STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2007

Marcellino Pena,
Relator,

vs.

Freeborn County, Minnesota,
Respondent.

Filed July 29, 2013
Affirmed
Willis, Judge[*]

Freeborn County Board of Commissioners

Richard A. Williams, Jr., R.A. Williams Law Firm, P.A., St. Paul, Minnesota (for relator)

Jessica E. Schwie, Jamie L. Guderian, Jardine Logan & O'Brien, P.L.L.P., Lake Elmo, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Willis, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

In this certiorari appeal, relator argues that respondent deprived him of procedural due process when it discharged him from his position as jail administrator. Because there is no record evidence from which to conclude that relator had either a property or liberty interest in his continued employment, we affirm.

FACTS

Relator Marcellino Pena was employed by respondent Freeborn County from 2004 until September 2012 as a jail administrator. The county initiated an investigation into Pena's conduct after receiving a complaint that on June 19, 2012, Pena donned a latex glove and told a female kitchen employee that he had to conduct a physical examination of her because she had called in sick the day before. The sheriff's office placed Pena on paid administrative leave pending the outcome of the investigation, which was conducted by Chief Deputy Sheriff Glen Strom.

In a letter dated August 17, Strom provided Pena with notice of a series of allegations against him. In addition to the June 19 incident, the letter summarized—with dates and brief descriptions—nine other incidents of alleged misconduct. The letter specified several rules of conduct in the Freeborn County Personnel Rules and Regulations and the Freeborn County Sheriff's Office General Rules of Conduct that Pena was alleged to have violated, including rules against sexual harassment, immoral conduct, abuse of position, unbecoming conduct, on-duty political activity, neglect of duty, interference with labor activity, and insubordination. Finally, the letter instructed

Pena to report on August 23 for a "mandatory appointment to provide a statement to the Freeborn County Staff."

In response to the notice, Pena requested a 14-day extension to obtain legal counsel and "copies of all complaints received including investigative reports" and "any audio and video recordings of interviews." The sheriff's office denied Pena's requests. Pena appeared at the August 23 meeting and gave a statement to Strom. During the course of the interview, Pena admitted to, among other things, making sexual comments, telling dirty jokes, putting his arm around female staff, and watching television and gambling while on duty.

After Strom completed the investigation, he prepared a report for Sheriff Bob Kindler. Kindler concluded that the evidence was sufficient to terminate Pena's employment. In a letter dated September 11, Kindler told Pena that the county had decided to terminate his employment. Kindler stated that the basis for the county's action was that "on or about June 19, 2012 you verbally indicated to a female working in the jail that you had to conduct a physical examination of her." Kinder further stated that there was credible evidence that Pena "made sexual comments, told dirty jokes, put [his] arm around female staff and required females to go into private and confined spaces for conversations"; "required two female employees to accompany [him] to McDonalds . . . [and] lectured them on who to support in the Sheriff election"; "threatened individuals with the loss of their jobs and ruled by intimidation"; used inappropriate language to a nursing supervisor; intimidated an individual into performing tuberculosis-screening tests on kitchen staff; "threatened the [f]ood [s]ervice [d]irector with termination for talking

about [Pena's] personal relationships"; "engaged in intimidation of [the food service director] because [he] believed that she had made a complaint against [him]"; "created a hostile and intimidating environment for jail staff"; "utilized work time in order to watch television shows and DVDs"; and gambled while on duty and in uniform. Kindler informed Pena that the county board would consider his termination at its September 18 meeting and that Pena could request a hearing "to explain why you should not be terminated or supply information that you believe the [c]ounty [b]oard should consider in this matter."

Pena requested a hearing, which was held during a closed session of the September 18 county-board meeting. After the hearing, the board voted to terminate Pena's employment, effective immediately. Pena petitioned for a writ of certiorari to appeal the board's decision. On appeal Pena argues that the county board violated his right to procedural due process.

