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NO. COA01-804

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

DANNY JACOB,
Petitioner,

v.

Onslow County
No. 00 CVS 2978

ONSLOW COUNTY BOARD
OF HEALTH,
Respondent.

Appeal by petitioner from order entered 26 February 2001 by Judge Ernest B. Fullwood in Onslow County Superior Court. Heard in the Court of Appeals 13 May 2002.

Voerman Law Firm, PLLC, by David E. Gurganus, for petitioner-appellant.

Cranfill, Sumner & Hartzog, LLP, by Gregory Wenzl Brown, for respondent-appellee.

EAGLES, Chief Judge.

Danny Jacob ("Jacob") appeals from an order of the Superior Court entered 26 February 2001 affirming the Final Decision of the Onslow County Board of Health to dismiss Jacob from employment. After careful consideration of the briefs and record, we affirm.

Jacob, the Health Director for the Onslow County Board of Health ("Board"), was placed on "Investigation with Pay" status effective 27 October 1998. Jacob received a "Summary of Charges of Alleged Misconduct by the Health Director" on 7 December 1998.

Jacob provided written responses to the charges and met with several members of the Board's Personnel Committee on 17 December 1998. On 23 December 1998, the Personnel Committee delivered to Jacob written notice of its conclusion that Jacob had engaged in unacceptable personal conduct which warranted his immediate dismissal. The Personnel Committee conducted a pre-dismissal conference with Jacob on 28 December 1998. The Personnel Committee sent Jacob a "Notice of Recommendation of Termination and Appeal Rights" on 30 December 1998. After Jacob appeared before the Board on 19 January 1999, the Board voted to dismiss him effective 20 January 1999 due to unacceptable personal conduct. Jacob pursued a contested case hearing before Administrative Law Judge Beecher R. Gray. Administrative Law Judge Gray issued a Recommended Decision on 12 October 1999 which recommended that Jacob be reinstated to his position and receive all back pay and benefits to which he was entitled. The matter then went before the State Personnel Commission ("Commission") which recommended that the Board reject Administrative Law Judge Gray's recommendation and affirm the disciplinary action. The Commission's "Recommendation For Decision To Local Appointing Authority" included the following findings:

14. On approximately October 2, 1998, [Jacob] had decided to hire Nancy Hall into a vacant position in the home health program, subject to confirmation of her references. . . . Late in the afternoon that day, [Jacob] learned from Patti Smith that a problem had arisen with one of Nancy Hall's references. She reported this to the Onslow County Personnel Director. Also on the afternoon of October 2, 1998, County Commissioner and Board of Health member Ernest Wright

talked to the County Personnel Director and County Manager and learned that there was a problem with Nancy Hall's references.

15. The next day, Saturday, October 3, 1998, Commissioner Wright called [Jacob] at home During that conversation, Commissioner Wright asked [Jacob] about the problem with the hiring of Nancy Hall. Commissioner Wright was not personally interested in the hiring of Nancy Hall, Commissioner Wright specifically asked [Jacob] about the references problem with Nancy Hall and stated to [Jacob] that references should have been checked out first. . . . *Commissioner Wright never told [Jacob] that Patti Smith or anyone on his staff had let him down.*
16. On approximately Monday, October 5, 1998, and again on October 6, 1998, [Jacob] met with Patti Smith during the workday at the Health Department and mentioned his Saturday conversation with Commissioner Wright regarding Nancy Hall. [Jacob] gave Patti Smith the impression or understanding, either directly or indirectly, that Commissioner Wright was upset about not having Nancy Hall's references checked out and that he might seek to attempt to have her fired over the incident. *[Jacob] warned Ms. Smith that if she ever told anyone about Commissioner Wright's desire to have her fired, he would stomp her like a "piss ant."* After a Health Department management team meeting on October 6, 1998, at which [Jacob] and Patti Smith had an open disagreement, [Jacob] called Patti Smith into his office and told her that she had embarrassed him in front of the other management team members. He reminded her that Commissioners Padgett and Wright wanted her fired because of her handling of the Nancy Hall application but that he had covered for her.
17. On approximately October 13, 1998, the Onslow County Board of Health conducted a

meeting. Patti Smith attended the meeting, as did [Jacob]. Patti Smith approached Commissioner Wright and, in [Jacob's] presence, asked Commissioner Wright whether he had told [Jacob] that he wanted her fired. Commissioner Wright admitted to talking to [Jacob] about the hiring of Nancy Hall but denied telling [Jacob] that he should fire Patti Smith.

18. [Jacob] informed Patti Smith following the Board of Health meeting that it was inappropriate for her to have put Commissioner Wright on the spot during the meeting. [Jacob] pulled Patti Smith aside and told her that County Commissioner Ernie Wright was lying and reprimanded Patti Smith for "making him look bad" in a manner that frightened Ms. Smith.
19. The next day, Patti Smith was summoned to [Jacob's] office where she was told by him to "get your coat and hat. We're going." When Patti Smith asked [Jacob] where they were going, he responded "Just get your hat and coat. You'll find out when we get there." [Jacob] repeatedly refused to inform Patti Smith where he was taking her. Afraid to refuse, Patti Smith complied with [Jacob's] orders. Patti Smith again asked [Jacob] where he was taking her, to which he again responded in an intimidating and threatening manner, "You'll find out when we get there." Patti Smith was afraid, intimidated and frightened that [Jacob] would cause her bodily harm. [Jacob's] conduct caused Patti Smith great apprehension, fear, and stress. [Jacob] drove himself and Patti Smith to "Northeast Park," an isolated and distant park several miles from the Health Department. A number of parks are closer to and. [sic] In fact, at least one park is adjacent to the Health Department. [Jacob] drove Patti Smith to an isolated place so that no witnesses would be present. At the park, [Jacob] continued to act in a threatening and intimidating manner towards Patti Smith. [Jacob] raised his voice, slapped the table in

front of Patti Smith, and pointed at Patti Smith menacingly. [Jacob] described the Onslow County Commissioners as "lying shitbirds" during this event. [Jacob] repeatedly slammed his fist into the table, yelling at Patti Smith, telling her that she should resign. When [Jacob] received a telephone call on his cellular phone, he instructed Patti Smith to get back into the automobile. [Jacob] then drove he and Patti Smith back to the Health Department. Throughout this encounter, Patti Smith was crying, and her face was swollen.

20. Throughout the interaction before departure from the Health Department, during the drive to the isolated park, through the encounter at the isolated park, and during the drive back to the Health Department, [Jacob] acted in an intimidating, threatening manner that expressed an intent to cause physical and/or mental harm, and did, in fact, cause mental harm and stress to Patti Smith.

21. Upon her return to the Health Department, Patti Smith first went to her office. She then went to see Francine Reeves, Personal and Family Health Program Director and management team member. . . . Francine Reeves testified at this hearing that Patti Smith's face was red, that she had been crying, and that she appeared scared when Patti Smith came into her office after the park trip.

. . . .

25. On Monday morning, October 19, 1998, [Jacob] called Administrative Officer Smith into his office to inquire about an assignment that he had asked her to have on his desk by that morning but which she had not accomplished. They talked about this assignment not being completed as requested and Patti Smith asked whether [Jacob] was going to do anything about her job. [Jacob] told Ms. Smith that the only way he could accomplish her dismissal would be to "kill or strangle

her." After Ms. Smith inquired whether Mr. Jacob was serious, he responded, "No Patti, I am serious. The only way I'm going to get rid of you is to kill you or to strangle you." Patti Smith testified at this hearing that she was frightened by the comment and believed that it was a threat against her. She returned to her office and called the Office of State Personnel to report the conversation as a threat to her.

. . . .

28. At some point in 1998 in a discussion about conflicts and difficulties arising within various health department programs, [Jacob] stated to Francine Reeves, his Director for Personal and Family Health Programs, that she needed to get some K-Y Jelly and bend over. When asked by Francine Reeves what he meant by that comment, he told her that she needed to be more flexible. *When asked whether the "You need to get some K-Y Jelly and bend over" comment offended her, Francine Reeves stated "Yes." When asked whether Francine Reeves considered the "K-Y Jelly" comment sexual, she stated "Yes, I knew it had sexual connotation."*

(Emphasis in original.) The Commission concluded that:

3. *The evidence produced in this contested case hearing demonstrates that Petitioner Danny Jacob: (a) misrepresented the intentions and statements of County officials and accused County officials of lying, all in an effort to exert control over subordinate Patti Smith; (b) ordered Patti Smith to accompany [Jacob] to an isolated destination far away from the Health Department, all the while refusing to inform Patti Smith where he was taking her, and then proceeding to berate, yell, slam his fist into a table, threaten, and otherwise intimidate Patti Smith, for the purpose of persuading Patti Smith to resign from the Health Department; (c) stated to Patti Smith that the only way he could accomplish the termination of*

her employment would be to "kill her or strangle her," and that he then stated, "I'm serious, I'm going to kill you;" (d) stated and uttered to subordinate Francine Reeves that she "needed to get some K-Y Jelly and bend over," and that Francine Reeves considered the comment offensive and including sexual connotations. Each of these acts, independently or collectively, constitute unacceptable personal misconduct.

(Emphasis in original.)

On 8 August 2000, the Board voted to accept without modification the Recommended Decision of the State Personnel Commission. Jacob petitioned for Judicial Review which was heard on 12 February 2001 before Judge Ernest B. Fullwood in Onslow County Superior Court. Judge Fullwood ordered that the decision of the Board be affirmed. Jacob appeals.

Jacob raises two issues on appeal. First, whether the superior court erred when it applied an inappropriate standard of review. Second, whether the superior court erred in affirming the Board's decision that Jacob was dismissed for just cause and was not denied due process. After careful consideration, we affirm.

In our review of a superior court's order which reviewed an agency decision, the proper scope is to examine "the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.'" *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)

(quoting *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)).

"The proper standard of review by the trial court depends upon the particular issues presented by the appeal." *Deep River Citizens' Coalition v. North Carolina Dept. of Environment and Natural Resources*, __ N.C. App. __, __, 560 S.E.2d 814, 816 (2002). "If the petitioner alleges that the agency decision is based on an error of law, the proper review is *de novo* review." *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 346, 543 S.E.2d 169, 174 (2001). "'De novo' review requires a court to consider a question anew, as if not considered or decided by the agency." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). "If appellant questions whether the agency's decision was supported by the evidence or whether it was arbitrary or capricious, then the reviewing court must apply the whole record test." *Deep River Citizens' Coalition*, __ N.C. App. at __, 560 S.E.2d at 816. "The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.'" *Gray v. North Carolina Dept. of Environment, Health and Natural Resources*, __ N.C. App. __, __, 560 S.E.2d 394, 398 (2002) (citations and quotations omitted). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and 'is more than a scintilla or a permissible inference.'" *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C. App.

527, 532, 406 S.E.2d 613, 616-17 (1991) (quoting *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)).

However, the whole record test "does not permit the court 'to replace the [agency'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*,'""; but "merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence."

Zimmerman v. Appalachian State University, __ N.C. App. __, __, 560 S.E.2d 374, 380 (2002) (citations omitted).

Jacob first contends that the superior court did not correctly apply the appropriate standards of review in that the superior court "failed to articulate the appropriate standard of review as applied to" each issue raised by Jacob in his petition for judicial review.

We must determine if the superior court applied the appropriate method of review. "[I]n reviewing a decision from an agency, a trial court's order must: (1) set out the appropriate standards of review, and (2) 'delineate which standard the court utilized in resolving each separate issue.'" *Gray*, __ N.C. App. at __, 560 S.E.2d at 399 (citations omitted).

Here, Jacob contended in his petition for judicial review that the Board's decision: violated his due process rights; was affected by various errors of law; was based upon unlawful procedure; was unsupported by substantial evidence; and was arbitrary and capricious. The proper method of review by the trial court for constitutional violations, unlawful procedure, and errors of law is

de novo review. *Dialysis Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261, *aff'd*, 353 N.C. 258, 538 S.E.2d 566 (2000). "When it is alleged that a final agency decision was not supported by the evidence or was arbitrary or capricious, this Court must apply the 'whole record' test." *Id.*

Here, the superior court's order states:

After applying all appropriate standards of review, including a *de novo* review of questions of law as well as the "whole record test" regarding questions of fact, to the State Personnel Commission's Recommendation to Local Appointing Authority which was accepted, in full, without modification, as the Final Decision of the Onslow County Board of Health, this Court also finds that the Onslow County Board of Health's Final Decision was neither arbitrary nor capricious, had been reached upon lawful procedures, had not been affected by errors of law, and was supported by substantial evidence in view of the entire record.

"[W]hile the court's order in effect set[s] out the applicable standards of review, it failed to delineate which standard the court utilized in resolving each separate issue raised by the parties." *In re Appeal of Willis*, 129 N.C. App. 499, 503, 500 S.E.2d 723, 726 (1998). However, even though "the trial court did not explicitly state the standard employed in its review of a specific issue, we can discern from the record which standard of review was applied." *Zimmerman*, __ N.C. App. at __, 560 S.E.2d at 380. Here, we hold that the superior court clearly applied the *de novo* standard of review to all questions of law.

Next, we must determine if the trial court properly applied the appropriate standards of review. Jacob contends that the superior court erred in affirming the Board's decision that Jacob was dismissed for just cause and was not denied due process. We are not persuaded.

Jacob argues that the Board's findings are arbitrary and capricious. Jacob contends that the record does not support a conclusion that his conduct constituted unacceptable personal conduct. Jacob argues that even if his conduct constituted grossly inefficient job performance, he was not provided with the required warnings to justify dismissal.

We review whether the decision was supported by the evidence and was arbitrary or capricious using the "whole record test." Testimony by Ernest Wright, Francine Reeves, and Pattie Smith supports Findings of Fact numbers 14-21, 25, and 28. We note that under the "whole record" test, "[t]he trial court is not permitted to substitute its judgment for the agency's judgment when there are two reasonably conflicting views." *Ritter v. Dept. of Human Resources*, 118 N.C. App. 564, 568, 455 S.E.2d 901, 903, *disc. review denied*, 340 N.C. 360, 458 S.E.2d 190 (1995). Here, our review of the entire record shows that the superior court was correct that the Board's decision was supported by substantial evidence and was neither arbitrary nor capricious.

"[T]his Court has held that a superior court's determination of whether a termination was for 'just cause' based upon personal misconduct is a question of law" which should be reviewed *de novo*.

Souther v. New River Area Mental Health, 142 N.C. App. 1, 4, 541 S.E.2d 750, 752, *aff'd*, 354 N.C. 209, 552 S.E.2d 162 (2001). Here, the superior court's order stated that:

After thorough review of the record including the parties' pleadings, the parties' memoranda of law, all relevant statutes as well as the presentations and arguments in open court, this Court finds that the Onslow County Board of Health possessed just cause when it dismissed Petitioner Danny Jacob from his employment

A career state employee may be discharged only for just cause. *Gainey v. N.C. Dept. of Justice*, 121 N.C. App. 253, 259, 465 S.E.2d 36, 41 (1996); G.S. § 126-35(a). "Just cause may result either from unacceptable job performance or unacceptable personal conduct." *Souther*, 142 N.C. App. at 5, 541 S.E.2d at 753. An employee discharged for unacceptable personal conduct is not entitled to receive warnings. *Id.* The North Carolina Administrative Code provides that unacceptable personal conduct includes:

- (1) conduct for which no reasonable person should expect to receive prior warning; or
- (2) job related conduct which constitutes violation of state or federal law; or
-
- (5) conduct unbecoming an employee that is detrimental to the agency's service; or
- (6) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility, or of an animal owned or in the custody of the agency.

