IN THE COURT OF APPEALS OF IOWA

No. 0-471 / 10-0100
Filed July 28, 2010

RORY ARMSTRONG,
Plaintiff-Appellee,

vs.

DAVENPORT CIVIL SERVICE COMMISSION,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge.

The Davenport Civil Service Commission appeals from a district court ruling reinstating Rory Armstrong's employment with the city. **AFFIRMED.**

Brian Heyer, Assistant City Attorney, Davenport, for appellant.

Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Rory Armstrong was discharged from his employment as a laborer for the city of Davenport because he failed to pass a physical examination. The district court reversed the decision by the Davenport Civil Service Commission to affirm the discharge and ordered reinstatement. On our de novo review, we affirm the decision of the district court.

I. Background Facts and Proceedings.

Rory Armstrong was hired by the city of Davenport as a laborer in September 2006 after passing a pre-employment physical examination. The examination revealed he was color blind and possessed only 20/200 vision in his left eye.[1] Despite those vision problems, Armstrong had a valid Iowa commercial driver's license (CDL), which he was required to maintain for his employment with the city.

In June 2008, Armstrong decided to apply for a higher-paying job with the city as a street maintenance worker. In order to qualify for that position, he was required to pass another physical examination. The city had apparently adopted new requirements for the physical examination required of its employees in the time since Armstrong had been hired as a laborer. Those requirements were based on the Federal Motor Carrier Safety Administration, Department of Transportation (FMCSA DOT) regulations for commercial motor vehicle drivers and demanded, among other things,

> distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40

[1] Armstrong was able to distinguish between basic red, green, and yellow colors, and he could see 20/15 using both eyes.

> (Snellen) or better with corrective lenses . . . and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

49 C.F.R. § 391.41(b)(10). Armstrong failed the physical examination because the 20/200 vision in his left eye was not correctable.

After learning the results of Armstrong's physical examination, the city sent him a notice of termination effective June 25, 2008, for "[f]ailure to properly perform duties" due to his inability "to pass D.O.T. physical." Armstrong appealed his termination to the Davenport Civil Service Commission. The commission upheld the termination. Armstrong then appealed to the district court which, after trial, overturned the termination and held it was arbitrary. The commission appeals that decision.

II. Scope and Standards of Review.

Our review of the decision by the district court is de novo. Iowa Code § 400.27 (2007); *Lewis v. Civil Serv. Comm'n*, 776 N.W.2d 859, 861 (Iowa 2010). We give weight to the court's findings but are not bound by them. *Lewis*, 776 N.W.2d at 861. Our review is confined to the record made and issues raised in the district court. *Dolan v. Civil Serv. Comm'n*, 634 N.W.2d 657, 662 (Iowa 2001).

III. Discussion.

Iowa Code chapter 400 controls civil service employment within the state. Section 400.18 sets forth the standard used to evaluate what actions employers may properly take against civil service employees like Armstrong. It provides:

> No person holding civil service rights as provided in this chapter shall be removed, demoted, or suspended arbitrarily, except as otherwise provided in this chapter, but may be removed,

> demoted, or suspended after a hearing by a majority vote of the civil service commission, for neglect of duty, disobedience, misconduct, or failure to properly perform the person's duties.

See also Iowa Code § 400.19. The language "failure to properly perform the person's duties" authorizes a discharge "based on future inability to adequately or safely perform one's duties as a result of an existing medical or physical condition." *Smith v. Des Moines Civil Serv. Comm'n*, 561 N.W.2d 75, 78 (Iowa 1997). A discharge based on this premise, as Armstrong's was, may be challenged by a section 400.27 appeal,[2] and "the burden is on the public employer to establish that the employee is in fact not able to adequately or safely perform the requirements of the employee's job." *Id.*

Standardized requirements may be a conclusive basis for the discharge "if the accuracy of the facts giving rise to the standardized requirements have been fairly tested by a rule-making process in which interested parties or entities are allowed to participate." *Id.* Conversely, the lack of a standard policy may be used in reversing a termination decision. *See Lewis*, 776 N.W.2d at 862; *see also Smith*, 561 N.W.2d at 79 (finding discharge arbitrary where employee failed a medical examination that was not part of a standardized personnel policy); *In re Fairbanks*, 287 N.W.2d 579, 582 (Iowa 1980) (holding a civil service employee could not be terminated because of his refusal to submit to a polygraph exam, as such a condition did not appear within his written job description). This tracks

