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NO. COA12-471  
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

HORACE BLAKENEY,  
Petitioner,

v.

Mecklenburg County  
No. 11 CVS 242

UNIVERSITY OF NORTH CAROLINA AT  
CHARLOTTE,  
Respondent.

Appeal by petitioner from order entered 23 December 2011 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 September 2012.

*Ferguson, Stein, Chambers, Gresham, & Sumter, P.A., by Geraldine Sumter, for petitioner.*

*Attorney General Roy Cooper, by Assistant Attorney General Brian R. Berman, for respondent.*

HUNTER, Robert C., Judge.

Horace Blakeney ("petitioner") appeals from an order affirming the State Personnel Commission's decision and order. On appeal, petitioner argues the superior court erred by: (1) failing to apply the proper two-step inquiry to determine whether respondent had just cause to discharge petitioner; (2)

not applying North Carolina just cause law; (3) holding that there was substantial evidence in the record to support a finding and conclusion that petitioner engaged in theft; and (4) concluding that respondent discharged petitioner for just cause. After careful review, we affirm the order of the superior court.

#### Background

Petitioner worked as a housekeeper for the University of North Carolina at Charlotte ("UNCC" or "respondent") since April 2005. Petitioner also worked as a dishwasher part-time for Chartwells, a food service business that served food in UNCC's residence dining hall ("dining hall"). While petitioner had access to the dining hall while working for Chartwells, he did not clean the dining hall for respondent.

On 13 July 2009, petitioner contends he was leaving his part-time job in the dining hall and noticed a toilet paper roll on a bench. Petitioner alleges he tried to return the toilet paper roll to the dining hall, but the doors had already been locked. Knowing that he would be returning to the dining hall the next day for another shift, petitioner claims he placed the roll in his backpack and took it with him intending to return it the next day.

At 10:00 p.m., petitioner began his shift with respondent and was assigned to clean the McEniry building ("McEniry") by his supervisor Johnnie Doyle ("Mr. Doyle"). While he was standing outside of McEniry at 4:15 a.m. on 14 July 2009, Mr. Doyle claimed he saw petitioner come out of a room that contained a housekeeping equipment closet carrying a roll of toilet paper and place the toilet paper roll in his backpack. Mr. Doyle did not confront petitioner about the toilet paper roll; instead, he called campus police to report it.

Officer Philip Greco ("Officer Greco"), an officer with the UNCC campus police, responded to Mr. Doyle's report. When Officer Greco confronted petitioner about the theft allegation, petitioner denied taking the roll of toilet paper but agreed to let Officer Greco search his backpack. Officer Greco found the toilet paper roll inside a shirt petitioner had in his backpack. Petitioner told Officer Greco the toilet paper roll came from the dining hall.

There was no conclusive evidence that the type of toilet paper that petitioner had in his possession was stored in the housekeeping closet in McEniry. However, Brian Guns ("Mr. Guns"), director of housekeeping and recycling, stated that the type of toilet paper petitioner had in his backpack was used in

McEniry and ten other academic buildings. Mr. Guns testified that when he inspected the housekeeping closet on 21 July 2009, he did not find any toilet paper rolls similar to the one found in petitioner's backpack.

Essie Spears ("Ms. Spears"), the third shift housekeeping manager for facility management for UNCC, gave a deposition and stated that Mr. Doyle and petitioner had a previous altercation in May or June where Mr. Doyle claimed that petitioner had threatened him. Mr. Doyle reported this incident to campus police. Ms. Spears also testified that about a month prior to the incident at issue in the present case, Mr. Doyle had told her that other employees reported that petitioner had been stealing. Ms. Spears told Mr. Doyle that since he had not witnessed petitioner actually take anything, Mr. Doyle could not do anything about it.

Respondent discharged petitioner 27 July 2009 for unacceptable personal conduct. Petitioner appealed his discharge to the UNCC Hearing Panel of the Staff Grievance Committee. The panel affirmed his termination. On 22 September 2009, petitioner filed a petition for a contested case hearing to the Office of Administrative Hearings ("OAH") alleging his termination was without cause. The matter came on for hearing

before Administrative Law Judge Selina M. Brooks ("ALJ Brooks") on 10 May 2010. ALJ Brooks filed her decision ("ALJ decision") on 14 July 2010 ultimately concluding that respondent proved it had just cause to discharge petitioner.

Petitioner appealed the ALJ decision to the State Personnel Commission ("SPC"). The SPC held a hearing on the matter on 21 October 2010 and issued a decision and order ("SPC order") that same day. The SPC order affirmed petitioner's discharge and adopted all the findings of fact from the ALJ decision, except finding number 24 which discussed after-acquired evidence, and all the conclusions of law, except conclusions numbers 15-20 which the SPC found unnecessary for its decision.

Petitioner filed his petition for judicial review on 5 January 2011. The Mecklenburg County Superior Court held a hearing on the matter on 12 December 2011. The superior court issued an order ("superior court order") 23 December 2011 affirming the SPC order. Petitioner filed his notice of appeal to this Court 20 January 2012.

### Arguments

#### I. Superior Court's Standard of Review

Petitioner first argues that the superior court erred in failing to apply the proper two-step inquiry in reviewing the

SPC order. Specifically, petitioner contends that the superior court order indicated that it had only conducted a "whole record" review pursuant N.C. Gen. Stat. § 150B-51(b).

The superior court's review of a final decision of the SPC is governed by N.C. Gen. Stat. § 150B-51(b) (2011). "On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004); see also *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596, 620 S.E.2d 14, 17 (2005). If the appealing party contends the administrative agency made a legal error, the superior court's review is *de novo*. N.C. Gen. Stat. 150B-51(c); see also *Hilliard*, 173 N.C. App. at 596, 620 S.E.2d at 17. However, if the appealing party asserts that the agency's decision was not supported by evidence or was arbitrary and capricious, "the [superior] court shall conduct its review of the final decision using the whole record standard of review." N.C. Gen. Stat. 150B-51(c); see also *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120, *aff'd per curiam*, 360 N.C. 52, 619 S.E.2d 502 (2005).

Here, a review of the superior court order fails to establish that it applied the wrong standard of review. The superior court order specifically stated it reviewed "the whole record" to determine whether there was substantial evidence to support the SPC's findings of fact. Moreover, the superior court order indicated it applied a whole record review and a *de novo* review to the legal issues raised by petitioner. Petitioner's argument is based on the fact that in one place in the order, the superior court seems to indicate it applied the whole record test to petitioner's claims that the SPC made conclusions that were "*erroneous as a matter of law.*" While that statement, standing alone, would likely indicate that the superior court did err by applying the incorrect standard of review to petitioner's alleged errors, the superior court order, read in its totality, indicates that it applied the proper *de novo* review to the "legal issues" and found "no errors of law." Thus, petitioner's argument is without merit.

## II. The Seven Factor Test

Next, petitioner argues that "the [superior] court erred in applying North Carolina just cause law." The basis of petitioner's argument is his contention that the superior court erred in not applying Arbitrator Carol R. Daugherty's seven

factor test ("seven factor test") in determining whether respondent had just cause to discharge petitioner.

While petitioner is correct that the SPC has recognized the "seven-factor test," see *Bulloch v. N.C. Dep't of Crime Control & Pub. Safety*, \_\_ N.C. App. \_\_, \_\_, 732 S.E.2d 373, 378 (2012), petitioner's premise that the superior court was required to apply this test when reviewing a final administrative agency decision is unsupported by our caselaw and statutes. Thus, the superior courts are not required to utilize this test in conducting their review pursuant to N.C. Gen. Stat. § 150B-51(b), and petitioner's argument that the superior court erred by not applying it is without merit.

### III. Evidence that Petitioner Engaged in Theft

Next, petitioner argues that the superior court erred in concluding there was substantial evidence that petitioner engaged in theft. Petitioner contends that the superior court should have concluded that the SPC failed to "fair[ly]" and "careful[ly]" consider the contradictory evidence or the evidence that led to a conflicting inference. Specifically, petitioner alleges that Mr. Doyle and Officer Greco were not credible witnesses because: (1) Officer Greco's "opinion on [p]etitioner's guilt is based solely on his disbelief of



[p]etitioner"; (2) Mr. Doyle gave conflicting testimony at the ALJ hearing and at his deposition; (3) Mr. Doyle's testimony conflicted with that of other witnesses; and (4) Mr. Doyle had an ulterior motive in reporting the theft based on his past altercation with petitioner. We disagree.

This Court's review of a superior court's order either affirming or reversing the decision of an administrative agency "is twofold, and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *Mayo*, 168 N.C. App. at 507, 608 S.E.2d at 120. "On review of an agency's decision, a [superior] court is prohibited from replacing the [a]gency's findings of fact with its own judgment of how credible, or incredible, the testimony appears to [the superior court] to be, so long as substantial evidence of those findings exist in the whole record." *N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 536, 616 S.E.2d 594, 599 (2005) (internal quotation marks omitted).

