

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 OSP 01648

Waldo Fenner)
Petitioner)
)
vs.)
)
John Umstead Hospital/RJ Blackley Alcohol)
and Drug Abuse Treatment Center (ADATC))
Respondent)
)

**FINAL DECISION
ORDER OF DISMISSAL
(IN PART)**

Upon consideration of Respondent's Motion for Summary Judgment, Petitioner's response thereto, the pleadings in this case, and for good cause shown, the undersigned hereby **GRANTS** Respondent's Motion In Part, as follows:

APPEARANCES

For Petitioner: Waldo Fenner, 1119 Clarendon Street, Durham, NC 27705

For Respondent: Adam M Shestak, Assistant Attorney General, 300 Veazey Road, Butner, NC 27509

ISSUE

Whether there are genuine issues of material fact, and if Respondent is entitled to judgment as a matter of law based on Petitioner's claim that he was discharged from employment without just cause, and based on Petitioner's claim that he failed to receive priority reconsideration?

FINDINGS OF FACT

1. On March 10, 2015, Petitioner filed a contested case petition with the Office of Administrative Hearings appealing Respondent's December 19, 2014 action of separating Petitioner from employment, effective November 13, 2014, due to Petitioner's failure to report to work or contact his employer for three consecutive scheduled workdays in November 2014. Petitioner alleged that Respondent had: (a) wrongfully terminated Petitioner from employment, and (b) failed to give Petitioner priority consideration by failing to reinstate him to a similar position he had previously held at John Umstead Hospital, in violation of Administrative Law Judge Donald W Overby's Order (07 OSP 0010). Petitioner also claimed that he had lost income and suffered emotional damage due to Respondent's actions.

2. Petitioner specifically alleged that Respondent failed to give him priority consideration by requiring him to submit to a pre-employment screening, and complete six weeks

of paid training, before being reinstated to employment, and reassigned to direct patient care at Respondent RJ ADATC.

3. Petitioner failed to state any facts in his petition, tending to establish how he was denied priority consideration based on the specific criteria in N.C. Gen. Stat. § 126-7.1 and -34.02(b)(5), and 25 NCAC 01H .0701. In responding to Respondent's interrogatories, Petitioner replied that he was denied priority consideration by Respondent "not following policy, order of Judge."

CONCLUSIONS OF LAW

1. This contested case is subject to dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b) of the Rules of Civil Procedure, N.C. Gen. Stat. §§ 150B-33(b)(10), and and 26 NCAC 3 .0105 and .0114.

2. N.C. Gen. Stat. § 126-1 et. seq. defines the exclusive grounds upon which the Office of Administrative Hearings has jurisdiction over personnel actions brought by State employees. N.C. Gen. Stat. § 126-34.02(c) states:

Any issue for which an appeal to the Office of Administrative Hearings has not been specifically authorized by this section shall not be grounds for a contested case hearing.

3. Under N.C. Gen. Stat. § 126.34.02(b), the Office of Administrative Hearings has jurisdiction over a State employee's claim that he was denied "hiring or promotion due to a failure to give priority consideration for promotion or reemployment as required by G.S. § 126-7.1." N.C. Gen. Stat. § 126-7.1 lists the specific instances when a State employee is entitled to receive priority consideration for promotion or reemployment.

4. 25 NCAC 01H .0701 "GENERAL PROVISIONS" provides in part:

(a) It is recognized that certain applicants for positions of State employment may receive a priority over other applicants for the position. Priority consideration in certain situations may be accorded to the following applicants:

- (1) Career State employees applying for a position that is a higher salary grade (or salary grade equivalency) as provided in 25 NCAC 01H .0800;
- (2) Career State employees who have received written notification of imminent separation due to a reduction in force;
- (3) Eligible employees in positions which are designated as exempt policymaking and who have less than 10 years of cumulative State service in subject positions as provided in 25 NCAC 01H .1000;
- (4) Eligible employees in positions which are designated as exempt managerial and who have less than 10 years of cumulative State service in subject positions and who have been removed from the

exempt position for reasons other than cause but not because the employee's selection violated G.S. 126-14.2, as provided in 25 NCAC 01H .1000;

- (5) Eligible employees in positions which are designated as exempt managerial and who have less than 10 years of cumulative State service and who have been removed from the exempt managerial position because the employee's selection violated G.S. 126-14.2, as provided in 25 NCAC 01H .1000; and
- (6) Eligible veterans applying for an initial position in State government, as provided in 25 NCAC 01H .1100.

. . . .

(c) The priority consideration listed in Subparagraphs (a)(3), (a)(4) and (a)(5) of this Rule may be defeated by an employee with the priority listed in Subparagraph (a)(2) of this Rule or by a current State employee who has greater cumulative State service in positions subject to the State Personnel Act. The selected applicant must meet the minimum qualifications, including training, experience, competencies and knowledge, skills and abilities. (Emphasis added)

5. N.C. Gen. Stat. § 150B-23(a) requires a petition:

shall state facts tending to establish that the agency named as the Respondent has deprived the Petitioner of property, has ordered the Petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the Petitioner's rights **and** that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

(Emphasis added)

6. In his petition, Petitioner failed to state any facts, in accordance with N.C. Gen. Stat. § 150B-23(a) and N.C. Gen. Stat. § 126-7.1 & -34.02(b)(5), tending to establish that Respondent denied him reemployment to a State employment position by failing to give him priority consideration under N.C. Gen. Stat. § 126-34.02(b)(5), § 126-7.1 and 25 NCAC 01H .0701. By failing to state sufficient facts in his petition tending to establish claims under N.C. Gen. Stat. § 126-34.02(b)(5), and 25 NCAC 01H .0701, Petitioner failed to state any claims upon which relief can be granted. As a result, the undersigned lacks subject matter jurisdiction over Petitioner's claim that he was failed to receive priority consideration.

7. The undersigned hereby **DENIES** Petitioner's Motion for Summary Judgment regarding Petitioner's claim that he was discharged without just cause when Respondent separated

Petitioner from employment for voluntarily resigning without notice pursuant to 25 NCAC 01C .1006.

FINAL DECISION (IN PART)

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **DISMISSES**, with prejudice, Petitioner's claim that he failed to receive priority consideration.

NOTICE AND ORDER

This Final Decision is issued under the authority of N.C.G.S. § 150B-34.02. 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 21st day of May, 2015.

Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 OSP 01648

WALDO FENNER,)
)
 Petitioner,)
)
 v.)
)
 JOHN UMSTEAD HOSPITAL/R.J.)
 BLACKLEY,)
)
 Respondent.)

FINAL DECISION

This case came before Administrative Law Judge Melissa Owens Lassiter on May 29, 2015 pursuant to Petitioner's March 10, 2015 petition for a contested case hearing. In his petition, Petitioner alleged that Respondent discharged him without just cause, and failed to give him priority consideration, thus causing Petitioner to lose income, and suffer emotional damage. On May 21, 2015, Administrative Law Judge Lassiter issued a Final Decision In Part, dismissing Petitioner's claim that he failed to receive priority consideration. On July 16, 2015, Respondent filed a proposed Final Decision with the Office of Administrative Hearings.

APPEARANCES

For Petitioner: Waldo N. Fenner, *Pro Se*, 119 Clarendon St., Durham, NC 27705

For Respondent: Adam M. Shestak, Assistant Attorney General, North Carolina Department of Justice, Central Regional Hospital, 300 Veazey Rd., Butner, NC 27509

ISSUE

Whether Respondent discharged Petitioner without just cause when it separated Petitioner from employment due to voluntary resignation without notice?

WITNESSES

For Petitioner: None

For Respondent: Katherine Williamson, Laura Newton

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner:

1. DHHS Policies and Procedures – Safety and Benefits, Alcohol and Drug Free Workplace
2. DHHS Policies and Procedures – Safety and Benefits, Criminal Records Check Policy

For Respondent:

1. Reinstatement confirmation letter from K. Williamson to W. Fenner, 10/16/14
2. Email from W. Fenner to K. Williamson, 10/19/14
3. Email from K. Williamson to W. Fenner, 10/31/2014
4. Email from K. Williamson to W. Fenner, 11/5/14
5. State Human Resources Manual, Section 11 - Separation
6. Email from W. Fenner to K. Williamson, 11/5/14
7. Letter from L. Newton to W. Fenner re: voluntary resignation without notice, 12/19/14
8. Grievance filing form
9. Certified mail receipts
10. State Human Resources Manual, Section 7 – Employee Grievances

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses 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:

Background

1. On January 3, 2007, Petitioner filed a Petition for Contested Case Hearing, *Pro Se*, in the North Carolina Office of Administrative Hearings, Waldo N. Fenner v. John Umstead Hospital (07 OSP 0010), appealing his June 2006 separation from employment as a Health Care Technician II at John Umstead Hospital ("JUH") in July 2006. After a hearing on the merits, on February 6, 2014, Administrative Law Judge Donald W. Overby ordered that Petitioner be reinstated to his former position, or a comparable position, with back pay and benefits accrued since his July 2006 separation. On June 20, 2014, the State Human Resources Commission (the "Commission") issued an order (the "Order") essentially adopting the findings and conclusions of Judge Overby. (Resp. Prehearing Statement p. 2)

2. The undersigned takes judicial notice of the June 20, 2014 Order and proceedings in Waldo N. Fenner v. John Umstead Hospital (07 OSP 0010) as evidenced in the Office of Administrative Hearings' file in that case.

Adjudicated facts

3. At the time of Petitioner's separation from employment in 2006, Petitioner was employed at JUH in Butner, North Carolina. (T p. 18, lines 2-6) JUH closed sometime in 2008 after Central Regional Hospital opened. (T p. 17, lines 7-8)

4. R.J. Blackley Alcohol and Drug Abuse Treatment Center ("RJB ADATC") is a state-operated alcohol and drug abuse treatment center in Butner, North Carolina. (T p. 17, lines 10-17) Individuals employed in the Health Care Technician ("HCT") II positions provide direct care to the patients at RJB ADATC. (T p. 17, lines 18-21) All employees in HCT II positions must be certified as certified nursing assistant ("CNA"). (T. p. 16)

5. On October 16, 2014, Katherine Williamson, Human Resources Director at Central Regional Hospital ("Central Regional"), notified Petitioner by letter that Respondent was reinstating him to the position of HCT II at RJB ADATC effective October 28, 2014. (Resp. Ex. 1) Williamson directed Petitioner to report to Central Regional on October 28, 2014 to begin six weeks of paid training. Petitioner was required to regain his Health Care Technician certification in order to provide direct care to patients as a HCT II at RJB ADATC. (T p. 16, lines 11-25; Resp. Ex. 1)

6. In the October 16, 2014 letter, Williamson also informed Petitioner that he needed to schedule a "pre-employment screening" before he returned to work. The pre-employment screening included a drug and alcohol test, criminal record check, and immunization review. (Resp. Ex. 1)

7. North Carolina Department of Health and Human Services ("NCDHHS") policy required that pre-employment drug testing be conducted for all positions in the Division of State Operated Healthcare Facilities. (Pet. Ex. 1; T p. 76, lines 12-18) A HCT II position at RJB ADATC, the job to which Petitioner was reinstated, is a position in the Division of State Operated Healthcare Facilities. (T p. 76, lines 12-14)

8. NCDHHS policy also required that its employees receive new criminal record checks any time there is a break in their employment of thirty days or more or when they transfer from one facility to another. (Pet. Ex. 2; T pp. 89-90, lines 11-20) Such policies are in place because DHHS employees at facilities such as CRH and RJB ADATC are charged with providing care to minors and vulnerable adults. (T p. 74, lines 14-24) Moreover, employee drug tests and criminal background checks are required by

at least two organizations that accredit state facilities such as CRH and RJB ADATC. (T pp. 71-72; lines 7-14)

9. On October 19, 2014, Petitioner responded to Ms. Williamson by email, stating that he "could not agree" to Ms. Williamson's "request" that he report to work on October 28, 2014. (Resp. Ex. 2)

10. Although Respondent reinstated Petitioner effective October 28, 2014, (Resp. Ex.

1), Petitioner did not report to work at RJB ADATC, as directed on that day. Neither did Petitioner contact Ms. Williamson that day, or show up for the pre-employment screening and training at Central Regional. (T p. 21, lines 12-14)

11. On October 31, 2014, Ms. Williamson sent an email to Petitioner, advising him:

You were expected to return to work on Tuesday, October 28, 2014, and to date, you have not reported to work. Please contact me immediately concerning your return to work.

