STATE OF MICHIGAN

COURT OF APPEALS

MARK A. ENSZER,

Petitioner-Appellee,

v

CIVIL SERVICE COMMISSION,

Respondent-Appellant.

UNPUBLISHED
June 28, 2011

No. 295439
Ingham Circuit Court
LC No. 08-000569-AA

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals by leave granted from the circuit court's order reversing its decision to affirm the Department of Correction's (DOC's) termination of petitioner's employment. We vacate the circuit court's order and remand to the circuit court for entry of an order affirming respondent's decision.

Petitioner had been employed with the DOC's Saginaw Correctional Facility for 20 years, 13 of them as a Resident Unit Manager, which was a supervisory position and a position of authority and trust. On October 1, 2005, petitioner attempted to leave a Cabela's store with nearly $2,000 worth of merchandise without paying. Afterwards, an investigator discovered that petitioner had, on several occasions, filled up his car with gas and left without paying; that he had questionable disputes with credit card companies in which he claimed he had never received purchased items and demanded a refund, or claimed that he had returned items; that one online merchant refused to do business with petitioner because he had claimed that nine separate items were either lost or returned; that two merchants recalled receiving empty boxes from petitioner when he claimed to have returned items; and that another merchant claimed that petitioner "committed fraud with them" and that petitioner had "'burned' them twice."

Based primarily on the Cabela's incident, the DOC terminated petitioner's employment. After he contested the discharge, the Employment Relations Board (ERB) recommended that the discharge be upheld. Respondent agreed. Petitioner appealed respondent's decision to the circuit court. The circuit court concluded that there was sufficient evidence to establish that petitioner had violated work rules, but remanded for further proceedings related to the decision to terminate petitioner's employment rather than impose some lesser form of discipline. On remand, the DOC again decided to terminate petitioner's employment and the ERB again recommended that the discharge be upheld. Respondent approved the ERB's recommendation.

Nevertheless, the circuit court reversed respondent's decision and ordered that petitioner be subjected to discipline of two years' suspension without pay and that he be reinstated to his former DOC position.

Respondent argues that the circuit court's determination should be reversed because respondent's decision was authorized by law and supported by competent, material, and substantial evidence on the whole record, and was neither arbitrary nor capricious. Respondent further contends that its decision was not given due deference and that the circuit court impermissibly reversed respondent's determination merely because it disagreed with the balancing of the evidence. We agree.

We review a circuit court's review of an agency's decision under the clearly erroneous standard. *Glennon v State Employees' Retirement Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003). In reviewing an administrative agency's decision, a circuit court "is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002); see also Const 1963, Art 6, § 28. Substantial evidence means "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). When this Court reviews a circuit court's review of an agency's decision, we "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." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). We overturn the circuit court's decision "only if we are left with the definite and firm conviction that a mistake has been committed." *Glennon*, 259 Mich App at 478.

MCL 24.306, a provision of the Administrative Procedures Act, states in pertinent part:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> * * *
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

Judicial review of respondent's decisions is established by MCL 600.631. If substantial evidence for an agency's decision exists, "the circuit court may not substitute its judgment for that of the agency, even if the court might have reached a different result." *Vanzandt v State Employees' Retirement Sys*, 266 Mich App 579, 584; 701 NW2d 214 (2005). Similarly, a court

may not substitute its findings for that of an agency merely because alternative findings also could have been supported by substantial evidence on the record. *Payne*, 444 Mich at 692. Deference must be given to an agency's findings of fact, particularly as to evidentiary conflicts and credibility of witnesses. *Vanzandt*, 266 Mich App 588. Additionally, courts must give "great deference to administrative expertise in choosing between two reasonably differing views." *UPS, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 201; 745 NW2d 125 (2007).

We find that there was substantial evidence to support respondent's decision concluding that the DOC's discharge of petitioner was appropriate. A surveillance tape from Cabela's shows petitioner removing tags from merchandise, placing more than $1,900 worth of merchandise into a shopping cart, and exiting the store without stopping at the cash registers. Furthermore, while petitioner's conduct ultimately resulted in a no-contest plea to a misdemeanor conviction, his conduct was sufficiently egregious such that he was charged with a felony. In light of the surveillance video evidence and the criminal charge and conviction against petitioner, it cannot be said that no reasonable mind would accept the evidence as sufficient to support respondent's decision to affirm the DOC's discharge of petitioner. Although it might have been reasonable to conclude that a lesser discipline was warranted based on the evidence, the decision of whether to discharge petitioner represented a choice between "two reasonably differing views." *UPS*, 277 Mich App at 201. Further, the DOC discipline coordinator testified that lesser sanctions, including demotion, were considered, but rejected in light of petitioner's actions, the charges, the fact that he was a high ranking supervisor, and the fact that, even if he were demoted, he would still be supervising some prisoners incarcerated for actions similar to his own. While the circuit court could have reasonably disagreed with respondent's decision to affirm the DOC's discharge of petitioner, the circuit court's finding that respondent's decision was unsupported by substantial evidence constituted a substitution of the circuit court's judgment for that of respondent's. It did not reflect the appropriate level of deference that was owed to respondent. *Vanzandt*, 266 Mich App at 584. Therefore, the circuit court misapplied the substantial evidence test to respondent's findings.

Further, it appears that the circuit court misunderstood the burden of proof regarding the appropriateness of the discharge decision. The circuit court agreed that the DOC established just cause to discipline petitioner. However, it then held, "[I]t's the burden of the Department to A- Show a violation, and B- show by a preponderance of the evidence that the sanction imposed is appropriate." This is contrary to CS Regulation 8.01, Standard 4(B)(13)(c)(2), which provides:

> If the appointing authority proves that there was just cause to discipline the grievant, a hearing officer *cannot alter the discipline imposed* by the appointing authority *unless the grievant proves by a preponderance of the evidence* that the particular discipline imposed by the appointing authority (1) violated a civil service rule or regulation, (2) violated a departmental work rule, or (3) was arbitrary or capricious.

