STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0995

Wallace J. Maire,
Respondent,

vs.

Independent School District No. 191,
Burnsville,
Appellant.

Filed April 22, 2013
Reversed
Rodenberg, Judge

Dakota County District Court
File No. 19HA-CV-11-3981

Phillip G. Villaume, Jeffrey D. Schiek, Villaume & Schiek, P.A., Bloomington, Minnesota (for respondent)

Maggie R. Wallner, Charles E. Long, Kennedy & Graven, Chartered, Minneapolis, Minnesota (for appellant)

Considered and decided by Chief Judge Johnson, Presiding Judge; Rodenberg, Judge; and Toussaint, 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

RODENBERG, Judge

This case arises from proceedings conducted before an ad hoc hearing board convened pursuant to the Veterans Preference Act (VPA) to conduct a hearing to determine whether appellant could discharge respondent for incompetency and misconduct. After the board issued a decision upholding the discharge, respondent appealed to the district court. The district court reversed and remanded the decision of the board, and appellant brought the present appeal. Because the board's decision was supported by substantial evidence and was not an abuse of discretion, we reverse the district court and reinstate the decision of the ad hoc hearing board.

FACTS

Respondent Wallace J. Maire is an honorably discharged veteran who was employed as a master plumber by appellant Independent School District No. 191. As part of his job, respondent was required to drive a vehicle owned and insured by the school district to perform maintenance work on the buildings within the school district.

On February 22, 2010, respondent was arrested for driving while intoxicated and for an open-bottle violation. According to the criminal complaint, a police officer came upon respondent in an alleyway attempting to free his vehicle from a snowdrift. When the officer approached respondent, he noted that respondent's eyes were glazed over and bloodshot and that respondent smelled of alcohol. Respondent allegedly admitted that he was "drunk." Respondent's driver's license was administratively revoked due to the

incident but, prior to the veterans preference hearing, the license was reinstated pending the resolution of a source-code challenge.[1]

Respondent informed his supervisor of the pending charges. The 2010 incident was respondent's third alcohol-related driving incident. Respondent was directed not to operate any vehicles owned by appellant, and appellant made a temporary arrangement to have respondent work with another employee who could provide transportation between school buildings. After consulting with its insurance broker, appellant learned that it would no longer be able to obtain insurance coverage for respondent's use of fleet vehicles.

On July 22, 2010, appellant notified respondent by letter that the termination of his employment was going to be submitted to the school board for action on August 5. The letter informed respondent that he would be placed on paid administrative leave pending the school board meeting and also informed respondent of his rights to a veterans preference hearing. The school board passed a resolution to discharge respondent by reason of his inability to perform all necessary job functions. The following day, respondent received notice of the board action, of his right to a veterans preference hearing, and of his right to continue to receive pay pending a "final determination" of his

[1] Challenges to the admissibility and reliability of the source code for the software used in breath-testing instruments were brought by criminal defendants and implied-consent petitioners throughout the state of Minnesota at the time of respondent's driver's license difficulties. These challenges were consolidated into a single proceeding. The district court hearing the consolidated challenge held that the source code was reliable except under certain circumstances and ruled that evidence of alleged defects in the source code was inadmissible. The supreme court affirmed. *See generally In re Source Code Evidentiary Hearings*, 816 N.W.2d 525 (Minn. 2012).

discharge at such a hearing. Respondent invoked his right to a veterans preference hearing.

At the veteran's preference hearing, respondent explained that he had been intoxicated on February 22, 2010, because he had used alcohol in combination with prescribed cancer medication. He had valid driving privileges as of the hearing date but remained an unacceptable risk in the judgment of appellant's fleet carrier. Representatives of the insurer appeared at the hearing and testified that their company would not cover appellant's use of fleet vehicles regardless of the outcome of his appeals in the criminal and implied-consent proceedings.

The veteran's preference hearing board concluded that appellant's discharge of respondent "meets the just cause requirements" and that respondent had been reasonably discharged for misconduct and incompetence. Respondent appealed to the district court, which reversed the decision of the hearing board. The district court remanded the matter to the hearing board for additional findings.

Appellant appeals from the order for remand and respondent cross-appeals.

D E C I S I O N

Under the VPA, a public employer may dismiss an employee who is an honorably discharged veteran only for incompetency or misconduct. Minn. Stat. § 197.46 (2012). The determination of incompetency or misconduct is made by the public employer's civil service board or commission, merit system authority, or an ad hoc hearing board convened specifically for the purpose of rendering such a decision. *Id.* In this case, the decision was issued by an ad hoc hearing board. "[T]he task of the hearing board is

twofold: first, to determine whether the employer acted reasonably; second, to determine whether extenuating circumstances exist justifying a modification in the disciplinary sanction." *In re Schrader*, 394 N.W.2d 796, 801–02 (Minn. 1986).

Either party may appeal the decision of the hearing board to the district court. Minn. Stat. § 197.46. On appeal from the district court's decision, we independently review the board's decision, and accord no deference to the district court. *Myers v. City of Oakdale*, 461 N.W.2d 242, 244 (Minn. App. 1990).

