# STATE OF MICHIGAN

# COURT OF APPEALS

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VIVIAN R. AKERS,

Petitioner-Appellee,

v

MICHIGAN CIVIL SERVICE COMMISSION,

Respondent-Appellant.

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UNPUBLISHED
August 10, 2004

No. 246703
Wayne Circuit Court
LC No. 02-222269-AA

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Respondent appeals by leave from the order reversing and remanding petitioner's claim to the Michigan Civil Service Commission. We reverse.

Petitioner was employed by the Family Independence Agency ("FIA") beginning in January 1995. On April 5, 2000, petitioner received a notice of charges, which stated that petitioner was charged with violation of employee work rules, and a notice of discipline, which stated that petitioner was dismissed from state service effective 5:00 p.m. the same day. Petitioner was dismissed from her employment because she wrote a reference letter on FIA letterhead. The letter, which was not signed by petitioner, stated the following:

> To Whom It May Concern:
>
> This is a reference for Ms. Lanita M. Moore with whom I worked for one year. During Ms. Moore's tenure here in the Office of Human Resources she was truly an asset. She is professional and has excellent interpersonal communication skills. Ms. Moore won the respect of everyone in the department with her confidence and capabilities. The image she projects demonstrates competence and control. Ms. Moore is a team player who knows how to get to the root of the problem if there is one. She is a quick learner that understands the tasks set before her and is very helpful with her suggestions. She is perceptive and in fact on several occasions noticed very important things that I had over-looked. Ms. Moore writes excellent, concise, reports and is very efficient in her work.
>
> If you have further questions, please call me at . . . . She would be an asset to anyone's staff.

Sincerely,

Vivian R. Akers

Secretary/Selections Unit

The issue before the hearing officer was whether petitioner's dismissal from employment for writing the above letter was for just cause. Respondent asserted that by writing the above letter, petitioner violated three FIA rules: (1) actual or attempted falsification of records (work rule 7); (2) actual or attempted misuse, abuse or theft of state property (work rule 8); and (3) conflict of interest (work rule 12). Testimony at the hearing revealed that petitioner was not a secretary when the letter was written, but rather a word processing assistant; that Moore was not a regular employee of the FIA, but rather volunteered for approximately a month; and that Moore never wrote reports as a volunteer. The hearing officer found that the letter contained some, but not all the misrepresentations asserted by respondent. Regarding the allegation that petitioner misrepresented that she supervised Moore, the hearing officer found that petitioner did not represent herself in the letter as having been Moore's supervisor, nor did the letter imply such a relationship. As to the other statements in the letter, the hearing officer stated:

> Contrary to her assertions in the letter, (1) Grievant did not work with Moore for the period of one year; (2) though the inference drawn from a fair reading of the letter is that Grievant was indicating that Moore had been an employee of the FIA, the fact is that Moore was a volunteer; and (3) Grievant was not classified as a secretary as she indicated in the appellation below her name.

After making the above findings, the hearing officer concluded that although the letter contained false statements, it had nothing to do with the business of the FIA; thus, it could not be deemed to be a record or report covered by work rule 7. However, the hearing officer concluded that use of the FIA stationery for this reference letter constituted misuse of state property within the meaning of work rule 8. Finally, the hearing officer concluded that petitioner's actions did not constitute the creation of a conflict of interest within the terms of the provisions contained in the handbook. Based on the above stated conclusions, the hearing officer determined that the dismissal of petitioner was excessive given that only one of the charges was actually proved by respondent. Thus, the hearing officer imposed a ten-day suspension.

Respondent appealed as of right the decision of the hearing officer. Respondent argued that the hearing officer erroneously misinterpreted work rules 7 and 12 and abused his discretion when he substituted his own interpretation of the work rules for that of the employer. The Employment Relations Board ("ERB") found that the use of respondent's stationery to create a record containing intentionally false and misleading information was a violation of work rule 7. The ERB also found that the hearing officer erred in finding that petitioner did not violate work rule 12. The ERB stated:

> First, Appellee provided for Moore information not accessible to the general public and which allowed for Moore's personal and financial gain. Second, Appellee engaged in a business transaction or private arrangement based on her

> official position, or information gained from her position as a staff member in the Human Resources Office, which allowed for Moore's personal gain. Third, Appellee gave Moore an advantage or favor beyond that which is the general practice with others under similar conditions.

Because the ERB found that petitioner did violate all three work rules with which she was charged, it recommended that the hearing officer's decision to reduce the dismissal to a ten-day suspension be vacated and petitioner be dismissed from state service. The Michigan Civil Service Commission approved and adopted this decision.

Petitioner appealed the decision to the circuit court. The circuit court found that the reference letter was not an FIA document, that the statements in the letter were petitioner's beliefs and did not constitute an official statement, and that there was no conflict between the FIA and Moore. Respondent contends that the circuit court exceeded its constitutional authority and improperly substituted its judgment by reversing the Michigan Civil Service Commission's decision to dismiss petitioner for violating the three employee work rules.

