STATE OF MICHIGAN

COURT OF APPEALS

THOMAS W. ROSE,

Plaintiff-Appellant,

v

HOUGHTON LAKE AMBULANCE SERVICE a/k/a HOUGHTON LAKE EMS a/k/a HOUGHTON LAKE AMBULANCE,

Defendant-Appellee.

UNPUBLISHED
March 16, 2004

No. 242327
Roscommon Circuit Court
LC No. 01-722731-CZ

Before: Fitzgerald, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying his appeal from defendant's administrative decision to terminate his employment as an emergency medical technician (EMT) after it held a Veteran's Preference Hearing before the Ambulance Board, pursuant to the Michigan Veterans Preference Act (VPA), MCL 35.401 *et seq*. We affirm.

Plaintiff first argues that his due process rights to a fair and impartial hearing were violated because two of the five members of the Ambulance Board had an employer/employee relationship that was not disclosed before plaintiff was terminated. After de novo review, we disagree. See *In re Carey*, 241 Mich App 222, 225-226; 615 NW2d 742 (2000).

The VPA "was enacted for the purpose of discharging, in a measure, the debt of gratitude the public owes to veterans who have served in the armed services in time of war, by granting them a preference in original employment and retention thereof in public service." *Sherrod v Detroit*, 244 Mich App 516, 523; 625 NW2d 437 (2001), quoting *Valentine v Redford Twp Supervisor*, 371 Mich 138, 145; 123 NW2d 227 (1963). The VPA converts at-will public employment positions into ones that are terminable only for just cause. *Jackson v Detroit Police Chief*, 201 Mich App 173, 176; 506 NW2d 251 (1993). Accordingly, it grants veterans a property interest in continued employment and, thus, such property interest cannot be deprived without "appropriate procedural safeguards," i.e., in violation of due process. *Sherrod*, *supra* at 523-524, quoting *Cleveland Bd of Ed v Loudermill*, 470 US 532, 541; 105 S Ct 1487; 84 L Ed 2d 494 (1985).

"A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Michigan Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). A

showing of actual bias is not necessary—a decisionmaker may be disqualified "where 'experience teaches that the probability of actual bias on the part of the . . . decisionmaker is too high to be constitutionally tolerable.'" *Id*., quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). The situations considered to present that risk are where the judge or decisionmaker (1) has a pecuniary interest in the outcome, (2) was the target of personal abuse or criticism from the party before him, (3) was involved in other matters related to the party, or (4) might have prejudged the case because of prior participation in the matter. *Crampton*, *supra*. In these types of situations the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id*. at 356.

Plaintiff has failed to persuade us that he was deprived of his due process right to an impartial and unbiased decisionmaker. That one retired Board member was employed for fourteen hours a month earning minimum wage in the employment of another Board member while collecting a pension from Detroit Edison, as well as Social Security, is not persuasive. Plaintiff's reliance on two distinguishable cases—*Albion Public Schools v Albion Educ Ass'n/MEA/NEA*, 130 Mich App 698; 344 NW2d 55 (1983) and *Glass v Mackie*, 370 Mich 482; 122 NW2d 651 (1963)—is misplaced. In both of those cases the decisionmaker had a significant interest in the outcome of the administrative proceeding over which he presided and, thus, presented an intolerable risk of bias. That is not the situation presented by the facts of this case. Review of the record deliberations fails to support plaintiff's claim as well. In sum, the employment relationship did not give rise to bias or even the appearance of bias; therefore, plaintiff has failed to establish a due process violation on this ground.

Next, plaintiff argues that he did not receive proper notice of the charges against him in violation of the VPA and rudimentary due process. After de novo review, we disagree. See *In re Grant*, 250 Mich App 13, 14-15; 645 NW2d 79 (2002); *In re Carey*, *supra*.

The VPA provides in relevant part:

> No veteran . . . holding an office or employment in any public department or public works of the state or any county, city or township or village of the state . . . shall be removed or suspended . . . except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency; and such veteran shall not be removed . . . except after a full hearing . . . and at such hearing the veteran shall have the right to be present and be represented by counsel and defend himself against such charges; Provided further, That as a condition precedent to the removal . . . of such veteran, he shall be entitled to a notice in writing stating the cause or causes of removal . . . at least 15 days prior to the hearing above provided for . . . . [MCL 35.402.]

