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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-765

Filed: 3 November 2020

Office of Administrative Hearings, No. 17 OSP 04570

DONALD RAY RICHARDSON, Petitioner

v.

NC STATE BUREAU OF INVESTIGATION, Respondent

Appeal by respondent from final decision entered 28 March 2018 by Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 9 April 2019.

Gross Law Offices, by Mikael R. Gross for petitioner-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamera S. Hill, for the State.

BRYANT, Judge.

Where the findings and conclusions of the final decision of the Administrative Law Judge (ALJ) from the Office of Administrative Hearing (OAH) were inadequate to show that the State Bureau of Investigation (SBI) lacked just cause to discipline petitioner Donald Ray Richardson, a career State employee with the SBI, we vacate the final decision of the ALJ and remand for further proceedings not inconsistent with

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this opinion. As such, we do not address the SBI's remaining challenge to the ruling concerning the extent of the discipline imposed.

Factual and Procedural Background

On 10 July 2017, Richardson filed a petition for a contested case hearing. Richardson alleged that his employer "was pre-disposed to discipline [him] for alleged conduct that was not a violation of policy or law[.]" and that the SBI's decision to impose a 10-day suspension and to deny Richardson the ability to work in Durham County violated state and federal law and was arbitrary and capricious. In his prehearing statement, Richardson specified the following facts.

Richardson was employed by the Alcohol Law Enforcement (ALE) branch of the SBI. On 5 January 2017, Richardson and three other ALE agents were at a convenience store in Durham when they discovered a woman asleep in a vehicle with the engine running and the headlights on. Richardson approached, engaged the woman in conversation, and determined that she was impaired on a narcotic. The woman was asked to step out of the vehicle during which a law enforcement agent observed drug paraphernalia (measuring scales and a straw) on her seat and in the floorboard. The agents did not arrest the woman but seized the paraphernalia and failed to log the evidence. Roughly twenty minutes later, the woman entered the convenience store and called police, alleging that Richardson had raped her. Dual investigations into the allegations surrounding the 5 January 2017 contact were

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launched by the SBI and the Durham Police Department. Ultimately, surveillance footage showed the claim to be false.

During the investigations, during the execution of a warrant to search Richardson's property and to seize "[e]lectronic data processing and storage devices such as cellphones, computers and computer systems," Richardson refused to surrender his personal cell phone. After conferencing with counsel, Richardson allowed law enforcement officers to make a copy of the data on his cell phone. Richardson and the other agents were placed on investigatory leave for sixty days. Following the conclusion of its investigation but prior to the issuance of its final agency decision, the SBI returned Richardson to full duty. At the commencement of the investigation, the SBI had served Richardson with notice that he was the subject of an internal investigation to address the allegation that he had engaged in Unacceptable Personal Conduct relating to the 5 January 2017 search; however, when served with notice of his pre-disciplinary conference, dated 7 March 2017, Richardson was informed that the allegations under investigation had been expanded to include unlawful search, unlawful seizure, obstruction of justice, and failure to complete an AL-50 ALE Report of Seized Property. On 12 June 2017, the SBI issued its final agency decision in which it suspended Richardson without pay for 10 days, prohibited him from working as an ALE agent in Durham County, and required

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remedial training. Richardson filed a petition for a contested case hearing in the OAH. The matter was heard on 17 December 2017 before ALJ Donald W. Overby.

On 28 March 2018, the ALJ entered an amended final decision in which it found that Richardson had not engaged in an illegal search of the vehicle on 5 January 2017 and was not responsible for failing to account for the paraphernalia taken from the vehicle. But Richardson had failed to comply with the search warrant executed during the investigation, when he failed to surrender his cell phone. Although he violated work rules, the ALJ concluded that Richardson's conduct did not rise to a level justifying discipline without prior warning. Based on this, the ALJ found that the "right thing to do [wa]s to give . . . a written warning and for [Richardson] to attend remedial training on search and seizure." Accordingly, the ALJ reversed the final agency decision of the SBI.

The SBI appeals.

Standard of Review

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006) (citation omitted). "When utilizing the whole record test, . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial

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evidence.” *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (citation and quotation marks omitted). “The ‘whole record’ test does not allow the reviewing court to replace the Board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.” *Thompson v. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

Just Cause for Discipline

In its first argument, the SBI contends that the ALJ erred in determining that the SBI lacked just cause to suspend Richardson. We agree.

Our General Statutes provide that “[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” N.C. Gen. Stat. § 126-35(a) (2019). Our Supreme Court has held that “just cause” is a term lacking a precise definition, and thus whether just cause exists “can only be determined upon an examination of the facts and circumstances of each individual case.” *N.C. Dep’t. of Env’t. & Nat. Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004) (citation omitted). This determination requires two separate inquiries: First, a factual inquiry, reviewed under the whole record test, as to whether the employee engaged in the conduct alleged; and second, a legal inquiry, reviewed *de novo*, as to whether that conduct

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constitutes just cause. *Id.* at 665–66, 599 S.E.2d at 898. In applying this inquiry, this Court stated the following:

The 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. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. 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. Just cause must be determined based upon an examination of the facts and circumstances of each individual case.

Warren v. N.C. Dep’t of Crime Control, 221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012) (citation and quotation marks omitted).

Here, the ALJ made findings of fact on each of the three *Warren* prongs—whether Richardson engaged in the conduct alleged, whether that conduct fell within a category of unacceptable personal conduct, and whether that misconduct amounted to just cause—which, on appeal, the SBI challenges.

A. The Conduct Alleged

On the first prong, whether Richardson engaged in the conduct alleged, the ALJ found that Richardson did not engage in an illegal search and was not responsible for property taken from the woman’s vehicle. The SBI contends, however, that there was no competent evidence of probable cause to search the woman’s

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vehicle, and thus that the search was illegal. The SBI further argues that, as Richardson initiated contact with the sleeping woman, he was “lead” agent, and therefore responsible for any evidence seized from the scene. The ALJ’s finding that nobody was responsible was unsupported by the evidence in the record, including Richardson’s own admission.

With regard to the vehicle search, one of the agents present with Richardson, Agent Cates, testified that he saw drug paraphernalia in plain sight within the vehicle. This evidence supported the ALJ’s finding and conclusion that the agent’s observation of drug paraphernalia in the vehicle in plain view supported the determination that the agents had probable cause to search the vehicle. Accordingly, pursuant to whole record review, the ALJ did not err in finding that Richardson did not engage in an illegal search.

With regard to whether Richardson was “lead” agent, Richardson argues that Cates was the one who in fact searched the vehicle and therefore, that Cates was responsible for the evidence. The ALJ found that no agent on the scene submitted a form AL-50, Report of Seized Property, but also found that no ALE policy established which agent was required to file such a report. Notwithstanding this finding, however, three facts are clear: One, Richardson was present at and initiated and maintained contact with the woman; two, Richardson was entrusted with the evidence but did not file the report of seized property; and three, ALE policy required

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that an agent at the scene file an AL-50 form. Neither the evidence nor the ALJ's findings dispute this. Accordingly, the ALJ erred in finding that Richardson did not have to take responsibility for the evidence seized from the woman's vehicle.

With regard to whether Richardson failed to comply with a search warrant for his cell phone, the ALJ found that Richardson did fail to comply, but qualified this finding with a determination that if Richardson had surrendered his cell phone and incriminating evidence was discovered on it, the evidence would be subject to suppression as a consequence of defects in the warrant application. The ALJ's assessment of the warrant application is not relevant. What matters is whether Richardson engaged in the conduct alleged. We hold that the ALJ properly determined that Richardson failed to comply with the search warrant.

B. Unacceptable Personal Conduct

Having established that Richardson (1) failed to account for seized evidence, and (2) failed to comply with a search warrant, we now examine the second *Warren* prong: Whether this conduct fell within the range of unacceptable personal conduct. As to unacceptable personal conduct, the ALJ only addressed Richardson's noncompliance with the search warrant, not his failure to account for seized evidence.¹

¹ The ALE policy on the collection of evidence is present in the record. In a section concerning reports to be filed, the policy states that "[t]he Report of Seized Property (AL-50) shall be used to record and report the seizure of any property connected with any arrest, investigation, or ABC violation."

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With regard to Richardson’s failure to comply with the search warrant for his cell phone, the ALJ found that Richardson did not engage in obstruction of justice, did not place the agency in disrepute, and did not discredit the SBI. However, the ALJ did find that Richardson’s conduct “does willfully violate known or written work rules[.]” Pursuant to the North Carolina Administrative Code, “unacceptable personal conduct” includes “the willful violation of known or written work rules[.]” 25 N.C. Admin. Code 1J.0614(8)(d). The ALJ found that Richardson’s conduct was a willful violation of work rules, and we hold that this finding shows that Richardson engaged in unacceptable personal conduct.

C. Just Cause

The final *Warren* prong is whether the conduct alleged amounted to just cause. Factors to consider in examining whether conduct justifies discipline include “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).

The policy goes on to specifically mandate when and how an AL-50 form must be executed. It is undisputed that Richardson, an agent at the scene where evidence was seized, did not file an AL-50 form.

Pursuant to the North Carolina Administrative Code, “unacceptable personal conduct” includes “the willful violation of known . . . work rules[.]” 25 N.C. Admin. Code 1J.0614(8)(d). Given his own insistence at the hearing that he was not responsible for the evidence, and his argument on appeal that in fact Agent Cates was responsible, it is clear that Richardson’s refusal to file the AL-50 form was the product of a willful decision on his part and constituted unacceptable personal conduct.

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The ALJ's findings on this issue are summary at best. In a total of four sentences, the ALJ found as follows:

48. Petitioner has a work history of over 20 years of good work performance and lack of any prior formal disciplinary action. There is little or no evidence of resulting harm to the Respondent or Durham Police Department.

49. There is no evidence of discipline imposed in cases involving similar violations. It is purely an assumption, but cases involving similar violations are probably a rarity.

The paucity of the ALJ's findings on this key point is concerning. We note that it is not the place of the ALJ as a fact-finding tribunal, administrative or otherwise, to make "an assumption." The role of the ALJ is to determine the facts, and to make findings and conclusions based thereupon. It is not the role of the ALJ to "assume" that what happened to Richardson is "probably a rarity."

Here, the ALJ's determinations on the *Wetherington* factors are inadequate. The lack of detail forces us to conclude that the ALJ did not adequately consider whether the conduct alleged amounted to just cause for discipline. The amended final decision offers no factual justification. The ALJ's findings throughout focus more on the conduct of third parties—such as whether the affidavit in support of the search warrant was perjured, or whether Agent Cates was responsible for the AL-50 form—than whether Richardson's conduct amounted to just cause for discipline. Accordingly, we hold as a matter of law that these determinations, and the conclusion arising from them, were not supported by substantial evidence, and were in error.

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Therefore, we vacate the decision of the ALJ and remand this matter for further proceedings not inconsistent with this opinion.

Authority

In its second argument, the SBI contends that the ALJ acted beyond its authority by ordering the SBI to permit Richardson to work in Durham. Because we vacate the decision of the ALJ, however, we need not address this argument.

VACATED AND REMANDED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).