Thus, contrary to the circuit court's assertion, once the DOC proved just cause, it did not bear the burden to show the discipline was appropriate. Rather, petitioner bore the burden to show the discipline was inappropriate.

Furthermore, even assuming that the circuit court had recognized that petitioner, rather than the DOC, bore the burden of proof related to whether the decision was arbitrary or capricious, the circuit court clearly erred in concluding that respondent's decision was arbitrary and capricious. "Arbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance. Capricious means apt to change suddenly, freakish, or whimsical." *Binsfeld v Dep't of Natural Resources*, 173 Mich App 779, 786; 434 NW2d 245 (1988).

Following its initial review of respondent's decision, the circuit court remanded and ordered the DOC to "consider the entire record, including [petitioner's] work and community service record." Additionally, the court indicated that discharge would be arbitrary and capricious unless the DOC could show that, prior to petitioner's discharge, it had discharged other employees for behavior similar to petitioner's. Relying on the case of *Battiste v Michigan Dep't of Social Services*, 154 Mich App 486; 398 NW2d 447 (1986), the court concluded that in the absence of such a showing, only a two-year suspension would be warranted.

The circuit court's reliance on *Battiste* is misguided. It does not stand for the absolute proposition that discipline involving suspension without pay in excess of two years would be excessive, as well as arbitrary and capricious. *Battiste* involved a Department of Social Services hearing officer who ordered his supervisor and deputy director to "cease and desist" from ordering rehearings of his cases. *Battiste*, 154 Mich App at 490. Thereafter, the hearing officer was dismissed for conduct unbecoming a state employee and failure to carry out the duties of his office. *Id.* at 491. The circuit court remanded the case to the ERB, directing that any sanction exceeding two years' suspension without pay would be arbitrary and capricious in that case. *Id.* at 492. This Court upheld the circuit court's remand, finding that it was reasonable and supported by substantial evidence on the record based on the facts of that case. *Id.* at 494-495. However, the Court's decision to uphold the circuit court's remand order was based on its holding that "a department's failure to *consider* progressive discipline" is arbitrary where an employee's prior work record is unblemished. *Battiste*, 154 Mich App at 493-494 (emphasis added). Here, the DOC considered the lesser discipline of demotion. Moreover, the *Battiste* Court specifically recognized that "[a] single incident of misconduct may be so gross and egregious as to warrant dismissal." *Id*. at 493.

We note that, pursuant to the circuit court's remand order, the DOC brought to the circuit court's attention three cases involving discharged employees who had committed theft-related violations. As noted by the ERB, the theft cases indicate that the DOC has imposed the discipline of discharge for substantially lesser violations than petitioner committed. In particular, none of the three theft cases matched petitioner's case in terms of value of items stolen. The DOC cases also show that the DOC had discharged lower level employees for conduct similar to petitioner's. However, the circuit court found that the cases identified by the DOC were distinguishable. The circuit court reasoned that, unlike the former DOC employees in the cases brought forth by respondent, petitioner had not stolen from the department, was not on duty at the time of the offense, was not wearing a uniform, and was not in possession of drugs. The circuit court's distinctions from, and ultimate rejection of, these cases constituted a denial of the appropriate level of deference due to an administrative agency. While no case brought forth by the DOC had the exact same facts, an identical analogy is not needed to show consistency. The distinctions drawn by the circuit court are, at best, supportive of an alternative reasonable

conclusion (i.e., that respondent should have imposed a lesser measure of discipline), which would require the circuit court to defer to respondent's reasonable conclusion. *UPS*, 277 Mich App at 201.

We recognize that petitioner produced several DOC cases—both theft-related and non-theft-related—that did not result in discharge. Petitioner argued that the discipline imposed on him was "unduly harsh" when compared to lesser disciplinary measures imposed on other employees. Petitioner's argument concerning proportional discipline fails to consider the appropriate level of deference that is afforded agency decisions under Michigan law, as articulated in *Payne*, 444 Mich at 692; *Vanzandt*, 266 Mich App 588; and *UPS*, 277 Mich App at 201. Each case identified, whether by the DOC or by petitioner, is factually distinguishable. That the DOC disciplinary decisions and respondent's review of them have varied between discharge and lesser forms of punishment for somewhat similar behavior does not demonstrate that the DOC's determination in petitioner's case was disproportionate or "unduly harsh."

Given the theft cases brought forward by the DOC, we conclude that respondent's decision to uphold petitioner's discharge was neither "arrived at through an exercise of will," nor "apt to change suddenly." *Binsfeld*, 173 Mich at 786. Instead, it appears to have been guided by the DOC's policy directive, as well as a prevailing trend to discharge in cases involving theft. Therefore, the circuit court's finding that respondent's determination to uphold petitioner's discharge was arbitrary and capricious constitutes a misapplication of legal principles. For these reasons, we are left with the definite and firm conviction that the circuit court committed a mistake. *Glennon*, 259 Mich at 478.

The record clearly supports respondent's decision to dismiss petitioner. Moreover, in light of the cases brought forth by the DOC that illustrate the proportionality of petitioner's dismissal as compared to similar discharge cases involving acts of theft, it is clear that respondent's decision was neither arbitrary nor capricious. Because there are no unresolved material issues to be decided by the circuit court, we vacate the circuit court's order and reinstate respondent's decision. See *Griffin v Civil Serv Comm*, 134 Mich App 413, 421 n 2; 351 NW2d 310 (1984).

We vacate the circuit court's order and remand for entry of an order affirming respondent's decision. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro