Legal Remedies for Employee Complaints and Grievances
Public Law for the Public's Lawyers 2019
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Grievance Appeal Process

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N.C.G.S. § 126-34.02.-Grievance appeal process; grounds. (Terms and Conditions Challenge)

"(a) Once a final agency decision has been issued in accordance with G.S. 126-34.01, an applicant for State employment, a State employee, or former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. The contested case must be filed within 30 days of receipt of the final agency decision. Except for cases of extraordinary cause shown, the Office of Administrative Hearings shall hear and issue a final decision in accordance with N.C.G.S. § 150B-34 within 180 days from the commencement of the case. In deciding cases under this section, the Office of Administrative Hearings may grant the following relief:

(1) Reinstate any employee to the position from which the employee has been removed.
(2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
(3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority."

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N.C.G.S. § 126-34.02.Grievance appeal process; grounds. (Terms and Conditions Challenge) cont.

"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."

N.C.G.S. § 126-34.02(a) (2019).

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N.C.G.S. § 126-34.02.Grievance appeal process; grounds. (Terms and Conditions Challenge) cont.

The following issues may be heard as contested cases after completion of the agency grievance procedure and the Office of State Human Resources review:

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

Id.

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N.C.G.S. § 126-34.02.Grievance appeal process; grounds. (Terms and Conditions Challenge) cont.

(c) 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.
(d) In contested cases conducted pursuant to this section, the burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer. In all other contested cases, the burden of proof rests on the employee.
(e) The Office of Administrative Hearings may award attorneys' fees to an employee where reinstatement or back pay is ordered or where an employee prevails in a whistleblower grievance. The remedies provided in this subsection in a whistleblower appeal shall be the same as those provided in G.S. 126-87.
(f) The Office of Administrative Hearings shall report to the Office of State Human Resources and the Joint Legislative Administrative Procedure Oversight Committee on the number of cases filed under this section and on the number of days between filing and closing of each case. The report shall be filed on a semiannual basis. (2013-382, ss. 6.1, 9.1(c); 2014-115, s. 55.3(d).)"

Id. See: https://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_126/GS_126-34.02.html.

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Personnel Cases 2014-2016 OAH Ruled Against the State Agency

2014

- 13 personnel cases: 8 unacceptable personal conduct cases; 2 separation due to unavailability; 2 promotional priority; and 1 case enforcing a settlement

2015

- 2 personnel cases: 2 procedural violation cases

2016

- 4 personnel cases: 4 unacceptable personal conduct cases

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Just Cause

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Just Cause

Career state employees may not be discharged, suspended, or demoted for disciplinary reasons without 'just cause. N.C.G.S. § 126-35(a).

> "Just cause, like justice itself, is not susceptible of precise definition. It is a 'flexible concept, embodying notions of equity and fairness,' that can only be determined upon an examination of the facts and circumstances of each individual case."

NC DENR v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004) (internal citations omitted) (citing Crider v. Spectrulite Consortium, Inc., 130 F.3d 1238, 1242 (7th Cir. 1997)).

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Just Cause

"We acknowledge that SPC regulations define 'just cause' to include 'unacceptable personal conduct' and 'unacceptable personal conduct' to include 'job-related conduct which constitutes a violation of state or federal law.'" 25 N.C.A.C. 01J .0604(b)(2), .0614(i)(2). Nonetheless, the fundamental question in a case brought under N.C.G.S. § 126-35 is whether the disciplinary action taken was 'just.' Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations."

Carroll, 358 N.C. at 669, 599 S.E.2d at 900.

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Just Cause

Determining whether a public employer had just cause to discipline its employee requires two separate inquiries:

"whether the employee engaged in the conduct the employer alleges," and

"whether that conduct constitutes just cause for [the disciplinary action taken]."

Carroll, 358 N.C. at 665, 599 S.E.2d at 899 (quoting Sanders v. Parker Drilling Co., 911 F.2d 191, 194 (9th Cir. 1990), cert. denied, 500 U.S. 917, 114 L. Ed. 2d 101 (1991)).

Ranger Carroll's "reasonable belief" that he could treat the medical emergency with his mother "as one of necessity" authorizing him to use his vehicle's emergency devices and to exceed the speed limit along an open section of road prevented his actions from constituting "conduct for which no reasonable person should expect to receive prior warning." Id. at 667, 599 S.E.2d at 899; 25 NCAC 01J .0614(8)(a)[sic].

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Just Cause

The first of these inquiries is a question of fact, the SPC's factual findings as to the conduct alleged are reviewed under the whole record test.

