IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-449

Filed: 17 December 2019

Office of Administrative Hearings, No. 18 OSP 2327

MARJORIE JEAN DAVIS, Petitioner,

v.

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.

Appeal by respondent from final decision entered 14 January 2019 by Administrative Law Judge David F. Sutton in the Office of Administrative Hearings. Heard in the Court of Appeals 14 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

John C. Hunter, for petitioner.

ARROWOOD, Judge.

The North Carolina Department of Health and Human Services ("respondent") appeals from a final decision of the North Carolina Office of Administrative Hearings ("OAH"), which concluded respondent lacked just cause to terminate Marjorie Davis ("petitioner") from her position as a Health Care Technician 1, and ordered her reinstatement. For the following reasons, we affirm.

I. Background

The J. Iverson Riddle Developmental Center ("JIRDC") is a state-operated healthcare facility and sub-division of respondent that provides 24/7 treatment and care for individuals with developmental disabilities. Petitioner began working for the JIRDC in June 2010 as a Health Care Technician 1 ("HCT 1"), the lowest level health care position within the JIRDC. As an HCT 1, petitioner was responsible for assisting and training the JIRDC residents in self-care activities such as feeding, bathing, cleaning, changing clothes, communicating, leisure and educational activities, and, as necessary, movement from one place to another. Petitioner's latest assignment at the JIRDC was to care for residents housed in the JIRDC's Maple Cottage, almost all of whom are wheelchair-bound.

Prior to the incident which led to her termination, petitioner had been employed at the JIRDC for eight years. During that time, petitioner received scores of 97 or above on most annual performance evaluations. She also had only one prior disciplinary action on her record, stemming from an incident in which she was discovered sleeping while on duty. Petitioner was given a five-day disciplinary suspension for the unacceptable personal conduct. The letter suspending petitioner informed her that "other incidents of unacceptable personal conduct will result in additional disciplinary action up to and including dismissal." Since then, petitioner has had no other incidents of sleeping while on duty.

On 19 December 2017, petitioner violated the JIRDC policy by manually lifting a resident from his motorized wheelchair and placing him on his bed. The resident, referred to as T.H., was thirty years old and weighed 120 pounds. He has a severe form of cerebral palsy and scoliosis, and is unable to walk or stand on his own and has limited arm movement due to extreme tightness in his muscles. T.H. is unable to assist with transfers between resting positions. His Person-Centered Plan ("PCP"), which governs his treatment at the JIRDC, requires the use of a certain mechanical "Arjo" lift for any transfer, including from his wheelchair to his bed. There are no exceptions to this requirement, and it is always posted on the back of T.H.'s bedroom door. In addition, respondent's Mechanical and Manual Lift Policy ("Lift Policy") mandates that "residents who shall be lifted in order to transfer utilize a mechanical lift, unless otherwise contraindicated." Petitioner was made aware of this policy and received training on use of the Arjo lift. However, petitioner disregarded this policy when she manually lifted T.H. to transfer him to his bed.

Judy Beck, a fellow HCT 1 employee at the JIRDC, was responsible for caring for T.H. at the time of the incident, and witnessed petitioner's violation of the JIRDC policy regarding proper lift procedure. Beck subsequently reported petitioner to their supervisor and completed a written report detailing what she had observed. Petitioner admitted to manually lifting T.H. in contravention of his PCP. She later also confessed to having manually lifted T.H. multiple times in the past, sometimes

due to a time crunch but also as part of a game with T.H. As a result of her violation of the Lift Policy, petitioner was terminated from her position at the JIRDC for "unacceptable personal conduct."

Petitioner challenged the dismissal internally and a final agency decision maintaining the dismissal was issued on 16 March 2018. Petitioner appealed the final agency decision to the OAH, challenging whether there was just cause to terminate her given that she was a career State employee.

Following the manual lift, T.H. was physically examined and found to have suffered no physical harm from petitioner's actions. Though non-verbal, T.H. is able to communicate via an assisted communication device. T.H. did not express to anyone that he was harmed in any way by petitioner's actions. Although T.H. suffered no harm, Dr. Wendy Reynolds, Director of Physical Therapy at the JIRDC, testified that the risks of performing a manual lift where a mechanical lift is required include spiral fracture, bruising, sheering forces, and skin tears. For T.H. in particular, if he were to fall or his catheter become dislodged during a manual lift, Dr. Reynolds believed the risks included further immobility, organ failure, and changes in his mental status. The parties stipulated petitioner did not act with malice or intent to harm when she manually lifted T.H.

Myra Jaquins, the JIRDC Area Director for Maple Cottage, testified that petitioner's manual lift of T.H. created a high risk that could have negatively affected

the quality of the resident's life in a very significant way. Petitioner consciously disregarded that risk when she decided to manually lift T.H. without using the Arjo, and this was not a risk other staff in similar situations would have taken. Petitioner testified she performed the manual lift because her supervisor demonstrated how to do it and she had observed another senior employee manually lift T.H. and other residents at various times. In addition, she lifted T.H. manually because she believed it was faster than waiting for an Arjo lift to become available, although she admitted waiting would not have been detrimental.

While petitioner was terminated for violating the Lift Policy, another JIRDC employee received a less severe form of discipline for the same violation. The employee, referred to as M.Y., was also an HCT 1. M.Y. had "physically lifted two residents instead of using the mechanical lift as stated in their Person[-]Centered Plans" on 2 March 2016. In addition, M.Y. also violated respondent's "Advocacy Investigation Statement of Confidentiality & Disclosure Statement." During the investigation into her violation of the Lift Policy, M.Y. attempted to contact and question the witnesses involved, and then lied to her supervisors about doing so. M.Y. was given a two-day disciplinary suspension without pay for her violation of these two policies. Prior to this incident, M.Y. had previously been issued two written warnings and a five-day suspension due to her excessive and unexcused tardiness or absence from work, which management felt "jeopardize[d] safety to residents."

The Director of the JIRDC, Todd Drum, testified he did not consider the level of disciplinary action taken against M.Y. when deciding the appropriate level of discipline for petitioner. The Administrative Law Judge ("ALJ") concluded that respondent "did not act with equity and fairness in the termination of the Petitioner" and ordered that petitioner be reinstated and imposed a two-day suspension instead. Respondent timely appealed.

II. Discussion

On appeal, respondent argues the OAH erred by failing to "giv[e] due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency" pursuant to N.C. Gen. Stat. § 150B-34 (2017).

Respondent contends its substantial rights were prejudiced in violation of N.C. Gen. Stat. § 150B-51(b)(2), (3), and (4) because OAH's decision was in excess of the statutory authority of OAH, made upon unlawful procedure, and affected by other error of law. This Court reviews errors of law asserted under N.C. Gen. Stat. § 150B-51(b)(1)-(4) *de novo*. N.C. Gen. Stat. § 150B-51(c) (2017). "*De novo* review requires the court to consider 'the matter anew[ ] and freely substitute[ ] its own judgment for the agency's.' " *Vanderburg v. N.C. Dep't of Revenue*, 168 N.C. App. 598, 609, 608 S.E.2d 831, 839 (2005) (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002)).

1. Due Regard Mandate

N.C. Gen. Stat. § 150B-34 provides, "[i]n each contested case the administrative law judge shall . . . decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." The essence of respondent's challenge to the ALJ's final decision stems from its belief that N.C. Gen. Stat. § 150B-34's "due regard" mandate means that the ALJ must give deference to the decision of the agency. This argument has no merit.

This Court previously addressed this same argument in *Harris v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, 798 S.E.2d 127, *aff'd*, 370 N.C. 386, 808 S.E.2d 142 (2017). There, we held, in no uncertain terms, that "[a]n ALJ, reviewing an agency's decision to discipline a career State employee within the context of a contested case hearing, owes no deference to the agency's conclusion of law that either just cause existed or the proper consequences of the agency's action." *Id.* at __, 798 S.E.2d at 134. We noted that "[g]iven that the statute explicitly places the burden of proof on the agency to show just cause exists for the discharge, demotion, or suspension of a career State employee, it is illogical for an ALJ to accord deference to an agency's legal conclusion and to the particular consequences or sanction imposed." *Id.* at __, 798 S.E.2d at 134.

Furthermore, contrary to respondent's assertions, the history of the statute also supports this conclusion. Prior to the 2013 amendment, the Administrative

Procedure Act provided for a very different process by which employees could challenge disciplinary actions taken against them by State employers. Under the former statutory framework, an ALJ provided a "recommended decision" to the agency involved, complete with findings of facts and conclusions of law, prior to the entry of a final agency decision. *See N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 657-58, 599 S.E.2d 888, 893-94 (2004). The agency could then review the ALJ's recommended decision, and had the discretion to either affirm said decision or issue a different one. *See id.* at 658, 599 S.E.2d at 894. The 2013 amendment, however, significantly changed the role of the ALJ.

Pursuant to N.C. Gen. Stat. § 126-34.02 (2017), the ALJ now has authority to review an agency's decision to terminate the employment of a career State employee, and must issue a *final decision* on the matter. (emphasis added). In its final decision, the ALJ *can* affirm the decision of the agency, but is not required to. Indeed, the statute outlines several alternative actions the ALJ may take to rectify an agency decision it deems erroneous. *See* N.C. Gen. Stat. § 126-34.02. Thus, the North Carolina legislature, in its wisdom, enacted a new framework in which the ALJ now has greater authority than an agency regarding appropriate disciplinary action against career State employees. Accordingly, we reject respondent's contention the ALJ must give deference to an agency's decision.

2. Just Cause

Respondent further argues the ALJ erred in concluding just cause did not exist to terminate petitioner. It is well settled that "[c]areer state employees, like petitioner, may not be discharged, suspended, or demoted for disciplinary reasons without 'just cause.' " *Warren v. N.C. Dep't of Crime Control & Pub. Safety*, 221 N.C. App. 376, 379, 726 S.E.2d 920, 923 (2012) (quoting N.C. Gen. Stat. § 126-35(a) (2011)). The North Carolina Administrative Code provides two bases for the statutory "just cause" standard: "(1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance[; and] (2) Discipline or dismissal imposed on the basis of unacceptable personal conduct." 25 N.C. Admin. Code 1J.0604(b)(1)-(2) (2018). The Administrative Code further defines unacceptable personal conduct as:

> (a) conduct for which no reasonable person should expect to receive prior warning;
> (b) job-related conduct which constitutes a violation of state or federal law;
> (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
> (d) the willful violation of known or written work rules;
> (e) conduct unbecoming a state employee that is detrimental to state service;
> (f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
> (g) absence from work after all authorized leave credits and benefits have been exhausted; or
> (h) falsification of a state application or in other employment documentation.

25 N.C. Admin. Code 1J.0614(8)(a)-(h) (2018). The Administrative Code also provides four disciplinary alternatives which may be imposed against an employee upon a finding of just cause: "(1) Written warning; (2) Disciplinary suspension without pay; (3) Demotion; and (4) Dismissal." 25 N.C. Admin. Code 1J.0604(a). This Court has recognized that "[u]nacceptable personal conduct does not necessarily establish just cause for all types of discipline. . . . Just cause must be determined based upon an examination of the facts and circumstances of each individual case." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925.

Here, petitioner's dismissal was based on allegations of unacceptable personal conduct. Respondent asserted petitioner's alleged unacceptable personal conduct included: conduct for which no reasonable person should expect to receive prior warning; the willful violation of known or written work rules; conduct unbecoming a state employee that is detrimental to state service; and neglect of a resident over whom petitioner had charge and to whom petitioner had responsibility.

