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NO. COA09-122

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

JERRY RIVAS,
Petitioner,

v. Wake County
Nos. 07 CVS 18949

N.C. DEPARTMENT OF TRANSPORTATION,
Respondent.

Appeal by petitioner from order entered 4 November 2008 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 September 2009.

Alan McSurely for petitioner-appellant.

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

HUNTER, Robert C., Judge.

On 18 April 2006, Jerry Rivas's ("petitioner") employment with the North Carolina Department of Transportation ("DOT" or "respondent") was terminated due to a willful violation of the DOT's Workplace Violence Policy ("the policy"). Petitioner appeals from the trial court's order affirming the State

Personnel Commission's ("SPC") order, which upheld the DOT's decision to terminate petitioner. After careful review, we reverse and remand.

Background

Petitioner began working for the DOT on 3 February 2003 as a temporary transportation worker in the Lee County Maintenance Unit. At that time, he signed a Violence in the Workplace Policy Acknowledgment Statement, which stated that "[i]t is the commitment of the North Carolina Department of Transportation to strive to maintain a work environment which is free from intimidation, threat and/or acts of violence. It is with this commitment in mind that this policy is developed and will be enforced." According to the policy, workplace violence "[i]ncludes, but is not limited to intimidation, threats, physical attack, domestic violence or property damage." Physical attack is defined as "[u]nwanted or hostile physical contact such as hitting, fighting, pushing, shoving or throwing objects." The policy also forbids "the use or carrying of weapons of any kind." The policy further states that "[a] violation of [the] policy . . . may be grounds for disciplinary action, up to and including dismissal."

Petitioner became a permanent employee on 5 July 2003, and the record indicates that he "maintained good work performance

ratings" and received a "very good" performance rating two weeks prior to his termination.

On 13 April 2006, at approximately noon, petitioner arrived at the break room area of the Lee County Maintenance Unit, also know as the "bullpen," where employees gathered to socialize and eat meals. Michelle Hughes ("Hughes"), the Office Assistant for Lee County Maintenance, came into the bullpen area between noon and 12:30 p.m. after purchasing lunch at Burger King. Hughes placed her lunch bag on one of the break room tables and proceeded to call her mother on her cellular phone. Petitioner was standing approximately three to five feet from the end of the table. Petitioner extracted the blade of his Swiss Army pocketknife, which was two and one half inches long, and gestured as if he intended to throw the knife overhand toward the table. Though the parties disagree as to whether Hughes had her hand on the table at that time, the trial court found as fact:

> Petitioner asked Ms. Hughes to move her hand away from the table. Ms. Hughes responded, "No. I'm going to eat my lunch." She ended her conversation with her mother, and Petitioner again asked her to move her hand. Ms. Hughes refused, and immediately thereafter Petitioner threw the knife toward the table. The knife hit the table and deflected off of the Burger King bag, veering to the other side of the table.
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> [] James ("Jimmy") McQuage . . . was sitting on the other side of the table, diagonally

> across from Ms. Hughes, with his chair leaning against the wall, one leg crossed, facing Petitioner. After striking Ms. Hughes' lunch bag, the knife slid in Mr. McQuage's direction, approximately 6 to 8 inches from his knee and fell off of the table, landing in the middle chair right next to him.

Petitioner then picked up the knife, held it approximately thirty inches above the table, and released it. The blade stuck into the wood table. Petitioner pulled the knife out of the table, closed it, and put it in his pocket.

Petitioner then walked over to the kitchenette and removed a steak knife from a butcher's block and gestured as if he were going to throw the knife at a nearby cabinet. Hughes testified at the hearing in this matter: "[S]everal times during all of this, I had asked him, please, to stop. He didn't need to be doing this. And when he did - with the steak knife, I told him - I said, 'You really need to go outside if you want to do that.'" Petitioner put the knife back in the butcher block, without ever throwing it, and walked out of the building. Other than petitioner, Hughes, and James McQuage ("McQuage"), the only other people in the bullpen at that time were Lee Stone ("Stone") and Jeff Brown ("Brown").

Later that day, McQuage reported the incident to Chuck Dumas ("Dumas"), District Engineer. Dumas instructed Johnny Ransdell

("Ransdell") to investigate the situation. Ransdell spoke with petitioner, who claimed that he was "playing" when he threw the knife. Ransdell also interviewed the other employees who were present at the time of the incident. On 17 April 2006, Stone, Brown, and Hughes provided written statements to Ransdell. The trial court found that "[n]one of the statements make any mention of the knife being thrown at Ms. Hughes, and, in fact, all three statements state that the knife was thrown at the table or toward Ms. Hughes' lunch bag."

