IN THE COURT OF APPEALS OF IOWA

No. 3-248 / 12-0583
Filed August 21, 2013

WILLIAM BOWKER,
Plaintiff-Appellant,

vs.

CITY OF FORT MADISON, IOWA and CIVIL SERVICE COMMISSION OF CITY OF FORT MADISON,
Defendant-Appellees.

Appeal from the Iowa District Court for Lee County (North), Michael J. Schilling, Judge.

A police officer appeals a district court order upholding a decision to terminate his employment. **AFFIRMED.**

Curtis Dial of Law Office of Curtis Dial, Keokuk, for appellant.

Cameron A. Davidson and Benjamin J. Patterson of Lane & Waterman, L.L.P., Davenport, for appellees.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VAITHESWARAN, J.

A police officer appeals a district court order upholding a decision to terminate his employment.

I. Background Facts and Proceedings

William Bowker was a police officer with the City of Fort Madison. For approximately sixteen months, he was assigned to a county narcotics task force. He was removed for not being an effective member and returned to his regular duties with the Fort Madison Police Department.

Shortly thereafter, Bowker began a romantic relationship with the wife of the Fort Madison police chief, who was herself a reserve officer. On learning of the relationship, the chief confronted Bowker, who initially denied the allegation.

The police chief took his concerns about the relationship to the Fort Madison city manager, who authorized an investigation. The investigation was expanded to include allegations of misconduct while Bowker was part of the narcotics task force.

Following the investigation, the city manager terminated Bowker's employment. The Fort Madison Civil Service Commission affirmed the decision, as did the district court. This appeal followed.

II. Analysis

Bowker raises several issues that, in his view, mandate reversal of the termination decision: (1) the district court's reliance on conduct that took place while he was on the drug task force, (2) the district court's reliance on his relationship with the police chief's wife, and (3) the commission's failure to comply with the procedures set forth in Iowa Code chapter 80F (2009). The third issue

was not raised or decided by the district court and, for that reason, was not preserved for our review. *See Civil Serv*. *Comm'n v*. *Johnson*, 653 N.W.2d 533, 537 (Iowa 2002) ("[W]e limit our review to the same issues raised in the district court."); *Meier v*. *Senecaut*, 641 N.W.2d 532, 537, 540 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal," and, "The rule requires a party seeking to appeal an issue presented to, but not considered by, the district court to call to the attention of the district court its failure to decide the issue."). Accordingly, our analysis will be limited to the first two issues.

The standard of review bears mention. The district court conducted a de novo trial, as authorized by statute. *See* Iowa Code § 400.27. Our review of the district court's decision is similarly de novo. *Lewis v*. *Civil Serv*. *Comm'n*, 776 N.W.2d 859, 861 (Iowa 2010). "A distinguishing feature of a trial de novo as opposed to de novo review is that we do not afford a presumption of regularity to the factual determination by a board, agency, or commission." *Sieg v*. *Civil Serv*. *Comm'n*, 342 N.W.2d 824, 828 (Iowa 1983). "Unlike section 17A.19 review, on de novo review we independently construe the factual record as a whole to determine if the officer's discipline was warranted." *City of Des Moines v*. *Civil Serv*. *Comm'n*, 513 N.W.2d 746, 748 (Iowa 1994). "We confine our review to the record made before the district court." *Dolan v*. *Civil Serv*. *Comm'n*, 634 N.W.2d 657, 662 (Iowa 2001).

A. Task Force Discipline

Bowker contends he was impermissibly disciplined for his conduct on the drug task force. First, he asserts the reasons for termination "relating to the 16 months that [he] was with the Task Force . . . were not set out in the Notice of Termination." *See* Iowa Code § 400.22; *Benson v. Fort Dodge Police Pension Bd. of Trs.*, 374 N.W.2d 392, 396 (Iowa 1985) (stating the commission, in seeking to uphold the discharge was "limited to the grounds specified in the notice of charges required by Iowa Code section 400.22"). To the contrary, the notice of termination included all the reasons that were relied on in terminating Bowker, including reasons arising during his tenure on the task force.

