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NO. COA09-1367

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

KAREN HAAS,
Petitioner

v.

Wake County
No. 08 CVS 7523

NORTH CAROLINA DEPARTMENT OF
CRIME CONTROL AND PUBLIC
SAFETY,
Respondent

Appeal by respondent from order entered 24 July 2009 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 24 March 2010.

Capitol District Law Offices, by Reagan H. Weaver, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Tamara Zmuda, for respondent-appellant.

CALABRIA, Judge.

The North Carolina Department of Crime Control and Public Safety, Alcohol Law Enforcement Division ("ALE" or "respondent") appeals an order reinstating the employment of Karen Haas ("petitioner"). We reverse and remand.

I. Background

Petitioner had been employed as an agent with respondent for sixteen years. In April 2005, petitioner was transferred from the New Bern District, which was near her home, to the Fayetteville

District. Although ALE agents are typically required to live within forty miles of their assigned district, petitioner was permitted by respondent to maintain her residence in Havelock, North Carolina, approximately sixty-five miles away from her new assignment. In addition, petitioner was permitted to use her ALE assigned vehicle to commute to and from work. However, petitioner was not permitted to include her time commuting as scheduled work hours.

In December 2006, petitioner's supervisor, Alan Fields ("Fields") conducted surveillance of petitioner as a result of information he had received that petitioner was not working her scheduled hours. Fields observed petitioner on three separate days, and observed that she was not working her scheduled hours or conducting inspections of businesses, contrary to the weekly activity reports petitioner provided to respondent.

On 3 January 2007, Fields and Bob Stocks ("Stocks"), Assistant Director of Professional Standards for ALE, interviewed petitioner about the discrepancies between Fields' observations and petitioner's weekly activity reports. During the interview, petitioner admitted that there were occasions that she did not work all of the hours indicated on her weekly reports.

After the interview with petitioner, Stocks met with ALE Deputy Director for Administration Dr. William Chandler ("Dr. Chandler") and ALE Director Mike Robertson ("Director Robertson") to discuss what petitioner had said. As a result of this meeting, Director Robertson generated a memorandum recommending petitioner's

dismissal and setting up a pre-dismissal conference for the next day, 4 January 2007. Petitioner was served with the memorandum shortly thereafter.

On 4 January 2007, at 10:00 a.m., Dr. Chandler and Fields met with petitioner and conducted the pre-dismissal conference. Petitioner was provided with several documents that explained the charges against her as well as the grievance and appeals process. During the conference, petitioner provided the names of potential witnesses that could verify she had been conducting inspections on the dates that were in question.

After the pre-dismissal conference, Dr. Chandler met with Director Robertson to discuss what had occurred. At that time, Director Robertson made the decision to terminate petitioner. On 5 January 2007, petitioner was served with dismissal documents.

On 7 March 2007, petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings. Beginning 10 September 2007, a hearing on the petition was conducted before an administrative law judge ("ALJ"). At the hearing, petitioner was represented by counsel and had the opportunity to present evidence. On 27 November 2007, the ALJ issued a "Decision" in which he concluded that petitioner had engaged in inappropriate conduct and upheld her dismissal.

Petitioner appealed the ALJ's decision to the State Personnel Commission ("the SPC"). On 21 February 2008, the SPC heard oral arguments from both parties. On 19 March 2008, the SPC issued a

"Decision and Order" adopting the ALJ's findings of fact and conclusions of law and upholding petitioner's dismissal.

On 28 April 2008, petitioner filed a "Petition for Judicial Review" in Wake County Superior Court. This Petition alleged that (1) the SPC made an error of law by failing to follow the provisions of the North Carolina Administrative Code, Title 25, Chapter 1, Subchapter 1J, Sections 4(c) and (e); and (2) the SPC "was arbitrary and capricious in that its findings were unsupported by substantial evidence in view of the entire record as submitted." On 2 July 2009, a hearing was conducted on petitioner's appeal. On 24 July 2009, the superior court issued an order that reversed the decision of the SPC and ordered that petitioner be reinstated with back pay, benefits, and attorney fees. The superior court's order described its review as *de novo* and included additional findings of fact that were not contained in the ALJ's Decision. From this order, respondent appeals.

II. Standard of Review

"An appellate court reviewing a superior court order regarding an agency decision 'examines 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.'" *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007) (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)).

Respondent argues that the superior court erred by conducting a *de novo* review of the factual record and by making independent findings of fact. We agree.

The parties agree that the scope and standard of judicial review of the SPC's decision by the superior court is governed by N.C. Gen. Stat. § 150B-51(b) (2009). Pursuant to this statute, the SPC's decision may be reversed or modified only

if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the 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, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2009).

The first four grounds for reversing or modifying an agency's decision . . . are law-based inquiries. On the other hand, [t]he final two grounds . . . involve fact-based inquiries. In cases appealed from administrative agencies, [q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.

N.C. Dep't of Revenue v. Bill Davis Racing, ___ N.C. App. ___, ___, 684 S.E.2d 914, 920 (2009) (internal quotations and citations omitted).

In the instant case, petitioner alleged that the SPC's decision contained both errors of law and "unfound" facts. The superior court's order did not differentiate between the types of review required for these separate allegations. Rather, it conducted what it called a "de novo review of the case," and then set forth its own findings of fact and conclusions of law, ultimately concluding that respondent failed to follow necessary procedures when it dismissed petitioner. This is ultimately a determination that the SPC made an error of law in upholding petitioner's dismissal.

III. Independent Fact Finding

The parties do not dispute that, in reaching its determination on a question of law, the superior court made findings of fact which were not identical to the findings of the ALJ that were adopted by the SPC. The parties do not agree on whether this independent fact finding constituted error.

In *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), our Supreme Court set out the appropriate procedure by which the superior court must review an administrative agency's findings of fact when conducting a *de novo* review of a question of law. The *Carroll* Court first explained that

[i]n a contested case under the APA, as in a legal proceeding initiated in District or

Superior Court, there is but one fact-finding hearing of record when witness demeanor may be directly observed. Thus, the ALJ who conducts a contested case hearing possesses those institutional advantages that make it appropriate for a reviewing court to defer to his or her findings of fact. The judicial review provisions of the APA should not be construed to substantially undermine the General Assembly's judgment that administrative agencies, not courts, should perform the primary fact-finding function in contested cases.

Id. at 662, 599 S.E.2d at 896 (internal quotations and citations omitted). The Court then went on to reaffirm prior precedent that, even when the superior court conducts a *de novo* review of a question of law, "where the findings of fact of an administrative agency are supported by substantial competent evidence in view of the entire record, they are binding on the reviewing court, and that court lacks authority to make alternative findings at variance with the agency's." *Id.* at 663, 599 S.E.2d at 897.

The *Carroll* Court held that the only time the superior court may make independent findings of fact is when it conducts its review pursuant to N.C. Gen. Stat. § 150B-51(c). *Id.* Under this subsection of § 150B-51, the superior court may make its own findings of fact when the agency does not adopt the decision of the ALJ. N.C. Gen. Stat. § 150B-51(c) (2009). This exception does not apply to the instant case since the SPC adopted the decision of the ALJ in its entirety.

Based upon *Carroll*, our Court has explained, "[a]ny determination that the [superior] court had the authority to disregard or supplement the administrative agency's factual

determinations would be inconsistent with the applicable standard of review and rest upon a misapplication of governing law." *In re Denial of NC Idea's Refund*, ___ N.C. App. ___, ___, 675 S.E.2d 88, 96 (2009). This is precisely what the superior court did in the instant case, and this was error.

Prior decisions of our Courts make it clear that "[w]hen an 'order or judgment appealed from was entered under a misapprehension of the applicable law,' an appellate court may remand for application of the correct legal standards." *Id.* (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004)). However,

in cases appealed from an administrative tribunal under the APA, it is well settled that the trial court's erroneous application of the standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b).

Carroll, 358 N.C. at 665, 599 S.E.2d at 898. In the instant case, we need not remand to the trial court for a rehearing on the substantive issues presented in this appeal, because this Court can, based upon the record before us, adequately assess the arguments raised in petitioner's petition for judicial review.

IV. Petition for Judicial Review

Petitioner essentially makes two arguments in her Petition for Judicial Review. First, petitioner argues that "in failing to find the proposed Findings of Fact as set out herein," the SPC "was

arbitrary and capricious in that its findings were unsupported by substantial evidence in view of the entire record as submitted." Secondly, petitioner argues that her dismissal was made upon unlawful procedure. We disagree.

A. Fact-based Challenges

In *State ex rel. Banking Comm'n v. Weiss*, this Court rejected an argument similar to petitioner's that an administrative agency failed to make "required" findings of fact. 174 N.C. App. 78, 91, 620 S.E.2d 540, 548 (2005). The *Weiss* Court relied upon our Supreme Court's holding that

North Carolina is in accord with the well-established rule that it is for the administrative body, in an adjudicatory proceeding, 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. The credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness.

Id. (quoting *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980)). In the instant case, a review of the whole record and the SPC's findings of fact demonstrates that the SPC properly considered the evidence in making its chosen findings of fact. As a result, petitioner's argument that the SPC failed to make additional findings of fact fails.

Our review of the factual findings actually made by the SPC is usually limited to a determination of whether specific challenged findings of fact are supported by the whole record. *Bill Davis*

Racing, ___ N.C. App. at ___, 684 S.E.2d at 920. However, since the Petition for Judicial Review filed with the superior court did not actually challenge any specific finding of fact of the SPC, the SPC's findings are binding on appeal. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 706, 635 S.E.2d 442, 448 (2006). Consequently, petitioner's "fact-based" challenges to the SPC's decision are without merit.

B. Unlawful Procedure

Petitioner next argues that her dismissal was made upon unlawful procedure, in that respondent failed to follow the requirements of 25 N.C.A.C. 01J.0613 (4)(c) and (e), and that, as a result, the SPC made an error of law in upholding her dismissal. The unlawful procedure provision "authorizes a court to reverse or modify agency action that is not in accordance with the procedural requirements specified in the . . . agency procedure." *Comr. of Insurance*, 300 N.C. at 409, 269 S.E.2d at 567 (internal quotation and citation omitted).

The agency's decision is presumed to be made in good faith and in accordance with governing law. Therefore, the burden is on the party asserting otherwise to overcome such presumptions by competent evidence to the contrary when making a claim that the decision was affected by error of law or procedure.

Richardson v. N.C. Dept. of Pub. Inst., ___ N.C. App. ___, ___, 681 S.E.2d 479, 483 (2009) (internal citations omitted).

In the instant case, petitioner alleges that respondent violated 25 N.C.A.C. 1J.0613(4), which states, in relevant part:

(4) DISMISSAL - Before an employee may be dismissed, a supervisor shall comply with the following procedural requirements:

. . .

(c) Advance written notice of the pre-dismissal conference shall be given to the employee of the time, location, and the issue for which dismissal has been recommended. The amount of advance notice shall be as much as is practical under the circumstances.

. . .

(e) . . . Every effort shall be made by the Supervisor or the designated management representative to assure that the employee has had a full opportunity to set forth any available information in opposition to the recommendation to dismiss prior to the end of the conference. This opportunity shall not include the right to present witnesses.

25 N.C.A.C. 1J.0613(4) (2009). In addition, petitioner alleges that respondent violated ALE Directive 5.05(d)(6), which states, in relevant part:

In the event the charged employee denies the violation, the employee shall be given an opportunity to supply the investigator with evidence or witnesses favorable to the employee. No decision as to whether the employee violated the code of conduct shall be made against a charged employee until the employee has had a reasonable opportunity to produce evidence or witnesses and has had an opportunity to explain his/her actions.

The intent of both the above quoted sections of the Administrative Code and the ALE Directive is to ensure that the employee has an adequate opportunity to challenge any accusations of misconduct. This is consistent with the holding of this Court

that, in order for a dismissal to comply with due process considerations, "the employee's opportunity to be heard must be meaningful in time and in manner." *Bishop v. N.C. Dep't of Human Res.*, 100 N.C. App. 175, 177, 394 S.E.2d 702, 703-04 (1990).

In the instant case, petitioner was first informed of the allegation against her on 3 January 2007. Later that day respondent provided petitioner with a memorandum setting up a pre-disciplinary conference at 10:00 the next morning. At that meeting, petitioner provided respondent with the names of witnesses to contact from the businesses she had allegedly not inspected. After the pre-dismissal conference, Dr. Chandler conferred with Director Robertson about what had taken place. Director Robertson then made the decision to terminate petitioner.

