2018 IL App (1st) 172218-U

FIRST DIVISION
November 13, 2018

No. 1-17-2218

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILLIAM BUTLER, Plaintiff-Appellant, v. THE ILLINOIS DEPARTMENT OF CORRECTIONS, JOHN BALDWIN, Director of the Illinois Department of Corrections, THE ILLINOIS CIVIL SERVICE COMMISSION, STATE OF ILLINOIS, WILLIAM SCHROEDER, Chairman of the Illinois Civil Service Commission, ANITA M. CUMMINGS, G.A. FINCH, SUSAN MOYLAN KREY, and CASEY URLACHER, Commissioners, Defendants-Appellees.	) Appeal from the Circuit Court of) Cook County)))))) No. 16 CH 10541)))))) Honorable Kathleen M. Pantle,) Judge Presiding.

JUSTICE GRIFFIN delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff's discharge from his employment with the Illinois Department of Corrections was not improper.

¶ 2 Plaintiff William Butler was discharged from his employment with the Illinois Department of Corrections (IDOC) after failing the test to retain his firearm proficiency

certification. Plaintiff argues that the IDOC did not follow the proper policy when it gave him only one attempt at remedial retesting rather than two. He took his case before the Illinois Civil Service Commission which rejected his arguments and approved his discharge. The circuit court affirmed on administrative review. We also affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff William Butler was employed by defendant the Illinois Department of Corrections from 2000 to 2015. He began his career as a correctional officer and was promoted along the way to become a parole agent. Parole agents are required to carry a state-issued weapon when on duty because they are required to visit offenders that are on parole or mandatory supervised release, do extraditions, and arrest parole violators.

¶ 5 In order to carry a state-issued weapon, newly-hired or promoted parole agents must undergo a 40-hour firearms training course and pass a marksmanship test. 50 ILCS 710/2 (West 2016). The training and qualification requirements are codified in the Peace Officer and Probation Officer Firearm Training Act. 50 ILCS 710/0.01 *et seq*. (West 2016). Plaintiff took the course, passed his test and began working as a parole agent. Parole agents in Illinois are required to requalify in firearm proficiency annually as a mandatory qualification for continued employment. 50 ILCS 710/2.5 (West 2016). After being on the job for 8 months, plaintiff was scheduled to take the marksmanship test again because the annual test for all employed parole agents is held in July. Agents are given three attempts to pass the test to requalify. Illinois Department of Corrections, Administrative Directive No. 03.03.103(K)(4) (eff. July 1, 2015). Plaintiff failed.

¶ 6 The procedures and standards for qualification and requalification are set forth in an Illinois Department of Corrections administrative directive. See Illinois Department of Corrections, Administrative Directive No. 03.03.103 (eff. July 1, 2015). Relevant here, because

it was the administrative directive in effect when plaintiff failed to requalify, the directive explains the process that must be followed when a parole agent fails to requalify after the initial three attempts.

> "Employees who are required to be Board Certified and fail to requalify after three attempts within a 14 day period shall be required to successfully complete the next available Board Certified Training as a final remedial measure. The employee's supervisor shall enroll the employee in the next available Board Certified training. Employees who fail to successfully complete the final remedial Board Certified training, or fail after one attempt to requalify after the training, shall no longer meet the requirements of their employment." Illinois Department of Corrections, Administrative Directive No. 03.03.103(K)(10) (eff. July 1, 2015).

¶ 7 Before this version of the administrative directive became effective in July 2015, it did not contain language that the retraining and testing was "a final remedial measure" or that the agent would become unqualified for his position after failing "one attempt to requalify." Those additions were made in July 2015 in response to a decision made by the Illinois Civil Service Commission and affirmed on administrative review in *Illinois Department of Corrections v. Ramiro Hernandez*, No. DA-17-14 (May 2, 2014).

