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NO. COA06-1649

NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2007

JAMES ALBERT KEYES,

Petitioner,

v.

Beaufort County
No. 06 CVS 540

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION,

Respondent
Court of Appeals

Appeal by petitioner from judgment entered 31 July 2006 by
Judge William C. Griffin, Jr., in Beaufort County Superior Court.

Heard in the Court of Appeals 23 August 2007.
Slip Opinion

*McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and
Stephen A. Graves, for petitioner.*

*Attorney General Roy Cooper, by Assistant Attorney General
Alexandra M. Hightower, for respondent.*

ELMORE, Judge.

James Albert Keyes (petitioner) appeals a superior court order affirming a final decision and order by the North Carolina State Personnel Commission (the SPC). The SPC's decision and order determined that petitioner had engaged in willful misconduct sufficient to warrant his dismissal from the North Carolina Department of Transportation (NCDOT or respondent).

On 14 October 2004, petitioner was a full-time employee of respondent, and had worked in that capacity for more than twenty-four months. As a transportation worker, petitioner had operated heavy equipment and trucks, which required him to have a North Carolina Commercial Driving License (CDL). From January of 2004 until 14 October 2004, petitioner was assigned to work as a "flagger" crew member, and was supervised by Ronnie Whitley.

Through a computer program operated by a human resources officer, petitioner was selected for random drug and alcohol testing on 14 October 2004. However, shortly after his arrival at work, petitioner informed "his immediate supervisor that there was a problem at his home involving a leaking hot water heater that he had to attend to immediately." Whitley then directed petitioner to see supervisor Stan Paramore. Petitioner explained his situation, and Paramore advised petitioner that he had been selected for random drug and alcohol testing. Petitioner reiterated that he needed to go home. The County Maintenance Engineer, Woody Jarvis, was then summoned, and both Jarvis and Paramore told petitioner that he could go home after completing the urine test. Jarvis advised petitioner that failure to take the test could result in petitioner's dismissal. Petitioner refused to take the test and went home.

Respondent terminated petitioner's employment because of his refusal to take the test. Petitioner appealed his dismissal, and an administrative law judge (ALJ) determined that respondent had failed to carry its burden of proof by a preponderance of the

evidence that petitioner was discharged for just cause. The ALJ ordered respondent to reinstate petitioner to the same or similar position, and awarded petitioner back pay, return of lost benefits, and attorneys' fees. Respondent appealed to the SPC, which rejected the ALJ's decision and found that respondent had met its burden. Petitioner appealed the SPC's decision to the superior court, which affirmed the SPC's decision in a two page order.

Our review of the superior court's order is governed by N.C. Gen. Stat. § 150B-52, which states, in relevant part, "The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. § 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52 (2005). "Pursuant to N.C. Gen. Stat. § 150B-52, our review of a trial court's consideration of a final agency decision is to determine whether the trial court committed any errors of law which would be based upon its failure to properly apply the review standard set forth in N.C. Gen. Stat. § 150B-51." *Sherrod v. N.C. Dept. of Human Resources*, 105 N.C. App. 526, 530, 414 S.E.2d 50, 53 (1992). "Our review of the superior court's order for errors of law is a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Ramsey v. N.C. Div. of Motor Vehicles*, ___ N.C. App. ___, ___, 647 S.E.2d 125, 128 (2007) (citations and quotations omitted).

Therefore, our first task is to determine whether the superior court exercised the appropriate scope of review. N.C. Gen. Stat. § 150B-51(c) states that when a superior court reviews

a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision, the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

N.C. Gen. Stat. § 150B-51(c) (2005). The case at bar is a contested case in which the SPC did not adopt the ALJ's decision. Accordingly, the requirements of N.C. Gen. Stat. § 150B-51(c) apply.

It is unclear from the record and order which standard of review the superior court applied. The order states that the superior court "conducted a Chapter 150B, Article 4 review" and "considered the record, the briefs, and the arguments of counsel." The transcript from the proceeding shows that the superior court judge asked counsel, "Is this a review or *de novo*?" and the

assistant attorney general replied, "Both." She later clarified, "There are eight findings of fact that [petitioner] complains of which have to be reviewed under the whole record test, two conclusions of law which have to be reviewed *de novo*." The superior court did not indicate whether it applied both standards or only the *de novo* standard. Furthermore, the superior court did not make findings of fact and conclusions of law as required by section 150B-51(c). N.C. Gen. Stat. § 150B-51(c) (2005).

Accordingly, because it is not clear whether the superior court reviewed the case *de novo*, and because the superior court did not make any "findings of fact or conclusions of law in accordance with section 150B-51(c), we remand this case to the trial court for a *de novo* review of the record and to make findings of fact and conclusions of law consistent with this opinion." *Royal v. Dep't of Crime Control & Pub. Safety*, 175 N.C. App. 242, 245, 622 S.E.2d 723, 725 (2005).

Remanded.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).