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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-337

Filed: 15 November 2016

North Carolina Office of Administrative Hearings, No. 15 OSP 05439

JOHNNIE M. DARDEN SR., Petitioner,

v.

DEPARTMENT OF PUBLIC SAFETY, Respondent.

Appeal by petitioner from order entered 31 December 2015 by Administrative Law Judge Donald W. Overby in the North Carolina Office of Administrative Hearings. Heard in the Court of Appeals 22 September 2016.

*Michael A. Jones for petitioner-appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for respondent-appellee.*

DIETZ, Judge.

Petitioner Johnnie Darden appeals the dismissal of his contested case as a sanction for failure to comply with discovery. Throughout most of his contested case, Darden represented himself. During that time, he repeatedly failed to respond to discovery requests necessary for the Department of Public Safety to prepare its case.

Darden argues on appeal that the ALJ failed to consider lesser sanctions before dismissing his case. As explained below, we disagree. The ALJ's comments when he

scheduled the hearing on the Department's motion for sanctions, and comments at the hearing, demonstrate that the ALJ considered lesser sanctions but felt that, because of the unreasonable delay and inability to litigate the case within the statutory time frame, dismissal was the only appropriate sanction. Accordingly, we affirm.

### **Facts and Procedural History**

On 9 April 2015, Respondent North Carolina Department of Public Safety terminated Petitioner Johnnie Darden's probationary employment as a public safety officer. The Department specifically cited a series of disciplinary problems involving Darden and his coworkers and immediate superiors as the basis for its decision. Darden later claimed he was the victim of discrimination, workplace harassment, and retaliatory discharge.

On 27 July 2015, Darden filed a petition for a contested case hearing in the North Carolina Office of Administrative Hearings. He represented himself in this petition and did not have legal counsel. During this time, Darden failed to respond to discovery requests submitted by the Department.

On 15 October 2015, J. Heydt Philbeck appeared as counsel for Darden. That same day, Darden responded to the Department's requests for admissions, but he did not respond to its interrogatories or its request for production of documents. Darden notified the Department and the ALJ of his intent to respond to those outstanding

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discovery requests by 30 November 2015. Darden also moved to amend the scheduling order and requested an additional sixty days to respond to the Department's outstanding discovery requests.

On 27 October 2015, the ALJ granted Darden's motion, extended discovery through 11 December 2015, and set a hearing date during the week of 28 December 2015.

On 2 December 2015, Philbeck moved to withdraw as Darden's counsel. At the same time, Darden filed a *pro se* motion for additional "time to hire another attorney and give him or her time to prepare for [Darden's] case." The ALJ granted Philbeck's motion to withdraw, denied Darden's motion for additional time, and set a hearing on the case for 29 December 2015.

On 15 December 2015, the Department filed a motion to compel or, alternatively, dismiss the case for failure to comply with discovery. On 22 December 2015, new counsel appeared on Darden's behalf. One day before the scheduled hearing, on 28 December 2015, Darden moved to continue the action. The ALJ did not continue the case and heard arguments on outstanding motions at the previously scheduled 29 December 2015 hearing. After the hearing, the ALJ granted the Department's motion to dismiss based on Darden's failure to comply with discovery. Darden timely filed notice of appeal.

**Analysis**

Darden argues on appeal that the ALJ erred by dismissing his case with prejudice without first considering lesser sanctions. As explained below, we reject this argument.

The North Carolina Rules of Civil Procedure “apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise.” 26 N.C. Admin. Code 3.0101(a). As a result, an ALJ has the authority under Rule 41(b) of the Rules of Civil Procedure to involuntarily dismiss a contested case with prejudice based on the petitioner’s failure to comply with the Rules of Civil Procedure or any order of the OAH. *See Scott v. N.C. Dep’t of Crime Control & Pub. Safety*, 222 N.C. App. 125, 131 n.7, 730 S.E.2d 806, 810 n.7 (2012). Similarly, an ALJ has the authority under Rule 37(b) of the Rules of Civil Procedure to dismiss a contested case as a sanction for failure to comply with the applicable discovery rules. 26 N.C. Admin. Code 3.0112.

