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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1085

Filed: 3 April 2018

Office of Administrative Hearings, No. 16 OSP 12191

WILLIAM G. ANTICO, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Respondent.

Appeal by petitioner from a final decision entered 3 July 2017 by Administrative Law Judge Augustus B. Elkins II in the Office of Administrative Hearings. Heard in the Court of Appeals 7 March 2018.

Bailey and Dixon, LLP, by Philip A. Collins and Maggie A. Craven, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Tammera S. Hill, for respondent-appellee.

ARROWOOD, Judge.

William G. Antico ("petitioner") appeals from a final decision of the North Carolina Office of Administrative Hearings, which concluded that the North Carolina Department of Public Safety ("NCDPS" or "respondent") had just cause to dismiss

petitioner from his position as a correctional officer. For the reasons that follow, we affirm the decision of the administrative law judge ("ALJ").

I. Background

On 25 August 2016, NCDPS terminated petitioner's employment as a correctional officer assigned to Polk Correctional Institution. His dismissal letter stated he was dismissed for unacceptable personal conduct, and that the decision to dismiss him "was made after a review of all of the information available, including prior disciplinary actions, the current incident of [u]nacceptable [p]ersonal [c]onduct, and the information [petitioner] provided during the Pre-Disciplinary Conference." The letter described the unacceptable personal conduct as petitioner's failure to follow his supervisor's instructions not to leave the premises of Polk Correctional Institution until he was released from his shift on 22 March 2016.

Petitioner grieved his termination, and, on 22 December 2016, he filed a petition for a contested case hearing at the Office of Administrative Hearings. The matter came on for hearing on 20 March 2017, the Honorable Augustus B. Elkins II presiding. In a final decision entered 3 July 2017, the ALJ found that petitioner had three active written warnings as of 22 March 2016:

> 3. On December 11, 2015 Petitioner received a written warning for unacceptable personal conduct for unauthorized use of force against an inmate that occurred on August 24, 2015 . . . .
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> 4. On June 30, 2016 Petitioner received a second written

> warning for unacceptable personal conduct for unauthorized use of force against an inmate that occurred on May 5, 2015. The warning was not issued for thirteen months after the conduct. Superintendent John Hamlin, correctional facility administrator at Polk, made the much-delayed warning retroactive to May 5, 2015. The written warning remained active for eighteen months from May 5, 2015 . . . . In his testimony, Hamlin[ ] acknowledged that (a) there was potential for bodily harm to Petitioner during this incident; (b) the inmate committed an aggressive physical act against Petitioner; (c) the situation was potentially dangerous; (d) Petitioner did not have much time to respond to the inmate's acts of aggression; and (e) there was no way Petitioner could have known the inmate's intentions at that time[.]
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> 5. On June 30, 2016, Petitioner received a third written warning for unacceptable personal conduct for failing to remain alert in his assignment to observe a self-injurious behavior inmate on March 16, 2016 . . . .

Concerning the events of 22 March 2016, the ALJ found as follows. On 22 March 2016, petitioner's overnight shift at Polk Correctional Institution, supervised by Sergeant Tamesha Jones, concluded. At the conclusion of the shift, Sergeant Jones ordered her squad to remain at the facility because some equipment was missing. Although it was known that employees were "expected to remain to help look for any missing equipment until they are relieved from duty by their supervisor or officer in charge[,]" it is unclear whether petitioner heard Sergeant Jones' order.

After the order was given, Sergeant Jones became aware that petitioner had failed to remain. Accordingly, she called the gatehouse to ask the attendant to request that petitioner call her when he arrived there to exit the premises. When petitioner called Sergeant Jones, the sergeant ordered him to return. When petitioner asked for an explanation, Sergeant Jones again instructed him to return. Petitioner assumed she directed him to return because equipment was missing. He told Sergeant Jones that he did not have any of the equipment, and refused to return, even though "[a]s a correctional officer, [p]etitioner was required to follow the reasonable commands of his superior officers" and Sergeant Jones' "directive to return to the unit was a reasonable, lawful command of a superior officer." Nevertheless, petitioner did not follow the order because "he did not like the tone in which she spoke to him, she did not answer his question as to why he needed to return to the unit and because he was tired and not in a good mood."

Based on these findings, the ALJ issued a final decision upholding petitioner's dismissal, concluding: (1) the greater weight of the evidence demonstrated that petitioner defied a reasonable and proper instruction, (2) this behavior constituted unacceptable personal conduct, and (3) just cause existed for petitioner's dismissal.

Petitioner appeals.

II. Discussion

Petitioner argues the ALJ erred in concluding respondent had just cause to terminate his employment. We disagree.

N.C. Gen. Stat. § 150B-51(b) (2017) authorizes our Court to affirm or remand the final decision of an ALJ, but we may only reverse or modify the decision if the petitioner's substantial rights:

> may have been prejudiced because the findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or [ALJ];
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

Id. We review "fact-intensive issues such as sufficiency of the evidence to support an agency's decision . . . under the whole-record test[,]" and questions of law *de novo*. *N. Carolina Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (brackets, quotation marks, and citation omitted). Thus, errors alleged under N.C. Gen. Stat. § 150B-51(b)(5) and (6) are reviewed pursuant to the whole record

standard of review, and we review errors alleged under § 150B-51(b)(1)-(4) *de novo*. N.C. Gen. Stat. § 150B-51(c).

A career state employee can only be discharged for disciplinary reasons if there is just cause. N.C. Gen. Stat. § 126-35 (2017). Just cause for a disciplinary action may be established upon a showing of an employee's unacceptable personal conduct, 25 N.C. Admin. Code 1J.0604(b)(2) (2017), which includes "(a) conduct for which no reasonable person should expect to receive prior warning; . . . (d) the willful violation of known or written work rules; [or] (e) conduct unbecoming a state employee that is detrimental to state service[.]" 25 N.C. Admin. Code 1J.0614(8) (2017).

To determine whether a disciplinary decision is supported by just cause, we first determine, as a question of fact under the whole record test, "whether the employee engaged in the conduct the employer alleges," and, then, "whether that conduct constitutes just cause for the disciplinary action taken." *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898 (brackets, internal quotation marks, and citation omitted). However, just cause "is not susceptible of a precise definition[,]" *id.* at 669, 599 S.E.2d at 900 (citations omitted), and "not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline." *Warren v. N. Carolina Dep't of Crime Control & Pub. Safety*, 221 N.C. App. 376, 382, 726 S.E.2d 920, 925 (2012).

Therefore:

> [t]he 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 . . . . If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Id. at 383, 726 S.E.2d at 925.[1] When considering whether there was just cause for termination, we consider "factors such as the severity of the violation, the subject matter involved, the resulting harm, the [employee's] work history, or discipline imposed in other cases involving similar violations." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

Here, the ALJ considered each of the *Warren* inquiries in concluding that just cause existed to dismiss petitioner. Petitioner argues the ALJ committed the following errors in determining there was just cause for termination: (1) finding that Sergeant Jones' order was reasonable, (2) concluding that petitioner's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code, and (3) failing to conclude that dismissal was unjust, and a lesser sanction should have been imposed. We consider petitioner's arguments in turn.

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[1] We note that "our Supreme Court is not bound by *Warren*'s three-prong analysis," however, "*Warren*'s analysis is a helpful conceptualization of *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), and is useful in the just cause analysis." *Harris v. N. Carolina Dep't of Pub. Safety*, __ N.C. App. __, __, 798 S.E.2d 127, 142 n.3, *aff'd*, __ N.C. __, 808 S.E.2d 142 (2017).

In his first argument, petitioner maintains the ALJ erred as to the first *Warren* inquiry, whether petitioner engaged in the conduct the employer alleged, by erroneously finding that Sergeant Jones' order was reasonable. We disagree. The ALJ did not err by finding that "[p]etitioner defied a reasonable and proper instruction given to him by a supervisor to return to his assigned unit."

Substantial evidence in the record demonstrates that an order to remain onsite to help look for any equipment missing at the end of a shift is expected of the correctional officers at Polk Correctional Institution, and they must remain until they are relieved from that duty. Moreover, although petitioner testified that Sergeant Jones unreasonably "yelled" at him when she gave him the order, he was the only witness that so testified; Sergeant Jones testified that she did not raise her voice. The ALJ heard the evidence, observed the witnesses, and was in the best position to determine the witnesses' credibility. *See Carroll*, 358 N.C. at 662, 599 S.E.2d at 896 (citations omitted). It is not this Court's role to substitute our judgment or resolve conflicting testimony. *N.C. Dep't of Crime Control and Pub. Safety v. Greene*, 172 N.C. App. 530, 536, 616 S.E.2d 594, 599 (2005) (citations omitted). We are only required to only decide whether substantial evidence supports a contested finding. We hold there is substantial evidence supporting the ALJ's finding that the order was reasonable. Thus, we find no error in the ALJ's first *Warren* inquiry.

Next, petitioner argues that the ALJ erred in the second *Warren* inquiry, whether petitioner's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code, because Sergeant Jones' order was unreasonable. We disagree. Petitioner's failure to follow the order violated a known and written workplace rule, which constitutes unacceptable personal conduct. *See* 25 N.C. Admin. Code 1J.0614(8).

Here, petitioner violated a known or written workplace rule through insubordination, which Section 7 of the State Human Resources Manual defines as "the willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning." According to NCDPS policy, as an officer in charge, Sergeant Jones was authorized to instruct petitioner in the performance of his duties. Although these policies have not been promulgated as a formal rule, and, thus, are not controlling, *see, e.g., Estate of Joyner v. N.C. Dep't of Health & Human Servs.*, 214 N.C. App. 278, 288-89, 715 S.E.2d 498, 506 (2011), the record demonstrates that these were known and written workplace rules. Substantial evidence supports the finding that the order was reasonable; thus, petitioner's failure to follow his supervisor's order amounted to insubordination, which violates a known and written workplace rule. Therefore, the ALJ did not err

by determining that petitioner's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code.

In his final argument on appeal, petitioner argues that the ALJ erred in his consideration of the third *Warren* inquiry because his dismissal was not just, and a lesser sanction should have been imposed. We disagree.

Just cause is a question of law that we review *de novo*. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 (citations omitted). To determine whether petitioner's conduct constituted just cause for his termination, we consider the facts and circumstances of the case, including the severity of the violation, the subject matter involved, resulting harm, work history, and discipline previously imposed. *Wetherington*, 368 N.C. at 592, 780 S.E.2d at 548. Petitioner admitted to disobeying a supervising officer, and the ALJ's determination that the command was reasonable was not in error. Considering these facts in light of the Department of Adult Correction's paramilitary rank structure, the need for order in a prison setting to maintain safety and security, that petitioner's conduct would cause respondent to lose confidence in petitioner's ability to work with an incarcerated population, and that discipline had previously been imposed for petitioner's unacceptable workplace behavior, we conclude that termination was warranted in this case.

AFFIRMED.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).