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NO. COA03-555

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

MARSHE MORGAN,  
Petitioner-Appellant,

v.

Wake County  
No. 01 CV 01450

BLACK MOUNTAIN CENTER/  
NORTH CAROLINA DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,  
Respondent-Appellee.

Appeal by petitioner from order entered 18 September 2002 by Judge John R. Jolly, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 24 February 2004.

*Law Offices of Glen C. Shults, by Glen C. Shults, for petitioner-appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Thomas M. Woodward, for the State.*

McGEE, Judge.

Petitioner Marshe Morgan (petitioner) appeals an 18 September 2002 order granting petitioner \$22,500 in attorney's fees and affirming the State Personnel Commission's award of costs in her underlying employment case.

Petitioner filed a *pro se* petition with the Office of Administrative Hearings (OAH) in September 1998 alleging that she was not selected for a position as a Symbol Board Technician because of her age and race. Glen C. Shults (Shults) filed a

notice of appearance as counsel on behalf petitioner in December 1998.

After a hearing, an administrative law judge issued a Recommended Decision in favor of petitioner on 11 July 2000. This decision was subsequently adopted by the State Personnel Commission (SPC) in January 2001. Neither petitioner nor the North Carolina Department of Health and Human Services (respondent) appealed the SPC's Decision and Order.

Petitioner thereafter filed a motion for attorney's fees and costs with the SPC in April 2001 seeking an order directing respondent to pay her attorney's fees in the amount of \$113,426 and her costs in the amount of \$12,229.53. Based upon the SPC's interpretation of petitioner's fee agreement with Shults dated 14 December 1998, the SPC awarded petitioner \$5,000 in attorney's fees and \$6,970.46 in costs. Petitioner filed a petition in Wake County Superior Court (superior court) challenging the SPC's award of attorney's fees and costs as inadequate and unreasonable, and requesting judicial review of the decision and order. The superior court ordered that the SPC's decision and order be modified. In a final order entered 16 September 2002, the superior court granted petitioner \$22,500 in attorney's fees and affirmed the SPC's award of costs. Petitioner appeals from the final order.

We first note that petitioner has failed to comply with the North Carolina Rules of Appellate Procedure. "The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App.

252, 255, 314 S.E.2d 566, 567-68 (1984). In her brief, petitioner refers this Court to petitioner's memoranda of law submitted to the SPC and to the superior court, which are included in the record on appeal to this Court. Petitioner directs this Court's attention to cases cited in her memoranda of law instead of citing those cases in her appellate brief for the stated purpose of complying with the space limitations imposed by the Rules of Appellate Procedure. See N.C.R. App. P. 28(j) (2) (A). N.C.R. App. P. 28(b) (6) provides that the body of the argument in a brief is to contain "citations of the authorities upon which the appellant relies." Despite her failure to comply with the rules of appellate procedure, this Court elects in its discretion, pursuant to N.C.R. App. P. 2, to review the merits of petitioner's argument.

#### Cross-Appeal

Respondent cross-assigned as error the superior court's affirmation of the SPC's award of attorney's fees and the superior court's modification of the SPC's award as to costs. N.C.R. App. P. 10(d) (2004) provides that an appellee may, without taking an appeal, "cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." Respondent does not present in its cross-assignments of error an alternative basis in law for supporting the superior court's order, but instead, contends that the superior court's award of attorney's fees and costs was excessive. These issues are

therefore not properly before this Court and will not be considered; the proper method for preserving such issues for appellate review would have been by cross-appeal. *City of Charlotte v. Whippoorwill Lake, Inc.*, 150 N.C. App. 579, 583-84, 563 S.E.2d 297, 300 (2002); *Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors*, 134 N.C. App. 468, 473, 518 S.E.2d 28, 32 (1999); *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 588, 397 S.E.2d 358, 361 (1990).

#### Standard of Review

Regarding errors of law, this Court's standard of review of a superior court's order entered upon review of an administrative agency decision mandates that we determine whether (1) the trial court used the appropriate scope of review and, if so, (2) whether the superior court did so correctly. *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341-42 (1999). "[I]f the appellant contends the agency's decision was affected by a legal error, G.S. § 150B-51(1)(2)(3) & (4), *de novo* review is required; if the appellant contends the agency decision was not supported by the evidence, G.S. § 150B-51(5), or was arbitrary or capricious, G.S. § 150B-51(6), the whole record test is utilized." *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999).

