STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0823

In the Matter of the Recommendation for Discharge of
Bruce Carlson,
Police Sergeant, Minneapolis Police Department.

Filed April 7, 2009
Affirmed
Lansing, Judge

Minneapolis Civil Service Commission

Marshall H. Tanick, Teresa J. Ayling, Brian N. Niemczyk, Mansfield, Tanick & Cohen, P.A., 1700 U.S. Bank Plaza South, 220 South Sixth Street, Minneapolis, MN 55402-4511 (for relator Bruce Carlson)

Susan L. Segal, Minneapolis City Attorney, Trina Renee Chernos, Assistant City Attorney, 300 Metropolitan Centre, 333 South Seventh Street, Minneapolis, MN 55402 (for respondent City of Minneapolis)

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

LANSING, Judge

Bruce Carlson obtained a writ of certiorari, seeking review of the Minneapolis Civil Service Commission's decision that sustained his discharge for cause from the Minneapolis Police Department. Because the commission correctly applied the law to evidence sufficient to establish cause for the discharge, we affirm.

F A C T S

The Minneapolis Police Department discharged Sergeant Bruce Carlson from employment in August 2007. Two incidents—both involving traffic stops—were at the center of the discharge decision. In the first incident, Carlson was a passenger in a car driven by his wife. In the second incident, Carlson was the driver.

The first incident occurred in October 2006 in Lonsdale. Carlson was a Minneapolis police sergeant at the time but was not on duty. Carlson and his wife were on their way home from a wedding reception, and his wife was driving. A Lonsdale police officer stopped the car for a traffic infraction. As the officer spoke to Carlson's wife, Carlson interrupted and told the Lonsdale officer that the driving conduct was not a traffic violation. He then identified himself as a police officer.

In the course of the stop, the Lonsdale officer discovered a mixed drink in the glove compartment. Carlson, who was under the influence of alcohol, said that he had not known it was there. When Carlson's wife failed a sobriety test and was placed in the squad car, the Lonsdale officer had difficulty keeping Carlson away from the squad car. Carlson's wife told the Lonsdale officer that the drink in the glove compartment belonged to Carlson.

The Lonsdale officer reported Carlson's conduct to the Minneapolis Police Department. In response, the department's Internal Affairs Unit (IAU) opened an investigation and notified Carlson. The notice stated that the conduct was being investigated for potential B-level charges for interfering with a criminal investigation and

for off-duty actions offending the department's ethical standards. The notice further stated that the categories and charges could be amended during the investigation.

Carlson told IAU investigators that he had identified himself as a police officer only to lend weight to his opinion that no traffic infraction had occurred. He also said that he had done nothing wrong and would not change his conduct if a similar event occurred in the future. He explained that the alcoholic drink in the glove compartment had been put there by some people at the wedding who had been warned that they could not have alcohol in the parking lot. The IAU report recommended a finding of three B-level violations, the two listed in the notice and an additional ethics violation for Carlson's identifying himself as a police officer in an attempt to gain special consideration.

The second incident occurred in May 2007 in Burnsville. A Burnsville police officer stopped Carlson, who was off duty, after Carlson made a series of aggressive lane changes. The Burnsville officer noticed that the Camaro Carlson was driving had no front license plate and, in a registration check, learned that the 2007 tabs on the back license plate were issued to a Taurus owned by the City of Minneapolis. The tabs for the Camaro had not been renewed in 2007. Carlson identified himself as a police officer and told the Burnsville officer that Carlson's autistic son must have mixed up the tabs when he put them on the car. Later, Carlson called the Burnsville officer and told him that what actually happened was that he received the tabs at work; forgot to put them on his police-issued, unmarked Taurus; carried them around until they ended up on a desk at his home; later saw them on that desk; and assumed that they were for his Camaro. The

Burnsville police officer expressed doubt about Carlson's shifting explanations and concluded that Carlson was attempting to obtain special treatment as a fellow police officer. When the Burnsville officer told Carlson that he had to treat him the same as anyone else, Carlson replied, "Well you don't have to, but that's your choice."

The Burnsville police officer reported Carlson's conduct to the Minneapolis Police Department and the IAU again opened an investigation. The IAU notified Carlson that using the city's license tabs on his personal vehicle could result in a more serious, D-level ethics violation. The level of seriousness turned on Carlson's intent, and the investigator's final report recommended a finding that the conduct was not intentional.

After a combined review of the two IAU investigations, a panel of three deputy chiefs made preliminary findings that both incidents resulted in D-level violations. The panel notified Carlson of its intention to recommend discharge and offered him the opportunity to address the charges at an August 7, 2007 meeting. Carlson attended with counsel but chose not to speak.

Following the meeting, the panel made a formal recommendation to the assistant chief responsible for final personnel decisions. For the Lonsdale incident, the panel recommended a D-level violation for untruthfulness. The recommendation stated that Carlson not only interfered with an investigation and attempted to obtain special treatment as a fellow police officer, but also "gave untruthful statements to police and . . . to IAU investigators [about] the open container of alcohol found in his vehicle." In the review of the Burnsville stop, the panel rejected outright the IAU investigator's conclusion that Carlson's use of the city's tabs had been unintentional. The panel stated

that either violation would independently warrant discharge. The assistant chief reviewed the record and concurred with the panel's recommendation. The department discharged Carlson from employment, effective August 8, 2007.

Carlson appealed to the Minneapolis Civil Service Commission, which conducted a full evidentiary hearing. The exhibits received as evidence included the combined case file from both incidents; copies of prior performance reviews; a copy of the department's labor agreement; records of Carlson's prior disciplinary actions; Carlson's diploma, certificates, and commendations as a police officer; copies of relevant departmental codes of conduct, policies, and procedures; and documentation of other departmental disciplinary measures submitted to support Carlson's argument that his discharge was a disproportional penalty. The deputy chief who had convened the three-member review panel and the assistant chief who made the final decision to discharge Carlson were witnesses at the hearing. Carlson both cross-examined and recross-examined the witnesses. Carlson's supervisor testified that Carlson had satisfactorily performed his duties, and Carlson testified extensively on his own behalf.

The department also relied on a 1996 disciplinary action against Carlson in reaching the discharge decision. The disciplinary action was a demotion and was based in part on Carlson's attempt to sway the report of fellow officers who had responded to a call from a liquor store where Carlson, who was on duty, had made a nonwork-related stop and provoked a physical altercation. The department also took into account Carlson's lack of remorse or failure to recognize the impropriety of the conduct.

The commission issued written findings sustaining Carlson's discharge for cause. By writ of certiorari, Carlson challenges the determination.

D E C I S I O N

Judicial review of a civil service commission's decision on a contested discharge of a police officer is analogous to review of a quasi-judicial decision by a state administrative agency. *See Bahr v. City of Litchfield*, 420 N.W.2d 604, 607 (Minn. 1988) (holding that commission's quasi-judicial decisions should receive same treatment as contested case under Administrative Procedure Act). Our review is limited to an inspection of the record to determine the propriety of jurisdiction and procedures and, with respect to the merits, to determine whether the decision was arbitrary, oppressive, unreasonable, fraudulent, or unsupported by the evidence or applicable law. *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992). We will uphold the commission's decision if the evidence "furnishe[s] any legal and substantial basis for the action taken." *Beck v. Council of St. Paul*, 235 Minn. 56, 58, 50 N.W.2d 81, 82 (1951).

Carlson's challenge to the commission's decision essentially relies on four grounds. He contends that it (1) is not supported by substantial evidence, (2) violated his right to due process by failing to notify him of the basis for his discharge, (3) incorrectly applied the law by taking into account a past disciplinary action, and (4) was arbitrary.

