

**Watlington
v.
Rockingham County
Department of Social Services**

By: Felissa Ferrell & Emily Sloop

- Felissa Ferrell, Director of Rockingham County Consolidated Health and Human Services
- Emily Sloop, Rockingham County Attorney

Introductions

- Petitioner Watlington filed a Petition for Contested Case Hearing with the North Carolina Office of Administrative Hearings (NCOAH) to appeal her termination of employment from Rockingham County Department of Social Services (RCDSS), a local government entity
- Questions at the trial level:
 - 1) Whether Petitioner was protected by the State Human Resources Act (SHRA)?
 - A. If she was protected, were her procedural rights violated as a result of the termination process; and
 - B. If she was protected, was she terminated for “just cause”?

What is the Case About?

- The Rockingham County Consolidated Health and Human Services Agency is composed of:
 - ✓ Department of Social Services
 - ✓ Department of Public Health
 - ✓ Head Start
 - ✓ Youth Services
 - ✓ Veteran’s Affairs
- The Department of Social Services includes approximately 136 Employees
- The Rockingham County Department of Social Services includes 12 Divisions

About the Agency

- Petitioner worked in the Foster Care Division of Rockingham County Department of Social Services
- Job title was a Community Social Services Technician
- Job duties included:
 - ✓ Transporting RCDSS clientele, including minor children, to various site visits, appointments, etc.
 - ✓ Overseeing such visits and appointments.
 - ✓ Report on the visitation and appointments to assigned social workers within the department

Specific Case Facts

- In December 2015 the RCDSS Director became aware that Petitioner had allegedly accepted a jewelry set from an RCDSS client whose daughter was in RCDSS custody
 - Her acceptance would have been a violation of RCDSS personnel policy against acceptance of gifts and favors
- RCDSS Director began an investigation into the alleged conduct, during which additional allegations were made
- Ultimately, Petitioner was terminated for unacceptable personal conduct based on the totality of the circumstances
- Petitioner appealed her termination to the County Manager, but the termination was upheld
- She then appealed to NCOAH

Specific Case Facts Cont.

- Employees covered by the SHRA may only be terminated for procedural and substantive just cause which we will define later
- Covered employees include “career state employees” as defined by G.S. §§ 126-1.1(a) and 126-5(a)(2), which include employees of local departments of social services
- Typically, employees of consolidated health and human services agencies are exempt from the SHRA protections pursuant to G.S. § 126-5(a)
- However, the Rockingham County Board of Commissioners passed resolutions extending coverage of the Act to employees of RCDSS that had been covered under the Act prior to the consolidation
- While SHRA provides the basis for employee protections, the North Carolina Administrative Code (NCAC) sets forth the method of implementation for said protections at the state and local government levels

The Trial Level

- The first type of protections afforded covered employees constitute “procedural just cause”
- These types of protections deal with whether or not the procedure followed by the agency during the termination process was legal
- Title 25, Chapter 1, Subchapter I of NCAC requires the following procedural protections for covered local government employees who are terminated (See 25 N.C.A.C. 01I.2308(4)):
 - ✓ Notice that the employee is being placed on administrative leave with pay pending the investigation;
 - ✓ Notice of a pre-disciplinary conference including specific reasons for the recommended disciplinary action;
 - ✓ A pre-disciplinary conference; and
 - ✓ A termination letter including specific reasons for termination and appeal rights

Procedural Just Cause

- The only procedural issue in this case dealt with a procedural requirement that was found in Subchapter J (applies to state employees), but which is absent from Subchapter I (applies to local government employees)
- Specifically, 25 N.C.A.C. 01J.0613(4)(h) requires that “the final agency decision” shall set forth the specific acts or omissions that are the basis for the employee’s dismissal and that the terminated employee be informed that the “final agency decision letter” constitutes a public record that must be released, if requested, pursuant to North Carolina public records laws
- Here opposing counsel argued that the letter from the county manager upholding Petitioner’s termination constituted the “final agency decision” and that it should have followed the requirements set forth in 25 N.C.A.C. 01J.0613(4)(h)
- However, RCDSS argued that:
 - It was not subject to Subchapter J procedural requirements as it is a local government, not state, entity and;
 - Subchapter I, as applicable to local government employees, does not address the format of a response to employee appeals through the employee grievance procedure, but rather, only addresses what must be included in the termination letter issued to the employee

Procedural Issue at Trial

- The Administrative Law Judge (ALJ) at the trial level found that RCDSS violated 25 N.C.A.C. 01J.0613(4)(h) and ordered RCDSS to pay back pay due to the alleged procedural violation
- RCDSS appealed the alleged procedural violation to the North Carolina Court of Appeals, which found in favor of RCDSS and held that Subchapter I, not J, of the NCAC governs the implementation of the SHRA with regards to local government employees and, therefore, RCDSS did not err in following the procedural requirements set forth in Subchapter I (*See Watlington v. Department of Social Services Rockingham County* decided April 4, 2017)
- Because the award of back pay was based on the erroneous application of Subchapter J, the North Carolina Court of Appeals reversed the ALJ’s award of back pay to Petitioner

Appeal of Procedural Finding

- Substantive just cause deals with whether or not the reason for termination was legal
- The concept is not statutorily defined, but has been defined through case law (*See Warren v. N.C. Dep't of Crime Control and Pub. Safety*, 221 N.C. App. 376, 382-383, 726 S.E.2d 920, 925 (2012))
- In *Warren*, the Court set forth a three-pronged test to determine whether or not just cause for termination existed:
 1. Did the alleged misconduct occur?
 2. Did the misconduct fall within one of the bases for just cause set forth by N.C.A.C.? and
 3. Did the misconduct that occurred match the level of discipline applied (essentially a “commensurate discipline” approach)

Substantive Just Cause

- Based on the three-prong test found in *Warren*, the ALJ upheld Petitioner’s Termination
- However, due to a lack of specific findings of fact and conclusions of law explaining each prong of the test, Petitioner cross-appealed on the allegation that RCDSS lacked substantive just cause for her termination
- The Court of Appeals remanded for further findings of fact and conclusions of law regarding the ALJ’s order that the termination be upheld

Cross-Appeal of Substantive Finding

- The ALJ heard oral arguments on remand on June 1, 2017
- On remand, the parties were largely in agreement that the alleged misconduct occurred and, therefore, the first prong of *Warren* is easily satisfied

Warren- Prong I

- Both Subchapters I (local) and J (state) of the N.C.A.C. include only two bases upon which to establish substantive just cause:
 1. Unsatisfactory job performance; and
 2. Unacceptable personal conduct
- The case at hand dealt with unacceptable personal conduct
- Subchapters I and J include almost identical categories of unacceptable personal conduct
 - However, Subchapter I includes one additional category (the category of insubordination) to those found in Subchapter J
- Unlike termination for unsatisfactory job performance requiring at least two prior disciplinary actions, 25 N.C.A.C. 01I.2304(a) allows termination for a “**current** incident of unacceptable personal conduct” and does not require prior disciplinary action*

Warren-Prong II

- 25 N.C.A.C. 01I.2304(b) sets forth nine categories of personal conduct:
 1. **Conduct for which no reasonable person should expect to receive a prior warning;** or
 2. Job related conduct which constitutes a violation of state or federal law; or
 3. Conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the agency; or
 4. **The willful violation of a known or written work rule;** or
 5. **Conduct unbecoming an employee that is detrimental to the agency's service;** or
 6. **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 of an animal owned or in the custody of the agency; or
 7. Falsification of an employment application or other employment documentation; or
 8. **Insubordination;** or
 9. Absence of work after all authorized leave credits and benefits have been exhausted

Warren Prong II-Cont.

- A major legal issue at trial was whether Petitioner's acceptance of a gift of jewelry from a foster parent in violation of the RCDSS personnel policy fell into the category of unacceptable personal conduct set forth in 25 N.C.A.C. 01I.2304(b)(4) for **the willful violation of a known or written work rule**
- Petitioner testified that:
 - ✓ She had received a copy of the RCDSS personnel policy;
 - ✓ That she had attended a new employee orientation during which the policy was discussed and explained in detail; and
 - ✓ That she considered the foster parent who gave her the jewelry set as having "business dealings" with the county (i.e. trying to regain custody of her child from RCDSS)
- Various RCDSS social workers testified that the rule against gifts and favors was well-known within RCDSS
- The foster parent in question testified that Petitioner had given her extra visitation time with her daughter on various visits
- The RCDSS Director gave explicit testimony about why the acceptance of gifts and favors was concerning to the agency

Warren Prong II-Cont.

- Case law has set forth the concept of commensurate discipline as addressed by the third prong of *Warren*
 - “‘Just cause,’ like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness”
- Essentially the third prong of Warren calls for a balancing of the misconduct against the level of discipline applied
- Factors to balance:
 - ✓ Job duties requires involvement with children and minors
 - ✓ Cases of a delicate nature
 - ✓ Actions reflect on the Agency as a whole (perceptions can be damaging)
 - ✓ Access to monetary funds
 - ✓ Multiple incidents disclosed vs. one minor incident
 - ✓ Lack of trust within the department
 - ✓ Etc.

Warren Prong III

- Proposed Findings of Fact and Conclusions of Law on remand are due by July 3, 2017 from each party

TBD...

1. Clearly determine whether or not the SHRA applies

- A. Does the employee meet the definition of a career state employee under G.S. §126-1.1(a)?
 - If you are a local entity, is your entity included in 126-5(a)(2)?
 - i. Local social services departments,
 - ii. County health departments,
 - iii. District health departments,
 - iv. Area mental health, developmental disabilities, and substance abuse authorities
- B. Does the consolidation exemption apply?
- C. Did your board take specific action to retain protections?

2. If the SHRA applies, determine which Subchapter of the N.C.A.C. governs

- A. Subchapter I applies to local government employees, J to state
- B. Each has slightly different procedural rules, categories of unacceptable personal conduct, and remedies available

Tips from the Road

3. Maintain Adequate Documentation

- A. Policies and training
 - ✓ Sign in sheets for trainings and orientation
 - ✓ Copies of the training materials (i.e. PowerPoint, handouts)
 - ✓ Proof that they received a copy of the policy (signed acknowledgement or ask in pre-disciplinary conference)
- B. Personnel Record
 - ✓ Prior disciplinary actions should always be documented in writing vs. oral if appropriate (avoid a "hearsay" objection)
 - ✓ Performance measures should be accurately scored (don't score 5/5 if actually a 1/5)
- C. Notices
 - ✓ Make sure notices include necessary information (i.e. rights to appeal and specific reasons for dismissal) as set forth in the N.C.A.C.
- D. Timing
 - ✓ Make sure that you have the required number of previous disciplinary actions required for the type of discipline being applied clearly documented in the file
 - ✓ DO NOT send out the termination letter too soon

Tips from the Road

4. Reporting Protocols

- A. Clear mechanism for reporting violations and misconduct to proper personnel when they occur
 - ✓ Avoid creating a fearful environment where employees are not comfortable reporting issues

- B. Avoid bottlenecks in the reporting chain
 - ✓ Make sure easy access to supervisory staff so that the information is timely
 - ❖ Keep in mind the “current” language in the N.C.A.C.

Tips from the Road

5. Fairness

- A. Apply discipline as equally as possible across the board
 - ✓ Avoid EEOC claims
 - ✓ Overcome the balancing standard in *Warren*

Tips from the Road



Questions?