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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1028

Filed: 20 June 2017

New Hanover County, No. 15CVS939

DONALD L. RAGAVAGE, Petitioner,

v.

CITY OF WILMINGTON, Respondent.

Appeal by Donald L. Ragavage from order entered 8 July 2016 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 9 March 2017.

Edelstein & Payne, by M. Travis Payne, Raleigh, N.C., and Woodley & McGillivary LLP, by Megan K. Mechak and T. Reid Coploff, Washington, D.C., for petitioner-appellant.

Sumrell, Sugg, Carmichael, Hicks, & Hart, P.A., by Scott C. Hart, New Bern, N.C., and Meredith Turner Everhart, City of Wilmington, Wilmington, N.C., for respondent-appellee.

DILLON, Judge.

Donald L. Ragavage (“Petitioner”) was terminated from his employment with the Fire Department in Wilmington (the “City”). The decision to terminate Petitioner was upheld by Wilmington’s Civil Service Commission (the “Commission”).

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Petitioner appeals a superior court's order which affirmed the Commission's decision to uphold his termination. We affirm.

I. Background

In 1990, the City hired Petitioner as a firefighter with the Wilmington Fire Department. In 2008, Petitioner was elevated to the rank of Captain.

In September 2014, the Chief of the Fire Department terminated Petitioner. In February 2015, the Commission sustained the Fire Chief's decision to terminate Petitioner.

Petitioner filed a petition in superior court for review of the Commission's decision. Petitioner also asserted state and federal constitutional claims. The City filed a notice of removal to federal court. The federal court remanded only Petitioner's petition challenging the Commission's decision, staying the remaining claims until Petitioner's claim challenging the Commission's decision was resolved in state court.

In July 2016 (on remand from federal court), the superior court affirmed the Commission's decision to uphold Petitioner's termination. Petitioner appeals.

II. Standard of Review

Pursuant to Section 11.6 of the Charter of the City of Wilmington (the "City Charter"), Petitioner filed a petition for judicial review with the Superior Court of New Hanover County. Section 11.6 of the City Charter makes the decisions of the

Commission subject to judicial review under the Administrative Procedure Act (“APA”), N.C. Gen. Stat. §§ 150B-1, *et seq.* 1977 N.C. Sess. Laws ch. 795, § 11.6.

On appeal, this Court must determine (1) whether the trial court applied the appropriate standard of review and, if so, (2) whether the court did so properly. *Amanini v. N.C. Dep’t of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994).

“Where the petitioner alleges that the agency decision was either unsupported by the evidence, or arbitrary and capricious, the superior court applies the whole record test to determine whether the agency decision was supported by substantial evidence contained in the entire record.” *Avant v. Sandhills*, 132 N.C. App. 542, 546, 513 S.E.2d 79, 82 (1999) (citation omitted). In applying the whole record test, “[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). “If substantial evidence supports an agency’s decision after the entire record has been reviewed, the decision must be upheld.” *Blalock v. N.C. Dep’t of Health and Human Servs.*, 143 N.C. App. 470, 473-74, 546 S.E.2d 177, 181 (2001). “A trial court reviewing an agency decision may not engage in independent fact-finding.” *In re Denial of NC IDEA’s Refund of Sales*, 196 N.C. App. 426, 434, 675 S.E.2d 88, 95 (citation omitted).

“Where the petitioner alleges that the agency decision was based on an error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency.” *Avant*, 132 N.C. App. at 546, 513 S.E.2d at 82.

III. Analysis

Petitioner argues that he was unlawfully terminated from the Fire Department when the City did not meet its burden to demonstrate that it had just cause to terminate him. The Commission found that Petitioner was terminated for taking his firetruck out of service on two separate occasions without notifying his superior. On one occasion, he clocked out; and on the other occasion, he allowed one of his subordinates assigned to his firetruck to leave work. Specifically, the Commission’s order stated, in relevant part, as follows:

9. An employee who clocks out without permission from his supervisor violates Wilmington Fire Department Policy 203.4 Hours Worked and Compensation, Section 4.1 which provides that “The Battalion Chief for the employee’s district, or in his/her absence, the acting Battalion Chief, is the only officer authorized to approve anyone for time off. In the case of an emergency, or if the Battalion Chief cannot be contacted, the Chief of Operations may approve time off.”

10. An employee who clocks out without permission from his or her supervisor leaving the fire station in question with insufficient numbers of fire fighters to operate a fire company violates Wilmington Fire Department Policy 206 Personnel Staffing, Section 3.7 which provides that “NOTE: At no time will any company operate with less

than three (3) people.”

11. The City of Wilmington Employee Handbook 2007 on page 2 under the heading “Work Policies and Procedures” and in the paragraph entitled “Attendance” provides in part as follows: “If you are absent from work without prior permission or without notifying your supervisor, you may be disciplined.”

12. On July 8, 2014, Mr. Ragavage clocked out from Fire Station #15 from about 12:31 p.m. until about 12:44 p.m. without notifying or obtaining permission from the acting Battalion Chief, . . .

13. On July 8, 2014, at approximately 12:31 p.m., Mr. Ragavage took his fire apparatus out of service without notifying or obtaining permission from the acting Battalion Chief, . . .

14. On July 8, 2014, at approximately 12:31 p.m., Mr. Ragavage left the fire station he was assigned to without notifying or obtaining permission from the acting Battalion Chief, . . .

15. On August 1, 2014, at approximately 1:00 a.m., Mr. Ragavage permitted one of the firefighters under his supervision at Fire Station #15 to leave work due to a family emergency before the end of his scheduled shift, causing his apparatus to be out of service.

16. On August 1, 2014, at approximately 1:00 a.m., Mr. Ragavage texted Battalion Chief . . . that his apparatus was out of service but did not receive an acknowledgement that Battalion Chief . . . received the text.

17. After texting Battalion Chief . . . on August 1, 2014, Mr. Ragavage made no other attempt to contact Battalion Chief . . . to inform him that his apparatus was out of service.

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18. On August 1, 2014, the apparatus Mr. Ragavage was assigned to at Station #15 was out of service from approximately 1:00 a.m. until approximately 6:30 a.m.

Petitioner does not challenge any of the Commission's findings of fact, and they are therefore binding on appeal. *In re K.D.L.*, 207 N.C. App. 453, 456, 700 S.E.2d 766, 769 (2010).

Petitioner offered evidence before the Commission which supports his view as to why he was terminated. However, there is also evidence which supports the Commission's findings that Petitioner was terminated for violating Fire Department policies. The superior court applied the "whole record test" to conclude that the Commission had "substantial, competent, and material evidence to determine that Petitioner violated policies of the City and the [Fire Department] and that Petitioner's termination should be upheld." We conclude that the superior court applied the correct standard and did so properly in affirming the Commission's findings regarding the reasons for Petitioner's termination.

Petitioner further argues that the superior court should have reversed the Commission's order based on the Commission's error in concluding that Petitioner was terminated for "cause." We have reviewed this argument *de novo* and conclude that the superior court did not err.

The City Charter provides that an employee of the Fire Department "may be dismissed only *for cause* and with an opportunity to be heard in his or her own

defense.” 1977 N.C. Sess. Laws ch. 795, § 11.6(a) (emphasis added). The City Charter does not specifically define “for cause.” The Charter further provides that “with the approval of the city manager, the chief of the appropriate department may dismiss or demote any employee for violating *any* rule or regulation of the department of which the employee is a member.” 1977 N.C. Sess. Laws ch. 795, § 11.6(c) (emphasis added). Further, “[t]he [C]ommission upon finding any employee guilty may sustain the action of the chief or take any other action that may be deemed appropriate.” *Id.*

Petitioner argues, citing *North Carolina Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 900-01 (2004), that “for cause” in the City Charter should be applied in the same way as “just cause” is applied in the context of disciplining a state employee under N.C. Gen. Stat. § 126-1, *et seq.*