We will sustain the board's findings of fact when they are supported by substantial evidence. *Schrader*, 394 N.W.2d at 801. "Substantial evidence" is defined as "1. [s]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2. [m]ore than a scintilla of evidence; 3. [m]ore than some evidence; 4. [m]ore than any evidence; and 5. [e]vidence considered in its entirety." *Cable Commc'ns Bd. v. Nor–West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984).

We review the decision of the hearing board only for an abuse of discretion. *Schrader*, 394 N.W.2d at 802. This is because the decision of an executive body to discharge an employee is a discretionary exercise of its administrative powers, and the judiciary cannot subject such a decision to de novo review without violating separation of powers principles. *See Tischer v. Hous. & Redev. Auth. of Cambridge*, 693 N.W.2d 426, 429 (Minn. 2005) (decision to dismiss is discretionary administrative function); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) (judiciary cannot review administrative decisions de novo without violating separation of powers principles).

Because the decision is administrative in character, the courts may not examine whether either party met any specific burden of proof, such as a preponderance of the evidence, so long as the hearing board's decision is supported by substantial evidence. *See State ex rel. McGinnis v. Police Civil Serv. Comm'n of Golden Valley*, 253 Minn. 62, 66, 71, 91 N.W.2d 154, 158, 160 (1958) (striking down a provision in a prior version of Minn. Stat. § 197.46 that placed the burden of proof on the public employer who was proposing dismissal, on the grounds that the provision violated separation of powers principles).

I

As an initial matter, respondent argues that, because the district court did not issue an order for judgment, no final judgment was entered from which appeal may be taken. This court may hear an appeal "from a final order, decision or judgment affecting a substantial right made in an administrative or other special proceeding." Minn. R. Civ. App. P. 103.03(g). A district court order reversing an agency decision that was favorable to the agency affects a substantial right and is appealable under this provision. *Minn. Dep't of Highways v. Minn. Dep't of Human Rights*, 308 Minn. 158, 165–66, 241 N.W.2d 310, 314–15 (1976) (interpreting a pre-Court-of-Appeals version of the rule).

This appeal arises from a district court order reversing a favorable administrative decision. Under *Minn. Dep't of Highways*, because the district court's decision affects a substantial right of appellant, we have jurisdiction to review it. *See id.*

II

Appellant argues that the district court erred by reversing the decision of the hearing board based on the district court's determination that the board "significantly misunderstood" the procedural posture of respondent's criminal and implied-consent proceedings.

When an agency's findings are supported by substantial evidence, a district court reviewing the agency's findings may not substitute its judgment for that of the agency. *State ex rel. Jenson v. Civil Serv. Comm'n of Minneapolis*, 268 Minn. 536, 538–39, 130 N.W.2d 143, 146 (1964). To do so would violate the separation of powers. *Tischer*, 693 N.W.2d at 429; *Reserve Mining Co.*, 256 N.W.2d at 824. The reviewing court may reverse the decision only if the hearing board abused its discretion. *Schrader*, 394 N.W.2d at 802.

The board found that respondent's driver's license had been reinstated on August 10, 2010, and that respondent had a driver's license at the time of the hearing. However, the board ascribed little weight to the procedural posture of the implied-consent proceedings, noting that although the driving-while-impaired charge against respondent might be resolved by the Intoxilyzer challenge, respondent's open-bottle charge was not subject to that challenge. The board's assessment is accurate, given that the evidence obtained from the Intoxilyzer would have no bearing on the open-bottle charge. *See generally* Minn. Stat. § 169A.35, subd. 3 (2010) (open-bottle law).

The board also emphasized that, regardless of the ongoing criminal and civil proceedings,

> the damage has been done to [respondent's] driving record . . . *in the eyes of the insurance broker, company, and the underwriter.* They will not insure him and [appellant] will not employ him to drive throughout the district to perform plumbing jobs without the insurance. He has rendered himself incompetent to hold the job by virtue of his actions.

(Emphasis added.)

Based on these findings and reasoning, the board's understanding of the procedural posture of the implied-consent and criminal proceedings was not the primary basis for the board's decision. Instead, the board based its decision on the uncontroverted testimony of appellant's insurance representatives. Respondent did not argue or cite to any authority prohibiting the insurer from refusing to cover his use of appellant's fleet vehicles.

The district court believed that the board should have ascribed greater weight to the procedural posture of the implied-consent proceedings. However, it was not within the power of the district court, nor is it within this court's power, to rebalance the weight given by the board to the evidence before it. *See Jenson*, 268 Minn. at 538–39, 130 N.W.2d at 146. The district court erred in reversing the hearing board on this basis.

III

Appellant argues that the hearing board did not abuse its discretion in determining that respondent's conduct on February 12, 2010 was misconduct and that the subsequent loss of his driver's license and the inability of appellant to obtain insurance for him renders him incompetent. Under the VPA, the term "misconduct" has the same meaning

as "just cause." *Cass Cnty. v. Law Enforcement Labor Servs., Inc.*, 353 N.W.2d 627, 630 (Minn. App. 1984). Such "just cause" must

> specially relate[] to and affect[] the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office. An attempt to remove an officer for any cause not affecting his competency or fitness would be an excess of power, and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office, and the qualifications necessary to fill it.

State ex rel. Hart v. Common Council, 53 Minn. 238, 244, 55 N.W. 118, 120 (1893), *quoted in Cass Cnty.*, 353 N.W.2d at 630.

Our role is to determine whether the hearing board's factual findings are supported by substantial evidence. *Schrader*, 394 N.W.2d at 801. In this case, there was substantial evidence before the board indicating that respondent's position required him to drive a school vehicle. Respondent's direct supervisor testified to this fact. There was substantial evidence before the board demonstrating that respondent had driven while intoxicated on February 12, 2010. Appellant admitted as much at the hearing, explaining that a mixture of medication and "a couple" of beers was the reason why he was "so intoxicated." There was substantial evidence before the hearing board indicating that respondent could no longer be insured to drive appellant's fleet vehicles. Appellant provided the board with testimony from the insurance broker with whom it works, the company vice president, and a representative of the insurance company. Each testified

that their company would no longer cover respondent's use of school vehicles regardless of the outcome of his appeals in the criminal and implied-consent proceedings.

The record contains substantial evidence touching on respondent's qualifications and ability to perform his job, and showing that he is not a fit or proper person to hold it. *See Hart v. Common Council*, 53 Minn. at 244, 55 N.W. at 120. Therefore, the ad hoc hearing board's conclusion that appellant's termination of respondent's employment under these circumstances amounted to removal for incompetence and misconduct was supported by substantial evidence and was not an abuse of discretion.

IV

Respondent argues that the board should have granted his motion to reopen the record to allow him to introduce evidence of events that occurred following the hearing. Respondent argues that, because the board did not reopen the record to permit the introduction of additional evidence, its decision was not supported by substantial evidence based on the record as a whole.

Respondent offers no authority to support an argument that the board had the authority to reopen the record following the hearing to permit the introduction of additional evidence. Section 197.46 is silent on this question. Respondent's allegations appear to have no merit, and we decline to address them in the absence of adequate legal analysis or citation. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519, 187 N.W.2d 133, 135 (1971) (stating that such arguments "will not be considered on appeal unless prejudicial error is obvious on mere inspection").

V

Respondent argues that his discharge violated section 197.46 because he was discharged prior to the hearing, while the statute provides that certain veterans in public-sector employment "shall not be removed from such position or employment except for incompetency or misconduct shown *after* a hearing, upon due notice, upon stated charges, in writing." Minn. Stat. § 197.46 (emphasis added). Respondent appears to argue that, because he was prohibited from being on school property, he was effectively discharged prior to the hearing and therefore the decision of the board to discharge him should be reversed.

The letter informing respondent of the school board resolution to discharge him informed him of the right to a veteran's preference hearing and further provided that, by asserting his right to a hearing, he would continue to receive pay "pending a final determination." Under the circumstances, respondent's discharge by the school board was a provisional action and subject to the outcome of respondent's invocation of his right to a veterans preference hearing.

Even if respondent was prematurely discharged, the remedy for a veteran who is not permitted to return to work pending a veterans preference hearing is to receive full pay and benefits pending a determination by the hearing board. *Johnson v. Vill. of Cohasset*, 263 Minn. 425, 436, 116 N.W.2d 692, 700 (1962); *Harr v. City of Edina*, 541 N.W.2d 603, 605 (Minn. App. 1996). Respondent continued to receive full pay and benefits until the hearing board issued its decision. Even if respondent was discharged prior to the hearing, any error was harmless.

VI

Respondent argues that extenuating circumstances justified modifying the discharge to a lesser sanction and that the board's failure to modify the discharge was an abuse of discretion. When a hearing board finds extenuating circumstances, it may modify the public employer's decision to discharge and instead impose lesser sanctions. *Schrader*, 394 N.W.2d at 802. However, the mere existence of extenuating circumstances does not compel modification of the sanction. *Myers*, 461 N.W.2d at 244. "[U]nder the correct standard of review, the [district] court, to reverse, had to find more than that the modification was 'justified.' It had to find the board's decision not to modify was an abuse of discretion or without substantial support in the record." *Id.*

Here, some of the extenuating circumstances advanced by respondent may have been sufficient to support a finding of extenuating circumstances and could have been supported by substantial evidence. The hearing board considered respondent's evidence and argument regarding modification of the sanction. It rejected those arguments. On this record, the circumstances did not *compel* a modification and the hearing board did not abuse its discretion by declining to modify the discharge.

In sum, the ad hoc hearing board's decision to discharge respondent was supported by substantial evidence and was not an abuse of discretion. By reweighing the evidence, the district court applied an incorrect standard of review. Accordingly, the decision of the district court is reversed, and the decision of the ad hoc hearing board is reinstated.

Reversed.