STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0604

Julie Lohse,
Relator,

vs.

City of Oak Grove,
Respondent.

Filed March 3, 2009
Affirmed
Kalitowski, Judge

City of Oak Grove

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Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

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

KALITOWSKI, Judge

Relator Julie Lohse challenges the Oak Grove City Council's (city council) action terminating her employment with respondent City of Oak Grove (the city), arguing that the decision was arbitrary, capricious, unreasonable, and unsupported by substantial evidence. We affirm.

D E C I S I O N

The city employed relator as an accountant/IT technician for approximately 12 years prior to the termination of her employment. In February 2008, the city administrator recommended to the city council that it terminate relator's employment because she changed her own pay rate without authorization. The city council held a hearing on this recommendation and subsequently voted to terminate relator's employment.

This court's review of a city's decision to terminate employment "is limited to an inspection of the record to determine the propriety of the city council's jurisdiction and procedures and, with respect to the merits, to determine whether its decision was arbitrary, oppressive, fraudulent, or unsupported by evidence or applicable law." *Reierson v. City of Hibbing*, 628 N.W.2d 201, 204 (Minn. App. 2001) (citing *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992)). This court does not retry the facts or make credibility determinations. *Id.* The decision will be upheld if the city furnished any legal and substantial basis for the action taken. *Id.* (quotation and citation omitted).

Reasonableness

Relator argues that the city council's decision was unreasonable because the record does not support the allegation that she changed her own pay rate without authorization. We disagree. The record includes evidence supporting the allegation. Specifically, the administrator's February 7, 2008 memorandum to the city council and the city administrator's testimony at the hearing describe in detail the allegation that relator changed her pay rate without authorization on January 2, 2008. In the resolution

terminating relator's employment, the city council expressly referenced the February 7, 2008 memorandum. Because the reasons set forth in the city administrator's memorandum support the city council's decision to terminate relator, we conclude that the decision was not unreasonable.

Arbitrariness and capriciousness

Relator argues that the city council's decision was arbitrary and capricious because the city council voted to terminate relator's employment without adequately determining whether relator acted with or without authorization in changing her own pay rate. We disagree.

A decision is arbitrary and capricious if it is an exercise of the administrative agency's will, rather than its judgment, or if the decision is based on whim or is devoid of articulated reasons. *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. App. 2001). Where there is room for two opinions on the matter, the choice of one course of action is not arbitrary and capricious. *Id.*

Relator correctly points out that one council member requested further investigation as to whether the city administrator authorized relator to change her pay rate. Relator argues that the decision not to investigate demonstrates the arbitrariness of the decision. But the record indicates that in voting to terminate relator's employment, the city council relied on the reasons set forth in the city administrator's February 7, 2008 memorandum that specifically states that relator did not have authorization. This memorandum provides a reasonable basis to terminate relator's employment and the

choice of this course of action over further investigation was not arbitrary and capricious. *See CUP Foods, Inc.*, 633 N.W.2d at 565.

Relator also points out that another council member expressed misgivings about terminating relator's employment. But that council member ultimately voted in favor of terminating relator's employment, stating that "the bottom line is that [relator] did not have council authorization to change the wage scale . . . whether it be hers or anybody's. Council action is needed." This council member's decision to vote in favor of terminating relator's employment was based on reasoned judgment and thus, was neither arbitrary nor capricious.

Relator argues that the council members did not follow their own reasonable judgments and instead merely followed the mayor's will. But the record indicates that the city council members discussed the options and thereafter voted to terminate relator's employment. Because the city council articulated its reasons for terminating relator's employment and adopted the city administrator's memorandum and because the record shows that the city council independently exercised its judgment, we conclude that termination of relator's employment was not arbitrary and capricious.

Substantial evidence

Relator argues that the city's decision was unsupported by substantial evidence because the record is void of any evidence suggesting that relator acted with improper intent. We disagree.

For purposes of reviewing an administrative agency's decision, substantial evidence is (1) such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety. *CUP Foods, Inc.*, 633 N.W.2d at 563 (citation omitted).

Relator argues that there was not substantial evidence of relator's criminal intent to support the city council's decision to invoke Minn. Stat. § 609.456 (2008). But that statute does not address the discharge of a city employee. Rather, it imposes a requirement on the city council to report to law enforcement evidence of theft, embezzlement, unlawful use, or misuse of public funds. Minn. Stat. § 609.456. Thus, it is not relevant to the determination of the propriety of terminating relator's employment. Relator notes that no criminal prosecution of relator occurred following the city council's decision to report under section 609.456. Relator urges this court to follow the reasoning of *Liffrig v. Indep. Sch. Dist. No. 442*, 292 N.W.2d 726 (Minn. 1980), which held that because the employee lacked improper intent, the termination of Liffrig's employment was not supported by substantial evidence. But *Liffrig* is distinguishable because that case concerned the discharge of a high school principal pursuant to proceedings under Minn. Stat. § 125.12 (1978). 292 N.W.2d at 727. Here, there is no statute governing the termination of relator's employment.

The relevant question here is not whether relator acted with improper intent, but whether substantial evidence supports the city council's decision. *See CUP Foods, Inc.*, 633 N.W.2d at 563 (reviewing an agency's decision for substantial evidence). As discussed above, the city administrator's testimony and memorandum state that relator was specifically told not to change her 2007 pay rate and that relator changed her pay rate

without authorization. Relator claims that the city administrator authorized her to change her pay rate or that the change resulted from a miscommunication. But the city council expressly adopted the reasons set forth in the city administrator's memorandum, thereby indicating that it chose to accept the city administrator's version of events. *See Reierson*, 628 N.W.2d at 204 (stating that this court does not retry the facts or make credibility determinations). We conclude that the memorandum and the testimony of the city administrator constitute substantial evidence supporting the city council's decision.

In sum, relator contended that her pay rate change was authorized while the city administrator contended it was not. And following a hearing on the matter the city council chose to accept the city administrator's version of events. Because this court does not retry facts or make credibility determinations, and because the city council's decision was not arbitrary, capricious, unreasonable or unsupported by substantial evidence, we affirm the decision to terminate relator's employment. *See Reierson*, 628 N.W.2d at 204; *CUP Foods, Inc.*, 633 N.W.2d at 565.

Respondent argues that relator was an at-will employee whose employment could be terminated for any reason and therefore that we need not consider whether relator's discharge was unreasonable, arbitrary and capricious, or unsupported by substantial evidence. Because we conclude that the termination of relator's employment was not unreasonable, arbitrary and capricious, or unsupported by substantial evidence, we need not address respondent's at-will arguments. Moreover, respondent did not present this argument below and the city council did not base its decision on relator's employment status; therefore this argument was waived. *See Thiele v. Stich*, 425 N.W.2d 580, 582

(Minn. 1988) (stating that appellate courts must generally consider only those matters presented and considered below).

Affirmed.