IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-188

Filed: 18 October 2016

Office of Administrative Hearings, No. 15 OSP 03279

MARY BOGGS, Petitioner,

v.

N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent.

Appeal by Petitioner from final decision entered 2 November 2015 by the Office of Administrative Hearings. Heard in the Court of Appeals 23 August 2016.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for the Petitioner-Appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General M. Shawn Maier and Special Deputy Attorney General Jennie W. Hauser, for the Respondent-Appellee.

DILLON, Judge.

Mary Boggs ("Petitioner") appeals from a Final Agency Decision of the Office of Administrative Hearings affirming the North Carolina Department of Environmental Quality's ("DEQ") finding of just cause to dismiss Petitioner for unsatisfactory job performance.

I. Background

Petitioner was a State employee, most recently with DEQ as a chemistry technician in DEQ's Particulate Matter Laboratory (the "PM Lab"). She had previously been employed by the Department of Health and Human Services ("DHHS").

In January 2015, Petitioner was dismissed from her position with DEQ for unsatisfactory job performance. Following her termination, Petitioner filed a petition in the Office of Administrative Hearings ("OAH") alleging that her dismissal was without just cause. After a hearing, the administrative law judge ("ALJ") issued a Final Agency Decision in favor of DEQ.

The evidence at the OAH hearing tended to show as follows: In May 2014, Petitioner began her employment with DEQ. DEQ is a division of the Department of Environment and Natural Resources which is responsible for monitoring the air quality of North Carolina to ensure that the State is in compliance with federal air quality standards. DEQ has stations positioned across North Carolina which draw air through filters in order to capture airborne particulate matter. As a chemistry technician, Petitioner's work responsibilities included weighing and distributing new filters to DEQ's regional offices for use at sampling stations, weighing used filters upon receipt, and recording this data to compare the "pre-weight" of the filter to its "post-weight" in order to detect the amount of pollutants captured. Filters are carefully transported below a specific temperature and must be weighed within thirty (30) days of receipt at DEQ in order to guarantee accurate data.

Petitioner's supervisor and coworkers testified that Petitioner struggled to perform her job responsibilities in a timely manner. The employee who trained Petitioner testified that he was responsible for Petitioner's job duties in addition to his own in the months preceding Petitioner's start date with DEQ and that he was able to complete the tasks ultimately assigned to Petitioner – along with his other job duties – in a timely manner. However, within a few months after Petitioner began her employment with DEQ, a backlog of work had accumulated in the PM Lab.

By September 2014, Petitioner received a written warning from DEQ (the "DEQ Warning") for failing to record weighing dates and final weights for filters, failing to timely review the PM Lab's operating procedures, and failure to provide her supervisor with a daily operating schedule. Several days later, Petitioner was given a Performance Improvement Plan which detailed the improvements she was expected to make and specific strategies for achieving those goals. Despite these measures, Petitioner continued to fail to weigh filters in a timely fashion. On two separate occasions while Petitioner was on leave, an employee assigned to assume her job responsibilities was able to perform the duties assigned to Petitioner in the PM lab *and* clear the backlog of work that had accumulated.

In January 2015, Petitioner's supervisor gave her notice of investigatory placement with pay and notice to attend a pre-disciplinary conference. Following the pre-disciplinary conference, DEQ determined that Petitioner should be dismissed for unsatisfactory job performance. At the time of her dismissal, Petitioner had an active

warning for unsatisfactory job performance from DEQ and an active warning for unacceptable personal conduct from DHHS.

After the ALJ issued its final decision affirming DEQ's finding of just cause for dismissal, Petitioner timely appealed.

II. Analysis

On appeal, Petitioner argues that the ALJ's finding of just cause was not supported by substantial evidence and that Respondent DEQ failed to establish just cause for dismissal as a matter of law. Petitioner also challenges the validity of the two warnings she received which were used to support her dismissal. We address each of these arguments in turn.

A. Sufficiency of the Evidence and Just Cause

Prior to her dismissal, Petitioner was a career status employee subject to the North Carolina Human Resources Act. N.C. Gen. Stat. § 126-35(a) provides that "no career State employee . . . shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2015). Determining whether a public employer had just cause to discipline its employee 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. Dept. of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (internal marks omitted). The first of these inquiries is a question of fact, and is reviewed under the whole record test. *Id.* at 665, 599 S.E.2d

at 898.[1] The latter inquiry is a question of law and is therefore reviewed *de novo*. *Id.* at 666, 599 S.E.2d at 898.