¶ 8 In *Hernandez*, the parole agent failed the initial requalification tests and failed in his remedial attempt to requalify. The Department of Corrections proposed terminating his employment. However, because the administrative directive did not quantify the number of attempts at requalification that an agent would be afforded, the ALJ found that Hernandez could not be limited to one attempt. Although the standard procedure was to allow one additional attempt to requalify after failing, there was evidence presented at the hearing that at least one

requalifier in the past had been given two attempts. The ALJ also noted that newly-hired employees were given two attempts. Based on those considerations, the ALJ found that all requalifiers "are entitled to two attempts to requalify at the conclusion of the remedial training, not just one."

¶ 9 Before plaintiff's remedial requalification test, he received and signed a printed copy of the updated directive that specified that he would only have one attempt to requalify after remedial training. Lieutenant Brown, the range instructor that day, also informed plaintiff that he would be afforded just one requalification attempt. Plaintiff failed in his attempt to requalify and the Department of Corrections notified him of his proposed discharge. Before his employment was officially terminated, plaintiff filed for an administrative hearing before the Civil Service Commission. See 80 Ill. Adm. Code 1.10 *et seq*. (eff. Sept. 1, 2018). Plaintiff argued that he should be permitted two attempts at requalification per *Hernandez*. He also argued that notice of the modification of the administrative directive was insufficient and that it was improper for him to be tested in that July exam because taking and passing the test is an annual requirement and he had qualified eight months earlier.

¶ 10 At the administrative hearing, 10 witnesses testified, including plaintiff. Plaintiff testified that he believed he was entitled to two opportunities to requalify after remedial training because of the decision in *Hernandez* and discussions with his union steward. The two other individuals that failed to requalify along with plaintiff testified that they were unaware of the updated administrative directive during the requalification process. Those two individuals also challenged their discharge on the same grounds, but did not appeal to this court.

¶ 11 Edward Jackson, chief of IDOC labor relations, testified that the modification to the administrative directive was made as a reaction to the *Hernandez* decision because four total

attempts had been the policy and practice since at least 2006. Jackson also testified that the union's regional director never formally or informally objected to the modification. Lieutenant Robert Brown testified that, as far as he knew and since he began as a firing range instructor in 2001, the IDOC had always only given would-be requalifiers one chance to pass the test after remedial training. Lieutenant Zachary Sarver testified in accord with Lieutenant Brown. Lieutenant Sarver made clear that the update to the administrative directive was a clarification, not a policy change.

¶ 12 Ty Poppenhaus testified that he was responsible for sending monthly notices about changes to administrative directives and other matters via email. When the relevant administrative directive in this case was updated in July 2015, Poppenhaus sent out an email stating the directive was "revised to clarify the number of requalification attempts for firearms certification." The email identifies the administrative directive by name and number and has a hyperlink on the page for where text of the directives can be found. Among others, Poppenhaus's email was sent to Eddie Caumiant, the union's regional director.

¶ 13 Caumiant testified that he receives notifications about all changes to administrative directives, but if there is a "major change" he would typically be personally contacted by Jackson, the chief of IDOC labor relations. Caumiant testified, however, that he was not personally contacted by Jackson in this case. Caumiant stated that he did not notice the revision when he received the email from Poppenhaus and that he did not learn about the updated administrative directive until February 2016. He testified that when he learned about the updated directive, it was a bit of an affront, because he is usually contacted when they make a change and that did not happen in this instance. The union never objected to the language added to the administrative directive and never filed a grievance about the revision.

¶ 14 The Civil Service Commission adopted the ALJ's recommendation that plaintiff be discharged. The Commission noted that, pre-*Hernandez*, the administrative directive did not specify the number of attempts at requalification that would be allowed. However, the Commission explained that, at the time plaintiff took and failed the test, the administrative directive had been updated to clarify that only one attempt at requalification after remedial training was permitted—four attempts total. Because the administrative directive that was in effect both at the time plaintiff took and failed the annual test and the time he took and failed the test after remedial training was specific that only one additional requalification attempt would be allowed, the proper course was to terminate plaintiff's employment. The Commission found the notice given to be appropriate and rejected plaintiff's argument that he should not have been tested again in July after qualifying just eight months earlier. Plaintiff filed a complaint in the circuit court of Cook County for administrative review. The circuit court affirmed the Commission's decision. Plaintiff appeals.

¶ 15 ANALYSIS

¶ 16 Plaintiff raises three issues on appeal. First, plaintiff argues that the IDOC applied the wrong rule in discharging him for failing to pass his annual firearms recertification training. Plaintiff's contention is that *Hernandez*, which was upheld on administrative review, is controlling. Second, plaintiff contends that the revision to the administrative directive was a material change and that the union was not given reasonable notice and a chance to demand bargaining. Third, plaintiff argues that he should not have been required to take the firearms requalification test at its annually-given time in July because he had passed the test eight months earlier.

¶ 17 In administrative review cases, we review the decision of the administrative agency, not

the judgment of the circuit court. *Department of Corrections v. Welch*, 2013 IL App (4th) 120114, ¶ 17. When an administrative agency's decision involves a pure question of law, we review it *de novo*. *Skokie Firefighters Union, Local 3033 v. Illinois Labor Relations Board, State Panel*, 2016 IL App (1st) 152478, ¶ 11. When reviewing factual findings, the agency's findings and conclusions are deemed to be *prima facie* true and correct and, thus, are reviewed under a manifest weight of the evidence standard. *Id*.; 735 ILCS 5/3-110 (West 2012). Under some circumstances, however, the issue presented cannot be accurately characterized as either a pure question of fact or a pure question of law and, therefore, will be treated as a mixed question, subject to an intermediate standard of review where we review for clear error. *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 369 (2002). If the case concerns a statute that the agency is charged with administering, we accord the agency's interpretation deference. *Skokie Firefighters*, 2016 IL App (1st) 152478, ¶ 12.

¶ 18 Plaintiff contends that the Civil Service Commission's decision in *Hernandez* which was upheld on administrative review "changed Section K (10)" of IDOC administrative directive 03.03.103 and should have been applied to him. He further argues that the IDOC could not ignore the change. Plaintiff's argument fails because it relies on the interpretation of a previous iteration of an administrative directive that does not apply to him. After the Commission in *Hernandez* interpreted the previous version of the administrative directive in a way that the IDOC deemed to be inconsistent with its policy, the administrative directive was updated to make clear that, after remedial training, agents had "one attempt to requalify." After the administrative directive went into effect, the remedial training and singular retesting was the "final remedial measure." Plaintiff does not even attempt to explain why that updated administrative directive would not apply to him. He cites no authority in the entire argument

section of his brief devoted to this issue that would plausibly support his position.

¶ 19 The modified version of Administrative Directive No. 03.03.103(K)(10) expressly became effective July 1, 2015. Plaintiff was tested July 13, 2015, July 15, 2015, and July 20, 2015. He was retested on August 21, 2015. All of the tests that plaintiff took followed the effective date of the updated administrative directive. Plaintiff admits that he was told before he took his requalifying test that he only had one attempt to pass, and he signed a copy of the updated administrative directive acknowledging as much. The updated directive supersedes any authority that might have been afforded to *Hernandez*, because *Hernandez* dealt with interpreting an administrative directive that was not in effect when plaintiff was tested. *Hernandez* did not "change Section K (10)"—it set a standard for interpreting a putatively unclear rule that was subsequently made clear through the issuance of an updated version of the rule.

¶ 20 Plaintiff admits that "the IDOC was free to revised (sic) Administrative Directive 03.03.103, assuming proper rulemaking and notice to stakeholders." In this case, the IDOC did just what plaintiff suggests it was allowed to do. After *Hernandez*, the IDOC revised the administrative directive to codify and clarify its longstanding policy that, after remedial training, subjects were entitled to one final qualification attempt. Putting aside the propriety of the rulemaking process and notice for the moment, plaintiff has no logical answer for why the IDOC was not fully entitled to revise the administrative directive and why that new version should not be applied to him.

