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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-845

Filed 19 March 2025

Office of Administrative Hearings, No. 23OSP005125

HOLLY FEHL, Petitioner,

v.

APPALACHIAN STATE UNIVERSITY, Respondent.

Appeal by petitioner from final decision entered 5 June 2024 by Administrative Law Judge David F. Sutton in the Office of Administrative Hearings. Heard in the Court of Appeals 27 February 2025.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lindsay Vance Smith and Assistant Attorney General Jeremy D. Lindsley, for respondent-appellee.

Miller & Johnson, PLLC, by Nathan A. Miller, for petitioner-appellant.

FLOOD, Judge.

Petitioner Holly Fehl appeals from the final decision of the Office of Administrative Hearings (“OAH”) awarding Petitioner back pay. On appeal, Petitioner argues the Administrative Law Judge (“ALJ”): (A) erred in failing to make any findings of fact as to Petitioner’s damages, and (B) erred in its calculation of

damages. Upon review, we conclude the ALJ: did not err in making findings of fact as to Petitioner's damages, because it made sufficient findings of fact to award Petitioner back pay; and did not err in its calculation of damages, because its calculation of back pay was not "arbitrary" or "capricious."

I. Factual and Procedural Background

On 4 November 2013, Petitioner began serving as a deputy clerk of Superior Court in Watauga County, North Carolina. On 15 January 2015, Petitioner became employed with the North Carolina Department of Adult Correction as a judicial services coordinator, and was considered a career-status employee under the North Carolina State Human Resources Act, Chapter 126 of the North Carolina General Statutes. Petitioner maintained her employment until she voluntarily resigned to work as a paralegal at a private law firm on 8 January 2024.

On 5 May 2023, Respondent Appalachian State University posted a job listing for "University Program Specialist—Paralegal" in its Office of General Counsel ("OGC"). A search committee (the "committee") designated by the OGC established evaluation criteria for reviewing applications. The committee initially conducted virtual interviews with six candidates, which included Petitioner, for the paralegal position. The committee selected three candidates for in-person interviews; Petitioner was not among those candidates selected for an interview, however, having received the lowest average score during this application cycle. Following the in-person interviews, the committee was unable to identify a suitable candidate, and on

1 August 2023, Respondent determined the search had “officially failed[,]” and decided to “repost the position.”

Respondent reposted the position on 2 August 2023, and Petitioner reapplied, submitting her application on 23 August 2023. A graduate student, and graduate assistant of Respondent (the “Graduate Assistant”), also applied for the position. The Graduate Assistant did not have career status with Respondent; on her application, however, she incorrectly identified herself as a career-status employee. Human Resources for Respondent forwarded the Graduate Assistant’s application to the committee without correcting the error.

During the new application cycle, Respondent’s hiring committee interviewed five candidates, including Petitioner and the Graduate Assistant. The interviewees were graded on a scale of one to five, utilizing fifteen questions. Based on the applications and the interviewees’ performances during the interviews, the committee interviewed two top candidates, including the Graduate Assistant and another candidate. Petitioner was eliminated from the hiring process, as the committee determined that Petitioner “did not substantially meet the criteria” for the position. The committee also determined Petitioner’s answers to the interview questions were “unresponsive.” Petitioner used profanity during the interview to describe someone with whom she interacted in her then-current position, and “name dropp[ed]” people whom she knew in the OGC, both responses of which the committee

found unprofessional. Out of a possible 75 points, the committee awarded Petitioner an average score of 48.2.

The committee unanimously chose the Graduate Assistant as the top candidate and offered her the position. The committee's average score for the Graduate Assistant was 74.2 out of 75. The Graduate Assistant accepted the paralegal position and began working in the OGC on 6 November 2023.

The committee was aware of its need to give promotional priority consideration to career-status employees; however, it mistakenly believed Petitioner and the Graduate Assistant were both career-status employees, and as a result, did not apply the promotional priority consideration policy in its hiring decision. Petitioner would have received priority consideration under N.C.G.S. § 126-7.1 had the Graduate Assistant not been determined to be a career-status employee.

Upon being notified on 28 September 2023 that she was no longer considered for the position, Petitioner filed a grievance on 22 November 2023 under Respondent's and the University of North Carolina's grievance policies. Respondent rejected Petitioner's grievance as untimely. Petitioner thereafter, on 8 December 2023, filed a petition for a contested case hearing with the OAH. The matter was heard on 20 March 2024.

At the hearing, evidence was presented that Petitioner earned \$44,822 per year in her then-current position as a judicial services coordinator. Evidence was also presented that she earned \$55,000 in her new role as a paralegal at the private law

firm at which she began working in January 2024. The posted salary range for the paralegal position was \$54,875 to \$57,772. Petitioner also testified that: she could retire in fifteen and one-half years; she would have earned \$361,476.87 at the minimum of the posted salary range, combined with average state employee wage increases and increases in retirement; and she would have earned \$445,978.92 had she started at the maximum of the posted salary range.

On 5 June 2024, the ALJ filed a final decision. In its final decision, the ALJ concluded, in relevant part, that “Petitioner failed to receive State employee priority consideration as required by law[,]” as Petitioner was a career-status employee, while the Graduate Assistant was not a career-status employee. In considering a remedy under N.C.G.S. § 126-34.02(a), the ALJ concluded that ordering Respondent to employ Petitioner was not warranted because Petitioner was, “in part, responsible for failing to receive the promotion to the paralegal position because of her poor performance during the interview.” The ALJ instead concluded that ordering Respondent to pay back pay to Petitioner was “the most suitable action” to “correct the abuse” in this case. The ALJ ordered, in relevant part:

Respondent . . . to pay to Petitioner back pay from the date of her termination from the hiring process on September 28, 2023 through the date of her resignation from her position as a Judicial Services Coordinator in January 2024, such back pay representing the difference in Petitioner’s salary on September 28, 2023, and the salary for the Paralegal position for which she failed to receive promotional priority consideration.

Petitioner timely appealed.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final decision entered by the ALJ pursuant to N.C.G.S. § 7A-29(a) (2023).

III. Standard of Review

“The standard for judicial review [of an agency’s decision] is set forth in” N.C.G.S. § 150B–51(b) (2023). *King v. N.C. Env’t Mgmt. Comm’n*, 112 N.C. App. 813, 816 (1993). Under the statute,

The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B–51(b). “It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review[.]” *Harris v. N.C. Dep’t of Pub. Safety*, 252 N.C. App. 94, 99 (2017) (citation omitted). “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 100 (citation omitted).

"When it is alleged on appeal that the agency's findings, conclusions, or decisions are unsupported by substantial evidence or that they are arbitrary or capricious, then the proper standard of review is the whole record test." *King*, 112 N.C. App. at 816. Under the whole record test:

The court may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter de novo. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Harris, 252 N.C. App. at 100 (citation omitted); *see also Thompson v. Union Cnty.*, 283 N.C. App. 547, 552 (2022). "Finally, the reviewing court must determine whether the administrative decision had a rational basis in the evidence." *King*, 112 N.C. App. at 816.

IV. Analysis

On appeal, Petitioner argues the ALJ: (A) erred in failing to make any findings of fact as to Petitioner's damages, and (B) erred in its calculation of damages. We address each argument, in turn.

A. Failure to Make Findings of Fact

Petitioner first argues the ALJ erred in failing to make findings of fact as to Petitioner's damages, specifically contending the ALJ failed to "make any findings of facts, except for the salary amount of [Petitioner] and the salary range of the position with [Respondent], as to [Petitioner's] damages." We disagree.

"[T]his Court has recognized that administrative agencies and ALJs need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute." *Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 23 (2017) (citation and internal quotation marks omitted). Under N.C.G.S. § 126-34.02, the ALJ may grant the following relief:

- (1) Reinstate any employee to the position from which the employee has been removed.
- (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
- (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

N.C.G.S. § 126-34.02(a) (2023). Back pay "may be awarded as allowed by [the North Carolina General Statutes, Chapter 126]." 25 N.C. Admin. Code 1J.1306(1).

Here, the ALJ made sufficient findings of fact that allowed it to reach its conclusion on an award of damages. The ALJ found, in relevant part: Petitioner's "last salary" as an "employee of the Department of Adult corrections was \$44,822.00"; the anticipated hiring range for the paralegal position for which Petitioner applied

was \$54,875 to \$57,772; Petitioner was notified she was no longer being considered for the position on 28 September 2023; Petitioner “voluntarily separated” from her position with the Department of Adult Corrections in January 2024, when she started working at a private law firm on 8 January 2024; the remedy of ordering Respondent to hire Petitioner in the position was not appropriate because Petitioner was “in part, responsible for failing to receive the promotion to the paralegal position because of her poor performance during the interview” due to her failure to “correlate her experience to the qualifications of the position” and her lack of professionalism during the interview; and “the most suitable action” to “correct the abuse” was a limited award of back pay to Petitioner.

