

WITNESSES

For Petitioner: None
For Respondent: Katherine Williamson

EXHIBITS

For Petitioner:

None admitted

For Respondent:

1. Letter dated October 16, 2014 from Katherine Williamson to Waldo Fenner
2. Excerpt from North Carolina State Human Resources Manual

PRELIMINARY MATTERS

Prior to hearing evidence, the Court addressed two preliminary matters raised by Petitioner.

Petitioner's Motion to Amend Order Denying Summary Judgment

On January 20, 2015, Petitioner sent a communication to the assistant to the undersigned Administrative Law Judge requesting amendment of the January 13, 2015 Order Denying Motion for Summary Judgment and Scheduling Order filed in this case. The amendment sought the inclusion of language stating that certain discovery propounded by Respondent had been answered and provided to Respondent's counsel in open court on January 13, 2015. The Court elected to treat Petitioner's communication as a Motion to Amend the Order Denying Motion for Summary Judgment and Scheduling Order.

The Court notes that the original discovery deadline in this case was extended by its January 13, 2015 Order Denying Motion for Summary Judgment and Scheduling Order. Any responses to discovery that were furnished by Petitioner to Respondent occurred after the hearing assistant who recorded the proceedings regarding Petitioner's Motion for Summary Judgment was excused from the courtroom and, therefore, outside of open court. As a result, the language Petitioner seeks to add is not appropriate for inclusion in the Court's Order Denying Motion for Summary Judgment and Scheduling Order.

Petitioner's Motion to Amend the Order Denying Motion for Summary Judgment and Scheduling Order is therefore DENIED.

Petitioner's Motion to Recuse

Prior to this hearing Petitioner filed a motion captioned "Motion Requesting New Judge." In his motion, Petitioner seeks the recusal of the undersigned Administrative Law Judge. The Court elects to treat Petitioner's Motion as a Motion to Recuse.

After reviewing Petitioner's "Motion Requesting New Judge" and considering any arguments of the parties on this issue, the Court finds that:

1. Petitioner's "Motion Requesting New Judge" is not in the form of an affidavit and does not otherwise include, contain, or reference an affidavit.

2. Petitioner, in his motion, has failed to allege personal bias that would demand or require the disqualification of the undersigned Administrative Law Judge.

3. Petitioner has failed to allege that the undersigned Administrative Law Judge has any personal bias or prejudice concerning the parties in this matter.

4. Petitioner has failed to allege that the undersigned Administrative Law Judge has personal knowledge of the disputed evidentiary facts.

5. Petitioner has failed to allege that while in practice the undersigned Administrative Law Judge, or someone with whom the undersigned Administrative Law Judge has practiced, served as a lawyer in this matter or controversy or is a material witness concerning this proceeding.

6. Petitioner has failed to allege that the undersigned Administrative Law Judge or any spouse or minor child has a financial interest in this matter or any other interest that could be substantially affected.

7. Petitioner has failed to allege that the undersigned Administrative Law Judge or someone associated with the undersigned Administrative Law Judge's family is a party to the action, a lawyer in the case, is known by the undersigned Administrative Law Judge to have an interest that could be substantially affected, or is known by the undersigned Administrative Law Judge as likely to be a material witness.

8. The undersigned Administrative Law Judge did not meet Petitioner until January 13, 2015 in connection with this proceeding and has no prior personal knowledge of Petitioner, his employment, or his personal affairs.

9. The undersigned Administrative Law Judge had not personally met counsel for the Respondent until January 13, 2015 in connection with this proceeding. To the best of the undersigned Administrative Law Judge's knowledge, the only prior communication with counsel for the Respondent dealt solely with issues concerning counsel's employment with the North Carolina Department of Justice and the undersigned Administrative Law Judge's prior

employment as a District Attorney.

Based upon the foregoing Findings of Fact, this Court makes the following Conclusions of Law:

1. 26 NCAC 03 .0110, titled "Disqualification of Administrative Law Judge," requires the filing of an affidavit of personal bias or disqualification pursuant to N.C. Gen. Stat. § 150B-32(b). Petitioner has failed to comply with this requirement. Nevertheless, the undersigned considered Petitioner's motion on the merits.

2. Petitioner's motion fails to allege any facts that would require disqualification or recusal of the undersigned Administrative Law Judge.

