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NO. COA09-1023

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

GARY LAWRENCE WALKER,

Petitioner

v.

Rockingham County
No. 08 CVS 1918

DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, *and its division*, LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM,

Respondent

Appeal by petitioner from order entered 12 March 2009 by Judge John O. Craig, III, in Rockingham County Superior Court. Heard in the Court of Appeals 28 January 2010.

Elliot Pishko Morgan, P.A., by Robert M. Elliot, for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert M. Curran, for respondent-appellee.

CALABRIA, Judge.

Gary Lawrence Walker ("petitioner") appeals the trial court's order upholding a decision of the Board of Trustees ("the Board") of the Local Governmental Employees' Retirement System ("LGERS") requiring petitioner to repay retirement benefits which had been overpaid to him. We affirm.

I. BACKGROUND

Petitioner was employed as a police officer with the City of Eden, North Carolina, from 1968 until his retirement on 1 April 1994. During his employment, petitioner was a member of LGERS. Upon his retirement, petitioner began receiving monthly retirement benefits.

Petitioner was subsequently recruited to work for the Town of Stoneville, North Carolina ("the town"), as a police officer. The town was a participating employer in LGERS, a division of the Department of State Treasurer, Retirement Systems Division ("respondent"). Petitioner informed the town's police chief that he was receiving retirement benefits from LGERS and that he was willing to work for the town as long as his employment did not jeopardize his retirement benefits. Petitioner then met with the town's finance officer, who assured petitioner that he could work for the town as long as: (1) he did not receive regular employee benefits from the town, (2) he did not join LGERS, and (3) he did not receive compensation in an amount exceeding the maximum compensation allowed under N.C. Gen. Stat. § 128-24(5)(c).

In or about July 1995, petitioner returned to work as a police officer with the town and by January 1996, petitioner was regularly working 40 hours per week. Some time during 1996, the town promoted petitioner to police chief. According to a written personnel policy adopted by the town in January 1996, the position of police chief required a minimum of forty hours of work per week. From 1996 through October 2006, petitioner worked more than 1,000 hours per year. From January 1996 through November 2006, the town

did not enroll petitioner as an LGERS member nor did it make retirement contributions on his behalf. During this time, town officials informed petitioner that his employment with the town complied with state laws governing LGERS.

In late 2006, respondent learned of the details of petitioner's employment with the town and notified him that his retirement benefits would be suspended effective 1 December 2006 on the basis that he returned to regular employment with the town, pursuant to N.C. Gen. Stat. § 128-21(10) and 20 NCAC 02C.0802. Respondent determined that petitioner was required to reimburse LGERS in the amount of $174,283.37 in retirement benefits he received from September 1995 through 30 November 2006. Additionally, respondent determined that petitioner should have been enrolled as a member of LGERS during the same time period, and that he would be required to pay LGERS the contributions which should have been deducted from his pay.

On 5 July 2007, petitioner filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings ("OAH"). Respondent filed a motion for summary judgment seeking reimbursement for the retirement benefits paid to petitioner from September 1995 through November 2006. On 11 February 2008, the administrative law judge ("ALJ") with the OAH entered a decision granting respondent's motion for summary judgment in part regarding monies paid to petitioner from 2 January 1996 until November 2006, and denying respondent's motion regarding monies paid to petitioner

for the calendar year of 1995. On 31 July 2008, respondent entered a Final Agency Decision, adopting the decision of the ALJ.

Petitioner then filed a Petition for Judicial Review pursuant to N.C. Gen. Stat. § 150B-43 *et seq.*, alleging that his substantial rights were violated because respondent's decision entering summary judgment against him was: (1) in violation of statutory authority; (2) made upon unlawful procedure; (3) unsupported by substantial admissible evidence in the record; (4) affected by other errors of law; and (5) arbitrary and capricious, and an abuse of discretion. Petitioner asked the trial court, *inter alia*, to vacate or reverse the Final Agency Decision of respondent and to immediately reinstate his retirement benefits.

The matter was heard before the 23 February 2009 session of Rockingham County Superior Court, and on 12 March 2009, the trial court entered an order holding that respondent properly suspended petitioner's retirement benefits in December 2006 and that petitioner was responsible for repaying any benefits respondent paid him from January 1996 through November 2006. Petitioner appeals.

