NO. COA05-1487

NORTH CAROLINA COURT OF APPEALS

Filed: 19 September 2006

ANTONIA MARIE COLLINS,
Petitioner,

v.

Wilson County
No. 04 CVS 2051

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
DIVISION OF FACILITY SERVICES,
Respondent.

Appeal by respondent from judgment entered 29 July 2005 by Judge Milton F. Fitch Jr., in Wilson County Superior Court. Heard in the Court of Appeals 14 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Susan K. Hackney, for the State.

Legal Aid of North Carolina, Inc., by Elizabeth C. Krabill and John R. Keller, for petitioner appellee.

McCULLOUGH, Judge.

Respondent North Carolina Department of Health and Human Services, Division of Facility Services, appeals from a superior court decision reversing the final decision of the administrative law judge. We reverse the decision of the superior court.

FACTS

This case arises out of a finding of abuse listed against petitioner, Antonia Marie Collins, on the Health Care Personnel

Registry. The finding of abuse was the result of an accusation by a nursing home resident, RE, that petitioner had slapped and threatened her. The following evidence was presented at the initial hearing before an administrative law judge:

Petitioner Antonia Marie Collins is an African-American certified nurse's aide (CNA) who was working at the Brian Center of Wilson (Brian Center), a nursing home in Wilson, North Carolina, from April of 2001 until her termination in September 2003. Her duties at the Brian Center included bathing and showering the residents, preparing them for breakfast and appointments, and other general assistance. One of the patients in her care was a 73-year-old woman who suffers from dementia, schizophrenia, and is slightly mentally retarded (hereinafter "RE"). During her six months of employment at the Brian Center, petitioner worked with RE at least three times each week.

On 2 September 2003, petitioner was assigned to work with RE. Petitioner went into RE's room at about 7:00 a.m., and seeing that she was already up, decided to bathe her before attending to her roommate. Petitioner found that there were dirty clothes in RE's closet and began removing them to send to the laundry. RE became agitated when petitioner started to go through her closet and told petitioner not to touch her clothes. Petitioner told RE that she would send the clothes to the laundry and they would be sent back to her. Petitioner testified that RE eventually acquiesced and let petitioner remove the dirty clothes. Petitioner then gave RE a bath at the sink, and noted that RE appeared to consent to bathing

and that her demeanor was normal during the bath. It took petitioner about thirty minutes to care for RE, and she left RE's room at about 7:30 a.m.

Stefanie Xan Knopick, a licensed practical nurse at the Brian Center, was responsible for giving RE her morning medications. Ms. Knopick testified that on the morning in question she gave RE her medications between 8:00 a.m. and 8:15 a.m. When Ms. Knopick gave RE her medication, she noticed that RE was very agitated and that RE told Ms. Knopick that she was "mad as hell" and wanted to call her sister. Ms. Knopick testified that one of RE's medications was for agitation, and that RE was generally agitated in the mornings until she took her medication. Ms. Knopick further stated that she did not see a red mark on RE's cheek at the time of medication administration.

Sometime between 8:30 a.m. and 9:00 a.m. Darnta Latisha Barnes, a CNA at the Brian Center, was walking down the hall and RE walked out of her room, agitated, and asked Ms. Barnes for a telephone because she wanted to call her sister. Ms. Barnes gave RE a telephone by placing it in the basket of her walker. Ms. Barnes testified that she did not see a red mark on RE's cheek.

Willie Carson Head, the maintenance supervisor at the Brian Center, testified that he has known RE for approximately seven or eight years and speaks to her at least once a day, usually when he makes his morning rounds between 8:00 a.m. and 9:00 a.m. On the day in question, Mr. Head stopped to see RE and found her in her recliner crying. In the many years of their association Mr. Head

had never seen RE crying. When he sat near RE he saw a red handprint mark on RE's face. When he asked RE what was wrong, RE asked to call her sister and then told Mr. Head that she had been slapped and threatened because she did not want to take her bath that morning. Mr. Head inquired with RE as to who had slapped and threatened her. After several other CNAs passed by RE's room, petitioner walked past RE's open door, and RE stated that she was the one who had slapped her. Mr. Head then left RE's room to report to Dawn Mitchum, the Director of Nursing, RE's allegations that petitioner had slapped and threatened RE.

Ms. Mitchum immediately went to RE's room, and found RE to be very angry. Ms. Mitchum testified that it was around 8:00 a.m. RE told Ms. Mitchum that a "nigger" had slapped and threatened her. Ms. Mitchum noticed that there was a red mark about the size of a fifty-cent piece on RE's cheek. Several CNAs walked passed RE's door, but when petitioner walked by RE's door, RE told Ms. Mitchum that she was the one who hit her. Ms. Mitchum then left to get Dan Cotten, the administrator of the Brian Center.

After Ms. Mitchum briefly explained the situation to Mr. Cotten, he went to see RE. Mr. Cotten was unsure of the time, and testified that it was "in the morning." RE was still upset and told Mr. Cotten that the woman who bathed her had slapped her and threatened her. Mr. Cotten saw no red mark on RE's cheek. He left and brought petitioner into RE's room, at which point RE said, "you hit me, and you threatened to kill me." Petitioner denied the accusations and said that RE was only angry because petitioner had

removed RE's clothing. Petitioner was then suspended and subsequently terminated.

Lisa Jordan, the activities director at the Brian Center, testified that following the incident with petitioner, RE repeatedly told Ms. Jordan that she had been hit, but did not cite a specific name. RE also told all of the activities volunteers what had happened to her, and wanted to know if Ms. Jordan was mad at her for telling others what had happened. Based on RE's demeanor after the incident, Ms. Jordan opined that RE was frightened. While Ms. Jordan admitted to previously hearing RE accuse staff members of taking her newspapers, money and clothes, in her opinion, RE's demeanor was different regarding this accusation. Ms. Jordan further testified that while usually RE can be easily distracted from her other accusations, she repeated that she had been slapped and threatened for over a week. Ms. Jordan believes RE's account of what happened to be accurate.

On 24 May 2004, eight months after the incident in question, RE was able to remember and recount being slapped and threatened by a black woman before she took her bath. She did not identify petitioner by name, but stated that the woman who slapped her was the woman who gave her a bath that day. She further described the woman who slapped her as having lost her job, and having four children. However, RE stated in her 24 May 2004 deposition that she knew the woman who slapped her and was fired had four children, because someone had told her; she did not describe petitioner this way at the time of the incident.

Evidence was further presented at trial tending to show that RE is very protective of her belongings and sometimes uses racial slurs when describing African-Americans. RE has also accused African-American staff members at the Brian Center of stealing her money, magazines or newspapers, and taking her clothes. While most employees testified that they had never heard RE accuse a staff member of abuse, petitioner presented the testimony of Ernestine Edmonds who stated that she heard RE say "that nigger Ernestine hit me" one morning after Ms. Edmonds threw away some of RE's newspapers. Ms. Edmonds testified that she reported the incident to staff member Lisa Billups. No one but Ms. Edmonds testified to hearing RE's accusation, and Ms. Billups testified that she remembers no report of the incident made to her by Ms. Edmonds.

On 30 December 2003, petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings to appeal respondent's finding of abuse listed against petitioner's name on the Health Care Personnel Registry. A recommended decision was issued by the administrative law judge on 15 September 2004. The recommended decision concluded that respondent carried its burden of proof by the preponderance of the evidence presented at the contested case hearing and upheld the agency's decision to list a finding of abuse against petitioner's name on the Health Care Personnel Registry.

On 18 November 2004, the agency issued its final decision adopting the administrative law judge's recommended decision and on 29 December 2004, petitioner filed a petition for judicial review

in Wilson County Superior Court. Following a hearing, the superior court judge reversed the agency's final decision. The Agency now appeals to this Court.

Analysis

I

In its first argument on appeal, respondent contends that the superior court erred in reversing the agency's decision because the decision was supported by substantial evidence in the whole record. We agree.

In reviewing the agency's decision, the superior court applies the "'whole record' test," which requires the examination of all competent evidence to determine if the administrative agency's decision is supported by substantial evidence. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'" and "is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (citations omitted).

In its role as an appellate court, the superior court reviews the agency's decision but is not allowed to replace the agency's judgment with its own when there are two reasonably conflicting views, even though the court could have reached a different result upon *de novo* review. *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). The whole record test requires that the trial court take all evidence into account, including the

evidence that both supports and contradicts the agency's findings. *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 344, 342 S.E.2d 914, 919, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). "However, the 'whole record' test is not a tool of judicial intrusion" and a court is "not permitted to replace the agency's judgment with [its] own[,] even though [it] might rationally justify reaching a different conclusion." *Floyd v. N.C. Dept. of Commerce*, 99 N.C. App. 125, 129, 392 S.E.2d 660, 662 (citation omitted), *disc. review denied,* 327 N.C. 482, 397 S.E.2d 217, *disc. review dismissed*, 327 N.C. 633, 399 S.E.2d 120 (1990).

In the instant case, respondent contends that petitioner slapped and threatened RE. To support this claim, respondent presented evidence including the testimony of RE stating that petitioner slapped her and threatened to kill her. Respondent also presented the testimony of Mr. Head stating that he found RE crying in her room, that he had never seen her cry before in their seven-year association, and that he observed a red mark on RE's cheek. Mr. Head's testimony was corroborated by the testimony of Ms. Mitchum in which she stated that she also observed a red mark on RE's cheek. Other employees testified that while RE did have a history of accusing staff members of stealing from her, they had never heard her accuse anyone of violence against her, and that her behavior associated with this accusation was far different than when she made the other accusations. Specifically, Ms. Jordan testified that usually RE could be distracted from making her

accusations, but that RE continued to make this accusation for over a week, and that RE acted frightened.

On the other hand, petitioner claims that she did not strike RE. To support her contention petitioner provided evidence that mainly consisted of her own testimony and the testimony of other Brian Center employees which tended to show that RE is mentally unstable, and has a history of accusing African-American staff members of wrongdoing. Petitioner also provided evidence which tended to show that there was possibly one and a half hours between the time when the alleged slap occurred and the time in which the handprint was observed, and that two employees of the Brian Center may have had close personal contact with RE during that time and neither observed a red mark on RE's face.

The administrative law judge weighed the credibility of the conflicting testimony presented by both the agency and the petitioner and found the former to be more credible. An appellate court cannot, on review, replace this judgment with its own when there are two reasonably conflicting views and the final determination is based upon credibility. Where the record reveals that this is a case of two reasonably conflicting views, we must hold that the evidence presented by respondent is sufficient to support a decision finding that the petitioner did slap and threaten RE. We further hold that it is evident from a review of the whole record that the findings of fact are supported by substantial evidence and the superior court erred in concluding otherwise.

II.

In its second argument on appeal respondent alleges that the superior court erred because the findings of fact and conclusions of law in the final agency decision were neither arbitrary and capricious nor an abuse of discretion. We agree.

The whole record test is applied when determining whether a decision is arbitrary and capricious. *Brooks, Com'r. of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). "Administrative agency decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith,' or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'fail to indicate "any course of reasoning and the exercise of judgment". . . .'" *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (citation omitted).

Where this Court has determined from a review of the whole record that this case was one of conflicting evidence which required the administrative law judge to weigh the credibility of the witnesses and the testimony, and that after doing such made findings of fact which are supported by substantial evidence, it cannot be said that the agency's decision was arbitrary or capricious.

The corresponding assignment of error is overruled.

III.

In its third argument on appeal respondent contends that the superior court erred because the findings of fact and conclusions

of law contained in the final agency decision were not affected by errors of law. We agree.

In her petition to the superior court, petitioner averred several errors of law in the administrative law judge's findings of fact and conclusions of law. The superior court did not specify in its order which errors of law, if any, the administrative law judge made, so this Court will only address those errors of law which are addressed by appellant in the brief to this Court.

Petitioner first asserted that several findings of fact and conclusions of law were affected by errors of law because they consisted of hearsay evidence. However, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion...." N.C.R. App. P. 10(b)(1) (2006). As appellant did not object to the hearsay evidence at the hearing, any objection has been deemed waived.

Petitioner also asserted that several findings of facts and conclusions of law are affected by errors of law because the administrative law judge omitted what petitioner considers relevant, necessary and material facts, or included findings of fact which are inaccurate.

When determining whether an agency's decision is affected by errors of law pursuant to N.C. Gen. Stat. § 150B-51(4), a superior court must review the record *de novo*. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004). "'*De novo*' review requires a court to consider a question anew, as if not considered or decided by the agency." *Amanini v. N.C. Dept.*

of Human Resources, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994).

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a)(1), findings of fact made without a jury or with an advisory jury must be more than evidentiary facts; they must be specific ultimate facts sufficient enough for an appellate court to determine if the judgment is supported by the evidence. N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2005); *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977). "[E]videntiary facts are those subsidiary facts required to prove the ultimate facts." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951). Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts. *Id.*

An error of law exists if a "conclusion of law entered by the administrative agency is not supported by the findings of fact entered by the agency or if the conclusion of law does not support the decision of the agency." *Brooks v. ANSCO & Associates*, 114 N.C. App. 711, 717, 443 S.E.2d 89, 92 (1994).

In the instant case, petitioner contends that the findings of fact should have included the times in which Mr. Head, Ms. Mitchum, Mr. Cotten, Ms. Knopick, and Ms. Barnes saw RE on the morning in question; that Mr. Cotten did not observe a red mark on RE's cheek; that Ms. Barnes was standing close to RE when she handed her the phone; and that no attempt was made to corroborate Ms. Edmonds' testimony. However, "'[t]he [agency] is not required . . . to find facts as to all credible evidence. That requirement would

place an unreasonable burden on the [agency]. Instead the [agency] must find those facts which are necessary to support its conclusions of law.'" *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000) (citation omitted). We hold that the administrative law judge found the ultimate facts necessary to allow him to reach his conclusions of law by processes of logical reasoning, and the omission of extraneous facts is not an error of law.

Petitioner also finds an error of law in the following finding of fact made by the administrative law judge, claiming that it is inaccurate:

> Ms. [Judy] Adkins [the investigator with the Health Care Personnel Registry] found that RE's accusation against petitioner was a one time occurrence. RE's story was corroborated by the red hand print Buddy Head saw on her face, and the half dollar sized mark that Dawn Mitchum later saw. The mark was smaller when Ms. Mitchum saw it because it had begun to fade. Ms. Adkins concluded that after petitioner slapped RE, Mr. Head came into the room, followed by Ms. Mitchum. Ms. Adkins substantiated the allegation of abuse against petitioner.

Petitioner contends that the above finding of fact is inaccurate, because the handprint only corroborates that someone struck RE, not that it was the petitioner. "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Rogers,* 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980). What is at issue is whether the existence of contrary evidence necessarily negates the conclusion

of law that the handprint corroborates RE's accusations against petitioner. We hold that it does not.

The gravamen of petitioner's argument is that the witnesses were not entirely clear as to when they came into contact with RE on the day in question, that the time between when RE was allegedly slapped and the time the handprint was first spotted could be up to an hour and a half, and two other nurses came in close personal contact with RE during that time and did not see a mark on RE's cheek. If that were the case, then the handprint would not corroborate RE's story, but actually weaken it, suggesting that RE was struck sometime later in the morning. However, other testimony indicates that the handprint was seen much earlier in the morning, which would corroborate RE's accusation against petitioner.

This is merely a case of conflicting evidence and "'[i]t is the duty of the fact finder to resolve conflicting evidence.'" *Welter v. Rowan Cty. Bd. of Comm'rs*, 160 N.C. App. 358, 366, 585 S.E.2d 472, 478 (2003) (citation omitted). In addition, the agency, as fact finder, determines the weight and credibility to be accorded the testimony of each of the witnesses. *Cartin v. Harrison*, 151 N.C. App. 697, 703, 567 S.E.2d 174, 178, *disc. review denied,* 356 N.C. 434, 572 S.E.2d 428 (2002). Evidence was presented by both sides which tended to show that the handprint could have been seen anywhere between 8:00 a.m. and 9:00 a.m. on the morning in question, and after weighing the credibility of the witnesses and the testimony, the administrative law judge determined that the

handprint was seen soon enough after 7:35 a.m. to corroborate RE's accusation against petitioner.

We therefore hold that the agency's conclusion of law, stating that the respondent carried its burden of proof to show that petitioner abused RE, was supported by substantial evidence in the record, was not arbitrary, capricious, or an abuse of discretion, and was not affected by error of law.

Accordingly, for the foregoing reasons, we reverse the order of the superior court.

Reversed.

Judges MCGEE and HUNTER concur.

Report per Rule 30(e).