Therefore, Petitioner's "Motion for New Judge" is DENIED.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witness presented at the hearing, the documents and exhibits received into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the undersigned Administrative Law Judge weighed all the evidence and assessed the credibility of the witness by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

1. The parties received proper notice of this hearing and had sufficient time to fully prepare for this hearing.

2. Despite the fact that Petitioner had the burden of proof in this case, the Court, due to Petitioner's *pro se* status, gave Petitioner the option to either present his case-in-chief first or have Respondent go forward with its evidence. Petitioner elected to have Respondent present its evidence first.

3. Petitioner presented no evidence at hearing of this matter on the merits.

4. On January 3, 2007, Petitioner filed a Petition for Contested Case Hearing, *pro se*, in the North Carolina Office of Administrative Hearings in a matter styled Waldo N. Fenner v. John Umstead Hospital (07 OSP 0010). The contested case arose out of Petitioner's separation from employment as a Health Care Technician II at John Umstead Hospital ("JUH") in July 2006. Petitioner subsequently obtained counsel and a hearing was held in the matter on November 26, 2013 before the Honorable Donald W. Overby. On February 6, 2014, Judge Overby ordered that Petitioner be reinstated to his former position or a comparable position with back pay and benefits

accrued since his separation in July 2006. The State Human Resources Commission (the "Commission") issued an order (the "Order") essentially adopting the findings and conclusions of Judge Overby on June 20, 2014.

5. On or about October 22, 2014, Petitioner filed a Petition for a Contested Case Hearing (the "Petition"), *pro se*, in the North Carolina Office of Administrative Hearings ("NCOAH"). In the Petition, Petitioner alleged that Respondent had i) violated the Order, and ii) retaliated against Petitioner.

6. On October 16, 2014, Katherine Williamson, Human Resources Director at Central Regional Hospital ("CRH"), sent Petitioner a letter (the "October 16 Letter").

7. The October 16 Letter sent to Petitioner was "the first step" in the process of reinstating him as ordered by the Commission.

8. The October 16 Letter stated that Petitioner would be reinstated to the position of Health Care Technician II ("HCT II") at R.J. Blackley Alcohol and Drug Abuse Treatment Center ("RJB ADATC") effective October 28, 2014. RJB ADATC is a state operated alcohol and drug treatment center in Butner, North Carolina.

9. The North Carolina State Human Resources Manual defines reinstatement as "the return to employment of a dismissed employee, in the same or similar position, at the same pay grade and step which the employee enjoyed prior to dismissal."

10. HCT II was the position that Petitioner held when he was separated from employment.

11. At the time of Petitioner's separation from employment, he was employed at JUH. JUH no longer exists, therefore it is not possible for Petitioner to be reinstated to a position at that facility. The undersigned, pursuant to N.C. Gen. Stat. § 8C-1 Rule 201, takes judicial notice that JUH was located in Butner, North Carolina prior to its closure. RJB ADATC is the successor to the alcohol and drug abuse unit at JUH.

12. Petitioner's annual salary when he was separated from employment was \$25,983. Upon his reinstatement to employment, his annual salary was to be \$29,459. This salary was calculated by incorporating all legislative pay increases awarded since Petitioner was separated from employment into Petitioner's prior salary.

13. Petitioner's work hours as a reinstated HCT II at RJB ADATC were to be from 7:30 A.M. to 4:00 P.M. Prior to Petitioner's separation from employment, he reported to work between 6:00 and 6:30 A.M.

14. The HCT II position is a "direct care" position, meaning that individuals in that

position have the primary purpose of interacting with patients on a daily basis.

15. Because the HCT II position is a direct care position, newly hired or reinstated HCT II's are required to complete a screening process including a drug and alcohol screening, criminal background check, and review of immunizations.

16. The screening process is considered "routine procedure" which is required prior to either starting employment or reinstatement of employment.

17. The October 16 Letter directed Petitioner to contact Ms. Williamson by October 22, 2014 to arrange for Petitioner to complete the screening process.

18. Petitioner received the October 16 Letter.

19. In response to that letter, he contacted Ms. Williamson via email on October 19, 2014 and informed her that he did not believe she was complying with the order directing his reinstatement.

20. During a subsequent telephone conversation that occurred either that day or the next, Ms. Williamson again informed Petitioner of the need to complete the screening process. Petitioner hung up on Ms. Williamson during that telephone conversation.

21. Petitioner never scheduled nor completed the screening process.

22. Petitioner did not report to work on October 28, 2014 as directed in the October 16 Letter.

23. The October 16 Letter contained a line for Petitioner to sign indicating he understood and accepted the terms and conditions of his reinstatement. Petitioner's signature on this line was not a necessary precondition to his reinstatement as a HCT II, however.

24. Prior to beginning direct care responsibilities as a HCT II at RJB ADATC, Petitioner was scheduled to complete six weeks of training at CRH to regain his nurse aide certification, which had expired. Petitioner was to be paid during this training period. Nurse aide certification was required for Petitioner to have direct patient care duties as a HCT II at RJB ADATC.

25. The Order specified that Petitioner was to receive back pay for the period of his separation.

26. Back pay is calculated by taking the amount of money an employee would have earned during the period he or she was separated from employment and reducing it by any interim earnings and/or unemployment compensation that the employee received during his or her separation.

27. Back pay awards cannot be processed or paid unless an employee who is entitled to back pay submits verification of any interim earnings that he or she received during the period of separation from employment.

28. In the October 16 Letter, and on at least one prior occasion, Respondent requested that Petitioner provide verification of any interim earnings he received during his period of separation from employment.

29. Petitioner did provide information concerning his receipt of unemployment insurance benefits; however, Petitioner failed and refused to provide any information concerning his interim earnings.

30. Petitioner's failure to provide any verification or information concerning his interim earnings during his period of separation has prevented Respondent from processing Petitioner's back pay award.

31. If Petitioner were to provide such information, Respondent could process Petitioner's back pay award.

CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings has jurisdiction over the parties. The parties received proper notice of this hearing. To the extent that Findings of Fact contain Conclusions of Law, or that Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. Petitioner presented no evidence at the hearing of this matter, and has not carried his burden of proof with regard to any claim alleged in his Petition for a Contested Case Hearing.

3. Petitioner, a former State employee, attempts to bring this case under the State Personnel Act, N.C. Gen. Stat. § 126-1 *et seq.* as he seeks redress concerning an alleged right to employment with the State of North Carolina.

4. A party wishing to bring a claim under the State Personnel Act must satisfy certain requirements prior to initiating a contested case in the North Carolina Office of Administrative Hearings. One of these requirements is that the party first follow the grievance procedure adopted by the Commission. N.C. Gen. Stat. § 126-34.02(a), *see also* Lewis v. North Carolina Dep't of Human Resources, 92 N.C. App. 737, 739 375 S.E.2d 712, 714 (reinstating a dismissal of an appeal to the State Personnel Commission due to employee's failure to properly follow the grievance procedure because "[t]he right to appeal to an administrative agency is granted by statute, and compliance with statutory provisions is necessary to sustain the appeal.")

5. There is no evidence that Petitioner grieved the claims in this contested case in

accordance with the Commission grievance procedure prior filing this contested case. Thus, he has not complied with the statutory prerequisites for filing this contested case. Because of this, this Court concludes that it lacks subject matter jurisdiction to decide his claims.

6. Even if Petitioner had properly grieved his claims, the State Personnel Act permits only certain claims to be brought under it as contested cases. See N.C. Gen. Stat. § 126-34.02(b) (listing issues that can be brought as contested cases). Any issue not enumerated in N.C. Gen. Stat. § 126-34.02(b) cannot be brought as a contested case. N.C. Gen. Stat. § 126-34.02(c). A claim that a party has not complied with an order providing for reinstatement and back pay is not among the permissible grounds for contested cases listed in section 126-34.02(b). As a result, this Court further lacks subject matter jurisdiction to decide this claim.

7. Assuming, *arguendo*, that the North Carolina Office of Administrative Hearings has jurisdiction over the subject matter of this case, as described below Petitioner has failed to prove that Respondent i) has not complied with the Order, or ii) has retaliated against Petitioner.

8. As it was in effect at the time of Petitioner's separation from employment in 2006, the North Carolina Administrative Code defined reinstatement as "the return to employment of a dismissed employee, in the same or similar position, at the same pay grade and step which the employee enjoyed prior to dismissal." 25 N.C.A.C. 1B .0428 (2006).

9. A position can be similar even if it is at a different location. North Carolina Dep't of Correction v. Myers, 120 N.C. App. 437, 443, 462 S.E.2d 824, 828 (1995).

