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JUDICIAL IMPARTIALITY IN EMPLOYMENT CASES

JUDGE AS WITNESS BEFORE HIMSELF

*Walter Lee Hearne v. Wayne Sherman, Health Director of
Chatham County*

By: Monique Shamun*

I. INTRODUCTION

On July 23, 1999, in *Walter Lee Hearne v. Wayne Sherman, Health Director of Chatham County, and Chatham County*, an equally divided North Carolina Supreme Court affirmed a decision of the North Carolina Court of Appeals by holding that the determination by final agency decision maker Wayne Sherman (Sherman) did not violate employee Walter Lee Hearne's (Hearne) due process rights to fair determination.¹ The Court held that, although final agency decision maker Sherman was the same individual that allegedly terminated employee Hearne, the final agency determination preserved Hearne's due process rights because the decision was rendered pursuant to the procedures required in section 126-37 of the North Carolina General Statutes (N.C.G.S.).² It also held that, because the material facts surrounding Hearne's termination were undisputed, the decision maker was unbiased, since he did not need to assess his own credibility.³ The Court thus concluded that, when an impartial decision maker renders a final agency determination pursuant to section 127-37, the

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¹516 S.E.2d 864 (1999).

²N.C.G.S. section 126-37 (b1) governs appeals involving local government employees. It provides in pertinent part: "The local appointing authority shall, within 90 days of receipt of the advisory decision of the State Personnel Commission, issue a written, final decision either accepting, rejecting, or modifying the decision of the State Personnel Commission. If the local appointing authority rejects or modifies the advisory decision, the local appointing authority must state the specific reasons why it did not adopt the advisory decision. A copy of the final decision shall be served on each party personally or by certified mail, and on each party's attorney of record." Hearne, 516 S.E.2d at 866-67.

³*Id.* at 866.

determination does not violate due process rights to fair determination.⁴

The decision has no precedential value because no majority existed. One of the Judges, who was about to leave the Supreme Court to work in a firm representing Hearne, recused himself. A petition for reconsideration has been filed with the appointment of a new Justice.

II. PROCEDURAL HISTORY

Hearne was employed as an Animal Control Officer with the Chatham County Health Department until January 1995.⁵ Sherman, Health Director of Chatham County and final agency decision maker, sought Hearne's resignation due to negative publicity surrounding allegations that Hearne improperly euthanized a litter of puppies.⁶ On August 31, 1995, Hearne filed a petition for a contested case hearing in the Office of Administrative Hearings, alleging that Sherman discharged him without a hearing and without just cause.⁷ In contrast, Sherman contended that Hearne voluntarily resigned.⁸

On January 16-17, 1996, an Administrative Law Judge (ALJ) conducted a hearing on Hearne's claim.⁹ In his recommended opinion to the State Personnel Commission (SPC), the ALJ determined that Hearne's resignation was involuntary and recommended his reinstatement.¹⁰ On August 5, 1996, the SPC subsequently recommended Hearne's reinstatement.¹¹ On October 31, 1996, Chatham County Health Director Sherman, acting as the "local appointing authority" pursuant to N.C.G.S. section 126-37(b1),¹² declined to adopt the SPC's determination and decided, in a final agency determination, that Hearne had voluntarily resigned.¹³

⁴*Id.* at 867.

⁵*Id.* at 865.

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²N.C.G.S. section 126-37(b1) provides in pertinent part: "In appeals involving local government employee's subject to this chapter...the decision of the State Personnel Commission shall be advisory to the local appointing authority." N.C.G.S. § 126-37(b1).

¹³Hearne 516 S.E.2d at 865.

Hearne sought judicial review in the Chatham County Superior Court pursuant to N.C.G.S. section 150B-43.¹⁴ On March 20, 1997, the Superior Court reversed Sherman's decision and ordered Hearne's reinstatement.¹⁵ Sherman and Chatham County filed a notice of appeal to the North Carolina Court of Appeals.¹⁶ The Court of Appeals, in an unpublished, divided opinion, reversed and remanded the Superior Court decision, holding that substantial evidence supported the conclusion that Hearne voluntarily resigned.¹⁷

Hearne then appealed to the North Carolina Supreme Court.¹⁸

III. NORTH CAROLINA SUPREME COURT DECISION

A. Substantial Evidence and Adequate Findings

The central issue before the North Carolina Supreme Court was whether director Sherman violated Hearne's due process rights when he reached the final agency decision.¹⁹

Sherman, in exercising his control as local appointing authority pursuant to N.C.G.S. section 126-37(b1), determined that Hearne had voluntarily resigned from his position as Animal Control Officer.²⁰ The basic facts surrounding Hearne's separation from employment are

¹⁴N.C.G.S. section 150B-43 governs the right to judicial review. It provides: "Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this article, unless adequate procedure for judicial review is provided by another statute, in which case the review should be under such other statute. Nothing in this chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this article." North Carolina General Statutes § 150B-43 (1985). Hearne, 516 S.E.2d at 865.

