IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DAVIDA DYER, *Plaintiff/Appellant*,

v.

CITY OF YUMA, a political subdivision of the State of Arizona,
Defendant/Appellee.

No. 1 CA-CV 15-0221
FILED 5-10-2016

Appeal from the Superior Court in Yuma County
No. S1400CV201400455
The Honorable Lawrence C. Kenworthy, Judge

VACATED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Maurice Portley joined.

N O R R I S, Judge:

¶1 The dispositive issue in this appeal is whether defendant/appellee City of Yuma was entitled to terminate plaintiff/appellant Davida Dyer's employment as a police officer without complying with Arizona Revised Statutes ("A.R.S.") section 38-1101(K) (2014),[1] a statute that prohibits the termination of a police officer unless the employer finds an appeals board's decision was arbitrary or without reasonable justification and states the reason for amending, modifying, rejecting, or reversing the appeals board's decision. Because the City did not comply with the requirements of the statute, it was not entitled to terminate Dyer's employment. We therefore vacate the superior court's decision to the contrary and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Dyer worked as an officer with the Yuma Police Department. The incident leading to Dyer's termination began with her identification of a driver that she and her partner pursued on the night of June 28, 2014. That night, after recognizing a car that had fled from them the previous night, Dyer and her partner began pursuing the car in their unmarked patrol car. While pursuing the car through a hotel parking lot at about 20 miles per hour, Dyer attempted to conduct a traffic stop. They lost sight of the car, however, as it sped out of the parking lot. Dyer later drafted a police report, noting "[t]he driver of the vehicle that fled appeared to be a white male, approximately 20-25 years of age, 130-150 pounds, with short hair or a shaved head." She also reported "[h]e appeared to be the same driver of the same vehicle that had fled from us the night prior." After viewing a booking photograph of a suspect, Dyer submitted a supplemental report identifying the suspect in the photograph as the driver of the car.

[1]This statute has been subsequently modified and renumbered, without material change, and is currently codified as A.R.S. § 38-1106(H) (2015).

¶3 The Yuma County Attorney's Office declined to prosecute the driver because "there were issues as to how the subject was identified." Nevertheless, when questioned by her sergeant about the identification, Dyer confirmed she was able to positively identify the driver. The sergeant also spoke to Dyer's partner who stated that "due to distance, time of night, [and] panic," "there was no possible way" Dyer could have identified the driver that night. Dyer later sent the sergeant a text message stating:

> Just thinking about the . . . case and if [my partner] cudn't [sic] see him and we were in the same car that may be potential for them to attack either one of us integrity wise. And looking at it from a prosecutors [sic] perspective I cud [sic] see a side glimpse of his face not being enough for me to testify that [sic] in court. Sorry I just want him locked up for all this. Hope it makes sense.

¶4 The Yuma Police Department initiated an internal affairs investigation. In a July 18, 2013 meeting with her supervisors, Dyer eventually stated she could not positively identify the driver. After the meeting, she wrote another supplemental report stating "[t]he driver appeared to be consistent with the driver" seen the night before, but she "could not positively identify him being the same subject." The Yuma Police Department placed Dyer on administrative leave. Dyer submitted to a polygraph test, which indicated deception when the examiner questioned her about her identification of the driver.

¶5 The City, acting through its Chief of Police, later sent Dyer a notice of intent to terminate, citing violations of the Yuma Police Department's policies relating to "[t]ruthfulness," "[f]alsification of [r]ecords," and "[u]nbecoming [c]onduct." About a week later, the City terminated Dyer for violating the policies cited in the notice. Dyer asked the City to reconsider her termination, stating she had been honest and consistent from the beginning about her ability to identify the driver. Dyer explained she waivered from her identification at the July 18 meeting due to "duress to alleviate . . . pressure" from her supervising sergeant, whom she "knew from prior experience" would pressure her until she agreed with him. Additionally, she alleged she had been "interrogated for a long period of time." The City denied her request. The Yuma County Attorney's Office declined to bring criminal charges against her. It did, however, place her on its integrity list, the "Brady List."

¶6 Dyer appealed her termination to the City's Merit System Board, which, after a hearing, on a 3-1 motion, rejected her termination. In its findings and recommendations, the Merit Board concluded "the City and the Yuma Police Department failed to prove that Ms. Dyer was untruthful, falsified records or exercised unbecoming conduct."

¶7 The City Administrator, on behalf of the City, subsequently reviewed the Merit Board's decision, overruled the Merit Board's findings and recommendations, and upheld Dyer's termination. The City Administrator stated he had reviewed the case and all documentation and explained:

> A major factor in my decision is the fact that The Yuma County Attorney's Office independently judged the incident and found the statements made by Officer Davida Dyer as not credible and dismissed the case while adding her to the "Brady List" . . . [and] [a]dditionally, the Polygraph testing did not clear Officer Dyer.

¶8 The City Administrator also noted Dyer's placement on the Brady List "complicates any criminal cases she may be involved in [in] the future."

¶9 Dyer sued the City, seeking judicial review of her termination, arguing, *inter alia*, the City, through the City Administrator, had failed to comply with A.R.S. § 38-1101(K). Section 38-1101(K) states:

> Except where a statute or ordinance makes the administrative evidentiary hearing the final administrative determination, an employer or a person acting on behalf of an employer may amend, modify, reject or reverse a decision made by a hearing officer, administrative law judge or appeals board after a hearing where the law enforcement officer or probation officer and the employer have been equally allowed to call and examine witnesses, cross-examine witnesses, provide documentary evidence and otherwise fully participate in the hearing if the decision was arbitrary or without reasonable justification and the employer or person acting on behalf of the employer states the reason for

> the amendment, modification, rejection or reversal.

¶10 The superior court dismissed Dyer's complaint, and rejected her argument that the City had failed to comply with A.R.S. § 38-1101(K), explaining:

> Appellant gives a constrained reading to [A.R.S. § 38-1101(K)]. Giving the language a reasonable construction, the employer is only required to "state[] the reason for the amendment, modification, rejection or reversal." If the employer was additionally required to include that the board's decision was arbitrary, the word "states" would have been placed prior to the word "arbitrary."

DISCUSSION

¶11 On appeal, Dyer argues the superior court misapplied A.R.S. § 38-1101(K), because, under the statute, the City Administrator could only reject the Merit Board's decision "if—and *only* if—the Merit Board's decision was arbitrary or without reasonable justification" and the City Administrator stated the reasons for the rejection. Because this argument raises an issue of statutory interpretation, we exercise de novo review. *See State v. Boyston,* 231 Ariz. 539, 543, ¶ 14, 298 P.3d 887, 891 (2013) (appellate court "interprets statutes de novo") (citations omitted); *Stant v. City of Maricopa Emp. Merit Bd.,* 234 Ariz. 196, 201, ¶ 15, 319 P.3d 1002, 1007 (App. 2014) (city's termination of sergeant included review of whether city "erred as a matter of law and exceeded its legal authority") (internal quotations and citations omitted). As we explain, we agree with Dyer.

¶12 "When interpreting a statute, we look to the plain meaning of the language as the most reliable indicator of legislative intent and meaning." *Grubaugh v. Blomo ex rel. Cty. of Maricopa*, 238 Ariz. 264, __, ¶ 6, 359 P.3d 1008, 1010 (App. 2015) (citations omitted); s*ee also State v. Rogers*, 227 Ariz. 55, 56, ¶ 2, 251 P.3d 1042, 1043 (App. 2010) ("The plain language of a statute is the best and most reliable indicator of the statute's meaning, and, unless otherwise indicated, we assume the words contained in the statute have their natural and obvious meanings.") (internal quotations and citations omitted). If a statute's plain meaning is clear, we do not look beyond the face of the statute to determine legislative intent. *Yollin v. City of Glendale*, 219 Ariz. 24, 27-28, ¶ 7, 191 P.3d 1040, 1043-44 (App. 2008).

¶13 On its face, A.R.S. § 38-1101(K) expressly limits an employer's authority to reject an appeals board's decision to circumstances in which it determines the appeals board acted arbitrarily or without reasonable justification. Consistent with its plain meaning, in *Berndt v. Arizona Department of Corrections*, 238 Ariz. 524, __, ¶ 15, 363 P.3d 141, 146 (App. 2015), we applied A.R.S. § 38-1101(K) and concluded the Arizona Department of Corrections had violated the statute when it rejected an appeals board's decision and terminated a corrections officer, without providing any stated reasons. We held an employer, subject to A.R.S. § 38-1101(K), "could reject the Board's decision only if it: (1) found the Board's action was arbitrary and capricious, and (2) provided reasons for its rejection." *Id.* We thus disagree with the superior court's construction of A.R.S. § 38-1101(K).

¶14 As in *Berndt*, before the City could reject the Merit Board's decision, it was required to first find the Merit Board's decision was arbitrary or without reasonable justification, and second, to explain the reasons for its rejection or reversal of the Merit Board's decision. Although the City provided reasons for its rejection of the Merit Board's decision, it did not make any finding that the Merit Board's decision was arbitrary or without reasonable justification. This standard has been defined in our jurisprudence. *See Maricopa Cty. Sheriff's Office, v. Maricopa Cty. Emp. Merit Sys. Comm'n*, 211 Ariz. 219, 222, ¶ 14, 119 P.3d 1022, 1025 (2005) ("*MCSO*") (the terms "arbitrary" and "without reasonable cause" mean an "unreasoning action, without consideration and in disregard of the facts and circumstances" and indicate a lack of sufficient evidence to support the decision in question). For example, in *MCSO*, our supreme court analyzed a county's rule which prohibited an appeals commission from overruling an employer's decision to terminate a detention officer, absent a finding the employer's action was "arbitrary or taken without reasonable cause." *Id.* at 222, ¶ 12, 119 P.3d at 1025.[2] The court explained those terms reflected an objective standard that defined the commission's authority "within fixed legal parameters. " *Id.*

¶15 Likewise, here, the City's authority to reject the Merit Board's decision is "limited as a matter of law." *Id.* at 222, ¶ 15, 119 P.3d at 1025. Under this standard, an arbitrary action is one taken "capriciously or at pleasure." *Id.* at 222, ¶ 14, 119 P.3d at 1025. A decision is not arbitrary or without reasonable justification simply because an employer, or person

[2]In *MCSO*, the court addressed the standard of review to be applied under a rule of procedure adopted by Maricopa County to restrict the commission's "remedial power." *Id.* at 221, ¶ 10, 119 P.3d at 1024.

acting on behalf of the employer, disagrees with the decision. *See id*. at 223, ¶ 17, 119 P.3d at 1026 ("[W]here there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.") (citations omitted). Here, the City made no findings as to whether the Merit Board acted arbitrarily or without reasonable justification when the Merit Board rejected Dyer's termination and found "the City and Yuma Police Department [had] failed to prove that Ms. Dyer was untruthful, falsified records or exercised unbecoming conduct." Importantly, the City had the burden of proof in justifying Dyer's termination. *See* A.R.S. § 38-1101(J) (2014)[3] ("The burden of proof in an appeal of a disciplinary action by a law enforcement officer . . . shall be on the employer.").

¶16 The City argues, however, that we should "infer" that the City Administrator "satisfied" the requirements of A.R.S. § 38-1101(K) because he rejected the Merit Board's decision only after "a comprehensive review of the case along with all the documentation . . . and the exhibits presented during the Merit System hearing," and the record evidence shows discipline was more than appropriate. We reject this argument for several reasons. First, the Legislature has limited the discretion otherwise granted to a city in personnel matters by requiring employers to make express findings that the appeals board acted "arbitrarily or without reasonable justification." The Legislature has, thus, directed the employer, not this court, to make that determination in the first instance. Second, the record evidence is subject to dispute, and contains evidence that Dyer recanted her identification of the driver under pressure from her supervising sergeant. Third, the case the City relies on in making this argument, *MCSO*, is distinguishable.

¶17 In *MCSO*, the issue was whether discipline imposed within the permissible range of a disciplinary policy could be rejected by an appeals board simply because the appeals board found it disproportionate. *MCSO*, 211 Ariz. at 220, ¶ 5-6, 119 P.3d at 1023. There, the appeals board, a commission, found some level of discipline was warranted, but disagreed with the employer's decision to terminate the employee, and reduced the discipline to a 15-day suspension. *Id.* The court noted "the Commission obviously believed that some discipline was justified" and reasoned that when the record contains credible evidence demonstrating the employee

[3]This statute has been subsequently modified and renumbered without material change, and is currently codified as A.R.S. § 38-1106(G) (2015).

committed an act "warranting some level of discipline, it can scarcely be said that discipline within the permissible range was taken without reasonable cause." *Id*. at 222-23, ¶ 16, 119 P.3d at 1025-26. In contrast, here, the Merit Board did not find that Dyer had committed any act warranting discipline.

¶18 Finally, the City argues A.R.S. § 38-1101(K) is inapplicable here because Yuma is a home rule city, discipline of police officers is a matter of local concern, and the Yuma City Charter gives the City Administrator final authority to remove a city employee. The City did not raise this argument in the superior court. Instead, it explicitly acknowledged the City Administrator "has the authority to reject the Merit Board's findings and invoke discipline *constrained only by* A.R.S. § 38-1101(K) which he satisfied." (emphasis added). Thus, in our view, it is too late for the City to argue it is not "constrained" by A.R.S. § 38-1101(K). *See Hannosh v. Segal*, 235 Ariz. 108, 115, ¶ 25, 328 P.3d 1049, 1056 (App. 2014) ("[W]e generally will not consider arguments that were not presented to the trial court for the first time on appeal."). Nevertheless, addressing the City's argument head on, we reject it.

¶19 Under Arizona's Constitution, "[a]ny city containing . . . a population of more than three thousand five hundred may frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state." Ariz. Const. art. 13, § 2. A "home rule city deriving its powers from the Constitution is independent of the state Legislature as to all subjects of strictly local municipal concern." *City of Tucson v. State*, 229 Ariz. 172, 174, ¶ 10, 273 P.3d 624, 626 (2012) (internal quotations and citations omitted). "[W]hether general state laws displace charter provisions depends on whether the subject matter is characterized as of statewide or purely local interest." *Id*. at 176, ¶ 20, 273 P.3d at 628. State law preempts a municipal ordinance when the two conflict, the state law addresses a matter of statewide concern, and the state legislature intended to appropriate the field through a clear preemption policy. *City of Scottsdale v. State*, 237 Ariz. 467, 470, ¶ 10-11, 352 P.3d 936, 939 (App. 2015) (statute prohibiting municipal bans on sign walkers was matter of statewide concern; legislature intended to protect public activity on public walkways on statewide basis). If, however, a municipal ordinance is of purely local interest, the ordinance prevails. *Id*. at 471, ¶ 16, 352 P.3d at 940 (noting Arizona courts have previously recognized selling and leasing municipal property as a matter of local interest) (citations omitted); *see also City of Tucson*, 229 Ariz. at 176, ¶ 22, 273 P.3d at 628 (home rule city's "method and manner of" selecting its own governments, such as running city council

elections on a partisan basis and with at-large elections is a matter of local concern not displaced by state statute banning such processes).

¶20 Here, A.R.S. § 38-1101(K) does not conflict with the Yuma City Charter provision the City cites on appeal in support if its home rule argument. The Charter provision gives the City Administrator authority to remove a city employee "when he deems it necessary for the good of the city . . . *except as otherwise provided by law*." Yuma City Charter art. VIII, § 4 (emphasis added). Thus, even though the City's administrative regulations state the City Administrator has "final and conclusive" authority to "modify, revoke or uphold the disciplinary action" of the Merit Board, the City Administrator's authority is limited as "otherwise provided by law."

CONCLUSION

¶21 For the foregoing reasons, we vacate the superior court's order and direct the superior court to remand this matter to the City for further action consistent with this decision and in compliance with A.R.S. § 38-1101(K). As the successful party on appeal, we award Dyer her reasonable attorneys' fees and costs pursuant to A.R.S. § 38-1104(G) (2014),[4] contingent upon her compliance with Arizona Rule of Civil Appellate Procedure 21(a).

Ruth A. Willingham · Clerk of the Court
FILED: ama

[4]This statute has been subsequently modified and renumbered without material change, and is currently codified as A.R.S. § 38-1107(E) (2015).