

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Frederick L. Gilmore, Jr., :
Appellant :
v. :
Civil Service Commission : No. 714 C.D. 2009
City of Philadelphia : Submitted: October 12, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE JIM FLAHERTY¹, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: January 7, 2011

Frederick L. Gilmore, Jr. (Appellant) appeals from a March 23, 2009, order of the Court of Common Pleas of Philadelphia County (trial court), First Judicial District of Pennsylvania, which affirmed the order of the Civil Service Commission (Commission) of the City of Philadelphia which (City) denied Appellant's appeal from the City's decision to dismiss him for just cause.² We affirm.

Appellant was employed as a Correctional Officer for the Philadelphia Prison System (PPS). He worked at the Alternative and Special Detention (ASD) facility, which has seven locations and included work

¹ This case was decided before Senior Judge Flaherty's retirement on December 31, 2010.

² This case was reassigned to Judge McGinley as the opinion writer on December 1, 2010.

release inmates of both sexes.³ Before his discharge, Appellant was never disciplined and was promoted to Sergeant.

On October 22, 2007, a captain in the PPS Office of Professional Compliance received an anonymous telephone call that Lauren Goerlich (Goerlich), a female work release inmate housed at the Cannery⁴, returned intoxicated to her facility late the previous night, after being at Appellant's home. Sergeant Jessica Bowers (Sergeant Bowers) was assigned to investigate the allegations. Sergeant Bowers interviewed Goerlich and Appellant, and both denied any relationship. Sergeant Bowers also reviewed Goerlich's letters and the transcripts of her recorded telephone calls. Additionally, Sergeant Bowers questioned Jermaine Harrington (Mr. Harrington), the manager of the McDonald's where Goerlich enjoyed work release employment. Based on her investigation, Sergeant Bowers determined that Appellant was guilty of "undue familiarity" with an inmate in violation of PPS policies and general orders. On November 27, 2007, the PPS discharged Appellant.

Appellant appealed his dismissal to the Commission and a hearing was held on March 18, 2008. The City and the Appellant presented evidence.

³ The PPS assigned Appellant to the 600 University Avenue facility, which housed male inmates only.

⁴ The Cannery is a "minimum custody" facility where female inmates are housed.

In support of Appellant's dismissal, the City presented the testimony of Mr. Harrington and Sergeant Bowers. Mr. Harrington testified, over Appellant's counsel's hearsay objection, that Goerlich told him and others about her relationship with Appellant. Mr. Harrington also stated that Appellant occasionally picked up Goerlich after her shift. Mr. Harrington knew the relationship was improper and he warned Goerlich he would report the relationship if it continued.

Sergeant Bowers testified that during her investigation she found that Goerlich had conversations with a former inmate, Christine Walton (Ms. Walton), in which the women discussed Goerlich's relationship with Appellant. Sergeant Bowers testified, over a hearsay objection, that Goerlich told Ms. Walton that Goerlich visited Appellant's house and drank alcohol. Notes of Testimony (N.T.), 3/18/08, at 40; Reproduced Record (R.R.) at 49A. Sergeant Bowers further stated that she spoke with Mr. Harrington who informed her that Appellant met Goerlich at work. Sergeant Bowers testified that, based on her investigation, she determined that Appellant had participated in an improper relationship with an inmate.

In addition to the above testimony, the City provided documentary evidence, including letters and transcripts of telephone calls between Goerlich and her friend Ms. Walton, to support its case against Appellant. Appellant's counsel also objected to the introduction of this evidence as hearsay.

Appellant testified that he did not have a personal relationship with Goerlich. N.T. at 59; R.R. at 68A. Appellant could not “fully recall [if he saw Goerlich] because I don’t really pay too much attention to the employees there... [m]ost of the time it’s a crowded McDonalds....” N.T. at 70; R.R. at 79A.

The Commission, with one member dissenting, credited the City’s evidence, discredited Appellant’s testimony that he did not know Goerlich and concluded that just cause existed for Appellant’s dismissal.⁵ The Commission denied Appellant’s appeal. In reaching its conclusion, the Commission stated:

It is the Commission’s position that Appellant had *some sort of relationship* with inmate Goerlich. He was seen in and around the McDonald’s where she works. Further, the manager, Mr. Harrington, *testified that Inmate Goerlich admitted* that the two were involved *in some sort of relationship*. It is simply not credible that an Inmate that Appellant “does not know” *would speak about him* to her supervisor and close friend. As such, the Commission finds that the Department had just cause to take action against Appellant.

Commission’s Decision, 6/26/08, at 4. (Emphasis added.)

Appellant then appealed to the trial court, which affirmed. The trial court stated:

⁵ Whether the findings of fact support a determination of just cause is a question of law for our review. *Civil Service Commission v. Putz*, 520 A.2d 940, 941 (Pa. Cmwlth. 1987). “The criteria for determining just cause must be based on merit. The standards must be job-related and in some rational and logical manner touch upon competency and ability.” *Civil Service Commission v. Poles*, 573 A.2d 1169, 1172 (Pa. Cmwlth. 1990).

Ample testimonial and documentary evidence was offered to establish that [Appellant] had fraternized with a female inmate. While such evidence may be hearsay on its face, a Pennsylvania agency such as the Commission is not bound by the rules of evidence at its hearings and all relevant and material evidence is admissible. 2 Pa.C.S.A. §554. Further, the testimony and letters were offered to show that [Appellant] had fraternized with the subject inmate, and were not offered to show the truth of what was contained therein.

Trial Court's Opinion, 2/16/10, at 2.

Appellant contends⁶ the trial court erred by failing to reverse the Commission's decision that substantial evidence supported Appellant's dismissal for just cause.⁷ This Court disagrees.

Substantial evidence is that relevant evidence a reasonable mind could accept as adequate to support a conclusion. *Lewis v. Civil Service Commission*, 518 Pa. 170, 175, 542 A.2d 519, 522 (1988). Substantial evidence is more than a scintilla of evidence and goes beyond creating a suspicion of the existence of the fact to be proven. *Id.*

⁶ This Court's review of an adjudication of a municipal civil service commission is limited to a determination of whether constitutional rights have been violated, an error law was committed or necessary findings of fact are not supported by substantial evidence. *Lewis v. Civil Service Commission*, 518 Pa. 170, 174, 542 A.2d 519, 522 (1988). Also, here, we are obligated to view the evidence in the light most favorable to the City, which is the party in whose favor the Commission has ruled, "giving it the benefit of all reasonable inferences." *Id.*

⁷ This Court has foregone the sequence of Appellant's arguments.

In the present controversy, Appellant was charged with the following violations of the PPS Policies and General Orders (G.O.):

G.O. 06, Employees are responsible for maintaining professional deportment at all times. Not permitting any undue familiarity on the part of inmates and refraining from it themselves. (emphasis added).

....

G.O. 60, Employees shall maintain a quiet but firm demeanor in their contact with inmates, not permitting any undue familiarity on the part of the inmate and refraining from it themselves. (emphasis added).

....

G.O. 62, Employees shall not visit, associate or correspond with inmates or former inmates without specific authorization in writing by the Warden/Commissioner.

Internal Affairs Unit Memorandum, Department Exhibit 1, December 3, 2007; Reproduced Record (R.R.) at 107A.

The term “undue familiarity” is not defined in the PPS Policies.⁸ In general, the term “undue” is defined as “improper, inappropriate.” Webster’s Third New International Dictionary 2493 (3rd ed. 1986). The term “familiarity” is defined as “a state of close personal relationship... a close acquaintance with or knowledge of something....” Webster’s Third New International Dictionary 820 (3rd ed. 1986).

⁸ If the term “undue familiarity” is defined in the PPS Policies, neither party has directed the Court where the definition may be found in the certified record.

Here, Mr. Harrington, manager of the McDonalds, testified to the following:

[Department's Counsel (Braunstein)]: Are you familiar with a person named Lauren Goerlich?

Harrington: Yes, I am.

Braunstein: Would you tell the Commissioners how you are familiar with her?

Harrington: That was one of my employees at Frankford McDonald's.

Braunstein: How did she become an employee? (emphasis added).

Harrington: Through the work release program. (emphasis added).

Braunstein: How long was she an employee at the Frankford McDonald's?

Harrington: I'd say approximately, maybe, three to four months.

Braunstein: How often a week would she work?

Harrington: At first, she was on five days a week, 8:00-4:00. And then a situation came up, she got put on hold- actually, she got put on hold twice. So I knew she was no longer reliable to me. So then I changed her schedule. It was like 11:00 to 4:00, maybe four days a week.

Braunstein: Did you ever give her overtime?

Harrington: No.

Braunstein: Did you ever call in overtime to the Prisons for her?

Harrington: No.

Braunstein: Have you ever seen the Appellant?
(emphasis added).

Harrington: Yes.

Braunstein: Where have you seen the Appellant?
(emphasis added).

Harrington: Inside the Frankford McDonald's store. (emphasis added).

Braunstein: And just describe to the Commissioners, you know, the circumstances of you seeing him?

Harrington: Well, he would come in the store. He would sit on- like, it's the store, the lobby is about this big. It's maybe on the side of that lobby, it's like- I guess you could call them booth benches. So he would be at the booth bench or either standing up against the trash can that's right there when you first walk inside the door.
(emphasis added).

Braunstein: Did you see him interact with Laura Gilmore [sic]? (emphasis added).

Harrington: Yes. I've seen her leave with him before. (emphasis added).

Braunstein: How many times? (emphasis added).

Harrington: I'd say, give or take, maybe three or four times. (emphasis added).

Braunstein: Three or four times. What kind of car does he drive?

Harrington: It's a black car. I'm not sure what type. I know it's a black car, four door.

Braunstein: Do you know his name? (emphasis added).

Harrington: Yes. From- actually, at my store, they got like different names but, from what I understand, it's Sergeant Gilmore. (emphasis added).

Braunstein: How do you know that? (emphasis added).

Harrington: I had two work release maintenance men at my store and also- I basically deal with the work release program (inaudible). Everybody at my work that's through the work release program knew who he was. That's actually how I knew who he was. (emphasis added).

Braunstein: Are you sure that it was this man, the Appellant, who you saw interacting with Lauren? (emphasis added).

Harrington: Yes, sir. (emphasis added).

Notes of Testimony, 3/18/08, at 8- 10; R.R. at 17A- 19A.

Mr. Harrington's testimony supports the Commission's decision to discharge Appellant based upon his violation of PPS Policies which prohibits undue familiarity between an employee and an inmate.⁹

⁹ Appellant also contends that the Commission erroneously relied on hearsay testimony to support his dismissal. Specifically, Appellant asserts that Goerlich's alleged statements to Mr. Harrington and the letters and the transcripts of Goerlich's phone calls to Ms. Walton were hearsay admitted over the timely objection of Appellant's counsel and upon which the Commission could not properly rely.

Because there was substantial evidence to discharge Appellant based upon Mr. Harrington's personal observations of Appellant and Goerlich, this Court need not address the hearsay arguments.

Accordingly, the order of the Commission should be affirmed.

BERNARD L. McGINLEY, Judge

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ORDER

AND NOW, this 7th day of January, 2011, the order of the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge

County, First Judicial District of Pennsylvania, nonetheless affirmed the Commission's decision.¹⁰

The only non-hearsay evidence upon which the Commission specifically relied to determine that just cause existed for Appellant's discharge is Harrington's testimony that he saw Appellant and Goerlich leave together "maybe three or four times" from a McDonald's that Appellant testified is less than three blocks from his home.¹¹ (N.T., 3/18/08, at 10.) When questioned by one of the Commissioners about Appellant's and Goerlich's interaction, Harrington stated: "I didn't notice anything about their interaction." (*Id.* at 27.) In my estimation, this evidence does not go beyond creating *a mere suspicion* of the existence of undue familiarity between Appellant and Goerlich. *See, e.g., Lewis v. Civil Service Commission*, 518 Pa. 170, 175, 542 A.2d 519, 522 (1988).

Accordingly, I would reverse.

ROCHELLE S. FRIEDMAN, Senior Judge

¹⁰ Hearsay is a statement made by an out-of-court declarant that is offered to prove the truth of the matter asserted. *Philadelphia Electric Company v. Unemployment Compensation Board of Review*, 565 A.2d 1246, 1248 (Pa. Cmwlth. 1989). The law is clear that properly-objected to hearsay is not competent, in and of itself, to support a factual finding of the Commission. *Davis v. Civil Service Commission*, 820 A.2d 874, 879 (Pa. Cmwlth. 2003). Here, Appellant's counsel raised a plethora of hearsay objections to the City's hearsay evidence.

¹¹ According to Appellant, the McDonald's was "three blocks from my house-actually, two and a half." (N.T., 3/18/08, at 64.)