The findings made by the ALJ necessary to support an award of back pay, including the relevant salary ranges and dates of employment, all demonstrate that the ALJ found “only [] those facts which are material to the settlement of the dispute.” *See Brewington*, 254 N.C. App. at 23. Petitioner’s argument, that evidence she presented as to her calculations of damages should have been included in the ALJ’s findings, is irrelevant to the ALJ’s award of back pay, particularly where the ALJ had discretion to “[d]irect other suitable action to correct the abuse[.]” *See* N.C.G.S. § 126-34.02(a)(3); *see also* 25 N.C. Admin. Code 1J.1306(1). Because the ALJ was not required to make findings “as to every fact which arises from the evidence[.]” and it made relevant findings sufficient to determine a back pay calculation, the trial court

made sufficient findings of fact as to Petitioner's damages. *See Brewington*, 254 N.C. App. at 23.

Accordingly, the ALJ's final award "had a rational basis in the evidence[.]" and because this Court "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result[.]" we conclude the ALJ did not err in failing to make findings of fact as to Petitioner's damages. *See Harris*, 252 N.C. App. at 100 (citation omitted); *King*, 112 N.C. App. at 816.

B. Calculation of Damages

Petitioner next argues the ALJ erred in its calculation of damages, specifically contending the award was arbitrary or capricious because it "was either whimsical and/or lacked fair consideration." We disagree.

"The 'arbitrary or capricious' standard is a difficult one to meet." *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 16 (2002) (citation omitted). A final administrative decision "is arbitrary and capricious if it was 'patently in bad faith,' 'whimsical,' or if it lacked fair and careful consideration." *Teague v. W. Carolina Univ.*, 108 N.C. App. 689, 692 (1993) (citation omitted); *see also Fonvielle v. N.C. Coastal Res. Comm'n*, 288 N.C. App. 284, 288 (2023).

Here, applying the whole record test to determine if the decision was arbitrary or capricious, we conclude the ALJ's calculation of damages in favor of Petitioner did not rise to the level of being "arbitrary" or "capricious." *See King*, 112 N.C. App. at

816. The calculation took into account Petitioner's then-current salary, her expected salary range, the date she was notified of Respondent's decision not to continue with employing her, and the date she accepted a new paralegal position at a private law firm. The calculation was not "whimsical" or in "bad faith"; rather, as explained previously, the calculation was based on the ALJ's discretion to award the remedy of back pay pursuant to N.C.G.S. § 126-34.02(a)(3), and the remedy accounted for the time frame Petitioner would have received compensation had she been offered the position, as well as the salary difference between the salary of her then-existing position and the salary range she would have earned had she been offered the paralegal position. *See Teague*, 108 N.C. App. at 692; *see also* N.C.G.S. § 126-34.02(a)(3). The ALJ's decision to base the award on the salary range of the posted decision, rather than on a specific salary, also was not "whimsical," because the salary range provides both upper and lower numerical limits from which Petitioner's back pay can be calculated. *See Teague*, 108 N.C. App. at 692.

To the extent Petitioner argues the statutory scheme of N.C.G.S. § 126-34.02 "invites whimsical and/or lacking fair consideration decisions[.]" and to the extent Petitioner argues the damages awarded "aren't enough to deter [Respondent] or similarly situated state agencies from these actions in the future[.]" Petitioner's arguments are not supported by any legal authority, and as such, are deemed abandoned on appeal. *See K2HN Constr. NC, LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 213 (2019) ("This Court has routinely held an argument to be

abandoned where an appellant presents argument without . . . authority[.]”); *see also* N.C.R. App. P. 28(b)(6) (providing that “[i]ssues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned”).

Accordingly, because under the whole record test, the ALJ’s award of damages was not “arbitrary” or “capricious[.]” the ALJ did not err in its calculation of damages. *Teague*, 108 N.C. App. at 692; *see also King*, 112 N.C. App. at 816. We therefore affirm the ALJ’s final decision.

V. Conclusion

Upon review, we conclude the ALJ did not err in failing to make additional findings of fact as to Petitioner’s damages, because it made sufficient findings of fact to award Petitioner back pay; and did not err in its calculation of damages, because its calculation of back pay was not “arbitrary” or “capricious.” Accordingly, we affirm the ALJ’s final decision.

AFFIRMED.

Judges STROUD and GRIFFIN concur.

Report per Rule 30(e).