

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-681

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

JUDITH CAVES,
Petitioner

v.

Wake County
No. 00 CVS 11580

NORTH CAROLINA DEPARTMENT
OF CORRECTION,
Respondent

Appeals by petitioner and respondent from judgment filed 11 January 2001 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 20 February 2002.

Allen & Pinnix, P.A., by M. Jackson Nichols and Angela Long Carter, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for respondent.

WALKER, Judge.

Petitioner was a career state employee working as a staff psychologist with the North Carolina Department of Correction (DOC). As a result of being passed over as a candidate for the vacant position of Psychological Program Coordinator I with DOC, petitioner filed a grievance with the State Personnel Commission (Commission). She claimed that DOC failed to give her the required preference accorded a career state employee. Petitioner's appeal

was first heard by an administrative law judge who recommended in part the following:

[T]hat the Department be required:

- A. to hire Petitioner into a comparable position;
- B. to award Petitioner back pay & benefits from December 7, 1998, the date Dr. Wilson began work;
- C. to award Petitioner a salary increase of \$11,000 consistent with the salary increase that was awarded to Dr. Wilson; and
- D. to pay Petitioner's reasonable attorney fees and costs.

DOC appealed the recommended decision to the Commission which agreed with the administrative law judge and, on 11 April 2000, ordered in part the following:

[T]he State Personnel Commission hereby orders that the Recommended Decision of the Administrative Law Judge in favor of the Petitioner be adopted and the Respondent's nonpromotion of Petitioner be reversed and the Commission hereby finds that the Petitioner met her burden of proof of showing that the Respondent failed to properly apply the promotional priority preference policies when it selected another applicant for the position of Psychological Program Coordinator I.

The Commission further orders that Petitioner be promoted into a Psychological Program Coordinator I position or a comparable position in accordance with 25 N.C.A.C. 1B .0428 or receive front pay until such a position is available; that Petitioner receive back pay in accordance with 25 N.C.A.C. 1B .0421; that Petitioner receive all other applicable benefits of continuous state employment from the date that the successful applicant was placed in the position. In addition, the Commission orders that

Petitioner may petition for attorney's fees pursuant to G.S. § 126-4(11) and 25 N.C.A.C. 1B .0414 and 1B .0438, which shall be awarded in any amount to be determined by the Commission upon receipt and consideration of a Petition for Attorneys Fees and the required documentation.

The order of the Commission was not appealed by either party.

On 6 September 2000, after a petition for attorney's fees was filed, the Commission found that petitioner was entitled to reimbursement for attorney's fees at the maximum rate allowable pursuant to N.C. Admin. Code tit. 25, r. 1B.0438 (1999). Petitioner timely filed an appeal of the award of attorney's fees through a petition for judicial review in the superior court and also filed a petition for a writ of mandamus to enforce the 11 April 2000 Commission's order. DOC filed a response contending that the Commission's order did not include the \$11,000 salary increase and that, because the Commission awarded attorney's fees at the maximum rate allowed under its rules, petitioner was not entitled to an increase in the hourly rate. Petitioner filed a motion to strike DOC's response.

On 5 December 2000, the trial court heard evidence and arguments of counsel on the petition for judicial review of attorney's fees, the petition for writ of mandamus, and the motion to strike the response of DOC. The trial court denied the motion to strike. It concluded the Commission's order included the salary increase of \$11,000 as recommended by the administrative law judge. It further concluded that "[a]s of the date of the hearing, the Department has not complied with the April 11, 2000 Order of the

State Personnel Commission" and granted the writ of mandamus. The trial court also concluded, "The Court is without authority to award an amount in excess of the maximum established rate of the State Personnel Commission at \$125.00 per hour," and denied the requested increase in attorney's fees. Both parties appeal.

We first consider DOC's appeal of the granting of a writ of mandamus. A writ of mandamus is an order from the trial court "commanding the performance of a specified official duty imposed by law." *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971). However, "the writ will not issue to compel the performance of an act which a defendant shows a willingness to perform." *Id.* A writ of mandamus "is an extraordinary remedy which the court will grant only in case of necessity." *Id.* To be granted, "[n]ot only must the [petitioner] show that [she] has a clear legal right; [she] must show that the opposing party is under legal obligation to perform the act." *Thomas v. Board of Elections*, 256 N.C. 401, 408, 124 S.E.2d 164, 169 (1962). DOC agrees that a trial court may issue a writ of mandamus where there is a clear legal right to demand it by the petitioner and the respondent agency is under a positive legal obligation to perform the act sought to be required.

Here, petitioner is attempting to enforce the order of the Commission. The Commission ordered "that the Recommended Decision of the Administrative Law Judge in favor of the Petitioner be adopted." Neither party appealed that order. When a party fails to file a petition for review within the required time, the party

"waives the right to judicial review." N.C. Gen. Stat. § 150B-45 (1999). Thus, the order of the Commission was final and enforceable. Petitioner had a right to seek enforcement of the order of the Commission and DOC had an obligation to comply with the order.

DOC contends that it had complied with all of the provisions of the order but the order did not require a salary increase of \$11,000. The administrative law judge recommended "a salary increase of \$11,000 consistent with the salary increase that was awarded to Dr. Wilson." In adopting the administrative law judge's recommended decision, the Commission did not exclude the \$11,000 from its order. Thus, there was a sufficient basis for the trial court to conclude the Commission's order included a salary increase of \$11,000 to the petitioner.

At the hearing before the trial court, petitioner testified that she had not been promoted as ordered and the other provisions of the Commission's order had not been complied with except for a five percent salary increase. Even though this was disputed in the trial court, there was competent evidence to support the trial court's finding that "[a]s of the date of the hearing, the Department has not complied with the April 11, 2000 Order of the State Personnel Commission."

Our Supreme Court held in *N.C. Dept. of Transportation v. Davenport*, 334 N.C. 428, 432 S.E.2d 303 (1993) that an administrative agency of this State cannot be held in contempt for failing to comply with an order to reinstate an employee and

provide back pay. Thus, here, petitioner did not have available the remedy of contempt for DOC's failure to comply with the Commission's order. On the other hand, petitioner has a "clear legal right" to seek enforcement of the Commission's order upon DOC's failure to comply. Thus, we conclude the trial court did not err in granting petitioner's writ of mandamus.

We next consider petitioner's appeal of the denial of her request for an increase in the hourly rate in setting attorney's fees. On 11 April 2000, the Commission concluded that the petitioner may petition for attorney's fees "pursuant to G.S. § 126-4(11) and 25 N.C.A.C. 1B .0414 and 1B .0438." N.C. Gen. Stat. § 126-4 states the following:

[T]he State Personnel Commission shall establish policies and rules governing each of the following:

. . . .

(11) In cases where the Commission finds discrimination, harassment, or orders reinstatement or back pay whether (i) heard by the Commission or (ii) appealed for limited review after settlement or (iii) resolved at the agency level, the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved.

N.C. Admin. Code tit. 25, r. 1B.0414 establishes the different categories in which attorney's fees and costs may be awarded to an aggrieved party who has brought an action against a State agency. N.C. Admin. Code tit. 25, r. 1B.0438 allows for the reimbursement of attorney's fees at a maximum rate of \$125.00 per hour, legal

assistant's fees at a maximum rate of \$55.00 per hour, and travel time at a maximum rate of one-half the applicable hourly rate.¹

Here, the Commission awarded attorney's fees at the maximum rate as established by its rules. The trial court did not err in concluding that it was without authority to award an amount in excess of the maximum established rates of the Commission.

In conclusion, we find that the trial court did not err in granting the writ of mandamus enforcing the order of the Commission which includes the \$11,000 salary increase to the petitioner. Based on this finding, we need not address the appeal of the denial of the motion to strike DOC's response to the petitions. The trial court did not err in denying petitioner's request for an increase in the hourly rates in setting attorney's fees. The order of the trial court is

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).

¹We note that N.C. Admin. Code tit. 25, r. 1B.0438 has been amended since the trial court heard arguments and filed its order. The amended rule establishes the hourly rate as "a reasonable hourly rate based on the prevailing market rate but at a rate no higher than the fee agreement between the parties." The amended rule has a temporary effective date of 11 May 2001.