The SPC concluded as a matter of law that respondent violated ALE Directive 5.05(d)(6) by failing to give respondent a reasonable opportunity to respond to the allegations against her and to present witnesses. The SPC went on to conclude that petitioner suffered no prejudice from this violation "because Petitioner received a pre-dismissal conference, detailed information regarding the charges against her, and the opportunity to respond and present witnesses before the final decision for termination was rendered." The SPC additionally concluded that respondent had otherwise followed all procedural requirements for terminating petitioner.

This Court has previously considered due process challenges based upon the procedures used before and during a pre-dismissal conference. In *Bishop*, the petitioner, a state employee, received

a pre-dismissal conference. 100 N.C. App. at 176, 394 S.E.2d at 703. The first time the petitioner was allowed to respond to the allegations against her was at this conference. The evidence indicated that her employers had already made the decision to terminate the petitioner before the pre-dismissal conference had begun. *Id.* This Court determined that the petitioner's due process rights had been violated because the decision to terminate her employment was made before she ever had a chance to respond to the allegations against her. 100 N.C. App. at 178, 394 S.E.2d at 704. Because the petitioner had not received the necessary due process protections of a pre-dismissal conference, the Court affirmed an award of back pay and attorney's fees to the petitioner. *Id.*

In *Hilliard v. N.C. Dep't of Corr.*, the petitioner argued that his dismissal was based upon unlawful procedure because he only received notice of his pre-dismissal conference two days before it occurred. 173 N.C. App. 594, 599, 620 S.E.2d 14, 18 (2005). This Court determined that the requirements of due process in the context of the termination of employment were "sufficiently protected by 'a pretermination opportunity to respond, coupled with post-termination administrative procedures.'" *Id.* (quoting *Owen v. UNC-G*, 121 N.C. App. 682, 686, 468 S.E.2d 813, 816 (1996)). The *Hilliard* Court also reiterated our Supreme Court's holding that "a State employee's due process rights are satisfied by the opportunity to pursue a contested case hearing before OAH." *Id.* (citing *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 324-25, 507 S.E.2d 272, 278-79 (1998)).

The instant case is more analogous to *Hilliard* than to *Bishop*. Petitioner first had the opportunity to respond to the allegations against her during her interview with Stocks and Fields on 3 January 2007. While petitioner only received notice less than twenty-four hours before her pre-dismissal conference¹, she was given a second opportunity at this conference to present her arguments against dismissal and provide the names of witnesses. The SPC's findings indicate that Director Robertson was aware of petitioner's evidence from the interview and the pre-dismissal conference when he made the determination to terminate her employment. Thus, unlike the petitioner in *Bishop*, petitioner in the instant case cannot support a claim that she was denied a pre-dismissal conference and its accompanying due process rights, as she was given two opportunities to respond to the allegations against her prior to respondent's decision to terminate her employment.

Moreover, petitioner received a full hearing before the ALJ. At this hearing, petitioner was represented by counsel and able to both present witnesses to testify on her behalf and cross-examine respondent's witnesses. Therefore, any due process deficiencies that may have resulted from the manner that respondent conducted the pre-dismissal conference were cured by the OAH hearing. *Hilliard*, 173 N.C. App. at 599, 620 S.E.2d at 18. Petitioner

¹ While we are concerned about the minimal amount of time petitioner was given to prepare for the pre-dismissal conference, we note that the record does not reveal any requests by petitioner for a continuance or any denial of such a request by her supervisors.

received both a pre-termination opportunity to respond to the allegations against her and a post-termination administrative hearing, fully satisfying due process requirements for the termination of employment. Accordingly, petitioner's argument that the SPC committed an error of law by upholding her dismissal is without merit.

V. Conclusion

The superior court committed an error of law by engaging in independent fact finding. Based upon the SPC's findings of fact, we determine, after a *de novo* review, that the SPC committed no errors of law in upholding petitioner's dismissal. The superior court's order requiring reinstatement of petitioner is reversed, and this case is remanded to the superior court with instructions to affirm the SPC's final agency decision.

Reversed and remanded.

Judges HUNTER, Robert C. and HUNTER, Jr., Robert N. concur.

Report per Rule 30(e).