The VPA requires that the veteran receive "notice in writing stating the cause or causes of removal," MCL 35.402, and rudimentary due process requires "timely written notice detailing the reasons for proposed administrative action," *Sponick v Detroit Police Dept*, 49 Mich App 162, 189; 211 NW2d 674 (1973).

Here, the first "notice in writing" of disciplinary action subject to the Veteran's Preference Hearing indicated that the charges against plaintiff included an alleged slapping

incident "and also certain previous inappropriate behavior and/or sub-standard performance as an EMS employee." The second "notice in writing" included reference to enclosed documentation, records, and plaintiff's personnel file, as well as the direction that such information "should give you complete details of all charges"—a reasonable indication that plaintiff's entire disciplinary history was going to be presented to the Board. The third "notice in writing" set forth in detail the following charges against plaintiff: (1) he never conducted himself in a professional manner, (2) he damaged ambulance equipment in 1993, (3) he called a female co-worker a foul name in 1993, (4) he was insubordinate and failed to follow procedures in 2000 – which were subject to a previous Veteran's Preference Hearing, (5) he displayed inappropriate conduct toward management and co-workers, and (6) he allegedly struck a patient. In other words, he was being terminated because of a long history of "official misconduct" and/or "habitual, serious or willful neglect in the performance of duty." See MCL 35.402. Plaintiff was also provided with supporting documentation related to the charges.

In light of the record, plaintiff's claim of insufficient notice is without merit. It is clear that plaintiff had adequate notice that defendant was seeking his termination because of his repeated failure to conform his conduct to that which is appropriate for an EMT and a member of defendant's ambulance crew. It is evident that this disciplinary action was the culmination of a long history of "official misconduct" and/or "habitual, serious or willful neglect in the performance of duty," MCL 35.402. Therefore, the trial court properly dismissed this claim.

Next, plaintiff argues that his due process rights were violated because some of the charges against him were raised in a previous Veteran's Preference Hearing and, thus, were barred from reconsideration by the doctrine of collateral estoppel. After de novo review, we disagree. See *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999); *In re Carey*, *supra*.

The doctrine of collateral estoppel bars "relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).

At the conclusion of the Veteran's Preference Hearing held in November of 2000, the Ambulance Board's attorney was going to open the meeting with a statement. Plaintiff's counsel objected to such procedure and a member of the Board responded: "There's no question this Board has not made any decision. We'll make some decision, but our attorney is here to make statements relative to the law, not decisions." Thereafter, the attorney read the following statement into the record:

> I have reviewed each of the allegations presented to this Board which involved Thomas Rose's misconduct. It is my opinion that each of the allegations is true, and that the allegations are sustainable at a hearing of this type. It is further my opinion that management acted properly and was justified in moving as it did.
>
> With that said, it is my legal opinion that Thomas Rose is a veteran, falling under what is known as the Veteran's Preference Act, and, as such, he can only be removed or suspended for official misconduct, habitual, serious or willful neglect

> in the performance of duty, extortion, conviction of intoxication, conviction of a felony, or incompetence.
>
> After reviewing the case law on the subject, and conferring with other counsel, I do not believe that Mr. Rose's actions are of a nature that meet the requirements for termination under the Michigan Veteran's Preference Act.
>
> It is therefore my recommendation to this Board that it not act on the remaining allegations, and that Mr. Rose be reinstated.

Then another member of the Board made the following motion:

> "I hereby move that, based upon the recommendation of our attorney, this Board not proceed on the remaining allegations against Thomas Rose, and that he be reinstated at this time.

The motion was supported and passed and the meeting was adjourned.

As evidenced by the discussion noted above, the matter was not adjudicated, i.e., the Board did not render *any* decision on the merits but rather, on the advice of counsel, decided not to proceed on the matter. The previous hearing did not culminate "in a valid final judgment" and the issue of plaintiff's misconduct was not "actually and necessarily determined in the prior proceeding." See *Ditmore*, *supra*. Contrary to the three inapposite cases relied on by plaintiff—*Minicuci v Scientific Data Management, Inc*, 243 Mich App 28; 620 NW2d 657 (2000), *Dearborn Heights School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120; 592 NW2d 408 (1998), *Ingham Co Employees' Ass'n v Ingham Circuit Court*, 170 Mich App 118; 428 NW2d 7 (1988)—here no factual determinations essential to the action were rendered. Accordingly, the collateral estoppel doctrine did not apply with regard to charges made in the previous hearing.

