

NORTH CAROLINA

OFFICE OF ADMINISTRATIVE HEARINGS

WAKE COUNTY

14 OSP 7804

RAYMOND GENE GONZALES)

Petitioner)

v)

NORTH CAROLINA DEPARTMENT)

OF HEALTH AND HUMAN SERVICES)

DIVISION OF VOCATIONAL)

REHABILITATION SERVICES)

Respondent)

**ORDER FOR SUMMARY
JUDGMENT**

This matter coming on pursuant to the Respondent's Motion for Summary Judgment filed February 10, 2015, and it appearing to the undersigned that the Petitioner filed a Response to Respondent's Motion for Summary Judgment on February 18, 2015. The Petitioner appears in this action pro se, and the Respondent is represented by Assistant Attorney General Joseph E. Elder. Neither party requested hearing on the Motion for Summary Judgment, and this Order is entered after reviewing the filings of the parties, including the documents and exhibits filed pursuant to this motion.

Although a final decision granting summary judgment "need not include findings of fact or conclusions of law" NCGS §150B-34(e), certain undisputed facts are relevant to disposition of this matter.

UNDISPUTED FACTS

1. Petitioner filed a Petition for Contested Case Hearing with the Office of Administrative Hearings on October 9, 2014, alleging discrimination and retaliation by the Respondent in violation of the Whistleblower Act.

2. Petitioner, a career state employee, worked as a Vehicle Modification Specialist (position number 60054305).

3. During the course of his employment, the Petitioner reported to his superiors instances which he contended demonstrated violations of state and federal law, rules, and regulations; fraud; danger to the public; mismanagement; and abuse of authority.

4. On December 12, 2013, a budget directive requesting budget reductions was sent by the Office of State Budget and Management to department heads of all state departments and agencies. OSBM was seeking, among other things, elimination of duplicative or underperforming programs, consolidation of programs and services, and reductions through service efficiencies and streamlining layers of management and administration.

5. Respondent reviewed job descriptions, functions, costs, and other factors in an effort to address the budget directive.

6. Respondent determined that a Reduction in Force (RIF) was an appropriate mechanism to comply with the budget directive. Fourteen vacant administrative positions were identified for RIF.

7. Seven filled positions were identified for elimination under the RIF, including the Petitioner's Raleigh-based Vehicle Modification Specialist position (number 60054305).

8. Position number 60054305 is titled Vehicle Modification Specialist/Vehicle Modification Engineer/Vehicle Modification Project Manager, and involves duties associated with vehicle modification, ensuring compliance with relevant guidelines and specifications, and consulting with rehabilitation engineers, counselors, and management regarding vehicle modification projects.

9. Position 60054305 was paid out of the department's administrative funds.

10. By letter dated June 23, 2014, Petitioner was formally notified of the RIF for position 60054305. The RIF was effective July 4, 2014.

11. Respondent had a vacant engineer position (position number 60054778) which was paid out of direct service funds.

12. Position 60054778 is an Engineer position, and duties associated with that position included vehicle modifications, monitoring and managing projects, and consulting with agencies, businesses, and consumers on, among other things, vehicle modifications.

13. A formal placement offer was made to Petitioner for position 60054778 on June 23, 2014.

14. Petitioner was to be paid the same salary, have the same career banding, and the same benefits in position 60054778 as he was in position 60054305.

15. Petitioner initially rejected this placement offer as the Respondent instructed Petitioner that position 60054305 would be based out of Greensboro.

16. On July 10, 2014, a subsequent offer was made, indicating that Raleigh would be the primary duty station for position 60054778.

17. Petitioner accepted position 60054788 on July 10, 2014, with an effective date of July 1, 2014.

18. The Respondent's RIF plan was ultimately approved.

Based upon the foregoing undisputed facts, the undersigned concludes the following as a matter of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein.

2. The Petitioner is a career state employee under the terms and conditions of N.C. Gen. Stat. § 126-1.1 (2010).

3. The burden of establishing a lack of any triable issue resides with the movant. *Nicholson v. American Safety Util. Corp.*, 488 S.E.2d 240, 244 (N.C. 1997).

4. In order to establish a prima facie case under the Whistleblower Act, Petitioner must show he suffered adverse employment action which was caused by his participation in protected activities. *Newberne v Department of Crime Control and Public Safety*, 359 NC 782 (2005).

5. While employment decisions such as dismissal, demotion, and/or pay cuts are recognized as adverse employment actions because of the inherent negative impact on the employee's employment, other actions such as transfers and reassignments do not, on their own, establish an adverse employment action. *DeMurry v. N.C. Department of Corrections*, 195 NCAppe 485 (2009).

6. Petitioner's position was eliminated through an approved RIF plan. Petitioner has not and cannot show the RIF affecting position 60054305 was in retaliation for any activity of the Petitioner. In fact, Respondent has proven a legitimate non-retaliatory reason for eliminating Petitioner's position through the RIF and the Petitioner has not shown that reason to be pretextual.

7. Petitioner has not suffered an adverse employment action.

8. There is no genuine issue of material fact and the Respondent is entitled to judgment as a matter of law.

For the reasons set forth herein, the Respondent's Motion for Summary Judgment is granted.

NOTICE AND ORDER

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under N.C. Gen. Stat. § 150B-45, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.**

In conformity with 26 N.C. Admin. Code 03 .0102, and the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the Judicial Review. Consequently, the party appealing a Final Decision must send a copy of the Petition for Judicial Review. Consequently, the party appealing a Final Decision must send a copy of the Petition for Judicial Review to the Office of Administrative Hearings when it initiates its appeal to ensure the timely filing of the record.

This 2nd day of March, 2015.

Philip Berger, Jr.
Administrative Law Judge

NORTH CAROLINA

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AMENDED NOTICE

The undersigned issued a final decision in the above-captioned matter on March 2, 2015. Said final decision contained an incorrect notice provision. The correct notice is set forth below and the Order entered March 2, 2015 is modified to reflect the proper notice below. Save and except the amendment to the notice provision, the final decision entered March 2, 2015 remains in full force and effect.

NOTICE

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29 (a). 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.

This the 4th day of March, 2015.

Philip E. Berger, Jr.
Administrative Law Judge