Carroll, 358 N.C. at 665, 599 S.E.2d at 899 (citing Skinner v. N.C. Dep't of Corr., 154 N.C. App. 270, 274-78, 572 S.E.2d 184, 188-90 (2002); Kea v. Dep't Health & Human Servs., 153 N.C. App. 595, 606, 570 S.E.2d 919, 926 (2002), aff'd per curiam, 357 N.C. 654, 588 S.E.2d 467 (2003)).

The latter inquiry is a question of law, the SPC's conclusion as to whether the employee's conduct gave rise to "just cause" for the disciplinary action taken is reviewed de novo. See Skinner v. N.C. Dep't of Corr., 154 N.C. App. 270, 280, 572 S.E.2d 184, 191 (2002); Gainey N.C. Dep't of Justice, 121 N.C. App. 253, 259 n.2, 465 S.E.2d 36,41 n.2 (1996); Balancing Administrative Law in North Carolina, Daye, 79 N.C.L. Rev. 1571, 1592-93 (Sep. 2001).

Carroll, 358 N.C. at 665-66, 599 S.E.2d at 899.

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Just Cause

Consider the specific discipline imposed as well as the facts and circumstances of each case to determine whether the discipline imposed was "just."

> [N]ot *every* violation of law gives rise to "just cause" for employee discipline." Carroll, 358 N.C. at 670, 599 S.E.2d at 901. In other words, not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline.

Warren v. Dep't. Crime Control Pub. Saftey, 221 N.C. App. 376, 382, 726 S.E.2d 920, 925 (2012).

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Just Cause

The best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis.

- The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline.

This Court held in Robinson v. N.C. Dep't of Health & Human Servs., 215 N.C. App. 372, 378, 715 S.E.2d 569, 572 (2011), that, in the absence of a rule or regulation to the contrary, the ALJ may consider evidence not offered to the agency.

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EQUAL PAY

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Equal Pay: Lilly Ledbetter Fair Pay Act of 2009 ("the ACT")

On January 29, 2009, President Obama signed the first piece of legislation of his Administration: the Lilly Ledbetter Fair Pay Act of 2009 ("Act"). This law overturned the Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007), which severely restricted the time period for filing complaints of employment discrimination concerning compensation.

- http://www.humanresourcesmba.net/faq/what-is-the-lilly-ledbetter-fair-pay-act/

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Equal Pay: the Act

Origins of the Act

Lilly Ledbetter, a supervisor at Goodyear, filed an equal pay lawsuit against the corporation after she learned that she earned much less than two male managers in comparable positions. Though she was awarded $3.3 million in punitive damages, this decision was later overturned by the Supreme Court on the grounds that employees may not contest wage discrimination if more than 180 days have passed since the initial wage discrimination occurred, even if it has been continued with subsequent paychecks. Less than two years later, Obama passed the Fair Pay Act to overturn this Supreme Court decision and help mitigate its effects by allowing wage discrimination suits to be filed within 180 days of the most recent paycheck reflecting the discrepancy.

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Equal Pay: Results of the Act

Under this Act, employees may challenge unfair pay even if they are not initially aware that they are being discriminated against by their employers. Not only does this Act allow women to better fight back against gender-based discrimination in the workplace, it puts measures in place to help ensure that this discrimination does not take place at all. Employers must voluntarily comply with the Act and do not have any incentive to hide pay discrepancies as they did under the previous Supreme Court ruling. However, employees do have incentive to challenge wage discrepancies as promptly as possible since, under the Act, there is a two-year cap on back pay that will be awarded in a lawsuit.

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Equal Pay - Results of the Act

The Act states the EEOC's longstanding position that each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began. The Ledbetter Act recognizes the "reality of wage discrimination" and restores "bedrock principles of American law." Particularly important for the victims of discrimination, the Act contains an explicit retroactivity provision.

People challenging a wide variety of practices that resulted in discriminatory compensation can benefit from the Act's passage. These practices may include employer decisions about base pay or wages, job classifications, career ladder or other noncompetitive promotion denials, tenure denials, and failure to respond to requests for raises.

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Equal Pay - Tornow

Tornow v. UNC, 977 F.2d 574 (4th Cir. 1992).

This case involves alleged sex discrimination in the starting salaries paid Purchasing Agent II employees in the University of North Carolina at Chapel Hill's ("UNC-CH") Department of Purchasing. On October 9, 1990, appellant Tornow filed a complaint in the United States District Court for the Middle District of North Carolina in which she alleged that the appellees were paying her a lower wage than that paid male employees for equal work in violation of her rights under the Equal Pay Act, 29 U.S.C. § 206(d). She alleged that the difference in the starting salaries between herself and two male Purchasing Agent II employees accounted for most of the later disparities in their wages and formed the basis of her complaint.

