NO. COA10-1298
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

TERRI WALKER WEST,
Petitioner,

v. Wake County
No. 09 CVS 17772

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,
Respondent.

Appeal by petitioner from order entered 6 July 2010 by Judge James E. Hardin, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 24 March 2011.

*Ferguson, Stein, Chambers Gresham, & Sumter, P.A., by Geraldine Sumter and Tanisha Johnson, for petitioner-appellant.*

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Neil Dalton, for the State.*

STROUD, Judge.

Petitioner appeals trial court order affirming the Decision and Order of the State Personnel Commission which determined petitioner was dismissed for just cause. For the following reasons, we affirm.

## I. Background

This case arises from respondent Department of Transportation's termination of petitioner's employment. We note that petitioner's hostility towards respondent and several of her co-workers is palpable throughout the record and transcript and began well before the specific timeframe at issue in this case, but we limit our recitation of the facts to those necessary for the resolution of the specific inquiries before us regarding petitioner's phone calls with her supervisors on 17 and 18 September 2007.

> On October 10, 2007, Respondent dismissed Petitioner for unacceptable personal conduct based upon insubordination, conduct unbecoming a State employee detrimental to State service, and conduct for which no reasonable person should expect to receive prior warning. . . . Specifically, this included three incidents of hanging up the telephone on her supervisors, refusing to obey a directive to report to the Aberdeen office, and lying about the hang-ups during her pre-disciplinary conference.

On 3 March 2008, petitioner filed a petition for a contested case hearing pursuant to N.C. Gen. Stat. §§ 126-34.1, -37 because she was "discharge[d] without just cause[.]" On or about 29 April 2009, Administrative Law Judge ("ALJ"), Joe L. Webster, affirmed "Respondent's dismissal of Petitioner in that Respondent had 'just cause' for such disciplinary decision

within the meaning of N.C.G.S. § 126-35[.]" Petitioner excepted to the ALJ's decision.

On or about 6 August 2009, the State Personal Commission ("SPC"), by E.D. Maynard III, adopted and affirmed the ALJ's decision. Petitioner requested review of the SPC's decision. On 6 August 2010, the trial court affirmed the Decision and Order of the SPC. Petitioner appeals.

II. Trial Court's Standard of Review

Petitioner first contends that "the trial court erred as a matter of law in failing to employ a *de novo* standard of review to conclusions of law numbers 8 and 9 of the Decision and Order of the State Personnel Commission." (Original in all caps.) However, as petitioner concedes in her brief, "an appellate court's obligation to review a superior court order examining an agency decision can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Shackleford-Moten v. Lenoir Cty. DSS*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002) (citation and quotation marks omitted), *disc. review denied*, 357 N.C. 252, 582 S.E.2d 609 (2003). Accordingly, we need not address this issue regarding the standard of review and turn to the "dispositive

issue(s)" before us. *Id.* ("In performing this task, the appellate court need only consider those grounds for reversal or modification raised by the petitioner before the superior court and properly assigned as error and argued on appeal to this Court.")

III. Petitioner's Dismissal

On appeal, petitioner challenges, as a matter of law, one finding of fact and two conclusions of law. "When reviewing a trial court's order affirming a decision by an administrative agency, the scope of review of this Court is the same as it is for other civil cases. We must examine the trial court's order for errors of law[.]" *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596, 620 S.E.2d 14, 17 (2005) (citation omitted). "If the petitioner argues the agency's decision was affected by an error of law, *de novo* review is required." *Shackleford-Moten*, 155 N.C. App. at 571, 573 S.E.2d at 769.

A. Finding of Fact 220

Finding of fact 220 states:

> 220. The undersigned agrees with the Civil Rights Division and finds that Petitioner hung up on Chief Grady on September 17, 2007, on Senior Examiner Kozen on September 18, 2007, and on Chief Grady on September 18, 2007, and this Court further finds that Petitioner willfully refused a lawful and reasonable directive issued by

> Chief Grady for Petitioner to report to the Aberdeen office. The undersigned finds that Petitioner was not required to use such ordinary departing words such as goodbye or I'll talk to you later before hanging up the phone. However, under the circumstances and serious nature of the telephone conversation that was taking place, Petitioner had an obligation to conclude the telephone conversations in a manner that would have demonstrated Petitioner's sincerity and non-belligerence toward her superiors and in a manner that would have conveyed understanding and cooperation with her employer.