The superior court conducted a whole record review of the SPC's interpretation of governing law and its findings relating to the SPC's award of attorney's fees. Then, based on *de novo* review, the superior court modified the SPC order and found petitioner was

entitled to recover \$22,500 in attorney's fees. Regarding the matter of costs, the superior court employed *de novo* review of whether the SPC exceeded its statutory authority in its award and then applied the whole record test in concluding the award was reasonable. Petitioner does not contend that the superior court exercised the incorrect standards of review regarding the issues. However, petitioner alleges that the superior court incorrectly applied those standards of review which resulted in errors of law. We must thus determine whether the superior court applied the applicable standards of review properly to the matters before the superior court, requiring *de novo* review by this Court. *Id.*

#### Attorney's Fees

We first review the relevant and material portions of the fee arrangement between petitioner and Shults regarding petitioner's employment discrimination action. In a letter dated 14 December 1998, Shults detailed the terms of his representation of petitioner and his billing practices. Under the heading "Fees," Shults wrote:

[a]s we have discussed, I will be charging you a maximum attorneys' fee of \$5,000.00 for my representation in this case. In the event that we fully litigate the case before the [OAH], and before any appellate tribunals, and prevail in the case, I will be seeking attorney's fees and costs from the State of North Carolina under the applicable fee-shifting statute. In any event, no matter whether you receive a favorable or unfavorable outcome in this case, the maximum amount of attorney's fees you will owe to me is \$5,000.00.

In a letter dated 23 September 1999, Shults stipulated that in the

event petitioner is "awarded attorney's fees in excess of \$5,000 but less than \$22,500, [Shults would] have a contractual right to receive all attorney's fees," but if the recovery of attorney's fees exceeded \$22,500, petitioner would "receive 50 per cent of such fees, and [Shults] would retain the other 50 per cent."

N.C. Gen. Stat. § 126-4(11) (2003) establishes the power and duties of the State Personnel Commission to assess "[i]n cases where the Commission finds discrimination, harassment, or orders reinstatement or back pay . . . reasonable attorneys' fees and witnesses' fees against the State agency involved." Pursuant to the authority of N.C.G.S. § 126-4(11), the SPC promulgated 25 N.C.A.C. 1B.0438 (2003) which provides that the SPC may award attorney fees at "a reasonable hourly rate based on the prevailing market rate but at a rate no higher than the fee agreement between the parties." <sup>1</sup>

The SPC, in keeping with its interpretation of 25 N.C.A.C. 1B.0438, found that the fee agreement of 14 December 1998 between petitioner and Shults limited petitioner's financial obligation for attorney's fees to \$5,000.00; thus, the SPC found that an award of attorney's fees was restricted to \$5,000.00. Upon appeal to the

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<sup>1</sup>When the SPC revised 25 N.C.A.C. 1B.0438 in 2001, the SPC eliminated language which placed a cap of \$125.00 per hour on attorney's fees. That language was replaced with terms providing for attorney's fees to be based upon the "prevailing market rate," but "at a rate no higher than the fee agreement between the parties." 25 N.C.A.C. 1B.0438. The amendment was temporarily effective 11 May 2001 and permanently effective on 1 August 2002. In the instant case, the SPC issued an order on 25 October 2001. Therefore, the revised version of 25 N.C.A.C. 1B was effective, albeit temporarily, at that time.

superior court, the superior court could "reverse or modify the decision of the Commission if the decision [was] unreasonable or the award [was] inadequate." N.C. Gen. Stat. § 126-41 (2003). The superior court found that the SPC's attorney's fee award was unreasonable in light of the parties' fee agreement. However, the superior court concluded that to award attorney's fees in excess of \$22,500 would "effectively allow [p]etitioner to realize a monetary recovery in excess of that awarded by the SPC and envisioned by applicable statutory schemes, and would violate public policy."

