IN THE COURT OF APPEALS OF IOWA

No. 1-718 / 11-0379
Filed November 9, 2011

RODNEY HICOK,
Petitioner-Appellant,

vs.

IOWA EMPLOYMENT APPEAL BOARD and IOWA DEPARTMENT OF PUBLIC SAFETY,
Respondent-Appellees.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Rodney Hicok appeals from the judicial review order affirming the Employment Appeal Board's determination that the commissioner fired him for good cause. **AFFIRMED.**

Pamela J. Walker of Sherinian & Walker Law Firm, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jeffrey C. Peterzalek, Assistant Attorney General, and Rick Autry, Iowa Employment Appeal Board, for appellees.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

TABOR, J.

A veteran member of the Iowa State Patrol lost his job after circulating inappropriate jokes in violation of Department of Public Safety rules. Rodney Hicok now challenges the judicial review order affirming the Employment Appeal Board's determination that the commissioner fired him for good cause. Hicok contends the commissioner imposed the harsh consequence after receiving pressure from state legislators who read about Hicok's initial transgression in the newspaper. Because we agree with the district court that Hicok has not shown the Board's action violated any provision of law or that the Board failed to consider any relevant and important matters, we affirm.

I. Background Facts and Proceedings

Hicok started his career with the Department of Public Safety (DPS) as a capitol police officer in 1981. He became a state trooper in 1985. Hicok received his promotion to sergeant in 2000. DPS Commissioner Eugene Meyer fired Hicok on May 20, 2009. The commissioner based the firing on Hicok's violation of the DPS rules governing communications and unbecoming conduct.

Sergeant Hicok's troubles started in January 2009 when he received an email entitled "FW: The new fashion statement for mugshots!" The email featured fifteen mugshots of suspects wearing various versions of tee-shirts in support of President Barack Obama. Twelve of the fifteen individuals appeared to be African-American. The forwarded email read:

> Chicago Police Dept. mugshots.
>
> Anyone out there have any mugshots of people wearing any President Bush or John McCain shirts? Didn't think so!!

> This was sent to me by a Chicago Police Officer, by the way…

Sergeant Hicok, using his state-issued laptop computer, sent the email on to about thirteen additional recipients both inside and outside of state government. Hicok added his own sentiments:

> I've seen some "unique individuals" aka SHITHEADS wearing these type shirts myself ….. He has quite a fan base. Nice to know that the lowlifes are getting involved in politics now.
>
> Sgt. Rodney Hicok
> Iowa State Patrol
> 2437 235th Street
> Fort Dodge, IA 50501

One of the recipients forwarded the email to columnist Rekha Basu at the Des Moines Register. On January 21, 2009, she contacted then DPS Commissioner Meyer, who was not aware of Hicok's email. On January 23, 2009, the newspaper published a piece on the controversy headlined: "E-mail, officer's leave force hard questions." The column quoted Meyer as saying:

> If all of this proves to be true, I am saddened and disappointed and disturbed. It certainly does not reflect the professionalism we expect from all of our employees, and especially our peace officers. . . . If it's true, we're going to deal with it.

As a result of the matter appearing in the newspaper, Commissioner Meyer and Patrick Hoye, chief of the Iowa State Patrol, met with several legislators, specifically members of the Black Caucus and Speaker of the House Pat Murphy.

At Meyer's direction, the DPS Professional Standards Bureau (the bureau) initiated an investigation. The bureau's investigation found as follows: (1) Hicok

used a state computer to forward the Obama email; (2) Hicok's use of the term "shitheads" expressed a view about "persons who were involved in criminal behavior" and was "not a reference to the race of the individuals"; (3) Hicok believed that the email might have been construed by some readers as having racial overtones, but that most of the concern about race resulted from the Register article and not the email itself; (4) he believed he was sending a political joke to friends and co-workers with similar beliefs; (5) Hicok completed diversity training for supervisors in November 2008; and (6) he was aware of DPS policy on communications and the rule regarding unbecoming conduct. Patrol Chief Hoye notified Sergeant Hicok on January 27, 2009, that Hicok would be suspended for thirty days. The suspension was "on paper" and did not result in a loss of salary or benefits. The notice also contained a "last-chance" warning, advising Hicok that any further violation of department rules would result in termination of his employment.

