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NO. COA01-331

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

ANTHONY RATCLIFF,
Petitioner

v.

Burke County
No. 00 CVS 679

N.C. DEPARTMENT OF HEALTH
AND HUMAN SERVICES,
Respondent

Appeal by petitioner from order entered 6 December 2000 by Judge Raymond A. Warren in Burke County Superior Court. Heard in the Court of Appeals 22 January 2002.

LeCroy Ayers & Willcox, Attorneys at Law, by M. Alan LeCroy, for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for respondent-appellee, Department of Health and Human Services.

CAMPBELL, Judge.

Petitioner, Anthony Ratcliff, appeals from an order affirming the decision and order of the State Personnel Commission ("Commission") upholding petitioner's dismissal from the Western North Carolina School for the Deaf ("School") in Morganton, North Carolina for sleeping while on duty. We affirm.

Petitioner was employed as a dormitory attendant ("attendant") at least since 1993. As an attendant, petitioner was responsible for safeguarding the welfare and safety of the children residing in

the dormitory. One method by which the School ensured an attendant fulfilled these responsibilities was through the enactment of Policy Number IV-28, "Sleeping on the Job" ("policy"), which states that an employee's sleeping while on duty constitutes unacceptable personal conduct and can result in dismissal without warning. Petitioner was familiar with this policy and agreed that it should apply to any attendant, regardless of his or her prior work record.

The events leading up to petitioner's dismissal took place while he was working on third shift the Thursday night/Friday morning of 21-22 May 1998 and essentially involve three separate observations made during that shift by another School employee, Bryan Kennedy ("Kennedy"). Kennedy first observed petitioner for approximately fifteen minutes, beginning at 12:22 a.m., lying on a sofa in the dormitory lounge with his eyes closed. At 2:10 a.m., Kennedy again observed petitioner lying on a sofa in the staff office with the lights off and his eyes closed. Petitioner appeared startled when he opened his eyes. Finally, when Kennedy returned to the staff office at 3:45 a.m., he saw petitioner still lying on the sofa in a similar position with his eyes closed and the lights off. Petitioner again appeared startled when he opened his eyes. Kennedy reported petitioner's conduct to his supervisor.

Petitioner was dismissed on 15 June 1998 for violating the School's policy against sleeping while on duty. He pursued his remedies through the School's internal grievance process. On 23 September 1998, the decision to terminate petitioner's employment was upheld by respondent.

On 27 October 1998, Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings. The hearing was held on 22 September 1999 before Administrative Law Judge Meg Scott Phipps ("ALJ Phipps"). ALJ Phipps found petitioner's termination was for just cause and recommended that respondent's decision be upheld. After reviewing the record and ALJ Phipps' recommendation, the Commission issued a decision and order on 15 March 2000 that adopted ALJ Phipps' recommended decision without change. Petitioner sought judicial review of this agency decision by the Burke County Superior Court.

Judge Raymond A. Warren ("Judge Warren") presided over the superior court hearing. On 6 December 2000, Judge Warren filed an order upholding the Commission's decision. Petitioner timely filed notice of appeal to this Court.

Petitioner brings forth three assignments of error. For the following reasons, we affirm the trial court's order.

I.

We first address petitioner's second assignment of error. By this assigned error petitioner argues there was not substantial evidence regarding whether he was sleeping while on duty to support the trial court's decision to affirm the Commission's adoption of ALJ Phipps' findings of fact and conclusions of law. We disagree.

Our state's Administrative Procedure Act allows a superior court to conduct judicial review of a final agency decision. See N.C. Gen. Stat. § 150B-43 (1999). "The proper standard for the

superior court's judicial review 'depends upon the particular issues presented by the appeal.' When the petitioner 'questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test.'" *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citations omitted). The "whole record" test:

'[D]oes not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views,' but rather requires the court to determine whether there was substantial evidence to support the conclusions by taking all the evidence, both supporting and conflicting, into account. Substantial evidence is 'more than a scintilla' and is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'

Williams v. N.C. Dept. of Env't & Natural Res., 144 N.C. App. 479, 483, 548 S.E.2d 793, 796 (2001) (citations omitted).

A superior court's order regarding an agency decision is reviewed by the appellate court for error of law. See *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392. "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." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994).

In the instant case, the correct standard of review was used because the trial court's order states "[t]he Court reviewed the

decision of the Commission upholding the Petitioner's dismissal using the 'whole record' test and found that it was not arbitrary or capricious and that substantial evidence exists to support each finding as well as the Commission's decision." However, petitioner argues that when looking at the "whole record," there are inconsistencies in Kennedy's testimony that make the trial court's findings and conclusions incorrect. Therefore, this Court must now determine whether the trial court properly applied the "whole record" test.

After reviewing the "whole record," we conclude that there was substantial evidence to support the Commission's adoption of ALJ Phipps' findings of fact and conclusions of law. The respondent's evidence showed that Kennedy observed petitioner with his eyes closed for several minutes on three separate occasions during petitioner's shift. Although Kennedy could not testify with complete certainty that petitioner was asleep, Kennedy did testify that on two of those occasions petitioner appeared startled when he finally opened his eyes. Furthermore, there was additional evidence offered that: (1) petitioner was having difficulty with his eyes and had to administer eye drops to himself several times during that shift, but Kennedy testified he never saw petitioner with eye drops; (2) Everett Patterson ("Patterson"), a co-worker of petitioner's, had agreed to "cover" the dormitory floor while petitioner took a break during his shift, but Patterson denied any knowledge of this agreement; and (3) on three occasions in February of 1997 petitioner received written warnings for leaving his post

without permission; however, petitioner testified that he had an exemplary work record. Despite the presence of this conflicting evidence, when taking all the evidence into account, there exists "more than a scintilla" of evidence for reasonable minds to conclude that petitioner's rendition of events is not credible. See *Williams*, 144 N.C. App. at 483, 548 S.E.2d at 796. Thus, the "whole record" contains substantial evidence to support the Commission's decision to terminate petitioner's employment with the School for sleeping while on duty.

