STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1757

David Seivert,
Relator,

vs.

City Council of the City of Sleepy Eye,
Respondent.

Filed July 28, 2009
Affirmed; motion granted in part and denied in part
Peterson, Judge

City Council of City of Sleepy Eye

Philip G. Villaume, Jeffrey D. Schiek, Villaume and Schiek, P.A., 2051 Killebrew Drive, Suite 611, Bloomington, MN 55424 (for relator)

Patricia Y. Beety, League of Minnesota Cities, 145 University Avenue West, St. Paul, MN 55103 (for respondent)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

PETERSON, Judge

In this certiorari appeal, relator challenges respondent city council's termination of his employment as police chief, asserting that (1) the termination decision was not supported by substantial evidence and (2) respondent's failure to provide an evidentiary

hearing before a neutral third party violated relator's due-process rights. We affirm the city council's decision, and we grant in part and deny in part relator's motion to strike.

FACTS

Relator was hired as a patrol officer for the Sleepy Eye Police Department in February 2000 and promoted to the position of police chief in October 2004. At 6:40 p.m. on September 3, 2007, a Sleepy Eye police officer responded to a medical emergency at relator's home. The officer found relator sitting in a chair, unresponsive. Relator's wife told the officer that relator had been drinking "a good part of the day" and that he had taken several of his wife's prescription muscle relaxers, described as a generic brand of Valium. She estimated that relator had drunk six to eight beers and three or four beverages similar to a wine cooler. She did not know how many pills relator had taken but stated that there had been about 30 left in the bottle. The bottle was missing, and police were unable to locate it. Relator was transported by ambulance and admitted into a hospital.

On September 10, 2007, the city placed relator on a leave of absence. On October 17, 2007, the city council met to decide whether to terminate relator's employment as police chief. Four police officers attended the meeting and expressed their concerns about relator's capability to continue working as police chief. One officer stated that officers did not feel safe when relator was the backup officer. Officers reported specific incidents that raised concerns, including relator often failing to report for work on Mondays, sniffing paint fumes at a local auto-body shop while on duty and in uniform, and shaking during work after drinking too many energy drinks. Relator was given the

opportunity to respond to the officers' statements, and he admitted to having an alcohol problem.

At the end of the meeting, the city council voted unanimously to terminate relator's employment. The October 17, 2007 meeting was audio recorded, and a transcript of the recording was provided to relator. On October 18, 2007, the city manager notified relator by letter of the reasons for the city council's decision. Relator appealed the October 17, 2007 decision and demanded an evidentiary hearing. The city agreed, and the evidentiary hearing was held before an open session of the city council on September 16, 2008. Relator was represented by counsel at the hearing.

At the hearing, a statement by Sleepy Eye police officers to the city council was admitted into evidence. The statement describes several incidents, each of which was witnessed by at least one Sleepy Eye Police Department member, including the following: On May 27, 2005, two officers responded to a domestic call involving alcohol at relator's residence. On several different occasions, officers saw relator, in uniform, huffing paint-thinner fumes at a local auto-body shop. On many occasions, relator failed to report for work. On one occasion, two officers responding to a call from an off-duty officer from another police department who was at relator's residence arrived to find that relator was intoxicated and upset and had broken a piece of furniture and a door. Relator testified that he saw the statement for the first time the day before the hearing. Three unsworn witness statements, dated December 13, 2007, regarding relator sniffing paint fumes were also admitted into evidence.

At the end of the meeting, the city council unanimously found that relator displayed poor judgment in his position as police chief by sniffing paint in public in uniform; engaging in inappropriate off-duty behavior, which required the assistance of law-enforcement officers; failing to communicate with law-enforcement personnel regarding scheduling; and general unreliability. The council voted unanimously to affirm the October 17, 2007 decision terminating relator's employment. This certiorari appeal followed.