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.*

¹⁹In his notice of appeal, Hearne asserted a substantial constitutional issue which queried whether his due process rights were violated when an agency renders a final decision based on his own testimony. On December 3, 1998 the Court granted Sherman's motion to dismiss Hearne's claim on the constitutional issue. Accordingly, the Court did not address the issue of whether a county health director is the proper person to serve as local appointing authority under section 126-37(b1). *Id.*

²⁰*Id.*

undisputed.²¹ During the Administrative Hearing, Hearne testified about a phone conversation with Sherman concerning his resignation.²² Sherman stated that he was concerned with the negative publicity surrounding the animal shelter and requested Hearne's resignation.²³ Hearne replied, "well, you've got it."²⁴ Hearne, being hurt and upset, also told Sherman to ask other people for their resignations and asked Sherman to get all the county "stuff" off of his property.²⁵ Hearne's wife heard Hearne's end of the phone conversation and corroborated Hearne's testimony.²⁶ Neither Hearne nor Sherman dispute the foregoing testimony regarding the material facts surrounding Hearne's resignation.²⁷ Hearne argued that he was forced to resign and thus his resignation was involuntarily.²⁸

A reviewing Court must apply the "whole record test" in reviewing agency determinations.²⁹ The "whole record test" requires the Court to determine whether the agency's determination is supported by substantial evidence in light of the entire record.³⁰ Thus, the Court's scope of review is limited to the agency's fact findings.³¹ Consequently, the Court must defer to the agency's findings if a Court finds that it is reasonable in light of all the evidence in the record, even if the Court could reasonably find otherwise.³²

Therefore, the Court limited its review to Sherman's findings of fact by applying the "whole record test."³³ Three members of the Court held that despite the fact that final agency decision maker Sherman was the same individual that allegedly terminated employee Hearne, the final agency determination preserved Hearne's due process rights because Sherman rendered his decision pursuant to section 126-37

²¹*Id.* at 866.

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸*Id.*

²⁹*Id.* (citing *Thompson v. Wake County Bd. of Edu.*, 292 N.C. 406 (1977)).

³⁰Hearne 516 S.E. 2d 866, citing *Thompson*.

³¹*Id.*

³²*Id.* (citing *Powell v. N.C. Dep't of Transp.*, 347 N.C. 614 (1998)).

³³Hearne, 516 S.E. 2d At 865.

N.C.G.S.³⁴ These Justices found that the testimony of Hearne and his wife was substantial evidence supporting the finding that Hearne voluntarily resigned.³⁵ They also found that since neither Hearne nor Sherman dispute the material facts surrounding Hearne's resignation, the decision by Sherman was unbiased because he was not put in a position to assess his own credibility.³⁶ The Justices thus concluded that, when an impartial decision maker renders a fair agency determination pursuant to requirements in section 127-37, the determination does not violate due process rights to fair determination.³⁷

B. Administrative Procedure Act Recusal Provision

The Supreme Court also noted that Hearne failed to take any measures to protect himself against a perceived bias on the part of Sherman.³⁸ Specifically, Hearne did not exercise his statutory right to seek Sherman's recusal under the Administrative Procedure Act (APA).³⁹ The Court further noted that there is no provision in the Administrative Procedure Act requiring the final agency decision maker to voluntarily recuse himself.⁴⁰

IV. DISSENTING OPINIONS

The first "dissent"⁴¹ held a more narrow view of the issue

³⁴*Id.* at 866-67.

³⁵*Id.* at 866.

³⁶*Id.*

³⁷*Id.* at 866-67.

³⁸*Id.* at 866.

³⁹N.C.G.S. section 150B-36(a) governs recusation of a final agency decision maker. It provides: "Before the agency makes a final decision, it shall give each party an opportunity to file exceptions to the decision recommended by the Administrative Law Judge, and to present written arguments to those in the agency who will make the final decision or order. If a party files in good faith, a timely and sufficient affidavit or personal bias or other reason for disqualification of a member of the agency making the final decision, the agency shall determine the matter as a part of the record in the case, and the determination is subject to judicial review at the conclusion of the case."

⁴⁰*Id.* at 866.

⁴¹The dissent is referred to as such, despite the awkward position of an equally divided Court that cannot itself resolve the issues.

presented in this case.⁴² The dissent phrased the issue as whether an Appellate Court reviewing a final agency decision is bound by findings of fact made by a final agency decision maker based on findings of his own credibility.⁴³ The dissent submitted that the Court is not bound by agency determinations under those circumstances because an unbiased, impartial decision maker is an imperative part of due process.⁴⁴ The dissent stated that due process requires the Court to assess an agency decision by balancing the individual's interests against the State's interests.⁴⁵ The Court has not done so in this case.⁴⁶

The second dissent found that the majority opinion "infringe[d] upon a cornerstone principle of procedural due process."⁴⁷ It noted that there were numerous material facts in dispute because, based on the same record, the ALJ and SPC came to a different conclusion than the Court.⁴⁸ Furthermore, the second dissent pointed out the erroneous finding of the Court that Sherman was not put in a position to assess his own credibility, where Sherman's determination was based on a finding that "Mr. Sherman's testimony [regarding disputed facts] [was] credible."⁴⁹ According to the dissent, the Court did not consider the substantial evidence supporting the finding of the lower tribunals that Hearne did not voluntarily resign.⁵⁰

Regarding Hearne's failure to recuse Sherman as decision maker, the second dissent noted that the Court neglected to mention that the APA does not provide for an alternative arbitrator in the event of recusal.⁵¹ Therefore, any attempt by Hearne to recuse Sherman would have been fruitless.⁵² Moreover, the Court did not consider evidence in the record which reflected that Sherman did not afford Hearne adequate notice or an opportunity to be heard prior to the final

⁴²*Id.* at 867.

⁴³*Id.*

⁴⁴*Id.* (citing *Crump v. Bd. Of Edu.*, 326 N.C. 603 (1990)).

⁴⁵*Id.* (citing *Hortonville Joint School Dist. No. 1 v. Hortonville Edu. Ass'n*, 426 U.S. 483, 494 (1976)).

⁴⁶Hearne, 516 S.E.2d At 867.

⁴⁷*Id.*

⁴⁸*Id.* at 868.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.* at 869.

⁵²*Id.*

agency decision because Sherman mailed his final decision to Hearne almost three months after the SPC adopted the ALJ's recommendation to reinstate Hearne.⁵³ In consideration of the paramount protections provided by the Constitution, the second dissent concluded that Courts should base their decisions on the presumption against waiver of constitutional rights.⁵⁴

V. CONCLUSION

The decision of the North Carolina Supreme Court, holding that the determination by final agency decision maker Sherman did not violate employee Hearne's due process rights to fair determination, may have adverse affects on North Carolina government employees.⁵⁵ Although this holding is without precedential value,⁵⁶ any Court that chooses to adopt the legal principles set forth in this opinion, will essentially deprive employees of their constitutional due process protection against biased agency determinations. In a system where separation of powers and checks and balances are an integral part of the governmental structure, this decision threatens the delicate balance of power at the very foundation of our Constitution.

While this is not the first decision to raise the "peculiar problem" of the decision maker assessing his or her own credibility, *see Arnett v. Kennedy*, 416 U.S. 134 (1974), it illustrates one of the merits of a central panel system of administrative law determinations. Whether Hearne voluntarily resigned or was pressured into such action may be a close question. Decisions on such close questions should come from an unbiased decision maker, not the person who applied the pressure. Compare, *Goldberg v. Kelly*, 397 U.S. 254 (1970), which required, for welfare cut offs, that the first person who decided to terminate a welfare recipient could *not* be the hearing officer on such a cut off. If nothing else, the very human tendency to resist confessing an error had been made, militates against the procedure followed in Hearne, [and Arnett]. A central panel system, with a final decision by

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.* at 866-67.

⁵⁶*Id.* at 867.

the central panel ALJ not only avoids any “rule of necessity” problem, but also has the appearance of fairness.

The Judge Is Always Right ©
Hearne v. Sherman*, 516 S.E.2d 864 (N.C. 1999)

This bizarre little case would finally turn
On whom to believe: Messrs. Sherman or Hearne.
Walter Hearne was a varmint control officer
Who, one day, sad to say, did some pups massacre.
And, as a result, as one might have well thought,
The general public was greatly distraught.
So, Wayne Sherman, his boss, was mightily ired
And gave Hearne a choice: to resign or be fired.

One way or the other, Mr. Hearne was soon gone.
But he then filed a suit claiming he'd been a pawn
Whom Sherman had sacked without cause or a hearing.
He wanted his job back, his name to be clearing.

ALJ Morrison conducted a trial.
He found it was Sherman whose actions were vile,
And that Hearne had indeed never willingly quit —
He must be reinstated as he was quite fit.
A state jobs commission affirmed every finding;
They ruled that Judge Morrison 's report ought be binding.

Now here's where the case becomes outright weird
As the “local authority” the issue next heard.

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And just who might that local authority be?
Why, none other than Sherman himself; it was he!

So, now acting as judge, Mr. Sherman decried:

At the trial either Sherman or Hearne must have lied.
I've reviewed all the facts and now I discern
That the witness who lied was, no doubt, Mr. Hearne.
And the one who was honest was, hmm, let me see,
That believable fellow was certainly ... me!
The lower decisions therefore lack support
And thus Hearne's appeal I must throw out of court.

I shan't bore you, dear readers, with all the details;
Suffice it to say, there were further appeals.
The state supreme court simply couldn't decide
If Hearne's right to due process was somehow denied.
They were evenly split. They just couldn't determine
Whether Hearne had been wronged, thus upheld Mr. Sherman.

* * *

When you're witness and judge, keep this adage in view —
If you say so yourself, to thine own self be true.
And if someone should dare to suggest you have lied,
Then your own credibility you can decide.