Petitioner contends that "the trial court erred as a matter of law in adopting finding of fact number 220 of the Decision and Order of the State Personnel Commission and finding that petitioner hung up on her supervisors on three separate occasions." (Original in all caps.) However, "[u]nchallenged findings of fact are binding on appeal." *Peters v. Pennington*, ___ N.C. App. ___, ___, 707 S.E.2d 724, 733 (2011). There are 232 unchallenged findings of fact.

The unchallenged findings of fact establish that

> 188. [On 17 September 2007,] Chief Grady then firmly stated, "I want you to understand that if you leave work that this will be unapproved leave." Petitioner responded, "I want you to understand, I am leaving and going home." *Petitioner then hung the phone up on Chief Grady*. The time was 9:40 a.m. . . .
>
> . . . .

193. On September 18, 2007, the evidence shows that Petitioner ***hung up the telephone on two different supervisors***.

194. First, at approximately 4:55 p.m., [on 18 September 2007,] Petitioner called Senior Examiner's office phone and stated that she would not be into work the following day, September 19, 2007. Senior Examiner Kozen -- who had been scheduled to be on vacation and returned to work only because of the shortage created by Petitioner's absence -- instructed Petitioner to call District Supervisor Franze and inform him of the time off. Petitioner exclaimed, "I'm telling you, you are my immediate supervisor!" Senior Examiner Kozen stated that she was going on vacation and that Petitioner, thus, needed to call District Supervisor Franze. Petitioner resisted, insisting, "Well, you answered the phone!" Senior Examiner Kozen responded, "I am giving you a directive to call District Supervisor Franze." Petitioner replied, "I called you, I'm telling you, you're my supervisor and I'm telling you!" ***Petitioner then slammed the phone down and hung up on Senior Examiner Kozen.***

. . . .

203. [On 18 September 2007,] Petitioner reiterated that she would bring the note to Aberdeen on September 20, 2007, and at that point, Petitioner stated, "I am on my time now," ***at which point she hung up on Chief Grady.***

. . . .

208. Although Petitioner may have reasonably believed in her own mind that she did not hang up on Senior Examiner Kozen and

> Chief Grady, this Court does find by the preponderance of the evidence that *Petitioner hung up on Kozen and Grady*. However, the undersigned does not find as a fact that the Petitioner lied during her predisciplinary conference about whether she hung up on the Respondent's supervisors. Petitioner was told by Respondent that she made untruthful statements when she denied in her predisciplinary conference on October 5, [2]007 that she had hung up on her supervisors prior to the conversations ending. . . . There is insufficient evidence in the record to conclude that Petitioner lied during her predisciplinary conference and therefore, Respondent should not have used this factor as a reason for Petitioner's dismissal. Petitioner's articulation of a good faith belief during the predismissal conference that she did not hang up on Kozen and Grady should not have become a basis of her dismissal. Nevertheless, the undersigned does find as a fact that *Petitioner's conduct in ending the conversations in the manner testified to, amounts to a "hanging up" on Kozen and Grady*.

(Emphasis added.) (Brackets omitted.) As several binding findings of fact establish that petitioner hung up on her supervisors, once on 17 September 2007 and twice on 18 September 2007, this argument is overruled.

B. Conclusions of Law 8 and 9

The challenged conclusions of law state:

> 8. Petitioner's hanging up the telephone on Chief Grady on September 17, 2007, on Senior Examiner Kozen on September 18, 2007, and on Chief Grady again on

> September 18, 2007, considered along with the facts and circumstances of this case, constitutes insubordination, conduct detrimental to State service, and conduct for which no prior warning is required. The undersigned does not find as a matter of law that Petitioner lied about the hang-ups during the pre-disciplinary conference, however by the preponderance of the evidence the undersigned finds as a matter of law that Petitioner "hung up" the telephone on Chief Grady twice and Senior Examiner Kozen within the ordinary meaning of the phrase "hung up." Petitioner's articulation of a good faith belief that she did not hang up the telephone on Grady and Kozen at the disciplinary conference should not have been used by Respondent as a reason to support her dismissal for cause.
>
> 9. Therefore, Respondent has met its burden of proof and established by substantial evidence in the record that it had just cause to terminate its employment of Petitioner for unacceptable personal conduct.