On 17 April 2006, Ransdell placed petitioner on investigatory suspension with pay. That same day, petitioner received a Notice of Pre-Disciplinary Conference. The notice stated: "The purpose of this conference is to provide you an opportunity to respond to the recommendation that you be dismissed for an incident of Workplace Violence that constitutes Unacceptable Personal Conduct." The conference was held the following day and was conducted by Ransdell and Dumas. According to Ransdell's hearing notes, "Rivas stated that he 'had no malice or intent to hurt anyone.'" Additionally, "Rivas stated that there was 'no attempt to intimidate or any intent to hurt anyone.'"[1] After the conference, Ransdell and Dumas recommended

[1] The trial court later found that "[p]etitioner described his actions with the pocketknife as 'being stupid' and admitted that it

that petitioner be terminated because of the DOT's "zero-tolerance" policy, which they believed required termination in this case. Petitioner was terminated for unacceptable personal conduct in that he willfully violated the Workplace Violence Policy.

Petitioner appealed his dismissal through the DOT's internal grievance procedures. On 26 June 2006, Chief Deputy Secretary Daniel H. DeVane ("DeVane") upheld the dismissal of petitioner. On 21 July 2006, petitioner appealed the DOT's decision to the Office of Administrative Hearings ("OAH"), and a hearing was held on 29 March 2007. On 11 July 2007, Administrative Law Judge ("ALJ") Donald W. Overby issued a "Proposed Decision[,]" in which he made the following determination:

> Respondent has failed to meet its burden that it had just cause to dismiss the Petitioner, and, therefore, the Respondent's decision to dismiss Petitioner from his position as a Transportation Worker with the DOT is REVERSED, and the Petitioner shall be reinstated to his position with the Respondent with all back pay and other benefits retroactively; however, the Petitioner shall be suspended without pay for a period of sixty (60) days, and the restoration shall be adjusted accordingly.

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was wrong to throw a knife in the middle of a workplace situation where people are present."

On 17 December 2007, the State Personnel Commission reversed the ALJ's decision and found that "Respondent [had] met it's burden of proving that Respondent had just cause for Petitioner's dismissal." The SPC adopted the majority of the ALJ's findings of fact, but altered portions of its findings to reflect its determination, based on the hearing transcript, "that the knife hit the table, near [Ms. Hughes's] hand[.]" The SPC also added to its findings that "[r]egardless of intent, Petitioner knowingly violated the policy by throwing a knife—a dangerous object—in the direction of another employee, posing a serious safety violation in the workplace."

Petitioner appealed the SPC's decision to the Wake County Superior Court. On 4 November 2008, upon *de novo* review, the trial court affirmed the order of the SPC. Petitioner now appeals the order of the trial court.

Analysis

Petitioner argues on appeal that the trial court erred when it: (1) concluded that respondent met its burden of proof as to just cause to terminate petitioner; (2) failed to give deference to the ALJ's decision; and (3) held that the level of discipline administered was within respondent's discretion and was not subject to review.

I. Standard of Review

As a preliminary matter, petitioner did not assign error to any of the trial court's findings of fact; therefore, these findings are deemed conclusive on appeal. *Hedingham Cmty. Ass'n v. GLH Builders, Inc.*, 178 N.C. App. 635, 645, 634 S.E.2d 224, 230, *disc. review denied*, 360 N.C. 646, 636 S.E.2d 805 (2006).

When reviewing a trial court's order affirming a decision by an administrative agency, the scope of review of this Court is the same as it is for other civil cases. We must examine the trial court's order for errors of law and determine whether the trial court exercised the appropriate scope of review and whether the trial court properly applied this standard. As in other civil cases, we review errors of law *de novo*. *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596, 620 S.E.2d 14, 17 (2005).

Accordingly, we must first determine whether the trial court in this case exercised the correct standard of review and, if so, whether the court properly applied this standard.

> In reviewing 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) (2007).

Here, we find that the trial court correctly exercised and applied the *de novo* standard by reviewing the record anew and making findings of fact and conclusions of law. Nevertheless, alleged errors of law are reviewed *de novo* by this Court. *Hilliard*, 173 N.C. App. at 596, 620 S.E.2d at 17.

II. Just Cause for Disciplinary Action

Petitioner argues that his actions on 13 April 2006 did not amount to just cause for termination and that the trial court erred in concluding as a matter of law that "the DOT had just cause to dismiss Petitioner for unacceptable personal conduct in accordance with N.C. Gen. Stat. § 126-35."