[2] This section permits an employee who has been suspended, demoted, or discharged to appeal to the civil service commission, which "may affirm, modify, or reverse any case on its merits." Iowa Code § 400.27. Further appeal to the district court is then allowed for "trial de novo." *Id.* "Throughout the trial court and appellate court proceedings, the commission has the burden of showing that the discharge was statutorily permissible." *Smith*, 561 N.W.2d at 77.

with the "clearly established standard for assessing the appropriateness of any civil service employee's discharge," which is whether the action was arbitrary. *City of Des Moines v. Civil Serv. Comm'n*, 540 N.W.2d 52, 59 (Iowa 1995) (emphasis removed). Where standardized requirements have not been formally adopted, the court on appeal must consider the totality of the evidence in determining whether an employee's discharge was arbitrary. *Smith*, 561 N.W.2d at 79.

Here, the district court concluded that

> the City adopted the heightened FMCSA DOT physical for all employees required to have a CDL. However, the Commission did not provide any evidence to the Court of any City Council consideration of this significant personnel policy matter. Nor did the Commission provide any evidence that the policy requiring this FMCAS DOT physical was supported by or tested by any rule-making process. In fact, there was no evidence this "new" policy is even in writing. Without any of this evidence, this Court is required to consider the totality of the evidence presented in this case with regard to [Armstrong's] individual circumstances.

The commission challenges this conclusion, arguing city council consideration and adoption of the FMCSA DOT regulations were not necessary for the regulations to be considered standardized requirements of Armstrong's employment. We conclude otherwise based on our supreme court's decision in *Smith*.

In *Smith*, a firefighter was discharged from his employment with the city's fire department after he failed to pass a spirometry test, which measures the amount of air a person can exhale at a given time. *Id.* at 76. The minimum standards for the test were established by the chief of the fire department after consultation with a physician. *Id.* Our supreme court found Smith's discharge

was arbitrary, stating the commission did not present any evidence that the physical standards he failed to meet were

> ever . . . formally adopted by the city as a standardized personnel policy to be applied in lieu of individual determinations. Our decision in *Bryan v. City of Des Moines*, 261 N.W.2d 685 (Iowa 1978), suggests that authority to establish that type of controlling standard lies in the city council. *Id.* at 687-88. There is nothing to suggest any council consideration of this significant personnel policy matter in the present case. There is not even any suggestion of formal action by the chief of the fire department as the appointing authority under section 400.15. . . . Absent some formal procedure for adoption of the . . . standards by the city, we cannot conclude that those requirements have been tested by a rule-making process so as to preclude individualized determination of the issue. We are thus forced to conclude that the situation presented must be treated . . . by considering the totality of the evidence presented on the issue.

Id. at 79.

The commission argues adoption of the FMCSA DOT regulations by its human resources department, which is authorized by city ordinance to "establish appropriate rules and regulations for the management of human resources," is sufficient formal action to satisfy *Smith*. It asserts the above-quoted language from *Smith* "expresses only that some type of formal action need be taken, whether by the city council or" some other entity, like the city's human resources department. We do not agree.

Following its decision in *Smith*, our supreme court reiterated in *Hopping v. College Block Partners*, 599 N.W.2d 703, 706 (Iowa 1999), that governmental policies that are to be generally applied in lieu of particularized decisions in individual cases should be approved by the city council. *See* Iowa Code §§ 364.2(1) ("A power of a city is vested in the city council except as otherwise provided by a state law."); 372.13(4) (authorizing a city council to "appoint city

officers and employees, and prescribe their powers, duties, compensation, and terms"). The FMCSA DOT regulations were not made applicable to city employees through a city ordinance, resolution, amendment, or motion. *See id.* § 364.3 (stating a "city council shall exercise a power only by the passage of a motion, a resolution, an amendment, or an ordinance"); *Bryan*, 261 N.W.2d at 687 (holding a city council can establish or amend employee job classifications or promotional qualifications by ordinance or resolution). The regulations were also not part of the written job description for Armstrong's laborer position; nor were they part of an employee handbook or code of conduct.[3] *Lewis*, 776 N.W.2d at 862-63 (stating we may look at a city's written rules, policies, or job descriptions in determining whether discharge was arbitrary).

