Kahn learned Respondent had been awarded the new NECTAC grant for \$21.8 million. (Pet. Ex. 3)

b. At hearing, Dr. Kahn acknowledged that "I'm not sure why the University keeps putting loss of funds when I keep correcting them to say changed work scope with new roles. . . . HR keeps putting in loss of funds." T. pp. 189, 190.

c. Kahn explained that although Petitioner's separation notice stated that such separation was based on a "loss of funding," Kahn meant such separation was based on a "loss of work." T. p. 139. Dr. Kahn articulated that the reasons for Petitioner being RIFed were that (1) Petitioner's longstanding job duties of event coordinating and planning no longer existed as OSEP had removed those duties from the NECTAC grant in 2010, and (2) Petitioner did not have the skills to perform the [outlined] duties under the new grant. T. pp. 139-40. She explained at hearing that "I could not write a person into a new contract without any job to do." T. p. 140.

66. It was clear from the August 2010 emails between Dr. Kahn and Ms. Rooney that Kahn and Rooney had been dissatisfied with Petitioner's job performance since 2010. However, neither Kahn nor Rooney took the required disciplinary actions against Petitioner so they could properly terminate Petitioner's employment for unsatisfactory job performance.

67. The preponderance of the evidence also proved that Rooney and Petitioner did not have a good working relationship. Petitioner described Rooney as conniving, and Petitioner didn't trust Rooney. Petitioner wasn't surprised by Rooney's emails about her, because Petitioner had "been on that side of Robin already." T. pp. 245-246.

68. At hearing, Petitioner explained Dr. Kahn's repeated statement, "Are you sure?," made Petitioner second-guess or be obsessive-compulsive, because you're always double-checking yourself to make sure. T. p. 266. In the internal grievance Petitioner filed with Respondent, Petitioner stated:

. . . Dr. Kahn habitually says to me, when I state a fact to her, 'Are you sure?' Whether she is conscious of it or not, this is a demeaning statement toward me as a Native American. I was never given any performance or conduct warnings.

(Pet. Ex. 22, no. 12)

69. At hearing, Petitioner acknowledged that in the early 1990s, she and Dr. Kahn scheduled conferences together in the Southwest [part of the US] because Kahn, Petitioner, and a former director Pat Trohanis liked the Southwest. Petitioner opined that Kahn liked the Southwest because "she's into Indians." T. pp. 275-276.

### **CONCLUSIONS OF LAW**

1. Pursuant to N.C. Gen. Stat. § 126-34.1(a)(2), the Office of Administrative Hearings has subject matter jurisdiction over the issue whether a RIF constitutes



unlawful discrimination on the basis of race, color, national origin, or age. *Feinstein*, 161 N.C. App. at 703, 590 S.E.2d at 403. 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. The Office of Administrative Hearings does not have subject matter jurisdiction over the issue of whether a RIF was without just cause or failed to comply with procedural requirements. N.C. Gen. Stat. § 126-34.1; *University of N.C. v. Feinstein*, 161 N.C. App. 700, 590 S.E.2d 401 (2003).

3. Petitioner was a career state employee at the time of her separation from employment based on a Reduction in Force (RIF). Because Petitioner is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent discriminated and retaliated against her, the Office of Administrative Hearings has jurisdiction to hear her appeal and issue a Decision.

4. 25 NCAC 01C .1004 REDUCTION IN FORCE provides:

(a) A State government agency may separate an employee whenever it is necessary due to shortage of funds or work, abolishment of a position or other material change in duties or organization. Retention of employees in classes affected shall be based on systematic consideration of all the following factors: type of appointment, relative efficiency, actual or potential adverse impact on the diversity of the workforce and length of service.

5. Petitioner has the burden of proving that Respondent unlawfully discriminated and/or retaliated against her, because of her race, color, national origin, and age. With regard to Petitioner's discrimination claim, the North Carolina Supreme Court has adopted the burden-shifting scheme used by federal courts, which was articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See *North Carolina Dep't of Corr. v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983); *North Carolina Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 537-38, 616 S.E.2d 594, 600 (2005).

6. Under the *McDonnell Douglas* burden-shifting scheme, a Petitioner must first establish a prima facie case of discrimination. If a Petitioner establishes her prima facie case, the burden then shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its decision. If the Respondent articulates a legitimate, non-discriminatory reason for the decision, then the burden shifts back to the Petitioner to prove that the reason given by the Respondent was a pretext for discrimination. *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011); *Greene*, 172 N.C. App. at 537-38, 616 S.E.2d at 600.

7. The “ultimate burden” of proving that the employer intentionally discriminated against the employee remains with the employee at all times. *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83.

8. In order to prove discrimination, Petitioner employee must prove that the protected trait(s) actually motivated the adverse employment decision. *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 286 (4th Cir. 2004) (“The protected trait must have actually played a role in the employer’s decision-making process, and had a determinative influence on the outcome.” (internal quotation marks omitted)).

9. “A prima facie case of discrimination may also be made . . . by showing the discharge of a black employee and the retention of a white employee under apparently similar circumstances.” *Gibson*, 308 N.C. 131, 137, 301 S.E.2d 78, 83. An employee may meet that burden when he proves that he was treated less favorably than other employees of a different race. *N.C. Dept. of Correction v. Hodge*, 99 N.C. app. 602, 394 S.E.2d 285, 290 (1990)

10. In this case, Petitioner established a prima facie case of discrimination based on race, color, national origin, and age. Petitioner was the only American Indian out of 33 employees with Respondent, and a member of a protected class. She was separated from employment by a RIF, while a younger white male employee, with fewer years of employment and a lower job classification, retained his job.

