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NO. COA02-169

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

RUTH MAE WILEY,
Petitioner-appellee,

v.

Alamance County
No. 00 CVS 1829

N.C. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF
FACILITY SERVICES,
Respondent-appellant.

Appeal by respondent from judgment and order entered 26 September 2001 by Judge Ronald L. Stephens in Alamance County Superior Court. Heard in the Court of Appeals 9 October 2002.

Dawson, Dawson and Dawson, P.A., by Alexander Dawson, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Jane L. Oliver, for respondent-appellant.

BRYANT, Judge.

Respondent appeals from an order reversing the final agency decision concluding that petitioner physically abused a nursing home resident. Petitioner, Ruth Mae Wiley, was a certified nursing assistant [CNA] at Alamance Health Care Center [Center], a nursing home and rehabilitation center. According to Keana Graves and Belinda Marsh, two other CNA's at the Center, petitioner slapped a center resident, MR, while the three bathed the resident and changed her diaper and bedding. Following the incident, Graves and

Marsh notified their supervisor. The Center's Director of Nursing reported the incident to the North Carolina Department of Health and Human Services' Facility Services Division [the agency], Health Care Personnel Registry section. The agency notified petitioner of its determination that the incident required further investigation, and that the agency was therefore required to list petitioner on the Health Care Personnel Registry [Registry] based upon allegations of abuse. An agency investigator found that the abuse had occurred based upon Graves and Marsh's statements.

Petitioner then filed for a contested case hearing with the Office of Administrative Hearings. Following the hearing, the administrative law judge [ALJ] concluded that respondent's allegations of abuse were not substantiated by the evidence.

On 18 July 2000, the agency issued a final agency decision in which it concluded that petitioner physically abused MR, and that it was therefore required to enter petitioner's name into the Registry. Petitioner appealed the decision to the superior court. The superior court reversed the final agency decision and further ordered respondent to pay petitioner \$3500 in attorney's fees. Respondent appeals.

There are two dispositive issues on appeal: whether the superior court erred in 1) finding that petitioner did not abuse MR and 2) awarding attorney's fees to petitioner.

I. Final Agency Decision

In examining the superior court's order reviewing the final agency decision, we must determine whether the court I) applied the correct standard of review, and II) whether it did so correctly. *Dillingham v. North Carolina Dept. of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999). Where a petitioner claims that the agency erred as a matter of law, the superior court must review the agency's decision *de novo*. *Id.* Where the petitioner claims that the agency's decision was unsupported by the evidence and/or arbitrary and capricious, the court must examine all competent evidence within the "whole record." *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 346-47, 543 S.E.2d 169, 174 (2001), *appeal after remand*, ___ N.C. App. ___, 571 S.E.2d 262 (2002).

The parties presented the following relevant evidence at the contested case hearing: MR was an elderly patient suffering from severe dementia and requiring total care. Petitioner testified that she requested Graves help her with MR, to which Graves responded that she would help petitioner when she returned from her break. Approximately half-an-hour later, petitioner again asked Graves to assist her. According to petitioner, Graves replied, "Why do you keep asking me the same thing? I'm going to help you." Petitioner noted that while she, Graves, and Marsh tended to MR, the resident was in a rage, kicking, fighting and spitting, behavior not uncommon for MR. Petitioner further noted that at the same time, Marsh and Graves were making accusations and negative comments towards petitioner.

Petitioner denied Graves and Marsh's allegations that she abused MR, testifying that she did not hit or slap the resident intentionally or otherwise. Petitioner, who was familiar with MR, noted that MR's skin was pale, that because of her combative nature, she bruised often and easily, and that MR's bruises lasted for hours.

Graves and Marsh were close but neither were particularly close to petitioner. They both testified that MR spit, at which time petitioner slapped MR across the face. Specifically, Graves testified that petitioner asked her to help care for MR. Like petitioner, Graves noted that "MR was really combative and scratching and spitting and kicking and really out of control." According to Graves, MR spat and petitioner "smacked MR across the face" with an open hand. The slap "was very loud and it rang." In her hearing testimony, Graves stated that petitioner said "I'm sorry," then continued with what she was doing. In an earlier statement, which was also admitted into evidence, Graves stated that MR did not react to petitioner's action except she waved her arms around, as she usually does.

Marsh likewise testified that she was assisting petitioner in changing MR's diaper and bedding when petitioner "just took and slapped [MR]; and she looked over and she goes, 'Oh, I'm sorry,' to MR." Marsh stated that the slap was so hard that "it echoed through the room." In her statement, also introduced into evidence, Marsh stated, "I think [petitioner] did this because of the spitting. I think she did it without thinking by reflex."

Marsh further noted in the statement that MR reacted by saying "oh". A subsequent examination of MR revealed no visible signs of abuse or injury.

The ALJ determined that neither Graves nor Marsh were credible in testifying that the slap actually occurred. The ALJ concluded, however, that even if the testimony was credible, the slap was not intentional. The ALJ based his conclusion on what he characterized as the "inadvertent[]" nature of the slap, as testified to by Marsh. The agency, however, found Graves and Marsh credible, and that based upon the evidence, petitioner did in fact abuse MR.

Petitioner claimed in her filing to the superior court that the agency erred as a matter of law and that its decision was not supported by the evidence and was arbitrary and capricious. Upon review, the superior court reversed the agency decision, reinstated the ALJ's recommendation and concluded that its findings of fact and conclusions of law were consistent with those of the ALJ. Specifically, the court concluded that there was "no 'abuse' . . . , that there was no 'willful' infliction of injury[.]"

Under section 131E-255 of our General Statutes and pursuant to federal law, the agency maintains a registry of all nurse aides working in nursing facilities in this State. N.C.G.S. § 131E-255(a) (2001). In addition, the agency must list in the registry any findings by the agency of abuse of a resident of a nursing facility by a nurse aide. N.C.G.S. § 131E-256(a) (2001). As noted in the agency's final decision, the agency's own regulations define

"abuse" as "the willful infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish." N.C. Admin. Code tit. 10, R.3H.2001(1).

The determination of whether petitioner willfully inflicted injury upon MR is one of fact, for which the reviewing court must review the whole record. See *Blalock v. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 474-75, 546 S.E.2d 177, 181 (2001). Under the "whole record" test, the reviewing court must determine whether the decision was supported by substantial evidence. *Hedgepeth*, 142 N.C. App. at 347, 543 S.E.2d at 174. "Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion." *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990) (citation omitted).

The agency argues that in determining that petitioner did not willfully slap MR, the superior court in the present case replaced the agency's judgment consisting of two conflicting views, with the court's own view. We disagree.

In its final decision, the agency noted that although the ALJ found Graves' testimony inconsistent, its review of her testimony did not reveal "any apparent or material inconsistency." The agency further noted that there was no apparent inconsistency between Graves and Marsh's testimony.

Certainly, "it is for the administrative body, [not the superior court], to determine the weight and sufficiency of the

evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *Com'r of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980) (citations omitted); *Associated Mechanical Contractors v. Payne*, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996). However, under the "whole record" test, the reviewing court "may not consider the evidence which in and of itself justifies [an agency's] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted). It must "take into account whatever in the record fairly detracts from the weight of the [agency's] evidence." *Id.*

Upon review, we conclude that evidence in the record does not support the agency's finding that testimony and/or statements from Graves and Marsh were materially consistent as to the issue of whether petitioner abused MR. Although Graves testified that petitioner said she was sorry after the alleged slap, in her prehearing statement, Graves stated that petitioner did not acknowledge that the incident happened. Although Graves noted in her statement that MR did not react to the alleged slap, Marsh stated her statement that MR responded with an "oh". Furthermore, at the hearing, Graves was unclear whether the slap was in reaction to the spitting on petitioner, simply testifying that "MR spit, and then I saw [petitioner] smack her." In contrast, Marsh noted in her statement that the slap was a reflexive reaction to MR's

spitting. It is unclear why the agency choose to ignore these material inconsistencies.

In fact, the only consistent evidence given by Graves and Marsh was their accusation that petitioner slapped MR. However, this allegation, contrary to the agency's finding, was not supported by other evidence in the whole record. The agency stated that because there need not be visible signs of abuse to qualify for registration as an abuser, evidence in the record that there was no visible signs of abuse to MR was irrelevant. We disagree. While the registration statute may not require visible signs of abuse, evidence thereof serves as circumstantial evidence to corroborate whether or not the slap occurred. The lack of any visible signs of abuse was uncontroverted evidence. Moreover, petitioner's testimony that MR bruised easily and often and that her bruises lasted for hours, was also uncontroverted. The accusing witnesses would have the agency believe that an elderly women with pale, quick-to-bruise skin, was slapped so hard that the slap echoed but no visible signs resulted. It is simply unfathomable that some mark, however slight, would not have been visible after such a riveting slap. See *Walker*, 100 N.C. App. at 503, 397 S.E.2d at 354 (stating that under whole record test, substantial evidence is that which a reasonable mind would infer). Given our review of the whole record, we conclude that the evidence does not support the agency's conclusion that petitioner "wilfully inflicted injury to" MR. Accordingly, we find no substantial evidence that petitioner "abused" MR as defined by the agency's own

regulation. Therefore, the trial court was correct in reversing the agency's final decision and concluding that petitioner's name should be removed from the Registry.

II. Attorney's Fees

In any civil action in which the State is not the prevailing party, a party who appeals from a final agency decision may recover reasonable attorney's fees in the court's discretion if: "(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust." N.C.G.S. § 6-19.1 (2001). "To show that it acted with 'substantial justification,' the agency must demonstrate that its position was rational and legitimate to the satisfaction of a reasonable person at the time of its initial action" and "in light of the law and facts known to [the agency]." *Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys.*, 138 N.C. App. 489, 493-94, 531 S.E.2d 500, 503-04 (2000) (citing *Crowell Constructors, Inc. v. State ex rel. Cobey*, 342 N.C. 838, 844-45, 467 S.E.2d 675, 679-80 (1996)). It is not inconsistent for a court to find both that an agency's action was ultimately incorrect and that the agency was substantially justified in its actions. See *Crowell*, 342 N.C. at 844, 467 S.E.2d at 679 (noting that agency not required "to demonstrate the infallibility of each suit it initiates").

Upon review of the record, we conclude that there was substantial justification for the agency's decision in the present

case. At the time of its initial action, the agency knew that two of petitioner's coworkers alleged that she abused an elderly resident and that an investigator had determined that the abuse had occurred. The agency was further aware of its well-established obligation to report such abuse, as required by statute and its own regulations. See *Herns v. District of Columbia, Dept. of Consumers & Reg. Affairs*, 704 A.2d 1181, 1183 (D.C. App. 1997) ("The position of nurse aide, carefully regulated both federally and locally, is one of trust[.]"). With knowledge of these and other relevant circumstances, a reasonable person would have been justified in acting as the agency did in the present case. The trial court erred in concluding otherwise. Consequently, we reverse the trial court's order granting attorney's fees.

Conclusion

The Judgment of 26 September 2001 reversing the final agency decision is affirmed, and the Order of 26 September 2001 requiring respondent to pay attorney's fees is reversed.

Affirmed in part; reversed in part.

Judges McCULLOUGH and TYSON concur.

Report per 30(e).