After consideration of the whole record, we hold that there was "competent, material, and substantial evidence" to support the findings of the ALJ. S*ee Bashford v. N.C. Licensing Bd. For General Contractors*, 107 N.C. App. 462, 465, 420 S.E.2d 466, 468 (1992). It is clear from the record and from the testimony offered at the OAH hearing that Petitioner did, in fact, exhibit the shortcomings alleged by DEQ. *See Carroll*, 358 N.C. at 665, 599 S.E.2d at 898. Petitioner failed to timely weigh filters, stay current with data entry, ship filters to regional offices, and generally stay current with the responsibilities required of her position as a chemistry technician in the PM Lab.

Further, we agree with the ALJ's conclusion that based on the record evidence and its findings, DEQ had just cause to dismiss Petitioner for unsatisfactory job performance.

There are two grounds for just cause: (1) unsatisfactory job performance, and (2) unacceptable personal conduct. Petitioner was dismissed for unsatisfactory job performance, which is defined as "work-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work

[1] The whole record test requires examination of the entire record, including evidence which detracts from the agency's decision. *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895. A reviewing 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*." *Id.*

plan, or as directed by the management of the work unit or agency." 25 N.C.A.C 01J.0614(9) (2015); 25 N.C.A.C. 01J.0604(b) (2015). "The standard of employee conduct implied in every contract of employment is one of reasonable care, diligence and attention." *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 504, 397 S.E.2d 350, 355 (1990) (internal marks omitted) (citing *Wilson v. McClenny,* 262 N.C. 121, 131, 136 S.E.2d 569, 577 (1964)). Thus, in establishing that it had just cause to terminate an employee, "an agency is bound to make a showing that the employee has not performed with reasonable care, diligence[,] and attention." *Walker*, 100 N.C. App. at 504, 97 S.E.2d at 355. Failure to fulfill certain quotas and complete certain tasks to the complete satisfaction of a supervisor is not enough. *Id.* The agency must show: (1) that these quotas and job requirements were *reasonable,* and if so, (2) that the employee made no reasonable effort to meet them. *Id.*

Petitioner argues that the ALJ failed to properly apply the criteria stated in *Walker* in its final decision. We disagree. Although the ALJ did not specifically cite to *Walker*, the decision did include findings which addressed the elements of the *Walker* test. Regarding the reasonableness of the job requirements, the ALJ found that Respondent DEQ "reasonably determined that a single employee would be able to perform [the job responsibilities of Petitioner's position], and that Petitioner failed to stay current with data entry, failed to promptly ship filters to regional offices, and generally did not perform her assigned tasks in a timely manner." This finding was supported by the testimony of the employee who trained Petitioner and the testimony

of the employees who managed the PM Lab during her absences. Regarding the lack of reasonable effort made by Petitioner to meet the job requirements, the ALJ found that Petitioner displayed a "persistent inability or unwillingness, over a period of six months, to timely execute tasks that fundamentally required consistent and meticulous performance[.]" Based in part on these findings of fact, the ALJ determined that Respondent DEQ had just cause to dismiss Petitioner for unsatisfactory job performance.

We conclude that Petitioner's related contention that she was dismissed for failing to complete her job responsibilities "to the complete satisfaction" of her supervisor is erroneous. The record evidence clearly shows that Petitioner's supervisor stated that her failure to follow his directives to his complete satisfaction would "not necessarily" result in discipline. And there is no evidence that DEQ's decision to dismiss Petitioner was based *solely* on her failure to do so. *See Walker*, 100 N.C. App. At 504, 397 S.E.2d at 355 (holding that when an agency seeks to establish that an employee was terminated for just cause, it "cannot rest solely on the grounds that a supervisor's directives were not carried out to their fullest extent"). Rather, the record shows that over the course of several months, Petitioner consistently failed to meet the reasonable requirements of her position as a chemistry technician with DEQ, despite being issued a warning for unsatisfactory job performance and receiving feedback from her supervisor regarding the need for improvement.

