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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-431

No. COA20-704

Filed 17 August 2021

Mecklenburg County, No. 19 OSP 04911

ERIC ERICKSON, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ADULT
CORRECTIONS AND JUVENILE JUSTICE, Respondent.

Appeal by respondent from order entered 7 May 2020 by Administrative Law
Judge Selina Malherbe in the Office of Administrative Hearings. Heard in the Court
of Appeals 11 May 2021.

Petitioner-Appellant, pro-se.

*Attorney General Joshua H. Stein, by Assistant Attorney General Norlan
Graves, for Respondent-Appellee.*

CARPENTER, Judge.

I. Factual & Procedural Background

¶ 1 Mr. Eric Erickson, (“Petitioner”) was employed by the North Carolina

Department of Public Safety, (“Respondent”), as a probation and parole officer. Petitioner was dismissed from his role on 15 September 2017 by reason of unacceptable personal conduct.

¶ 2 The events leading to Petitioner’s dismissal from employment with Respondent were as follows in relevant part: Petitioner was granted a community service leave day for the purpose of volunteering with the Board of Elections. On 6, 7, and 8 September 2017, Petitioner used his community service leave to campaign for Charlotte City Council and run personal errands.¹ On that day, Petitioner wore a “Vote for Eric Erickson” shirt and passed out campaign literature.

¶ 3 Also on 8 September 2017, Petitioner visited Sunset Auto Inspection (“Sunset Auto”). Two managers, Ryan Bailey and Christopher Bailey, were present at Sunset Auto at the time, and both managers interacted with Petitioner. Petitioner presented

¹ The State Human Resources Manual, Section 5, Community Service Leave, states in relevant part: “Service may include serving inside a polling facility to assist voters with the voting process as long as the employee is not receiving pay for the service. Vacation leave rather than Community Service leave must be used if the employee is receiving pay for the “inside” poll work or if the employee is distributing brochures, transporting voters or other partisan campaigning outside of the polls. Partisan political activity during State time and the use of State equipment or property for any community service are not permitted. Special care must be taken to avoid any possible interpretation that the State is in, in fact, permitting time off and in so doing supporting a political candidacy. State employees engaging in political activity must do so in accordance with [N.C. Gen. Stat.] 126-13 of the Human Resources Act.” State Human Resources Manual, Community Service Leave Policy, § 5, at 18. N.C. Gen. Stat.] 126-13 states in relevant part, “no State employee subject to the North Carolina Human Resources Act or temporary State employee shall . . . [t]ake any active part in managing a campaign, or campaign for political office or otherwise engage in political activity while on duty or within any period of time during which he is expected to perform services for which he receives compensation from the State[.]” N.C. Gen. Stat. § 126-13(a) (2019).

himself as a member of law enforcement by showing a badge and state-issued radio. Petitioner asked the managers of Sunset Auto if he could place a yard sign for his political campaign outside the store. Petitioner also represented his personal vehicle was a law enforcement vehicle used to do undercover work and asked for a law enforcement exemption for his personal vehicle's window tinting. Christopher Bailey informed Petitioner the personal vehicle was not registered to a law enforcement agency and referred Petitioner to the local DMV office for further information. Petitioner then left and returned with paperwork purporting to grant the exemption. Christopher Bailey called the DMV Inspector's Office and was informed Petitioner had been told by the DMV his vehicle did not meet the requirements for the exemption. Christopher Bailey testified Petitioner became "upset" and repeated his request for the exemption.

¶ 4 Ryan Bailey filed a citizen's complaint with Respondent reporting the 8 September events. As a result of the complaint, Respondent initiated an internal investigation. The investigation revealed that on 8 September 2017, while Petitioner was running for Charlotte City Council, Petitioner utilized his community service leave for the purpose of partisan political campaigning and to conduct personal business at Sunset Auto Inspection. The investigation also revealed that contrary to Petitioner's statements to his supervisor, no early voting was held at any school locations on 6-8 September 2017. The investigation further revealed Petitioner failed

to request and receive approval for secondary employment with a security business Petitioner owned and operated, “Equestrian Police Company.” Petitioner was dismissed based on the findings of the investigation.

¶ 5 After exhausting his internal appeals, Petitioner instituted this action by filing a contested case petition in the Office of Administrative Hearings contending his dismissal lacked just cause. Petitioner was given a hearing before Administrative Law Judge Selina Malherbe (“ALJ”) to determine if just cause existed for his dismissal. In its final decision, the ALJ found just cause in fact existed. Petitioner filed notice of appeal on 22 May 2020.

II. Jurisdiction

¶ 6 Jurisdiction lies in this court as a matter of right over a final judgment from the North Carolina Office of Administrative Hearings (“OAH”) pursuant to N.C. Gen. Stat. § 7A-29 (2019).

III. Issues

¶ 7 The issues on appeal are (1) whether the ALJ improperly allowed the presentation of hearsay evidence at Petitioner’s trial, and (2) whether substantial evidence existed to support the OAH’s final decision to affirm Respondent’s dismissal of Petitioner for just cause.

IV. Standard of Review

A. Hearsay Evidence

¶ 8

Pursuant to N.C. Gen. Stat. § 150B-51, where Petitioner assigns an error of law, we review the issue *de novo*. N.C. Gen. Stat. § 150B-51 (2019), *See also Skinner v. N.C. Dep't of Corr.*, 154 N.C. App. 270, 279, 572 S.E.2d 184, 191 (2002). The North Carolina Administrative Code provides: “The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes shall govern in all contested case proceedings, except as provided otherwise in these Rules and [N.C. Gen. Stat.] § 150B-29.” 26 N.C.A.C. 3.0122 (2019). N.C. Gen. Stat. § 150B-29(a) provides in relevant part:

In all contested cases, irrelevant, immaterial and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence available shall be admitted.

N.C. Gen. Stat. § 150B-29(a) (2009). The North Carolina Rules of Evidence therefore guide our analysis in determining whether “the substantial rights of the [P]etitioner[] may have been prejudiced because the findings, inferences, conclusions, or decisions” . . . [were] affected by [the ALJ’s] . . . error of law.” *See* N.C. Gen. Stat. § 150B-51. *See also Craven Reg'l Med. Auth. v. N.C. HHS*, 176 N.C. App. 46, 53-54, 625 S.E.2d 837, 842, (2006) (where petitioner asserted the ALJ improperly considered hearsay evidence, but did not object to the introduction of the documents during his hearing before the ALJ, this Court’s analysis was guided by the rules of evidence as applied

in the trial division of the General Court of Justice).

¶ 9 Exceptions to the admission of evidence must generally be preserved by an objection by counsel at the time of their admission. N.C. Gen. Stat. § 8C-1, Rule 103; N.C. R. App. P. 10(a)(l). Failure to object, absent provision in the evidentiary rules, generally constitutes a waiver of any assignment of error on appeal related to the admission of evidence. *See State v. Reid*, 322 N.C. 309, 312, 367 S.E.2d 672, 674 (1988). *See Joyner v. Garrett*, 279 N.C. 226, 235, 182 S.E.2d 553, 560 (1971) (holding that where petitioner failed to object to introduction of arresting officer's sworn police report at administrative hearing, report "was sufficient evidence to sustain [Department of Motor Vehicles'] suspension of petitioner's license.") This issue is dismissed.

B. Just Cause for Dismissal

¶ 10 Pursuant to the North Carolina Human Resources Act ("NCHRA"), appeals of just cause discipline are made directly to this Court. N.C. Gen. Stat. § 126-34.02(a) (2019). The standard of review of an administrative agency's decision is set out in N.C. Gen. Stat. § 150B-51, which provides:

(b) 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 statutory authority or jurisdiction of the

agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary and capricious, or an abuse of discretion.

(c) . . . With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b) (2019). *See also Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 206-07, 784 S.E.2d 509, 517 (2016).

¶ 11 Our Supreme Court has stated every determination of whether a public employer's decision to discipline its employee was supported by just cause "requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (citation, quotation marks, and brackets omitted). "[T]he first of these inquiries is a question of fact . . . [and is] reviewed under the whole record test. . . . [T]he latter inquiry is a question of law . . . [and] is reviewed *de novo*." *Carroll*, 358 N.C. at 665-66, 599 S.E.2d at 898.

¶ 12 Petitioner contends the ALJ's determination Respondent had just cause to dismiss Petitioner was "in error." From Petitioner's brief, it appears Petitioner asserts the final decision regarding his dismissal was not supported by substantial

evidence. For example, Petitioner's brief states "there was no evidence presented that at the time of the alleged incident . . . appellant was anything less than a professional and competent probation and parole officer"; "there was no evidence presented that the appellant obtained any contract or engaged in secondary employment . . ."; and "the evidence did not support the administrative law judge's findings of fact or conclusion of law that just cause existed for termination." Based on the foregoing, we review the ALJ's findings and conclusions under the whole record test to determine if substantial evidence existed to support them pursuant to N.C. Gen. Stat. § 150B-51(b)(5) (2019) and *Carroll*. *Id.* at 665-66, 599 S.E.2d at 898.

¶ 13 "Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Human Res.*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889-90 (1988) (citation omitted). "[T]he whole record test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 674, 599 S.E.2d 888, 903-04 (2004) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)). Therefore, the whole record test "does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views[.]" *Lackey v. Dep't of Human Res.* 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982).

¶ 14 Our review of the ALJ's final decision Respondent had just cause to terminate
Petitioner is a *de novo* review. See *Carroll*, 358 N.C. at 666, 599 S.E.2d at 898.

V. Analysis

¶ 15 Under the statutory standard for “just cause” as set out in N.C. Gen. Stat. §
126-35(a), a career State employee may be dismissed for grossly inefficient job
performance or unacceptable personal conduct. N.C. Gen. Stat. § 126-35(a) (2019).

¶ 16 “Just cause, like justice itself, is not susceptible of precise definition.” *Carroll*,
358 N.C. at 659, 599 S.E.2d at 900. This Court has held that “not every instance of
unacceptable personal conduct as defined by the Administrative Code provides just
cause for discipline.” *Warren v. N.C. Dep’t of Crime Control & Pub. Safety*, 221 N.C.
App. 376, 382, 726 S.E.2d 920, 925 (2012). In *Warren*, we articulated a three-pronged
approach to determine whether just cause exists to discipline an employee who has
engaged in unacceptable personal conduct:

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.

Warren, 221 N.C. App. at 382, 726 S.E.2d at 925.

¶ 17 Precedent from our Supreme Court also requires the review of certain factors to determine whether unacceptable personal conduct warrants the discipline imposed. In the just cause analysis, a court must consider such factors as severity of the violation, the subject matter involved, the resulting harm, the employee's work history, and discipline imposed in other cases involving similar violations; collectively, the "*Wetherington* factors." *Wetherington v. N.C. Dep't. of Crime Control and Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

¶ 18 Here, the ALJ analyzed the facts of Petitioner's case through an application of the *Warren* three-pronged approach, taking the *Wetherington* factors into consideration, to ultimately conclude Petitioner's conduct justified dismissal. The ALJ concluded (1) the preponderance of the evidence proved Petitioner engaged in the conduct Respondent alleged, (2) Petitioner's acts and omissions constituted unacceptable personal conduct; and (3) the misconduct amounted to just cause for dismissal.

¶ 19 After careful review, we find substantial evidence exists supporting the ALJ's findings of fact, conclusions of law, and final decision. The ALJ relied on Petitioner's own admissions under oath as well as the testimony of Christopher Bailey and Petitioner's supervisors, which tended to show Petitioner violated Respondent's policy by, *inter alia*, (1) attempting to obtain a law enforcement exemption for window tinting on his personal vehicle; (2) using his community service leave for improper

campaigning purposes; and (3) failing to report his secondary employment with Equestrian Police Company. We review the ALJ's final decision as to the existence of just cause for Petitioner's dismissal by taking each *Warren* inquiry in turn.

1. The Preponderance of the Evidence Proved Petitioner Engaged in the Conduct Alleged

¶ 20 Petitioner contends “no evidence” existed to support the findings of fact or conclusions of law made by the ALJ. We disagree.

¶ 21 Even under the whole record standard, this Court has recognized that in an administrative proceeding, it is the “prerogative and duty” of the ALJ to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. *City of Rockingham v. N.C. Dep’t of Env’t & Nat. Res.*, 224 N.C. App. 228, 239, 736 S.E.2d 764, 771 (2012). As discussed, Christopher Bailey’s testimony corroborating the citizen complaint filed against Petitioner constituted substantial evidence to support findings Petitioner both attempted to obtain a law enforcement exemption for his window tinting on his personal vehicle and used his community service leave for improper campaigning purposes on 8 September 2017. *See* State Human Resources Manual, Community Service Leave Policy, § 5, at 18; *see also* N.C. Gen. Stat. § 126-13(a) (2019). The testimony of Petitioner’s supervisors that Petitioner did not report his employment with Equestrian Police Company, coupled

with Petitioner's own admissions as to having done private policing work while employed by Respondent, constituted substantial evidence petitioner failed to report secondary employment to Respondent in violation of Respondent's policy.

2. Petitioner's Acts and Omissions Constituted Unacceptable Personal Conduct

¶ 22 The categories of unacceptable personal conduct are defined by North Carolina Administrative Code and include the following: "(a) conduct for which no reasonable person should expect to receive prior warning; . . . (d) the willful violation of known or written work rules; [and] (e) conduct unbecoming a state employee that is detrimental to state service[.]" 25 N.C.A.C. 1J.0614(8) (2019). While Petitioner disputes that his use of Community Service Leave was "improper," which is an erroneous interpretation using only the term and not its definition, he does not otherwise dispute the alleged acts and omissions would amount to unacceptable personal conduct. We agree with Respondent, and with the ALJ, that Petitioner's acts and omissions meet the definition of unacceptable personal conduct as provided by the North Carolina Administrative Code. *See* 25 N.C.A.C. 1J.0614(8).

3. Petitioner's Misconduct Amounted to Just Cause for Dismissal

¶ 23 Our review of the ALJ's final decision Respondent had just cause to terminate Petitioner is a *de novo* review. *See Carroll*, 358 N.C. at 666, 599 S.E.2d at 898.

¶ 24 The ALJ found Petitioner's attempt to convince Sunset Auto Inspection to grant a window tinting exemption for a personal vehicle and Petitioner's failure to

report secondary employment to Respondent were acts and omissions reflecting upon Petitioner's integrity and honesty. This Court has held untruthfulness alone can constitute just cause for dismissal when the untruthfulness concerns a serious matter. *See Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 11, 802 S.E.2d 115, 123 (2017) (employee was dismissed from the State Bureau of Investigations for unacceptable personal conduct for consuming alcohol while on duty and being untruthful when questioned about the matter during the internal investigation.) Standing alone, Petitioner's untruthfulness regarding the police status of his personal vehicle concerns a serious matter, as Petitioner was attempting to coerce a citizen to break the law based on Petitioner's misrepresentations. Therefore, we affirm the ALJ's final decision Petitioner was terminated for just cause.

VI. Conclusion

¶ 25 After careful consideration of the whole record, we affirm the ALJ's determination Respondent's decision to dismiss Petitioner for just cause was proper. Therefore, we affirm the final decision of the ALJ that Petitioner was terminated for just cause.

AFFIRM.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).