D E C I S I O N

Generally, decisions of municipalities "enjoy a presumption of correctness" and as long as the municipality "engaged in reasoned decision-making, a reviewing court will affirm its decision even though the court may have reached another conclusion." *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 562 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). "A city council's decision may be modified or reversed if the city . . . made its decision based on unlawful procedure, acted arbitrarily or capriciously, made an error of law, or lacked substantial evidence in view of the entire record submitted." *Montella v. City of Ottertail*, 633 N.W.2d 86, 88 (Minn. App. 2001) (quotation omitted). This court's review "is confined to the record before the city council at the time it made its decision." *Id.*

I.

> Well-established law declares that a public employee with a constitutionally protected property interest in that employment is entitled to a pretermination hearing consisting of notice and an opportunity to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487,

> 1493 (1985). A full evidentiary hearing is not necessary if a more complete hearing is available to the employee after the termination. *Id.* at 545, 105 S. Ct. at 1495. Rather, the pretermination hearing "should be an initial check against mistaken decisions." *Id.*

Pelerin v. Carlton County, 498 N.W.2d 33, 36 (Minn. App. 1993), *review denied* (Minn. May 18, 1993).

Relator was given notice of the charges against him and an opportunity to respond at both the October 17, 2007 and September 16, 2008 hearings. Relator's due-process argument is based on the city council's failure to provide him a hearing before a neutral decision maker. Relator relies on teacher-termination cases, in which the supreme court has "questioned the fairness of termination proceedings under our current statute, which permits local school boards to exercise the three-part role of prosecutor, judge and jury" and "emphasized that, absent unusual or extenuating circumstances, a hearing examiner should be hired in all cases." *Ganyo v. Indep. Sch. Dist. No. 832*, 311 N.W.2d 497, 499 n.2 (Minn. 1981); *see also Kroll v. Indep. School Dist. No. 593*, 304 N.W.2d 338, 345 n.3 (Minn. 1981). The supreme court, however, has not held that appointment of a hearing officer is a due-process requirement, and we decline to do so in this case.

Thus, the issue is whether there was actual bias. *See Peterson v. County of Dakota*, 479 F.3d 555, 560 (8th Cir. 2007) (applying actual-bias standard in holding that grievance procedures in collective-bargaining agreement satisfied procedural due-process requirements). The decision to terminate relator's employment followed the September 3, 2007 incident, which raised serious concerns about relator's fitness to perform the duties of a police chief. At the October 17, 2007 hearing, officers reported additional

incidents that indicated that relator was unfit to perform the duties of a police chief, and relator admitted to having an alcohol problem. The record shows that the city council's decision was based on the evidence presented at the October 17, 2007 and September 16, 2008 hearings, and nothing in the record indicates any bias against relator by any member of the city council.

Relator asserts that some of the incidents described in the police officers' statement were more than one year old and, therefore, under the Sleepy Eye employee handbook, the statements should not have been considered. But employees who receive the manual sign a form acknowledging that the handbook "is neither a contract of employment nor a legal document." Instead, the "handbook is intended to provide employees with a general understanding of [the city's] personnel policies" and "is not intended to create contractual obligations of any kind." *See Audette v. Ne. State Bank of Minneapolis*, 436 N.W.2d 125, 127 (Minn. App. 1989) (finding disclaimer language in employee handbook adequate to avoid formation of contract).

Relator argues that his rights under the Peace Officer Discipline Procedures Act, Minn. Stat. § 626.89 (2008), were violated. Even if relator's rights under Minn. Stat. § 626.89 were violated, he has made no showing of prejudice, and, accordingly, is not entitled to reversal on that basis. *See Deli v. Univ. of Minn.*, 511 N.W.2d 46, 49 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994) (stating that governmental body's decision made on unlawful procedure requires reversal only if party's substantial rights were prejudiced).

II.

Relator argues that the city failed to present substantial evidence of cause for termination at the September 18, 2008 hearing, and, therefore, he is entitled to reinstatement. But relator does not dispute that the evidence presented at the October 17, 2007 hearing, the statement of Sleepy Eye police officers to the city council, and unsworn witness statements constitute substantial evidence supporting his termination. *See Gruening v. Pinotti*, 392 N.W.2d 670, 674 (Minn. App. 1986) (explaining legal cause), *review denied* (Minn. Oct. 29, 1986). Instead, his argument goes only to the procedure followed by the city council.

Relator objects to the statement of Sleepy Eye police officers and unsworn witness statements because they are dated December 2007, almost two months after the city council terminated relator's employment. But the paint sniffing and most of the incidents described in the police officers' statement were addressed at the October 17, 2007 hearing. Also, when determining whether substantial evidence supports a termination decision, the entire termination process is considered as a whole. *See Smutka v. City of Hutchinson*, 451 F.3d 522, 527-28 (8th Cir. 2006) (rejecting argument that pretermination and posttermination hearings should be viewed as separate and distinct events). Relator also raised a general objection to the unsworn witness statements on grounds of hearsay and foundation and to the police officers' statement on grounds of hearsay, foundation, identification, and that there was no date on the statement. But the city council was not bound by the rules of evidence. *Cf. Lee v. Lee*, 459 N.W.2d 365, 370 n.2 (Minn. App.

1990) (noting relaxed evidentiary rules for administrative proceedings), *review denied* (Minn. Oct. 18, 1990).

Relator argues that at the September 16, 2008 hearing, he "did not have an opportunity to cross examine any witnesses because the City Attorney failed to produce any live testimony that [relator] did not adequately perform his job duties and responsibilities." Because the entire termination process is considered as a whole, it was proper for the city council to rely on the record of the October 17, 2007 hearing as support for the termination decision. The city charter provision that governs the termination process does not require the city council to produce witnesses for cross-examination at a posttermination hearing. City of Sleepy Eye Charter, § 2.14. If relator wanted to cross-examine witnesses, he could have requested that those witnesses be present at the September 16, 2008 hearing. Similarly, if relator felt that he lacked adequate time to respond to the unsworn witness statements and statements by police officers, he could have requested additional time to do so.

III.

Relator moves to strike 12 documents from the record compiled by the city on the ground that the documents were not offered as exhibits at the September 16, 2008 evidentiary hearing. The "record" for judicial review must be the "proceedings" and actions of the agency or body. *Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671, 676 (Minn. 1990); *see also Rostamkhani v. City of St. Paul*, 645 N.W.2d 479, 483 (Minn. App. 2002) (stating that record in certiorari appeal is composed of papers, exhibits, and transcripts of any testimony considered by decision-making body being reviewed).

Generally, an appellate court's review is confined to the record before the agency or body at the time it made its decision. *Resolution Revoking License No. 000337 West Side Pawn*, 587 N.W.2d 521, 523 (Minn. App. 1998). But an appellate court may consider evidence outside the record when the evidence is uncontroverted documentary evidence that supports the result being challenged on appeal. *In re Real Property Taxes for 1980 Assessment*, 335 N.W.2d 717, 718 n.3 (Minn. 1983).

Relator moves to strike exhibits 6, 7, 8, 26, and 27, which are notices and minutes of the October 17, 2007 and September 16, 2008 city council meetings. Relator also moves to strike exhibits 13, 19, 21, and 25, which are copies of written correspondence between legal counsel for the parties regarding the posttermination process. The minutes are properly included in the record as records of the proceedings being reviewed. The notices and letters are properly part of the record as uncontroverted procedural documents pertaining to the October 17, 2007 and September 16, 2008 city council meetings.

Finally, relator moves to strike exhibits one (a supplemental police report regarding the September 2, 2007 incident), two (a September 10, 2007 confidential memorandum from the city manager to the police department), and five (a September 12, 2007 confidential memorandum from the city manager to the police department). Although exhibit one was not referred to by name or date, the facts stated in it were referred to at the October 17, 2007 hearing. We, therefore, deny the motion to strike the supplemental report. Because exhibits two and five are evidentiary in nature and were

not presented to the city council, we grant relator's motion to strike those documents, and we have not considered them in rendering our decision.

Affirmed; motion granted in part and denied in part.