The SPC found in its order both Mr. Doyle's and Officer Greco's testimony reliable. Both of these findings were supported by testimony at the OAH hearing and corroborated by

written statements made after the incident.<sup>1</sup> Moreover, a review of the record does not establish any substantial inconsistencies in their testimony. Furthermore, although petitioner points to the fact that Officer Greco's testimony was not credible because "his opinion on [p]etitioner's guilt is based solely on his disbelief of [p]etitioner," there is nothing in the record to support petitioner's claim that Officer Greco was not a credible witness. Thus, since there was substantial evidence in the record supporting the findings that Mr. Doyle and Officer Greco were credible, the superior court properly affirmed the SPC's findings.

Petitioner also contends that because there was inconsistent or contradictory testimony, the superior court should only have relied on the "incontrovertible evidence." Specifically, petitioner claims the "incontrovertible evidence" established that petitioner could not have stolen the toilet paper roll from McEniry since: (1) the housekeeping closet did not contain any rolls of toilet paper similar to the one in petitioner's backpack when Mr. Guns conducted his investigation;

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<sup>1</sup> It should be noted that Mr. Doyle's written statement is dated 12 July 2009, even though the date of the incident is 14 July 2009. However, in his testimony, Mr. Doyle stated that he put the wrong date on the statement and reported that he made the statement the day after the incident.

(2) the toilet paper roll appeared to have been forced off a spindle; and (3) the work requests for McEniry demonstrate that dispensers for toilet paper rolls like the one found in petitioner's backpack were not installed until after petitioner's discharge.

Petitioner's allegation that this evidence is "incontrovertible" is not supported by the record. Mr. Guns testified that McEniry used two types of toilet paper, and the type of toilet paper roll found in petitioner's backpack is one of the types used in McEniry. Furthermore, although petitioner claims that the 2010 work orders prove that the type of toilet paper roll found on petitioner was not used in McEniry until after he was discharged, Mr. Guns testified that these work orders only applied to installing dispensers in the handicap bathrooms, not all bathrooms.

Thus, the superior court properly applied the whole record test, and there was substantial evidence supporting the superior court's affirmation of the SPC findings that Mr. Doyle and Officer Greco were credible. Moreover, petitioner's contention that the "incontrovertible evidence" proves that he could not have stolen the toilet paper roll is without merit.

IV. Conclusion that Respondent Discharged Petitioner for Just Cause

Finally, petitioner argues that the superior court erred in affirming the SPC's conclusion that petitioner was discharged for just cause.<sup>2</sup> In support of his argument, petitioner alleges that the testimony and evidence the SPC relied on to make its conclusions were contradicted by other testimony. Thus, petitioner contends that the evidence constituted only speculation, and respondent failed to meet its burden to establish just cause.

Pursuant to N.C. Gen. Stat. § 126-35 (2011), "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." Unacceptable personal conduct, which includes "job-related conduct which constitutes a violation of state or federal law[,] . . . the willful violation of known or written work rules[,] [or] conduct unbecoming a state employee that is detrimental to state service[,]" 25 N.C.A.C. 1J.0614

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<sup>2</sup> In support of his argument, petitioner claims that a "just cause [analysis] requires the application of the seven factor test[.]" Moreover, petitioner alleges that since a *de novo* review would determine that respondent has failed to meet three of those factors, respondent did not have just cause to terminate petitioner. However, as discussed *infra*, the seven factor test has been recognized by SPC, but a superior court is not required to utilize it in a just cause analysis. Therefore, petitioner's argument that the superior court erred in not properly applying this test is without merit.

(2012), may constitute just cause. "Employees may be dismissed for a current incident of unacceptable personal conduct, without any prior disciplinary action." 25 N.C.A.C. 1J.0608(a) (2012).

Here, the SPC concluded that "[r]espondent demonstrated with credible and substantial evidence that [p]etitioner's theft of State property violated State law, willfully violated known or written work rules, and constituted conduct unbecoming a state employee that is detrimental to state service." As discussed *infra*, the superior court, in applying its whole record review, did not err in finding that there was substantial evidence that petitioner engaged in theft. Thus, the superior court did not err in concluding that respondent had just cause to discharge him. Moreover, Mr. Gun testified that, based on state law and internal policies, housekeepers are not permitted to steal from respondent, and housekeepers are informed of these policies. Accordingly, the superior court did not err in affirming the SPC's conclusion that petitioner's conduct constituted unacceptable personal conduct pursuant to 25 N.C.A.C. 1J.0604(b). Therefore, the superior court order should be affirmed.

V. "After-Acquired Evidence"

In the event that this case is remanded back to the superior court, respondent requests that this Court require the superior court to consider the after-acquired evidence regarding petitioner's false and misleading information on his employment application. However, since we are affirming the superior court order, we need not address respondent's argument on this issue.

#### Conclusion

Based on the foregoing reasons, we affirm the superior court order.

Affirmed.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).