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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOHN S. TURNER,) No. 1 CA-CV 11-0531
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules of
ARIZONA LAW ENFORCEMENT MERIT) Civil Appellate Procedure)
SYSTEM COUNCIL, an)
administrative agency; ANDREW)
LUCK; GAIL GOODMAN; and ENRIQUE)
CANTU, all in their official)
capacities as members of THE LAW)
ENFORCEMENT MERIT SYSTEM COUNCIL;)
ROBERT HALLIDAY, in his official)
capacity as Director of the)
Department of Public Safety,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. LC2010-000700-001

The Honorable Crane McClennen, Judge

AFFIRMED

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By Dale F. Norris
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By Robert J. Sokol, Assistant Attorney General
Attorneys for Defendants/Appellees LEMSC, Luck, Goodman, and
Cantu

And

By Dennis D. Carpenter, Jr., Assistant Attorney General
Attorneys for Defendant/Appellee Halliday

S W A N N, Judge

¶1 Appellant John S. Turner appeals from the superior court's judgment affirming the decision of the Arizona Law Enforcement Merit System Council ("LEMSC") to uphold the termination of his employment by the Arizona Department of Public Safety ("ADPS"). Turner argues that he was deprived of pretermination and posttermination due process in connection with his termination. We conclude that Turner received adequate due process, and affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Turner was employed by ADPS as a sworn, full-time highway patrol officer. In October 2008, Turner's personal psychologist contacted ADPS and advised that Turner be temporarily relieved from duty so that he could be treated for psychosis and paranoid schizophrenia, which was causing him to see demons in traffic violators. The psychologist stated that Turner had given him permission to make this disclosure.

¶3 ADPS promptly relieved Turner from duty and placed him on paid administrative leave. With Turner's permission, his

psychologist's records were released to an ADPS-contracted psychologist. ADPS then ordered Turner to submit to a fitness-for-duty evaluation by the ADPS-contracted psychologist.

¶4 The ADPS-contracted psychologist met with Turner in December 2008 and issued a detailed report to ADPS in January 2009. The report was sent to ADPS only. In the report, the psychologist summarized Turner's self-reported history, his medical records, and interviews with his wife and his personal psychologist; interpreted his performance on various psychological tests; and opined that he was not fit for duty because of serious psychiatric symptoms. The psychologist also made recommendations for Turner's care.

¶5 Some months later, ADPS received a letter from Turner's neurologist opining that Turner's hallucinations had been caused by medications he was no longer taking. But in June 2009, ADPS notified Turner that it had determined he was unable to properly perform his job responsibilities. ADPS removed Turner from administrative leave and gave him the option to use his accrued leave and request Family and Medical Leave Act leave. ADPS explained in its notification letter that the decision was based on "the results of the Fitness for Duty evaluation" set forth in its psychologist's January 2009 report, but neither described those results nor provided Turner with a copy of the report.

¶16 Turner immediately responded by providing a report from his personal psychiatrist, in which the psychiatrist stated that Turner's treatment would continue. A few months later, in September 2009, Turner asked to return to work in a limited capacity and provided a second report from his psychiatrist opining that he was able to do so. ADPS denied Turner's request. Less than a month later, Turner asked that he be allowed to return to full active duty and provided a handwritten note from his psychiatrist opining that he was fit to do so.

¶17 ADPS responded to Turner's request to return to work by ordering him to submit to a second fitness-for-duty evaluation. The same ADPS-contracted psychologist met with Turner and issued a report to ADPS in January 2010. Again, the report was sent to ADPS only. The report updated Turner's history and treatment progress, interpreted his performance on re-administered psychological tests, and opined that he was still not fit for duty.

¶18 After receiving the second report, ADPS terminated Turner's employment by letter dated February 11, 2010. The letter stated that Turner's employment was discontinued effective the next day because "it has been determined by competent medical authority that you are no longer capable of performing the essential functions of the classification in which you are employed, OFFICER." The letter further stated

that "[t]his action is not considered discipline[,]” and informed Turner that he could apply for reinstatement within a year if he became capable of performing his job functions.

¶9 Turner appealed his termination and requested a hearing. The LEMSC first held a hearing on jurisdiction, and then held a hearing on the merits of Turner’s termination. Turner was represented by counsel at both hearings. About a month before the merits hearing, the parties submitted written briefs to the LEMSC, and ADPS attached copies of all of the parties’ correspondence, both fitness-for-duty reports, and copies of all reports and correspondence from Turner’s doctors. This was the first time that Turner saw the fitness-for-duty reports.

¶10 At the merits hearing, Turner’s counsel called Turner’s former chief (whom he had subpoenaed) and Turner to testify under oath, admitted various documents into evidence, and gave a closing and rebuttal statement. The LEMSC found by a preponderance of the evidence that Turner was unable to perform the essential functions of his job due to medical reasons, and upheld his termination.

¶11 Turner appealed to the superior court and the superior court affirmed. Turner timely appeals. We have jurisdiction pursuant to A.R.S. § 12-913.

DISCUSSION

¶12 Turner contends that he was denied due process both before and after his termination. We review constitutional claims, such as an alleged denial of due process, de novo. *Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, 430, ¶ 13, 153 P.3d 1055, 1059 (App. 2007). On this record we conclude that Turner received adequate due process.

I. TURNER'S RIGHT TO DUE PROCESS IN CONNECTION WITH THE TERMINATION OF HIS EMPLOYMENT WAS NOT DIMINISHED BY THE NON-DISCIPLINARY NATURE OF THE TERMINATION.

¶13 As a permanent ADPS employee, Turner had a constitutionally protected property interest in his employment and could not be deprived of that interest without due process of law. *Ariz. Dep't of Econ. Sec. v. Redlon*, 215 Ariz. 13, 17, ¶ 8, 156 P.3d 430, 434 (App. 2007). As an initial matter, we address ADPS's argument that Turner's property interest in his employment was diminished because he was terminated for a non-disciplinary reason and not "for cause."

¶14 A termination for a physical or mental disability is a termination "for cause" under A.R.S. § 41-1830.15(A)(7) -- and, contrary to ADPS's contentions, may be just as stigmatizing as a termination for disciplinary reasons. The employee's right to due process is the same in either situation.¹ We therefore

¹ ADPS is correct that the procedures set forth in A.A.C. R13-5-702 and -703 contemplate disciplinary terminations. But this

conclude that Turner's property interest in his employment, and his entitlement to due process, were unaffected by the nature of the termination.

II. TURNER RECEIVED ADEQUATE DUE PROCESS.

¶15 In *Cleveland Board of Education v. Loudermill*, the United States Supreme Court held that due process requires "some kind of a hearing" before an employee with a constitutionally protected property interest in his employment may be terminated. 470 U.S. 532, 542 (1985). This requirement balances the employee's interest in retaining employment, the government's interest in the expeditious removal of unsatisfactory employees without significant administrative burden, and the parties' shared interest in avoiding erroneous decisions. *Id.* at 542-45. The Court held that these interests may be balanced by a pretermination "hearing" that need not be elaborate and is "something less" than a full evidentiary hearing. *Id.* at 545. The Court explained: "[T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe

does not mean that an employee's due process rights are any less substantial in the context of disability terminations. Any policies or procedures established by ADPS pursuant to A.A.C. R13-5-803 for disability terminations must include appropriate procedural safeguards with respect to both pretermination and posttermination proceedings.

that the charges against the employee are true and support the proposed action." *Id.* at 545-46. The Court held that due process is satisfied so long as the employee receives "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546.

¶16 We have interpreted *Loudermill* to require "only the barest of a pretermination procedure, especially when an elaborate posttermination procedure is in place." *Williams v. Pima Cnty.*, 164 Ariz. 170, 174, 791 P.2d 1053, 1057 (App. 1990) (citation omitted). Accordingly, we have held on more than one occasion that a pretermination written exchange is sufficient when coupled with a full posttermination evidentiary hearing. *Johns v. Ariz. Dep't of Econ. Sec.*, 169 Ariz. 75, 79-80, 817 P.2d 20, 24-25 (App. 1991); *Carlson*, 214 Ariz. at 428, 430-31, ¶¶ 5, 6, 15, 153 P.3d at 1057, 1059-60. The procedural requirements for the posttermination hearing may vary depending on the case, but generally require adequate written notice of the grounds for termination, disclosure of the evidence supporting termination, the opportunity to confront and cross-examine available adverse witnesses, the opportunity to be heard in person and present evidence, the opportunity to be represented by counsel, a fair and impartial decision-maker, and a written statement by the decision-maker as to the evidence

relied upon and the reasons for the decision. *Deuel v. Ariz. State Sch. for the Deaf & Blind*, 165 Ariz. 524, 526-27, 799 P.2d 865, 867-68 (App. 1990).

¶17 Turner received adequate due process. Despite having not been provided copies or a detailed description of the fitness-for-duty evaluation reports before his termination, Turner was fully aware of the nature of the allegations against him and had multiple chances to present his side of the story. He effectively self-reported his disability through his psychologist and provided ADPS with three separate reports from his psychiatrist over the course of the next year. His neurologist also submitted a letter. This was not a case in which an employee was terminated on a whim, or without a meaningful understanding of the grounds for termination. We conclude that the pretermination due process requirements were satisfied on these specific facts.

¶18 Well in advance of the posttermination hearing before the LEMSC, ADPS provided Turner with copies of all relevant documents, including the fitness-for-duty evaluation reports. Turner was represented by counsel at the hearing, and he was able to subpoena and examine his former chief, offer his own testimony, and present evidence. There is no indication or argument that the LEMSC was not fair and impartial, and the

LEMSC's explanation of its decision, though brief, was sufficient.

¶19 In these circumstances, we find that the parties' written exchanges before Turner's termination, when coupled with the state of his knowledge of ADPS's concerns and the evidentiary hearing after his termination, constituted adequate due process. Turner had the opportunity to present his side of the story both before and after his termination. We caution, however, that in cases where the nature of an alleged disability or grounds for adverse employment action is not so well-known to the employee, a governmental employer's failure to provide the employee with copies of pertinent records or more than conclusory explanations of its evidence before termination may deprive the employee of a meaningful opportunity to be heard and therefore run afoul of due process.

CONCLUSION

¶20 On this record we find that Turner received adequate pretermination and posttermination due process. We affirm the superior court's judgment. We deny Turner's request for attorney's fees and costs.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

ANDREW W. GOULD, Judge