Next, plaintiff argues that his termination was retaliatory for asserting his right to a Veteran's Preference Hearing. We disagree. Although discharging an employee for exercising a right conferred by a well-established legislative enactment is actionable, *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 695-696; 316 NW2d 710 (1982), plaintiff has failed to carry his burden of establishing a causal connection between the assertion of that right and his discharge. The record evidence supported the Ambulance Board's conclusion that plaintiff had a long history of "official misconduct" and "habitual, serious or willful neglect in the performance of duty" as defined by the VPA.

Plaintiff also argues that his due process rights were violated because the Ambulance Board considered disciplines over a year old in violation of its own policy. However, plaintiff has failed to provide a copy of this policy and has failed to support this claim with any persuasive authority. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). The case of *Konyha v Mount Clemens Civil Service Comm*, 393 Mich 422; 224 NW2d 833 (1975) relied on by plaintiff is not on point since there the Firemen and Policemen's Civil Service Act, MCL 38.514, specifically prevented consideration of charges older than 90 days. Accordingly, this issue is without merit.

Next, plaintiff argues that there was insufficient evidence to support the Ambulance Board's termination decision. The trial court's review of this claim is limited to whether the decision and findings of the administrative agency were supported by competent, material, and substantial evidence on the whole record. *Bajis v Dearborn*, 151 Mich App 533, 537-538; 391 NW2d 401 (1986). This Court's review of the trial court's decision is limited to whether the trial court applied the correct legal principles or misapprehended the substantial evidence test. *In re Grant*, *supra* at 18.

As previously discussed, the VPA effectively converts a veteran's at-will public employment into "just-cause" employment. The just-cause is defined under the VPA in this case and includes "official misconduct" and "habitual, serious or willful neglect in the performance of duty." The Ambulance Board's decision to terminate plaintiff was required to be supported by competent, material, and substantial evidence. *In re Grant, supra*. "Substantial evidence is any evidence that reasonable minds would accept as sufficient to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence." *Id*. at 18-19.

Here, the trial court held that, although it might have reached a different result, the Ambulance Board's decision was supported by sufficient evidence. We agree. Plaintiff's discharge was supported by substantial, competent and material evidence in the form of witness testimony, incident reports, reprimands, and written complaints by co-employees which all support the Board's decision. We also reject plaintiff's claim that termination was excessive in light of the record evidence.

Next, plaintiff argues that defendant violated the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*., because the Ambulance Board considered records that were not included in plaintiff's personnel file. After de novo review of this issue of statutory interpretation, we disagree. *Atchison v Atchison*, 256 Mich App 531, 534-535; 664 NW2d 249 (2003).

MCL 423.502 provides, in relevant part, as follows:

> Personnel record information which was not included in the personnel record but should have been as required by this act shall not be used by an employer in a judicial or quasi-judicial proceeding. However, personnel record information which, in the opinion of the . . . hearing officer in a quasi-judicial proceeding, was not intentionally excluded in the personnel record, may be used by the employer in the . . . quasi-judicial proceeding, if the employee agrees or if the employee has been given a reasonable time to review the information.

Here, the hearing officer granted plaintiff time in which to review the disputed information following his objection. Plaintiff neither indicates how much time was allotted for his review nor explains how he was prejudiced; he simply argues that the time permitted was not sufficient. Under these circumstances, we will not second-guess the hearing officer's discretion. Further, even if the disputed personnel information should not have been admitted as evidence, plaintiff has failed to establish that this evidentiary error warrants reversal. See MRE 103(a).

Plaintiff next argues that the record evidence did not support the Ambulance Board's determination that he slapped a patient. It is unclear from the record whether the Board made

such finding, however, that was not the ground for plaintiff's termination. Accordingly, we will not consider this moot issue. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Finally, plaintiff argues that the cumulative effect of errors justifies reversal of the Ambulance Board's decision to terminate his employment. As we have rejected all of plaintiff's claims of error, this issue is without merit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra