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NO. COA11-414
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

BRYAN BEATTY, SECRETARY OF THE
N.C. DEPARTMENT OF CRIME CONTROL
AND THE N.C. DEPARTMENT OF CRIME
CONTROL AND PUBLIC SAFETY (N.C.
HIGHWAY PATROL),

Petitioner,

v.

Wake County
No. 08 CVS 21917

CHARLES JONES,

Respondent.

Appeal by petitioner from order entered 6 January 2010 by
Judge James E. Hardin, Jr. in Wake County Superior Court. Heard
in the Court of Appeals 26 October 2011.

*Attorney General Roy Cooper, by Assistant Attorneys General
Tamara Zmuda and Jess D. Mekeel, for petitioner-appellant.*

*Narron, O'Hale and Whittington, P.A., by John P. O'Hale,
for respondent-appellee.*

*The McGuinness Law Firm, by J. Michael McGuinness, for The
National Association of Police Organizations, The Southern
States Police Benevolent Association, and The North
Carolina Police Benevolent Association, amicus curiae.*

STEELMAN, Judge.

The trial court did not err in making findings of fact, where the findings were supported by substantial evidence in the record. The trial court properly concluded that the Patrol lacked just cause to terminate Jones. Because we affirm the trial court's order reinstating Jones with back pay, the appellants' argument relating to procedural violations in Jones' pre-dismissal conference is moot.

I. Factual and Procedural History

Charles Jones (Jones) went to work for the North Carolina State Highway Patrol (Patrol) in 1994. In May 2001, Jones was selected for the Patrol's Canine Handler School, and assigned Ricoh, a Belgian Malinois, as his canine partner. On 8 August 2007, Jones and Ricoh took part in a canine maintenance narcotics training session. When Ricoh refused to release a piece of fire hose he had been given as a reward for alerting to the presence of drugs, Jones proceeded to discipline him. After commanding Ricoh to release the reward and Ricoh's failure to do so, Jones directed Ricoh to the ground and strung his lead over the railing of a loading dock. Jones then raised Ricoh so that only his hind legs were touching the ground and tied off the lead. Jones jumped off the loading dock and kicked Ricoh five times. The kicks caused Ricoh's legs to swing out from

underneath him. When Ricoh finally released the reward Jones picked it up and returned it to his patrol vehicle, which was parked in front of the loading dock. Jones then untied Ricoh and let him down. A fellow member of the Patrol made two video recordings of the incident from approximately fifteen to twenty feet away. Following the incident Ricoh and Jones continued the training for the remainder of the day.

Word of the incident was leaked to the media, and officials within the Patrol and in former North Carolina Governor Michael F. Easley's office investigated the incident. Governor Easley decided that Jones should be dismissed from the Patrol. In response to Governor Easley's decision, on 31 August 2007, Jones was placed on "investigatory placement," meaning his badge, gun, identification, and vehicle were taken from him and he was not to represent the Patrol, but he still received pay and benefits. A pre-dismissal conference was held on 7 September 2007 at which Jones was informed of the allegations against him, as well as the disciplinary actions being considered, and was allowed to present rebuttal evidence in the form of a written statement and other documents. Lieutenant Colonel Cecil Lockley, Deputy Commander of the Patrol, who was conducting the pre-dismissal conference, did not consider any of the rebuttal materials

presented by Jones prior to making the pre-determined decision to dismiss Jones. On 9 September 2007, Jones was dismissed from the Patrol.

Jones appealed his termination to the Secretary of the North Carolina Department of Crime Control and Public Safety, Bryan Beatty (Beatty), who named an "employee advisory committee." The committee unanimously recommended that the dismissal be reversed and that Jones be reinstated. After reviewing the information provided to him by the Committee, Beatty upheld Jones' dismissal. On 12 December 2007, Jones filed a petition for a contested case hearing in the Office of Administrative Hearings. On 5 June 2008, an administrative law judge (ALJ) filed a recommended decision that Jones had been terminated without just cause and recommending that he be reinstated with back pay, benefits, and attorney's fees. On 16 October 2008, the State Personnel Commission (the Agency) entered a decision adopting the ALJ's decision but also finding that the Patrol had just cause to issue an appropriate disciplinary action against Jones for unacceptable job performance. On 16 December 2008, Beatty and the Patrol filed a petition for judicial review. On 6 January 2010, the trial court entered an order containing new findings of fact and

conclusions of law and directing that Jones "be reinstated with back pay and attorneys' fees."

