NO. COA05-1390

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

ALVIN EARL WILLIAMS,

Petitioner,

v. Cumberland County
No. 04 CVS 5956

CUMBERLAND COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent.

Appeal by respondent from order entered 11 May 2005 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 7 June 2006.

Douglas E. Canders for respondent-appellant Cumberland County Department of Social Services

Carmen J. Battle for petitioner-appellee.

ELMORE, Judge.

Alvin Earl Williams (petitioner) was employed as an Adult Home Specialist in the Preventative Services of the Cumberland County Department of Social Services (Cumberland County DSS) beginning in the summer of 1998. Petitioner received pre-orientation training and completed basic orientation. Petitioner was not given any post-basic orientation, which consists of a consultant observing him in the field and developing an individualized work plan.

In May of 2000, a Division of Facility Services (DFS) Consultant, Siv Dossett (Ms. Dossett), reviewed petitioner's files and asked about complaints at his facilities. Ms. Dossett interviewed petitioner and yelled at him in a loud tone. During her observation of petitioner at the Rose Vista Adult Care Home, Ms. Dossett belittled the administrator and the assistant. After their return to petitioner's work area, Ms. Dossett continued to yell at petitioner. Based upon this incident, petitioner filed a complaint to William Scarlett (Mr. Scarlett), the Director of the Cumberland County DSS. Following the May 2000 incident, petitioner's supervisor Ruby Underwood (Ms. Underwood) accompanied petitioner to the McLeod facility for a routine monitoring. This was the first time that Ms. Underwood accompanied petitioner to a facility since the summer of 1998. Ms. Underwood did not mention any unsatisfactory work performance by petitioner.

On 9 April 2001 petitioner agreed to enter a work plan. He requested that his evaluator for the work plan not be Ms. Underwood, but Ms. Underwood was assigned as the evaluator nonetheless. The work plan provided that the evaluator would make three field visits a month, but Ms. Underwood made four field visits over a three-month period.

Ms. Michele Elliot (Ms. Elliot), a DFS Consultant, trained petitioner on 24 April 2001 regarding the changes in law and regulations for restraint of residents. On 15 May 2001 petitioner conducted an inspection at the Hillside Rest Home. Petitioner discovered that the Hillside Rest Home did not have a restraint

policy consistent with the amendments to the law and regulations that became effective in January of 2001. Petitioner noted this lack of a restraint policy as a concern on the monitoring report but did not issue a written corrective action. Ms. Underwood told petitioner that the corrective action plan requires that action be taken within a specified time period. Subsequently, when he revisited the facility, petitioner issued a written corrective action.

Ms. Elliot conducted a quarterly review of the Cumberland County DSS on 28 June 2001. Ms. Elliot monitored petitioner's inspection of the Rose Vista Adult Care Home for compliance with health care issues. Ms. Elliot noted that petitioner did not point out the residents in restraints. After Ms. Elliot informed petitioner that this was on the checklist for medical inspection in the procedure manual he was using, petitioner stated that he was going to address the restraints as a concern on the monitoring report. Petitioner was instructed that a corrective action report was required to enforce correction of this violation. Petitioner did not issue a corrective action to the facility. Instead, he told the Rose Vista Home Administrator that the restraint violation was a concern and that he was recording it as such on the monitoring report.

On 15 July 2001 petitioner was released from the work plan until further notice. He was terminated as an Adult Home Specialist by the Cumberland County DSS on 28 November 2001 for grossly inefficient job performance. Petitioner was not given the

opportunity to proceed to post-basic training. Petitioner filed a Petition for a Contested Case in the Office of Administrative Hearings (OAH) on 2 January 2002. A hearing was held before an Administrative Law Judge (ALJ) on 9 June 2003. The ALJ concluded that petitioner's dismissal for grossly inefficient job performance was without just cause.

The State Personnel Commission recommended that the Cumberland County DSS adopt the recommended findings of fact and conclusions of law entered by the ALJ. The Director of the Cumberland County DSS rejected the ALJ's decision and made new findings of fact pursuant to N.C. Gen. Stat. § 150B-36. The Director concluded that Cumberland County DSS had just cause to dismiss petitioner for grossly inefficient job performance and for unacceptable personal conduct. This order was entered on 9 July 2004.

