2012 IL App (1st) 111888-U

THIRD DIVISION
October 24, 2012

No. 1-11-1888

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

REX DE LA CRUZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 CH 27402
	)	
ILLINOIS CIVIL SERVICE COMMISSION and	)	
ILLINOIS DEPARTMENT OF HUMAN SERVICES,	)	Honorable
	)	Mary Anne Mason,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Neville and Steele concurred in the judgment.

O R D E R

¶ 1 *Held*: The decision of the Illinois Civil Service Commission that plaintiff's discharge from employment was warranted was not against the manifest weight of the evidence or arbitrary or unreasonable.

¶ 2 Plaintiff Rex De La Cruz appeals from an order of the circuit court of Cook County affirming the decision of the Illinois Civil Service Commission (the Commission) that plaintiff's discharge from employment was warranted because his conduct was detrimental to the discipline and efficiency of the service. On appeal, plaintiff contends that the trial court "erred in

concluding an agency does not have to uniformly apply its rules of discipline." For the reasons that follow, we affirm.

¶ 3 Plaintiff was employed by the Illinois Department of Human Services (the Department) as a security therapy aide at the Elgin Mental Health Center (the Center). On May 5, 2009, plaintiff and another employee, Sally Edwards, were assigned to provide security for an Alcoholics Anonymous (AA) meeting at the Center. They had to enter the building where the meeting was to be held through a locked double door. An employee inside the building, Abebe Gemeda, was monitoring the locked door. Gemeda and plaintiff had been involved in a workplace incident in 2005 that led to plaintiff being prosecuted but acquitted. On the day in question, Gemeda did not immediately unlock the door for plaintiff and Edwards. When Gemeda did open the door, he and plaintiff engaged in a verbal altercation.

¶ 4 Plaintiff reported the May 5, 2009, incident to his supervisor immediately. Edwards and Gemeda did not make any reports until several days later. As a result of the incident, the Department charged plaintiff with conduct unbecoming an employee and eventually discharged plaintiff from employment. No discipline was imposed upon Gemeda or Edwards.

¶ 5 Plaintiff filed an appeal with the Commission, seeking review of the Department's decision to discharge him. In 2010, a hearing was held before the Commission's administrative law judge.

¶ 6 At the hearing, Sally Edwards testified that typically, when staff would approach the locked door of the building where the AA meeting was being held, an employee at the door would automatically push a button to unlock the doors. On the day in question, when she and plaintiff approached, she could see Abebe Gemeda at the door, listening to his radio and playing with his cell phone. Plaintiff knocked on the door, but it was not until Edwards stepped out from behind plaintiff that Gemeda opened the door. Once Edwards and plaintiff passed through the

door, plaintiff asked Gemeda, "Why did you do that?" Gemeda replied that plaintiff had a key and should have used it. Plaintiff said, "Oh, I will kick your ass in," and Gemeda responded, "Come on." Plaintiff then said, "I will kick your ass and I will kill you," to which Gemeda replied, "Come on. You know what I did to you. You know what I can do to you." At some point during the exchange, plaintiff gave Gemeda the middle finger. After this exchange, Edwards urged plaintiff to go and they proceeded to monitor the AA meeting.

¶ 7 Edwards explained that to monitor the meeting, she and plaintiff sat in the hallway about five to ten feet from Gemeda. During the meeting, which lasted for about an hour, plaintiff and Gemeda stared at each other. At the end of the meeting, Edwards and plaintiff waited near the door while the AA leaders signed out. Plaintiff and Gemeda argued in front of the patients and staff, with Gemeda repeatedly saying, "Come on," and "You know what I did to you and I would do it again," and plaintiff saying, "I will kick your ass," and "I will kill you." Eventually, at Edwards' urging, she and plaintiff left the building. According to Edwards, plaintiff asked her if she owned a gun. When she said she did, plaintiff said, "I will kill him." Plaintiff also told Edwards that he was going to write up the incident, and Edwards told him not to include her name in the report because she did not want to be involved.

¶ 8 Edwards explained that she did not make an immediate report to her supervisor because she did not want to be involved. However, she eventually talked to her supervisor, and because plaintiff included her name in his report, her supervisor required her to write a statement as well. At the hearing, she identified her statement, which was dated nine days after the incident. The statement was entered into evidence.

¶ 9 Abebe Gemeda testified that on the day in question, he was working at the security desk in the building where the AA meeting was being held. Plaintiff approached the double doors with an angry face, pointing his middle finger at Gemeda. Plaintiff said, "Fuck you," and kicked

the door. Gemeda testified that he thought plaintiff was going to attack him, so he did not open the door until he saw Sally Edwards step out from behind plaintiff. When Edwards and plaintiff came through the door, plaintiff shouted, "Motherfucker, I am going to kick your ass." Plaintiff tried to punch Gemeda, showed him his fist, and gave him the finger. Gemeda felt threatened and backed away in his chair. Gemeda asked plaintiff why he wanted to kick him, and when plaintiff continued to threaten him, Gemeda said, "Come on. I am going to call the police like I did five years ago. I am going to call the police on you." Gemeda also said, "You know what I can do." Edwards urged both men to stop, and eventually, Edwards and plaintiff went about 15 to 20 feet down the hallway to sit outside the AA meeting room. Plaintiff stared at Gemeda, and Gemeda could hear plaintiff continuing to say, "Motherfucker, I am going to kick your ass."

¶ 10 Gemeda testified that later, when Edwards and plaintiff came back to the doorway, plaintiff raised his fist, bumped and kicked the door, and said "all kinds of things," including, "Next time I see you I am going to kick your ass," and "I am going to kill you." Again, Edwards urged plaintiff and Gemeda to stop. She also urged plaintiff to leave, and eventually, they both walked away.

¶ 11 Gemeda stated that he did not report the incident right away because he was confused. Eventually, he talked to his supervisor, made a report to a security official at the Center, and wrote three statements documenting the incident. He acknowledged that his written statements did not mention that plaintiff had threatened to kill him.

¶ 12 Plaintiff testified that when he and Edwards approached the door on the day in question, he could see Gemeda sitting inside, playing with his phone and listening to the radio. Gemeda looked at plaintiff but did not open the door. After waiting for about a minute, plaintiff started knocking on the door, but Gemeda did not open it until Edwards showed her face in the window. When plaintiff walked through the door, he asked Gemeda what took him so long. Gemeda

stared at plaintiff and said, "You know what I can do. You know what I have done to you." According to plaintiff, he and Edwards walked away from Gemeda and proceeded about 50 feet down the hall. After a short interaction with another employee, plaintiff and Edwards went back to the doorway to meet the counselors for the AA meeting. When they passed Gemeda, he said, "Come on. Come on. You know what I can do. I'm not afraid of you." Plaintiff testified that while he and Edwards monitored the AA meeting, Gemeda stared at him from his desk. When the meeting was over, plaintiff and Edwards left the building. Plaintiff told Edwards that he was going to write a statement about the incident, and Edwards said she did not want to get involved. Plaintiff denied making any gestures at Gemeda, saying anything to Gemeda, or kicking the door when he left the building. He also denied ever addressing Gemeda with profanity or threatening to kill him.

¶ 13 Plaintiff testified that he made a report to his supervisor immediately following the incident. He did not hear anything about his report until over a month later, when he was placed on administrative leave and subsequently discharged from employment.

¶ 14 Kenneth McCaffrey testified that he was the chief of the Department's workplace violence bureau and that he investigated and prepared an investigative report of the incident in question. Following his investigation, he recommended a finding that both Gemeda and plaintiff had violated Department policies regarding workplace violence. Specifically, Gemeda had violated Department policies by challenging plaintiff to fight, and plaintiff had violated Department policies by making a death threat and subsequently inquiring about the availability of a gun. McCaffrey recommended that both men should be disciplined, and stated in his report that plaintiff's behavior was so serious that it called into question his continued employment with the Department.

¶ 15 Diana Hogan, the Center's Associate Director of Nursing, testified that she was involved in drafting the disciplinary hearing charges against plaintiff. Hogan identified numerous employee policies regarding workplace violence that plaintiff had been charged with violating. She characterized the charges against plaintiff, especially the charge that he threatened to kill someone and asked for a gun, as "very, very serious," and indicated that the actions warranted discharge. Hogan testified that violation of the Department's workplace violence policy was detrimental to the Center because it makes for a hostile work environment and because employees must model proper behavior for the patients. The decision to terminate plaintiff's employment was made by Hogan, the human resources department, and the Director of Nursing. Hogan also testified that violations of the work rules were supposed to be reported immediately.

¶ 16 Following the hearing, the Commission determined that the charge against plaintiff for conduct unbecoming a state employee had been proven and that discharge from employment was warranted. In doing so, the Commission found that neither plaintiff nor Gemeda was a particularly credible witness, as each slanted his testimony to support a version of events that cast himself as the victim. In contrast, the commission found that Edwards was believable because her description of events fell "right in between the extremes" of plaintiff's and Gemeda's accounts; her testimony and statement were sufficiently consistent with both plaintiff's and Gemeda's; she expressed her unhappiness at becoming involved in the matter; and her testimony was credible and consistent. Based on Edwards' testimony, the Commission found that plaintiff made a direct threat to Gemeda and then asked Edwards whether she owned a gun. The Commission concluded, "A verbal altercation accompanied by threats (which could have been chalked up to posturing) is one thing. Following it up with an inquiry that reasonably can be construed as a step to carry out the threat is a much more serious matter. For these reasons, the charge against [plaintiff] has been proven." The Commission determined that discharge was

warranted because plaintiff's conduct was detrimental to the discipline and efficiency of the service.

¶ 17 Finally, the Commission noted that Gemeda's conduct in initiating the incident, verbally engaging plaintiff, and not immediately contacting security warranted some level of discipline. The Commission stated, "The failure of the agency to impose *any* discipline on him while imposing the maximum on [plaintiff] would normally have been sufficient grounds to recommend that [plaintiff's] discharge be reduced to a suspension. However, [plaintiff's] subsequent handgun inquiries made his conduct too extreme to warrant any reduction despite the agency's apparent arbitrary and inequitable application of discipline in this matter."

¶ 18 Plaintiff filed a complaint for administrative review. Following argument, the trial court affirmed the Commission's decision. This appeal followed.

¶ 19 On appeal, plaintiff contends that the "trial court erred in concluding an agency does not have to uniformly apply its rules of discipline." Noting that neither Gemeda nor Edwards was disciplined, despite Gemeda's participation in the incident and both Gemeda's and Edwards' failure to report it immediately, plaintiff argues that the Department did not follow its own policy that the directives concerning workplace conduct be equally applied. He asserts that because the Department's policies were not applied uniformly, its decision to terminate his employment was arbitrary.

¶ 20 Our role on appeal is to review the decision of the administrative agency, not the decision of the circuit court. *Department of Juvenile Justice v. Civil Service Comm'n*, 405 Ill. App. 3d 515, 521 (2010). In cases involving discharge from employment, our review follows a two-step process. *Id*. First, we consider whether the agency's factual findings are against the manifest weight of the evidence. *Id*. If they are not, we next determine whether the findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge exists. *Id*. This

second step is measured by whether the discharge decision is arbitrary, unreasonable, or unrelated to the requirements of service. *Department of Human Services v. Porter*, 396 Ill. App. 3d 701, 726 (2009).

¶ 21 Plaintiff has not explicitly argued that the Commission's factual findings are against the manifest weight of the evidence. However, he has asserted that the evidence was "conflicting, disputable and tainted" and that the testimony offered against him was "exaggerated and tainted."

¶ 22 An administrative agency's findings and conclusions on questions of fact shall be held to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 2010). In examining an agency's factual findings, this court will not reweigh the evidence or substitute its judgment for that of the agency. *Department of Juvenile Justice*, 405 Ill. App. 3d at 522. Rather, as noted above, we are limited to determining whether the agency's factual findings are against the manifest weight of the evidence. *Id*. Findings are considered to be against the manifest weight of the evidence only where " 'all reasonable and unbiased persons, acting within the limits prescribed by the law and drawing all inferences in support of the finding, would agree that the finding is erroneous and that the opposite conclusion is clearly evident.' " *Porter*, 396 Ill. App. 3d at 722 (quoting *Sheehan v. Board of Fire & Police Commissioners*, 158 Ill. App. 3d 275, 287 (1987)). It is the agency's responsibility to weigh the evidence, determine the credibility of the witnesses, and resolve conflicts in the testimony. *Id*. at 723. If the record contains supporting evidence, then the agency's determination must be affirmed. *Id*.

¶ 23 In the instant case, the Commission chose not to believe plaintiff or Gemeda, as each man slanted his testimony to present himself as the victim. Instead, the Commission chose to believe Edwards, since her testimony was consistent and fell "right in between the extremes" of plaintiff's and Gemeda's accounts. We will not substitute our judgment for the Commission's on issues of credibility. *Id*. at 722. At the hearing, Edwards testified that plaintiff repeatedly told

Gemeda he would "kick [his] ass," used obscene gestures toward Gemeda, and threatened to kill Gemeda at least twice. According to Edwards, after she and plaintiff left the immediate area, plaintiff again said he would kill Gemeda and asked her if she had a gun. Based on Edwards' testimony, the Commission found that plaintiff had engaged in conduct unbecoming a state employee. Because evidence exists in the record to support the Commission's finding, it is not against the manifest weight of the evidence. See *id*. at 723.

¶ 24 We next consider whether the Commission's findings of fact provide a sufficient basis for its conclusion that cause for discharge exists. *Department of Juvenile Justice*, 405 Ill. App. 3d at 521. In making this determination, we evaluate whether the discharge decision is arbitrary, unreasonable, or unrelated to the requirements of service. *Porter*, 396 Ill. App. 3d at 726. Plaintiff argues that by disciplining him but not Gemeda and Edwards, the Commission unfairly applied its rules, and that therefore, the Commission's decision was arbitrary and capricious.

¶ 25 The Commission's regulations define "cause for discharge" as follows:

> "Cause for discharge consists of some substantial shortcoming which renders the employee's continuance in his or her position in some way detrimental to the discipline and efficiency of the service and that the law and sound public opinion recognize as good cause for the employee no longer holding the position. 80 Ill. Adm. Code § 1.170(a) (2008).

¶ 26 The record reflects that the Department had a written zero tolerance policy regarding workplace violence. Specifically, the policy provided that "[a]cts of intimidation, willful destruction of property, possession of weapons of any sort, threats, and/or attacks will not be tolerated," and that "[a]ny of these actions may result in disciplinary action, up to and including discharge." Plaintiff violated the Department's policy when he threatened to kill Gemeda and

followed up that threat with an inquiry to Edwards regarding whether she owned a gun. We agree with the Commission that such conduct was detrimental to the discipline and efficiency of the Center and warranted discharge. The Commission's decision is not arbitrary, unreasonable, or unrelated to the requirements of service.

¶ 27 We are mindful of plaintiff's position that the Commission's decision was arbitrary because he was discharged for his participation in the incident while Gemeda and Edwards received no discipline despite Gemeda's involvement and both Gemeda's and Edwards' failure to report the incident immediately. It is true that an administrative agency's finding of cause for discharge may be considered arbitrary and unreasonable when compared to the discipline imposed in a completely related case. *Launius v. Board of Fire & Police Commissioners*, 151 Ill. 2d 419, 441-42 (1992). However, cause for discharge can still be found even where other employees have been disciplined differently. *Id*. at 442. Here, plaintiff's conduct included threatening death and following up that threat with an inquiry about a gun. In contrast, Gemeda delayed unlocking a door for plaintiff, taunted him, and did not make an immediate report of the incident. Edwards simply failed to report the incident right away. In our view, plaintiff's, Gemeda's, and Edwards' actions are not sufficiently comparable so as to render the Board's discharge decision arbitrary and unreasonable. See *id*. at 443.

¶ 28 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.