I

Under its charter, the City of Minneapolis must have cause to discharge a police officer who has completed a training course and twelve months of continuous employment. Minneapolis, Minn., City Charter ch. 19, § 11 (1986). To show cause, the

city must have a reason for removing an officer that "specially relates to and affects the administration of the office . . . [or] relate[s] to the manner in which the employee performs his duties." *Caldwell v. City of Minneapolis*, 486 N.W.2d 151, 153 (Minn. App. 1992) (citations omitted), *review denied* (Minn. Aug. 4, 1992). A finding of cause must be supported by substantial evidence. *Hagen v. State Civil Serv. Bd.*, 282 Minn. 296, 299 164 N.W.2d 629, 632 (1969).

The rules of the Minneapolis Civil Service Commission provide that cause for termination arises through "gross or repeated misconduct" or "severe initial misconduct." Minneapolis R. Civ. Serv. Comm'n 11.04(E). Behaviors that qualify as misconduct include "dishonest conduct," whether on-duty or not, and knowingly making false statements when being investigated for misconduct. Minneapolis R. Civ. Serv. Comm'n 11.03(B). Untruthfulness is always a D-level violation, the most severe level of offense on a scale from A to D. Minneapolis Police Dep't, Policy & Procedure Manual § 5-101.01. Misconduct also includes misappropriation of city property and violation of any departmental rule, policy, or procedure or the city's code of ethics. Minneapolis R. Civ. Serv. Comm'n 11.03(B). The city's code of ethics forbids use of an official position "to solicit privileges or special treatment." Minneapolis, Minn., Code of Ethics § 15.70 (2003).

These rules and code provisions establish that legal cause for dismissal exists when the department can prove a D-level offense involving dishonesty, theft of city property, or abuse of a police officer's position to obtain special treatment. The record, which we review in a light most favorable to the commission's decision, provides

substantial support for findings of a D-level offense on each of these three causes. The commission's findings on the Lonsdale and Burnsville incidents rely on extensive evidence in the record, which the commission apparently credited. The commission also relied on the conclusions of the disciplinary panel that reviewed the two incidents. The commission's findings cite the panel's conclusions that a D-level violation was proved in each incident and concludes that "[t]he department has proved that it had cause" to discharge Carlson. The evidence in the record is sufficient to support the commission's findings of untruthfulness, theft of property, and Carlson's use of his position to obtain special treatment.

The finding that Carlson was untruthful in the Lonsdale incident is supported by the Lonsdale officer's account of the incident, Carlson's wife's statement that the drink in the glove compartment belonged to Carlson, and Carlson's shift in his explanation from a lack of knowledge to a claim that the drink was placed in the glove compartment by people at the wedding. With respect to the misappropriation of the city license tabs, the record supports a conclusion that Carlson acted intentionally in using the city-owned tabs for his personal vehicle. The Burnsville officer repeatedly expressed doubt about Carlson's changing story, and the department's testimony before the commission—describing how city tabs are marked and distributed—makes highly improbable Carlson's insistence that it was merely an "honest mistake." Substantial evidence in the record, including transcripts of Carlson's statements, also supports the commission's conclusion that Carlson attempted to obtain special treatment in both the Lonsdale and the Burnsville

incidents. The record, viewed in a light favorable to the commission's decision, provides substantial evidence of cause for Carlson's termination on any of the three grounds.

II

Carlson next asserts a violation of his right to due process based on the disciplinary panel's failure to notify him that his discharge was grounded in part on evidence that he attempted to obtain special treatment from the Burnsville officer. He says this allegation was absent from the notice provided by the disciplinary panel and from its written conclusions following the hearing.

A public employee who can only be removed for cause has a property interest in his employment. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 1493 (1985). Before the state can deprive him of the property interest, it must afford him a pre-termination hearing at which the government must provide "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546, 105 S. Ct. at 1495. These pre-termination procedures need not be elaborate, and the availability of a full evidentiary hearing posttermination can accommodate for minimal pre-termination proceedings. *Id.* at 546, 105 S. Ct. 1495; *Conlin v. City of St Paul*, 418 N.W.2d 741, 744 (Minn. App. 1988).