North Carolina courts have established a three-part analytical approach to determine whether just cause exists to support a disciplinary action against a career State employee for unacceptable personal conduct:

> [F]irst determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. . . . If the employee's act qualifies

> as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Warren, 221 N.C. App. at 383, 726 S.E.2d at 925. In undertaking this last inquiry, courts must consider a number of factors, including "the severity of the violation, the subject matter involved, the resulting harm, the [career State employee's] work history, or discipline imposed in other cases involving similar violations." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

Here, respondent alleged petitioner manually lifted a resident in contravention of the resident's PCP and the JIRDC's Lift Policy. Petitioner admitted to engaging in the alleged misconduct. She also admitted to being aware of respondent's policies prohibiting such conduct and had been trained on the proper lift procedure. Petitioner's conduct therefore falls within at least one of the categories of unacceptable personal conduct provided by the Administrative Code—willful violation of known or written work rules. Thus, the first two prongs of the test set out in *Warren* are easily met. The primary issue in this case centers around the third prong, which asks whether petitioner's misconduct amounted to just cause for the disciplinary action taken. Ultimately, it is a question of fairness and equity, such that the disciplinary action must be commensurate to the misconduct. *Warren*, 221 N.C. App. at 381-82, 726 S.E.2d at 924-25.

The five *Wetherington* factors inform our analysis. The JIRDC presented extensive evidence of the potential for harm but conceded that no harm in fact resulted from petitioner's conduct. Thus, this factor weighs against a finding of just cause. However, the potential for harm does speak to the severity of the violation. Given the substantial associated risks of manually lifting residents whose care plans require use of an Arjo lift, including further disability or injury to both resident and caretaker, the severity factor weighs in favor of just cause. In addition, the fact that the resident involved has cerebral palsy and sclerosis indicates following proper lift procedure was especially important. However, the ALJ found petitioner is trained in and has experience with safe techniques for manual lifts of residents, and that she used these techniques when lifting T.H. We agree with the ALJ that this mitigates the severity of the violation. The next factor, the subject matter involved, also weighs in favor of just cause. The subject matter here concerns the proper care of disabled residents, and more specifically, the proper lift procedure for transferring residents from one place to another in a way that protects their health and safety. In casually disregarding the policies put in place by her employer, petitioner created an unreasonable risk of substantial harm to both the resident and herself.

The remaining factors, however, weigh against a finding of just cause. Throughout petitioner's eight years of employment at the JIRDC, she maintained a good employee record. She consistently performed well on annual evaluations,

receiving high ratings and reviews, and had only one prior instance of misconduct in an unrelated matter. In the prior incident, petitioner was discovered sleeping while on duty, and was put on a five-day suspension. Following this disciplinary action, petitioner never slept on the job again, and had no other incidents of misconduct until two years later, when she manually lifted T.H. Although petitioner was terminated for violating the Lift Policy, another HCT 1 employee at the JIRDC who committed the same offense received a less severe form of disciplinary action.

JIRDC employee M.Y. was only given a two-day suspension from work after respondent found that she violated the JIRDC's policies by manually lifting two residents and then interfering with the investigation into her misconduct. At the time, M.Y. also had a disciplinary record, having previously received a five-day suspension for excessive and unexcused tardiness and absence from work. Although respondent now maintains it relied on its specialized knowledge and expertise in determining petitioner's misconduct was greater than M.Y.'s, and thus warranted more severe disciplinary action, the Director of the JIRDC admitted he failed to consider this factor when making the decision to terminate petitioner.

In light of these facts and mitigating circumstances, we hold respondent did not have just cause to terminate petitioner, the severest form of disciplinary action. We further hold the ALJ properly exercised its authority to impose a less severe form

of disciplinary action following its conclusion respondent lacked just cause to terminate petitioner.

N.C. Gen. Stat. § 126-34.02(a) permits the OAH to impose the following relief when it has determined that the final agency decision was erroneous:

> (1) Reinstate any employee to the position from which the employee has been removed[;]
> (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied[; or]
> (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

Here, the ALJ ordered that petitioner be reinstated and subjected to a two-day suspension, thereby imposing the same disciplinary action respondent had felt appropriate for M.Y. In so doing, the ALJ acted well within its statutory authority to "[r]einstate any employee" and "[d]irect other suitable action to correct the abuse" resulting from respondent's erroneous decision. N.C. Gen. Stat. § 126-34.02(a). Accordingly, we uphold the imposition of alternative discipline by the ALJ.

III. Conclusion

For the foregoing reasons, we affirm the final decision of the OAH.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).