Both Meyer and Hoye testified the decision to discipline Hicok was difficult given his long and spotless work history. In fact, Meyer testified Hicok would have been fired rather than suspended but for his excellent record with the DPS. DPS officials also told the media after this first incident that Hicok would receive additional training on diversity and cultural sensitivity. But the training was not scheduled before Hicok engaged in further misconduct.

Sergeant Hicok did not appeal the initial suspension. He instead issued this public apology:

> I am deeply sorry for my actions. I would like to apologize to all members of the DPS for any embarrassment I have caused. I

> apologize to anyone this email may have offended, as well as my family, the citizens in my community and Iowa taxpayers.
>
> I have proudly served the DPS for 27 years and have done so with dignity and do not have a blemish on my record. I wear the uniform proudly and have dedicated most of my life to the Iowa State Patrol. I can guarantee with 100% certainty that nothing like this will ever happen again. I regret what happened and wish I could take it back.

Other employees who forwarded the email received written reprimands. Those employees did not hold supervisory positions and did not add any commentary to the email that could be considered offensive. Sergeant Hicok asserts he did not know the severity of their punishments until after the time for challenging his discipline had expired.

On April 16, 2009, during work time and using DPS equipment, Sergeant Hicok printed off a racially derogatory joke he received by email. He left the joke on the desk of his post's secretary, Sue Walsh. The joke read as follows:

> In South Los Angeles, a 4 plex was destroyed by a fire.
>
> A Nigerian family of six con artists lived on the first floor, and all six died in the fire.
> An Islamic group of seven welfare cheats, all illegally in the country from Kenya, lived on the second floor, and they too, all perished in the fire.
> 6 LA, Hispanic, Gang Banger, ex-cons, lived on the 3rd floor and they too, died.
> A lone, white couple lived on the top floor. The couple survived the fire.
> Jesse Jackson, John Burris and Al Sharpton were furious. They flew into LA, met with the fire chief, on camera. They loudly demanded to know why the Blacks, Black Muslims and Hispanics all died in the fire and only the white couple lived…?
> The fire chief said, "They were at work."

The joke offended Walsh and she reported it to the post's supervisor, Lieutenant Kelly Hindman, the day after she received the printout from Hicok.

Hindman was deliberating how to handle the situation brought to his attention by Walsh, when he received information from Sergeant Mark Miller regarding additional misconduct by Hicok. On April 21, 2009, Hicok gathered co-workers and subordinates around his state-issued laptop computer to watch a video comedy sketch by Hispanic comedian Carlos Mencia entitled "Wetback English." The ALJ found: "The gist of the video was that illegal Hispanic immigrants were taking all of the jobs in the United States and that Caucasian people had to learn to speak broken, 'wetback' English so that they too could find employment." Among the many troopers gathered to view the video was David Saldivar, who is Hispanic. Saldivar and Hicok were friends. Before showing the video, Hicok turned to Saldivar and said, "No offense intended."

Lieutenant Hindman asked the Professional Standards Bureau to again investigate Hicok's actions. This second investigation determined that Hicok's dissemination of the racist joke on April 16, 2009, and playing of the video on April 21, 2009, were done during work hours, using state equipment, were not done with prior approval, and were not part of his official duties. The bureau also determined Hicok was aware of the rules he was alleged to have violated. The commissioner received the bureau's findings and fired Hicok on May 20, 2009, for violation of DPS rules governing unbecoming conduct and the communications policy.

Hicok filed an administrative appeal of his termination. He alleged he was unfairly punished for circulating the Obama email due to political pressure placed on the DPS commissioner by state legislators and the Des Moines Register. He

further asserted that the two "minor" incidents from April 2009 should not outweigh his many years of exemplary service. The administrative law judge (ALJ) upheld the termination.

Hicok took his case to the Employment Appeal Board (the Board), which made an explicit finding Hicok was not credible in his claims he did not understand that the joke and video he disseminated in April 2009 could be viewed as racially offensive. The Board concluded: "We do not find that he is a 'racist,' but only that he engaged in racially offensive (attempted) humor at work, with work equipment, and when he knew better."

Hicok sought judicial review. On February 21, 2011, the district court affirmed the Board's decision, concluding Sergeant Hicok was discharged for "just cause." Hicok now asks us to reverse the decisions below and order his reinstatement.

