

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA03-356

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2004

JERRELLE B. JONES,
Petitioner,

v.

Wake County
No. 01 CVS 13907

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES/
O'BERRY CENTER,
Respondent.

Appeal by respondent from order entered 31 December 2002 by Judge Evelyn Hill in Wake County Superior Court. Heard in the Court of Appeals 4 December 2003.

Shanahan Law Group, by Fenita M. Shepard, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Thomas M. Woodward, for respondent-appellant.

TYSON, Judge.

North Carolina Department of Health and Human Services/O'Berry Center ("respondent") appeals from an order reversing respondent's termination of Jerrelle B. Jones' ("petitioner") employment. We reverse.

I. Background

Petitioner was employed as a group home director at the O'Berry Center, an in-patient medical facility operated by respondent. Petitioner was responsible for supervising O'Berry

Center employees who cared for approximately twelve patients.

On 3 May 2000, Deborah Exum ("Exum"), petitioner's immediate supervisor, and Brenda Davis ("Davis"), Coordinator of Residential Services, met with petitioner to discuss her performance. Exum and Davis discussed petitioner's failure to timely fill vacant employee positions under her supervision and to follow O'Berry Center Policy #94-5 that addresses authorizing, accounting for, and computing an employee's work and leave time. Exum testified that petitioner had failed to follow the policy that resulted in excessive amounts of overtime being paid to petitioner's subordinates. Petitioner was directed to refer to O'Berry Center Policy #94-5 should she have any questions concerning how to properly handle work or leave time issues in the future. On 18 May 2000, petitioner was given a written warning regarding the issues discussed in the 3 May 2000 meeting. This written warning expressly addressed petitioner's failure to comply with O'Berry Center Policy #94-5.

On 15 May 2000, petitioner met with her staff to discuss administrative matters and client care issues. Beverly Decker ("Decker"), Jacqueline Bell ("Bell"), Nadine Billups ("Billups"), Tracy Dawson ("Dawson"), and Paula McCullough ("McCullough") testified that the 15 May meeting began at 2:30 p.m. and ended at 4:45 p.m. All testified that petitioner directed them to sign out at their regular quitting time of 3:30 p.m. rather than at 4:45 p.m., the actual time they left work. Decker, Dawson, and Billups expressed concern that petitioner's directive would result in falsified time records.

McCullough testified that petitioner later informed her that she should always correctly report her time. McCullough did not believe that this statement was made in reference to the 15 May meeting or was a retraction of petitioner's prior directive. No other witnesses recalled petitioner retracting her 15 May directive.

On 7 June 2000, Exum learned of petitioner's actions. Exum wrote to petitioner advising her that she was investigating petitioner's actions of instructing her staff not to report compensatory time on their time sheets. Exum notified petitioner that she was placed on administrative leave with pay pending the outcome of the investigation.

As part of the investigation, Exum interviewed petitioner and staff who attended the 15 May meeting. Petitioner denied the allegations and confirmed this denial in a letter written to Exum. Exum testified that petitioner's written denial was contrary to the statements she received from all other witnesses.

On 12 June 2000, Exum informed petitioner by letter that a pre-dismissal conference regarding the 15 May incident was scheduled for 15 June 2000. This conference was rescheduled for 11 September 2000, due to petitioner being out on approved medical leave. Davis notified petitioner of the rescheduled conference by letter on 8 September 2000.

On 11 September 2000, the pre-dismissal conference was held. Petitioner, Exum, Davis, and Dr. Frank Farrell ("Farrell"), Assistant Director of the O'Berry Center, attended the conference.

Exum and Farrell testified that petitioner again stated that she had not directed her staff to incorrectly report their time. Exum and Farrell also testified that when petitioner was asked about the contradictory statements made by her staff she replied that they were lying and their statements were untrue. Petitioner later testified and admitted to instructing her staff to incorrectly report their time, to put their names on a separate sheet, and that petitioner would ensure the employees received administrative leave for their overtime hours.

