An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-1457

NORTH CAROLINA COURT OF APPEALS

Filed: 5 August 2008

WILLIE STEVE TELLADO,
Petitioner

v.

Catawba County
No. 06 CVS 13

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION, (Newton),
Respondent

Court of Appeals

Appeal by respondent from an order entered 23 July 2007 by Judge Jesse B. Caldwell, III in Catawba County Superior Court. Heard in the Court of Appeals 30 April 2008.

Slip Opinion

Sigmon, Sigmon & Isenhower, by W. Gene Sigmon, for petitioner-appellee.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tina A. Krasner, for respondent-appellant.

HUNTER, Judge.

The North Carolina Department of Transportation ("DOT") appeals from a superior court order that reinstated Willie Steve Tellado ("petitioner") as an employee with DOT. The superior court reversed a decision of the Personnel Commission ("Commission"), which adopted the findings and conclusions of an administrative law judge, finding in favor of DOT that they had properly terminated

petitioner for cause.[1] After careful review, we reverse the order of the superior court and remand the case to the superior court with instructions to affirm the Commission's final decision.

Petitioner began his employment with DOT on 28 October 2000 as a transportation worker in the division of highways. He remained in that position until his dismissal on 17 October 2003.

The following facts that were presented to the Commission are undisputed: Petitioner worked on a maintenance crew with Ernesto Vasquez ("Vasquez"), Bruce Holler ("Holler"), Brian Leonhardt, and Cameron Huddleston ("Huddleston"). On 3 October 2003, the crew was assigned to grind cracked places in a roadway and patch them with new asphalt.

Petitioner and Vasquez were having problems that day; it was common for the two men not to get along. The Commission described the pair as having a personality conflict. According to Holler, Vasquez was taunting petitioner and petitioner asked Vasquez to leave him alone. Holler eventually left the area, believing that the exchange of words between the two could escalate, posing a safety concern to the crew.

Later that day, Vasquez threatened petitioner and his family. Sometime thereafter, petitioner threw a shovelful of ground-up asphalt on Vasquez. This fact is undisputed; however, the parties contest whether the act was intentional or accidental. The Commission concluded that it was intentional and, in part,

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[1] For clarity, we refer to the findings of fact and conclusions of law made by the ALJ that were adopted by the Commission as the "Commission's."

justified petitioner's termination on that ground. The Commission also justified his termination on the ground that the disruptive behavior created an increased risk of danger to the crew and was unbecoming a state employee.

The superior court reversed the decision of the Commission, finding "that the competent and substantial evidence in the record does not support the conclusion of the . . . Commission that [DOT] had . . . dismissed the [p]etitioner for unacceptable conduct." DOT presents only one issue for this Court's review: Whether the superior court erred in making that determination.

In this case, petitioner contended that the Commission's decision was not supported by substantial evidence when he appealed[2] to the superior court. Accordingly, the superior court was required to apply the "whole record test." *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999). This Court reviews whether: (1) the superior court utilized the whole record test; and (2) whether the superior court used the test appropriately. *In re Appeal by McCrary*, 112 N.C. App. 161, 168, 435 S.E.2d 359, 363 (1993).

The whole record test "does not allow the reviewing court (here, the superior court) to substitute its judgment for the agency's as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the

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[2] "When the trial court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004).

matter been before it *de novo*." *Id.* at 167, 435 S.E.2d at 364. Although not de *novo* review, "'it does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached.'" *Id.* at 167-68, 435 S.E.2d at 364 (citation omitted). If the Commission's decision is supported by substantial evidence, the decision must be affirmed. *Id.* at 168, 435 S.E.2d at 365. "'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.'" *Id.* at 168, 435 S.E.2d at 364 (citation omitted).

At the outset, there is no dispute as to whether the superior court applied the whole record test as the superior court stated explicitly that its decision was "[u]pon review of the entire record[.]" Accordingly, the superior court did not err in the test it used; the question is whether the superior court erred in applying that test when it reversed the Commission.

In determining that the Commission had erred, the superior court ruled that substantial evidence did not support the Commission's conclusion. The Commission concluded that DOT had just cause to terminate petitioner's employment based on his unacceptable personal conduct.

The Commission's finding of fact that supported termination was finding of fact fourteen, which states:

> Petitioner's unacceptable personal conduct consisted of the willful violation of known or written work rules (the DOT's Workplace Violence Policy []) and conduct unbecoming a

> state employee that is detrimental to state service. Petitioner had signed an acknowledgment form outlining the DOT's Workplace Violence Policy on October 30, 2000. . . . The definition of "workplace violence" includes a "physical attack" which is defined as "[u]nwanted or hostile physical contact such as hitting, fighting, pushing, shoving or throwing objects." Mr. Huddleston had witnessed [p]etitioner throw a shovelful of asphalt on Mr. Vasquez. Furthermore, disruptive behavior in the work force that involves the safety of other members on the crew and the traveling public is conduct unbecoming a state employee that is detrimental to state service.

Petitioner, as a career state employee, could only be terminated for "just cause." N.C. Gen. Stat. § 126-35 (2007). Although "just cause" is not defined in the statute, it includes "'[u]nacceptable personal conduct.'" *N.C. Dep't of Correction v. McNeely*, 135 N.C. App. 587, 592, 521 S.E.2d 730, 734 (1999). Unacceptable personal conduct means, *inter alia*, a willful violation of known or written work rules and conduct unbecoming a state employee. *Id.* at 593, 521 S.E.2d at 734. The Commission's finding of fact referenced above includes all of the requisite findings to support a termination. Thus, we must determine whether the Commission's findings of (1) a violation of written work rules or (2) conduct unbecoming a state employee are supported by substantial evidence. If either one is, the order of the superior court must be reversed and the Commission's decision affirmed.

As to the throwing of asphalt, DOT argues that Huddleston's testimony on the issue constitutes substantial evidence to support

the Commission's finding that petitioner willfully[3] threw the asphalt at Vasquez. We agree.

Huddleston testified that petitioner threw half a shovelful of ground-up asphalt on Vasquez. When asked if he thought the throwing of the asphalt was accidental, Huddleston responded that it was not. Huddleston also testified that he had never seen anyone accidentally shovel asphalt on another person. Finally, Huddleston testified that he never heard petitioner apologize for throwing the asphalt on Vasquez, providing further evidence from which the Commission could have reasonably concluded that petitioner acted willfully.

Petitioner argues that Vasquez was the instigator in nearly all of the incidents and petitioner was merely non-responsive to Vasquez. While there are findings of fact and evidence within the record that Vasquez was equally, if not more so, responsible for the troubles between the two[4] (Vasquez was also terminated), it does not change the fact that petitioner willfully violated a written work rule prohibiting throwing items at co-workers. Moreover, the fact that there was conflicting evidence as to the

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[3] Although the Commission did not make an explicit finding that petitioner acted in a "willful" manner, such a finding is implicit in finding of fact six, which states, "[p]etitioner was not an innocent bystander" when he threw a shovelful of ground-up asphalt on Vasquez.

[4] The Commission made a finding of fact that Vasquez told petitioner, "I'll get you and I'll get your family." In another finding of fact, the Commission found that Vasquez had challenged petitioner to a fight when Vasquez stated to petitioner, "[c]ome on. We can do it right here. We can fight right here. We can do it right now."

willfulness of the act by petitioner in his testimony to the ALJ is not determinative as "[t]he credibility of . . . witnesses and the resolution of conflicting testimony is a matter for the administrative agency to resolve, not the reviewing court." *Huntington Manor of Murphy v. N.C. Dept. of Human Resources*, 99 N.C. App. 52, 57, 393 S.E.2d 104, 107 (1990).

Because we find substantial evidence in the record to support the Commission's findings of fact, which in turn support its conclusions of law, regarding petitioner's willful violation of written work rules, we need not address whether petitioner could also have been terminated for conduct unbecoming a state employee. The order of the superior court is therefore reversed and the case is remanded with instructions to affirm the Commission's final decision.

Reversed and remanded.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).