(Resp Ex 3)

12. After Williamson sent the October 31, 2014 email, Petitioner telephoned Ms. Williamson. Petitioner told Ms. Williamson that he did not believe that Respondent was complying with the Judge's Order to reinstate him. Williamson explained that Petitioner needed to complete the pre-employment screening. Petitioner then hung up the telephone. (T pp. 20-21)

13. On November 5, 2014, Ms. Williamson sent Petitioner another email directing Petitioner to report to work at CRH on Friday, November 7, 2014. (T p. 23, lines 10-11; Resp. Ex. 4) Williamson informed Petitioner that, pursuant to Section 11 of the State Human Resources Manual, an employee who is absent from work, and does not contact his or her supervisor for three consecutive scheduled workdays may be separated from employment as a voluntary resignation. (Resp Ex 4) Williamson advised Petitioner that should he fail to report to work on November 7, 2014, he could ultimately face such separation from employment. She also advised Petitioner:

A factor to be considered when determining whether the employee should be deemed to have voluntarily resigned is the employee's culpability in failing to contact his or her employer. Such separations as described above are voluntary separations from State employment and create no right of grievance or appeal.

(Resp Ex 4) Ms. Williamson cited Section 11 in this email to put Petitioner on notice of the potential consequences of failing to report to work on November 7, 2014. (T pp. 23-24, lines 25-5) Williamson explained at hearing that through this email, Respondent wished to give Petitioner a second opportunity to return to work, despite Petitioner's failure to report to work on October 28, 2014. (T p. 23, lines 7-8)

14. Petitioner received Respondent's November 5, 2014 email, and replied to Ms. Williamson on November 5, 2014. In his reply, Petitioner reiterated that Respondent was not following the guidelines stated in the orders of the Judge and the commission, and that Petitioner "cannot agree to your request of me for that reason." (Resp. Ex. 6) Petitioner asked Ms. Williamson to ask Respondent's attorney whether the State would reimburse him for the \$250,000 he lost, and debt incurred, while he was illegally fired from employment, outside of back pay. He further advised:

Please feel free to contact me by email . . . by US postal service . . . and 919-425-5436. . . Also please do not send me anymore threatening letters. Therefore please

do not tell lied or put words in my mouth

(Resp Ex 6) In this email, Petitioner did not state, implicitly or explicitly, that he would not report to work.

15. Petitioner did not report to work as directed on November 7, 2014. (T pp. 25-26, lines 24-1) He did not contact anyone at CRH or RJB ADATC on that day regarding his absence. (T p. 26, lines 2-6) November 8 and 9, 2014 were a Saturday and Sunday. Petitioner was not scheduled to work those days. (T p. 26, lines 7-11)

16. Petitioner was scheduled to report to work on Monday, November 10, 2014, but he did not do so. (T p. 26, lines 12-16) He did not contact anyone at CRH or RJB ADATC on that day regarding his absence. (T p. 26, lines 17-21)

17. November 11, 2014 was a State holiday. Petitioner was not scheduled to work that day. (T pp. 26-27, lines 22-2) Petitioner was scheduled to report to work on November 12, 2014, but he did not report to work that day. (T p. 27, lines 3-4) He did not contact anyone at CRH or RJB ADATC on that day regarding his absence. (T p. 27, lines 5-9)

18. Petitioner never reported to work as directed for three consecutive days, and made no contact with his employer after his response to Respondent's November 5, 2014 email. (T p. 27, lines 10-16)

19. On December 19, 2014, Laura Newton, then Human Resources Manager for RJB ADATC, notified Petitioner by letter that Respondent was separating him from employment due to his voluntary resignation without notice. (T p. 28, lines 4-13; Resp. Ex. 7) Newton informed Petitioner he was being separated from employment, because he had not reported to work, or contacted his employer, for three consecutive scheduled workdays, namely November 7, 10, and 12, 2014 in violation of Section 11 of the State Personnel Manual. (Resp. Ex. 7) In deciding to separate Petitioner from employment, Respondent considered Petitioner's culpability in failing to contact his employer. (T p. 29, lines 8-23) Ms. Newton knew about Petitioner's failure to report to work as directed and his failure to contact his employer from her conversations with Ms. Williamson. (T p. 28, lines 16-19; Resp. Ex. 4)