On 14 September 2000, petitioner was dismissed by letter for unacceptable personal conduct for directing her staff to incorrectly report their time in direct violation of O'Berry Center Policy #94-5. Petitioner filed a petition for a contested case hearing with the North Carolina Office of Administrative Hearings ("OAH"). The Administrative Law Judge ("ALJ") issued a recommendation that petitioner's dismissal be upheld. The North Carolina State Personnel Commission ("SPC") adopted and affirmed the ALJ's decision. Petitioner appealed the decision. The superior court reversed the SPC's order, finding that petitioner had been dismissed without due process and that respondent's decision to dismiss petitioner was not supported by the whole record.

II. Issues

The issues are whether the trial court erred in finding: (1) petitioner was denied due process prior to her dismissal and (2) insufficient evidence in the whole record to support respondent's

decision to dismiss petitioner for unacceptable personal conduct.

III. Standard of Review

_____The North Carolina Administrative Procedure Act governs trial and appellate court review of administrative agency decisions. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). Although N.C. Gen. Stat. § 150B-51(b) lists the grounds upon which a court may reverse or modify an administrative agency decision, the proper standard of review to be employed by the court depends upon the nature of the alleged error. *Id.* at 674, 443 S.E.2d at 118.

If a petitioner asserts that the administrative agency decision was based on an error of law, then *de novo* review is required. *Id.* (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)). If a petitioner asserts that the administrative agency decision was not supported by the evidence, or was arbitrary and capricious, then the trial court employs the "whole record" test. *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. The standard of review for an appellate court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court. See *In re Appeal of Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254 (1995). We must determine (1) whether the trial court applied the appropriate standard of review and, if so (2) whether the court did so properly. *Amanini*, 114 N.C. at 675, 443 S.E.2d at 118-119.

IV. Due Process

Respondent contends the trial court erred in finding that respondent failed to provide due process before petitioner's employment was terminated for unacceptable personal conduct. Petitioner contends that she was denied due process by (1) lack of notice of the pre-dismissal conference held on 11 September 2000, (2) Exum participating in the pre-dismissal conference, and (3) the dismissal letter she received.

This Court has held that:

Under federal due process an employee's property interest in continued employment is sufficiently protected by 'a pretermination opportunity to respond, coupled with post-termination administrative procedures' Further, the federal due process concern for fundamental fairness is satisfied if the employee receives 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.' To interpret the minimal protection of fundamental fairness established by federal due process as 'requiring more than this . . . would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.'

Owen v. UNC-G Physical Plant, 121 N.C. App. 682, 686, 468 S.E.2d 813, 816 (1996) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547-548, 84 L. Ed. 2d 494, 507 (1985) (internal citations omitted)).

The 12 June 2000, letter gave petitioner legally sufficient notice of the pre-dismissal conference. The letter states: (1) the date and time of the conference, (2) the place of the conference, (3) the purpose of the conference, (4) the allegations concerning petitioner, (5) the date the incident giving rise to the

allegations occurred, and (6) that petitioner would be provided an opportunity to offer any additional information regarding the allegations. The initial pre-dismissal conference was rescheduled for 11 September 2000, due to petitioner being on approved medical leave. On 8 September 2000, Davis sent petitioner another letter advising her that the pre-dismissal conference had been rescheduled and that petitioner would be given the opportunity to present any additional information pertaining to the allegations set out in the previous letter. Petitioner had been interviewed previously as part of the initial investigation into the allegations and had responded with a written statement denying the allegations. Petitioner was given sufficient notice of the pre-dismissal conference.

Respondent also contends that the trial court erred in finding that the pre-dismissal conference itself was insufficient because one of the participants of the pre-dismissal conference, Exum, had initially investigated the allegations.