D E C I S I O N

I. This court has jurisdiction to consider Pena's due-process claim.

As a preliminary matter, the county argues that this court lacks subject-matter jurisdiction to hear Pena's due-process claim. When a party challenges subject-matter jurisdiction, the court examines whether it has the authority to hear the type of dispute at issue and to grant the type of relief sought. *Williams v. Smith*, 820 N.W.2d 807, 812-13 (Minn. 2012). If the court lacks subject-matter jurisdiction, it must dismiss the claim. *Id.* at 13. The existence of subject-matter jurisdiction is a question of law, which this court reviews de novo. *Id.*

Certiorari is the exclusive method of reviewing employment-termination decisions of a state agency or local unit of government. *Williams v. Bd. of Regents of Univ. of Minnesota*, 763 N.W.2d 646, 651 (Minn. App. 2009). Review by certiorari is limited to an inspection of the record of the decision-making agency below. *Dietz v. Dodge Cnty.*, 487 N.W.2d 237, 239 (Minn. 1992). The reviewing court is "necessarily confined to questions affecting the jurisdiction of the board, the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Id*. (quotation omitted).

The county argues that this court has no jurisdiction because Pena contests only the procedure that the county used to terminate him and not the county board's ultimate "discretionary decision" to terminate Pena's employment. The county cites *Williams* for the proposition that claims that do "not involve any inquiry into the agency's 'discretionary decision' [are] not subject to certiorari review." 820 N.W.2d at 814. But the county's reliance on *Williams* is misplaced. The issue in *Williams* was whether the district court had subject-matter jurisdiction over a negligent-misrepresentation claim related to a state agency's hiring decision. *Id*. at 812. The supreme court concluded that because the elements of the tort claim did not focus on the government agency's actual hiring decision, the claim of negligent misrepresentation was "separate and distinct" from the hiring decision and therefore not subject to certiorari review. *Id.* at 814.

Here, Pena's procedural-due-process claim is not separate and distinct from the county board's discretionary decision to terminate his employment. Pena challenges the very process by which the board made its discretionary decision.

The county's assertion that "due process violations . . . are not subject [to] certiorari review" is contradicted by *Dietz*, in which the supreme court addressed the scope of certiorari review. *See Dietz*, 487 N.W.2d at 239 (stating that certiorari review includes review of "the regularity of its proceedings") (quotation omitted). *Dietz* adopted its standard for certiorari review from *State ex rel. Ging v. Bd. of Educ. of Duluth*, 213 Minn. 550, 7 N.W.2d 544 (1942), *overruled on other grounds by Foesch v. Indp. Sch. Dist. No. 646*, 300 Minn. 478, 223 N.W.2d 371 (1974). *Id*. *Ging* was a certiorari appeal in which teachers challenged on due-process grounds a school board's decision to terminate their employment. 213 Minn. at 563, 7 N.W.2d at 552. To determine its scope of review, the supreme court considered "the nature, functions, and modus operandi of administrative tribunals." *Id*. The supreme court noted that "[n]either the federal nor the state constitution guarantees any particular form of administrative procedure" and that "[a]ll that is required is that the liberty and property of the citizen shall be protected by the rudimentary requirements of *fair play*." *Id*. at 564, 7 N.W.2d at 552-53 (quotations omitted). The court then explained that administrative proceedings must provide both procedural and substantive due process. The proceedings "may not be so lacking in the fundamentals of a fair hearing as to be contrary to the requirements of due process of law, as where no notice is given or hearing granted." *Id.* at 564, 7 N.W.2d at 553. The remaining requirements of due process are satisfied if the administrative agency's

findings are "based upon substantial evidence" and are not "arbitrary, oppressive, and therefore in excess of [the agency's] powers." *Id.* at 564-65, 7 N.W.2d at 553.

Thus, *Dietz* makes clear that an appellate court may review an administrative proceeding for jurisdiction, procedural due process, and substantive due process. *Dietz*, 487 N.W.2d at 239. Therefore, contrary to the county's assertion, certiorari review may include the examination of issues of due process, and we conclude that this court has subject-matter jurisdiction over Pena's due-process claim.

II. Pena had neither a property nor a liberty interest in his employment.

Pena argues that he was "denied procedural due process during the termination of his employment as a sheriff's deputy." Constitutional due process requires that a party receive adequate notice and an opportunity to be heard before the government deprives the party of life, liberty, or property. *Christopher v. Windom Area Sch. Bd.*, 781 N.W.2d 904, 911 (Minn. App. 2010), *review denied* (Minn. June 29, 2010). To establish a procedural-due-process violation, a plaintiff must first show that he had a protected property or liberty interest and that state action deprived him of that protected interest. *Phillips v. State*, 725 N.W.2d 778, 782 (Minn. App. 2007), *review denied* (Minn. Mar. 28, 2007). The government's constitutional obligation to provide due process applies only when a party's protected interest is at stake. *Id.*

To demonstrate a property interest, a government employee must show a legitimate claim of entitlement to continued employment. *Id.* at 783. The constitution does not create property interests. *Id.* Rather, a property interest stems from an independent source, such as a statute or contract. *Id.* A statute or contract creates a

property interest if it secures certain benefits and supports claims of entitlement to those benefits. *Id*.

Pena argues that the Freeborn County Personnel Rules and Regulations create a property right in his employment because the rules provide for an appeal hearing in the event of dismissal. But the county personnel rules explicitly state that "[t]hese rules are not intended to extend employment rights or provide for a property right in employment. Specifically, these rules are not intended to alter employment at will provisions of Minnesota Statutes." At-will employees have no interest protected by the Due Process Clause. *See Rutherford v. Cnty. of Kandiyohi*, 449 N.W.2d 457, 460 n.1 (Minn. App. 1989) ("At-will employees have no property interest in continued employment."), *review denied* (Minn. Feb. 28, 1990).

Pena also argues that he has a property interest in his employment because his employment is "protected by statute," specifically Minn. Stat. § 626.89 (2012), which provides procedural safeguards for peace officers facing disciplinary action. The county argues that section 626.89 does not apply to Pena because he was not a "peace officer" within the meaning of the statute.

Under section 626.89, "licensed peace officer or part-time peace officer" is "defined in section 626.84, subdivision 1, paragraphs (c) and (d)." Minn. Stat. § 626.89, subd. 1(c). Under section 626.84, "peace officer" means, in relevant part, "an employee or an elected or appointed official of a political subdivision or law enforcement agency who is licensed by the board, charged with the prevention and detection of crime and the

enforcement of the general criminal laws of the state and who has the full power of arrest." Minn. Stat. § 626.84, subd. 1(c)(1) (2012).

The county concedes that Pena may have had a license during the time he served as jail administrator but argues that Pena was not "actively detecting and preventing crime." The county asserts that Pena merely supervised the jail kitchen staff and nursing staff. The record does not show that Pena argued to the sheriff's department or to the county board that section 626.89 applied to him. Therefore, the record contains few details regarding the extent of Pena's duties and contains no findings by the board on the issue. Because the record does not support a conclusion that Pena was a peace officer within the meaning of section 626.89, Pena cannot now rely on section 626.89 to establish a property interest in his continued employment. *See In re License of W. Side Pawn*, 587 N.W.2d 521, 523 (Minn. App. 1998) (stating that certiorari review "is confined to the record before the [government agency] at the time it made its decision"), *review denied* (Minn. Mar. 30, 1999); *see also Montella v. City of Ottertail*, 633 N.W.2d 86, 88 (Minn. App. 2001) ("The party seeking reversal has the burden of demonstrating error.").

Pena also argues that the county deprived him of his liberty interest in "his good name, reputation, honor and integrity." A person may claim a liberty interest in continued employment if a government agency harmed his "good name, reputation, honor, or integrity" during the employment-termination process in a way that "foreclose[d] his freedom to take advantage of other employment opportunities." *Phillips*, 725 N.W.2d at 784 (quotation omitted). To establish a liberty-interest violation,

an employee must show that the government used stigmatizing reasons for termination and that the government made those reasons public. *Id.*

Pena argues that the accusations against him "implied that he was involved in sexual improprieties, dishonesty, insubordination, and failure to perform his duties in an appropriate fashion." He asserts that the "accusations became public when the [c]ounty provided a redacted copy of the entire record to the local newspaper." But there is nothing in the record to support Pena's assertion that the county made the accusations public. Because Pena's argument relies on facts outside the record, we cannot conclude that the county deprived him of a liberty interest. *See W. Side Pawn*, 587 N.W.2d at 523 (stating that certiorari review "is confined to the record before the [government agency] at the time it made its decision").

On the limited record before us, we conclude that Pena had neither a property nor liberty interest in his employment that would support a due-process claim.

Affirmed.