On 9 August 2004 petitioner filed a petition for judicial review pursuant to N.C. Gen. Stat. § 150B-43 in the Cumberland County Superior Court. Judge Jack Thompson entered an order on 11 May 2005. Judge Thompson ordered that the final decision of the Agency dated 9 July 2004 be reversed and the ALJ's decision as recommended by the State Personnel Commission be adopted. The Cumberland County DSS (hereinafter "respondent") appealed to this Court.

The proper standard of review for the superior court considering a final agency decision is determined by the nature of the errors asserted. *Shackleford-Moten v. Lenoir Cty. DSS*, 155 N.C. App. 568, 571, 573 S.E.2d 767, 769 (2002), *disc. review*

denied, 357 N.C. 252, 582 S.E.2d 609 (2003). If the petitioner asserts that the agency's decision contains an error of law, then *de novo* review is proper; if it is asserted that the agency decision is unsupported by the evidence or is arbitrary or capricious, then the trial court must apply the whole record test. *Id.* This Court reviews a superior court order examining a final agency decision for errors of law. *Id.* at 572, 573 S.E.2d at 770. This review "can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting), *adopted per curiam by* 355 N.C. 269, 559 S.E.2d 547 (2002).

Here, petitioner asserted that the Agency committed errors of law in its conclusion that respondent had just cause to terminate petitioner. As such, the proper standard of review is *de novo*. Our General Statutes provide that "no career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat § 126-35(a) (2005). In a contested case proceeding pursuant to Chapter 150B, the burden is on the respondent agency to show that the employee was discharged for just cause. *See* N.C. Gen. Stat. § 126-35(d) (2005). The trial court concluded that when respondent terminated petitioner (1) without prior warnings as a career employee; (2) while supervised by Ms. Underwood on the work plan; and (3) without complete training, it acted erroneously,

contrary to law, and in an arbitrary and capricious manner. As such, the court concluded that respondent did not have just cause to terminate petitioner for grossly inefficient job performance. Grossly inefficient job performance occurs when

> the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency and that failure results in . . . the creation of the potential for death or serious harm to a client(s), an employee(s), members of the public, or to a person(s) over whom the employee has responsibility[.]

25 N.C.A.C. 1I.2303 (2005). Termination for grossly inefficient job performance does not require prior disciplinary action. *See id.*

First, respondent asserts that the trial court applied the wrong standard for grossly inefficient job performance by concluding that petitioner was terminated without just cause when there were no prior warnings. Respondent contends that the trial court mistakenly concluded that, before an employee can be terminated for grossly inefficient job performance, he must receive warnings. However, the trial court did not make this conclusion. Instead, it concluded that based upon several reasons, petitioner's termination was contrary to law. One of these reasons was the fact that he did not receive any prior disciplinary warnings. This factor is relevant to an analysis of proper termination of a career employee for unsatisfactory job performance. *See* 25 N.C.A.C. 1I.2302 (2005) (employee must receive at least two prior disciplinary actions prior to proper dismissal for unsatisfactory

performance of duties). In his petition for judicial review, petitioner asked the trial court to conclude that a career employee must receive certain warnings before termination for unsatisfactory job performance and that petitioner received no such warnings. Thus, the trial court properly concluded that petitioner could not have been terminated for unsatisfactory job performance as an alternative to respondent's assertions that petitioner was properly terminated for either grossly inefficient job performance or unacceptable personal conduct.

Next, respondent contends that the findings of fact set forth in the trial court's order concerning the events of 28 June 2001 establish only one permissible conclusion: that petitioner's actions constituted grossly inefficient job performance. Respondent cites the following findings of the trial court in support of its argument:

> 46. That Petitioner received training from Ms. Michele Elliot, Consultant, NCDHHS, DFS on April 24, 2001 concerning the changes in law and regulations setting the standards and restriction on restraint of residents by licensees of developmentally delayed adults and adults care homes.
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> 47. That prior deaths under the old standards were used to underscore the importance of enforcement measures to insure that the new standards were put in place immediately.
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> 51. That Mrs. Elliot, Adult Home Consultant of NCDHHS, DFS, visited CCDSS to conduct a quarterly review of June 28, 2001. She reviewed Mr. Williams' work and went to Rose Vista Adult Care Home to monitor his inspection of health care issues for compliance.

52. That Mrs. Elliot noted that Petitioner did not point out residents in restraints.

53. That when she directed Petitioner's attention to the resident in restraints, he advised that that was not a medical care issue. Ms. Elliot informed him that it was covered in the checklist for medical inspection in the State Manual that he was using. (Appendix C, Adult Care Home Procedures Manual)

54. That in the pre-exit conference between Ms. Underwood, Ms. Elliot and Mr. Williams, which is used to prepare the summary for the exit meeting with the home Administrator, Mr. Williams indicated that he was going to address the restraints as a concern on the monitoring report.

55. That Petitioner was instructed that a corrective action report was required. He was instructed that law and the manual clearly define when Type B violation is required and when a corrective plan is used to enforce correction of a violation.

56. That Petitioner failed to cite the licensee with a violation of the restraint provisions of [the North Carolina General Statutes and the North Carolina Administrative Code] pursuant to N.C.G.S. § 131D-34 during the exit interview with the home Administrator.

57. That Petitioner advised the Rose Vista Home Administrator that the restraint violation was a concern and recorded it as such on the monitoring report.

Respondent argues that in failing to issue a corrective action plan on 28 June 2001 for the restraint violations, petitioner failed to satisfactorily perform his job requirements and created a risk of death or serious harm to the residents at the Rose Vista facility.

Respondent references deaths of residents arising out of inappropriate restraints that occurred prior to the enactment of

the amendments to rules and regulations concerning resident restraints, effective January of 2001. However, respondent does not indicate if the circumstances of those deaths were in any way similar to the circumstances of petitioner's failure to issue a corrective action plan to the Rose Vista Adult Care Home. Petitioner was under the supervision of Ms. Underwood and, after being informed by Ms. Underwood that the regulations require an issuance of a Type B violation and corrective action plan, informed the home administrator of the restraint concerns instead of issuing a corrective action. Respondent asserts that petitioner "had a working understanding of the monitoring process used to enforce the [restraint] regulations" and notes that petitioner was corrected by his supervisor following the 15 May 2001 failure to issue a corrective action. But the record indicates that petitioner was in training on the restraint regulations at the time of the 28 June 2001 situation. Also, petitioner testified that respondent's policy on issuing corrective action reports for restraint violations changed when Ms. Elliot began training the adult home specialists:

> . . . any [corrective action] report you get, you can second-guess anybody you want. But once you're out there, you're going to make the call based on the scope and severity as you see it. And that might – up until this time frame, we did not consistently go by the procedure manual at that time. We had our regulations when we went out there. Since [Ms. Elliot] came, that's when – focus saying, "Let's get it right. Let's get all the counties on one – just in one area, functioning together."

> And all this started with [Ms. Elliot], with the new – because they changed over all the consultants. They came with new consultants. Michiele was new. She was learning, and we were learning – attempting to learn with her.

The record supports the conclusion that had petitioner possessed the requisite understanding of compliance with restraint regulations, he would not have been participating in a work plan. Additionally, petitioner testified that the training conducted by Ms. Elliot was based upon the procedure manual, but that his previous supervision by Ms. Underwood was not in compliance with the procedure manual. Based upon the evidence in the record, we cannot conclude that petitioner failed to satisfactorily perform his job. *See Donoghue v. N.C. Dep't of Corr.*, 166 N.C. App. 612, 618, 603 S.E.2d 360, 364 (2004) (concluding that the petitioner probation officer did not engage in grossly inefficient job performance in approving out-of-state travel for a probationer because the sentencing court's order was ambiguous on this point). We do not believe petitioner's failure to issue a corrective action plan to the Rose Vista Home Administrator for being in violation of the recent amendments to the administrative regulations on restraints constitutes grossly inefficient job performance.

Although petitioner could have been dismissed for unsatisfactory job performance after respondent had documented several occurrences of his failures and issued disciplinary warnings, it could not dismiss him based solely upon the Rose Vista Adult Care Home incident as his conduct was not grossly inefficient job performance. Respondent argues, in the alternative, that

petitioner's actions constituted unacceptable personal conduct within the meaning of the State Personnel Act. Respondent points out that a dismissal for unacceptable personal conduct does not require prior action. *See* 25 N.C.A.C. 1I.2304 (2005). However, respondent has not assigned error to this issue. As such, respondent has not properly preserved the issue of unacceptable personal conduct for appellate review before this Court. *See* N.C.R. App. P. 28(b)(6).

We hold that the trial court did not err in reversing the final agency decision. Accordingly, we affirm the order of the trial court.

Affirmed.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).