The job description for the laborer position set forth the following qualifications for employment: "Must pass a physical examination as prescribed by the City. Must possess and maintain throughout duration of employment a valid Iowa Commercial Driver's License (CDL)." Christina Mondanaro-Murphy, the employment manager for the city, testified that effective January 1, 2008, the city "implemented the . . . D.O.T. physical that is used nationwide by anyone who carries a commercial driver's license." She explained the city adopted the federal physical requirements for commercial motor vehicle drivers because

[3] The commission did not even admit the federal regulations it contended the city had adopted into evidence before the district court. Armstrong argues this failure precludes us from considering the applicability of the regulations on appeal. *See* Iowa Code § 622.61; Iowa R. Civ. P. 1.415; *In re Estate of Allen*, 239 N.W.2d 163, 169 (Iowa 1976) ("Foreign law, both statutory and case law, must be pled and proven. . . ."); *see also Pennsylvania Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 811 (Iowa 2002) (stating citation to foreign law in a party's brief "is not adequate 'because it is not the introduction of evidence'" (citation omitted)). We choose to bypass this complaint, which we believe applies more appropriately in choice-of-law debates, given our resolution of the appeal.

> [o]ne, it was mandated by the federal government for us to do it; but number two, we believe that again safety of our employees and safety of the public is very, very important. So . . . no matter whether that was mandated by the federal government, it was important to go ahead and find, through our risk managers, HR staff, and legal department, to find a physical that we could prescribe again that would be not out of the industry standards and not out of the ordinary for someone who was driving something with a CDL.

See City of Des Moines, 540 N.W.2d at 58 n.2 (stating a standard mandated by federal statutory law or other guidelines may be considered as evidence in determining whether the standard is arbitrary).

On cross-examination, however, Murphy contradicted her earlier testimony and admitted the city was "under no federal mandate to adopt the D.O.T. physical."[4] In addition, when asked to confirm that the FMCSA DOT requirements were first imposed in 2008, she stated, "Okay. I think there is a miscommuni[cation] here. The D.O.T. physical has always been given to those people that have to have the CDL upon the time they are employed." She testified that Armstrong was able to pass his first pre-employment physical with the city because he was inadvertently given "the wrong test."

Aside from that contradictory testimony, the commission presented no evidence regarding when or how the federal regulations were adopted by the city "as a standardized personnel policy to be applied in lieu of individual determinations." *Smith*, 561 N.W.2d at 79. As in *Smith*, there is nothing in this case "to suggest any council consideration of this significant personnel policy matter." *Id.* There is not even any suggestion of formal action by the city's

[4] 49 C.F.R. § 391.62 provides a limited exemption from the requirements of sections 391.11 (general qualifications) and 391.41 (physical qualifications) for municipalities.

human resources department accepting, for the sake of argument, that the city council could delegate adoption of employment qualifications to the city's human resources department. The commission attempts to overcome these shortcomings by arguing the FMCSA DOT requirements were tested by "the federal government's rigorous rule-making process." Regardless, we believe the commission needs to show "some formal procedure for adoption of the . . . standards *by the city*." *Id.* (emphasis added); *see also Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687, 695 (Iowa 1993) (finding anti-nepotism policy that was passed by a city council resolution was not arbitrary).

Because the commission failed to show the FMCSA DOT regulations were a standardized requirement of Armstrong's employment, we must examine the totality of the evidence in determining whether his discharge was arbitrary. *Smith*, 561 N.W.2d at 79. This requires us to consider whether the commission established that Armstrong was "in fact not able to adequately or safely perform the requirements of the employee's job." *Id.* at 78. Upon our de novo review of the record, we find the commission did not meet that burden.

Murphy, the city's human resources liaison, testified that driving a commercial vehicle was an essential part of Armstrong's job as a laborer for the city, which is why he was required to possess a CDL as a condition of his employment. The laborer job description, however, did not list driving a commercial vehicle among the examples of employee duties, whereas the job description for the street maintenance worker position did. Indeed, Armstrong testified that during the spring, summer, and fall months, he usually rode on the back of a machine filling potholes on the city streets. In the winter, however, he

did occasionally drive commercial vehicles such as snowplows. He testified his vision problems were no impediment to that requirement of his employment, as he possessed a valid Iowa CDL. Although the vision in his left eye was only 20/200, he possessed 20/15 uncorrected vision using both eyes. Armstrong was involved in three driving accidents while he worked for the city. But, it appears those accidents occurred during the winter months and were attributable to poor weather rather than vision problems. Finally, we observe the year before he was terminated, Armstrong received a favorable performance review that determined he possessed the "technical ability, knowledge and skills to perform the essential functions of the job."

We are persuaded by the foregoing evidence that the commission did not show Armstrong was physically incapable of performing his job duties. We accordingly find the city's reasons for discharging Armstrong under section 400.18 to be arbitrary. The decision of the district court reinstating Armstrong to the position he held prior to his June 25, 2008 discharge is affirmed.

AFFIRMED.