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

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHAEL J. DEMEURE, M.D.,)	2 CA-CV 2009-0054
)	DEPARTMENT A
Plaintiff/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
STATE OF ARIZONA BOARD OF)	Appellate Procedure
REGENTS,)	
)	
Defendant/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20083448

Honorable John E. Davis, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 In this appeal from an administrative decision, appellant Michael Demeure challenges the superior court's judgment affirming the decision of University of Arizona

President Robert Shelton to terminate Demeure from his position at the University of Arizona College of Medicine. Because the superior court did not err, we affirm.

Facts and Procedural History

¶2 We view the evidence in the light most favorable to sustaining President Shelton’s decision. *See Pima County v. Pima County Merit Sys. Comm’n*, 189 Ariz. 566, 569, 944 P.2d 508, 511 (App. 1997) (when reviewing administrative decision under Administrative Review Act, A.R.S. §§ 12-901 through 12-914, appellate court does not weigh evidence but merely determines if substantial evidence supports administrative findings); *see also Empire W. Cos. v. Ariz. Dep’t of Econ Sec.*, 182 Ariz. 95, 97, 893 P.2d 746, 748 (App. 1995) (appellate court affirms administrative decision if “it is supported by any reasonable interpretation of the record”); *Moore v. Ariz. Dep’t of Econ. Sec.*, 132 Ariz. 360, 364, 645 P.2d 1274, 1278 (App. 1982) (same).

¶3 Demeure is a surgeon who was hired by the University of Arizona College of Medicine (college of medicine) in 2002. Pursuant to the terms of Demeure’s employment contract, he was required, and agreed, to become a member and employee of University Physicians Healthcare (UPH)—a nonprofit corporation that manages clinical healthcare through the University of Arizona. Demeure’s college of medicine contract also mandated that he maintain his membership and employment with UPH in order to be permitted to engage in any sort of clinical medical practice. Demeure had surgery for a rotator cuff injury in 2006. His agreement with UPH permitted it to terminate the relationship if Demeure became ineligible for membership. Pursuant to the UPH bylaws, a UPH member is ineligible for membership if “such [m]ember is disabled.” Because Demeure could not practice surgery while his shoulder was

injured, UPH terminated his clinical employment agreement “until such time as [Demeure was] able to return to clinical practice.”

¶4 Once Demeure’s shoulder healed, UPH’s Interim Director of Surgery, Dr. Hugo Villar, offered to reinstate him as a UPH employee. The offer, however, required Demeure to perform surgery at Kino Hospital, as well as at University Medical Center, the hospital where he had performed surgery before his shoulder injury. UPH’s offer also denied Demeure’s request to conduct research in Phoenix if such research would conflict with his surgery schedule. Negotiation ensued but UPH’s offer eventually expired without Demeure’s acceptance, and Demeure was not reinstated as a UPH employee, although he continued to be employed by the college of medicine.

¶5 Demeure eventually began to see patients in his own private practice, which was not affiliated with the University or UPH. When UPH’s new director of surgery, Rainier Gruesser, learned about Demeure’s practice, he informed Demeure that he was in violation of his employment contract and could be terminated if he did not cease engaging in the private practice of medicine. *See* Ariz. Bd. of Regents Policy Manual §§ 6-201(J)(1), 6-212(B) (university employee may only be terminated for just cause, which includes violation of university rules and regulations). When Demeure refused to comply, Gruesser and Dr. Keith Joiner, the dean of the college of medicine, eventually recommended to the University Provost that Demeure be terminated. The Provost subsequently informed Demeure that he would recommend dismissal.

¶6 Demeure appealed the Provost’s recommendation to University President, Robert Shelton. *See id.* § 6-201(L)(3)(a) (faculty member may appeal notice of dismissal to president of university). As required by the Board of Regents’ policy manual, President Shelton forwarded Demeure’s appeal to a faculty conciliation committee. *See id.* The committee was unable to

resolve Demeure’s appeal, however, and President Shelton subsequently dismissed Demeure from his position at the college of medicine for breaching his contract by establishing his own practice. *See id.* § 6-201(L)(3)(b) (if conciliation committee unable to resolve appeal, “president shall provide the faculty member with a written notice of dismissal”).