This Court, addressing a similar issue, held that no *per se* due process violation occurs when an administrative tribunal acts as both an investigator and an adjudicator in the same matter. *Kea v. Department of Health and Human Servs.*, 153 N.C. App. 595, 605, 570 S.E.2d 919, 926 (2002) (quoting *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 354, 342 S.E.2d 914, 924 (1986)). We further held that in order for there to be a violation of due process, petitioner must show that the employer or its representative held a personal bias against him. *Kea*, 153 N.C.

App. at 605, 570 S.E.2d at 925. "Mere familiarity with the facts of a case gained by an agency or individual in the performance of its statutory role does not, however, disqualify, a decision maker." *Id.*

No evidence shows that Exum was biased against petitioner. The facts merely show that Exum was familiar with the facts of the case as she was the initial investigator. Exum informed petitioner that she would have an opportunity to offer additional information regarding the allegations and that all information would be considered before a decision was made. Further, Farrell, Exum's supervisor, participated in the pre-dismissal conference and had authority to disregard or overrule Exum's conclusions.

Respondent contends the trial court erred in finding that the notice of dismissal provided to petitioner was legally insufficient to provide petitioner due process and violated the provisions of N.C. Gen. Stat. § 126-35.

N.C. Gen. Stat. § 126-35 (2003) states:

(a) No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.

The purpose of N.C. Gen. Stat. § 126-35 is to provide the employee with the reasons for the personnel action so that the employee has sufficient information to prosecute an appeal. *Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 922.

Here, the dismissal letter of 14 September 2000, states: (1) the date of the occurrence, (2) the acts that took place, (3) the reason for the dismissal, and (4) petitioner's right to appeal with a copy of the appeal procedures attached. This letter clearly fulfilled the purpose of N.C. Gen. Stat. § 126-35.

Petitioner was afforded sufficient due process by the letter notifying her of the pre-dismissal conference, the holding of the pre-dismissal conference, and by the letter terminating petitioner's employment which informed her of her right to appeal. The trial court erred in finding that petitioner was denied due process.

V. Unacceptable Personal Conduct

Respondent contends that the trial court erred in finding insufficient evidence in the whole record to support petitioner's dismissal for unacceptable personal conduct. We agree.

Petitioner argued to the trial court that the record did not contain substantial evidence to support the decision to terminate petitioner for unacceptable personal conduct. A claim that an agency's decision is not supported by substantial evidence requires a reviewing court to apply the "whole record" test. *Pittman v. North Carolina Dep't of Health and Human Servs.*, 155 N.C. App. 268, 272, 573 S.E.2d 628, 631 (2002), *rev'd on other grounds*, 357 N.C. 241, 580 S.E.2d 692 (2003). The whole record test does not allow a reviewing court "to replace the [agency's] judgment as between two reasonable conflicting views, even though the court could justifiably have reached a different result had the matter been

before it *de novo*." *Id.* at 279, 573 S.E.2d at 635 (quoting *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). "If substantial evidence supports an agency's decision after the entire record has been reviewed, the decision must be upheld." *Pittman*, 155 N.C. App. at 272, 573 S.E.2d at 631 (quoting *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 473-474, 546 S.E.2d 177, 181 (2001)).

Petitioner also argued that her actions did not amount to unacceptable personal conduct. As a determination of just cause to dismiss an employee raises an issue of law, the reviewing court must apply a *de novo* standard of review. See *Steeves v. Scotland Cty. Bd. of Health*, 152 N.C. App. 400, 406, 567 S.E.2d 817, 821 (2002).

We must first address whether substantial evidence exists to support the SPC's findings. The ALJ's Conclusion of Law No. 6, adopted by the SPC, states:

The Respondent proved by a preponderance of the evidence that: (1) the Petitioner instructed her staff on May 15, 2000 to falsely record their time, (2) such action was a violation of the O'Berry Center's Policy #94-5, (3) approximately two weeks prior to this incident, Ms. Exum counseled Petitioner about violations of O'Berry Policy #94-5 and directed Petitioner to review the policy should she have any questions, (4) the Petitioner knew or should have known that her actions were in violation of O'Berry Policy #94-5, and (5) Petitioner continued to deny the allegations during the investigation, the pre-dismissal conference, and Steps 2 and 3 of the internal grievance procedure, despite overwhelming evidence to the contrary.

Petitioner consistently maintained that she never told her staff to

falsify their work times during the 15 May meeting. Five witnesses who attended that meeting testified that petitioner did instruct them to record their scheduled quitting time of 3:30 p.m. rather than their actual quitting time of 4:45 p.m. Petitioner subsequently changed her testimony at the Level 3 conference and admitted to instructing her staff to record the incorrect time but that she later instructed them to go back and correct their time. All five witnesses further testified that petitioner never recanted her directive or told them to go back and change their time entries.

Less than two weeks prior to the 15 May meeting, Exum and Davis met with petitioner regarding excessive overtime being taken by petitioner's staff. Petitioner was directed to refer to O'Berry Center Policy #94-5. This meeting was followed up with a letter to petitioner again referring to O'Berry Center Policy #94-5. On 15 May 2000, petitioner instructed her staff to falsify their time cards so that she could avoid another disciplinary action similar to the one petitioner received two weeks earlier. This evidence is sufficient to support the SPC's findings.

We next must consider whether the substantial evidence in the record constitutes grounds to dismiss petitioner for unacceptable personal conduct.

A career state employee may be dismissed for either unsatisfactory job performance or unacceptable personal conduct. 25 NCAC 1J.0604(c) (2002). Title 25 of the North Carolina Administrative Code defines unacceptable personal conduct as: (1)

conduct for which no reasonable person should expect to receive prior warning; or (2) job-related conduct which constitutes a violation of state or federal law; or (3) the willful violation of known or written work rules. 25 NCAC 1J.0614(i) (2002).

This Court delineated the difference between unacceptable job performance and unacceptable personal conduct. *Amanini*, 114 N.C. App. at 679, 443 S.E.2d at 120-121. Unacceptable job performance includes things such as careless errors, poor quality work, and untimeliness. *Id.* (citing State Personnel Manual, Sec. 9, at 8.1-8.2). Unacceptable personal conduct includes insubordination, reporting to work under the influence of drugs or alcohol, and stealing or misusing State property. *Amanini*, 114 N.C. App. at 679, 443 S.E.2d at 121. Termination for just cause for unacceptable personal conduct does not require prior written warning before an employee is terminated. *Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 923.

Substantial evidence shows that petitioner instructed her staff to falsify their time in order for her to avoid further disciplinary action. Petitioner had been informed of O'Berry Center Policy #94-5 less than two weeks before this incident occurred. She was fully aware that her actions were a direct violation of respondent's work rules. Petitioner argues that falsification of state records is a mere job performance issue. Falsification of state records, however, is a far more serious matter that involves personal misconduct, not mere job performance. *See Leeks v. Cumberland Cty. Mental Health Dev'l Disab. & Sub.*

Abuse Facil., 154 N.C. App. 71, 571 S.E.2d 684 (2002). A supervisor who instructs employees under her supervision to falsify time records, after having received a written warning for violation of this policy less than two weeks earlier, commits a far more egregious offense than a mere job performance issue. Falsification of state records is not only a violation of O'Berry Center Policy #94-5 but is also a violation of state law. See *Id.*

After careful review of the whole record, we hold sufficient evidence supports respondent's decision to terminate petitioner's employment based upon unacceptable personal conduct. We reverse the trial court's order reinstating petitioner to her former position.

VI. Conclusion

_____The trial court erred in finding that petitioner was denied due process prior to her termination and in finding that there was insufficient evidence in the whole record to support respondent's termination of petitioner. The decision of the trial court is reversed. This cause is remanded to the trial court with instructions to enter an order affirming the decision of the State Personnel Commission.

Reversed and Remanded with instructions.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).