Applying these principles, we conclude that Carlson received due process because he ultimately received a full evidentiary hearing before the commission. Carlson admits in his brief that he was able to provide his own explanation of his statements to the Burnsville officer. He also had access to the IAU file which included the complete

transcripts of those statements. And he cross-examined the department's witnesses about their impressions of his statements. Carlson has not provided any explanation of what more he would have done if he had received a more explicit notice. Carlson was provided ample opportunity to present his account of the events. That is the opportunity that *Loudermill* requires.

Because we are satisfied that Carlson fully availed himself of the opportunity to address the allegations against him, we do not reach the question of whether the panel's written notice and recommendation before and after his hearing sufficiently encompassed the allegation that Carlson sought special treatment from the Burnsville officer.

III

Carlson's third asserted ground of error is that the commission, in deciding the propriety of his discharge, improperly considered evidence of a 1996 disciplinary action that involved an incident in a liquor store. He contends that, based on the severity level of the 1996 incident, department policies require removal of this material from his files after five years. The evidence does not support this claim.

The current policies, which establish four different levels for violations and assign "reckoning periods" for each level, were apparently not in effect at the time of the 1996 incident. Minneapolis Police Dep't, Complaint Process Manual 1-2, 10 (Mar. 2002). Nowhere does the record definitively establish, therefore, the exact level of the 1996 violation or its reckoning period. But based on the current policies and on testimony at the commission hearing, the department has never had a reckoning period that removes

the evidence of the most serious disciplinary actions from the file. Minneapolis Police Dep't, Complaint Process Manual 14. Consistent with this evidence, the D-level violations under the current policy remain permanently in an officer's record and may be weighed when considering the discipline for any subsequent violation. *Id.*

It is undisputed that the on-duty liquor-store incident was considered sufficiently serious to result in a permanent demotion. Although an arbitrator mitigated Carlson's punishment to a temporary demotion based on Carlson's years of service, the mitigated punishment does not diminish the severity of the offense itself. The 1996 incident is serious enough to have remained in Carlson's file, and it was not an error of law for the commission to allow the past disciplinary incident to be considered as an aggravating factor in the current disciplinary proceeding.

IV

Finally, Carlson argues that the commission's decision was arbitrary and capricious in four ways.

First, he contends that his discharge was disproportionate to any proven misconduct. At the commission hearing, Carlson presented evidence from an expert in an attempt to demonstrate that his discharge was unreasonable because other officers had not been discharged for similar or more egregious conduct. We agree with the department's contention that the expert's conclusions are questionable because the foundational data lacks detail. Furthermore the data shows that at least two other officers, who committed infractions, which on their face, were comparable to Carlson's

misconduct, were also discharged. We cannot say as a matter of law that the commission's assessment was incorrect or that discipline short of discharge was required.

Second, Carlson alleges that the department based its decision on his age. We reject this claim because it simply has no basis in the record.

Third, Carlson asserts that the city changed its rationale for his discharge. This assertion is accurate to some degree, but the reasons for the changes were based on a consistent factual record that developed in response to Carlson's shifting positions. The record viewed as a whole supports multiple grounds for termination.

Carlson's final allegation, that the commission's decision ignores his many years of service to the department, is not supported by the record. The commission allowed voluminous evidence on Carlson's work history and made findings of positive aspects of his job performance. Contrary to Carlson's suggestion, the evidence of his many years of service supported negative as well as positive inferences. The department might reasonably have seen his many years of service as a source for his apparent sense of privilege. Carlson's testimony that he would act no differently in the future demonstrates an inability to recognize the impropriety of attempting to misuse his position as a police officer.

Carlson has not shown that the city acted arbitrarily or contrary to law, and we conclude that the record provides substantial evidence of cause for his discharge as a police officer.

Affirmed.