10. The HCT II position at RJB ADATC offered to Petitioner is, at a minimum, a "similar" position to the HCT II position held by Petitioner prior to his separation in 2006. The job title is the same. Petitioner is to be employed at the successor facility in the same town as the now shuttered hospital that Petitioner was employed at prior to his 2006 separation. Petitioner's new salary is to be in excess of \$3,000 more than it was when he was separated, and his new work hours are to vary minimally from his prior ones.

11. Respondent did not fail to comply with the Order reinstating Petitioner.

12. Petitioner's failure to take reasonable action requested by Respondent is the reason he has not secured back pay or reinstatement.

13. Respondent made a good faith effort to reinstate Petitioner. The testimony of Katherine Williamson and the October 16 Letter admitted as Respondent's Exhibit 1 illustrate that Respondent contacted Petitioner, informed him of his planned reinstatement as of October 28, 2014, and gave him explicit instructions concerning how to complete the screening process that was necessary due to the HCT II position being a direct care position. It was Petitioner's own refusal to complete the screening process and report as directed on October 28, 2014 that prevented his return to work.

14. Respondent's requirement that Petitioner complete the screening process (i.e., the drug test, criminal background check, and immunization review) does not amount to a failure by Respondent to comply with the order that Petitioner be reinstated.

15. The North Carolina State Human Resources Manual and the North Carolina Administrative Code does not exempt an employee from satisfying the uniformly applicable prerequisites of the position to which he or she is to be reinstated. The reasoning that underpins this conclusion is perhaps nowhere more evident than in the case of healthcare workers, such as those in the HCT II position, who are in direct care positions at State healthcare facilities. These workers are entrusted with the care and safety of patients on a daily basis. The term "reinstatement" cannot reasonably be interpreted to obviate the standard procedure of screening direct care staff at State healthcare facilities for drug use, criminal history, or missing immunizations prior to their return to work when those employees' chief duties require daily involvement with patients.

16. Respondent's requirement that Petitioner complete six weeks of paid training at CRH in order to regain his nurse aide certification prior to being assigned to direct care duties at RJB ADATC is also not a violation of the Order. A valid nurse aide certification is a requirement of the HCT II position. Petitioner's certification had expired.

17. Regarding back pay, Respondent has made a good faith effort to comply with the Order. Gross back pay is reduced by interim earnings. 25 NCAC 01J .1306. As a result, prior to being awarded back pay, a reinstated employee must provide a certification of what interim earnings, if any, he or she had. Petitioner has refused to furnish this information despite multiple requests from Respondent. Ms. Williamson testified that back pay could be paid once Petitioner provided this information. However, Respondent could not pay back pay without having information regarding what interim earnings, if any, Petitioner had received. A party generally must be capable of complying with a court order before it can be faulted for a purported failure to do so. Henderson v. Henderson, 307 N.C. 401, 408, 298 S.E.2d 345, 350 (1983) (discussing ability to comply as a condition precedent in the civil contempt context). Respondent has not violated the Order by failing to pay back pay.

18. Petitioner did allege retaliation. To establish a prima facie case for retaliation, a petitioner must show that i) he engaged in a protected activity, ii) he suffered an adverse employment action subsequent to the protected activity, and iii) his engagement in the protected activity was a substantial or motivating factor in the adverse employment action. Wells v. N.C. Dep't. of Correction, 152 N.C. App. 307, 314, 567 S.E.2d 803, 809 (2002) (citations and internal quotations omitted). Despite alleging retaliation in the Petition and arguing it in his closing statement, Petitioner presented no evidence at all, let alone any evidence to state a prima facie case of retaliation. Thus, Petitioner's retaliation claim should be dismissed.

IT IS THEREFORE ORDERED that the Petitioner's claims for relief are denied and the Petition for a Contested Case Hearing is dismissed.

NOTICE

Under the provisions of North Carolina General Statute section 126-34.02, an aggrieved party in a contested case under the State Personnel Act shall be entitled to judicial review of this decision by the North Carolina Court of Appeals as provided in North Carolina General Statute section 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 North Carolina Office of Administrative Hearings and served on all parties to the contested case hearing. In conformity with the Office of Administrative Hearings' rule, 26 NCAC 03.012, and the North Carolina 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.

This the 26th day of March, 2015

Philip E. Berger, Jr.
Administrative Law Judge