N.C. Admin. Code tit. 25, r. 1I.2304(b) (June 2002). The discharged employee "has the burden of proving that the agency's decision was improper." *Souther*, 142 N.C. App. at 5, 541 S.E.2d at 753.

Here, the Board concluded that the following actions constituted "just cause" in the form of unacceptable personal conduct:

Jacob: (a) misrepresented the intentions and statements of County officials and accused County officials of lying, all in an effort to exert control over subordinate Patti Smith; (b) ordered Patti Smith to accompany [Jacob] to an isolated destination far away from the Health Department, all the while refusing to inform Patti Smith where he was taking her, and then proceeding to berate, yell, slam his fist into a table, threaten, and otherwise intimidate Patti Smith, for the purpose of persuading Patti Smith to resign from the Health Department; (c) stated to Patti Smith that the only way he could accomplish the termination of her employment would be to "kill her or strangle her," and that he then stated, "I'm serious, I'm going to kill you;" (d) stated and uttered to subordinate Francine Reeves that she "needed to get some K-Y Jelly and bend over," and that Francine Reeves considered the comment offensive and including sexual connotations.

(Emphasis in original.) These actions constitute "conduct for which no reasonable person should expect to receive prior warning," "conduct unbecoming an employee that is detrimental to the agency's service," or the abuse of a person "over whom the employee has charge." N.C. Admin. Code tit. 25, r. 1I.2304(b). These actions constitute unacceptable personal conduct and support a conclusion that just cause existed for Jacob's dismissal. Since Jacob was

dismissed for unacceptable personal conduct, no warnings were required.

Jacob further contends that he was denied due process in the termination proceedings. Specifically, Jacob argues that he was: not given a proper pre-dismissal conference; not provided notice of a pre-dismissal conference; and not provided with specific written reasons for his dismissal. We are not persuaded.

The record on appeal includes a copy of the 23 December 1998 memorandum provided to Jacob which advises him that a pre-dismissal conference will be held on 28 December 1998. Jacob's "Statement of Petitioner" in support of his request for a contested case hearing states "[i]n accordance with the instructions contained in the December 23, 1998 letter, . . . [Jacob] appeared before the Personnel Committee . . . on December 28, 1998." At this meeting, the requisite pre-dismissal conference was held. Jacob's "Statement of Petitioner" also notes that "[o]n or about January 2, 1999, [Jacob] received a document which . . . is a 'Notice of Recommendation of Termination and Appeal Rights.'" This letter stated:

The allegations and evidence found in the previous notices to you are expressly incorporated herein, are attached hereto, and should be considered as written reasons for the dismissal under N.C.A.C. 1I.2304(d). Based upon our investigation, and the two conferences with you regarding the charges and evidence, the Committee has determined that the allegations and evidence of you [sic] misconduct are credible and warrant your dismissal.

(Emphasis added.) These earlier notices identified the four instances of personal conduct found by the Board. The attached and incorporated notices "enable[d] [Jacob] to conduct an effective appeal of the disciplinary action taken . . . by notifying him of the reasons for the disciplinary action and advising him of his right to appeal." *Meyers v. Dept. of Human Resources*, 92 N.C. App. 193, 197, 374 S.E.2d 280, 283 (1988), *aff'd*, 332 N.C. 655, 422 S.E.2d 576 (1992). Our review of the record confirms that the superior court correctly determined that Jacob was afforded the procedural rights to which he was entitled.

Accordingly, the decision of the superior court is affirmed.

Affirmed.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).