We agree with the superior court's implicit conclusion that the SPC misinterpreted the fee agreement between petitioner and Shults as expressed in the letter dated 14 December 1998. Although petitioner's personal liability to Shults for attorney's fees was restricted to \$5,000.00, the letter indicated an unambiguous intention on the part of Shults to seek reimbursement from respondent for attorney's fees as afforded by the applicable statute. Although 25 N.C.A.C. 1B.0438 explicitly provides that the SPC is to consider the fee agreement between a petitioner and a petitioner's attorney and a petitioner is required to submit a copy of the representation agreement along with the petition for attorney's fees, we find no basis for the SPC's holding that an award of attorney's fees is limited to a petitioner's personal liability to a petitioner's attorney.

However, the General Assembly has limited the scope of the SPC's power to grant recovery and restitution to a petitioner. In a case brought on the basis of alleged discrimination, the SPC is

authorized to reinstate any employee to the position from which the employee has been removed, to order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied or to direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improperly discriminatory action of the appointing authority.

N.C. Gen. Stat. § 126-37(a) (2003). It is a well-established principle of statutory interpretation that a statute is to be given its plain meaning when the statutory language is clear and unambiguous. *Cochran v. N.C. Farm Bureau Mutual Ins. Co.*, 113 N.C. App. 260, 262, 437 S.E.2d 910, 911, *disc. review denied*, 335 N.C. 768, 442 S.E.2d 513 (1994). The General Assembly has specified the remedies the SPC is authorized to grant. Simply stated, the SPC does not have the authority to award compensatory damages beyond those set forth in N.C.G.S. § 126-37.

The fee agreement between petitioner and Shults is unusual and we are concerned about the implication of such arrangements between attorneys and clients involving matters before the SPC. To allow petitioner to recover what are labeled "attorney's fees" is the equivalent of an award of damages that is beyond the scope of the SPC's authority. See N.C.G.S. §§ 126-4, 126-41, 126-37. For the foregoing reasons, we agree with the trial court's conclusion that an award of attorney's fees over \$22,500 would be in violation of the applicable statutory scheme. We find petitioner's assignment of error number one to be without merit.

Petitioner directs this Court to a substantial number of cases



from the federal courts regarding attorney's fees. However, petitioner's right to file with the SPC for attorney's fees and costs was made pursuant to Chapter 126, specifically N.C.G.S. § 126-4(11). Petitioner's appeal of that award was also pursuant to Chapter 126, specifically N.C.G.S. § 126-41. We conclude therefore that North Carolina law dictates the powers of the State Personnel Commission in awarding attorney's fees in this case.

We further note that petitioner also contends that the superior court erred in failing to award her attorney's fees for pursuing her petition for judicial review. The superior court declined to make such an award, stating that it found "nothing in the record to show any fee arrangement between the petitioner and Shults specific to this issue. Accordingly, the Fee Agreement is controlling and no further fee is awarded[.]" The superior court made no award to petitioner of attorney's fees beyond \$22,500.

As we previously noted, petitioner's petition for judicial review as to attorney's fee was made pursuant to N.C.G.S. § 126-41. This statute specifically provides that "[t]he reviewing court *shall* award court costs and a reasonable attorney's fee for representation in connection with the appeal to an employee who obtains a reversal or modification of the Commission's decision in an appeal under this section." N.C.G.S. § 126-41 (emphasis added). In the case before us, the reviewing superior court did modify the award and, as such, our General Assembly has mandated that the superior court shall make an award of court costs and reasonable attorney's fees. That award relates only to those costs and attorney's fees incurred in bringing

forth petitioner's petition for judicial review. Accordingly, we remand this case to the superior court for it to make the appropriate award.

Costs

Petitioner contends the superior court erred in affirming the SPC's determination of costs, which limited the award to \$6,970.45. Petitioner maintains that she is entitled to \$12,229.53 in litigation costs incurred in bringing the case before the SPC. Specifically, petitioner contends she is entitled to receive additional costs relating to transcript costs, photocopying expenses, postage, and expert witness fees.

In reviewing the applicable law regarding the powers of the State Personnel Commission, as embodied in N.C. Gen. Stat. §§ 126-4(11), 126-41, the SPC is specifically restricted as to what costs it may award and that it may have exceeded its authority in this instance. However, because respondent failed to properly preserve its grounds for appeal, we do not address whether the SPC exceeded its authorized powers. We affirm the superior court's decision as to costs.

Affirmed in part, remanded in part.

Judges WYNN and TYSON concur.

Report per Rule 30(e).