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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-755

Filed 05 September 2023

N.C. Office of Administrative Hearings, Nos. 21 OSP 4777, 21 OSP 4783

MICHAEL SHOOK and JEFFREY MILLER, Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Respondent.

Appeal by Petitioners from orders entered 9 June 2022 by Administrative Law Judge Selina Malherbe in the Office of Administrative Hearings. Heard in the Court of Appeals 9 May 2023.

Jennifer J. Knox for Petitioners.

Attorney General Joshua H. Stein, by Assistant Attorney General Jaren E. Kelly, for Respondent.

GRIFFIN, Judge.

Petitioners Michael Shook and Jeffrey Miller appeal from orders entered by the administrative law judge (“ALJ”) affirming the decision by the Department of Public Safety to dismiss Petitioners from employment for unacceptable personal conduct. We affirm the decision of the ALJ.

I. Factual and Procedural Background

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On 24 March 2020, inmate J. Lowery was transferred to Alexander Correctional Institution, where Petitioners were employed as correctional officers. Petitioners, together with several other officers, were called to transport Lowery to the Restrictive Housing Unit (“RHU”). Lowery was placed in a wheelchair because he was restrained.

Upon arrival at the RHU, Lowery was placed into a shower. All five transporting officers, including Petitioners, entered the shower with Lowery. The officers then brought Lowery out of the shower and placed him in the hallway while a cell was cleared for him. After clearing the cell, Lowery was placed in cell H-1, which contained cameras showing visible injuries and blood running down Lowery’s face. Lowery was treated by medical staff and, two days later, reported the incident to Sergeant Daves—claiming the officers who transported him to RHU, including Petitioners, assaulted him and called him racial slurs.

Daves reported the incident to Lieutenant Clifton who was assigned to investigate the allegations. Clifton submitted his report to Investigator Hatcher who continued looking into the use of force allegations. Based on these investigations, it was determined the officers were involved in some unauthorized use of force. Consequently, Petitioners were terminated from their employment for unacceptable personal conduct for committing an unauthorized and unreported use of force.

Petitioners filed a contested case petition in the Office of Administrative Hearings arguing their dismissal lacked just cause. On 21 March 2022, the matter

came on for hearing before ALJ Malherbe who found just cause for Petitioners' dismissal. On 9 June 2022, ALJ Malherbe filed a final decision.

Petitioners filed notice of appeal on 28 June 2022.

II. Standard of Review

The standard under which we review the final decision of an administrative agency will differ depending upon the asserted errors. *See* N.C. Gen. Stat. § 150B-51 (2021). Where the appellant contends the decision of the administrative agency is unsupported by substantial evidence, we must review the agency's final decision using the whole record standard. N.C. Gen. Stat. § 150B-51(c). The whole record standard, or whole record test, "requires the examination of all competent evidence to determine if the administrative agency's decision is supported by substantial evidence." *Rector v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991) (citations omitted); *see also State ex rel. Comm'r of Ins. v. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

We recognize "the whole record test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 19, 802 S.E.2d 115, 127 (2017) (internal marks and citations omitted). Thus, upon review under this test, "administrative findings

of fact, if supported by substantial evidence in view of the entire record, are conclusive upon [this Court].” *Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 14, 569 S.E.2d 287, 297 (2002) (citations omitted). We may not “replace the [agency’s] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result.” *Thompson v. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977); *see also Brewington*, 254 N.C. App. at 13, 802 S.E.2d at 123 (“[T]he ALJ who conducts a contested case hearing possesses those institutional advantages that make it appropriate for a reviewing court to defer to his or her findings of fact.” (internal marks and citations omitted)).

We review the agency’s conclusions of law de novo. *Ayers v. Currituck Cty. Dep’t of Soc. Servs.*, 279 N.C. App. 514, 514, 866 S.E.2d 785, 788 (2021).

III. Analysis

Petitioners argue the ALJ erred in Findings of Fact 13 and 14 in both orders; Findings of Fact 31 in Miller’s order and 32 in Shook’s order; Findings of Fact 45 in Miller’s order and 46 in Shook’s order; and Finding of Fact 51 in Shook’s order. Further, Petitioners argue the trial court also erred in Conclusions of Law 11 and 17 in both orders.¹ We disagree.

A. Petitioners’ Contentions as to the ALJ’s Findings of Fact

¹ Petitioners’ cases were tried together and were joined for appellate purposes. The ALJ entered nearly identical orders regarding each Petitioner; however, the numbering as to certain findings varies between the two orders entered.

Petitioners argue the trial court erred in Findings of Fact 13 and 14 in both orders; Findings of Fact 31 in Miller's order and 32 in Shook's order; Findings of Fact 45 in Miller's order and 46 in Shook's order; and Finding of Fact 51 in Shook's order.

1. *Finding of Fact 13 in both orders*

Petitioners argue the ALJ erred in Finding of Fact 13. Finding of Fact 13 is identical in both orders and states:

As the correctional officers placed [Lowery] in the shower, all five of the correctional officers entered behind [Lowery] where they were out of the view of the camera for 12-14 seconds.

Petitioners contend there is not substantial evidence to support such a finding as Lowery and the correctional officers—including Petitioners—were only in the shower for six seconds. Further, Petitioners argue this time discrepancy is significant in that there was not enough time to commit all the acts alleged by Lowery.

The surveillance footage introduced at the hearing depicts all five officers, including Petitioners, entering the shower with Lowery. The officers are out of sight until 14 seconds later when they exit the shower and close the door. Further, at the hearing, Hatcher, upon cross-examination, testified accordingly stating:

A: Okay. And then all of the officers were in the shower by 1:47 - 1:47:12. I guess I need to be more specific. And they all came out of the shower by 1:47:26.

Q: And that was all five officers came out, but [Lowery] stayed in?

A: Yes. [Lowery] stayed in. So I guess that's what, 14

seconds, if my math is right?

This evidence supports the ALJ's Finding. Therefore, the ALJ did not err in Finding of Fact 13.

2. Finding of Fact 14 in both orders

Next, Petitioners argue the ALJ erred in Finding of Fact 14. Finding of Fact 14 is identical in both orders and states:

The officers brought [Lowery] out of the shower and placed him in the hallway while they cleared out the cell H-1, ("Hotel 1"), for him. [Petitioner] stood next to [Lowery] as the other officers cleared the cell.

Petitioners contend there is not substantial evidence to support this Finding because Miller and Shook took two separate and different actions after Lowery was removed from the shower. The State concedes the portion of the above Finding which states, "[Petitioner] stood next to [Lowery] as the other officers cleared the cell[,]" applies only to Shook as Miller was not in the hallway when Lowery was removed from the shower. This portion of Finding of Fact 14 is therefore erroneous, but only in Miller's order as the surveillance footage clearly depicts Shook standing with Lowery as the cell was cleared. As such, Finding of Fact 14 in Shook's order is supported by substantial evidence and the ALJ did not err.

3. Finding of Fact 31 in Miller's order and Finding of Fact 32 in Shook's order

Finding of Fact 31 in Miller's order and Finding of Fact 32 in Shook's order are identical and state:

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Lt. Clifton testified that whenever there is a use of force incident, the incident must be reported pursuant to NCDPS Use of Force Policy. [] [Petitioners] failed to file a report for the use of force as required by this policy.

Petitioners contend the above Findings of Fact are not supported by substantial evidence as there was no use of force on Lowery and therefore no need for them to make a report.

At the hearing, upon direct examination, Clifton testified as to the use of force policy noting:

Q: Lieutenant Clifton, I'm going down to what appears to be Section .1506 of the use of force policy.

A: Okay.

Q: And do you see what this says?

A: Yes.

Q: And this talks about the reporting—the reporting procedures. And you kind of went over it briefly. Could you tell me—in regards to the policy, whenever there is a use of force incident, whether it is anticipated or unanticipated, what is a correctional officer who was involved in the use of force supposed to do?

A: They're supposed to report.

Further, Clifton and Hatcher both testified, upon viewing the video surveillance, it appeared there had been some use of force as Lowery was placed in the shower without injuries and when removed had both lacerations and bruising. Clifton also noted Lowery had told him several officers had assaulted him in the shower.

Nevertheless, Petitioners further contend the ALJ stated, in Finding of Fact 49 in Miller's order and 50 in Shook's order, she did not find the testimony of Lowery to be credible and therefore, there could not be substantial evidence of use of force.

The ALJ, in said Finding, stated:

The Undersigned finds the testimony of [Lowery] to be credible to a limited extent. [Lowery's] testimony concerning the extent of his injuries and the place where the injuries occurred which is supported by other credible and objective evidence is given some weight. [Lowery's] other testimony is not credible and is given no weight.

Here, the ALJ specifically stated she believed Lowery's testimony concerning the extent of his injuries and the place where they occurred. Regardless of the ALJ's statement in the above Finding as to the credibility of Lowery's other testimony, there exists other evidence in the record—including the video surveillance footage and testimony from both Clifton and Hatcher—substantial enough to support Finding of Fact 31 in Miller's order and Finding of Fact 32 in Shook's order. As such, the ALJ did not err.

4. Findings of Fact 45 in Miller's order and Finding of Fact 46 in Shook's order

Finding of Fact 45 in Miller's order and Finding of Fact 46 in Shook's order are identical and state:

The relevant policies that [Petitioners] violated were: NCDPS Prisons Policy and Procedure Manual, Chapter F, Section .1500, Use of Force, Subsection .1503, Subsection .1506 Reporting Procedures and the State Human Resources Manual Disciplinary Action Policy regarding

Unacceptable Personal Conduct.

Petitioners argue the above Findings are not supported by substantial evidence because the ALJ did not believe the evidence concerning use of force and a report is only required upon actual use of force. Despite Petitioners' contention here, the ALJ found other evidence in the record sufficient to support a finding that Petitioners committed a use of force against Lowery. *See Supra.* III.A.3. As such, the trial court did not err in this Finding.

5. Finding of Fact 51 in Shook's order

Finding of Fact 51 in Shook's order states:

[Petitioners] testified that there was no use of force in Restrictive Housing. This testimony was contradicted by other credible and objective testimony and evidence.

Petitioners contend this Finding is not supported by competent evidence as the ALJ found, in Finding of Fact 50, Lowery's testimony regarding the assault was not credible. Further, Petitioners note that Lowery's written statements in Exhibit 1 and Exhibit 2 are consistent with his testimony at trial. Thus, Petitioners argue the ALJ, in finding Lowery's testimony was not credible, also found the written statements were not credible. As stated above in sections III.A.3. and III.A.4., the ALJ found substantial evidence to support a finding of Petitioners' use of force even without considering Lowery's additional testimony. Specifically, both Clifton and Hatcher testified as to Petitioners' use of force. Therefore, the trial court did not err in Finding of Fact 51 in Shook's order.

B. Petitioners' Contentions as to the ALJ's Conclusions of Law

Petitioners contend the ALJ erred in Conclusions of Law 11 and 17 in both orders.

1. Conclusion of Law 11

The ALJ's Conclusion of Law 11 states:

Here, the preponderance of the evidence shows that [Petitioners] engaged in the conduct alleged by [] [Lowery]. The greater weight of evidence demonstrates that there were no injuries to [Lowery] prior to [Petitioners] and the other correctional officers placing [Lowery] in the Restrictive Housing shower, however, once [Lowery] was removed from the shower and placed in the holding cell, he had injuries to his face. Furthermore, [Petitioners] did not report that there was a use of force incident or that [Lowery] had caused the harm to himself.

Petitioners contend the ALJ erred in this Conclusion of Law as it is based on faulty findings of fact. Specifically, Petitioners argue Lowery was in the cell with the five correctional officers, with the door open, for seven seconds, during the time he alleged he was assaulted. Further, Petitioners note the State's Exhibit 6 shows immediately thereafter, Lowery was in the cell alone for thirty-seven seconds while Shook and three other officers were casually milling about the hallway. Miller, on the other hand, had already walked away. Thus, Petitioners suggest this evidence is not sufficient to support the above Conclusion. Nonetheless, as explained in further detail above, there is substantial evidence in the record to support both the challenged and unchallenged Findings of Fact and therefore the ALJ did not err in

Conclusion of Law 11.

2. Conclusion of Law 17

The ALJ's Conclusion of Law 17 states:

[Petitioners] failed to report a use of force to his supervisors or offer a reasonable explanation for why [Lowery] had injuries that were not present before [Petitioners] taking custody of him.

Petitioners contend this Conclusion is a determination of matters outside the scope of the hearing and is not based on any Findings of Fact. Further, Petitioners argue there was not credible evidence suggesting use of force and therefore no reason for any officer to make a use of force report. Petitioners note the State's Exhibit 6 shows no officer looking in on Lowery while he was alone in the shower and any issue as to whether the officers' failing to watch Lowery in the shower is a policy violation, of which Miller and Shook should have been disciplined, is not a matter before the ALJ here. However, the above findings of fact, together with the unchallenged findings of fact, are supported by substantial evidence upon review of the entire record. these findings, in turn, support the above conclusion of law. Thus, the ALJ did not err in Conclusion of Law 17.

IV. Conclusion

For the aforementioned reasons, we affirm the decision of the ALJ.

AFFIRMED.

Chief Judge STROUD and Judge WOOD concur.

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Report per Rule 30(e).