As in other proceedings applying these procedural rules, “[b]efore dismissing an action with prejudice, the trial court must make findings and conclusions which indicate that it has considered . . . less drastic sanctions. If the trial court undertakes this analysis, its resulting order will be reversed on appeal only for an abuse of discretion.” *Foy v. Hunter*, 106 N.C. App. 614, 620, 418 S.E.2d 299, 303 (1992) (citations omitted). “[T]he trial court is not required to list and specifically reject each

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possible lesser sanction prior to determining that dismissal is appropriate.” *Badillo v. Cunningham*, 177 N.C. App. 732, 735, 629 S.E.2d 909, 911, *aff'd per curiam*, 361 N.C. 112, 637 S.E.2d 538 (2006). “[W]here the record on appeal permits the inference that the trial court considered less severe sanctions, this Court may not overturn the decision of the trial court unless it appears so arbitrary that it could not be the result of a reasoned decision.” *Id.* at 734, 629 S.E.2d at 911.

Darden does not dispute that he violated numerous discovery rules and deadlines during the proceedings below, resulting in significant delay and potential prejudice to the Department. The sole issue in this appeal is whether the ALJ properly considered lesser sanctions before dismissing his case with prejudice as a sanction for these violations.

We hold that the record on appeal demonstrates the ALJ considered lesser sanctions but concluded that dismissal was the only appropriate sanction. We acknowledge that the ALJ’s written sanctions order does not include any express representation that he considered lesser sanctions before imposing dismissal with prejudice. But in the notice of hearing on the Department’s motion to compel or, alternatively, dismiss, the ALJ informed the parties that he would be “consider[ing] sanctions, up to and including, dismissing th[e] contested case action with prejudice” at the hearing. This language indicates that the ALJ understood there were a range of possible sanctions available but ultimately decided against imposing a lesser

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sanction. *See generally Lovendahl v. Wicker*, 208 N.C. App. 193, 209, 702 S.E.2d 529, 540 (2010) (“The trial court is not required to *impose* lesser sanctions, but only to *consider* lesser sanctions.”)

Moreover, the ALJ’s comments at the hearing indicate why he found dismissal with prejudice to be the most appropriate sanction. He first explained the following to Darden’s counsel: “A few years back the General Assembly decided, in their infinite wisdom, or lack thereof, that they would put serious time restraints on these types of cases so that we have to be fully disposed of this case in 180 days. And that’s the problem that you’re running into.”<sup>1</sup>

Under questioning from the ALJ, Darden’s counsel conceded that Darden’s failure to comply with the rules of discovery meant it was no longer possible to resolve the case within the statutory time period. The ALJ asked, “How do you propose that we would be able to conduct a hearing if you handed . . . every bit of discovery due right this minute? How would we be able to conduct a hearing and have a final order done by January the 23rd?” Darden’s counsel responded “in all candor” that he did not “know how that would be done” and that it would “almost be impossible” even to turn over the discovery responses that day as the Department requested.

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<sup>1</sup> The ALJ also warned Darden at earlier points in the proceeding that there was a statutory deadline and that Darden would not be permitted to delay the proceeding to the point that the ALJ could not issue a decision by the deadline.

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Taken together, these excerpts from the record are sufficient to permit the inference that the ALJ considered less severe sanctions. The ALJ's remarks confirm that he understood he could impose lesser sanctions but that, because of the unreasonable delay and Darden's concession that the delay meant it would be impossible to resolve the matter by the statutory deadline, dismissal was the only appropriate sanction.<sup>2</sup> Accordingly, we find no abuse of discretion in the ALJ's decision to dismiss this contested case as a sanction for Darden's repeated failures to comply with his discovery obligations.

**Conclusion**

We affirm the order of the Office of Administrative Hearings.

AFFIRMED.

Judges HUNTER, JR. and McCULLOUGH concur.

Report per Rule 30(e).

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<sup>2</sup> Darden also argues in his brief that, because he represented himself throughout much of the proceedings, the ALJ's decision to impose such severe sanctions for violations of the discovery rules was improper. We reject this argument because the rules apply equally to all litigants, regardless of whether they are represented by counsel or not. *See, e.g., Bledsoe v. Cty. of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999).