¶ 21 Because the revised IDOC directive was in effect before plaintiff attempted to requalify and because the directive plainly permitted just one remedial attempt, we now must address whether the directive can be properly enforced in plaintiff's case. Plaintiff complains about the notice that was given to his representatives, arguing that "the IDOC's notice was insufficient to

provide AFSCME an opportunity to demand bargaining."

¶ 22 A basic concept in the area of collective bargaining is that when an employer intends to make a material change in the terms and conditions of employment, the employer is required to notify the union so that, if the union disapproves of the change, it has the opportunity to demand bargaining. *N.L.R.B. v. Katz*, 369 U.S. 736, 747 (1962); see also *Amalgamated Transit Union v. Illinois Labor Relations Board*, 2017 IL App (1st) 160999, ¶ 35 (an employer "violates its obligation to bargain in good faith, and therefore sections 10(a)(1) and (4) of the [Illinois Public Labor Relations] Act, when it makes a unilateral change in a mandatory subject of bargaining without granting notice and an opportunity to bargain with its employees' exclusive bargaining representative."). Here, even assuming the revision to the administrative directive was "material," the union was given adequate notice of the modification and did not object to it or demand bargaining.

¶ 23 The IDOC sent an email to all interested parties about the revisions to the subject administrative directive. A monthly email of this type was the standard form of communicating changes to administrative directives to the union. The union admits it received and reviewed the email, but somehow apparently overlooked the revision at issue.

¶ 24 On the issue of notice, in his reply brief, plaintiff cites several cases for the first time and presents new, yet more cogent legal arguments urging us to adopt his position. But the reply brief is not the place for new authority or arguments. Ill. S. Ct. R. 341(h)(7) (West 2016). Nonetheless, the notice here was sufficient. The IDOC employed the customary form of notice given to the union. The emailed revisions informed the union precisely of the proposed change—the memorandum conspicuously proclaimed that "03.03.103 Firearms Training, Qualification and Requalification" was "Revised to clarify the number of requalification attempts for firearms

certification." The memorandum advised the recipient to "[p]lease review and communicate this information to appropriate staff." The revised directive was also attached in electronic form.

¶ 25 While the IDOC sometimes called the union and discussed "major changes," plaintiff points to no authority demonstrating that the IDOC was required to do so or any evidence that the union could expect and reasonably rely on such notification. The memorandum sent by the IDOC told the union exactly what the revision to the administrative directive would be, in unmistakable terms. Plaintiff does not provide any authority for the proposition that notice in the manner given in this case has been found to be insufficient. The union did nothing to engage in bargaining after notice was given. The union had the opportunity to demand bargaining if it wished. The failure to realize the import of the revision and challenge it does not fall to the IDOC—the burden on the IDOC is to give specific notice of the change, which it did.

¶ 26 Plaintiff also argues that he should not have been required to take the firearm requalification test because the Peace Officer and Probation Officer Firearm Training Act requires the test to be given *annually*. 730 ILCS 5/3-14-1.5(1) (West 2016); see also 50 ILCS 710/2.5 (West 2016). Plaintiff argues that his firearm certification was valid until December 2015 and, thus, he should not have been made to requalify in July 2015.

¶ 27 The record evidence makes clear that all parole agents are tested to requalify annually for firearms proficiency each July. Plaintiff seems to suggest that the IDOC must administer the test at hundreds of times each year in which each individual parole agent's certification would be expiring. After an employee's first year on the job, this concern is moot because he will be tested one year later in July. An annual test date simply assures that parole agents maintain their qualifications as a condition of their employment. The policy of administering the test once a year has a rational basis to the rule's objective. Again, plaintiff cites no authority to support his

position nor does he point to any statute, rule, or constitutional provision that prohibits the IDOC's practice. We see no reason for overruling the Civil Service Commission's decision on this issue.

¶ 28 CONCLUSION

¶ 29 Accordingly, we confirm the decision of the Illinois Civil Service Commission and affirm the decision of the circuit court.

¶ 30 Affirmed.