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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-890

Filed 06 June 2023

Office of Administrative Hearings, No. 21OSP01175

N.C. DEPARTMENT OF PUBLIC SAFETY, Respondent/Appellant,

v.

JOE T. LOCKLEAR, Petitioner/Appellee.

Appeal by respondent from a decision entered 9 May 2022 by Administrative Law Judge Michael C. Byrne. Heard in the Court of Appeals 10 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Bettina J. Roberts, for respondent-appellant.

The McGuinness Law Firm, by J. Michael McGuinness, for petitioner-appellee.

Amicus brief filed by M. Travis Payne, Edelstein & Payne, and Trisha Pande, Patterson Harkavy LLP, for petitioner-appellee.

Amicus brief filed by John W. Gresham, Tin Fulton Walker & Owen, PLLC, for petitioner-appellee.

FLOOD, Judge.

The North Carolina Department of Public Safety (“Respondent”) appeals from an administrative decision concluding Respondent lacked just cause to terminate Trooper Joe Travis Locklear (“Petitioner”) from his position as a career State

employee. As explained in further detail below, Administrative Law Judge Michael C. Byrne (“ALJ Byrne”) did not err.

I. Factual & Procedural Background

Petitioner became employed by Respondent on 31 May 2006. Petitioner served as a highway patrolman with the North Carolina State Highway Patrol (the “SHP”) until his termination on 30 October 2020, at which time he was a Master Trooper.

On 20 August 2020, at approximately 2:30 p.m., Petitioner was on a routine patrol traveling east on NC Highway 72. While on patrol, Petitioner noticed a tan vehicle; the vehicle’s driver was not wearing a seatbelt, and the passenger appeared to be drinking a beer. Petitioner activated his blue lights and pulled alongside the tan vehicle. Petitioner made contact with the driver of the tan vehicle (the “Driver”) but Petitioner did not exit his own vehicle in doing so. Petitioner observed that the Driver had put his seat belt on and that the passenger was drinking a Red Bull rather than a beer. Petitioner gave the Driver a verbal warning and allowed the Driver and his passenger to leave.

After driving away from the vehicle stop, Petitioner noticed a small camouflage bag in the ditch line next to the road. Without activating his blue lights, Petitioner stopped and pulled his patrol vehicle to the shoulder of the road. Petitioner smelled an odor of marijuana coming from the bag, and he opened the bag and saw marijuana. Petitioner believed the bag was associated with the tan vehicle and determined he

should take the bag, search for the vehicle, and make inquiries of the Driver. Petitioner placed the camouflage bag into his patrol vehicle and attempted to locate the tan vehicle. He failed to do so. He then returned to the scene where he had found the bag hoping that the Driver and his passenger would return to retrieve it. Eventually, near the end of his shift, Petitioner threw the camouflage bag into the woods.

On the same day as the stop, between 7:30 p.m. and 7:45 p.m., the Driver called in a citizen complaint related to Petitioner's stop of the Driver's vehicle. Later that evening, Petitioner received a group text communication from his superior, Sergeant Philip Collins ("Sgt. Collins"). Sgt. Collins inquired about the traffic stop of the Driver's vehicle, and Petitioner responded that nothing unusual had occurred. Sgt. Collins then informed Petitioner that the Driver had alleged Petitioner stole the Driver's bag. Petitioner responded, "[w]ell, that [was not] me. I didn't even get out of the car[.]"

The following morning, on 21 August 2020, at approximately 6:00 a.m., Petitioner and Sgt. Collins went to the scene of the traffic stop, and Petitioner explained to Sgt. Collins what had occurred during the stop. Petitioner and Sgt. Collins found the bag, and Sgt. Collins directed Petitioner to go to the "weigh station" to write his report. That same morning, as Sgt. Collins was logging the bag and its contents into evidence, he received a call from the Director of Professional Standards for the SHP, who ordered Sgt. Collins to bring Petitioner to Raleigh for an interview

by Internal Affairs. In his interview with Internal Affairs, Petitioner admitted to being untruthful to Sgt. Collins, admitted to making “several mistakes” involving the incident, and expressed regret as to his actions.

Lieutenant Colonel Gordon of the SHP held a pre-disciplinary conference with Petitioner and wrote the memorandum recommending Petitioner’s termination. On 30 October 2020, Respondent terminated Petitioner from his position. On 5 March 2021, Petitioner filed a Petition for a Contested Case Hearing pursuant to N.C. Gen. Stat. § 126. A contested case hearing was heard on 31 January 2022 before ALJ Byrne. On 6 May 2022, ALJ Byrne issued a Final Decision reversing Respondent’s termination of Petitioner. On 9 May 2022, ALJ Byrne issued an Amended Final Decision that also reversed Respondent’s termination of Petitioner. In his Decision, ALJ Byrne made extensive findings of fact which, *inter alia*, included:

7. Prior to the incidents in this case, the [SHP] had never charged Petitioner with any untruthfulness.
8. Prior to the incidents in this case, Petitioner never received any disciplinary action from the [SHP].
9. Petitioner received annual performance reviews. Sgt. Collins testified that Petitioner had earned a good personnel record and that he (Collins) had found that to be true as Petitioner’s supervisor.
10. Petitioner’s performance reviews for the three years prior to his dismissal . . . are in evidence. Petitioner has no individual or overall performance rating less than “meets expectations.”

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11. Specific observations in the performance reviews include: Petitioner “exceeds expectations” on ethics and integrity. He is an “asset to the [SHP]. He represents the [SHP] “very well.” He sets a good example for others. He has good work ethic. He has commendable “professionalism and leadership.”

. . . .

46. In the Internal Affairs investigation, Lt. Snotherly and First Sergeant Thomas Van Dyke (“Sgt. Van Dyke”) interviewed Petitioner [and the Driver]

47. During his interview with Lt. Snotherly, [the Driver] admitted he threw his bag of marijuana out the window when he realized he had been seen by Petitioner to not be wearing a seat belt.

. . . .

49. During his interview with Lt. Snotherly, [the Driver] admitted “the large amount of marijuana” found in the bag was, in fact, his. . . . Following this admission, Lt. Snotherly and Sgt. Van Dyke did not arrest [the Driver], nor was there any evidence at the contested case hearing that the admission was turned over to the District Attorney or other law enforcement organizations. . . .

50. At a later point in the interview, [the Driver] again admitted that the marijuana in the bag was his, and that there was “about five ounces” of it. . . . Neither officer hearing this second admission, concerning marijuana that was in the [SHP’s] possession, initiated any enforcement action.

51. [The Driver] then admitted a third time that the marijuana was his, and that “[i]t was a nice bag” of “about four or five ounces.” [The Driver] stated that the street value of the marijuana was “about a thousand [dollars].” Once again, neither Highway Patrol officer initiated any

law enforcement action. Following [the Driver's] admission as to the value of the marijuana, the interview terminated.

52. Lt. Snotherly knew that [the Driver's] bag contained approximately 207 grams of marijuana, and also knew that possession of more than [forty-two and a half] grams of marijuana "is considered a felony."

53. There is no evidence that Lt. Snotherly's repeated lack of enforcement action on [the Driver's] marijuana, despite [the Driver's] repeated admissions, drew attention from anyone in the Highway Patrol.

. . . .

55. Following the investigation, [t]he marijuana and paraphernalia were destroyed. [The Driver] was never arrested or prosecuted.

56. The Internal Affairs investigation resulted in a "personnel charge sheet" alleging that Petitioner violated [SHP] policies involving "neglect of duty," "truthfulness," and "unbecoming conduct."

57. The factual basis of the "neglect of duty" violation involved two issues. First, that Petitioner neglected his duty, in that he "failed to exit his patrol car during a traffic stop he initiated so he could conduct a thorough investigation of the driver and passenger as he was trained to do." Second, that he threw [the Driver's] bag of marijuana into the woods rather than logging it into evidence.

58. The factual basis of the "truthfulness" violation also involved two issues. First, that Petitioner denied to Sgt. Collins that he had picked up [the Driver's] bag or taken any action with it. Second, that he again lied to Sgt. Collins the following morning regarding his actions with [the Driver's] bag.

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59. The “unbecoming conduct” violation involve[s] [the] issue[] [that] Petitioner failed to tell Sgt. Collins that he had thrown the bag into the woods the previous day and represented to Sgt. Collins the following day that Petitioner had not seen the bag before.

60. The “personnel charge sheet” makes no allegation that [the Driver] not being charged regarding the marijuana and/or paraphernalia either was the fault of Petitioner or stemmed from Petitioner’s violation of [SHP] policy.

. . . .

64. Lt. Col. Gordon held the pre-disciplinary conference with Petitioner; nothing in that conference changed his mind that Petitioner should be dismissed.

. . . .

66. [A]s a part of [the] recommenadation for Petitioner’s dismissal[,] [o]nly three performance reviews were considered. No performance reviews for the previous ten years of Petitioner’s work history with the [SHP] were retrieved, reviewed, or considered[.]

. . . .

68. Lt. Col. Gordon’s memorandum supporting Petitioner’s dismissal states that he considered: the severity of Petitioner’s violation(s); the subject matter involved; the harm resulting from the violation(s); [Petitioner’s] prior work history; and the discipline imposed in other cases involving similar violations.

69. Lt. Col. Gordon did not identify in his memorandum, or his testimony, any other disciplinary cases that he considered in reaching the decision that Petitioner be dismissed.

. . . .

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73. The Colonel of the [SHP], Col. Glenn McNeill, made the final decision to dismiss Petitioner. His letter states out his reasoning. His letter also states, unlike the “personnel charge sheet,” that Petitioner’s actions led to [the Driver] not being prosecuted.

74. The evidence fails to support this allegation. No witness testified . . . that Petitioner’s conduct led to [the Driver’s] non-prosecution. Neither the “personnel charge sheet” nor the pre-disciplinary conference and dismissal letters to Petitioner reference this allegation, which appears only, in terms of written notice, in the final agency decision letter.

75. Col. McNeill did not testify at the contested case hearing. Accordingly, the Tribunal has no admissible, first-hand testimony from Col. McNeill on what the [SHP’s] final decision-maker considered in upholding Petitioner’s dismissal.

76. This is notable given that Lt. Col. Gordon had no direct conversations with Col. McNeill about this matter, including any details of the investigation. Col. McNeill, for his part, never explained his reasoning to Lt. Col. Gordon. He never explained to or discussed with Lt. Col. Gordon any comparative cases he may have considered in making his final agency decision. This included discussion of any [SHP] member who was disciplined for failure to get out of his car during a traffic stop.

(citations omitted).

In his Decision, ALJ Byrne concluded that just cause did not exist for the disciplinary action against Petitioner, and ordered that Petitioner be retroactively reinstated to employment with the SHP, that Respondent demote Petitioner from Master Trooper to Trooper, and, that Respondent suspend Petitioner for five days without pay. Respondent provided timely notice of appeal.

II. Jurisdiction

Respondent's appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-29(a). *See* N.C. Gen. Stat. § 7A-29(a) (2021).

III. Analysis

Respondent presents one argument on appeal: that ALJ Byrne erred by concluding Respondent lacked just cause to dismiss Petitioner. Respondent specifically alleges that Petitioner's conduct was such that it justified dismissal, Respondent had "the discretion and authority to determine the severity and level of discipline[.]" and there is substantial evidence that Respondent properly considered each of the required factors (the "*Wetherington* factors") pursuant to *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 780 S.E.2d 543 (2015) ("*Wetherington I*").

A. Just Cause Factors

In appeals from administrative tribunals, this Court reviews questions of law *de novo*, and issues of fact under the "whole record" test. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004). Under the *de novo* standard of review, the trial court "considers the matter anew and freely substitutes its own judgment for the agency's." *Id.* at 660, 599 S.E.2d at 894 (citation and internal quotation marks omitted) (cleaned up). Because Respondent's sole argument is an issue of law, we exercise a *de novo* review. *See id.* at 666, 599 S.E.2d at 898; *see also Skinner v. N.C. Dep't of Corr.*, 154 N.C. App 270, 280, 572 S.E.2d 184, 191 (2002). ALJ Byrne's findings of fact are unchallenged by Respondent, and

therefore are binding on appeal. *See Whitehurst v. East Carolina University*, 257 N.C. App. 938, 944, 811 S.E.2d 626, 631 (2018).

