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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-152

No. COA20-346

Filed 20 April 2021

No. 19 OSP 3469

ALEJANDRO ASBUN, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

Appeal by petitioner from final decision entered 27 January 2020 by Administrative Law Judge Tenisha S. Jacobs in the Office of Administrative Hearings. Heard in the Court of Appeals 24 March 2021.

Alejandro Asbun, pro se, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Assistant Attorney General Joseph E. Elder, for respondent-appellee.

ARROWOOD, Judge.

¶ 1

Alejandro Asbun (“Mr. Asbun”) appeals from a final decision filed 27 January 2020 by an administrative law judge (“ALJ”) in the Office of Administrative Hearings (the “OAH”). For the following reasons, we dismiss this appeal.

I. Background

¶ 2

Since October 2014, Mr. Asbun has been employed by the North Carolina Department of Health and Human Services (“DHHS”) as a Drug Control Unit manager in the Division of Mental Health. Mr. Asbun was terminated on 31 July 2018. As of the date of his dismissal, Mr. Asbun was a career state employee subject to all provisions, protections, and appeal rights afforded to such government employees.

¶ 3

On 27 June 2018, DHHS dismissed Mr. Asbun for disciplinary reasons on the stated basis of unacceptable personal conduct. The offensive conduct included Mr. Asbun’s release of a North Carolina Medical Board (“NCMB”) report containing data from the North Carolina Controlled Substances Reporting System about NCMB members and their prescriptions of controlled substances for a period including the first quarter of 2018 (“Report D”). Report D contained information for over 20,000 prescribers, including personally identifiable information about some professionals not regulated by NCMB. In support of its termination decision, DHHS claimed that Mr. Asbun released Report D without prior authorization from his supervisor, made errors in the report, and released the report knowing that NCMB intended to release portions of the report to the public.¹

¹ DHHS further accused Mr. Asbun of failing to report for work on two separate occasions.

¶ 4 Mr. Asbun had no prior disciplinary history during his employment with DHHS. To the contrary, Mr. Asbun had received positive and above-average performance reviews during his tenure with the agency.

¶ 5 This action was commenced by the filing of a petition for a contested case hearing by counsel for Mr. Asbun on 17 June 2019. Mr. Asbun claimed that DHHS had terminated him without just cause and in violation of the North Carolina Whistleblower Act. A hearing was held in the OAH before an ALJ on 30 August 2019. On 27 January 2020, the ALJ entered a final decision determining that DHHS had dismissed Mr. Asbun without just cause and ordered that he should be “retroactively reinstated to the same or similar position with back pay, attorney’s fees, as well as all other remedies available under law.” However, the ALJ concluded that Mr. Asbun failed to establish that his termination stemmed from a violation of the Whistleblower Act codified in Chapter 126, Article 14 of our General Statutes.

¶ 6 On 25 February 2020, pursuant to N.C. Gen. Stat. § 126-34.02 and § 7A-29, Mr. Asbun, *pro se*, appealed the dismissal of his complaint regarding the alleged Whistleblower violation.

II. Discussion

¶ 7 “The following issues may be heard as contested cases in the OAH: (1) discrimination or harassment; (2) retaliation for protesting discrimination; (3) just cause for dismissal, demotion, or suspension; (4) denial of veteran’s preference; (5)

failure to post a State position, or to give a career State employee priority consideration for promotion; and (6) whistleblower grievances.” *Brown v. N. Carolina Dep’t of Pub. Safety*, 256 N.C. App. 425, 427, 808 S.E.2d 322, 324 (2017) (citing N.C. Gen. Stat. § 126-34.02(b)(1)-(6)). Section 126-34.02(a) of the North Carolina General Statutes reads, in pertinent part, “[a]n **aggrieved party** in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a).” N.C. Gen. Stat. § 126-34.02(a) (2019) (emphasis added). Only an “aggrieved party” is entitled to appeal directly to this Court for review of a final decision by an ALJ in a contested case in the OAH. *See* N.C. Gen. Stat. § 126-34.02(a); *see also Harris v. N. Carolina Dep’t of Pub. Safety*, 252 N.C. App. 94, 98, 798 S.E.2d 127, 132, *aff’d*, 370 N.C. 386, 808 S.E.2d 142 (2017) (citations omitted); *accord Sarda v. City of Durham Bd. of Adjustment*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) (holding that petitioners lacked standing to appeal from the respondent agency’s decision).

In this case, the ALJ determined that DHHS failed to prove by a preponderance of the evidence that it had just cause to dismiss Mr. Asbun and therefore ordered that Mr. Asbun be retroactively reinstated to the same or similar position with back pay, attorney’s fees, as well as all other remedies available under law. In the instant appeal, Mr. Asbun does not allege any additional actual damages apart from those already remedied by the final agency decision. Thus, assuming

arguendo that Mr. Asbun *had* established that he was terminated in violation of the Whistleblower Act, he has not argued on appeal (in his briefs or other papers) that he would have received anything more than he previously received by virtue of the recourse ordered by the ALJ, which included all available remedies set out in N.C. Gen. Stat. § 126-34.02. Therefore, Mr. Asbun has failed to show this Court that he is an “aggrieved party” as that term is used in N.C. Gen. Stat. § 126-34.02(a). As such, Mr. Asbun is not entitled to judicial review of the final agency decision dismissing his Whistleblower allegation. *See* N.C. Gen. Stat. § 126-34.02(a); *see also Harris*, 252 N.C. App. at 98, 798 S.E.2d at 132; *accord Johnson v. N. Carolina Dep’t of Pub. Safety*, 266 N.C. App. 50, 61, 830 S.E.2d 857, 864 (2019) (declining to reach second contested issue due to court’s holding that ALJ applied improper framework for determining propriety of first issue raised in support of contested-case hearing petition). To the extent Mr. Asbun implies that he is entitled to additional remedies under his dismissed Whistleblower claim, those requests are waived as they were not raised in the instant appeal. N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

Nonetheless, Mr. Asbun asks this Court to issue an injunction prohibiting DHHS and officials at O’Berry Neuro Medical Treatment Center (his “new” employer following reinstatement) from retaliating against him for his prior actions. This claim was not part of his initial claim before the OAH nor could it have been. Mr.

Asbun’s claim for retaliation after reinstatement would properly be made by filing a new claim through the appropriate administrative channels. Mr. Asbun’s attempt to litigate a case for retaliation involving speculative and future acts by officials at O’Berry Neuro Medical Treatment Center is not properly before this Court in the instant appeal.

¶ 10 Mr. Asbun has made no showing that he is a party aggrieved in this appeal and, therefore, his appeal must be dismissed.

III. Conclusion

¶ 11 For the foregoing reasons, we dismiss this appeal.

DISMISSED.

Judges HAMPSON and CARPENTER concur.

Report per Rule 30(e).