IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-277

No. COA20-562

Filed 15 June 2021

Wilkes County, No. 20 OSP 05603

JAMES E. BELCHER, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, STATE HIGHWAY PATROL, Respondent.

Appeal by respondent from order entered 8 May 2020 by Administrative Law Judge David F. Sutton in the Office of Administrative Hearings. Heard in the Court of Appeals 11 May 2021.

Barry K. Henline for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Norlan Graves, for Respondent-Appellee.

CARPENTER, Judge.

I. Factual & Procedural Background

¶ 1 Mr. Belcher, Petitioner-Appellant ("Petitioner"), was employed by Respondent-Appellee, the North Carolina Department of Public Safety, State Highway Patrol

("Highway Patrol" or "Respondent"), for ten years. Respondent dismissed Petitioner from his employment on 1 July 2019 following an internal affairs investigation. Petitioner was terminated from his employment with Respondent for (1) grossly inefficient job performance for committing Highway Patrol chase policy violations; and (2) for unacceptable personal conduct for violating the Highway Patrol truthfulness policy. After exhausting his internal appeals, Petitioner instituted this action by filing a contested case petition in the Office of Administrative Hearings contending his dismissal lacked just cause. Petitioner testified at his hearing before the Administrative Law Judge ("ALJ") on his own behalf, and several members of the Highway Patrol testified on behalf of Respondent. In its final decision, the ALJ found just cause existed to support Petitioner's dismissal. Petitioner filed notice of appeal on 2 June 2020.

¶ 2 The facts relevant to our review of the ALJ's decision are as follows: On 9 January 2019 Petitioner was engaged in routine patrol duties and driving an unmarked patrol car. Petitioner initiated a stop of a motorcycle being driven by Cody Cooper ("Cooper") at a high rate of speed in the area of Highway 421 in Wilkesboro, North Carolina. The attempted stop turned into a chase when Cooper refused to stop. Petitioner was assisted by his shift partner Trooper Sean Hall ("Trooper Hall").

¶ 3 Sergeant Brandon Buchanan ("Sergeant Buchanan") was supervising Petitioner and Trooper Hall and was monitoring radio traffic pertaining to the chase.

Sergeant Buchanan was responsible for determining whether the vehicle pursuit should be allowed to continue. At Petitioner's hearing before the ALJ, Sergeant Buchanan testified it was vital he receive accurate information so he could make informed decisions regarding whether a pursuit should continue, and his primary concern in doing so was weighing the risk of harm to the public and the violator against the need to stop the violator.

¶ 4 The chase went on, supervised by Sergeant Buchanan, for approximately thirteen minutes, until Cooper lost control of his motorcycle and was ejected. Unfortunately, Cooper was pronounced dead at the scene of the crash.

¶ 5 At Petitioner's hearing before the ALJ, Petitioner contended Respondent lacked just cause to terminate Petitioner's employment. The ALJ issued the following conclusions of law, *inter alia*, regarding Petitioner's conduct during the chase.

> 17. Petitioner's Conduct Related to Alleged Violations of Policy
> A. . . . (1) The preponderance of the evidence as seen on the video recorded from Petitioner's dash camera and the testimony of Highway Patrol members superior to Petitioner is that Petitioner failed to discontinue his chase of Cooper despite Cooper weaving in and out of traffic at high speeds.
> B. . . . (1) The preponderance of the evidence is that on two occasions, Petitioner ended up in the primary position during the chase while operating an unmarked patrol vehicle, and thereafter, made no effort to relinquish the primary position.
> . . .
> E. Failing to activate Petitioner's blue lights and siren

> while engaged in a traffic enforcement response. . . .
> (1) The preponderance of the evidence is that Petitioner violated this policy. Petitioner has readily admitted he violated Highway Patrol policy in regard to this allegation. . . . Petitioner . . . admitted the violation under oath during his Contested Case Hearing.
> 20. Petitioner's Statements Alleged to Violate the Truthfulness Policy
> A. "The motorcycle attempted to strike 237's [Trooper Hall's] car."
> (1) The preponderance of the evidence as seen through video footage and Petitioner's own acknowledgement is that this statement was inaccurate, and as such, was a violation of the truthfulness policy.
> B. "He's back on our side."
> (1) The preponderance of the evidence as seen through video footage and Petitioner's own acknowledgment is that this statement was inaccurate, and as such, was a violation of the truthfulness policy. To Petitioner's credit, however, he did correct himself within 10 seconds after having made the inaccurate statement and there is no indication that this statement influenced Buchanan's decision to allow the chase to continue.
> . . .
> D. "So far we have not weaved[.]"
> (1) The preponderance of the evidence as established by video footage and the testimony of three Highway Patrol Members superior to Petitioner is that this statement was blatantly false, and as such, was a violation of the truthfulness policy.