Petitioner contends that "the trial court erred as a matter of law in adopting conclusions of law numbers 8 and 9 of the Decision and Order of the State Personnel Commission and concluding that petitioner was terminated for just cause." (Original in all caps.) Petitioner makes various arguments as to conclusions of law 8 and 9, but we remind petitioner that this Court will only address those issues raised before the trial court. *See Walker v. N.C. Dept. of Human Res.*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990) ("We note initially

that respondent did not object in either case to the adopted findings of fact at the superior court level. The findings of fact were binding, therefore, at that appellate level, and are binding for purposes of our review."), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991); *see also* N.C.R. App. P. 10(a) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.") Before the trial court the petitioner argued in pertinent part,

> [c]onclusion of Law No. 8 and 9, which is based on the erroneous Finding of Fact No. 220 and concluded that petitioner's hanging up the phone on management constitutes unacceptable personal conduct, is unsupported by the substantial evidence and is also erroneous as a matter of law.

As we have already addressed finding of fact 220, the only remaining issue before this Court is whether, "as a matter of law[,]" "petitioner's hanging up the phone on management constitutes unacceptable personal conduct[.]"

"A state employee may be dismissed only for just cause."

*Souther v. New River Area Mental Health*, 142 N.C. App. 1, 5, 541 S.E.2d 750, 753 (quotation marks omitted), *aff'd per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001); *see* N.C. Gen. Stat. § 126-35 (2007). "'Just cause,' like justice itself, is not susceptible of precise definition. It 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." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004) (citations and quotation marks omitted).

> (b) There are two bases for the discipline or dismissal of employees under the statutory standard for "just cause" as set out in G.S. 126-35. These two bases are:
>
> (1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance.
>
> (2) Discipline or dismissal imposed on the basis of unacceptable personal conduct.
>
> (c) Either unsatisfactory or grossly inefficient job performance or unacceptable personal conduct as defined in 25 NCAC 1J. 0614 of this Section constitute just cause for discipline or dismissal.

25 N.C. Admin. Code 1J.0604(b)-(c) (2006).

Here, conclusions of law 8 and 9 state that petitioner was insubordinate, that her "conduct [was] detrimental to State

service" and required no prior warning, and that petitioner was terminated for "just cause" due to "unacceptable personal conduct." The North Carolina Administrative Code states,

> (h) Insubordination--The willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is considered unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning.
>
> (i) Unacceptable Personal Conduct is:
>
> . . . .
>
> (5) conduct unbecoming a state employee that is detrimental to state service[.]

N.C. Admin. Code 1J.0614(h)-(i) (2006).

The unchallenged findings of fact establish that petitioner hung up on her supervisors three times. Certainly, hanging up on supervisors while they were attempting to instruct petitioner regarding her job qualifies as insubordination. *See* 25 N.C. Admin. Code 1J.0614(h). We again note that "[i]nsubordination is considered unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning." *Id.*

The trial court also concluded that petitioner's "conduct [was] detrimental to State service[.]" "No showing of actual harm is required to satisfy definition (5) of [unacceptable

personal conduct], only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer)." *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17. Hanging up three times on supervisors qualifies as "detrimental to state service" as without speaking to petitioner her supervisors could not ensure that her job was being performed.[1] 25 N.C. Admin. Code 1J.0614(i)(5). As both insubordination and "conduct detrimental to State service" are forms of unacceptable personal conduct, petitioner was dismissed for just cause. *See* 25 N.C. Admin. Code 1J.0604(b)-(c), .0614(h)-(i)(5).

IV. Conclusion

As petitioner was insubordinate and her conduct was "detrimental to State service" and as both insubordination and "conduct detrimental to State service" are forms of unacceptable personal conduct, petitioner was dismissed for just cause. For the foregoing reasons, we affirm.

AFFIRMED.

Judges HUNTER, JR., Robert N. and THIGPEN concur.

---

[1] The importance of the telephone conversations and ensuring that petitioner's job was performed is emphasized by finding of fact 194 in that "Senior Examiner Kozen . . . had been scheduled to be on vacation and returned to work only because of the shortage created by Petitioner's absence[.]"

Report per Rule 30(e).