

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 OSP 00867**

FINAL DECISION

For Petitioner: M. Jackson Nichols
Allen, Pinnix & Nichols, P.A.
510 Glenwood Ave., Suite 301
Raleigh, NC 27602

For Respondent: Joseph E. Elder
Assistant Attorney General
North Carolina Department of Justice
PO Box 629
Raleigh, NC 27602-0629

WITNESSES

For Petitioner: Kristin O'Connor
Stephen Davis
Jack Rogers
Anna Hamburg
Tammy Johnson

For Respondent: Kevin Kelley
Patricia Garcia
Kristin O'Connor

EXHIBITS

For Petitioner:

1. Job Posting, Social Services Program Manager II-DF, 1/16/13
2. Job Posting, Social Services Program Consultant II
3. Organizational Chart – DSS Child Welfare Services, 1/1/13
4. E-Mail from Kelley to DSS, 8/30/13
5. Petitioner's employment application, 1/25/13
6. Employee Grievance, Step 1, 9/10/13
7. Letter, DHHS/DSS to Petitioner, 9/16/13, Step 1 Response
8. Employee Grievance Step 2, 9/20/13
9. Letter from Black to Petitioner, 9/30/13, Step 2 Decision
10. Employee Grievance Step 3, 10/3/13
11. Letter from Payne for Wos, 1/8/14, Step 3 Decision
12. Hearing Officer's Report, 12/18/13
13. Verified Petition for Contested Case Hearing, 2/3/14
14. Not Offered
15. Not Offered
16. DHHS Direction III-8, Employee Grievance Policy
17. Position Description, Social Services Program Consultant II
18. DHHS Work Plan, Petitioner 6/1/06-5/31/09
19. DHHS Work Plan, Petitioner 6/1/09-5/31/10
20. DHHS Work Plan, Petitioner 7/7/11-6/30/12
21. Certificate of Appreciation, 5/10/13
22. Excerpts from Focus Group Results, 1/2014

23. Not Offered
24. Interview Notes of Kelley, 3/15/13, Bazemore and Hamburg interviews
25. Not Offered
26. Not Offered
27. E-Mail from Kelley to DSS/Child Welfare Services re Position Postings, 4/3/14
28. Not Offered
29. Not Offered
30. Memo from Black to Staff of Adoption Services Team, Child Welfare Services Section, 10/22/13
31. DHHS Work Plan, Petitioner 7/1/12 – 6/30/13
32. Petitioner's First Set of Interrogatories and Request for Production of Documents, 4/14/14
33. Petitioner's First Request for Admissions, 4/14/14
34. Respondent's Responses to Petitioner's First Request for Admissions, 4/29/14
35. Email Exchange between Petitioner and Bazemore, 6/19/14 and 6/20/14 re: OAH Hearing – Time Request
36. Memo from Bradsher to Cruz, 2/11/13 with attached DSS 2013 EEOC Plan
37. DHHS 2013 EEO Plan
38. Deposition of Tammy Johnson, 6/9/14
39. DVD, Video Deposition of Tammy Johnson, 6/9/14

For Respondent:

1. Job Posting, Social Services Program Manager II-DF, 1/16/13
2. Request for Posting, 1/14/13
3. Application of Jan. M. Bazemore, 2/22/13
4. Interview Notes of Kelley, 3/15/13, Bazemore interview
5. Not Offered
6. Application of Anna Hamburg, 2/14/13, printed from NEOGOV
7. Interview notes of Kelley, Hamburg interview, 3/11/13
8. Not Offered
9. Not Offered
10. Selection Log, 4/4/14
11. Not Offered
12. Not Offered
13. Not Offered
14. Not Offered
15. Not Offered
16. Not Offered
17. Not Offered
18. DHHS Policies and Procedures, Merit-Based Selection Program Plan, 5/26/06
19. Excerpt from State Human Resources Manual, Civil Leave, 12/1/95

ISSUES

Whether Petitioner was denied promotional priority when she was not selected for the adoption services manager position for which she applied.

Did Respondent violate N.C. Gen. Stat. § 127-7.1 because of the failure of the Department to give Petitioner Career State Employee priority consideration?

Did Respondent violate N.C. Gen. Stat. § 127-7.1 because of the failure of the Department to promote Petitioner as a Career State Employee?

Whether Respondent discriminated against Petitioner based on her age and race when not selecting Petitioner for the adoption services manager position.

Did Respondent commit an act of age discrimination when Respondent hired an applicant who was younger than Petitioner?

Did Respondent commit an act of race discrimination when Petitioner was denied employment in the position for which she applied and a Caucasian was hired?

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 Administrative Law Judge makes the following Findings of Fact by a preponderance of the evidence. In making these 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 witnesses, 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 this case.

FINDINGS OF FACT

1. Petitioner has been continuously employed by the State of North Carolina since May 4, 1987 and has been continuously employed with the North Carolina Department of Health and Human Services (DHHS), Division of Social Services (DSS), since November 17, 2003. Petitioner has worked as a Social Services Program Consultant II since beginning her employment with DSS. This work has been with the adoption services team of the Child Welfare Services Section.
2. On February 3, 2014, through counsel, Petitioner Anna Hamburg filed a Petition for a Contested Case Hearing with the OAH against Respondent North Carolina Department of Health and Human Services alleging that, in connection with its hiring for the position of Social Services Program Manager II (the "Position"):

- a. Respondent failed to provide Petitioner her rights as a Career State Employee;
- b. Respondent violated N.C. Gen. Stat. § 127-7.1 because it failed to give Petitioner promotional priority consideration;
- c. Respondent committed an act of age discrimination when Respondent hired an applicant who was younger and less experienced than Petitioner;
- d. Respondent committed an act of race discrimination when Respondent hired an applicant who was Caucasian rather than Petitioner, who is Latina;
- e. Respondent committed a procedural violation contrary to N.C. Gen. Stat. § 126-34.01 by failing to resolve Petitioner's grievance within the 90-day deadline.

3. At all times relevant to this proceeding, Petitioner was a career State employee, as defined by N.C. Gen. Stat. § 126-1, and was subject to the provisions of the State Personnel System [State Human Resources System] and entitled to the rights that the State Personnel Act guarantees.

4. Petitioner has been a State Employee since 1987. From 1986 to 1987, Petitioner worked for the Wake County District Attorney's Office. She first took a position as a paralegal working with district attorneys on preparing indictments and getting court records together. From 1987 to 1992, she worked as a victim witness assistant for the Wake County District Attorney's Office. From 1992 to May 2003, Petitioner worked with the guardian ad litem program (GAL program) as a Program Supervisor. In that role, Petitioner supervised and monitored all aspects of case assignments from volunteer assignment through disposition of the case through the court system. Her work included training the volunteers, attending court with the volunteers, attending outside meetings between the volunteers and external agencies and partners, and partnering with DSS. From May 2003 to November 2003, Petitioner worked as a Victim Education Outreach Specialist with the Department of Correction. In this role, Petitioner assisted crime victims with parole hearings for convicted inmates and assisted crime victims register with an outreach program under the crime victims' bill of rights laws.