Under North Carolina statute, “[n]o career State employee . . . shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” N.C. Gen. Stat. § 126-35(a) (2021). “[T]he burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer.” N.C. Gen. Stat. § 126-34.02(d) (2021). The regulation governing just cause for disciplinary action provides, in pertinent part:

Any employee . . . may be warned, demoted, suspended or dismissed by the appointing authority. Such actions may be taken . . . only for just cause. . . . The degree and type of action shall be based upon the sound and considered judgment of the appointing authority in accordance with the provisions of this Rule. When just cause exists the only disciplinary actions provided for under this Section are:

- (1) Written warning;
- (2) Disciplinary suspension without pay;
- (3) Demotion; and
- (4) Dismissal.

25 N.C.A.C. 1J .0604(a). Although this regulation provides that the appointing authority’s decision shall be based upon its “sound and considered judgment[,]” our Supreme Court has clarified that specific determinations must be made as to whether a public employer had just cause to discipline an employee.

In *Carroll*, our Supreme Court provided that two separate inquiries are

required in cases concerning State employers' disciplinary measures against public employees: "first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." 358 N.C. at 665, 599 S.E.2d at 898 (internal quotation marks omitted). The Court further provided that just cause is "a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Id.* at 669, 599 S.E.2d at 900 (internal quotation marks omitted); *see also Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 107–108, 798 S.E.2d 127, 137 (2017) ("A just and equitable determination of whether the unacceptable personal conduct constituted just cause for the disciplinary action taken requires consideration of the facts and circumstances of each case, *including mitigating factors.*") (emphasis in original).

The *Wetherington* factors identified in *Wetherington I* that courts must consider when administering disciplinary actions for just cause against career State employees include: (1) the severity of the violation; (2) the subject matter involved; (3) the resulting harm; (4) the trooper's work history; and (5) discipline imposed in other cases involving similar violations. *Id.* at 592, 780 S.E.2d at 548 ("We emphasize that consideration of these factors is an important and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.").

Our Supreme Court remanded *Wetherington I* to the trial court for additional

findings of fact, and the case was heard again by this Court on appeal. *Wetherington v. N.C. Dep't of Pub. Safety*, 270 N.C. App. 161, 840 S.E.2d 812 (2020) (“*Wetherington II*”). In *Wetherington II*, we emphasized the necessity of considering each of the *Wetherington* factors in finding just cause to impose discipline upon a career State employee. *Id.* at 190, 840 S.E.2d at 832. After considering each of the *Wetherington* factors, we concluded the respondent failed to “consider most of the factors our Supreme Court directed were ‘necessary’ in this case[,]” and reversed the ALJ’s conclusion that the “respondent met its burden of proof and established by substantial evidence that it had just cause to dismiss [the p]etitioner[.]” *Id.* at 199, 840 S.E.2d 812, 837–38.

B. Just Cause Application

Here, ALJ Byrne found in Finding of Fact 68 that “Lt. Col. Gordon’s memorandum supporting Petitioner’s dismissal states that he considered: the severity of Petitioner’s violation(s); the subject matter involved; the harm resulting from the violation(s); [Petitioner’s] prior work history; and the discipline imposed in other cases involving similar violations.” ALJ Byrne, however, also made fact findings that undermine the Respondent’s assertion that Respondent properly considered *each* of the *Wetherington* factors. We conclude that Respondent failed to consider the resulting harm of Petitioner’s conduct, Petitioner’s work history, and discipline imposed in other cases. We address each of these three *Wetherington* factors, in turn.

1. The Harm Resulting from Petitioner's Violations

ALJ Byrne found in Finding of Fact 74 that “[t]he evidence fails to support” Col. McNeill’s allegation in the dismissal letter that “Petitioner’s actions led to [the Driver] not being prosecuted.” ALJ Byrne further articulated in Finding of Fact 74 that,

[n]o witness testified on behalf of the Robeson County District Attorney’s Office that Petitioner’s conduct led to [the Driver’s] non-prosecution. Neither the “personnel charge sheet” nor the pre-disciplinary conference and dismissal letters to Petitioner reference this allegation, which appears only, in terms of written notice, in the final agency decision letter.

As we concluded in *Wetherington II*, the respondent there failed to consider the resulting harm because “[the r]espondent has never been able to articulate how this particular lie was so harmful.” *Wetherington II*, 270 N.C. App. at 195, 840 S.E.2d at 835. Col. McNeill, here, contended once that Petitioner’s conduct prevented prosecution of the Driver, but Respondent has provided no proof to substantiate that assertion. ALJ Byrne’s Findings of Fact 49 through 53 actually demonstrate that there was ample opportunity and cause to arrest and prosecute the Driver, as the Driver admitted three times to interviewing officers that the felonious portion of marijuana was his. Additionally, as ALJ Byrne stated in Finding of Fact 53, “there is no evidence that [the] lack of enforcement action on the Driver’s marijuana, despite the Driver’s repeated admissions, drew attention from anyone in the Highway Patrol[,]” and in Finding of Fact 55, “[t]he marijuana and paraphernalia were

destroyed.” Both of these findings support a conclusion that Petitioner’s conduct yielded no discernable harm.

“A just and equitable determination of whether the unacceptable personal conduct constituted just cause for the disciplinary action taken requires consideration of the facts and circumstances of each case, *including mitigating factors*.” *Harris*, 252 N.C. App. at 107–108, 798 S.E.2d at 137 (emphasis in original). Respondent has the burden of proof to show just cause for its disciplinary measures, and a finding of just cause requires consideration of the harm caused by Petitioner’s conduct. *See* N.C. Gen. Stat. § 126-34.02(d) (2021); *see Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548. ALJ Byrne’s findings, however, demonstrate a failure of Respondent to meaningfully consider the mitigating factors concerning the harm caused by Petitioner’s conduct.

Accordingly, Respondent failed to meet its burden of showing it considered the harm resulting from Petitioner’s violation.

2. Petitioner’s Work History

ALJ Byrne found in Finding of Fact 66 that “[o]nly the three performance reviews were considered” in determining disciplinary action against Petitioner. ALJ Byrne further provided in the same finding, “[n]o performance reviews for the previous ten years of Petitioner’s work history with the [SHP] were retrieved, reviewed, or considered[.]” *Wetherington I* requires consideration of Petitioner’s work history, and neither we nor our Supreme Court have stipulated that a partial

consideration is sufficient to meet this factor for a proper finding of just cause. *See Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 584.

Accordingly, we conclude Respondent failed to consider Petitioner's work history in determining disciplinary action.

3. Discipline Imposed in Other Cases

ALJ Byrne found in Finding of Fact 69 that "Lt. Col. Gordon did not identify in his memorandum, or his testimony, any other disciplinary cases that he considered in reaching the decision that Petitioner be dismissed." In *Wetherington II*, we concluded the respondent there failed to make this requisite consideration, as the respondent did not "note factors in other disciplinary cases which support dismissal for [the p]etitioner's violation." *Wetherington II*, 270 N.C. App. at 199, 840 S.E.2d at 837.

Here, because Respondent failed to note such factors, we conclude Respondent did not consider discipline imposed in other cases when determining disciplinary action.

4. Remaining Wetherington Factors

We note the Record shows Respondent considered the severity of Petitioner's violation and the subject matter involved. Respondent, however, was required to consider *each Wetherington* factor, and such meaningful consideration is necessary for a finding of just cause. *Wetherington II*, 270 N.C. App. at 199, 840 S.E.2d at 837–38 ("Col. Grey failed to consider most of the factors our Supreme Court directed were

‘necessary’ in this case. . . . We emphasize that consideration of these factors is an appropriate and *necessary component of a decision to impose discipline* upon a career State employee for unacceptable personal conduct.”) (emphasis in original). Respondent failed to meet its evidentiary burden of showing consideration of all five *Wetherington* factors, and Respondent therefore failed to demonstrate just cause in its termination of Petitioner. ALJ Byrne’s binding findings of fact support his conclusion that Respondent lacked just cause in its termination of Petitioner from the SHP, and we must affirm.

IV. Conclusion

Respondent has failed to show that ALJ Byrne erred in concluding Respondent lacked just cause to terminate Petitioner. Accordingly, we affirm ALJ Byrne’s decision.

AFFIRMED.

Judges MURPHY and GORE concur.

Report per Rule 30(e).