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NO. COA13-275
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

ROBERT ANTHONY COATS,
Petitioner,

v.

Wake County
No. 09 CVS 17880

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
O'BERRY NEURO-MEDICAL TREATMENT
CENTER,
Respondent.

Appeal by respondent from order entered 5 July 2012 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 23 September 2013.

Ryan McKaig, for petitioner-appellee.

Roy Cooper, Attorney General, by Kathryn J. Thomas, Special Deputy Attorney General, and Joseph E. Elder, Assistant Attorney General, for the State.

MARTIN, Chief Judge.

Respondent North Carolina Department of Health and Human Services, O'Berry Neuro-Medical Treatment Center appeals from an order of the superior court remanding this case to the Office of Administrative Hearings ("OAH") for a new hearing and awarding

attorney's fees and costs to petitioner Robert Anthony Coats as the prevailing party. For the reasons stated herein, we reverse.

This case arises from proceedings before the OAH in which petitioner alleged that respondent violated State personnel vacant position posting requirements under N.C.G.S. § 126-7.1(a) and deprived him of an opportunity for promotion. Administrative Law Judge Shannon R. Joseph presided over the contested case hearing. Prior to rendering her decision, Judge Joseph resigned from her position as an Administrative Law Judge ("ALJ") in order to accept appointment as a Special Superior Court judge. Pursuant to N.C.G.S. §§ 7A-757 and 150B-32(c), John B. Lewis, Jr. was then appointed as a temporary ALJ to the case, and the parties received notice of the appointment. Judge Lewis reviewed the record developed at the contested case hearing and rendered his recommended decision to the State Personnel Commission ("SPC"). In his recommended decision to the SPC, Judge Lewis concluded that petitioner failed to demonstrate by a preponderance of the evidence that respondent had violated State personnel vacant position posting requirements.

Petitioner submitted to the SPC written objections and exceptions to the findings of fact, conclusions of law, and

recommended decision made by Judge Lewis. Petitioner primarily took exception to the recommended decision on the grounds that it was rendered by an ALJ who did not preside over the contested case hearing and hear the live witness testimony. The SPC rejected petitioner's objections and entered a final decision adopting the recommended decision.

Petitioner sought judicial review of the SPC's final decision in Wake County Superior Court pursuant to N.C.G.S. § 150B-43. Concluding that the OAH's appointment of an ALJ who issued the recommended decision from a cold record violated petitioner's due process rights as well as the North Carolina Administrative Procedure Act ("APA"), the superior court remanded the case to the OAH for rehearing and awarded petitioner attorney's fees and costs.

On appeal, respondent contends that the superior court erred by determining that petitioner's due process rights and the APA were violated because the ALJ rendered the recommended decision based upon a cold record. Respondent also argues that the court erroneously awarded petitioner attorney's fees and costs as the prevailing party.

The APA, codified at Chapter 150B of the General Statutes, governs judicial review of the final decision of an

administrative agency in a contested case. "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). Where it is alleged that an agency decision was made upon an unlawful procedure, de novo review is required. *Richardson v. N.C. Dep't of Pub. Instruction Licensure Section*, 199 N.C. App. 219, 223, 681 S.E.2d 479, 483, *disc. review denied*, 363 N.C. 745, 688 S.E.2d 649 (2009). Under the de novo standard of review, we consider the matter anew and may freely substitute our own judgment for that of the agency's judgment. *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

"Procedural due process restricts governmental actions and decisions which 'deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.'" *Peace v. Emp't Sec. Comm'n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 31 (1976)) (internal quotation marks omitted). Once a protected interest has been demonstrated, the Court must "determine exactly what procedure or 'process' is due." *Id.* at 322, 507 S.E.2d at 278. The North Carolina Supreme Court has held that a contested case

hearing before the OAH affords a State employee the procedural protections required by due process. *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 599, 620 S.E.2d 14, 18 (2005) (citing *Peace*, 349 N.C. at 323-27, 507 S.E.2d at 278-80).

Under the SPA, a State employee has an interest in the opportunity for promotion through the proper posting of notice of a vacant position. N.C. Gen. Stat. § 126-7.1(a) (2011). A State employee who alleges that he or she has been denied the opportunity for promotion because notice of a vacant position was not posted in accordance with the procedures set forth under the SPA may demand a formal evidentiary hearing by filing a petition for a contested case with the OAH. 2013 N.C. Sess. Laws 59, 65-66, ch. 382, § 6.1.

Governed by the APA, a contested case hearing is presided over by an ALJ, and the parties are afforded the rights to present arguments and physical evidence and to examine and cross-examine witnesses during the hearing. N.C. Gen. Stat. §§ 150B-25(c)-(d), -32(a) (2011). Where an ALJ can no longer preside over a hearing, the APA allows for a replacement ALJ to be appointed to the case "unless it is shown that substantial prejudice to any party will result, in which event a new hearing shall be held or the case dismissed without prejudice." N.C. Gen. Stat. § 150B-32(c). Therefore, absent a showing of

substantial prejudice, an ALJ who is later assigned to a case and hence did not preside over the hearing may nonetheless decide the case based upon the official record. See *Crawford v. Wayne Cty. Bd. of Educ.*, 275 N.C. 354, 361, 168 S.E.2d 33, 37-38 (1969) (“[A]n administrative decision is not invalid merely because an officer who was not present when the evidence was taken made or participated in the decision, provided he considers and acts upon the evidence received in his absence.”).

While recent amendments to the APA make the ALJ’s decision the final decision,¹ at the time this case commenced, the ALJ only had the authority to issue a recommended decision to the SPC. N.C. Gen. Stat. § 150B-34(a) (2007), amended by 2011 N.C. Sess. Laws 1678, 1686, ch. 398, § 18. Under the then-existing procedural scheme, the parties were given the opportunity to file exceptions to the ALJ’s recommended decision and present written arguments to the SPC before the agency made a final decision. N.C. Gen. Stat. § 150B-36(a) (2007), repealed by 2011 N.C. Sess. Laws 1678, 1687, ch. 398, § 20. Upon review of the ALJ’s recommended decision, the parties’ written arguments, and

¹ In 2011, the General Assembly enacted several amendments to the APA that significantly alter the procedural scheme for making a final decision in contested cases. 2011 N.C. Sess. Laws 1678, 1685-97, ch. 398, §§ 15-55. These amendments became effective 1 January 2012 and apply to all contested cases commenced on or after that date. *Id.* at 1701, § 63. Because petitioner’s contested case was filed on 16 April 2008, the amendments are inapplicable to this case.

the official record, the SPC then entered a final agency decision. See N.C. Gen. Stat. § 150B-36(b), *repealed by* 2011 N.C. Sess. Laws 1678, 1687, ch. 398, § 20.

In this case, the superior court determined that the OAH's appointment of Judge Lewis to issue a recommended decision from the record developed at the hearing before Judge Joseph violated petitioner's due process rights as well as the APA. We disagree.

Petitioner's due process rights were satisfied by the opportunity to pursue a contested case hearing before the OAH as provided under the SPA and APA. See *Hilliard*, 173 N.C. App. at 599, 620 S.E.2d at 18. Petitioner fully participated in the hearing and was given the opportunity to present witnesses and cross-examine respondent's witness. Conducted in accordance with both the APA and SPA and in a reasonable manner, the contested case hearing afforded petitioner an opportunity to be heard as required by procedural due process protections.

Furthermore, the recommended decision at issue in this case was not based upon unlawful procedure. Judge Lewis was appointed to the case pursuant to N.C.G.S. §§ 7A-757 and 150B-32(c) after Judge Joseph's resignation, and the parties received notice of the appointment. The APA allows for a party to object to the appointment of a replacement ALJ by showing that the

replacement would be substantially prejudicial to either party. N.C. Gen. Stat. § 150B-32(c). Petitioner, however, made no showing that Judge Lewis's appointment to continue with the case would be substantially prejudicial upon receiving notice of the appointment. Because the parties received notice of the appointment and there was no showing that substantial prejudice would result, the appointment of Judge Lewis to the case was lawful procedure as set forth under the APA.

Lastly, we find no merit to petitioner's argument that he was denied due process because Judge Lewis issued his recommended decision from a cold record and without the benefit of live testimony. While the ALJ presiding over a hearing is in the best position to evaluate the credibility of witnesses and evidence presented, "due process and the concept of a fair hearing require only that an administrative officer who was absent when the evidence was taken consider and appraise the evidence himself." *Crawford*, 275 N.C. at 360, 168 S.E.2d at 37. In his recommended decision, Judge Lewis made findings of fact and conclusions of law with citations to specific evidence and testimony in the transcript of the hearing, indicating that he considered and appraised the evidence himself. Due process requirements were therefore met, because Judge Lewis entered his recommended decision based upon his consideration of the

evidence and testimony presented.

Moreover, because the SPC made the final agency decision, it is of little importance that Judge Lewis issued his recommended decision from a cold record. At the time this case commenced, the ALJ's "recommended decision [was] only advisory." *Allen v. N.C. Dep't of Health & Human Servs.*, 155 N.C. App. 77, 82, 573 S.E.2d 565, 568 (2002), *disc. review denied*, 357 N.C. 163, 580 S.E.2d 358 (2003). The SPC, as the final agency decision maker, was vested with full authority to accept or reject the ALJ's recommended decision. See *Davis v. N.C. Dep't of Human Res.*, 110 N.C. App. 730, 737, 432 S.E.2d 132, 136 (1993) ("Even though the administrative law judge had already made findings of fact and conclusions of law, the Personnel Commission had the ability to make its own findings of fact and conclusions of law if it chose to do so.").

Before the SPC entered a final decision, petitioner submitted to the agency written objections to the recommended decision arguing that it was prejudicial because it was issued by an ALJ who did not preside over the contested case hearing. The SPC's final decision stated that, upon full consideration of the matter, including the ALJ's recommended decision and a review of the whole record, the agency adopted as its own the findings of fact and conclusions of law made by the ALJ, as well

as his recommended decision in favor of respondent. While the SPC had statutory authority to reject the ALJ's recommended decision and make its own findings of fact and conclusions of law, the agency chose to adopt the recommended decision. It can therefore be assumed that the SPC found that petitioner had not been prejudiced and that the decision in favor of respondent was proper.

The superior court erred in finding that the OAH's appointment of a replacement ALJ to render a recommended decision from a cold record was unlawful procedure in violation of petitioner's due process rights and the APA. The contested case hearing before the OAH and final review by the SPC were conducted according to the prescribed statutory law and in a reasonable manner. The decision of the superior court is reversed. Our disposition of this issue thus renders unnecessary our consideration of the remaining arguments.

Reversed.

Judges GEER and STROUD concur.

Report per Rule 30(e).