5. Since November 2003, Petitioner has worked as a Program Consultant for DSS. In that role, Petitioner is responsible for two of the three primary functions of the Adoptions Service Unit: (a) adoption review and indexing, and (b) confidential intermediary services.

6. The Child Welfare Services section's core mission is to provide support to county departments of social services and private child placing agencies in serving children who have been reported or have been abused or neglected. The mission is to provide quality services to the children it serves and to find placement for them when appropriate in other homes either through the foster care system or through permanent placement.

7. The Adoptions Service Unit within the Child Welfare Section at DSS exists to promote permanency for youth that are served by the foster care system, as well as youth and children who are adopted outside of the foster care system. The adoption services team is one of seven teams within the Child Welfare Services section of the NCDSS. This team has three primary functions consisting of NC Kids, Confidential Intermediary, and Adoption Indexing.

8. The NC Kids function involves placement of children served by the foster care system into more permanent settings based on matching those children with individuals who have been approved to care for children based on the individuals' capabilities.

9. Confidential Intermediary is the newest function to the team and involves the coordination of adoptees meeting their birth parents if both parties agree to the meeting. The service is provided at the local level and supported at the State level.

10. The adoption indexing and review function is responsible for indexing all adoptions in North Carolina. This function is necessary for new birth certificates to be issued for the adoptee. While the statute specifically addresses the indexing function, the team has historically performed an additional quality assurance review.

11. In June 2013, Wayne Black began serving as the Director of DSS. Ms. Sherry Bradsher served as Director of DSS prior to June 2013. Jack Rogers serves as the Deputy Director of DSS. Mr. Rogers supports Mr. Black in the administration of DSS.

12. Timothy Kevin Kelley serves as the Section Chief for the Child Welfare Services Section of DSS within DHHS. Mr. Kelley reports to Mr. Black. Kristin O'Connor serves as the Assistant Section Chief for the Child Welfare Services Section of the Division of Social Services at the Department of Health and Human Services in North Carolina. Until her retirement in March 2013, Tammy Johnson served as Social Services Program Manager II at DSS.

13. A Social Services Program Manager II position with DSS was posted with an opening date of January 16, 2013. The position was being vacated by Ms. Johnson who retired in March 2013. The position served as the Adoption Services Manager in the Adoption Services Team of the Child Welfare Services Section. The Salary Grade for the Position was set at 75. The recruitment range for the Position was set as \$47,195 to \$78,204.

14. The job posting provided that the Minimum Education and Experience Requirements for the Position were as follows:

“A master’s degree in social work and three years of experience in social work including one year in a consultative or supervisory capacity; graduation from a four-year college or university, nine months of graduate training in social work, and four years of experience in social work including one year in a consultative or supervisory capacity; graduation from a four-year college or university and five years of experience in social work including two years in a consultative or supervisory capacity; or an equivalent combination of education and experience.”
Pet. Ex. 1

15. The job posting provided that the Knowledge, Skills and Abilities/Competencies for the Position were as follows:

“The successful candidate for this position will have a working knowledge of the laws, rules and policies related to the adoption of children in North Carolina. The candidate will need to demonstrate effective supervisory and leadership of individuals to provide support to all 100 county departments of social services as well as private child placing agencies. Emphasis is placed on ensuring good customer service is provided to all agency employees, their partners, and to the general public at large. Individual will need to have a strong attention to detail and

demonstrate ability to use automated information systems and data to inform and improve program operations.” Pet. Ex. 1

16. Ms. Johnson, who held the Position from 2001 until 2013, testified that the primary job responsibilities of the Position were as follows: “Interpreting the legal statutes in adoptions. It's not just adoptions. We have to know a little bit about termination of parental rights. You have to know about civil -- it's a little bit of everything -- foster care statutes. It's just having that legal background and being able to interpret and explain. And that's the most important role, even as a manager because your consultants that are working for you are having to come and you're having to make really major decisions that will affect people's lives.” Johnson Dep. 18. Ms. Johnson believed of the three primary functions of the Adoptions Service Unit, the adoption review and indexing was the most challenging and required the most work. Johnson Dep. 21, 23.

17. Petitioner submitted an application for the Adoption Service Manager position. This position would have been a promotion for Petitioner. She was a career State employee. She held a bachelor's degree in political science.

18. Jan M. Bazemore applied for the Adoption Services Manager position. She was employed with the Chatham County Department of Social Service at the time she applied. She had received both a bachelor's and master's degree in social work. Ms. Bazemore was ultimately selected for the manager position and received and accepted an offer of the position in August 2013.

19. Mr. Kelley prepared the job posting, particularly the description of the work to be performed and the knowledge skills and abilities and competencies necessary for a successful candidate. He reviewed the job description and considered the knowledge, skills and abilities of the position, including managerial and leadership skills, in creating the posting. He also considered the needs of the work unit. The hiring manager is responsible for preparing the job posting. Mr. Kelley, the Section Chief for Child Welfare Services, was the Hiring Manager for the Position.

20. Human resources conducted an initial review of the applications to determine the pool of minimally qualified candidates. The Office of Human Resources for DSS determined that 19 applicants for the Position were minimally qualified.

21. As hiring manager, Kelley determined the highly qualified candidates from the pool of minimally qualified candidates forwarded to him by human resources. He reviewed the applicants' knowledge and experience related to the adoptions work as well as their managerial and leadership skills. Kristin O'Connor also reviewed each highly qualified candidate's qualifications including their knowledge, skills and abilities related to the adoption services manager position.

22. Mr. Kelley is familiar with promotional priority in the hiring context. He is aware that applications from outside state government are not entitled to promotional priority.

23. Of the applicants that were deemed qualified, Mr. Kelley determined that four applicants were highly qualified and would be interviewed. These four applicants were Petitioner, Meisha Matthews, Heather Lockey Englehart, and Jan Bazemore.

24. Kelley signed the selection log which identifies the highly qualified candidates as well as those who received an interview. Each of the highly qualified candidates received an interview. The selection log was also signed by Rogers.

25. Of the highly qualified applicants chosen for interviews, the Human Resources Office determined that three of the four candidates had promotional preference. These three applicants were Petitioner, Ms. Matthews, and Ms. Lockey Englehart. At the time of their application, all three of these applicants worked on the adoption services team in the Child Welfare Section of DSS.

26. Respondent did not consider Ms. Bazemore to be a Career State Employee and did not find her to be entitled to priority promotional consideration.

27. Mr. Kelley created an Interview Committee consisting of himself and Ms. O'Connor. They conducted interviews for the Position in mid-March 2013. It was customary for at least two individuals at the management level to participate on an interview panel. He requested O'Connor based on her knowledge and experience working in the section and experience with the hiring process. Kelley prepared the interview questions and O'Connor reviewed them and suggested any changes she felt may be appropriate. In preparing the questions, Kelley reviewed the position description and job posting. They were designed to reveal how an applicant thinks about their work and the responsibilities of the position for which they have applied. The same set of interview questions were used for each of the four interviews conducted.

28. Petitioner's interview for the Position with the Interview Committee lasted about an hour. During her interview, Petitioner volunteered answers that brought up her leadership experience. Petitioner also discussed her supervisory experience with the Interview Committee.

29. After the interviews for the Position were concluded, Mr. Kelley could recall checking the references for only one interviewed candidate, Ms. Bazemore.

30. Petitioner had provided references to the Interview Committee. These references included a Wake District Court Judge and an attorney in the Attorney General's Office whose client was the Department. Mr. Kelley could not recall contacting any of these references. Mr. Kelley only spoke to Petitioner's immediate supervisor, Ms. Johnson.

31. Prior to her retirement, Ms. Johnson twice recommended Petitioner as her replacement to Mr. Kelley. Ms. Johnson also recommended Petitioner as her replacement to Gwen Sanders, when Ms. Sanders served as HR Director. Johnson Dep. 50.

32. When Ms. Johnson first recommended Petitioner to Mr. Kelley as her replacement, she told Mr. Kelley that Petitioner would be the best person for the Position because "the staff looked to her as a leader and that – it was a – I loved them dearly, but they are a hard group

sometimes, just like any group can be. They need a strong manager and someone that they respected.” Johnson Dep. 28.

33. Ms. Johnson testified that the second time that she recommended Petitioner for the Position, which was during her exit interview, Mr. Kelly told her, “I’ve got an outside applicant that’s very well qualified.” T. 617; Johnson Dep. 29. At Ms. Johnson’s exit interview, Ms. Johnson and Mr. Kelley discussed the Position and Mr. Kelley made “...a comment that sometimes it’s best to bring someone outside with a new vision.” T. 624-25; Johnson Dep. 35-36.

34. Mr. Kelley testified that Ms. Johnson’s recommendation of Petitioner was “made with a lot of hesitation” and “she expressed it with some concern.” T. 502-03. Ms. Johnson denies that she was reluctant or had any reservations in recommending Petitioner for the Position. Rather, Ms. Johnson merely suggested to Mr. Kelley that Petitioner “...have some management training skills with State Personnel. That was no bad reflection on her. I didn’t intend for that to be a reflection on her, but I’m an honest person. And I recommended her, but I also know that she needed some managerial training. That is not unusual. Usually when you hire a manager, just like when I was hired or Patrick was hired or any other manager, you take that state personnel training. It’s good. Every manager with state government needs to take it and probably take it every few years. But that was no reflection on her.” T. 635.

35. Mr. Kelley decided to hire Ms. Bazemore for the Position in April 2013. However, despite a high vacancy rate in staff and a backlog in reviewing files, Ms. Bazemore was not offered the position until August 2014. Mr. Kelley offered Ms. Bazemore the position in a telephone call in August 2013. At hearing, Respondent did not explain why Ms. Bazemore’s hiring was delayed. Ms. Johnson had given Mr. Kelley and Ms. O’Connor one year’s advanced notice of her retirement so that Mr. Kelley could hire her replacement and so that she would train the person before she left. Johnson Dep. 31.

36. Both O’Connor and Kelley referred to the need to have a manager that could understand the continuum of services provided through the child welfare services system and how the adoptions services team fit into that continuum. Additionally, the successful candidate needed leadership skills and supervisory experience in the adoptions context.

37. At the time she applied for the adoption services manager position, Bazemore was the placement services supervisor with the Chatham County DSS with supervisory responsibility for five employees. She had been in that position since August 2008 and had over four years of directly related supervisory experience.

38. O’Connor and Kelley believed Bazemore was more comprehensive than Petitioner in her interview responses and was able to make connections between the outcomes sought in the Child Welfare Services section. She was able to speak of the REAP initiative despite Chatham County not being involved in that initiative. She was familiar with the NC Kids function. The interview team believed Bazemore revealed a more positive and proactive approach, and was able to give detailed examples of her work throughout her responses. Overall the interviewers

thought Bazemore was better able to express how to move the team forward versus maintaining the status quo and how to manage individuals in difficult situations.

39. Petitioner had supervised volunteers of the Guardian ad Litem program during her work with the Administrative Office of the Courts. The interview team thought Petitioner failed to make any connection between her experience supervising volunteers in the GAL program and the adoption services manager position. At the time she applied for the adoption services manager position Petitioner did not officially have direct experience supervising State employees.

40. Ms. Johnson testified that Petitioner would serve as her “back-up” for the Position when she was away from the office. Johnson Dep. 44-45. According to Ms. Johnson, “the other team members, the other staff, respected [Petitioner], would go to her and ask her questions. Anytime I was not there, they would go to [Petitioner.]” *Id.*

41. Petitioner showed she was knowledgeable and professional. Her answers focused more on the day-to-day operations and the interview team thought she did not show a broader understanding of the work. Petitioner had experience with the Confidential Intermediary function as the only person on the adoption services team working in that role.

42. During the seven months between Ms. Johnson’s retirement and Ms. Bazemore’s start of employment, Petitioner largely performed the duties of the Position, without additional compensation. Indeed, Respondent acknowledged as much in Petitioner’s interim performance review on May 31, 2013, in which Petitioner’s immediate supervisor wrote, “Anna has taken on a lead role on her team since the supervisor retired from the agency and helped lead the completion of the federal AFCARS report. She takes pride in her work and is a strong advocate for the needs of the team.” T. 217-19; Pet. Ex. 31.

43. O’Connor and Kelley believed Petitioner had a less positive approach in her responses. She discussed administrative changes and the stress and uncertainty associated with that. In reference to the adoption services team and solving conflicts, she discussed the strong personalities within the team and the need for a strong leader and supervisor. She stated that she would be good for the position. Petitioner acknowledged that she would need training with personnel matters.

44. O’Connor and Kelley discussed each candidate following their interviews and again after all of the interviews of the highly qualified candidates had been completed. They were in agreement that Bazemore reflected the knowledge, skills and abilities required of the manager position, and that through her interview she demonstrated the skills and behaviors they were looking for in a successful candidate.

45. Mr. Kelley made a conscious decision to reject the internal applicants and selected Ms. Bazemore, whom he knew to be an external candidate. Mr. Kelley testified that he thought an external candidate would be preferential because DSS benefits from having a diverse applicant pool.