In *City of Asheville v. Aly*, we dealt with a similar issue relating to interpreting a session law of the General Assembly governing the Civil Service Commission of the City of Asheville. 233 N.C. App. 620, 627, 757 S.E.2d 494, 500 (2014). In that case, the respondent, a terminated employee of the City of Asheville, argued that a requirement in the session law that an employee’s termination be “justified” required a finding that the termination be for “just cause” under N.C. Gen. Stat. § 126-35. *Id.* We held, in part, that the “just cause” standard did not apply, stating, “principles of statutory construction require that we assume the General Assembly would have

made clear [. . .] its intent that the “just cause” standard be utilized had it intended for that standard to apply.” *Id.*

“[I]ndividual portions of a statute must be interpreted in the context of the whole and ‘accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.’” *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 24, 348 S.E.2d 524, 526 (1986) (citing *Watson Industries v. Shaw, Comm’r of Revenue*, 235 N.C. 203, 210, 69 S.E.2d 505, 511 (1952)).

Here, as with the statute in *City of Asheville v. Aly*, if the General Assembly had intended “for cause” to mean “just cause,” it would have made its intent clear. The language in the City’s Charter provides that “violating any rule or regulation of the department of which the employee is a member” constitutes “cause” to terminate the employee. Here, Petitioner does not challenge that he violated City policies when he allowed his fire truck to be taken out of service on two occasions without properly informing his supervisor.

Based on the unchallenged findings of fact regarding City policy and Petitioner’s conduct, it is clear that the City had “cause” to discipline Petitioner. Assuming, *arguendo*, that “cause” should be construed as “just cause,” we conclude that the Commission’s findings support its conclusion that there was just cause to discipline Petitioner.

Petitioner further argues that the Commission's failure to address whether the City followed its progressive discipline policy and the City's failure to follow the policy violates his due process rights. We do not address the due process argument as that claim was retained by the federal court. In any event, we have reviewed the policy *de novo* and conclude that the City's policy was not violated.

The relevant language from the City's Employee Handbook, in which the progressive discipline policy is set out, states:

The City's progressive disciplinary system consists of Level One Reminder, Level Two Reminder, Suspension and Dismissal. A disciplinary notice remains active for a period of twelve months. Discipline will be progressive to at least the next level when the employee has a current active discipline. *Department directors are authorized to skip levels of progressive discipline.* [emphasis added]

Additionally, Article XI of the City Charter, called the "Civil Service Act," establishes that "[u]nless specifically excepted by this act, all other ordinances and *policies* affecting the employees of the City of Wilmington shall apply to employees under the Civil Service Act." 1977 N.C. Sess. Laws ch. 795, § 11.8 (emphasis added).

Here, there is a disagreement between the parties as to whether "levels of progressive discipline" were skipped. Assuming levels were skipped, we disagree with Petitioner's argument. Based on the plain language of the Employee Handbook, the Fire Chief, as the director of the Fire Department, was not required to follow the levels of the progressive discipline policy before terminating Petitioner. It was in the

Chief's discretion to "skip levels of progressive discipline." Petitioner has not established that City policy was not followed assuming the City chose not to follow its progressive discipline policy before terminating Petitioner for him allowing his firetruck to be taken out of service on two occasions without first notifying his supervisor, thereby rendering his station unable to respond to emergency calls, conduct described as a "major rule violation" under City policy.¹

We have also reviewed Petitioner's other arguments concerning the superior court's order affirming the Commission's decision to sustain Petitioner's termination and conclude that they lack merit. We note that Petitioner's constitutional and federal claims have been retained by the federal court; and, therefore, we do not address those claims.

IV. Conclusion

Based on the unchallenged findings of fact regarding City policy and Petitioner's conduct, we conclude that the City had cause to terminate Petitioner. The superior court's order upholding the Commission's order affirming the decision to terminate Petitioner is affirmed.

AFFIRMED.

Judges BRYANT and MURPHY concur.

¹ We note that the superior court found that Petitioner had previously received two written warnings and a suspension from his superiors relating to unrelated incidents concerning an email he had sent to other firefighters and comments he had made to City personnel, facts stipulated to the Commission.

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Report per Rule 30(e).