IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-358

No. COA20-612

Filed 20 July 2021

Jackson County, No. 19 CVS 176

ARIE J. BIRD, Petitioner,

v.

EASTERN BAND OF CHEROKEE NATION ALCOHOLIC BEVERAGE CONTROL and NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, Respondents.

Appeal by petitioner from order entered 9 October 2019 by Judge Athena Brooks in Jackson County Superior Court, and appeal by respondents from order entered 11 May 2020 by Judge Forrest Bridges in Jackson County Superior Court. Heard in the Court of Appeals 11 May 2021.

David A. Sawyer for petitioner-appellant/appellee.

Mikael R. Gross for respondent-appellee/appellant Eastern Band of Cherokee Nation Alcoholic Beverage Control.

Timothy M. Melton for respondent-appellee/appellant NC Department of Commerce, Division of Employment Security.

GORE, Judge.

I. Factual and Procedural Background

¶ 1 In February 2016, Arie J. Bird ("petitioner") was appointed to the Tribal

Alcoholic Beverage Control Commission ("Commission") for a five-year term. Pursuant to the Eastern Band of Cherokee Indians Code of Ordinances, the Commission is charged with, *inter alia*, issuance of ABC permits and the administration and enforcement of the Tribal ABC laws. Eastern Band of Cherokee Indians Code of Ordinances § 18B-203. Also, in February 2016, petitioner was elected to serve as Chairman of the Commission. A Chairman is elected annually from among the Commission's members and that member serves as the Chairman for the duration of the fiscal year, which spans from October to September. In the subsequent election, petitioner was not reelected and was replaced by Pepper Taylor as Chairman in November 2016. However, petitioner remained a member of the Commission after the election.

¶ 2 On 8 September 2017, Chairman Taylor and the other Commission members sent a letter to petitioner requesting his resignation from the Commission. The letter cited petitioner's lack of attendance at meetings and notified him of the Commission's intent to institute removal proceedings if he did not resign. Petitioner did not resign, and the Commission drafted a resolution to present to the Tribal Council that would remove petitioner from the Commission. At a meeting on 7 November 2017, the Commission presented petitioner with a copy of the proposed resolution, and the other members voted to suspend him with pay.

¶ 3 Petitioner testified that as Chairman, he was assisting the Tribal Police and

the Alcohol Law Enforcement Division in their investigations of potential violations of tribal alcohol policy. On 6 November 2017—after Chairman Taylor's election and prior to petitioner's suspension—petitioner participated in a public forum regarding the Eastern Band of Cherokee Indians' ("EBCI") alcohol policies. At this forum, petitioner alleged impropriety surrounding the Commission's issuance of alcohol permits, specifically singling out Chairman Taylor. Petitioner had previously made his suspicions known to the Commission at a meeting on 10 October 2017. The next day, petitioner reported alleged violations of the code of ethics and Tribal ABC laws to the EBCI's Internal Audit Department. Petitioner was suspended the same day—7 November 2017.

¶ 4 On 7 December 2017, the Tribal Council passed Resolution 68 to remove petitioner from the Commission, effective 20 December 2017. Petitioner testified that the Tribal Council declined his request to investigate the Commission's allegations against him, and that he was not afforded an opportunity to defend himself. Petitioner filed a protest with the Tribal Council, embodied as Resolution 74, requesting an opportunity to be heard regarding his termination. Petitioner testified that the Tribal Council held a closed meeting on the matter, at which no minutes were taken, nor video recorded despite being an official proceeding. Furthermore, the Trial Council did not issue a written decision.

¶ 5 Petitioner filed a claim for unemployment benefits with the Division of

Employment Security of the North Carolina Department of Commerce ("NC DES") on 28 January 2018, which was referred to an adjudicator. The adjudicator determined that petitioner had been discharged for reasons other than misconduct, and thus he remained qualified for unemployment benefits in compliance with N.C. Gen. Stat. § 96-14.6. On 20 March 2018, the EBCI appealed the adjudicator's determination.

¶ 6 Appeals Referee Michael C. Warren ("referee") heard EBCI's appeal, and on 29 August 2018, issued his findings of fact in Appeals Decision No. VII-A-54897C. The referee concluded that petitioner was terminated for work-related misconduct and reversed the adjudicator's determination that petitioner qualified for unemployment benefits. The referee's ruling made no mention of petitioner's assistance in investigations or the public forum. Petitioner appealed the referee's determination.

¶ 7 On 28 January 2019, the Board of Review of the State of North Carolina issued Higher Authority Decision No. C1969, affirming the referee's determination and adopting his findings of fact as its own. Petitioner filed a Petition for Judicial Review in the Superior Court of Jackson County on 27 February 2019. On 30 September 2019, Judge Athena Brooks affirmed the Board of Review's decision. On 8 November 2019, petitioner timely filed Notice of Appeal to this Court.

¶ 8 The transcript of the proceedings was delivered to petitioner's counsel on 7 January 2020, and petitioner moved for an extension of time to propose a record on

appeal on 19 February 2020. Respondents ECBI and NC DES opposed the motion, and a hearing was held 4 March 2020. On 9 March 2020, Judge Forrest Bridges granted petitioner's motion to extend, ordering the proposed record on appeal to be served on or before 16 March 2020 at 5:00 P.M.

¶ 9 On 16 March 2020, the respective counsels of the respondents received via first-class mail a package which contained a compact disc ("CD") that contained petitioner's proposed record on appeal in portable document format ("PDF"). On the same day, counsels also received an email from petitioner's counsel—Mr. David Sawyer ("Mr. Sawyer")—that included a link to a "Google Drive" that contained the proposed record on appeal. Counsel for respondent NC DES—Mr. Timothy Melton—contacted Sawyer to advise him he was not allowed to open the CD pursuant to NC DES policy and inquired about a physical copy of the proposed record. Sawyer did not respond to this email.

¶ 10 On 16 March 2020, respondents filed a Joint Motion to Dismiss Petitioner's Appeal for failing to properly serve a proposed record on appeal in accordance with N.C.R. App. P. 11. On 19 March 2020, in response to the state of emergency declared by Governor Roy Cooper due to the COVID-19 pandemic, then Chief Justice Cheri Beasley of the Supreme Court of North Carolina issued an order, which provided in pertinent part:

> I order that all pleadings, motions, notices, and other

> documents and papers that were or are due to be filed in any county of this state on or after 16 March 2020 and before the close of business on 17 April 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 17 April 2020.
>
> I further order that all other acts that were or are due to be done in any county of this state on or after 16 March 2020 and before the close of business on 17 April 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 17 April 2020.
>
> This order does not apply to documents and papers due to be filed or acts due to be done in the appellate courts.

¶ 11 On 27 March 2020, the Supreme Court of North Carolina issued another order, in which Justice Mark Davis signed for the court, that in relevant part stated, "Deadlines imposed by the Rules of Appellate Procedure that fall between 27 March 2020 and 30 April 2020, inclusive of those endpoints, are hereby extended for 60 days." On 13 April 2020, due to concerns that "[l]ate April . . . may be the apex of the [COVID-19] outbreak," Chief Justice Beasley issued a new order that further extended the 17 April 2020 deadline to 1 June 2020.

¶ 12 On 18 April 2020, petitioner sent paper copies of the proposed record on appeal to respondents' respective counsels via Certified United States Mail, Return Receipt Requested, which both parties received. On 22 April 2020, petitioner filed a brief in opposition to the motion to dismiss which asserted that service of the proposed record on appeal was timely done in compliance with Chief Justice Beasley's orders. Judge

Bridges heard arguments on the motion via WebEx teleconference on 23 April 2020 and denied respondents' motion to dismiss on 11 May 2020. On 29 June 2020, respondents timely filed joint Notice of Appeal to this Court.

II. Discussion

¶ 13 Before this Court is a double appeal: petitioner appeals from Judge Brooks's Order denying his petition for judicial review, and respondents appeal from Judge Bridges's subsequent Order denying their joint motion to dismiss. We first examine respondent-appellants' appeal from Judge Bridges' Order.

A. Motion to Dismiss

¶ 14 Respondent-appellants argue that the trial court erred in denying their joint motion to dismiss petitioner-appellee's appeal because: (1) petitioner-appellee did not properly serve a proposed record on appeal on or before 16 March 2020; (2) the orders entered by Chief Justice Beasley on 19 March 2020 and 13 April 2020 did not constitute an extension of time during which petitioner-appellee could serve a proposed record on appeal; and (3) petitioner-appellee's submission of a proposed record on appeal in paper format on 18 April 2020 did not constitute a timely submission of the proposed record on appeal. We affirm the trial court's order.

¶ 15 The trial court's findings of fact are conclusive on appeal if they are supported by competent evidence. *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010). Conclusions of law are reviewed *de novo*. *Carolina Power*

& Light Co. v. City of Asheville, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

¶ 16 As to respondent-appellant's first argument, we note that the trial court correctly concluded that petitioner-appellee's service of a CD containing a copy of the proposed record on appeal on 16 March 2020, in PDF format, did not comply with Rules 12(c), 24, and 26 of the North Carolina Rules of Appellate Procedure. Furthermore, petitioner-appellee's emailing of a link to a shared Google Drive storage is not an accepted means of accomplishing service. Rule 26(c) of the North Carolina Rules of Appellate Procedure provides that "[s]ervice may be made in the manner provided for service and return of process in Rule 4 of the Rules of Civil Procedure." N.C.R. App. P. 26(c). While Rule 4 of the North Carolina Rules of Civil Procedure permits service via certified or registered mail, return receipt requested or by signature confirmation, Rule 4(j6) specifically does not authorize "the use of electronic mailing for service on the party to be served." N.C. R. Civ. P. 4(j6).

¶ 17 As to respondent-appellants' second and third arguments, Chief Justice Beasley's orders entered on 19 March 2020 and 13 April 2020 specifically stated that the directives therein "d[id] not apply to documents and papers due to be filed or acts due to be done in the appellate courts." While service of the proposed record on appeal was an act to be done pursuant to Rule 11 of the North Carolina Rules of Appellate Procedure, Chief Justice Beasley's orders did not address deadlines imposed by the Rules of Appellate Procedure. Service of the proposed record on appeal is not a

document to be filed in this Court. It qualifies as an "act" to be done in "any county of this state[,]" and is within the scope of those orders despite our Supreme Court's separate 27 March 2020 order that specially addressed deadlines imposed by the Rules of Appellate Procedure. In this case, Chief Justice Beasley's orders extended the deadline to serve a proposed record on appeal, and petitioner-appellee's service of the proposed record in paper format constituted a timely submission. Accordingly, we affirm the trial court's denial of the motion to dismiss.

B. Petition for Judicial Review

¶ 18 Petitioner-appellant argues that the trial court erred in denying his Petition for Judicial Review and affirming Higher Authority Decision No. C1969 in its entirety.

¶ 19 When judicial review of a decision of the Division of Employment Security of the North Carolina Department of Commerce is sought, "the findings of fact by the Commission, if there is evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." *Williams v. Burlington Indus., Inc.*, 318 N.C. 441, 448, 349 S.E.2d 842, 846-47 (1986) (quotation marks and citation omitted). "When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *In re*

Appeal of N.C. Sav. & Loan League, 302 N.C. 458, 465, 276 S.E.2d 404, 410 (1981) (citations omitted).

¶ 20 Petitioner-appellant first argues that the appeals referee failed to address conflicting evidence when making findings of fact, and instead merely restated respondents-appellees' contentions without finding the facts in dispute. Specifically, he argues that issues were raised before the appeals referee that were not addressed in his decision, such as, *inter alia*, his contention that Chairman Taylor was issuing licenses to sell alcoholic beverages outside the parameters of sanctioned Commission action. Petitioner-appellant argued to the appeals referee that his suspension and ultimate termination were not the result of his own misconduct, but retaliatory measures after he reported several violations of Tribal law by other Commission members to the EBCI Internal Audit Department. Petitioner-appellant asserts that his conflicting testimony regarding the basis for his suspension and termination were not addressed. Thus, the appeals referee failed to adequately find material facts in dispute, frustrating this Court's ability to determine the rights of the parties in this case. As explained below, we reject this argument and conclude that the findings were sufficient to resolve this matter on appeal.

¶ 21 "[A] proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of

the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982) (citation omitted).

> When a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom. It is not within this Court's purview to reweigh the evidence, as we are only to determine whether the findings of fact are supported by competent evidence and, if so, these are binding on appeal. If the trial court did not make a finding of fact with regards to Appellant's claim, it simply means that the trial court was not convinced that it was valid. It is well established that when the facts found by the trial court are sufficient to determine the entire controversy, the court's failure to find other facts is not error.

In re Patron, 250 N.C. App. 375, 384, 792 S.E.2d 853, 860-61 (2016) (*purgandum*).

¶ 22 "Credibility determinations and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness." *Oates v. N.C. Dep't of Corr.*, 114 N.C. App. 597, 601, 442 S.E.2d 542, 545 (1994) (citation and quotation marks omitted). In declining to make findings of fact specifically addressing petitioner-appellant's conflicting evidence, such as his contention that termination of his employment resulted from retaliation and not misconduct, it is presumed that the referee weighed the evidence and credibility of the claims and found them to be without merit.

¶ 23 The central questions to be addressed in petitioner-appellant's appeal is whether there is any competent evidence in the record to support the challenged findings of fact in Higher Authority Decision No. C1969, and whether those findings properly support conclusion of misconduct in the resulting decision.

¶ 24 Petitioner-appellant challenges the following findings of fact:

> 3. [Petitioner] was discharged from his job for poor attendance at [C]ommission meetings, failure to obtain required approval for expenditure of additional monies to fund a forensic audit of the Commission, and for allowing the Tribal chief to intervene in Commission matters in violation of known policy.
>
> 4. During the period between November 2016 and the date of [petitioner's] removal from the Commission on October 16, 2017, [petitioner] was absent from over half of the properly scheduled and noticed Commission meetings. Attendance at the meetings was an essential function of his job, Commissioner, a position for which he was compensated at the rate of $25,000 per year. [Petitioner's] absences were due to various reasons.
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> 5. During a period when [petitioner] was engaged as Chairman of the Commission, [petitioner] ordered a forensic audit of the Commission and its employees. The Commission paid for the audit with Commission funds and authorized an expenditure of up to $25,000.
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> 6. [Petitioner] unilaterally subsequently expanded the scope of the audit, without proper authorization from the commission, and authorized payments in excess of $74,000 for the audit.
>
> 7. Subsequent to [petitioner's] removal from Chair of the Commission via electoral process, [petitioner] refused to provide the Commission documentation of the audit the

> Commission had paid for.
>
> 8. [Petitioner] failed to comply with established and known policy prohibiting the Tribal Chief from intervening in Commission functions by allowing the chief's input in to Commission licensing decisions.
>
> . . .
>
> 10. Due to [petitioner's] failure to comply with commission policies and procedures he was removed from his position, for cause, pursuant to Commission procedures.

Upon review, these findings of fact are sufficient to determine the rights of the parties in this controversy, and each of the challenged findings are supported by competent evidence.

¶ 25 Pursuant to N.C. Gen. Stat. § 96-14.6, "[a]n individual who the Division determines is unemployed for misconduct connected with the work is disqualified for benefits." N.C. Gen. Stat. § 96-14.6(a) (2020). The statute defines misconduct as:

> (1) Conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.
>
> (2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

§ 96-14.6(b). "A determination that an employee's unemployment is due to misconduct connected with the work is a conclusion of law, and is therefore

reviewed *de novo*." *Burroughs v. Green Apple, LLC*, 267 N.C. App. 139, 142, 832 S.E.2d 267, 270 (2019) (citation omitted).

¶ 26 Here, the trial court found that petitioner-appellant was discharged for poor attendance at commission meetings, failure to obtain required approval for expenditure of additional monies to fund a forensic audit of the Commission, and allowing the Tribal Chief to intervene in Commission matters in violation of known policy. It concluded that petitioner-appellant was engaged in misconduct connected with the work of the Commission and therefore, disqualified for employment benefits.

¶ 27 Petitioner-appellant argues that while there is no question that he was absent from one or more meetings, subsection (c)(10) of the statute provides that only a "violation of an employer's written absenteeism policy[ ]" is prima facie evidence of misconduct, and neither the Eastern Band nor ABC Commission has a written absenteeism policy. § 96-14.6(c)(10). However, we note that where a violation of an employer's written absenteeism policy is one example of misconduct, attendance at Commission meetings was an essential function of petitioner-appellant's work as the Commissioner and finding of fact 4 establishes that he missed approximately half of those meetings between November 2016 and October 2017.

¶ 28 Findings of fact 5 through 7 establish that petitioner-appellant ordered an authorized forensic audit of the Commission for $25,000.00, but unilaterally expanded the scope of that audit without notice or additional authorization from the

Commission, resulting in payments exceeding $74,000.00. Further, petitioner-appellant refused to provide the Commission with a copy of the forensic report it had paid for after his removal as Chairman. Findings of fact 8 and 9 show that petitioner-appellant was aware of Commission policies and procedures, including a policy prohibiting the Tribal Chief from intervening in Commission functions.

¶ 29 Respondent-appellees have demonstrated that, at a minimum, petitioner-appellant's "[c]onduct evince[ed] carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer." § 96-14.6(b)(2). Accordingly, the findings of fact support a conclusion that petitioner-appellant was discharged from employment for misconduct connected with the work, and he is disqualified from employment benefits.

III. Conclusion

¶ 30 For the foregoing reasons, we affirm both Judge Bridges' Order denying respondent-appellants' joint motion to dismiss, and Judge Brook's Order denying petitioner-appellant's petition for judicial review.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).