This Court must determine "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Dana v American Youth Foundation,* 257 Mich App 208, 211; 668 NW2d 174 (2003) citing *Boyd v Civil Service Comm,* 220 Mich App 226, 234; 559 NW2d 342 (1996). This is essentially a clearly erroneous standard of review. *Hanlon v Civil Service Comm,* 253 Mich App 710, 716 ; 660 NW2d 74 (2002). On direct review of an agency decision, the trial court must determine whether the administrative action was authorized by law and whether the decision was supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 25; *Boyd, supra* at 232, citing *Viculin v Dep't of Civil Service,* 386 Mich 375; 192 NW2d 449 (1971).

The issue in this case is whether the Michigan Civil Service Commission's decision was supported by competent, material, and substantial evidence on the whole record. "The substantial evidence test requires that a decision be supported by evidence that a reasonable person would accept as sufficient." *Cogan v Osteopathic Med Bd,* 200 Mich App 467, 469-470; 505 NW2d 1 (1993) (citations omitted). Substantial evidence is more than a mere scintilla, but somewhat less than a preponderance. *Id.* at 470.

Work rule 7 states that an employee might be counseled or disciplined for "actual or attempted falsification of records or reports." The handbook also contains a section titled "FALSIFICATION OF AGENCY RECORDS," which states the following:

> Falsification of records, printed or computerized, including knowingly making untrue or unauthorized changes to any record is a serious offense, which could result in disciplinary action up to and including dismissal . . . Falsification of the Pre-Employment Application (CS-1502) and all other paperwork, including time reports and travel vouchers as an employee completes after appointment are also included. Additional examples are as follows:
>
> - referencing home calls, phone calls or personal visits which never occurred,

- providing falsified medical statements,
- indicating that certain required actions were completed when they are not,
- filing false claims for reimbursement of travel or other costs,
- deliberately recording inaccurate names, addresses, dates or other information,
- changing information on any electronic data base system without proper documentation, computations or appropriate actions being completed, sometimes accomplished through a "computer review." For example:
- changing a review on the FIA-5 or other eligibility authorization document and entering or causing the information to be entered into CIS without having obtained proper documentation.

* * *

The above examples are not intended to be all inclusive.

The ERB stated that "[a]lthough Appellant's policies and work rules concerning employee conduct are often written in terms that are predominantly applicable to those in its employ delivering services to welfare clients, these policies and Work Rules also apply to other employees as well, and must be interpreted that way." The ERB found that petitioner created an unauthorized document on respondent's stationery, thus, creating an apparent official agency record. The ERB stated that in this record, petitioner implied that she had worked with Moore for a year at the FIA and misrepresented her status with respondent. The circuit court questioned the ERB's conclusion that this letter was an official agency record. The circuit court asked respondent's counsel what false record petitioner created, and she responded, "When Work Rule 7 is read in relation to the FIA employee handbook 11 which says, you are not to deliberately record inaccurate information."

We found no definition of "record" or "report" in the portions of the employee handbook that were admitted into evidence at the grievance hearing. "Although an administrative agency's interpretation of its own rule is entitled to deference, *Reiss v Pepsi Cola Metro Bottling Co, Inc*, 249 Mich App 631, 637; 643 NW2d 271 (2002), courts apply principles of statutory construction in construing administrative rules." *In re Consumers Energy Co*, 255 Mich App 496, 503-504; 660 NW2d 785 (2003) citing *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services*, 431 Mich 172, 185; 428 NW2d 335 (1988). Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, considering the context in which the words are used. *Lewis v LeGrow*, 258 Mich App 175, 183; 670 NW2d 675 (2003) citing *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). A dictionary may be consulted to determine the meaning of undefined words. *Id.* citing *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001).

*Random House Webster's College Dictionary* (2000) defines record as: "information or knowledge preserved in writing or the like; a report, list, or aggregate of actions or

achievements." Report is defined as follows: "a detailed account of an event, situation, etc., usually based on observation or inquiry." *Id*. Based on these definitions, we find that the reference letter at issue comes within the above definition -- that this letter, prepared on FIA letterhead, preserved information regarding the abilities and qualities of Moore, a volunteer with the FIA.

The next question is whether there was competent, material, and substantial evidence to support the finding that the above letter contained false statements. At the grievance hearing, there was testimony about the inaccuracies contained in this letter. Mildred Wilson stated that petitioner was demoted from secretary to word processing assistant, therefore, she was not a secretary to the selections unit as the letter stated. On the other hand, petitioner stated that she considered herself a secretary. According to petitioner, she worked for the selections unit even after being demoted. Petitioner stated, "I was still doing work through October for the Selections Unit." We note that petitioner did not state the year. However, petitioner was terminated in April 2000, so it appears that petitioner meant that she continued working as a secretary for the selections unit through October 1999. The letter in this case was written in December 1999. Even petitioner's own testimony reveals that she was not a secretary and was not doing secretarial duties at the time this letter was written.

