IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

OFFICER SAMUEL RASH, A SINGLE MAN,
Plaintiff/Appellee,

v.

TOWN OF MAMMOTH,
MAMMOTH POLICE DEPARTMENT, AND
PINAL COUNTY EMPLOYEE MERIT SYSTEM COMMISSION,
Defendants/Appellants.

No. 2 CA-CV 2015-0100
Filed May 4, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pinal County
No. S1100CV201201479
The Honorable Daniel A. Washburn, Judge

REVERSED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Judge Miller and Judge Staring concurred.

E C K E R S T R O M, Chief Judge:

¶1 Appellants Town of Mammoth (Town) and Mammoth Police Department (Department) challenge the superior court's judgment that vacated the "Determination" of the Pinal County Employee Merit System Commission (Commission) upholding the termination of appellee Samuel Rash, a Department police officer. Appellants dispute the court's conclusion that the Commission violated Rash's right to due process by finding a "chain of command" violation not included in his letter of termination. Because we conclude Rash received adequate notice that his violation of the chain of command was a basis for termination, we reverse the superior court's judgment and affirm the Commission's determination. Our disposition makes it unnecessary to address the other arguments presented.

Factual and Procedural Background

¶2 On March 19, 2011, the Department terminated Rash's employment, effective immediately. He received a letter later that month from his former supervisor, Detective William Naber, providing formal notice of the grounds for termination. Among those grounds, the letter alleged as follows:

> Harassment of Town Official
>
> a. Your memo dated, March 15, 2011, regarding arresting the acting Town

> Manager for keeping [Department] firearms locked up in her office was an abuse of police power. As acting Town Manager, Ms. S[.] has the authority and a duty to make sure that any firearms that are not currently issued to an active police officer are ke[pt] locked up for security reasons. I had previously addressed the issue with you, as your supervisor, informing you that the issue was taken care of; yet you insisted on writing your letter threatening Ms. S[.] of arrest her [sic] for theft of 'town property'. Furthermore, on Friday, March 18, 2011, you informed me that you had contacted the Pinal County Attorney's office with the intent of carrying out your threat to arrest Ms. S[.]

¶3 Rash then pursued an appeal, which the Commission heard at the Town's request. Following an evidentiary hearing in November 2011, the Commission upheld the termination, finding the Department's action "was taken for reasonable or just cause and was neither arbitrary nor capricious." In its written determination, the Commission expressly found that "[f]or [Rash] to by-pass his supervisor, Det. Naber, regarding . . . Department issues violated [the] chain of command."

¶4 In 2012, Rash filed in the superior court a statutory special action pursuant to the version of A.R.S. § 38-1004(A) then in effect. *See* 2006 Ariz. Sess. Laws, ch. 83, § 2. Although the court initially dismissed the action, we vacated that ruling and remanded the case for further proceedings in the superior court. *Rash v. Town of Mammoth*, 233 Ariz. 577, ¶ 1, 315 P.3d 1234, 1236-37 (App. 2013). In 2015, the court determined the letter of termination had not specifically listed the chain of command as a basis for the disciplinary decision and, consequently, the Commission had violated Rash's right to due process. After the court entered a final judgment vacating the Commission's determination, the

Department and Town filed a timely notice of appeal in September 2015.

Discussion

¶5 Although the parties have failed to address the character of the present appeal and the law applicable to it, we need not decide these questions in order to resolve the case. Under the law in effect when Rash commenced his statutory special action in the superior court, this court had jurisdiction to review a judgment involving a merit system determination pursuant to A.R.S. § 12-120.21(A)(1). *See Stant v. City of Maricopa Emp. Merit Bd.*, 234 Ariz. 196, ¶ 11 & n.5, 319 P.3d 1002, 1005-06 & 1006 n.5 (App. 2014). Under the law in effect since 2015, we have jurisdiction to review such a judgment pursuant to A.R.S. §§ 38-1004(A), (D) and 12-913. *See* 2014 Ariz. Sess. Laws, ch. 240, §§ 2, 17; *see also Svendsen v. Ariz. Dep't of Transp., Motor Vehicle Div.*, 234 Ariz. 528, ¶ 13, 323 P.3d 1179, 1184 (App. 2014).

¶6 In a statutory special action proceeding, we would be obligated, like the superior court, to uphold the Commission's determination unless it "'was arbitrary and capricious or an abuse of discretion.'" *Stant*, 234 Ariz. 196, ¶ 14, 319 P.3d at 1007, *quoting* Ariz. R. P. Spec. Actions 3(c). Under the Administrative Review Act, A.R.S. §§ 12-901 through 12-914, we would similarly consider whether the Commission's action "is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." § 12-910(E); *accord Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, ¶ 13, 153 P.3d 1055, 1059 (App. 2007).

¶7 We review de novo questions of law such as the constitutionality of the process afforded a merit system employee. *Carlson*, 214 Ariz. 426, ¶ 12, 153 P.3d at 1059. Such an employee "must be provided advance notice of the specific grounds for termination so he may prepare his defense." *Id.* ¶ 17. Whether the context is civil or criminal, due process requires "a reasonable definite statement of the charge or charges," *Application of Levine*, 97 Ariz. 88, 91, 397 P.2d 205, 207 (1964), which is satisfied by information that "clearly sets forth the offense in such manner to enable a person of common understanding to know what is

intended" and to respond accordingly. *State ex rel. Purcell v. Superior Court*, 111 Ariz. 418, 419-20, 531 P.2d 541, 542-43 (1975); *see Pope v. U.S. Postal Serv.*, 114 F.3d 1144, 1148 (Fed. Cir. 1997) ("Due process requires that the charges in the notice be set forth 'in sufficient detail to allow the employee to make an informed reply.'"), *quoting Brook v. Corrado*, 999 F.2d 523, 526 (Fed. Cir. 1993).

¶8 The Department's letter of termination met this standard. As noted above, the letter alleged that Rash's memorandum to the town manager constituted "[h]arassment" and an "abuse of police power" because her storage of Department firearms had been "previously addressed" by Rash's direct supervisor and "taken care of." Rash's subsequent communication to the county attorney thus contravened an order from a supervisor and was an obvious violation of the chain of command, as the Commission found. Together, these specific actions amounted to harassment and an abuse of power precisely because they violated the chain of command. Had they been authorized or consistent with the Department's command structure, they could not have been harassment or an abuse of power. Thus, no "substantial variance" existed between the stated and actual grounds for discipline, *Carlson*, 214 Ariz. 426, ¶ 21, 153 P.3d at 1061, and the letter of termination provided sufficient notice insofar as it was "specific as to time, place and the nature of the offense charged." *Roberts v. City of Tucson*, 122 Ariz. 125, 130, 593 P.2d 679, 684 (App. 1978), *approved in relevant part*, 122 Ariz. 91, 92, 93, 593 P.2d 645, 645, 647 (1979).

¶9 The sufficiency of the notice is further illustrated by the fact that Rash presented a defense to the allegation that he had violated the chain of command. He testified at the hearing that, as the Department's "armorer" and "range master," he was responsible for ensuring its weapons were kept clean, unloaded, and securely stored in the Department's evidence locker. When Rash discovered that two Department firearms were missing, he reported this fact to his supervisor. According to Rash, the supervisor said the weapons were in the town manager's office. The supervisor also said that "she had no business having them in there, and that it was [Rash's] responsibility as range master for the safekeeping of these firearms." According to the supervisor's own testimony, he had agreed to

recover the weapons from the town manager and had made a plan to do so with Rash on a particular day, but that effort had proved unsuccessful because the manager was in a meeting. Thus, under Rash's view of the evidence, his subsequent actions to recover the weapons were consistent with "the chain of command" or, at minimum, the result of Rash "not [being] aware of the efforts [the supervisor] had made . . . to resolve the dispute" over this property.[1] Regardless of the merits of this defense, the record confirms that an ordinary person would have understood the notice to include an alleged violation of the chain of command. *See Purcell*, 111 Ariz. at 419-20, 531 P.2d at 542-43.

¶10 Although the superior court acknowledged that the letter of termination might have been "meant" to provide such notice, the court nonetheless concluded the letter was "too vague to put [Rash] on notice that a violation of the chain of command [wa]s a charge or reason for his termination." We cannot agree. As a general matter, language is not vague when it provides a "'fair and definite warning'"; "'perfect notice or absolute precision' of language" is not required. *State v. Kaiser*, 204 Ariz. 514, ¶ 9, 65 P.3d 463, 466 (App. 2003), *quoting State v. Singer*, 190 Ariz. 48, 50, 945 P.2d 359, 361 (App. 1997). Ultimately, the purpose of requiring specificity in a notice of termination is to enable an employee to prepare an explanation or defense, which Rash did here. *See Roberts*, 122 Ariz. at 129-30, 593 P.2d at 683-84. Adequate notice does not depend on formalities such as citations to specific rules or regulations, *see Schmidt v. Creedon*, 639 F.3d 587, 592-93, 594, 599-600 (3d Cir. 2011); *Carlson*, 214 Ariz. 426, ¶ 19, 153 P.3d at 1060-61, or allegations being

[1]As a factual matter, we agree with the superior court that the record supported the Commission's finding that Rash had violated the chain of command. "We will not substitute our judgment for that of the [Commission], even where the question is faulty or debatable and one in which we would have reached a different conclusion had we been the original arbiter of the issues raised." *Blake v. City of Phoenix*, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (App. 1988).

expressly included in the heading of a notice of termination. *See Allen v. U.S. Postal Serv.*, 466 F.3d 1065, 1070 (Fed. Cir. 2006).

¶11 For all these reasons, the Commission's findings did not create a "new charge" for termination, as the superior court mistakenly concluded. The letter of termination clearly described specific conduct violating the chain of command, and the Commission based its determination on the same conduct and ground that was alleged in the letter. At the evidentiary hearing before the Commission, Rash did not challenge the Town's assertion that "[p]art of [the letter of termination] had to do with insubordination," and Rash made the first explicit reference to the "chain of command" during his cross-examination of his supervisor.[2] The entire record therefore confirms that Rash received sufficient information and an adequate opportunity to defend himself against the alleged violation of the chain of command. The proceeding did not violate his due process rights.

¶12 In reaching the opposite conclusion, the superior court relied primarily on this court's decision in *Carlson*. There, the employer alleged a maximum of two grounds for the employee's dismissal: sexual harassment of a subordinate and reprisal against her for exercising her rights. *See* 214 Ariz. 426, ¶ 5 & n.2, 153 P.3d at 1057 & n.2. In his defense, the employee argued that "he did not engage in 'unwelcome sexual conduct or advances' that would constitute sexual harassment and . . . had done nothing to injure [his subordinate]'s employment opportunities." *Id.* ¶ 7. The hearing officer accepted these defenses and found the employer had failed to sustain the alleged violations of its sexual harassment policy. *Id.* ¶ 8. Nevertheless, the officer upheld the employee's dismissal on other grounds neither specified in the termination notice nor subject to these defenses. *Id.* ¶¶ 8-9. Specifically, the officer found the employee had lied about his prior consensual relationship with his subordinate, he had given her preferential treatment, and he had

[2]Rash erroneously asserted at oral argument in this court that the Commission first raised the issue of the chain of command "sua sponte."

created a conflict of interest by lending her a large sum of money. *Id.* ¶ 8.

¶13 In contrast to *Carlson*, Rash's chain-of-command violation was described and included in the allegation of harassment of a town official, as explained above. Unlike the employee in *Carlson*, Rash therefore was aware of the allegation that he had violated the Department's chain of command and had the opportunity to present a defense to this charge. There is no basis to assume here, as we did in *Carlson*, that a more specific notice would have resulted in a different defense. *See id.* ¶ 20.

¶14 That the Commission ultimately rejected Rash's defense further distinguishes this case from *Carlson*. There, "the hearing officer rejected as unproven the only *factual* basis alleged . . . in [the] dismissal notice," namely that the employee had violated the employer's sexual harassment policy by a certain e-mail and telephone call to his subordinate. *Id.* Here, the factual basis of the harassment charge was not rejected, but rather sustained, and the chain-of-command violation was not a separate issue. Hence, this was not a case where the reviewing body upheld a decision on a "'right result-wrong reason' rationale." *Id.* ¶ 9.

Disposition

¶15 For the foregoing reasons, the superior court's judgment is reversed and the Commission's determination is affirmed.