N.C. Gen. Stat. § 126-35 (2007) (emphasis added) states that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary

reasons, except for *just cause*."[2] "'Just cause is a legal basis, set forth by statute, for the termination [or demotion] of a State employee, and requires the application of legal principles. Thus, its determination is a question of law.'" *Skinner v. N.C. Dep't of Corr.*, 154 N.C. App. 270, 280, 572 S.E.2d 184, 191 (2002) (quoting *Gainey v. N.C. Dep't of Justice*, 121 N.C. App. 253, 259 n.2, 465 S.E.2d 36, 41 n.2 (1996)).

Though not defined in the statute, "just cause" may consist of "unacceptable personal conduct." 25 N.C.A.C. 1J.0604(b) (2008). It is undisputed that petitioner was dismissed for unacceptable personal conduct, which includes: "(4) the willful violation of known or written work rules[.]" 25 N.C.A.C. 1J.0614(i) (2008). "One act of [unacceptable personal conduct] presents 'just cause' for any discipline, up to and including dismissal." *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17. "Under subsection (4) of 25 N.C.A.C. 1J.0614(i), the employer's work rules may be written or 'known' and a willful violation occurs when the employee willfully takes action which violates the rule and *does not require that the employee intend his conduct to violate the work rule*." *Id.* (citing *N.C. Dep't of*

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[2] It is undisputed that petitioner qualified as a career State employee.

Corr. v. McNeely, 135 N.C. App. 587, 592-93, 521 S.E.2d 730, 734 (1999)) (emphasis added).

In the present case, the trial court concluded that petitioner had willfully violated known or written work rules in the form of the Workplace Violence Policy and that his "actions posed a potential detrimental impact on the safety of other employees[.]" These actions amounted to unacceptable personal conduct according to the trial court. Petitioner argues that he did not violate known or written work rules and points to the ALJ's determination that petitioner's actions amounted to "horseplay" and that "[t]he contention that 'horseplay' is prohibited by the Workplace Violence Policy is not supported by the plain meaning of the published policy."[3] However, the trial court, in reviewing the evidence *de novo*, concluded:

> The DOT's Workplace Violence Policy provides that workplace violence "*[i]ncludes, but is not limited to* intimidation, threats, physical attack, domestic violence or property damage." (Emphasis addded). Therefore, the policy is not all inclusive and not strictly limited to the definitions therein provided. Whether or not Petitioner's actions met the plain definition of a "physical attack" or constituted an

[3] The SPC adopted this finding of fact, concurring that horseplay does not constitute a violation of the policy; nevertheless, the SPC still found that petitioner's actions violated the policy because his actions "pos[ed] a serious safety violation in the workplace."

> assault is not the determining factor for constituting a violation of the policy. The main objective of the policy is to maintain a safe, healthy and efficient working environment.

Though petitioner claims that his motives were innocent and that none of the employees were placed in danger, we agree with the trial court's reasoning above. Even though "horseplay" is not listed as a violation of the Workplace Violence Policy, the actions of petitioner could have potentially caused physical harm to a fellow employee. Petitioner threw a knife at a table where another employee was in close proximity, and when the knife bounced off the table, it landed near another employee.[4] Though petitioner never meant to harm anyone, his intentions are irrelevant where the actions he took constituted a willful violation of known and/or written work rules. *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17. In sum, we find no error in the trial court's conclusion of law that "the DOT had just cause to dismiss Petitioner for unacceptable personal conduct[.]"

III. Deference to the ALJ's Recommendation

Petitioner contends that the trial court erred in failing to give deference to the ALJ because the ALJ is in a position to

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[4] We note that the trial court did not find as fact that the knife thrown by petitioner constituted a "weapon" prohibited by the Workplace Violence Policy.

hear the evidence and assess the credibility of the witnesses, while the trial court reviews the cold record.

N.C. Gen. Stat. § 150B-51(c) (emphasis added) clearly states:

> 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 . . . .

Accordingly, petitioner's argument is without merit. *Granger v. Univ. of North Carolina at Chapel Hill*, __ N.C. App. __, __, 678 S.E.2d 715, 716-17 (2009) (acknowledging a trial court's obligation to review contested cases *de novo*, without deference to prior decisions in the case).

III. Level of Discipline Administered

Petitioner argues that the trial court erred in concluding that the OAH and the Commission lack the authority to review the level of discipline an agency chooses to administer. We agree. Although we hold that there was just cause for dismissal due to a violation of the Workplace Violence Policy, we further conclude that the supervisors presiding over the pre-disciplinary conference, who subsequently recommended dismissal, were under

the erroneous impression that the DOT's Workplace Violence Policy *required* dismissal, as opposed to some other disciplinary action.