Beatty and the Patrol (collectively appellants) appealed.

II. Standard of Review

"When this Court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold . . . : (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard.'" *Corbett v. N.C. Div. of Motor Vehicles*, 190 N.C. App. 113, 118, 660 S.E.2d 233, 237 (2008) (quoting *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120 (2005)) (alteration in original).

N.C. Gen. Stat. § 150B-51(c) (2009)¹ states:

In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's

¹ This statute was subsequently amended by the General Assembly. However, the amendments only apply to contested cases filed on or after 1 January 2012, and do not affect the instant case.

final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

In the instant case, the Agency did not fully adopt the ALJ's decision, because it found that the Patrol had just cause to issue appropriate disciplinary action against Jones for unacceptable job performance. Therefore, the appropriate standard of review for the superior court in this case was *de novo*. See *Granger v. University of N.C.*, 197 N.C. App. 699, 702, 678 S.E.2d 715, 717 (2009) ("Because the case before us involves a situation where the final agency decision rejected the decision of the ALJ, the appropriate standard of review for the trial court was *de novo*."). The superior court applied the correct standard of review in this case, stating "this Court has conducted a *de novo* review of this case and gives no deference to any prior decision made in this matter."

We next determine "whether the superior court properly applied this standard." *Corbett*, 190 N.C. App. at 118, 660

S.E.2d at 237 (quoting *Mayo*, 168 N.C. App. at 507, 608 S.E.2d at 120). When, as in this case, the superior court reviews an agency decision *de novo* under N.C. Gen. Stat. § 150B-51(c), and the trial court's decision is appealed, "the trial court's findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52 (2009); *see also Granger*, 197 N.C. App. at 705, 678 S.E.2d at 719 (reviewing findings of fact to determine whether they were supported by substantial evidence). Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2 (2009).

III. Findings of Fact

In their first argument, appellants contend that the trial court's findings of fact 3, 5, 6, 11, 16, 17, and 22 are not supported by substantial evidence. We disagree.

A. Finding of Fact 3

Appellants argue that there is not substantial evidence to support the trial court's finding of fact 3. We disagree.

Finding of fact 3 states:

Patrol training of canines consistently stressed Obedience & Control. Canine handlers were taught to rule with an "iron fist" as canines were "weapons" which had to

be under control at all times. Having been taught **"when youor [sic] dog is not performing, bust his ass,"** handlers were taught to find what worked with each individual dog and handlers used whatever methods worked with their dogs.

(Emphasis added) (citations omitted). Appellants particularly point to the portion which states: "when youor [sic] dog is not performing, bust his ass." We have not been able to locate the exact quote challenged by appellants in the record. However, the remainder of the quote and its import are amply supported by substantial evidence, and the elimination of the quoted language does not affect the overall meaning of finding of fact 3 or the conclusions of law based thereon.

Trooper James R. Pickard, III testified as follows:

Q. Now in your training as a canine handler with the North Carolina Highway Patrol, would you just tell us some of the things that you have personally been trained to do and what you've seen with respect to dog handling with, for instance, concerning compliance techniques? What are some of the things you've been taught to do?

A. It all depends on what the dog is doing. If the dog, of course, is acting in an undesirable manner, you would use the choke collar primarily for compliance. But let's say there is something more extreme, like [Jones] was having to deal with with his dog, as far as handler aggression, which would usually happen whenever he tried to retrieve the toy from the dog. Numerous times, he'd get bitten by the dog, and it

usually would end up being a fight between him and the dog. Nine times out of ten, [Jones] came out on the short end of the stick, to be very honest with you.

Whenever displayed handler aggression by the dog [sic], you use any means necessary to discipline that dog, whatever you can get a hold of, whatever you can do, whatever it takes to reinforce this canine, you don't do this. You cannot do this. The handler has to be in control. If he's not in control, let's be honest. The dog turns into a four-wheel-drive stabbing machine because he can do whatever he wants and he has no control over him.

You have to have total control of the dog at all times. If that means kicking him, hitting him, choking him, whatever it takes to make sure he understands, "This is not acceptable. You cannot do this." It becomes an extreme liability on the side of the road if you can't control that dog.

Finding of fact 3 was supported by the testimony of Trooper Pickard and other similar testimony in the record.

This argument is without merit.

B. Finding of Fact 5

Appellants argue that the trial court lacked substantial evidence to support finding of fact 5, which stated that Jones commanded Ricoh to release the reward before kicking him. We disagree.

Finding of fact 5 states in part, "Jones then jumped off the loading dock and commanded that Ricoh release the

reward. . . . Ricoh failed to obey this command. Jones then kicked Ricoh with his right foot five (5) times" Jones' testimony provides substantial evidence to support this portion of finding of fact 5. Jones testified as follows:

I pull [Rico] up and I'm telling him to let it [the reward] go, and he won't let it go. I then wrap the lead over the top railing. His rear legs are still in touch with the ground. His front paws are up in between holding onto the toy, and I believe, trying to pull on the lead.

And I get down—jump down off the deck, and get down there, and I strike him with my foot—the instep of my foot.

Jones' testimony supports the trial court's finding of fact that he commanded Rico to release the reward prior to kicking him.

This argument is without merit.

C. Finding of Fact 6

Appellants argue that the trial court erred in finding of fact 6 in holding that "[t]he entire incident took 26 seconds and was over." We disagree.

Appellants point out that it is undisputed that there are two video recordings lasting thirteen seconds each, and that finding of fact 6 fails to take into account the lapse of time between the videos and the events occurring before and after the videos. While the incident was likely longer than 26 seconds it

still took place over a short period of time, and the brevity of the incident is what is significant in this finding of fact, not the precise amount of elapsed time.

The brevity of this incident is supported by the testimony of Trooper Herndon, who took the videos in question. He testified as follows:

Q. So you got on your cell phone, and how long did you record it?

A. I took two fourteen- or fifteen-second videos in sequence.

Q. Why were they only fourteen or fifteen seconds?

A. That's all the phone is capable of recording at a time.

Q. What was the length of time between the end of the first video and the beginning of the second video?

A. Maybe a second or two, just long enough to hit the record button on it, because it stops itself and then you have to hit record again for the next video.

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Q. And Sergeant Jones picked up the reward and walked out of the frame shot of what you were filming?

A. Right.

Q. What did you see Trooper Jones—Sergeant Jones do immediately after this video ended? Where did he go?

A. He went to his car and then came back and released the dog.

Q. Do you know what he went to his car for?

A. I believe it was to put the toy up, but—

Q. And what was the time frame from the time he retrieved the toy off the ground that was shown in the video to the time he actually released Ricoh down from the deck—approximately your best guess?

A. Just a few seconds. I don't know. Maybe ten seconds, fourteen seconds. I don't know. I mean obviously it was—the video is fourteen seconds long, so it would be somewhere in that neighborhood—from the time it took him to walk to his car and back.

The entire incident likely took less than one minute. The brevity of this incident is supported by substantial evidence in the record, and supports the ultimate finding of fact set out later in finding of fact 6 stating that the evidence "shows that Jones was attempting to correct Ricoh and did not intend to harm or abuse the dog."

This argument is without merit.

D. Finding of Fact 11

Appellants argue that the portion of finding of fact 11 holding that "[t]he training method used by Jones on Ricoh in

this matter, while appearing excessive and extreme to the general public, is not unreasonably outside of or substantially different from several of the training techniques that are tested, trained and approved for use by the Patrol" is not supported by substantial evidence. We disagree.

Mike Evitt, a member of the Patrol, testified as follows:

Q. All right. And in an effort to kind of speed up the process here today, are you familiar with various compliance or training techniques employed by the Highway Patrol for canine handling?

A. Yes, sir.

Q. All right. Are you familiar with the choke-out technique on a dog?

A. Yes, sir.

Q. Have you ever seen that done?

A. Yes, sir.

Q. Can you tell us about that?

A. When you're trying to get a dog to comply, there are steps that we try first, you know, verbal, but when they don't respond to that and you have to choke them out, there are several ways to choke them out. You can put them in an airplane spin, it's called. You can hold them up by the choke collar and choke them out. You can tie them off and choke them out.

Q. And are these techniques that you have learned in your training as a canine handler in the North Carolina Highway Patrol?

A. Yes, sir.

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Q. Okay. Now is this—what you observed in the tape the handler doing, who turns out to be former Sergeant Jones, techniques that you were trained by—to do by Captain Castelloe on the Highway Patrol?

A. Yes, sir.

Q. And how about in the second tape; can you tell us what, if anything, you observed in that tape?

A. Nothing unusual. I mean—

Q. Based upon your utilization of a canine and your training with—three, three and a half years with the North Carolina Highway Patrol, have you seen situations that were similar or may be perceived by people who are not familiar with the canine training program that may even appear to be worse than what you saw in those videotapes?

A. Yes, sir.

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Q. Okay. And what other types of training techniques have you seen in your experience as a North Carolina Highway Patrol canine handler in addition to what you've already told us about?

A. Like I said, the airplane spins, You know, where you let go of them and they roll. Kicked—I've seen them be kicked in training.

Q. When would you see someone kick a

canine in training, under what circumstances?

A. One time that I remember, was trying to get a dog to out on a bite—on a bite suit—and had worked with the same dog day in and day out and were having to escalate the measures to try to get it to comply, to get it to out on a bite.

Q. And when the dog does not out or release on the bite, then what do you do when he's not following your commands?

A. Then you have to escalate to something else by choking him off.

Q. All right. Would you also then at some point in time escalate by kicking the dog?

A. Yes, if that's the only way you can get it to out on the bite.

Q. Now these training techniques that you learned from Mr. Castelloe and the North Carolina Highway Patrol, were any of these designed to abuse or injure or hurt the dog?

A. No, sir.

Evitt's testimony constitutes substantial evidence supporting finding of fact 11. This argument is without merit.

E. Findings of Fact 16, 17, and 22

Appellants argue that the trial court erred in findings of fact 16, 17, and 22 in holding that Governor Easley made the decision that Jones should be terminated. We disagree.

Appellants stipulated before the ALJ "[t]hat on or about August 31, 2007 Governor Easley decided that Charles Jones . . . should be dismissed from the North Carolina Highway Patrol." This constitutes substantial evidence supporting the trial court's findings holding that Governor Easley made the decision to terminate Jones.

This argument is without merit.

IV. Just Cause

In their second argument, appellants contend that the trial court erred in reinstating Jones because the Patrol had just cause to dismiss Jones from his employment. We disagree.

"No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2009). "Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for [the disciplinary action taken]." *N.C. Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (internal quotation marks omitted). There is no dispute in the instant case that Jones engaged in the alleged conduct.

Therefore, we must determine whether or not the conduct in question constituted just cause for disciplinary action.

Pursuant to N.C. Gen. Stat. § 136-35(a) and (b) just cause may only be established through proof of "unsatisfactory job performance" or "unacceptable personal conduct." *Id.* at 666, 599 S.E.2d at 899. The existence or nonexistence of just cause is a question of law, which we review *de novo*. *Id.* at 666, 599 S.E.2d at 899. "However, the *de novo* standard set forth by the Supreme Court in *Carroll* does not mandate that the reviewing court make new findings of fact in the case. Instead, the court, sitting in an appellate capacity, should generally defer to the administrative tribunal's 'unchallenged superiority' to make findings of fact." *Early v. Cnty. of Durham, Dept. of Soc. Servs.*, 193 N.C. App. 334, 342, 667 S.E.2d 512, 519 (2008). "In contested cases conducted pursuant to Chapter 150B of the General Statutes, the burden of showing that a career State employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer." N.C. Gen. Stat. § 126-35(d). In the instant case the Patrol found just cause to discipline Jones based upon "unacceptable personal conduct." This case does not involve Jones' job performance.

The North Carolina Administrative Code defines

"unacceptable personal conduct" as:

- (1) conduct for which no reasonable person should expect to receive prior warning; or
- (2) job-related conduct which constitutes a violation of state or federal law; or
- (3) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State; or
- (4) the willful violation of known or written work rules; or
- (5) conduct unbecoming a state employee that is detrimental to state service; or
- (6) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State; or
- (7) absence from work after all authorized leave credits and benefits have been exhausted; or
- (8) falsification of a state application or in other employment documentation.

25 N.C.A.C. § 1J.0614(i) (2010).²

[T]he 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.

"Just cause," like justice itself, is not

² This regulation was modified effective 1 January 2011, but this case is governed by the pre-modification version of the regulation.

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.

Carroll, 358 N.C. at 669, 599 S.E.2d 900-01 (citations omitted).

According to unchallenged finding of fact 1, Jones was employed by the Patrol beginning in November of 1994 until his termination on 9 September 2007. During his thirteen year service to the Patrol Jones served as a Cadet, Trooper, Senior Trooper, Master Trooper, and Sergeant. As found by the trial court in finding of fact 11 and discussed in section III.D of this opinion, "[t]he training method used by Jones on Ricoh in this matter, while appearing excessive and extreme to the general public, is not unreasonably outside of or substantially different from several of the training techniques that are tested, trained and approved for use by the Patrol." Further, in unchallenged finding of fact 25 the trial court found, "Lt. Col. Lockley testified that he did the 'wrong thing' by approving the pre-determined decision to fire Jones because, in his opinion, Jones acted in the manner in which he was trained even though it was an 'ugly manner.'"

The unchallenged findings of fact and the findings of fact supported by substantial evidence made by the trial court

support the trial court's conclusion of law that the patrol lacked just cause to terminate Jones. The fact that Jones acted consistently with his training demonstrates that he did not engage in "unacceptable personal conduct." His conduct was not "conduct for which no reasonable person should expect to receive prior warning," "the willful violation of known or written work rules," or "conduct unbecoming a state employee that is detrimental to state service," the portions of the definition of "unacceptable personal conduct" most applicable to Jones' conduct. See 25 N.C.A.C. 1J.0614(i)(1),(4),(5) (stating that these terms each constitute "[u]nacceptable [p]ersonal [c]onduct"). Jones acted consistently with his training, and used compliance techniques on Ricoh similar to those used by all Patrol members who were canine handlers. The Patrol failed to meet its burden of showing that Jones was terminated for just cause.

The circumstances of this case indicate that equity and fairness would not be served by terminating Jones from the Patrol. One isolated incident, consistent with practices sanctioned by the Patrol, does not constitute just cause for termination on the grounds of "unacceptable personal conduct."

This argument is without merit.

V. Procedural Violation

In their third argument, appellants contend that any procedural violation, as found by the trial court in conclusion of law 10, caused by Lt. Col. Lockley's failure to give meaningful consideration to Jones' statements and documents presented at his pre-dismissal conference was cured by Beatty's subsequent review. We hold this argument is moot.

Lt. Col. Lockley testified that prior to conducting the pre-dismissal conference with Jones, he was advised that "they want him gone" (referring to Governor Easley's office). He further stated that "the decision regarding Sergeant Jones' career was predetermined, not by the Patrol's disciplinary process but by an outside entity whose purpose was not a fair and equitable treatment of Sergeant Jones."

North Carolina Administrative Code, Title 25, Section 1B.0432(c) (2010) states

Failure to conduct a pre-dismissal conference shall be deemed a procedural violation. Further, the remedy for this violation shall require that the employee be granted back pay from the date of dismissal until a date determined appropriate by the commission in light of the purpose of pre-dismissal conferences. Reinstatement shall not be a remedy for lack of a pre-dismissal conference.

The remedy for any procedural violation relating to Jones' pre-dismissal conference would be "back pay from the date of the dismissal until a date determined appropriate by the commission in light of the purpose of pre-dismissal conferences." *Id.* We affirm the trial court's order that Jones receive back pay from the time of his dismissal. Therefore, this argument is moot.

VI. Conclusion

Findings of fact 3, 5, 6, 11, 16, 17, and 22, were supported by substantial evidence. Based upon these findings and other uncontested findings, the trial court properly concluded the Patrol lacked just cause to terminate Jones. Because we are affirming the trial court's order reinstating Jones with back pay, the appellants' argument relating to procedural violations in Jones' pre-dismissal conference is moot.

AFFIRMED.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).