¶ 6 The foregoing conclusions formed the basis for the ALJ's final decision Respondent in fact had just cause to terminate Petitioner.

II. Jurisdiction

¶ 7 Jurisdiction lies in this Court as a matter of right over a final judgment from

the North Carolina Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 7A-29 (2019).

III. Issue

¶ 8 The sole issue on appeal is whether substantial evidence existed to support a rational basis for the North Carolina Office of Administrative Hearings' final decision to affirm Respondent's dismissal of Petitioner for just cause.

IV. Standard of Review

¶ 9 Pursuant to the North Carolina Human Resources Act, appeals of just cause discipline are made directly to this Court. N.C. Gen. Stat. § 126-34.02(a) (2019). The standard of review of an administrative agency's decision is set out in N.C. Gen. Stat. § 150B-51, which provides:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional provisions;
> (2) In excess of statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
> (6) Arbitrary and capricious, or an abuse of discretion.
> (c) . . . With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the

whole record standard of review.

N.C. Gen. Stat. § 150B-51 (2019). *See also Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 206-207, 784 S.E.2d 509, 517 (2016).

¶ 10 Our Supreme Court has stated every determination of whether a public employer's decision to discipline its employee was supported by just cause "requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (citation, quotation marks, and brackets omitted). "[T]he first of these inquiries is a question of fact . . . [and is] reviewed under the whole record test. . . . [T]he latter inquiry is a question of law . . . [and] is reviewed *de novo*." *Carroll*, 358 N.C. at 665-66, 599 S.E.2d at 898.

¶ 11 Petitioner contends certain of the ALJ's conclusions were unsupported by substantial evidence, arbitrary and capricious, or an abuse of discretion; therefore, we review the ALJ's conclusions using the "whole record" standard of review pursuant to N.C. Gen. Stat. § 150B-51 (2019) and *Carroll*. *Id*. at 665-66, 599 S.E.2d at 898. Our review of the ALJ's final decision Respondent had just cause to terminate Petitioner is a *de novo* review. *See Carroll*, 358 N.C. at 666, 599 S.E.2d at 898.

¶ 12 "Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative

agency's findings and conclusions." *Henderson v. N.C. Dep't of Human Res.*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted). The whole record test is not a tool of judicial intrusion. *See Carroll*, 358 N.C. at 674, 599 S.E.2d at 903. However, under the whole record test, this Court must not consider only that evidence which supports the agency's result; we must also take into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). Ultimately, this Court must determine whether the administrative decision was arbitrary or capricious, or in fact had a rational basis in the evidence. *Overton v. Bd. of Educ.*, 304 N.C. 312, 322, 283 S.E. 2d 495, 501 (1981).

V. Analysis

¶ 13 Petitioner contends the ALJ's determination Respondent had just cause to dismiss Petitioner was in error because the ALJ's "findings, inferences, conclusions, or decisions" were either "not supported by substantial evidence" or were "arbitrary, capricious, or an abuse of discretion."

A. Warren Framework and Wetherington Factors

¶ 14 Under the regulatory standard for "just cause" as set out in 25 N.C. Admin. Code C 01J.0604, a career State employee may be dismissed for grossly inefficient job performance or unacceptable personal conduct. 25 N.C. Admin. Code 01J.0604 (2019). "Just cause, like justice itself, is not susceptible of precise definition."

Carroll, 358 N.C. at 669, 599 S.E.2d at 900. This Court has held that "not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline." *Warren v. N.C. Dep't of Crime Control & Pub. Safety*, 221 N.C. App. 376, 382, 726 S.E.2d 920, 925 (2012). In *Warren*, we articulated a three-pronged approach to determine whether just cause exists to discipline an employee who has engaged in unacceptable personal conduct:

> The proper analytical approach is to first 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. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. 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 382, 726 S.E.2d at 925.

¶ 15 Precedent from our Supreme Court also requires the review of certain factors to determine whether unacceptable personal conduct warrants the discipline imposed. In contemplating the just cause inquiry, a court must consider such factors as severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, and discipline imposed in other cases involving similar violations; collectively, the "*Wetherington* factors." *Wetherington v. N.C. Dep't of Crime Control and Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

B. ALJ's Conclusions of Law Regarding Petitioner's Conduct

¶ 16 Here, although the ALJ's factual analysis fell short, the ALJ analyzed certain facts of Petitioner's case through an application of the *Warren* three-pronged approach and consideration of the *Wetherington* factors. *See Warren*, 221 N.C. App. at 382, 726 S.E.2d at 925; *see also Wetherington*, 368 N.C. at 592, 780 S.E.2d at 548. The ALJ concluded (1) the preponderance of the evidence proved Petitioner engaged in the conduct Respondent alleged, (2) the preponderance of the evidence proved Petitioner's acts and omissions constituted grossly unacceptable personal conduct; and (3) the misconduct amounted to just cause for dismissal. The ALJ ultimately concluded Petitioner's conduct justified dismissal.

¶ 17 The whole record test requires us to consider evidence both supporting and contradicting the ALJ's conclusions of law. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541. Therefore, we take each appealed conclusion from the ALJ's final decision in turn, analyzing all the testimony and facts provided by the record which are relevant to those conclusions. After a careful review of the whole record, we find substantial evidence did not exist to support a rational basis for the ALJ's final decision.

1. Petitioner's Conduct Related to Alleged Violations of Policy

a. Petitioner's Failure to Discontinue Chase Despite Violator Weaving

¶ 18 In making its determination Petitioner violated Respondent's policy by

continuing a chase despite Cooper's weaving, the ALJ relied on dash camera video footage and the testimony of three Highway Patrol members that Cooper's actions constituted "weaving."

¶ 19 Petitioner asserted at his hearing before the ALJ, and continues to assert on appeal, the definition of weaving is not provided by Respondent's policy, is nebulous, and is therefore subject to selective enforcement. Petitioner contended his understanding of "weaving" was dictated by the training required by his employment. Contrary to Sergeant Buchanan's initial testimony, "weaving" is not defined by Respondent's policy. All Highway Patrol members testifying on Respondent's behalf gave different definitions of "weaving." The record reflects the ALJ did not consider the fact all testifying troopers had different definitions of "weaving," and that weaving was not defined by Respondent's policy—facts which definitively confirm Petitioner's contention the term "weaving" was not defined, and its meaning was subjective.

¶ 20 Further, Sergeant Buchanan testified that policy dictated termination of a chase if a motorcycle was "weaving in and out of traffic at a high rate of speed . . . absent exigent circumstances," though the exigent circumstances portion of the policy had to be coaxed out of Sergeant Buchanan on cross-examination. Sergeant Buchanan directly compared the portion of the chase where Cooper was traveling in the lane of oncoming traffic to that of the infamous Parkland Shooting, which

undoubtedly represented an exigent circumstance. When confronted on cross-examination with the question whether, in the presence of exigent circumstances, the policy on terminating a chase involving weaving "would not come into play," Sergeant Buchanan admitted, "[t]hat's what it says," in reference to the policy. Therefore, per Respondent's policy, and Sergeant Buchanan's testimony, where exigency was established, whether the motorcycle was weaving would not have affected a decision to terminate the chase.

¶ 21 The exigency of the circumstances, taken together with the fact Respondent Agency did not have an official definition of "weaving," negated any rational basis for concluding Petitioner violated Respondent's policy by failing to discontinue the chase without instruction to do so. Such a conclusion is therefore arbitrary.

b. Petitioner's Failure to Relinquish the Primary Position

¶ 22 The ALJ found, "the preponderance of the evidence is that on two occasions, Petitioner ended up in the primary position during the chase while operating an unmarked patrol vehicle, and thereafter, made no effort to relinquish the primary position." These actions or omissions collectively amounted to an alleged violation of Respondent's policy.

¶ 23 Sergeant Buchanan testified he approved of Petitioner's assumption of the primary chase position based on Petitioner's experience with the maneuvers required to stop Cooper. Petitioner could not have been responsible for violating Respondent's

policy when following the direction, whether implicit or explicit, of the supervising Sergeant. Considering the record as a whole, there was no rational basis for concluding Petitioner violated Respondent's policy by failing to relinquish his primary position during the chase.

c. Petitioner's Failure to Activate Emergency Equipment

¶ 24 Petitioner was alleged to have violated Respondent's policy by failing to activate his patrol car's blue lights and siren while engaged in a traffic enforcement response. The ALJ found, "the preponderance of the evidence is that Petitioner violated this policy. Petitioner has readily admitted he violated Highway Patrol policy in regard to this allegation. . . . Petitioner . . . admitted the violation under oath during his Contested Case Hearing."

¶ 25 We analyze this violation using the *Warren* framework, which implicates three inquiries: (1) whether the employee engaged in the conduct the employer alleges; (2) whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code; and (3) whether the misconduct amounted to just cause for the disciplinary action taken. *Warren*, 221 N.C. App. at 382, 726 S.E.2d at 925. The ALJ rightfully answered the first inquiry in the affirmative, as Petitioner admitted the violation under oath. The ALJ rightfully answered the second inquiry in the affirmative, as the violation amounted to "the willful violation of known or written work rules," a defined category of

unacceptable personal conduct pursuant under the North Carolina Administrative Code. 25 N.C. Admin. Code 01J.06148; *see also Carroll*, 358 N.C. 649, 599 S.E.2d 888.

¶ 26 The third *Warren* inquiry, whether the misconduct amounted to just cause for the disciplinary action taken, requires an analysis of the *Wetherington* factors: the severity of the violation, the subject matter involved, the resulting harm, the employee's work history, or discipline imposed in other cases involving the violation. *Wetherington*, 368 N.C. at 592, 780 S.E.2d at 543. The severity of the violation was low: the chase went on for twenty miles, spanned thirteen minutes, and Petitioner activated his lights within one minute of calling in the chase. Based on the foregoing, Cooper and the motoring public must have been aware Cooper was being chased by troopers, not citizens. While the harm involved, Cooper's death, was great, it was not a harm that resulted from Petitioner's failure to immediately activate his emergency equipment when speeding. Taken together with a consideration of the severity of the violation, this violation alone does not rise to the level of just cause to terminate Petitioner's employment.

2. Petitioner's Statements Alleged to Violate the Truthfulness Policy

a. "The motorcycle attempted to strike 237's [Trooper Hall] car."

¶ 27 The ALJ found, "the preponderance of the evidence as seen through video footage and Petitioner's own acknowledgement is that this statement was inaccurate,

and as such, was a violation of the truthfulness policy." In its determination Petitioner's statement that Cooper attempted to strike Trooper Hall's car constituted a violation of Respondent's truthfulness policy, the ALJ failed to consider the fact the dash camera footage, which he relied upon, did not represent the vantage point of Petitioner during the chase. The dash camera footage represented the vantage point of the passenger side of Petitioner's patrol car. Sergeant Buchanan testified the driver of a patrol car "could see things that might not be captured [by the dash camera] and vice versa," because of the dash camera's position. Further, Petitioner called out the statement when Petitioner was one tenth of a mile behind Cooper and while rounding a curve. These conditions would have furthered the discrepancy between what the dash camera footage showed and what Petitioner perceived during the chase.

¶ 28 In the ALJ's conclusion Petitioner was untruthful, the ALJ states he relied on "video footage" and "Petitioner's own acknowledgment." "Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Human Res.*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (citation omitted). Under the whole record test, this Court must not consider only that evidence which supports the agency's result; we must also take into account contradictory evidence or evidence from which conflicting inferences

could be drawn. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541. Ultimately, this Court must determine whether the administrative decision was arbitrary or capricious, or in fact had a rational basis in the evidence. *Overton v. Bd. of Educ.*, 304 N.C. 312, 322, 283 S.E. 2d 495, 501 (1981).