¶7 Demeure appealed President Shelton’s dismissal. *See id.* § 6-201(L)(4)(a) (faculty member may appeal notice of dismissal). Pursuant to Board policy, Demeure was entitled to an evidentiary hearing on his appeal before the University Committee on Academic Freedom and Tenure (CAFT). *See id.* § 6-201(L)(4)(b). CAFT made a recommendation on Demeure’s appeal to President Shelton, finding that Demeure should be reinstated as a university employee. *See id.* § 6-201(L)(4)(i) (after evidentiary hearing, CAFT shall make recommendation on faculty dismissal to president). President Shelton disagreed, however, and issued a written decision affirming Demeure’s termination. *See id.* § 6-201(L)(4)(j) (president may approve, disapprove, or modify CAFT recommendation on dismissal).

¶8 After President Shelton denied Demeure’s request for reconsideration of the dismissal, *see id.* § 6-201(L)(4)(k), Demeure filed an appeal in the superior court, pursuant to the Administrative Review Act (ARA). *See id.* § 6-201(L)(4)(m) (superior court shall review president’s decision pursuant to ARA). That appeal was brought against the Arizona Board of Regents in their capacity as the employer of University of Arizona professors.¹ The superior court affirmed President Shelton’s decision, and this appeal followed.

Appeal of Dismissal

¶9 Demeure first argues the superior court erred in affirming President Shelton’s decision to terminate his employment contract with the University. “When an administrative

¹Demeure also brought a separate action against UPH.

decision is appealed to the superior court pursuant to the Administrative Review Act, the superior court decides only whether the administrative action was illegal, arbitrary, capricious, or involved an abuse of discretion.” *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 386, 807 P.2d 1119, 1122 (App. 1990) (citation omitted); *see also Berenter v. Gallinger*, 173 Ariz. 75, 77, 839 P.2d 1120, 1122 (App. 1992). This court, in turn, reviews the superior court’s judgment “to determine whether the record contains evidence to support [it]” and, therefore, necessarily reaches the same underlying issues. *Berenter*, 173 Ariz. at 77, 839 P.2d at 1122. This court will affirm an administrative decision if “any reasonable interpretation of the record” supports it. *Empire W. Cos.*, 182 Ariz. at 97, 893 P.2d at 748. We review any legal conclusions de novo. *See Tornabene v. Bonine ex rel. Ariz. Highway Dep’t*, 203 Ariz. 326, ¶ 12, 54 P.3d 355, 361 (App. 2002).

Ineligibility Claim

¶10 Demeure first contends the superior court erred in affirming President Shelton’s determination that the terms of his contract prevented him from engaging in clinical practice without being a member of UPH. He relies on that portion of the University’s agreement with UPH stating that physicians ineligible for membership with UPH are not required to join. President Shelton’s decision was based on his interpretation of the contractual requirement of UPH membership eligibility, an issue of law that this court reviews de novo.² *See Tornabene*, 203 Ariz. 326, ¶ 12, 54 P.3d at 361 (we review legal conclusions de novo).

¶11 In deciding to terminate Demeure from employment with the college of medicine, President Shelton concluded that Demeure’s rotator cuff injury may have made him ineligible for

²Although the Board of Regents argues that this court should review President Shelton’s conclusion to determine if it was “supported by substantial evidence in the record and [whether it] was not contrary to the law,” we need not resolve this dispute because the trial court did not err as a matter of law under the more stringent standard of review.

UPH membership. Shelton also concluded that Demeure was eligible for UPH membership, however, once his shoulder healed. And once Demeure was again eligible for membership, he was required to re-join UPH if he desired to engage in clinical practice. Because Demeure did not re-join UPH, and instead opened his own practice without being a UPH member, President Shelton determined that Demeure had breached the terms of his contract with the University, as well as University policy, and should be terminated from employment.

¶12 When interpreting any contract, this court must determine and enforce the parties' intent. *See U.S. W. Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996). To make this determination, "the court will [first] look to the plain meaning of the words [in the contract] as viewed in the context of the contract as a whole." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983). We may also consider the contract's surrounding circumstances and the context under which the contract was formed. *Miller v. Hehlen*, 209 Ariz. 462, ¶ 12, 104 P.3d 193, 197 (App. 2005).

¶13 Demeure's contract with the University of Arizona states that all faculty "physicians providing clinical care to patients must be employees and members of UP[H]." Demeure's member practice agreement with UPH, however, permits UPH to terminate an employee's membership and employment if the employee "becomes ineligible for [m]embership in accordance with the UP[H] Bylaws." The UPH bylaws list the "criteria" for membership, including that a UPH member must "hold a current UPH Member Practice Agreement in full force," "provide clinical services . . . on behalf of UPH and . . . [have] no independent outside clinical practice." The UPH bylaws require a doctor to have a member practice agreement in full force and to not be providing clinical services as a non-UPH physician in order to be eligible for UPH membership. Therefore, Demeure contends that his lack of membership in UPH permitted

him to engage in clinical practice pursuant to the agreement between UPH and the University permitting faculty physicians “ineligible for membership or employ” with UPH to nevertheless practice medicine.

¶14 But the Medical Services Plan between UPH and the Arizona Board of Regents states that UPH is the entity responsible for determining whether a physician is ineligible for membership and thereby permitted to engage in clinical practice without being a UPH member. And this agreement is explicitly incorporated into the terms of Demeure’s contract with the University.³ UPH determined that Demeure was eligible for membership when it offered to reinstate him as a member; the fact that Demeure refused to accept the terms of membership did not render him ineligible.⁴

¶15 Moreover, Demeure’s suggested interpretation of his contractual eligibility for UPH membership defies common sense. *See Miller*, 209 Ariz. 462, ¶ 12, 104 P.3d at 197 (courts use common sense in interpreting contracts). As explained above, Demeure contends that under the plain meaning of his contract, he is ineligible for membership with UPH because “he does not hold a current UPH Member Practice Agreement that is in full force and effect” and because

³Demeure’s contract states that his “appointment and continuing appointment with the University are contingent upon . . . continued membership and employment in good standing with UP[H] if . . . engaged in clinical care of patients” as well as “compliance with all University Medical Center rules, regulations and bylaws, University of Arizona College of Medicine and UP[H] rules, regulations, and bylaws, and other contractual obligations, including the Me[dical] Services Plan of 1985 . . . all of which are incorporated herein by reference.”

⁴In his opening brief, Demeure briefly claims that President Shelton determined his eligibility for UPH membership based upon “the testimony of several witnesses” who the CAFT had concluded to be lacking in credibility. Citing *Ritland v. Arizona State Board of Medical Examiners*, 213 Ariz. 187, 140 P.3d 970 (App. 2006), Demeure claims that President Shelton could not rely on the credibility of these witnesses unless he “cite[d] substantial evidence in the record” for his reliance. But despite any testimony that Demeure was eligible for UPH membership, we have explained that UPH necessarily determined that Demeure was eligible when it extended an offer of reinstatement. This argument is therefore without merit.

“he has an independent outside practice.” But the UPH bylaws clearly state the requirements for UPH membership. And one requirement is that the prospective member enters into a UPH member practice agreement. Although this court will look to the plain meaning of Demeure’s contract to ascertain its meaning, when a portion of the contract, if taken by itself, could have two possible meanings, we will apply the meaning that, based upon the entirety of the contract, must have been intended by the parties. *United Cal. Bank*, 140 Ariz. at 259, 681 P.2d at 411. Neither Demeure nor UPH could have intended that a faculty member who has yet to sign a membership contract with UPH would necessarily be ineligible to be a UPH member. Indeed to interpret the contract this way would mean no newly hired college of medicine employees would ever be eligible to join UPH. Nor will we interpret the contract in such a way that Demeure’s private practice in violation of the contract excuses his breach.

¶16 Demeure further argues, however, that UPH terminated him because he was ineligible for membership and claims that the Medical Services Plan, which was incorporated by reference into his contract with the University, did not permit UPH to subsequently require him to re-join once it deemed him eligible again. But Demeure conceded in his complaint to the superior court that the “Medical Services Plan of 1985 required UPH to reinstate [him] to membership in UPH in January 2007 unless it found [him] to be ineligible.” Moreover, as noted above, we will interpret contracts in accordance with common sense. *See Miller*, 209 Ariz. 462, ¶ 12, 104 P.3d at 197. So interpreted, the Medical Services Plan termination policy refers to an employee’s current status, not whether the employee had been declared ineligible at some point in the past. And UPH and Demuere could not have intended for all faculty members deemed ineligible for UPH membership at a certain point in time to remain ineligible for membership

permanently. The superior court did not err in affirming President Shelton's decision that Demeure was eligible for UPH membership.⁵

Lack of Good Faith Claim

¶17 Demeure next argues the superior court erred in affirming President Shelton's termination decision because UPH's offers of reinstatement were not made in good faith. Demeure contends that this is a question of contract interpretation that we must review de novo. *See Taylor v. Graham County Chamber of Commerce*, 201 Ariz. 184, ¶ 29, 33 P.3d 518, 526 (App. 2001) ("We review de novo . . . any issues concerning contract interpretation."). The Board of Regents asserts, however, that the question is really one of fact and claims we must simply decide "whether the President's conclusions are supported by substantial evidence." Even if we accept Demeure's contention that we should review the decision de novo, we nevertheless conclude that the Board of Regents did not have a legal duty to control UPH's employment relations.

¶18 Demeure first argues that the Medical Services Plan, the agreement between the Board of Regents and UPH, included a covenant of good faith and fair dealing, that the principle purpose of the agreement was to support the college of medicine and that, therefore, the Board had the power to control UPH to some extent. But the parties to the Medical Services Plan, who are owed the duty of good faith in that contract, are the Board of Regents and UPH, not Demeure. The fact that the agreement supports the purposes of the college of medicine does not

⁵Because we agree with President Shelton's determination that Demeure was eligible for UPH membership, we need not consider Demeure's contention that Shelton's determination was "contrary to law . . . arbitrary and capricious, [or] . . . an abuse of discretion." Moreover, this claim is unsupported and therefore waived. *See Ariz. R. Civ. App. P. 13(a)*.

somehow transmute the agreement into an obligation that the Board monitor UPH's dealings with its members.

¶19 Demeure also claims that the Board of Regents delegated to UPH its authority “for the provision of health care services.” However, Demeure cites no authority for the proposition that the Board is responsible for providing health care services. Instead, he refers only to the Board's responsibility to educate. We assume, therefore, that Demeure is referring to the Board's responsibility for the clinical aspect of the education of medical students and residents. Nevertheless, the Board did not delegate its authority to UPH but rather contracted with it for the provision of certain services. Demeure has not cited any authority to support his suggestion that the Board may not fulfill its responsibility to provide clinical education by contracting with a separate entity for that service. Thus, Demeure's argument that the Board of Regents is liable for any lack of good faith on the part of UPH is without merit.

UPH's Status as a Labor Organization

¶20 Demeure also claims that he was improperly terminated because his contractual requirement of membership in UPH violates A.R.S. § 23-1302, as well as article XXV of the Arizona Constitution. The Arizona Constitution and § 23-1302 prohibit employers from requiring employees to be members of labor organizations.

¶21 Whether UPH fits the definition of a labor organization “is a question of law that involves statutory interpretation and constitutional issues,” that we review de novo.⁶ See *Tornabene*, 203 Ariz. 326, ¶ 12, 54 P.3d at 361. When interpreting statutes, we first look to their

⁶Additionally, neither CAFT nor President Shelton made findings on the issue before President Shelton denied Demeure's request for reconsideration and commented he did “not accept Dr. Demeure's argument . . . that UPH exists as a labor organization in violation of the Arizona Constitution.”

plain meaning. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). Only when the language of the statute is unclear do we consider other factors. *Id.*

¶22 Using the same language, both article XXV and A.R.S. § 23-1302 prohibit employment discrimination based on non-membership in a labor organization. The Constitution does not include a definition of “labor organization.” *See* Ariz. Const. art. XXV. However, the statute defines a “[l]abor organization” as “any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment.” A.R.S. § 23-1301.

¶23 Demeure relies on two provisions of the agreement between UPH and the Board of Regents. The first states: “A principal purpose of this agreement is to establish a plan by which members of the clinical faculty of the College of Medicine can be compensated for rendering those clinical services which are part of the curriculum of the College of Medicine.” The second provision states that “the amount of such compensation to any such member or employee who is also an employee of the Board shall be set in consultation with and be subject to the approval of the Dean of the College of Medicine.” This provision is preceded by this clause: “Compensation to the members and employees of UP[H] for their clinical services shall be determined by UP[H].”

¶24 These provisions suggest that the Dean may have some say in the compensation paid by UPH to UPH members, not that UPH negotiates on behalf of its employees with the college of medicine. Demeure has not produced any evidence that UPH “deals” with the college of medicine on behalf of their shared employees concerning matters relating to their employment by the college of medicine. *See* § 23-1301. Thus, these provisions do not cause UPH to fall

within the definition of labor organization because they do not show that UPH was formed in whole or in part for the purpose of negotiating for its members with the college.

¶25 Demeure cites a similar statute from the National Labor Relations Act, 29 U.S.C. § 152(5), and case law interpreting it in support of his argument that the definition should have a broad meaning. But those cases do not support any attempt to expand the definition beyond that chosen by the legislature. Similarly, he refers to the subterfuge of making UPH an employer, but nothing in the record supports any suggestion of subterfuge. Consequently, UPH does not fall within the definition of a labor organization, and the requirement that Demeure be a member of UPH violates neither the statute nor the Arizona Constitution.

Conclusion

¶26 For the foregoing reasons, we affirm Demeure's termination and deny his request for attorney fees pursuant to A.R.S. §§ 12-341.01 and 12-348.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

GARYE L. VÁSQUEZ, Judge