II.

By petitioner's next assignment of error he argues the trial court committed reversible error by upholding the Commission's decision to impose the burden of proof on him. We disagree.

Governmental actions and decisions which "deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendment" are restricted by procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 31 (1976). "The North Carolina General Assembly created, by enactment of the State Personnel Act, a constitutionally protected 'property' interest in the continued employment of career State employees." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998). Therefore, in order to prevent deprivation of this property interest and ensure procedural due process, "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or

demoted for disciplinary reasons, except for just cause." See N.C. Gen. Stat. § 126-35(a) (1999). Nevertheless, although the right to employment is a substantial right which triggers due process protection when deprived, our Supreme Court has held that there is not a substantial risk of erroneous deprivation of this right by placing the burden of proof upon a terminated state employee. See *Peace*, 349 N.C. at 324, 507 S.E.2d at 279.

In the case *sub judice*, it is undisputed that petitioner is a career state employee with a constitutionally protected property interest in continued employment. However, petitioner argues that, unlike the "typical" state employee, imposing the burden of proof on him violated his right to due process because he is hearing-impaired. Petitioner supports this argument by analogizing his case to *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970). In *Goldberg*, the United States Supreme Court ruled that welfare recipients should be afforded greater procedural safeguards when a state agency is attempting to terminate their welfare benefits. *Goldberg*, 397 U.S. at 264, 25 L. Ed. 2d at 297. The United States Supreme Court reasoned that since welfare recipients lack independent resources, even a temporary deprivation of welfare benefits could deprive these recipients of the very means by which to live. *Id.* Petitioner argues he should also be given greater procedural safeguards, such as having the burden of proof placed on respondent, since his impaired hearing makes his loss of employment more dire than that of a "typical" state employee. We are not persuaded by this argument.

In *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 507 S.E.2d 272 (1998), our Supreme Court held that unlike a welfare recipient, a "typical terminated State employee" does not need additional or substitute procedural safeguards because he or she has "other independent sources of support, including savings, gifts from family members, as well as government-assistance programs. Additionally, the terminated employee is free to and can readily seek alternate gainful employment, utilizing his or her skills and experience, within the available job market." *Id.* at 324, 507 S.E.2d at 279. Here, aside from petitioner being hearing-impaired, he has failed to show why his particular situation is any different from the "typical" state employee described in *Peace*.

Similar to the distinction made in *Peace*, the petitioner in the present case is also "a career State employee contesting a 'just cause' termination [who] does not face the same dire consequences from loss of employment" as a welfare recipient. See *id.* Petitioner, like the terminated employee in *Peace*, would likely have other independent sources of support, such as savings accumulated during his employment with the School, which would be unavailable to a welfare recipient. Furthermore, petitioner is free to utilize the skills and experience he acquired as a School employee to seek alternate gainful employment in the job market, the same as any other "typical" state employee. Petitioner's inability to hear does not so affect his ability to utilize these skills and experience that a substitute procedural safeguard, i.e., shifting the burden of proof to respondent, is required. Thus, the

trial court ruled consistently with procedural due process requirements by holding petitioner is a "typical" state employee who properly had the burden of proof placed on him in a hearing to decide whether his termination met the required "just cause" provision of our statutes.

III.

By petitioner's final assignment of error he argues reversible error was committed when ALJ Phipps denied his motion *in limine* and allowed respondent to offer evidence of petitioner's prior bad acts. Specifically, petitioner argues that ALJ Phipps allowed respondent to offer into evidence testimony that Patterson had observed petitioner sleeping on the sofa in the staff office on various occasions. We disagree.

The rules of evidence are generally applicable in administrative hearings. See N.C. Gen. Stat. § 150B-29(a) (1999). Rule 404(b) of our rules of evidence governs the admissibility of prior bad acts. See N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). Rule 404(b) states, in part, that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Id.

Based on the evidence in the case *sub judice*, we find that ALJ Phipps properly admitted the testimony of Patterson in the

administrative hearing for purposes other than to prove character, such as to prove intent, plan, and opportunity. Patterson's testimony was admissible to prove that on the evening in question, petitioner intended to use the staff office sofa to sleep, not to administer eye drops to himself. Furthermore, it is also admissible to prove petitioner planned to use the staff office in the same manner as he had on various occasions. Finally, Patterson's testimony is admissible under Rule 404(b) to prove petitioner had the opportunity to use the sofa in the staff office for sleeping. Thus, ALJ Phipps properly denied petitioner's motion to exclude evidence that he had slept while on duty on occasions prior to the occasion that led to his termination.

Accordingly, we conclude that the superior court did not err in affirming the Commission's decision to terminate petitioner's employment with the School.

Affirmed.

____ Chief Judge EAGLES and Judge McCULLOUGH concur.

Report per Rule 30(e).