11. Since Petitioner proved a prima facie case of discrimination based on race, color, national origin and age, the burden then shifts to Respondent to articulate that Petitioner’s RIF from employment was based on a legitimate non-discriminatory reason. *Gibson*, *supra* requires that:

The employer is not required to prove that its action was actually motivated by the proffered reasons . . . [I]t is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination.

*Gibson*, 308 N.C. at 138, 301 S.E. 2d at 83. An employer’s burden at this stage “is not one of production, not persuasion; it can involve no credibility assessment.” *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 142 (2000); *Boutin v. Hampton Inn, Hickory, LLC*, 2013 WL 5567506 (W.D. N.C.)

12. Respondent articulated a legitimate, non-discriminatory reason for separating Petitioner from employment; namely, the scope of work under the new grant that replaced NECTAC did not include work that matched Petitioner’s skills and job description. The new NECTAC grant required Respondent provide technical and research-based assistance “to improve services and results for children with disabilities” for the federal Office of Special Education and Rehabilitative Services, Department of Education.” The preponderance of the evidence showed that Petitioner lacked the computer software skills to be a research assistant under the new NECTAC grant.

Petitioner's job duties as an event coordinator had been eliminated from NECTAC grants since in 2010.

13. Given Respondent's production of a legitimate non-discriminatory reason for separating Petitioner from employment by a RIF, the burden shifts back to Petitioner to prove that the reason given by the Respondent was a pretext for discrimination. To demonstrate that Respondent's stated reasons are a pretext for intentional discrimination, Petitioner "can reuse evidence from [her] prima facie showing." *Gibson*, 308 N.C. at 139, 301 S.E. 2d at 84.

14. The issue is not whether the employer's decision was reasonable, but whether it was unlawfully motivated. *Enoch v. Alamance County DSS*, 164 N.C.App. 233, 595 S.E.2d 744, 752 (2004)(citing *Olsen v. Southern Pac. Transp. Co.*, 480 F.Supp. 773, 780 (N.D. Cal. 1979)) "It is not enough . . . to disbelieve the employer; the factfinder must believe the [claimant's] explanation of intentional discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519, 125 L. Ed. 2d 407, 424 (1993).

15. Courts have considered "evidence of the employer's treatment of the employee during his term of employment" as relevant evidence of pretext. *Gibson*, 308 N.C. at 139-40, 301 S.E.2d at 84. In *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000), Justice O'Connor wrote:

[I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated (*in St. Mary's*):

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

*Reeves v. Sanderson*, 530 U.S. at 147.

16. However, the "[t]rier of fact is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination." *Gibson*, 308 N.C. at 139, 301 S.E. 2d at 84.

17. Here, Petitioner argued that Respondent's purported "legitimate non-discriminatory reason" for RIFing Petitioner was false, and not believable, and, combined with a suspicion of mendacity surrounding the four different SPA Layoff Request Forms, that showed Respondent intentionally discriminated against Petitioner.

18. The evidence at hearing strongly suggested that the real reason Respondent separated Petitioner from employment was because Dr. Kahn and Dr. Rooney were dissatisfied with Petitioner's job performance for two years, and disappointed and/or displeased that Petitioner had not improved her computer skills as they had urged Petitioner to do. However, since Respondent had not issued the required disciplinary actions to Petitioner, Respondent could not terminate Petitioner from employment for unsatisfactory job performance.

19. Nonetheless, Petitioner failed to prove ultimately that Respondent's reasons for the RIF were a pretext for discrimination based on Respondent's race, color, national origin, or age. In particular, Petitioner failed to prove Dr. Kahn, as the decision maker, had a discriminatory animus against Petitioner based on Petitioner's race, color, age, and national origin.

20. As to Petitioner's claim for retaliation for her engaging in protected activity, "[t]o establish a *prima facie* case of retaliation, it must be shown that (1) the plaintiff engaged in a protected activity, (2) the employer took adverse action, and (3) there existed a causal connection between the protected activity and the adverse action." *Salter v. E & J Healthcare Inc.*, 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003) (quoting *Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 690, 504 S.E.2d 580, 586 (1998), *disc. rev. denied*, 350 N.C. 91, 527 S.E.2d 662 (1999)). Federal courts use the same burden-shifting schemes for retaliation claims. See, e.g., *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4<sup>th</sup> Cir. 2011).

21. In this case, Petitioner failed to establish a *prima facie* case of retaliation, because she failed to establish that she engaged in any protected activity. Moreover, even if she had demonstrated she engaged in any protected activity, she failed to establish a causal connection between the protected activity and the adverse action. Petitioner presented no evidence of a discriminatory animus by Respondent against Petitioner.

22. Respondent's evidence shows a legitimate non-retaliatory reason for Respondent's action, and Petitioner failed to establish any evidence of retaliatory intent by her supervisors. Petitioner failed to present any evidence that Respondent's legitimate non-retaliatory reason for the RIF was pretextual, or that retaliation was the real reason for the action.

23. Based on the foregoing, Respondent's separation of Petitioner from employment based on a RIF was not the result of discrimination based on race, color, national origin, or age. Respondent's separation of Petitioner from employment based on a RIF was not the result of retaliation based on age.

### **FINAL DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's decision to separate Petitioner from employment based on a Reduction in Force.

### **ORDER**

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, N.C. 27699-6714, in accordance with N.C.G.S. § 150B.

### **NOTICE**

The North Carolina State Personnel Commission will make the final decision in this contested case. That agency is required to give each party an opportunity to file exceptions to Decision and to present written arguments to those in the agency who will consider this Decision. N.C.G.S. § 150B-34(a).

The agency is required by N.C.G.S. § 150B to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings...

This 28<sup>th</sup> day of April, 2014.

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Melissa Owens Lassiter  
Administrative Law Judge