Bowker also contends he was punished "a second time for his alleged misconduct while on the Task Force." He cites the police chief's concession that his removal from the task force was a form of discipline. We need not decide whether Bowker's removal amounted to discipline, because whether or not it did, our precedent authorizes a district court to consider prior acts of misconduct in a termination decision. *See Johnson*, 653 N.W.2d at 538 (stating an officer's prior disciplinary record may be considered "in determining whether the cumulative effect of an officer's misconduct is sufficient to warrant discharge"); *Dolan*, 634 N.W.2d at 664 ("[W]e consider Dolan's prior punished acts of misconduct as well as this current incident."); *Sieg*, 342 N.W.2d at 830 (stating evidence revealed "a consistent pattern of indifference to departmental rules and established procedures"). Those acts included sleeping on the job, missing calls to report to duty, and using the computer excessively for personal purposes.

Third, Bowker argues that it was "arbitrary and capricious . . . to use [his] alleged misconduct while in another law enforcement agency to justify termination of his employment with the Fort Madison Police Department." This contention is refuted by the police chief's testimony that Bowker was subject to Fort Madison Police Department rules while he was on the task force. All the violations arising from his time on the task force were premised on the rules set forth in the Fort Madison Police Department manual.

Finally, Bowker points to "mitigating factors," including his testimony that he did not use the internet for personal purposes any more than other employees and he "had no further alleged misconduct, other than the alleged misconduct involving the relationship with the Chief's estranged wife." *See Dolan*, 634 N.W.2d at 664 (stating court would consider "extenuating circumstances mitigating the misconduct"). In fact, Bowker was cited one additional time for sleeping on the job. He is correct, however, that other problems he experienced on the task force essentially resolved themselves. Nonetheless, he did not remain misconduct-free, choosing to engage in a romantic relationship with his supervisor's wife. His attempt to avoid the types of violations for which he was cited in the past makes little difference in the face of this new and significant rule violation, which will be discussed in more detail below. *See City of Clinton v. Loeffelholz*, 448 N.W.2d 308, 312 (Iowa 1989) (stating present incident of misconduct was "in itself an indication of poor judgment").

We conclude the district court appropriately considered Bowker's incidents of past misconduct in affirming his termination from the Fort Madison Police Department.

B. Relationship with Police Chief's Wife

The district court found that Bowker's relationship with the police chief's wife constituted misconduct "because the conduct violated several departmental rules and was a major breach of decorum." The court reasoned as follows:

> Bowker's affair with the Chief of Police's wife, who was also a reserve officer, and his lack of candor about the affair violated Rule 102 because the conduct (a) brought the department into disrepute; (b) reflected discredit on Bowker and the Chief; and (c) impaired the operation or efficiency of the department and Bowker. The affair and the subsequent deceit about the affair also violated the Canons of Ethics Article VI. The act of lying or deceit about the affair could constitute moral turpitude under Rule 103.

On our de novo review, we agree with this assessment. Several witnesses testified that Bowker's conduct was detrimental to the public interest. *See City of Des Moines*, 513 N.W.2d at 748; *Sieg*, 342 N.W.2d at 828–29. The city manager testified that the affair affected the chain of command and the chief's ability to perform his duties. He noted that the chief's "ability to possibly discipline or do other types of reassignments" might have been jeopardized. The chief seconded this opinion, stating that Bowker was within his chain of command and he was responsible for promoting him, disciplining him, and giving him assignments. Another officer explained the chief's conundrum as follows:

> [I]f the both of them were still working together at the department, the chief could not effectively make decisions, in my opinion, of Officer Bowker. Any decision he makes, if he's passed over for a promotion, disciplinary action, if he sends him on the most dangerous calls, every dangerous call he gets, he sends him to all the dangerous calls, it's going to consistently come back that he's being targeted because he had sex with his wife.

While the officer conceded that none of these events had come to pass, there was evidence that the very public affair gave the department a black eye and

caused some officers to question whether they would want to work with Bowker. *See Caruso v. City of Cocoa*, *Florida*, 260 F. Supp. 2d 1191, 1209 (M.D. Fla. 2003) ("When a law enforcement officer engages in an extramarital affair with the spouse of a subordinate officer, such behavior could undermine the trust of both the public and fellow officers."); *Mercure v. Van Buren Twp*., 81 F. Supp. 2d 814, 827 (E.D. Mich. 2000) ("Plaintiff's partner in his relationship was not a third party or mere stranger with no connection to Defendant's police department; rather, he choice [sic] to enter into a relationship with the wife of his superior officer on the force, Sergeant Yono. The courts have frequently recognized the critical importance of cohesiveness among fellow officers on a police force.").

We recognize that other officers in the department were not disciplined for having affairs. The key difference in those cases was the absence of evidence that their affairs implicated the chain of command. In light of this distinction, we conclude the decision to terminate Bowker was not arbitrary or capricious, as he contends.

AFFIRMED.