II. APPELLATE RULES VIOLATIONS

As an initial matter, we note that petitioner's brief did not comply with N.C.R. App. P. 28(b)(6) (2008), which states, "[i]mmediately following each question [presented] shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." This rule applies to

petitioner's appeal since he gave notice of appeal before 1 October 2009. *See* N.C.R. App. P. 28(b)(6) (2010) ("Rule 28(b)"). We remind petitioner that "[c]ompliance with the rules . . . is mandatory." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 362 (2008). "'[F]ailure to follow [the] rules will subject an appeal to dismissal.'" *Id.* at 194, 657 S.E.2d at 363 (quoting *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (internal quotation and citation omitted).

Rule 28(b) is a nonjurisdictional rule. *Id.* at 198, 657 S.E.2d at 365.

> Based on the language of [North Carolina Rules of Appellate Procedure] 25 and 34, the appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a "substantial failure" or "gross violation." In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible.

Id. at 199, 657 S.E.2d at 366.

In the instant case, we hold that petitioner's failure to fully comply with Rule 28(b) does not rise to the level of a "substantial failure" or a "gross violation." Therefore, this Court will review the merits of petitioner's appeal.

III. STANDARD OF REVIEW

"Judicial review of the final decision of an administrative agency in a contested case is governed by section 150B-51(b) of the Administrative Procedures Act (APA)." *In re Denial of NC IDEA's*

Refund of Sales, ___ N.C. App. ___, ___, 675 S.E.2d 88, 93-94 (2009) (citing N.C. Gen. Stat. § 150B-51(b) (2007)).

> According to the relevant provisions of the APA, an agency's final decision may be reversed or modified only if the reviewing court determines that the petitioner's substantial rights might have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
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> (2) In excess of the statutory authority or jurisdiction of the agency;
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> (3) Made upon unlawful procedure;
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> (4) Affected by other error of law;
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> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

Id. at ___, 675 S.E.2d at 94 (citing N.C. Gen. Stat. § 150B-51(b) (2007)). "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) (citation omitted). "During judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *In re Denial*, ___ N.C. App. at ___, 675 S.E.2d at 94 (citation omitted). The first four grounds for reversing or modifying an agency's decision are law-based inquiries

while the final two grounds are fact-based inquiries. *Id.* at ___, 675 S.E.2d at 94.

In cases appealed from administrative agencies, questions of law receive *de novo* review whereas for "fact-intensive issues," the reviewing court must apply the whole record test. *Id.* at ___, 675 S.E.2d at 94 (internal citation omitted). When the superior court undertakes *de novo* review, it considers the matter anew and freely substitutes its own judgment for that of the agency. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002).

> A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases.

N.C. Gen. Stat. § 150B-52 (2007). "In reviewing a superior court order entered upon review of an administrative agency decision, this Court has a two-fold task: (1) determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) decide whether the court did so properly." *County of Wake v. N.C. Dep't of Env't & Natural Res.*, 155 N.C. App. 225, 233-34, 573 S.E.2d 572, 579 (2002) (internal quotation and citation omitted). "[W]e need consider only those grounds for reversal or modification argued by the petitioner before the superior court, and properly assigned as error on appeal to this Court." *Amanini v. N.C. Dept. Of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994) (internal quotations and citation omitted).

In the instant case, petitioner's sole argument before this Court is that the trial court failed to apply the proper standard of review under N.C. Gen. Stat. § 150B-51(b)(3), since it failed to determine whether, in the light most favorable to petitioner, there were genuine issues of material fact which barred summary judgment. Petitioner asks this Court to review this issue *de novo*.

IV. SUMMARY JUDGMENT

Petitioner contends that there were genuine issues of material fact that the town was acting as an agent of respondent in any misrepresentations made to petitioner, and respondent should be equitably estopped from seeking reimbursement of retirement benefits paid to petitioner from 1996 through 2006. We disagree.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The standard of review of a ruling on a motion for summary judgment is *de novo*. *Thrash Ltd. P'ship v. County of Buncombe*, 195 N.C. App. 678, 682, 673 S.E.2d 706, 709 (2009).

> The moving party bears the burden of showing that no triable issue of fact exists. This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that the non-moving party cannot surmount an affirmative defense which would bar the claim. Once the moving party

> has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case.

Lawyer v. City of Elizabeth City, ___ N.C. App. ___, ___, 681 S.E.2d 415, 417 (2009)(internal citations omitted).

In arguing equitable estoppel, petitioner relies exclusively on "the representations of Town officials, on which he relied in accepting work with the Town of Stoneville . . . ." He argues that respondent "should be bound by the Town's undisputed conduct" based on principles of agency. Petitioner does not point to any evidence or authority that the town's officials are actual agents of respondent,[1] but rather relies upon apparent agency, citing primarily *Fike v. Bd. of Trustees*, 53 N.C. App. 78, 279 S.E.2d 910 (1981).

In *Fike*, Dr. Fike, who sought disability retirement benefits on behalf of his wife, contended that the N.C. State University retirement representative had apparent authority to accept retirement applications on behalf of the Teachers' and State Employee Retirement System. The question before this Court was whether, based on equitable estoppel, the Retirement System was estopped from denying that the application was received on the date it was given to the N.C. State retirement representative. *Id.* at 79-80, 279 S.E.2d at 912.

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[1]The Local Governmental Employees' Retirement System Employer Manual, as revised January 2007, states: "Please remember that employers are not agents of the Retirement System, and that personnel and payroll officers do not represent the LGERS and are representative of their employers only."

This Court first explained the test for finding agency by estoppel, also known as apparent agency:

> "Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact."

Id. at 80, 279 S.E.2d at 912 (quoting *Daniel Boone Complex, Inc. v. Furst*, 43 N.C. App. 95, 107, 258 S.E.2d 379, 388 (1979); *disc. review denied*, 299 N.C. 120, 261 S.E.2d 923 (1980)). In applying this test, the Court noted that the Retirement System issued a publication to Dr. Fike and other employees that represented to him that the retiree's personnel office would provide the proper forms, would advise on proper execution of the forms, and would furnish whatever assistance was necessary. *Id.* at 81, 279 S.E.2d at 912-13. In addition, the publication twice stated that the completed application was to be returned to the employer. *Id.*, 279 S.E.2d at 913. The application could not be filed directly with the Retirement System because the form required the employer to complete a portion of the application prior to forwarding it to the Retirement System. *Id.*

The Court concluded, based on this publication, that Dr. Fike had followed the procedures set out by the Retirement System and filled out the form as directed by N.C. State's retirement representative. *Id.* Dr. Fike relied upon the retirement representative's assertions that Dr. Fike had done all that was necessary to file the application. *Id.* The Court then held that

> [w]hile it is doubtful that the Retirement System had sufficient control over [the retirement representative], or her employer, for her to be its actual agent, we find that the evidence of representations to the contrary is sufficient to estop the Retirement System from denying the agency as to Dr. Fike, who dealt with [the retirement representative] in reliance on its representations to his detriment.

Id.

This Court, in *Deal v. N.C. State Univ.*, 114 N.C. App. 643, 442 S.E.2d 360 (1994), summarized the reasoning in *Fike* as follows:

> In *Fike*, . . . the plaintiff successfully asserted agency by estoppel to prevent the Retirement System from denying retirement benefits. In that case the plaintiff followed the defendant Retirement System's published guidelines in submitting his claim for benefits to his employer, but the employer failed to submit plaintiff's application in time. The Retirement System denied the application. The Court found that although the plaintiff's employer was not the Retirement System's actual agent, evidence of representations by the Retirement System was sufficient to create an agency by estoppel and that the plaintiff justifiably relied on those representations to his detriment. In *Fike* the Retirement System was the sole entity to which plaintiff could resort for retirement benefits, *and he sought to deal with the Retirement System specifically*. *Plaintiff dealt with his employer only because of his reliance on the Retirement System's representations that his employer was a Retirement System agent*. In that case it would have been unjust to allow the Retirement System to deny benefits when it led the plaintiff to believe he was dealing with its agent when plaintiff specifically sought to deal with the Retirement System.

114 N.C. App. at 646, 442 S.E.2d at 362-63 (emphasis added).

After reviewing other apparent agency decisions, the Court then concluded: "The common thread in the cases upholding the

assertion of apparent agency is the plaintiff's desire to deal with the estopped party for some particular reason and the plaintiff acting because he believed he was dealing with the estopped party's agent." *Id.* at 647, 442 S.E.2d at 363. Applying this principle, the Court concluded that a Wake County Health Department nurse was not the apparent agent of N.C. State for purposes of a personal injury claim arising out of a vaccine given by the nurse to an N.C. State student because the student was not looking to N.C. State for health care. He had sought the vaccine from the nurse because she was conveniently located on the N.C. State campus and not because N.C. State had made any suggestion that the nurse was its agent. *Id.*[2]

While this case falls somewhere in between *Fike* and *Deal*, we believe that petitioner has failed to present evidence that meets the tests set out in *Fike* and *Deal*. There is no indication in the record that respondent by words or conduct represented or permitted the town to represent that the town is its agent. *Fike*, 53 N.C. App. at 80, 279 S.E.2d at 912. In petitioner's affidavit, filed in opposition to respondent's motion for summary judgment, he did not suggest that respondent in any way referred him to the town for information regarding his retirement benefits. Nor did he say that

[2]While petitioner also cites *Meacham v. Montgomery County Bd. of Educ.*, 59 N.C. App. 381, 297 S.E.2d 192 (1982), that decision did not address apparent agency. Rather, this Court held that the Board of Education was estopped from denying that the plaintiff was a career teacher when she sought to return to work after a disability retirement because school district officials represented to the plaintiff that she could take disability retirement without affecting her ability to return as a teacher. *Id.* at 388-89, 297 S.E.2d at 196-97.

he consulted with the town's officials because of a belief that they were respondent's agents.

Instead, petitioner stated: "I informed Stoneville's police chief that I was receiving retirement benefits from the State Retirement System and that I was willing to work for Stoneville as long as my work did not jeopardize my retirement benefits." Petitioner then confirmed, in his affidavit, that he was referred to the town's finance officer by the police chief:

> *At the police chief's request*, I met with Stoneville's Finance Officer, in order to ensure my eligibility to work for Stoneville while receiving my retirement benefits. . . . Based on the representations of Stoneville's Finance Officer and others with Stoneville, I began working for Stoneville in or about the latter part of 1994 as a patrol officer.

(Emphasis added).

Petitioner also refers in his affidavit to other meetings with town officials regarding his retirement benefits that occurred throughout his years working for the town. He does not, however, suggest that these consultations with the town regarding his retirement were prompted in any way by respondent. In short, the record contains no indication that, at any time, petitioner sought advice from town officials because of any belief that the town was acting as respondent's agent.

In arguing that the town was the apparent agent of respondent, petitioner contends in his brief on appeal (1) that respondent "ha[s] conceded that they relied on the local governmental employer to inform employees and members of their rights and obligations"; (2) "[respondent's] publications are misleading, to say the least,

with respect to the applicability of the 1000-hour work limitation"; and (3) "the evidence is conclusive that the Town officials, consistent with the above expectations of the [respondent], held themselves out as the authorities responsible for administering retirement benefits — and thus, advising retirees on their rights and limitations — at the local level."

These arguments, however, overlook the critical elements of establishing apparent agency. Under *Fike* and *Deal*, petitioner was required to show (1) representations through words or conduct of respondent to petitioner indicating that the town was its agent and (2) that petitioner dealt with the town and relied upon the town's representations in reliance on respondent's representations regarding the town's agency. None of petitioner's three contentions relate either to representations to him by respondent regarding agency or petitioner's reliance on those representations of agency.

With respect to the second contention, the representations in respondent's publication distributed to petitioner do not relate to agency, but rather the terms of the retirement plan and, therefore, have no bearing on whether the town was an apparent agent. As for the third contention, even if there was evidence that the town held itself out to petitioner as the agent of respondent, which we do not believe there is, assertions or conduct by the town are not sufficient to establish apparent agency in the absence of evidence that respondent "permitted" the town to hold itself out as its

agent. *Fike*, 53 N.C. App. at 80, 279 S.E.2d at 912. Such evidence of permission is also missing.

Turning to the first contention, petitioner appears to argue that, as in *Fike*, respondent pointed employees to local employers for advice on retirement benefits. Petitioner's affidavit does not, however, state that he was pointed to his local employer for advice. Petitioner relies instead on respondent's response to an interrogatory asking about each instance in which respondent "notified petitioner directly of the retirement rules, N.C. statutes, and administrative code governing petitioner's return to work, the number of hours petitioner could work and maintain retirement benefits and the amount of money he could earn per year[.]"