Regarding the other alleged misrepresentations contained in the letter, there was testimony from Wilson, and Moore herself, that Moore was not a regular employee, but rather had volunteered for approximately a month. Wilson was asked if Moore ever wrote reports as a volunteer, and she responded, "No, not to my knowledge." According to petitioner, Moore did work for the Daughters of the Sisters of Sheba newsletter, and that is how she knew Moore's work to be good.

This Court will overturn the circuit court's decision only if it is left with the definite and firm conviction that a mistake has been committed. *Glennon v State Emp Ret Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003). "Further, under Michigan law, a reviewing court may not substitute its judgment for that of an administrative agency if substantial evidence supports the agency's decision." *Id.* at 478-479.

In its ruling on the record, the circuit court addressed the statements contained in the letter. Regarding the statements, "This is a reference for Ms. Lanita M. Moore with whom I worked for one year. During Ms. Moore's tenure here in the Office of Human Resources she was truly an asset," the circuit court stated:

> Well, you can say well, was that at the agency? Well, she doesn't say at the agency. She says she worked with her one year. And then she says, her tenure here in the office. She doesn't say she was there for a year; she just said her tenure. Well, if she was there for 30 days, 60 days, I guess that's her tenure.

We find that the circuit court relied upon petitioner's statement at oral argument that she and Moore had worked together for a year at the Daughters of the Sisters of Sheba. We note that while petitioner stated at the grievance hearing that she knew Moore from the Sisters of Sheba, she did not state that they had worked together at this organization for a period of one year. Therefore, we conclude that the circuit court relied on testimony that was not offered at the

previous hearing, and then substituted its judgment for that of the Michigan Civil Service Commission.

Regarding the statement that Moore wrote excellent and concise reports, the circuit court stated:

> Maybe she does. Maybe she wrote some reports about these people that she had at the Daughter of Sheba or somewhere else.

Again, we find that the circuit court relied upon petitioner's statements at the oral argument that she knew Moore's work, i.e., writing articles for the Sisters of Sheba newsletter, to be good. Therefore, we conclude that the circuit court substituted its judgment for that of the Michigan Civil Service Commission.

Respondent also contends that the trial court erred in finding that petitioner did not violate work rule 12. Respondent argues that it was clearly a conflict of interest for petitioner to fabricate a reference letter that was patently contrary to FIA interests.

Work rule 12 states that an employee may be disciplined for becoming involved in a conflict of interest situation. The handbook contains a section titled "CONFLICT OF INTEREST AND DISCLOSURE OF INTEREST" that states the following:

> Each employee's conduct is to be such that their private activities with respect to clients or recipients of agency services or businesses or individuals with which the agency contracts do not conflict, in fact or appearance, with any of their official responsibilities.
>
> You or your immediate family, must not create or knowingly allow to be created any situation which is, or appears to be, in conflict of interest with your duties and responsibilities as a state employee.
>
> * * *
>
> Basically, you are not to:
>
> 1. Provide to family or friends information which is not accessible to the general public and which would allow for the personal or financial gain of you or those persons.
>
> You are not prevented from divulging information to proper authorities if you believe laws, rules or regulations are being violated unless the information is confidential by law, court order or professional record.
>
> 2. Engage in any business transaction or private arrangement which is based on, or possible because of your official position or on confidential information gained from your position, and which will allow your own personal gain or that of others.

The ERB found that petitioner violated work rule 12 in that she provided Moore information not accessible to the general public, which allowed for Moore's personal or financial

gain; engaged in a business transaction or private arrangement based on her official position, or information gained from her position as a staff member in the human resources office, which allowed for Moore's personal gain; and gave Moore an advantage or favor beyond that which is the general practice with others under similar conditions. The circuit court found that there was no conflict of interest because Moore was not an employee of the FIA and that the letter was not submitted in response to any inquiry for the recommendation.

Testimony revealed that petitioner supplied Moore with this letter of recommendation that gave the impression that Moore had worked with the FIA for a substantial period of time and that her work with the FIA, i.e., writing reports, was excellent. In reality, Moore was a volunteer with the FIA for approximately a month, and did not write reports as a volunteer. Another volunteer, similarly situated, would not have received the benefit of such a letter of recommendation. In addition, this letter of recommendation was intended to cause a personal gain for Moore, that being improving her chance of obtaining employment. Thus, we conclude that the Michigan Civil Service Commission's decision that petitioner's actions came within this work rule was supported by competent, material, and substantial evidence, and that the circuit court clearly erred in reversing the commission's decision.

Reversed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad