

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-37

Filed: 19 November 2019

Wake County, No. 17 OSP 562

DAVID PRICKETT, Petitioner,

v.

NORTH CAROLINA OFFICE OF STATE HUMAN RESOURCES, Respondent.

Appeal by respondent from final decision dated 11 September 2018 by Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 17 October 2019.

*Law Offices of Michael C. Byrne, by Michael C. Byrne, for Petitioner-Appellee.*

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for Respondent-Appellant North Carolina Office of State Human Resources.*

ARROWOOD, Judge.

Respondent North Carolina Office of State Human Resources (“OSHR”) appeals from a final decision of the Office of Administrative Hearings (“OAH”) granting a motion for summary judgment by David Prickett (“petitioner”) and denying OSHR’s motions for summary judgment. For the following reasons, we reverse.

I. Background

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On 25 September 2014, petitioner was hired as a “Communications Director” for OSHR, and was to report directly to the Chief Deputy State Human Resources Director. His position was characterized as a “confidential assistant,” and was therefore deemed statutorily exempt from the State Human Resources Act pursuant to N.C. Gen. Stat. § 126-5(c)(2) (2017). As an exempt employee, petitioner could be fired at-will for any nondiscriminatory reason. Petitioner worked in this exempt position from 13 October 2014 through 22 December 2016, at which point then-Governor Pat McCrory changed petitioner’s exempt status to non-exempt.

On 19 December 2016, following the election of Governor Roy Cooper, the General Assembly passed Session Law 2016-126, which made several amendments to Chapter 126 of the North Carolina General Statutes (the “State Human Resources Act” or “SHRA”). Specifically, an amendment to N.C. Gen. Stat. § 126-5(d)(1) reduced the number of state government positions the Governor could deem “exempt” from the State Human Resources Act from 1500 to 425. 2016 N.C. Sess. Law ch. 126, §§ 7, 8. It also removed OSHR from the list of cabinet department positions the Governor could deem exempt. In addition, a new provision, codified at N.C. Gen. Stat. § 126-5(d)(2c), provided that employees designated exempt pursuant to N.C. Gen. Stat. § 126-5(d)(1) who the Governor changes to “non-exempt” would gain immediate career State employee status (hereinafter the “Career Status Law”). *Id.*

As a career State employee, an employee enjoys the protection of the SHRA and can only be fired for cause. Prior to the enactment of the Career Status Law, an employee was required to work in a non-exempt position for at least twelve consecutive months before they could attain career status. *See* N.C. Gen. Stat. § 126-1.1(a) (2017). During that 12-month period, the non-exempt employee was considered to be probationary and not yet subject to the provisions of the SHRA. *Id.* The Career Status Law effectively eliminated this probationary period for certain previously exempt employees whose designation was changed to non-exempt.

Following the passage of these amendments, then-Governor McCrory changed petitioner's position from exempt to non-exempt effective 22 December 2016. On 30 December 2016, Governor-elect Cooper filed a lawsuit, *Cooper, III v. Berger*, No. 16 CVS 15636, 2017 WL 1433245 (N.C. Super. Mar. 17, 2017) (hereinafter "*Cooper I*"), challenging the recent amendments to the SHRA. This lawsuit included a challenge to the Career Status Law. *Cooper I*, 2017 WL 1433245, at \*2. On 3 January 2017, the Chief Justice of the North Carolina Supreme Court appointed a three-judge panel of the Superior Court to hear *Cooper I*. *Id.* at \*1. While that case was pending, petitioner received a letter on 19 January 2017 informing him that Governor Cooper reversed his position back to exempt status, and that he was terminated as of the end of day. On 27 January 2017, petitioner filed a Petition for

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Contested Case Hearing in the OAH, challenging his termination on grounds he could only be fired for cause.

On 17 March 2017, the three-judge panel appointed to hear *Cooper I* granted summary judgment to Governor Cooper. The panel found that N.C. Gen. Stat. § 126-5(d)(2c), the Career Status Law, was unconstitutional and enjoined its enforcement. *Cooper I*, 2017 WL 1433245, at \*13. The defendants subsequently appealed that decision to this Court. Prior to this Court considering the appeal, the Career Status Law was repealed on 25 April 2017 by Session Law 2017-6. 2017 N.C. Sess. Law 6, § 1. On 26 April 2017, the *Cooper I* defendants filed a motion asking this Court to dismiss as moot their appeal of the Career Status Law, and to vacate the lower court's decision. On 11 May 2017, this Court granted the motion to dismiss the appeal, but denied the motion to vacate the lower court's decision. On 11 September 2018, the administrative law judge ("ALJ") issued a final decision granting summary judgment to petitioner and denying OSHR's motions for summary judgment. OSHR appealed the ALJ's decision on 11 October 2018.

### II. Discussion

On appeal, OSHR contends the ALJ erred in granting petitioner's motion for summary judgment and denying its motions for three reasons. First, former Governor McCrory had no authority in the first instance to change petitioner's status from exempt to non-exempt. Second, the ALJ's decision runs contrary to the Superior

Court ruling in *Cooper I*, which found the Career Status Law to be unconstitutional. Finally, any notice violation was procedural in nature, not substantive, and thus the appropriate remedy is not reinstatement of petitioner.

This Court “appl[ies] the same review standard established by Rule 56 of the North Carolina Rules of Civil Procedure when reviewing an agency’s summary judgment ruling, and our scope of review is *de novo*.” *Heard-Leak v. N.C. State Univ. Ctr. for Urban Affairs*, 250 N.C. App. 41, 45, 798 S.E.2d 394, 397 (2016).

As an initial matter, we address this Court’s jurisdiction to hear the present case. The ALJ instructed the parties to file an appeal directly with this Court pursuant to N.C. Gen. Stat. § 126-34.02 (2017). However, this case was originally filed under N.C. Gen. Stat. § 126-5(h), which provides: “[i]n case of dispute as to whether an employee is subject to the provisions of this Chapter, the dispute shall be resolved as provided in Article 3 of Chapter 150B.” N.C. Gen. Stat. § 126-5(h) (2017). Article 3 of Chapter 150B provides a right to a contested case hearing in an administrative proceeding, in which the ALJ shall make a final decision or order. N.C. Gen. Stat. §§ 150B-22, 150B-34 (2017). Article 4 of that Chapter in turn provides “[a]ny party or person aggrieved by the final decision in a contested case . . . is entitled to judicial review of the decision under this Article[.]” N.C. Gen. Stat. § 150B-43 (2017). Thus, Chapter 150B, which governs contested case hearings before an

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ALJ, also provides a right of appeal of the ALJ's final decisions. However, it is unclear whether an appeal may be made directly to this Court.

Even if N.C. Gen. Stat. § 126-5(h) does not provide a direct right of appeal to this Court, “[t]his Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to ‘treat the purported appeal as a petition for writ of certiorari’ and grant it in our discretion.” *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (quoting *State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985)). Acknowledging the law is unclear in this area, the parties have both requested that this appeal be treated as a petition for *writ of certiorari*. In the interest of judicial economy, we consider OSHR's brief as a petition for *writ of certiorari*, grant the petition, and determine the merits of this appeal.

We now address the merits of the case.

At the outset, we note petitioner's argument relies heavily on *Wright v. N.C. Office of State Human Res.*, No. COA18-276, 2019 WL 1283831 (N.C. Ct. App. Mar. 19, 2019), an unpublished decision of this Court. Indeed, petitioner contends *Wright* renders moot many of the issues in the present case. However, petitioner's reliance on our decision in *Wright* is misplaced for two reasons. First, as an unpublished disposition, *Wright* is not binding precedent. Second, *Wright* is easily distinguishable from the present case. There, the Court held the petitioner was a career State employee on grounds not applicable here.