II. Scope and Standard of Review

We review agency action under the Administrative Procedures Act (Iowa Code section 17A.19(7) (2009)) for errors at law. *Sharp v. Emp't Appeal Bd.*, 479 N.W.2d 280, 282 (Iowa 1991). We are bound by the agency's factual findings if they are supported by substantial evidence, but we may correct misapplications of the law. *Id*. "Substantial evidence" means proof that a reasonable mind would accept as adequate to reach a given conclusion, even if we would draw a contrary inference from that proof. *Titan Tire Corp. v. Emp't Appeal Bd.,* 641 N.W.2d 752, 755 (Iowa 2002).

We defer to an agency's application of law to fact if that process "has clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(10)(m). The Board asserts that it is "clearly vested with authority to interpret issues of law concerning just cause termination in individual cases, specifically the existence of misconduct." If authority is vested with the agency, we can only reverse the Board's application of Iowa Code section 80.15[1] and the good cause standard if the application of the law is "irrational, illogical, or wholly unjustifiable." *Id*.

Hicok contends the agency had no "just cause" for his firing if it was for "political reasons" under section 8A.415(2)(b). He asserts that we should reverse the Board's decision because its action violated the law under section 17A.19(10)(b).[2]

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[1] That statute provides, in pertinent part:

> After the twelve months' service, a peace officer of the department, who was appointed after having passed the examinations, is not subject to dismissal, suspension, disciplinary demotion, or other disciplinary action resulting in the loss of pay unless charges have been filed with the department of inspections and appeals and a hearing held by the employment appeal board created by section 10A.601, if requested by the peace officer, at which the peace officer has an opportunity to present a defense to the charges. The decision of the appeal board is final, subject to the right of judicial review in accordance with the terms of the Iowa administrative procedure Act, chapter 17A. . . . All rules, except employment provisions negotiated pursuant to chapter 20, regarding the enlistment, appointment, and employment affecting the personnel of the department shall be established by the commissioner in consultation with the director of the department of administrative services, subject to approval by the governor.

Iowa Code § 80.15.

[2] That statute provides:

> The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:
>
> . . . .

A court will not tamper with an agency's action unless the complaining party has been harmed. *Hill v. Fleetguard, Inc.,* 705 N.W.2d 665, 671 (Iowa 2005). Therefore, Hicok bears the burden of demonstrating both the invalidity of the agency action and resulting prejudice. *See id.*

III. Analysis

A. Did DPS administrators succumb to political pressure in deciding the appropriate discipline for Sergeant Hicok's action of forwarding the Obama email with a derogatory message about those charged with crimes?

Sergeant Hicok claims that he was fired for "political" reasons. He rests his claim on a meeting that DPS Commissioner Meyer and Patrol Chief Hoye had with state legislators who were concerned after reading in the newspaper about Hicok's conduct. Hicok cites to Iowa Code section 8A.415(2)(b), which provides, in pertinent part:

> If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

Members of the state patrol are exempt from state government's merit system. Iowa Code § 8A.412(13). But that same code section directs the DPS commissioner to adopt rules consistent with the objectives of the merit system.

> b. Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law.

Iowa Code § 17A.19(10)(b).

Id. The merit system sets forth a "good cause" standard for discharge or suspension. *See id.* § 8A.413(18)(a)(12).

The DPS concluded that Hicok violated two specific rules: Rule 4-2(A) on "unbecoming conduct" and Order L-98-31 regarding the "communications policy." The unbecoming-conduct rule provides:

> Whether on or off duty, you will conduct yourself at all times in a manner that reflects favorably on the Department. Unbecoming conduct includes conduct that:
> - Brings the Department into disrepute
> - Reflects discredit upon yourself
> - Impairs the operation and efficiency of the Department or yourself.

The communications policy explains:

> [DPS] and the State of Iowa (Department) communication systems shall be used for official purposes only, except for specifically authorized (non-official) use. . . . Departmental communications include . . . electronic mail . . . when use is paid for by the State of Iowa.

The communications policy describes "official use" as "communications that are necessary in the interest of the Department." The policy defines "authorized personal use" as "incidental use as authorized by this policy or as specifically authorized by supervisors using guidelines issued under this policy."

The Board argues no evidence supports the conclusion that political pressure altered the DPS choice of discipline for Hicok's violation of these rules. It asserts that Hicok's arguments ignore the substantial evidence standard applied to judicial review of agency action. According to the Board: "The question is not whether other discipline would have been appropriate, but whether substantial evidence supports the decision actually made."

Hicok counters that he is not claiming a lack of substantial evidence, but rather he is arguing the Board's ruling must be reversed because it is in violation of the law. *See* Iowa Code § 17A.19(10)(b). He contends the "main reason for requiring just cause in terminating governmental employees is to keep politics out of the decision making process." Hicok alleges the meeting between legislators and DPS officials automatically injected politics into the disciplinary process, which violated section 8A.415(2)(b). We do not find Hicok's conclusory allegation is sufficient to carry his burden to show that the Board's action in affirming his firing violated any law.

To the contrary, the Board properly found the DPS commissioner had good cause for firing Hicok. Iowa courts have used the phrase "good cause" interchangeably with "just cause." *See Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 658 n.4 (Iowa 2008). "Just cause" carries no all-encompassing definition, but relates to "an employee's performance of his or her job and the impact of that performance on an employer's ability to attain its reasonable goals." *Lockhart v. Cedar Rapids Cmty. Sch. Dist*., 577 N.W.2d 845, 847, 577 N.W.2d 845, 847 n. 1 (Iowa 1998).

The first discipline stemmed from Hicok's unauthorized use of the state email system to forward a partisan and arguably racially insensitive collection of mugshots—including Hicok's addition of the term "shitheads" to refer to people being booked for crimes. Hicok decided not to appeal this first reprimand.[3]

[3] Hicok has not advanced a reason for failing to appeal his initial suspension that would have allowed him to reopen the matter after the agency's action became final.

Instead, he issued a public apology for embarrassing the DPS, promising that "nothing like this will ever happen again."

About ten weeks after his apology and six weeks after the end of his suspension, Hicok shared another internet-distributed joke—this one blatantly racist—with the post secretary. Offended by the joke, she informed the post supervisor. While the supervisor was deciding what action to take, he received a second report of Hicok using state-issued equipment to share a video comedy sketch entitled "Wetback English" that another sergeant recognized as potentially offensive. Hicok asserts that he did not understand the racist implications of the joke he shared with the secretary or the video he shared with colleagues. The facts belie his assertion. We note he printed off the offensive joke and left a paper copy for the secretary, rather than risking that an email would be forwarded to disapproving parties. Hicok also turned to a Hispanic colleague and said "no offense" before showing the "Wetback English" video. Both actions signal that he grasped the offensive nature of the material. The Board did not believe Hicok was naïve to the offensive nature of these attempts at humor. We defer to this credibility finding. *See HyVee v. Employment Appeal Bd*., 710 N.W.2d 1, 3 (Iowa 2005).

The question is whether the record supports Hicok's argument that he was improperly fired for "political" reasons. Commissioner Meyer and Chief Hoye testified the publicity regarding Hicok's email messages and the resulting unhappiness of lawmakers played a role in their decision to suspend Hicok and give him the "last-chance" warning. They point to language in the unbecoming-

conduct rule prohibiting actions that bring disrepute to the department and that impair its efficient operation. Meyer and Hoye believed that by forwarding the Obama email to multiple people inside and outside the DPS, Hicok assumed the risk that he would bring disrepute to his employer. They also testified that public knowledge of Hicok's misconduct threatened citizens' trust in the department and hindered efforts to recruit minority officers.

We reject the notion that the level of media coverage an officer's conduct attracts should be the measure of whether the conduct brings the department into disrepute. To do so would be to bestow upon the media a role in determining what is good cause for imposing discipline on a public employee. *Cf. In re Hamilton,* 932 A.2d 1030, 1035-36 (Pennsylvania Ct. Jud. Disc. 2007) (giving no weight to publicity in deciding if judicial office brought into disrepute).