Pursuant to 25 N.C.A.C. 1J.0604(a) (2008):

> The degree and type of action taken shall be based upon the sound and considered judgment of the appointing authority in accordance with the provisions of this Rule. When just cause exists the only disciplinary actions provided for under this Section are:
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> (1) Written warning;
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> (2) Disciplinary suspension without pay;
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> (3) Demotion; and
>
> (4) Dismissal.

Based on the regulation's plain language, dismissal is an option when just cause is established; however, there are other alternatives. "On judicial review, an agency's interpretation of its own regulations will be enforced *unless clearly erroneous or inconsistent with the regulation's plain language*." *Hilliard*, 173 N.C. App. at 598, 620 S.E.2d at 17-18 (citing *Britt v. N.C. Sheriff's Educ. and Training Stds. Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998)) (emphasis added). In reviewing the record *de novo*, we conclude that the DOT's interpretation of its own regulation, the Workplace Violence Policy, was clearly erroneous and inconsistent with its plain language.

Ransdell, petitioner's immediate supervisor, and Dumas, Ransdell's supervisor, presided over petitioner's pre-disciplinary conference and recommended that petitioner be dismissed because the Workplace Violence Policy was "black-and-white." Ransdell testified at the administrative hearing that based on the language of the policy and his training regarding the policy, it was his belief that the DOT had a "zero tolerance policy" with regard to "[v]iolence involving a weapon[,]" and that dismissal of petitioner was the only option. He further stated that suspension, transfer, mediation, or a written warning, were not options in this case. Ransdell also testified that it was his belief that throwing a knife, or even a wadded up piece of paper, in an empty room would constitute a violation of the policy.[5] After Ransdell and Dumas recommended termination, petitioner received a letter from Timothy Johnson ("Johnson"), Division Engineer, which informed petitioner that he had "decided to follow the recommendation to dismiss [him] . . . ." After petitioner filed an internal grievance, DeVane upheld the decision to terminate petitioner.

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[5] Although it does not specifically go to the issue of petitioner's conduct in the present case, we note that this interpretation of the policy is also erroneous. The plain language of the policy reveals that the intention of the policy is to prevent certain actions that could negatively impact other individuals.

Based on Ransdell's testimony, we find that the recommendation that petitioner be dismissed was based on an erroneous belief that the policy required dismissal. The Workplace Violence Policy states that "[a] violation of [the] policy . . . may be grounds for disciplinary action, *up to* and including dismissal." (emphasis added). The policy includes all manner of assault and physical attack, among other things, and states that dismissal is an option, not that it is the only option in circumstances such as the one involving petitioner. Therefore, the other alternatives enumerated in 25 N.C.A.C. 1J.0604(a) were available to reprimand petitioner once just cause was established. Had Dumas and Ransdell recommended suspension, which the ALJ later determined was the appropriate remedy, it is reasonable to presume that Johnson, and later DeVane, may have followed that recommendation. In the letter terminating defendant, Johnson did not specify why the DOT had selected termination as opposed to other disciplinary options; he simply followed the recommendation of Dumas and Ransdell.[6]

In sum, the supervisors who were in charge of investigating the allegations against petitioner and presiding over the pre-

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[6] DeVane's decision is not contained in the record; however, it appears that both Johnson and DeVane relied upon the recommendation of Ransdell and Dumas, which was based upon an erroneous interpretation of the policy.

disciplinary conference erroneously interpreted the plain language of the policy. The policy does not mandate "zero tolerance" in situations such as the one involving petitioner, and dismissal was not the only option available.[7] While we have established that just cause was present for disciplinary action up to and including dismissal, we find that the trial court erred in refusing to review the DOT's disciplinary action in this case. Accordingly, we remand for further proceedings not inconsistent with this opinion. The actions allowed by N.C. Gen. Stat. § 150B-51(c) are still available to the trial court on remand, including adoption of the ALJ's proposed decision.

Conclusion

We hold that the trial court did not err in concluding that the SPC had just cause to administer disciplinary action against petitioner, up to and including dismissal; the trial court did not err in failing to give deference to the ALJ determination; however, the trial court erred in concluding that it could not review the DOT's interpretation of its own regulations, which were, in fact, misinterpreted in this case.

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[7] We have found no case law that suggests that the agency must consider other options prior to selecting termination; however, 25 N.C.A.C. 1J.0604(a) clearly lists three less severe options from which the agency may choose.

Reversed and remanded.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).