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Equal Pay - Tornow

In October 1985, Ms.Tornow was employed as a Purchasing Agent II in the purchasing department at UNC-CH. The university's purchasing department is made up of two distinct purchasing sections: (1) the scientific purchasing section, and (2) the general purchasing section. Ms. Tornow was hired to work in the scientific purchasing section at a starting salary of $20,196.00.

In May 1988, the purchasing department hired two men, Mr. George Michael Tutor and Mr. Malcolm L. McMillan, Jr., to work as Purchasing Agents II in the scientific purchasing section. Each of these persons was hired at a starting salary of $28,236.00.

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Equal Pay - Tornow

This court finds that the record in the present action reveals that UNC-CH's Pay Plan was applied in a gender-neutral manner in setting the starting salaries of appellant as well as Mr. McMillan and Mr. Tutor. All of the evidence indicates that the relevant educational and work experience of Ms. Tornow and her two male comparators was evaluated under the Pay Plan, and their salaries were determined accordingly.

This court further notes that both of appellant's male comparators were hired two and one-half years after appellant, yet there is no evidence in the record as to inflationary and market factors pertaining to the time span between the hiring of these persons. Certainly inflation would account for at least some of the difference in the starting salaries.

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Equal Pay - Tornow

Finally, this court notes that the record reveals that serious management problems existed in the UNC-CH purchasing department, and such may have created personnel problems; however, a federal court is not the proper forum to deal with such issues, and such problems do not show that the starting salaries of the purchasing department's employees were determined in a gender discriminatory manner.

- https://law.justia.com/cases/federal/appellate-courts/ F2/977/574/304991/

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Equal Pay - Guidelines
Bona Fide Classification System

In sum, the record clearly shows that UNC-CH set the starting salaries of new employees in accordance with the guidelines contained in a bona-fide classification system. Such salaries were based on an individual's relevant educational and work experience as well as market and labor factors prevailing at the time of hiring. The record further shows that the university's Pay Plan was applied in the present action in a non-gender discriminatory manner. Although some subjectivity entered into the salary determinations, i.e., both Mr. McMillan and Mr. Tutor were paid the same starting salaries even though Mr. Tutor had more relevant work experience, as this court has previously held:

> "An element of subjectivity is essentially inevitable in employment decisions; provided that there are demonstrable reasons for the decision, unrelated to sex, subjectivity is permissible."

EEOC v. Aetna Ins. Co., 616 F.2d 719, 726 (4th Cir. 1980).

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GERA

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GERA

Exempt Doesn't Equal No Available Remedies for Discharged Employees.

The Government Employee Rights Act (GERA), 42 U.S.C. § 2000e-16a et. seq.

Vincoli v. State of North Carolina, 250 N.C. App. 269, 792 S.E. 2d 813 (2015).

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GERA - Vincoli

Discriminatory practices prohibited (similar to Title VII – race, color, religion, sex, national origin, age disability)

Remedies: back pay, front pay, compensatory damages, attorney fees to prevailing employee

NO punitive damages

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GERA - Vincoli

Procedure
- Federal EEO
- Federal ALJ

EEO Commission

A ruling by the EEOC against the employer means that U.S. Justice represents the EEOC as the complainant/appellee in front of the U.S. Circuit Court (4th Cir. for North Carolina).

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GERA - Vincoli

Until 2013, a career state employee whose non-exempt position was subsequently designated as exempt was entitled by N.C.G.S. § 126-34.1(c) to a contested case hearing before OAH to challenge the propriety of the designation.

- DPS asserted lack of subject matter jurisdiction (repeal of a portion of N.C.G.S. § 126-34.1)
- Vincoli asserted that while N.C.G.S. § 126-34.1 was repealed, N.C.G.S. § 126-5(h) mandating that disputes on whether one is subject to the State Personnel Act "shall be resolved as provided in Article 3 of Chapter 150B" was not.
- OAH granted DPS' motion to dismiss.

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GERA - Vincoli

Vincoli failed to timely appeal but filed a Declaratory Judgment action challenging the constitutionality of the act as applied to him.

The trial court granted Vincoli's motion for summary judgment and ordered an OAH hearing on whether the exemption designation was proper.

CONCLUSION

Vincoli was entitled to a contested case hearing before OAH; ruling dispositive of the case therefore it did not address constitutional issues .

See State v. Crabtree, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975).