20. On December 20, 2014, Petitioner received Respondent's December 19, 2014 letter. (Resp. Ex. 9)

21. Petitioner submitted a grievance form to RJB ADATC appealing his separation from employment. (Resp. Ex. 8) Petitioner dated the grievance form January 31, 2015. RJB ADATC received such form on February 2, 2015. (Resp. Ex. 8)

22. Per State Human Resources policy, employee grievances related to alleged discharge without just cause must be received within fifteen days of when the employee receives notice of the adverse employment action. (T p. 63, lines 10-14; Resp Ex 10)

23. Respondent did not conduct any grievance proceedings of Petitioner's internal

grievance, because the reason for Petitioner's separation, i.e., a voluntary resignation without notice, is not a grievable issue. (T. p. 63; Resp. Exs. 8, 10)

24. At the contested case hearing, Petitioner presented no evidence during his case in chief. (T p. 94, lines 7-9) By failing to present any evidence at hearing, Petitioner failed to rebut Respondent's evidence that Petitioner voluntarily resigned from work by failing to report to work on three consecutive days.

25. At the contested case hearing, Petitioner argued that he notified Respondent, in his October 15, 2014 and November 5, 2014 emails that he would not return to work. However, Petitioner's statement in those emails that "I cannot agree to your request of me" was insufficient notice to Respondent that Petitioner would not return to work. The plain, ordinary meaning of such statement was that Petitioner disagreed with Respondent's "request" for him to return to work and participate in required CNA training and pre-employment screening. Even if one infers Petitioner's emails as notice that Petitioner was not returning to work, such notice was not delivered during the three consecutive days Petitioner failed to report to work, and therefore, was not a timely notice in accordance with 25 NCAC 01C .1006.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case and this matter is properly before OAH for consideration. 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 is a career State employee subject to the North Carolina Human Resources Act, N.C. Gen. Stat. § 126-1.1 (2013). Therefore, Petitioner could only "be warned, demoted, suspended or dismissed by" Respondent "for just cause." N.C. Gen. Stat. 126-35 (a) (2013), 25 NCAC 01J .0604(a).

3. N.C. Gen. Stat. § 126-34.02(b) lists the following issues for which a career State employee may bring a contested case before OAH:

- 1) Discrimination or harassment;
- 2) Retaliation;
- 3) Just cause dismissal, demotion, or suspension;
- 4) Veteran's preference;
- 5) Failure to post or give priority consideration; and
- 6) Whistleblower

N.C. Gen. Stat. § 126-34.02(b)(in part)

4. N.C. Gen. Stat. § 126-34.02(c) provides:

any issue for which an appeal to the Office of Administrative Hearings has not been

specifically authorized by this section shall not be grounds for a contested case hearing.

Under N.C. Gen. Stat. § 126-34.02(c), OAH's jurisdiction "is confined to the limits established by the [State Human Resources Act]." Winbush v. Winston-Salem State Univ., 165 N.C. App. 520, 522, 598 S.E.2d 619, 621 (2004).

5. In the instant case, Petitioner challenges his separation from employment due to voluntary resignation without notice. Both North Carolina State Human Resources Policy, (See Resp. Ex. 5), and the North Carolina Administrative Code, (See 25 NCAC 01C .1006), provide that such separations create no right of grievance or appeal.

6. Although Petitioner challenges his separation due to voluntary resignation without notice, a claim for which there is no right to appeal to OAH under N.C. Gen. Stat. § 126-34.02(b), Petitioner alleged in his contested case petition that Respondent discharged him from employment without just cause, and he failed to receive priority consideration. (Petition) These allegations were sufficient to invoke subject-matter jurisdiction of OAH over Petitioner's claims. Winbush, 165 N.C. App. at 522, 598 S.E.2d at 621.

7. Both the North Carolina State Human Resources Manual and North Carolina Administrative Code discuss voluntary resignation without notice. They state, in pertinent part:

[a]n employee who is absent from work and does not contact the employer for three consecutive scheduled workdays may be separated from employment as a voluntary resignation. A factor to be considered when determining whether the employee should be deemed to have voluntarily resigned is the employee's culpability in failing to contact his or her employer.

(Resp. Ex. 5; 25 NCAC 01C .1006)

8. Section 11 of the North Carolina State Human Resources Manual sets forth the circumstances under which a voluntary resignation without notice can occur. (Resp. Ex. 5) It provides in pertinent part:

[a]n employee who is absent from work and does not contact the employer for three consecutive scheduled workdays may be separated from employment as a voluntary resignation. A factor to be considered when determining whether the employee should be deemed to have voluntarily resigned is the employee's culpability in failing to contact his or her employer.

Such separations as described above are voluntary separations from State employment and create no right of grievance or appeal.

(Id.)

9. In this case, the preponderance of the evidence proved that Petitioner failed to

report to work on three consecutive, scheduled workdays, specifically November 7, 10, and 12, 2014. Petitioner voluntarily chose not to return to work. Petitioner also failed to contact his employer on these scheduled workdays, on any intervening day, or on any day thereafter.

10. Respondent considered Petitioner's culpability in failing to contact his employer during that period. Given Petitioner's numerous prior communications with Respondent, and a lack of any evidence to suggest Petitioner was suddenly unable to contact his employer, Respondent properly concluded that Petitioner was culpable in his failure to notify his employer of his absence.

11. In addition, Respondent properly notified Petitioner that his failure to report to work could subject him to separation from employment. The undersigned concludes that Petitioner was subject to separation from employment as a "voluntary resignation without notice," as described in 25 NCAC 01C .1006, and the North Carolina State Human Resources Manual (Resp. Ex. 5), after he failed to report to work, or contact his employer on November 7, 10, and 12, 2014.

12. Petitioner's last communication with Respondent, on November 5, 2014, before Petitioner failed to report to work for three consecutive scheduled workdays beginning November 7, 2014, did not insulate Petitioner from being separated from employment. (See Resp. Ex. 6) A close reading of the entirety of Petitioner's November 5, 2014 email to Ms. Williamson reveals that Petitioner's remarks concerning his willingness to return to work appeared to be an attempt to dispute certain assertions allegedly made by Ms. Williamson in a prior communication. (*Id.*) In his November 5, 2014 email, Petitioner did not state that he did not plan to come to work on November 7, 2014. Also, there was no evidence that Petitioner intended his November 5, 2014 email to convey that he did not plan to report to work on November 7, 2014. Thus, Petitioner's comments in his November 5, 2014 email cannot reasonably be construed as notice to Respondent that Petitioner would not be coming into work.

13. Even if Petitioner's November 5, 2014 email could be regarded as notice that he did not plan to come to work on November 7, 2014, Petitioner nevertheless failed to contact his employer on any of the scheduled workdays on which he did not report. Such notice was necessary if Petitioner was to avoid being eligible for separation due to voluntary resignation without notice, as described in 25 NCAC 01C .1006.

14. Assuming Petitioner objected to completing the pre-employment screening (drug test, criminal background check, and immunization check) before resuming employment, such objection did not excuse Petitioner's failure to report to work or contact his employer for at least two reasons. First, whether or not Petitioner was properly subject to a pre-employment screening was irrelevant to the issue whether Petitioner failed to report to work or contact his employer for three consecutive scheduled workdays. Second, NCDHHS policies, as well as at least two accrediting organizations, mandate a drug test and criminal background check for people in Petitioner's situation. These policies are clearly reasonable and valid in light of Petitioner's and other HCT II's role in providing direct care to vulnerable patients at State facilities.

15. Although Petitioner attempted to grieve his separation, he was not entitled to do so, because a voluntary resignation without notice is not a grievable or appealable issue. 25 NCAC

01C .1006. Assuming, *arguendo*, that a voluntary separation without notice was grievable, Petitioner's grievance request was nevertheless untimely.

16. The preponderance of the evidence proved that Respondent properly separated Petitioner from employment as a voluntary resignation without notice in accordance with 25 NCAC 01C .1006. Petitioner was not discharged without just cause.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's decision to separate Petitioner from employment due to Petitioner's voluntary resignation without notice.

NOTICE

Under the provisions of North Carolina General Statute § 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 7th day of August, 2015

The Honorable Melissa Owens Lassiter
Administrative Law Judge