In response to that interrogatory, respondent first noted that petitioner never contacted respondent inquiring as to the retirement rules and that respondent does not believe it has a "duty to provide legal counsel to a member or retiree with respect to retirement law and regulations unless the person initiates specific inquiries." Respondent also stated, however, that it did communicate with its members and retirees by providing manuals:

> Nevertheless, Respondent also does communicate with members and retirees on a regular recurring basis, with respect to the contours of retirement law and significant changes in the law. In Petitioner's case, he should have received an annual employee handbook from the Retirement System, sent by the System to the Town of Eden for distribution to all of its employees in each and every year during which Petitioner was employed by the Town of Eden, and Eden was an LGERS participant from 1983

> forward. Those annual handbooks would number more than 10.[3]
>
> . . . In addition, Respondent also regularly communicates directly with LGERS employers so that employers can provide more detailed information about retirement law to their employees. Respondent typically does not know to what extent a particular employer shares such communications with particular employees, however. That is the case with Petitioner.

Respondent also acknowledged that it provided sufficient copies of "Your Retirement System/How it Works" to each local governmental employer sufficient to provide one copy to each employee enrolled in the retirement plan. Respondent stated that it "depends on each local governmental employer to make this publication available at the HR/Benefits office as well as to employees individually." In addition, "at the time of retirement, each active member receives a written brochure summarizing the salient details of retirement law. Petitioner would have been sent such a brochure in early 1994 at the latest."

This interrogatory answer, even when viewed in the light most favorable to petitioner, does not support a finding of apparent agency. This answer indicates that respondent created publications setting out information about retirement benefits that they distributed through local employers. The mere distribution of materials authored and published by a third party does not, standing alone, create the appearance of a principal/agent

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[3]Petitioner was a member of the retirement program while he was employed by the Town of Eden and, therefore, would have received his manual from the Town of Eden until he retired from that employment. The crux of this case is that petitioner was not a member while employed by the Town of Stoneville.

relationship between the third party and the distributor. The fact that respondent admits that it communicates with local government employers "so that employers can provide more detailed information about retirement law to their employees" is closer to the situation in *Fike*. Nevertheless, such communications are from respondent to the employer and not to the employee. This admission does not provide evidence of any representation to the employee suggesting that the local governments are agents of respondent. Nor, in any event, has petitioner provided any evidence that he relied on representations from the town because of any communication by respondent to the town suggesting that he do so.

Therefore, we hold that petitioner failed to present sufficient evidence to give rise to an issue of fact regarding whether respondent could be held liable based on apparent agency for representations made by the town. Because petitioner has not argued that he acted in reliance upon any representations by respondent when accepting work with the town, we do not consider the applicability of equitable estoppel to the town's representations. *See McCaskill v. Department of State Treasurer*, ___ N.C. App. ___, ___, 695 S.E.2d 108, 127 (2010) ("[U]nlike the situation at issue in *Fike*, there is no indication that Petitioner relied on anything that the Retirement System did or said in deciding to enter into the settlement agreement . . . . As a result, the trial court appropriately concluded that '[n]either the elements of estoppel nor quasi-estoppel are present in this case.'").

Based on the foregoing, we hold that the trial court exercised the appropriate scope of review and did so properly. *County of Wake*, 155 N.C. App. at 233-34, 573 S.E.2d at 579. There were no genuine issues of material fact, and respondent was entitled to judgment as a matter of law. Petitioner's assignment of error is overruled.

V. CONCLUSION

This Court is very distressed and troubled that petitioner must reimburse the retirement benefits paid to him by respondent. For approximately thirty-six years, petitioner has served the people of North Carolina through his employment as a law enforcement officer. In this matter, it is obvious that respondent, the town, and petitioner failed to communicate. Somewhere down the line, someone "dropped the ball" and as a result, petitioner received incorrect information regarding his retirement benefits. However, while this Court sympathizes with petitioner's plight, we are an error-correcting court, not a policy-making court. Therefore, we are bound to follow the law, and the law in the instant case leads us to the conclusion that the trial court correctly held that respondent properly suspended petitioner's retirement benefits in December 2006 and that petitioner was responsible for repaying any benefits respondent paid him from January 1996 through November 2006.

Assignments of error not argued in petitioner's brief are abandoned. N.C.R. App. P. 28(b)(6) (2008). The trial court's

order upholding the Board's decision requiring petitioner to repay retirement benefits which had been overpaid to him is affirmed.

Affirmed.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).