46. Ms. Bazemore was hired for the Position, effective October 15, 2013.

47. Petitioner consistently has been evaluated as an “Outstanding” employee in her performance evaluations throughout her tenure. In her Work Plans and evaluations from 2006 to 2012, management rated her as Outstanding.

48. Ms. Johnson testified that she rated Petitioner as “Outstanding” in her performance evaluations and that she did not give all of her subordinates such a high ranking. Ms. Johnson testified that she took the evaluation process “very seriously” and rewarded those who went “above and beyond.” Johnson Dep. 47

49. Ms. Johnson, while recommending Petitioner for the position among the internal candidates, did not know the qualifications or experience of Bazemore. Johnson acknowledged that having supervisory experience was helpful.

50. Petitioner and Johnson had developed a friendship during their time working together which included Petitioner visiting Johnson at her beach home.

51. Before Ms. Johnson retired, Petitioner submitted a reclassification request to DSS management. Petitioner’s request was not granted.

52. In April 2013, prior to Ms. Bazemore’s selection for the Position, Petitioner asked Mr. Kelley to consider reclassifying her position from salary grade 71 to salary grade 73, given that other consultants were salary grade 73 and given that she had been managing the confidential intermediary program for five years without additional compensation. Mr. Kelley responded by telling Petitioner that he did not feel that confidential intermediary was a program.

53. At the time that Petitioner’s reclassification request was pending, the DSS was involved in a department wide workplace planning initiative that involved each employee completing a talent inventory and new job description. There are over 400 positions in the DSS that required new job descriptions and a talent inventory. The DSS human resources office was informed of the initiative in the spring of 2013. The DSS human resources office was understaffed at the time the initiative was underway. As of the hearing, human resources had four of six positions filled. Based on the talent inventory and job description project for over 400 positions, the DSS HR office has not been able to move on any reclassification requests.

54. In July 2013, prior to Ms. Bazemore’s selection for the Position, Petitioner requested for a second time a reclassification of her salary grade. As of the hearing, Petitioner had not received a formal response to her request from management but, in the course of this litigation, Petitioner learned through the deposition of Mr. Kelley that the request was denied.

55. Kelley reviewed Petitioner’s most recent reclassification request and did not agree that reclassification was indicated. This was based on the fact that he believed Petitioner’s work duties had not changed significantly.

56. Prior to Ms. Johnson's retirement, Petitioner raised concerns about problems with inadequate heat in her office. Specifically, the Adoption Service team worked in a building for three to four years with inadequate heating. According to Ms. Johnson, Petitioner led the efforts in having this issue addressed and finally resolved by management. These concerns were raised by other members on the adoption services team and Kelley shared those concerns. Kelley acknowledged that this was a problem and supported the team as best he could, including advocating repeatedly to his management that the problem be dealt with. He even considered moving the team as he did not consider the conditions to be conducive to a productive work environment.

57. Prior to Ms. Bazemore's selection for the Position, Petitioner had raised concerns to management about compliance with certain issues within DSS and the Child Welfare Section. She raised concerns about inadequate staffing as well as concerns about a shortened adoption indexing review. This was a matter of discussion for some time within the Child Welfare Services section at various levels of management. Ultimately, the director determined that in order to address the backlog of adoptions to index, a minimal review was all that would be done. While management and team members alike expressed a desire to conduct a quality assurance review, the minimal review was all that was required by law.

58. In her Petition for Contested Case Hearing, Petitioner asserted a claim based on the denial of promotional priority consideration, which is contrary to N.C. Gen. Stat. § 126-7.1.

59. Mr. Stephen Davis was tendered by Petitioner and accepted as an expert witness in the following categories: As an expert regarding the State Personnel Act, its implementing regulations, and the Human Resources Manual (formerly known as the State Personnel Manual); as an expert regarding the procedures to be followed in the hiring and promotion of State Employees consistent with the State Personnel Act, regulations and Human Resources Manual; and, as an expert regarding the development and use of an EEO plans in hiring and promotional decisions, particularly with respect to priority promotional consideration.

60. From July 1978 until November 1981, Mr. Davis worked as a Personnel Analyst for the Division of Health Services (which was a Division of the former Department of Human Resources). From November 1981 until May 1984, Mr. Davis worked as a Personnel Analyst II for the Office of State Personnel. From May 1984 until 1985, Mr. Davis worked at N.C. State University as an Associate HR Director. From 1985 until July 1989, Mr. Davis worked as the Assistant Personnel Director for the Department of Administration.

61. From July 1989 until February 1993, Mr. Davis became a Personnel Officer for the Office of the State Controller. In this role, he was responsible for establishing a personnel system for the newly-created agency. He also was responsible for developing personnel-related policies. From February 1993 until May 1998, Mr. Davis served as Division Director for the Division of Human Resources with the Department of Health and Human Services. In this role, Mr. Davis administered three personnel systems: (a) one system for approximately 20,000 employees of DHHS who were subject to the State Personnel Act; (b) one education system subject to 116C of the North Carolina General Statutes; and (c) one local government system for local social services, public health, and mental health departments (other than those that were substantially equivalent in their personnel systems).

62. From May 1998 until May 2000, Mr. Davis worked as the Deputy Director for the Office of State Personnel. From May 2000 until September 2000, Mr. Davis served as the Assistant Secretary for Human Resources and Community Services for DHHS. From September 2000 until February 2001, Mr. Davis served as the interim State Personnel Director at the Office of State Personnel. From February 2001 until July 2003, Mr. Davis was appointed as Director of Employee Relations and Local Government Services. In that role, he oversaw a staff of ten consultants, who worked with assigned agencies on employee relations issues.

63. Since retiring from State employment, Mr. Davis has engaged in contract work regarding personnel issues for state and local government agencies. In the course of that work, Mr. Davis has proactively stayed informed of changes to the State Personnel System [State Human Resources System], its implementing regulations, and the policies adopted by the State Human Resources Commission. Over the past five years, Mr. Davis has been retained as an expert witness in other personnel matters.

64. While retained as an expert witness in this case, Mr. Davis reviewed the following materials during the course of formulating his opinions:

- a. Excerpts from the Petitioner's personnel file;
- b. The job posting for the Position;
- c. The Petition for Contested Case Hearing;
- d. The Prehearing Statements filed by both parties;
- e. N.C. Gen. Stat. § 126 *et seq.*, with emphasis on N.C. Gen. Stat. § 126-7.1 and its implementing regulations; and
- f. Depositions taken during the course of the litigation;
- g. The Hearing Officer's Report from Petitioner's internal grievance;
- h. Ms. Bazemore's and Petitioner's applications for employment;
- i. Interview notes taken during Respondent's interview of Ms. Bazemore for the Position;
- j. Performance evaluations regarding Petitioner.

65. Mr. Davis testified that the purpose of the promotional priority rights are as follows:

The promotional priority policy exists to - certainly in the eyes of state employees - assure fairness in the selection when they are competing with candidates who are not state employees. So this particular policy is very clear in that it is specifically designated for career state employees, that is those who are in a permanent position and who have been continuously employed, that is without a break in service, for the immediately preceding 24 months. The policy is a form of protection, I think, for state employees. It enables a state employee some recourse if they have career status, if they have not been selected when competing with an outside candidate whose qualifications are deemed less than equal. And so this particular policy that the state Human Resources Commission approved in 1997 assured those protections and also gave those employees recourse if they felt they had been denied their priority as a state employee. T. 113

66. Mr. Davis testified that based upon his review, Petitioner was entitled to promotional priority. When applying for the Position, Petitioner had 20 years' of experience in social work, 11 of which included on-the-job consultative experience with hands-on work. Ms. Bazemore only had 7 years' of experience in social work, less than 5 of which included supervisory experience.

67. Mr. Davis testified that the experience of Petitioner was significantly better than that of Ms. Bazemore:

When you consider that the 20 years that Ms. Hamburg brings to the job, or brings to the table, I think appropriately recognizes that she has had this amount of time to develop skills and abilities and knowledge that are probably an exact match that are shown on the job posting, if not exact, a pretty close match. So I would argue that certainly that range of experience compared to that presented by the individual hired is dramatically wide. There's a big gap there. . . . [W]hen you have such a wide disparity, I think, in experience, I don't know how you can come to the conclusion, quite frankly, that 20 plus years perhaps is equal to seven years. I can't get there." T. 122

68. Ms. Bazemore has a one-year master's degree in Social Work and Petitioner has an undergraduate degree in political science.

69. Davis opined that the education and job experience set forth in the posting established equivalencies such that each combination of education and experience would make the applicant qualified for the position. He stated that someone with an undergraduate degree and 15 years of on the job, specific experience in the field of work may be better suited to a position than someone with a master's degree and less experience. Mr. Davis testified that, generally, listings under the Minimum Education and Experience Requirements for job postings are equivalent.

70. Davis acknowledged that there is a qualitative component to a hiring. He did not know Bazemore and did not participate in any of the interviews such that he could assess the candidates' qualitative performance. He was also not familiar with the day-to-day work

performed in the Child Welfare Services section and was not familiar with the personalities and working relationships within the adoption services team.

71. Petitioner has taken staff development training throughout the course of her 20-year career in the areas of child abuse, neglect and child welfare. Petitioner completed the Office of State Personnel's month-long professional management course while working with the Guardian ad Litem program.

72. Ms. Bazemore had no experience with the confidential intermediary work and had never done anything with the AFCARS report. Petitioner had substantial experience in both areas of work. Petitioner took a lead role in submitting the AFCAR report in 2013, following Ms. Johnson's retirement, which was a responsibility above and beyond her normal duties as Program Consultant. Both confidential intermediary work and the submission of the AFCARS report are supervised by the Social Services Manager II.

73. According to her application, Ms. Bazemore supervised 5 employees for approximately 4 years 4 months while employed by Chatham County. By contrast, according to Petitioner's application, Petitioner supervised over 60 volunteers for over 10 years as a Program Supervisor for the Guardian ad Litem Program. Davis acknowledged that managers have discretion whether to consider an applicant's experience supervising volunteers and that management could consider the needs of the work unit in assessing candidates.

74. As the job posting was written, a successful candidate could present experience either in a supervisory role or a consultative role. In Mr. Davis' opinion, Ms. Bazemore's supervisory experience was not significantly better than Petitioner's 11 years of on-the-job consultative experience.

75. No direct questions regarding supervision were asked during the applicants' interview. The Interview Committee determined the applicants' supervisory experience only from the information provided in their respective applications. Based on only his review of the applications, Mr. Kelley determined that Ms. Bazemore had more supervisory experience than the other highly-qualified applicants who were interviewed.

76. The Interview Committee did not give Petitioner credit for her supervisory experience with the Guardian Ad Litem (GAL) volunteers, during which Petitioner supervised approximately 60 volunteers for over 10 years.

77. According to Mr. Davis, the Office of State Human Resources historically encourages HR Directors to advise managers to give applicants credit for supervisory experience over volunteers, if that experience is germane to the nature of the work to be performed. Mr. Davis testified that, with regard to Petitioner's supervision of GAL volunteers, "I would contend that that level of supervisory responsibility and experience is as good as supervising a full-time employee and in some respect maybe more of a challenge." T. 124-25.

78. According to Mr. Davis, Petitioner's supervisory experience over the GAL volunteers was germane to the nature of the work to be performed, given the nature of the knowledge,

skills and abilities of the Position. Specifically, the knowledge, skills and abilities included: (a) effective supervisory and leadership; (b) providing support to private child placing agencies; and (c) a strong attention to detail. In Mr. Davis' opinion, Petitioner's skills in supervising GAL volunteers was "absolutely transferable" to the skills required for the Position.

79. Ms. Johnson testified that she would have recommended Petitioner for the Position, even if Petitioner had limited supervisory experience. Johnson Dep. 27. Ms. Johnson stated that she would have done so because:

"[Petitioner] had done such a good job with confidential intermediary services. She really took it and as a program. The other employees liked Anna. They respected her. And that is a huge part of having a leader in a manager right there. There were other -- I knew she knew the -- I had trained her for years. I knew she knew the statutes. She knew how to interpret them. She was good on the phone with the public. It's hard to find those leadership qualities in just anyone. And I liked to think, too, she looked at me as setting an example. So she knew go to personnel, go to Human Resources, and, you know -- trying to the right way to do things." Johnson Dep. 27

80. Respondent presented no evidence to show that the applicants' interview responses were scored or ranked with "fair and valid selection criteria." *See* N.C. Admin. Code 1H .0634. Respondent presented no evidence of any methods or means by which the applicants' interview responses were measured.

81. In Mr. Davis' opinion, the questions posed by the Interview Committee to the applicants were not sufficiently structured to elicit responses that ultimately were used as the justification for the selection decision; especially in light of the fact that Petitioner's experience was far greater than that of Ms. Bazemore.

82. Mr. Davis opined that selection of an outside applicant over an applicant with promotional priority for the purpose of avoiding an internal candidate is not compliant with N.C. Gen. Stat. §126-7.1. Mr. Davis opined that selection of an outside applicant over an applicant with promotional priority for the purpose of bringing in a "different perspective" or overcoming "morale problems" is not compliant with N.C. Gen. Stat. §126-7.1.

83. The interview team considered that Petitioner and Bazemore were both highly qualified but that Bazemore was better able to express her experience as a leader and supervisor better during the interview. The posting identified a preference for someone with supervisory experience and Mr. Kelley believed Bazemore's supervisory experience from 2008 until she was hired was stronger than Petitioner's experiences.

84. Mr. Rogers received the hiring packet for the adoption services manager team. Rogers was aware that promotional priority was indicated with respect to Petitioner. Consideration was given to the qualifications of both Petitioner and Bazemore as those qualifications related to the adoption services manager position and the needs of the adoption services team.

85. Mr. Rogers gave approval for Ms. Bazemore's hiring for the Position, upon the recommendation of Mr. Kelley. To justify his recommendation, Mr. Kelley gave Mr. Rogers a comparison chart summarizing the candidates' knowledge, skills and abilities. Nothing in this comparison chart justified the selection of Ms. Bazemore based upon her interview. Mr. Rogers relied upon this chart in approving the selection of Ms. Bazemore. Mr. Rogers testified that if he found that the chart was inaccurate, this might affect his approval of Ms. Bazemore's selection. Because it was not provided in discovery, the chart was not introduced as an exhibit.

86. In her application for the Position, Petitioner identified herself as Hispanic. She also identified her date of birth as 7/20/1964, which also indicates that she was over forty (40) years of age.

87. Petitioner's race was not viewable to Kelley as hiring manager or O'Connor as an interview panelist. Petitioner had not previously held herself out as identifying as Hispanic and confirmed that her personnel file would reveal she not had identified herself as Caucasian until applying for the adoption services manager position.

88. When Respondent submitted its request that the Position be posted, the Human Resources Office for DSS ("DSS HR") noted that the department's EEO Plan indicated a need for outreach recruitment.

89. The 2013 EEO Plan for DHHS (the "2013 Departmental EEO Plan") establishes policies, procedures, and goals for agencies of the Department, including DSS, to meet in order to "...provide equal employment opportunities for all persons regardless of race, color, national origin, creed, religion, sex, age, disability, genetic information or political affiliation." Pet. Ex. 37.

90. The 2013 EEO Plan written for DSS (the "2013 Division EEO Plan") provides that DSS shall "assure that all the employment practices of the agency will be administered without regard to race, color, national origin, creed, religion, sex, age, disability, or political affiliation." Pet. Ex. 36.

91. The 2013 Division EEO Plan delegated "the responsibility for the actual development of the Equal Employment Opportunity plan and program to the EEO officer. However, responsibility for the implementation of and compliance with this plan and program will be shared by the Director and all managers and supervisors." Pet. Ex. 36.

92. One program objective in the 2013 Division EEO Plan included taking steps to "ensure greater utilization of all persons by identifying the underutilized groups based upon their representation in the workforce and making special efforts to increase their participation in . . . recruitment, selection, training and development, upward mobility programs, and any other terms, condition or privilege of employment." Pet. Ex. 36

93. The EEO plan states that neither race nor age can be a factor in making a hiring or promotion decision. Respondent follows a merit based hiring policy which requires the hiring

of the most qualified candidate for a position. This policy is not inconsistent with the equal employment goals set forth in its EEO policy and plan.

94. Mr. Kelley, as the hiring manager and Section Chief, was aware of the existence of the 2013 Departmental EEO Plan but had not seen the 2013 Departmental EEO Plan or 2013 Division EEO Plan.

95. When Mr. Kelley signed the Selection Log as Hiring Manager, the following language is written above his signature: "All of the below Hiring Authorities have given consideration for EEO, Priority Promotion, RIF & Veteran Preferences." Res. Ex. 10.

96. Mr. Kelley testified that his signature did not mean that he was attesting to that review, but "That's an agency responsibility and that other individuals have responsibility to ensure some of those components are met." T. 463.

97. The EEO plan identifies areas of underutilization – areas where particular classes of employees are underrepresented in the work pool of DHHS as compared to the general population. The plan sets goals in an attempt to address the identified underutilizations, but there are not quotas that must be adhered to by Respondent.

98. The 2013 Division EEO Plan projected that there was an underutilization for a female other than a White or Black female (identified as OF) in the Standard Occupational Classification ("SOC") Category to which Petitioner applied. Mr. Kelley confirmed that the hiring of an Other Female (that is, Other than a White or Black Female) was a hiring goal for the Division in the SOC Professional Category.

99. Mr. Kelley testified that he did not refer to the 2013 Division EEO Plan when making hiring recommendations or hiring decisions of the Position. Mr. Kelley stated that he did not recall discussing with anybody in HR about the EEO aspects of the hiring for the Position.

100. The 2013 Departmental EEO Plan provides that:

To ensure the selection procedures, hiring standards and placement process remain free from discrimination based on race, color, creed, religion, sex, age, national origin, disability, genetic information and political affiliation, the following activities are occurring

a. Require that hiring managers and human resources offices [sic], in completing the merit-based requirements, determine first whether the position is an EEO goal or there is an underutilized group.

b. Monitor the difference in qualified applicant pools and highly qualified pools to assure discrimination was not involved in the decision. This includes monitoring throughout the entire process, from the initial advertising of the position to the offer of hire.

c. Encourage hiring managers to interview members of underutilized groups. Underutilized groups should be interviewed based

upon their qualification and not because of membership in any class. Pet. Ex. 37.

101. The 2013 Departmental EEO Plan provides that: “It is a goal of [DHHS] to increase the number of minorities in upper management and supervisory positions. Because of this, specific recruitment efforts will be implemented, including encouraging current employees to apply for promotional opportunities.” Pet. Ex. 37. Mr. Kelley testified that he was unaware of this directive when making the hiring decision for the Position.

102. In January 2014, a focus group prepared a report for the Child Welfare Services Section of DSS to examine, among other things, the agency’s climate and culture. A number of concerns about discrimination were set forth in that report, as follows:

- a. There’s concern among staff . . . that there are cultural and racial issues not being addressed. This is one area that needs to be worked on. Recognition is the first step.
- b. How can you see good leadership with 99.9 percent of the leaders are white? That’s not diversity, not inclusion, it’s discriminatory. The closed door meetings might as well say ‘Whites only.’ All managers there are White males. T. 507.

103. The staff survey conducted in 2013 and presented in a January 2014 revealed some concerns related to unresolved cultural and race related issues and a lack of diversity in management positions. There was nothing more specific as to what the concerns were and whether these had to do with discrimination in the hiring process or whether they related to the individuals involved in the hiring decision for the adoption services manager position. Kelley and O’Connor were not aware of these concerns at the time they were conducting the hiring process for the adoption services manager position.

104. Other than this contested case, Petitioner has not made any other complaint about age or race discrimination. Petitioner was unaware of Kelley or O’Connor ever behaving in a discriminatory manner and she never heard them make any discriminatory remarks or suggest that they preferred to hire someone of a particular race or age.

105. Petitioner filed her Step 1 grievance on September 10, 2013. On September 16, 2013, Mr. Kelley sent a letter to Petitioner, noting that her grievance “...was considered timely and this Memorandum constitutes my Step I Response in according with DHHS Directive III-8, Employee Grievance Policy.” Pet. Ex. 7. In that letter, Mr. Kelley stated: “Neither your age nor your ethnicity had any bearing on the recommendation of the Program Manger [sic] II position.” Pet. Ex. 7

106. Petitioner filed her Step 2 grievance on September 20, 2013. Mr. Black sent Petitioner a letter on September 30, 2013, denying her grievance. That letter provided as follows: “Based on my consideration of the issues involved, it is my determination that your “Race and Age” have no bearing on your non-selection for the Social Services Program Manager II position.” Pet. Ex. 9

107. Petitioner filed her Step 3 grievance on October 2, 2013. The agency hearing officer conducted the grievance hearing on October 28, 2013 and issued a Hearing Report and Recommendation on December 18, 2013. On January 8, 2014, Mark Payne, acting on behalf of the DHHS Secretary, sent Petitioner a Certified Mail letter denying her grievance and accepting the Recommendation of the DHHS Hearing Officer.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings (OAH), 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. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).
3. Petitioner has the burden of proving that Respondent unlawfully discriminated against her because of her race and/or 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).
4. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against an applicant remains at all time with the applicant. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143, 147 L.Ed. 2d 105, 117 (2000); see also *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83.
5. 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)).
6. The issue is whether the employer's decision 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 fact finder 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).

7. Petitioner failed to prove ultimately by the greater weight of the evidence that Respondent’s non-selection for the Position was the result of discrimination based on Petitioner’s race or age. Petitioner failed to prove the decision maker had a discriminatory animus against Petitioner based on Petitioner’s race or age.

8. On August 21, 2013, the North Carolina Governor signed House Bill 834 into law which substantially revised Chapter 126 of the General Statutes, now cited as State Personnel System [State Human Resources System]. Any use of terms such as State Personnel Act or Office of State Personnel or the like shall be construed as a reference to the State Human Resources System.

9. Petitioner was a career state employee at the time she applied for the Position and entitled to the protections of the North Carolina State Human Resources System, including the provision that provided her with promotional priority rights N.C. Gen. Stat. § 126-7.1

10. The State Personnel Act specifically holds that Career State employees shall be granted certain preferences when seeking promotional opportunities in State employment:

If a State employee subject to this section: (1) Applies for another position of State employment that would constitute a promotion; and (2) Has substantially equal qualifications as an applicant who is not a State employee; then the State employee shall receive priority consideration over the applicant who is not a State employee. This priority consideration shall not apply when the only applicants considered for the vacancy are current State employees.

N.C. Gen. Stat. § 126-7.1(e).

11. The term “qualifications” as used in N.C. Gen. Stat. § 126-7.1(e) is defined as follows: “(1) Training or education; (2) Years of experience; and (3) Other skills, knowledge and abilities that bear a reasonable functional relationship to the abilities and skills required in the job vacancy applied for.” N.C. Gen. Stat. § 126-7.1(g)

12. Under the regulations implementing N.C. Gen. Stat. § 126-7.1(e);, an employee with promotional priority rights must be selected for promotion over an outside applicant when it is practical and feasible:

Promotion is a change in status upward, documented according to customary professional procedure and approved by the State Personnel Director, resulting from assignment to a position assigned a higher salary grade. When it is practical and feasible, a vacancy shall be filled from among eligible employees; a vacancy must be filled by an applying employee if required by 25 NCAC, Subchapter 1H, Recruitment and Selection, Section .0600, General Provisions, Rule .0625, Promotion Priority Consideration for Current

Employees. Selection shall be based upon demonstrated capacity, quality, and length of service.

25 N.C. Admin. Code 1D .0301

13. Under the regulations implementing N.C. Gen. Stat. § 126-7.1(e), an employee with promotional priority rights must be selected for promotion over an outside applicant unless the hiring authority can reasonably determine that the outside applicant's job-related qualifications are significantly better than the those of the State employee:

- (a) Promotional priority consideration shall be provided when a career State employee, as defined in G.S. 126-1.1, applies for a position that is a higher salary grade (salary grade equivalency) or has a higher statewide journey market rate and the eligible employee is in competition with outside applicants.
- (b) If it is determined that an eligible employee and an outside applicant have "substantially equal qualifications," then the eligible employee must receive the job offer over an outside applicant.
- (c) "Substantially equal qualifications" occur when the employer cannot make a reasonable determination that the job-related qualifications held by one applicant are significantly better suited for the position than the job-related qualifications held by another applicant.

25 N.C. Admin. Code 1H .0801

14. In this case, it is not disputed that Petitioner was entitled to promotional priority under N.C. Gen. Stat. § 126-7.1(e) and that the selected candidate was not.

15. In this case, the Undersigned cannot discern what, if any, objective merit-based standards Respondent applied in determining that Ms. Bazemore's job-related qualifications were "significantly better" than those of Petitioner. The evidence suggests that Respondent, in making the selection, did not properly apply Petitioner's training, years of experience and other demonstrated skills, knowledge and abilities as advertised in the job posting for the Position. Instead, the Respondent primarily based its selection decision on a subjective and standard-less interview process, without the use of any uniform score or ranking system.

16. In this case, Petitioner has proven, by a greater weight of the evidence, that she had, at the very least, substantially equal qualifications to that of the selected candidate, Ms. Bazemore:

- a. First, Petitioner has shown that she had, at least, substantially equal training or education when compared to Ms. Bazemore. Although Ms. Bazemore completed a one-year MSW program in social work and Petitioner did not, Petitioner proved that she regularly has taken staff development training throughout the course of her 20-year career in the areas of child abuse, neglect and child welfare. Moreover, Petitioner completed the Office of State Personnel's month-long professional management course while working with the Guardian ad Litem (GAL) program.

b. Second, Petitioner has shown that she had superior years of experience when compared to Ms. Bazemore. Specifically, Petitioner had 20 years of experience in social work, 11 of which included on-the-job consultative experience with hands-on work while Ms. Bazemore only had 7 years' of experience in social work, less than 5 of which included supervisory experience.

c. Third, Petitioner has shown that she had superior attainment of the skills, knowledge and abilities set forth in the job posting when compared to Ms. Bazemore. Petitioner has shown an outstanding level of "working knowledge of the laws, rules and policies related to the adoption of children in North Carolina" during her 20-year career with DSS. According to Petitioner's last supervisor, Ms. Johnson, Petitioner has demonstrated "effective supervisory and leadership" to members on the Adoptions Service Unit, as she often served as a back-up during Ms. Johnson's absences. Moreover, Petitioner exercised supervisory and leadership skills for over 10 years while supervising over 60 volunteers in the GAL program. Petitioner's performance evaluations indicate that Petitioner has a "strong attention to detail and demonstrated ability to use automated information systems and data to inform and improve program operations." By contrast, Respondent has not presented any objective or competent evidence that Ms. Bazemore exercised these abilities.

17. Respondent violated N.C. Gen. Stat. § 126-7.1(e) when it failed to give Petitioner promotional priority consideration, and failed to select Petitioner instead of a non-State applicant for the Position.

18. Respondent violated N.C. Gen. Stat. § 126-7.1(e) because of the failure of the Department to promote Petitioner as a Career State Employee who had more than substantially equivalent qualifications than the successful applicant.

19. As remedy for Respondent's violation of N.C. Gen. Stat. § 126-7.1 (e), Petitioner is entitled to be placed in a comparable position, with back pay and benefits. *See Dockery v. NC Dep't of Human Resources*, 120 N.C. App. 827, 832, 463 S.E.2d 580, 584 (1995) (affirming State Personnel Commission's order to place successful petitioner in the position that she sought, with back pay).

20. Respondent's denial of Petitioner's request to use leave in connection with her pursuit of this Contested Case is contrary to the Leave Policy in the State Human Resources Manual, as codified in the N.C. Administrative Code. 25 N.C. Admin. Code 01E .1010 provides as follows:

(a) An appointing authority shall grant leave with pay to an employee for any of the following purposes: (1) to prepare for participation in his or her internal agency grievance or mediation procedure in accordance with 25 NCAC 01J .1208(a) [and] (2) to participate in contested case hearings or other administrative hearings in accordance with 25 NCAC 01J .1208(b).

21. Furthermore, 25 N.C. Admin. Code 01D .1937 provides that “The time an employee spends during a regular work schedule in adjusting a grievance under the state procedure on Employee Appeals and Grievances in work time.” Respondent’s denial of Petitioner’s request was arbitrary and capricious and Petitioner is entitled to reinstatement of the vacations days that she was required to use in pursuit of this Contested Case.

22. In accordance with N.C. Gen. Stat. § 150B-33(b)(11), an administrative law judge may “order the assessment of reasonable attorneys’ fees and witnesses’ fees against the State agency involved in contested cases decided under ... Chapter 126 where the administrative law judge ...orders reinstatement or back pay.”

23. In accordance with N.C. Gen. Stat. § 126-34.02 the “Office of Administrative Hearings may award attorneys’ fees to an employee where reinstatement or back pay is ordered.”

24. The starting point for determining the amount of a reasonable fee is the calculation of “the number of hours reasonable expended on the litigation multiplied by a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed2d 40 (1983).

25. The determination of a reasonable attorney’s fee is a matter of discretion with the Court. See *Robinson v. Equifax Info. Services*, 560 F.3d 235, 243 (4th Cir. 2009). In determining what is reasonable, the Fourth Circuit has instructed that a Court should be guided by the following factors, known as the “Johnson factors”: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney’s opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney’s expectations at the outset of the litigation;(7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys’ fees awards in similar cases. *Grissom v. The Mills Corp.*, 549 F.3d 313, 321 (4th Cir. 2008) (applying twelve-factor test set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974)) (citation omitted).

26. Petitioner has filed a Motion and Affidavit for Attorneys’ Fees and Costs which includes a Detail Fee Transaction File List and a Detail Cost Transaction File List. The Undersigned has studied and considered all matters regarding Petitioner’s Motion.

27. Petitioner seeks an award of attorneys’ fees and related costs in the amount of \$73,339.10 (see Para 10 of Petitioner’s Motion) (incorrectly calculated as \$72, 636.10 in Para 1 of the Motion) based upon the handling of this case as follows: Fees for Allen Pinnix & Nichols law firm: \$63,616.00, Costs for Allen, Pinnix & Nichols law firm: \$6,713.10, and Fees and Costs of Expert Witness Steve Davis: \$3,010.00. All attorneys representing the Petitioner are licensed in the State of North Carolina and are attorneys in good standing with the North Carolina Courts.

28. An award of attorney fees should be based on rates prevailing in the community where the action takes place. The Undersigned has reviewed the qualifications and experience of Petitioner's attorneys as well as the reasonableness of the charges associated with paralegal and administrative services. Based on the information provided and the Undersigned's own knowledge of and experience with prevailing rates charged in the relevant community, the Undersigned finds the requested hourly fees to be reasonable. Further, the Undersigned finds that the time charged by each of the legal professionals involved in the representation of the Petitioner are reasonable in light of their respective skill, training, and experience.

29. Petitioner seeks to recover costs incurred by her attorneys for filing fees, postage, coping, faxes, and the like as well as the fees and costs of Petitioner's expert witness. The Undersigned concludes the claimed costs are reasonable. The Undersigned has reviewed these fees and costs, and finds them to be proper in light of the complexity and novelty of the matters at issue, the resources available to the Petitioner, and the skill necessary to successfully represent the Petitioner.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based on those conclusions and the facts in this case, the Undersigned holds as follows:

- I. Petitioner met the qualifications for the position of Social Services Program Manager;
- II. Petitioner was entitled to priority promotional rights as a permanent career State Employee for the Position;
- III. The selected candidate, Jan M. Bazemore, was a non-State employee;
- IV. The Hiring Committee and the Department hired Ms. Bazemore, a non-State employee, as the successful applicant;
- V. Petitioner's qualifications in all regards were substantially equal and in many areas exceeded the qualifications of Ms. Bazemore; and
- VI. Respondent failed to provide Petitioner with promotional priority in denying Petitioner promotion to the Position.

Petitioner is entitled to appropriate and proper placement with a salary commensurate to that to which she would have been entitled had Respondent not erred in denying Petitioner promotion to the position of Social Services Program Manager. Petitioner is to be paid all compensation to which she would otherwise have been entitled since the date of the hiring of the non-State applicant, including but not limited to back pay, leave, contributions into the State retirement system, and any and all benefits to which she would have been entitled. Petitioner is further entitled to reinstatement of the vacations days that she was required to use in pursuit of this Contested Case.

The Undersigned further holds that Petitioner's Motion for Attorneys' Fees and Costs is granted, and Petitioner shall have and recover of the Respondent the sum \$63,616.00 in attorney's fees and \$9,723.10 in costs.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 126-34.02(a): "An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing."

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of the Court of Appeals within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This is the 21st day of November, 2014.

Augustus B. Elkins II
Administrative Law Judge