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In *Wright*, the petitioner worked in a non-exempt position for almost twelve consecutive months. *Wright*, 2019 WL 1283831, at \*1. Just one day before the petitioner would have attained career State employee status, she received a letter informing her that her status was changed to exempt and that she was terminated. *Id.* at \*2. However, because the petitioner was notified of the exempt designation the same day it took effect, OSHR violated N.C. Gen. Stat. § 126-5(g) (2017), which required 10 working days prior written notice before placing an employee in an exempt position. Reasoning that the petitioner would have attained career State employee status had the statutory notice period been honored, we held the petitioner in *Wright* was a career State employee at the time of her termination, and could thus not be terminated without cause. *Id.* at \*5. Furthermore, we held the General Assembly's placement of OSHR in the Governor's Office for organizational purposes did not grant the Governor authority to exempt the petitioner. *Id.* at \*8. Importantly, the facts of *Wright* differ from those of the present case, and compel us to reach a different conclusion.

We find that all three arguments advanced by OSHR have merit, and that each, standing alone, would justify reversal. Nevertheless, in order to make the record clear, we address each argument in turn below.

#### A. Reversal of Exempt Status

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On appeal, OSHR first argues petitioner was not a career State employee and could thus be dismissed without cause because former Governor McCrory had no authority in the first instance to change petitioner's status to non-exempt. We agree.

Section (d) of the SHRA grants the Governor the authority to designate as exempt certain cabinet department positions, as provided below:

- (d) (1) Exempt Positions in Cabinet Department. - Subject to the provisions of this Chapter, which is known as the North Carolina Human Resources Act, the Governor may designate a total of 425 exempt positions throughout the following departments and offices:
  - a. Department of Administration.
  - b. Department of Commerce.
  - c. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
  - d. Department of Public Safety.
  - e. Department of Natural and Cultural Resources.
  - f. Department of Health and Human Services.
  - g. Department of Environmental Quality.
  - h. Department of Revenue.
  - i. Department of Transportation.
  - j. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
  - k. Department of Information Technology.
  - l., m. Repealed by Session Laws 2016-126, 4<sup>th</sup> Ex. Sess., s. 7, effective December 19, 2016.
  - n. Department of Military and Veterans Affairs.



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N.C. Gen. Stat. § 126-5(d)(1) (2017). Section (d) further grants the Governor the authority to reverse the designation of a position the Governor designated exempt, as follows:

- (d) (6) Reversal. - Subsequent to the designation of a position as an exempt position as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the Governor or by an elected department head in a letter to the Director of the Office of State Human Resources, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate.

N.C. Gen. Stat. § 126-5(d)(6).

In a letter dated 28 December 2016, then-Governor McCrory reversed petitioner's position from exempt to non-exempt effective 22 December 2016. In so doing, then-Governor McCrory cited authority under N.C. Gen. Stat. § 126-5(d)(6). However, the organization and language of N.C. Gen. Stat. § 126-5 as a whole reveals the Governor's power to reverse exempt status under N.C. Gen. Stat. § 126-5(d)(6) only applies to cabinet department employees the Governor has power to designate exempt in section (d). Section (d) begins by listing the departments in which the Governor may designate exempt positions. N.C. Gen. Stat. § 126-5(d)(1). The Session Law 2016-126 amendments to the SHRA removed OSHR, the department in which petitioner was employed, from that list. 2016 N.C. Sess. Law ch. 126, § 7. In addition, petitioner's position was initially designated exempt not under N.C. Gen. Stat. § 126-

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5(d), but under N.C. Gen. Stat. § 126-5(c), which rendered petitioner statutorily exempt as a “confidential assistant.” See N.C. Gen. Stat. § 126-5(c) (2017). Thus, then-Governor McCrory had no authority to designate petitioner’s position as exempt in the first instance; rather, petitioner’s position was designated exempt under a different statutory provision. It follows, then, that he also had no authority to reverse such designation. Accordingly, petitioner’s position was still exempt from the SHRA at the time of his termination, and OSHR was well within its rights to terminate petitioner at will.

The ALJ correctly found “McCrory’s authority under N.C. Gen. Stat. § 126-5(d)(6) was left intact during the General Assembly’s amendment of N.C. Gen. Stat. § 126-5 in Session Law 2016-126.” However, it failed to consider the limited circumstances in which such authority may be exercised. We therefore hold the ALJ erred in finding petitioner was a career State employee because the Governor had no authority to reverse petitioner’s exempt status.

#### B. Career Status Law Unconstitutional

OSHR next argues the ALJ erred in finding petitioner was a career State employee because the Career Status Law was inapplicable to petitioner and the ALJ’s decision runs directly contrary to the superior court’s ruling in *Cooper I*. We agree.

The Session Law 2016-126 amendments added the following subsection to the SHRA:

Changes in Cabinet Department Exempt Position Designation. - If the status of a position designated exempt pursuant to subsection (d)(1) of this section is changed and the position is made subject to the provisions of this Chapter, an employee occupying the position who has been continuously employed in a permanent position for the immediate 12 preceding months, shall be deemed a career State employee as defined by G.S. 126-1.1(a) upon the effective date of the change in designation.

2016 N.C. Sess. Laws ch. 126, § 7, codified at N.C. Gen. Stat. § 126-5(d)(2c). A “career State employee” is defined as one who “(1) [i]s in a permanent position with a permanent appointment, and (2) [h]as been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the [SHRA] for the immediate 12 preceding months.” N.C. Gen. Stat. § 126-1.1(a) (2017). Protected under the SHRA, career State employees may generally only be fired for cause and after some due process. An employee who has not yet worked the full twelve consecutive months in a non-exempt position is considered a probationary State employee not subject to the SHRA, and can be terminated at will. N.C. Gen. Stat. § 126-1.1(b). However, the Career Status Law effectively eliminated the probationary period for employees designated exempt pursuant to subsection (d)(1) whose exempt status was changed to non-exempt.

Days after its enactment, Governor-elect Cooper challenged the Career Status Law and other amendments in *Cooper I*. On 17 March 2017, the three-judge panel in *Cooper I* found the Career Status Law unconstitutional. Noting that the Career

Status Law, “by affording ‘career’ status to those employees who were exempt in the prior administration, has also substantially limited the Governor’s ability to remove them[,]” the panel concluded that the law “leave[s] the Governor ‘with little control over the views and priorities of the officers’ holding key decision-making positions in the executive branch.” *Cooper I*, 2017 WL 1433245, at \*13. Because it “prevent[ed] the Governor from taking care that the laws are faithfully executed,” the three-judge panel permanently enjoined the Career Status Law and declared it unconstitutional. *Id.* at \*14. On 11 May 2017, this Court granted the *Cooper I* defendant’s motion to dismiss their appeal, but denied the motion to vacate the lower court’s decision. Petitioner’s contested case was heard and a final decision issued in the OAH on 11 September 2018, after *Cooper I* was decided.

“It is a rule of statutory construction that a statute declared unconstitutional is void *ab initio* and has no effect.” *Am. Mfrs. Mut. Ins. Co. v. Ingram*, 301 N.C. 138, 147, 271 S.E.2d 46, 51 (1980) (citations omitted). Indeed, as the Supreme Court has recognized, “[a]n unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.” *Norton v. Shelby Cty.*, 118 U.S. 425, 442, 30 L. Ed. 178, 186 (1886). Nevertheless, noting that “[t]he actual existence of a statute, prior to [ ] a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored[,]” the Supreme Court has

rejected a general rule of retroactivity. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 84 L. Ed. 329, 332-33 (1940). North Carolina courts have followed suit, holding that, ultimately, “a test of reasonableness and good faith is to be applied in determining the effect which a judicial decision that a statute is unconstitutional will have on the rights and obligations of parties who have taken action pursuant to the invalid statute.” *Ingram*, 301 N.C. at 149, 271 S.E.2d at 52.

Here, petitioner was designated exempt pursuant to N.C. Gen. Stat. § 126-5(c)(2), not N.C. Gen. Stat. § 126-5(d)(1). The Career Status Law conferred immediate career State employee status only on “a position designated exempt pursuant to subsection (d)(1) of [ ] section [(d)]” that was changed to non-exempt. 2016 N.C. Sess. Laws ch. 126, § 7. Thus, it did not apply to petitioner. Accordingly, even if the Governor’s reversal of petitioner’s status was valid, petitioner at most became a probationary State employee in a non-exempt position. As such, he was required to work in a non-exempt position for twelve consecutive months before he could achieve career state status. As of 19 January 2017, the date petitioner was terminated, petitioner had only served in a non-exempt position for 29 days. Therefore, he was not a career State employee, and could be fired at will.

Furthermore, even if, assuming *arguendo*, the Career Status Law did apply to petitioner, it was found to be unconstitutional shortly after its enactment. Because we denied the appellant’s motion to vacate the judgment, the reasoning stands. In

addition, though petitioner argues *Cooper I* was not binding on the OAH, we disagree. Chapter 150B grants the superior court authority to review final decisions of the OAH, such as the one at issue here. *See* N.C. Gen. Stat. § 150B-43. Thus, the superior court's rulings with regard to disputes of whether an employee is subject to the SHRA are binding on the OAH. *Cooper I* concerned a provision directly related to whether an employee was subject to the SHRA. We therefore hold its decision was binding on the OAH.

In addition, while North Carolina courts have “retreated from the absolute rule that an unconstitutional statute is a nullity,” we hold the Career Status Law is null under the *Ingram* test. *Ingram*, 301 N.C. at 149, 271 S.E.2d at 52. Pursuant to *Ingram*, we will not retroactively apply a holding of unconstitutionality unless the parties who relied on the unconstitutional statute acted unreasonably or in bad faith. Here, while it may have been lawful for then-Governor McCrory to rely on the Career Status Law when he changed petitioner's status to non-exempt, and thereby attempted to confer immediate career status on petitioner, we find no support in the record to persuade us that he acted reasonably or in good faith.

Only days prior to the end of his term, then-Governor McCrory acted to prevent the removal of exempt employees hired under his administration by making them non-exempt, with the expectation that the Career Status Law would protect them from being fired without cause by the next Governor. This action was clearly an

attempt to permanently install employees hired by then-Governor McCrory—who had been defeated in his bid to retain his seat—who may not be favorable to the incoming administration. Thus, then-Governor McCrory’s actions taken pursuant to the Career Status Law would serve to thwart the duly elected Governor’s authority to hire employees to carry out the will of the people. Therefore, these unreasonable actions done under this unconstitutional statute should not be allowed to stand. Moreover, retroactively applying the *Cooper I* decision will not result in untoward consequences. Those employees whose positions then-Governor McCrory changed to non-exempt are, though unable to attain *immediate* career status, still eligible for career status upon their completion of the twelve month probationary period, as has been the policy for years.

C. 10-Day Notice

Finally, OSHR argues that if petitioner was entitled to a 10-day notice period upon reversal of his status from non-exempt back to exempt, any notice violation was procedural in nature, not substantive, and thus the appropriate remedy is not reinstatement of petitioner. We agree.

Pursuant to N.C. Gen. Stat. § 126-5(g), “No employee shall be placed in an exempt position without 10 working days prior written notification that such position is so designated.” N.C. Gen. Stat. § 126-5(g) (2017).

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Because we have held that even if petitioner was a non-exempt employee the Career Status Law did not apply to him, we also hold that even if there was a violation of the 10-day notice period, it would not have been substantive. Had the notice period been honored, petitioner still would not have had a protected property interest in his position. The Career Status Law did not apply to petitioner, and even if it did, it has been struck down as unconstitutional and, as discussed *supra*, is void *ab initio*. Thus, petitioner at most was a probationary State employee at the time of his termination. As such, he was required to work in a non-exempt position for twelve consecutive months before he could attain career State employee status and thereby gain a protected property interest in his continued employment. *See* N.C. Gen. Stat. § 126.1-1. However, petitioner only worked in a non-exempt position for 29 days before he was terminated. Even if OSHR had waited 10 working days to terminate him, petitioner would not have attained career State employee status in that time period, as he still had eleven more months to go. Accordingly, any violation of the 10-day notice period was procedural in nature, not substantive, and reinstatement was not the appropriate remedy.

### III. Conclusion

For the foregoing reasons, we reverse the decision of the OAH.

REVERSED.

Judges COLLINS and HAMPSON concur.