B. Validity of Warnings

Petitioner's second set of arguments on appeal concern Petitioner's written warnings – the DHHS Warning and the DEQ Warning. Specifically, Petitioner contends that (1) the ALJ improperly considered the DHHS Warning, and (2) the DEQ Warning was invalid on its face. We review both issues *de novo*. *See Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

Before dismissal for a current incident of unsatisfactory job performance, an employee must receive: (1) one or more written warnings, and (2) a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal.[2] 25 N.C.A.C. 01J.0605(b) (2015). In order to be used to support dismissal of a career State employee, a warning must be "active" at the time of the dismissal. *State Human Resources Manual*, § 7. VI. D. Unless removed by the employer, a warning remains active for eighteen (18) months after issue. *Id.*

Petitioner argues that Respondent DEQ improperly considered the DHHS Warning when it took disciplinary action against Petitioner because it was issued by a separate agency and was related to unacceptable personal conduct rather than unsatisfactory job performance. However, the ALJ specifically concluded that

[2] These warnings are required because warnings for unsatisfactory job performance are intended to notify an employee of performance-related inadequacies and allow opportunity for improvement. 25 N.C.A.C. 1J.0605(a) (2015); *see also Jones v. Dept. of Human Resources*, 300 N.C. 687, 690-91, 268 S.E.2d 500, 502 (1980).

Respondent DEQ "properly considered the prior [DHHS] Warning," and that "[d]isciplinary actions related to personal conduct may be included in the successive system for performance-related dismissal, provided that the employee receives the number of disciplinary actions required for dismissal on the basis of inadequate performance." We agree with the ALJ's conclusion.

The State Human Resources Manual provides that "when an employee transfers to another department or unit, any active written warnings or disciplinary actions will transfer with the personnel file of the employee and will remain in full force at the new work unit until removed by the new employer, or made inactive by the passage of 18 months without further disciplinary actions." *State Human Resources Manual*, § 7. VI. D. Additionally, "disciplinary actions related to personal conduct *may be included in the successive system for performance-related dismissal"* so long as the employee receives at least the number of disciplinary actions required for dismissal on the basis of inadequate performance. 25 N.C.A.C. 1J.0605(a) (2015) (emphasis added).

At the OAH hearing, the parties stipulated that Petitioner's manager at DHHS had reviewed the contents of the DHHS Warning with Petitioner at the time it was issued, that the warning was active at the time of Petitioner's transfer to DEQ, and that it was active at the time of Petitioner's dismissal from DEQ. Based on the plain meaning of the Human Resources Manual and the Administrative Code provisions,

it is clear that DEQ properly considered the DHHS Warning in its dismissal of Petitioner. Accordingly, this argument is overruled.

Petitioner also argues that the DEQ Warning for unacceptable job performance was facially invalid, and thus was improperly considered by the ALJ. Specifically, Petitioner contends that the written warning lacked details of specific "corrective action" to be taken by Petitioner and a specific time frame for improvement. The Administrative Code provision regarding written warnings states, in relevant part:

> The written warning shall:
>
> (3) [T]ell the employee what specific improvements, *if applicable*, shall be made to address the[] specific issues [that are the basis for the warning];
>
> (4) [T]ell the employee the time frame allowed for making the required improvements or corrections. *Absent a specified time frame, 60 days is the time frame allowed for correcting unsatisfactory job performance*[.]

25 N.C.A.C. 1J.0610(3)-(4) (2015) (emphasis added).

Petitioner's DEQ Warning did not include a specific time frame; however, the Administrative Code clearly states that in the absence of a stated time frame, the default is sixty (60) days. *Id.* Therefore, the omission of a specific time frame does not invalidate a warning. And we agree with DEQ that the specific improvements required of Petitioner were obvious from the issues stated in the DEQ Warning on which the warning was based. The DEQ Warning included the following corrective action: "[Petitioner] is required to meet the expectations specified in her

[performance plan] for the current work cycle. This includes the expectation to follow the standard operating procedures for the [PM Lab]." The DEQ Warning also referenced the following issues: failure to enter filter weighing dates and final weights for air filters, failure to adequately set priorities and complete work assignments according to a provided timeline, and failure to complete work as directed by a supervisor.

III. Conclusion

For the foregoing reasons, we affirm the ALJ's final decision affirming DEQ's finding of just cause to dismiss Petitioner for unsatisfactory job performance.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).