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NO. COA07-463

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2007

PEGGY ANDERSON,  
Petitioner,

v.

Wake County  
No. 06 CVS 4395

NORTH CAROLINA DEPARTMENT OF  
HEALTH AND HUMAN SERVICES/  
WHITAKER SCHOOL,

Respondent.

# Court of Appeals

Appeal by petitioner from an order entered 19 January 2007 by Judge John R. Jolly, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 November 2007.

## Slip Opinion

*Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner-appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Angel E. Gray, for respondent-appellee.*

BRYANT, Judge.

Peggy Anderson (petitioner) appeals from an order entered 19 January 2007 affirming the decision of the State Personnel Commission (SPC) holding petitioner was not subject to a denial of promotional priority. For the reasons stated herein, we remand this case to the superior court for further review.

### *Facts and Procedural History*

Petitioner has been continuously employed by the North Carolina Department of Health and Human Services (respondent) at

Whitaker School since March of 1995. On 14 December 2004, petitioner applied for a promotion to an open position of "Mental Health Unit Director I" at Whitaker School. Based on the interview and screening process employed by respondent, petitioner was denied the promotion and the position was offered to, and accepted by, an outside candidate.

On 15 March 2005, petitioner filed a Petition for Contested Case Hearing (petition) in the Office of Administrative Hearings alleging respondent failed to give her promotional priority consideration in violation of N.C. Gen. Stat. § 126-7.1 (2005). The case was heard before Administrative Law Judge (ALJ) Beecher R. Gray on 26 and 27 September 2005. On 25 October 2005, the ALJ issued his decision finding in favor of petitioner and awarding her back pay, front pay, promotion into the next available Mental Health Unit Director I position at Whitaker School, and attorney's fees. The SPC considered the ALJ's decision and heard the case at its 16 February 2006 meeting. On 27 February 2006, the SPC issued its Decision and Order adopting the ALJ's decision that petitioner was entitled to promotional priority consideration, but also finding that because another state employee was more qualified than petitioner, petitioner was not entitled to promotion, front pay, or back pay. On 11 May 2006, the SPC issued an Amended Decision and Order, adding exhibit numbers and an employee's name which were left blank in the decision issued by the Commission on 27 February 2006. On 28 March 2006, petitioner filed a Petition for Judicial Review in Wake County Superior Court. The case was heard

before the Honorable John R. Jolly, Jr., during the 19 May 2006 session of Wake County Superior Court. On 5 January 2007, the superior court issued an Order affirming the decision of the SPC. Petitioner appeals.

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At the outset, we note that respondent raises the issue of whether petitioner's appeal should be dismissed for rules violations. Respondent argues: (1) petitioner's brief has numerous "style and format issues[;]" (2) the "Statement of the Facts" in petitioner's brief is not a "non-argumentative summary of all material facts underlying the matter in controversy . . ." in violation of N.C.R. App. P. 28(b)(5); and (3) petitioner has failed to include a statement of the applicable standard of review for each question presented in violation of N.C.R. App. P. 28(b)(6).

"It is well settled that the Rules of Appellate Procedure are mandatory and not directory. Thus, compliance with the Rules is required. However, every violation of the Rules does not require dismissal of the appeal or the issue[.]" *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007) (internal citations and quotations omitted). While petitioner's brief contains minor violations of our Rules of Appellate Procedure, these violations do not prevent this Court or the defendant "from a full understanding of the issues at hand, nor [do they] obstruct the process of this appeal." *State v. Burke*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 648 S.E.2d 256, 258 (2007). Further, in an attempt to correct her most egregious rules violation, petitioner has filed with this Court a motion to

amend her brief to include the applicable standard of review. We allow petitioner's motion to amend her brief and decline to dismiss her appeal.

"When this Court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is . . . limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120 (2005). The dispositive issue before this Court is whether the superior court erred in reviewing the petition for judicial review of the decision of the SPC under the wrong standard of review.

Pursuant to N.C. Gen. Stat. § 150B-51,

In reviewing a final decision in a contested case in which an administrative law judge made a decision . . . 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 final decision. . . .

N.C. Gen. Stat. § 150B-51(c) (2005); see also *Cape Med. Transp., Inc. v. N.C. Dep't of Health & Human Servs.*, 162 N.C. App. 14, 20, 590 S.E.2d 8, 13 (2004) (holding N.C.G.S. § 150B(c) "provides only one standard of review, de novo, and does not require the trial court to state the standard of review."). "De novo review requires a court to consider the question anew, as if the agency has not

addressed it.” *Cape Med. Transp.*, 162 N.C. App. at 21, 590 S.E.2d at 13 (citation and quotations omitted).

Here, the SPC “adopted” the findings of fact and conclusions of law of the Administrative Law Judge. However, the SPC found an additional finding of fact “to present a complete picture of the factual evidence in the record” and modified two of the ALJ’s conclusions of law “to correct erroneous conclusions of law[.]” The SPC’s final order stated:

the Decision of the Administrative Law Judge in favor of the Petitioner finding that Petitioner was entitled to priority consideration because her qualifications were substantially equal to those of the successful non-State employee applicant selected for the position be adopted, but the Commission also finds that because there was another State employee more qualified than Petitioner, Petitioner is not entitled to promotion, front pay, or back pay and Petitioner did not present sufficient evidence to show that but for the denial of promotional priority, she would have received the promotion.

Thus, while the SPC may have “adopted” the components of the ALJ’s decision, the SPC’s decision was contrary to the ultimate decision of the ALJ and the superior court should have considered the petition under the *de novo* standard of review.

It is clear, however, that the superior court reviewed the facts of this case using the “whole record test.” The superior court states in its order:

(9) Pursuant to N.C. Gen. Stat. § 150B-51(b), this Court reviewed each of the Findings of Fact and Conclusions of Law and the Final Agency Decision . . . applying the “whole record test” to determine whether each was supported by substantial evidence in the record and whether any were arbitrary and capricious.

. . .

(11) Upon a review of the whole record, the Findings of Fact, Conclusions of Law and the Final Agency Decision (and Amended Final Agency Decision) of the State Personnel Commission were supported by substantial evidence in the entire record as submitted.

The superior court then upheld and incorporated by reference the sixty-three findings of fact of the ALJ and the additional finding of fact of the SPC because they are "supported by substantial evidence in the record and are not arbitrary and capricious[.]" This is the "whole record test." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (holding under the whole record test, the superior court must "examine all the record evidence . . . to determine whether there is substantial evidence to justify the agency's decision.").

Because the superior court erroneously applied the "whole record test" to, and did not conduct a *de novo* review of, the facts of this case, we remand this case to the superior court to review the record *de novo* and to make findings of fact and conclusions of law in accordance with N.C.G.S. § 150B-51(c). *Royal v. Dep't of Crime Control & Pub. Safety*, 175 N.C. App. 242, 622 S.E.2d 723 (2005); *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 664, 599 S.E.2d 888, 897 (2004) ("When an 'order or judgment appealed from was entered under a misapprehension of the applicable law,' an appellate court may remand for application of the correct legal standards.") (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004)).

Remanded.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).