¶ 29 A review of the whole record reveals that Respondent, nor Petitioner, nor the ALJ, possessed any video footage amounting to an accurate representation of what Petitioner saw, from Petitioner's perspective at the time the statement was made. Based on Sergeant Buchanan's plain statement the driver of a patrol car "could see things that might not be captured" by dash camera footage, it stands that the dash camera footage did not amount to substantial evidence to support a rational basis for the conclusion Petitioner's statement was "untruthful." Further, Petitioner's "acknowledgment" related only to an agreement that the dash camera footage, when viewed in slow motion, did not show Cooper striking, or attempting to strike, Trooper Hall's patrol car. Petitioner, however, never wavered in his contention the dash camera footage was not an accurate representation of what he saw at the time he made the statement, nor did any witness testifying for Respondent refute Petitioner on this fact.

¶ 30 Because neither points of evidence the ALJ cited to in his conclusion of law—the dash camera footage or Petitioner's "acknowledgment"—amounted to substantial evidence to support a rational basis for the conclusion Petitioner's statement was

"untruthful," we find the conclusion was arbitrary.

b. "He's back on our side."

¶ 31 The ALJ found, "the preponderance of the evidence as seen through video footage and Petitioner's own acknowledgment is that this statement was inaccurate, and as such, was a violation of the truthfulness policy."

¶ 32 Under the whole record test, Petitioner's statement must be viewed in the context in which it was made. Petitioner testified he called out this statement based on Cooper's actions, in anticipation of what was going to happen next. Calling out anticipatory statements as factual occurrences was confirmed as a standard practice by Trooper Walker of the Highway Patrol testifying for Respondent. Sergeant Buchanan testified anticipating the actions of a violator was the "sign of a good trooper."

¶ 33 Petitioner realized his anticipation was incorrect and corrected himself within ten seconds of making the statement. Sergeant Buchanan did not order the termination of the chase when Petitioner corrected himself. Based upon Sergeant Buchanan comparing a chase involving a vehicle traveling in the wrong direction toward oncoming traffic to the Parkland Shooting, it is evident that Sergeant Buchanan would have been more likely to terminate the chase upon being told that the motorcycle was on the correct side of the road rather than continuing on the wrong side of the road. Therefore, the record reflects Sergeant Buchanan did not rely on

Petitioner's incorrect statement in his ongoing determination of whether to terminate the chase.

¶ 34 A consideration of the whole record reveals Petitioner immediately corrected an inaccurate anticipatory statement made during a high-speed chase, not that Petitioner made an untruthful statement, much like Sergeant Buchanan testifying that the Highway Patrol had a definition of weaving, and later testifying that "weaving" is not defined in patrol policy. A rational basis for the opposite conclusion was not supported by evidence in the record and is therefore arbitrary.

c. "So far we have not weaved[.]"

¶ 35 The ALJ found, "the preponderance of the evidence as established by video footage and the testimony of three Highway Patrol Members superior to Petitioner is that this statement was blatantly false, and as such, was a violation of the truthfulness policy."

¶ 36 The ALJ did not consider that (1) "weaving" was not defined by Respondent's policy, and (2) all testifying troopers had different definitions of "weaving." These facts confirm Petitioner's contention the meaning of the term "weaving" was unclear. A determination Petitioner made an "untruthful" statement when he told Sergeant Buchanan that Cooper had not weaved would require either Petitioner's ability to identify "weaving" the same way all other members of the Highway Patrol would identify "weaving" in that moment, or Respondent's provision of a clear definition of

the term "weaving" as used in Respondent's Policy.

¶ 37 Because we agree the definition of "weaving" was undefined, subject to individual determination of meaning, and therefore, subject to selective enforcement, substantial evidence did not exist in the record to support a rational basis for a conclusion Petitioner made an untruthful statement by stating, "[s]o far we have not weaved[.]" The ALJ's determination Petitioner's statement was untruthful relies on a definition that does not exist, and is therefore arbitrary.

VI. Conclusion

¶ 38 We find there was a lack of substantial evidence to support a rational basis for the ALJ's conclusions that Petitioner violated Respondent's truthfulness policy. While Petitioner violated Respondent's policy by failing to immediately activate his emergency equipment during the chase, this violation did not proximately cause the harm that resulted from the chase. Respondent's decision to dismiss Petitioner for just cause was therefore in error. We reverse the final decision of the ALJ and remand to the Respondent Agency for the reinstatement of Petitioner's employment and any necessary proceedings not inconsistent with this opinion.

REVERSE AND REMAND.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).