But we also reject Hicok's argument that his discharge was not based on good cause because the DPS commanders admitted they considered negative feedback from lawmakers when determining his initial sanction. The DPS commissioner did not fire Hicok after hearing the legislators' concerns. They suspended him and warned him that future rule violations would result in termination. Hicok did not appeal the first punishment. Hicok's subsequent rule violations resulted in his firing. Law enforcement officials are entitled to consider the impact of an officer's conduct that others view as offensive on the efficient operation of the department. *See generally Tindle v. Caudell*, 56 F.3d 966, 971-72 (8th Cir. 1995) (upholding suspension of Little Rock police officer who went to off-duty Halloween party dressed in blackface because police department

showed potential for disruption of its operations). Hicok's job performance detracted from the department's reasonable goal of having officers treat all citizens impartially and fairly. *See Lockhart,* 577 N.W.2d at 847. His violation of the rules regarding unbecoming conduct and the communications policy justified his firing when he had been issued the last-chance warning.

The ALJ reasoned:

> The Respondent's discipline handed down on January 27, 2009, clearly states that the Respondent will be terminated if he is found to have violated any of the Department's rules and regulation. The Respondent committed two acts that clearly violate the Department's rules and regulations. The Department correctly determined that the Respondent should be terminated based upon his actions.

We do not find the Board's adoption of this rationale to be in violation of any provision of law. The fact lawmakers were upset that a sergeant in the Iowa State Patrol was using state resources to promote his partisan viewpoint or, at a minimum, to engage in vulgar name-calling does not mean the first reprimand was politically motivated or the subsequent firing was without good cause.

B. Did the DPS properly analyze all relevant factors when deciding good cause existed to fire Sergeant Hicok?

Hicok next argues the Board failed to consider important and relevant evidence under Iowa Code section 17A.19(10)(j). First, he claims that the rules regarding unbecoming conduct and incidental personal use of the state email system are not clear. Hicok also argues he had no bad intent in disseminating the offensive jokes. We do not think that the Board overlooked a lack of forewarning as to what was expected of an experienced sergeant in the state

patrol. The professional standards bureau found in both investigations that Hicok was aware of the DPS policy on communications and the rule regarding unbecoming conduct. Moreover, neither rule required a showing of bad intent.

Second, Hicok argues he was not informed of the reasons for his discipline because he did not know until Meyer and Hoye testified that they took the legislators' views into consideration when issuing the first reprimand. Hicok also reiterates that he was not informed of the lesser punishment meted out to the other employees who forwarded the Obama email before his time for appeal had run. The DPS provided Hicok with notice of the reasons for his own suspension and last-chance warning. The notice cited the specific rules he violated. He issued a statement that he regretted his conduct. We do not find any lack of notice for the Board to consider.

Third, Hicok claims the discipline he received did not follow a progression and was disproportionate to his conduct. Hicok asserts that the ALJ did not consider the discipline given in comparable cases. This assertion is not accurate. The ALJ explained that other DPS employees—who forwarded the Obama email and received written reprimands—were not in supervisory positions and did not add the same offensive comment. The Board adopted the ALJ decision.

In addition, Hicok argues the DPS failure to ensure he received a cultural sensitivity refresher course after the email incident is a mitigating factor: "Public Safety should not be allowed to terminate Sgt. Hicok's employment when it has not provided the promised training." We initially note that the training offer was

not part of the formal notice of disciplinary action issued to Hicok in January 2009, but rather the DPS commissioner noted in a press release that Hicok would attend training. While it would have been preferable for the DPS to promptly schedule Hicok for diversity education, the problem was not so much a long delay by DPS, but the short time before Hicok reoffended. Hicok had just attended diversity training in November 2008, less than two months before he forwarded the Obama email. He was scheduled for the next round of training in May 2009, less than a month after he shared the two offense jokes with co-workers in April 2009. We do not think the relatively short delay in offering a refresher course to Hicok constituted a relevant and important matter overlooked by the Board in affirming his termination. *See* Iowa Code § 17A.19(10)(j).

Hicok also points to his innovative achievements in the state patrol and the outpouring of support he received from colleagues and the community where he worked. The record clearly reflects Sergeant Hicok's positive contributions made during his nearly three decades of public service. But the final blows to his career were self-inflicted.

The Board's decision upholding the firing was not the product of a decision-making process lacking in adequate consideration of key matters. The Board's factual findings were backed by substantial evidence and its determination that the DPS showed good cause for firing Hicok based on the departmental rule violations was not "irrational, illogical or wholly unjustifiable."

AFFIRMED.