

IN THE COURT OF APPEALS OF IOWA

No. 3-842 / 13-0363
Filed October 2, 2013

JEROME WELSH,
Plaintiff-Appellee,

vs.

**CITY OF DUBUQUE, IOWA and CIVIL
SERVICE COMMISSION FOR THE CITY
OF DUBUQUE, IOWA,**
Defendants-Appellants.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

The City of Dubuque and the Civil Service Commission for the City of Dubuque appeal a district court order reversing a decision to demote an employee. **AFFIRMED.**

Barry A. Lindahl, City Attorney, and Maureen A. Quann, Assistant City Attorney, Dubuque, for appellants.

Kyle A. McCoy of Soldon Law Firm, L.L.C., Rochester, Minnesota, for appellee.

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

VAITHESWARAN, P.J.

The City of Dubuque and the Civil Service Commission for the City of Dubuque appeal a district court order reversing a decision to demote an employee.

I. Background Facts and Proceedings

Jerome Welsh worked for the City of Dubuque for thirty years, most recently as its landfill foreman. One day, nineteen-and-a-half years into his employment at the landfill, Welsh had an altercation with employee John Gillen. He attempted to contact Gillen to be relieved for his lunch break. When he was unable to reach Gillen, he called his supervisor and told him they needed Gillen at the landfill. His supervisor said he would take care of it.

Welsh got into his vehicle and left. As he approached the main road, he noticed Gillen driving an end loader. According to Welsh, he saw “Gillen come up in the end loader and proceed to turn right into [his] lane of travel and come directly at [him] with the end loader.” In the last seconds, Gillen swerved away and gave Welsh the finger. Welsh pulled over his vehicle. He testified, “I figured as a foreman, which is my right, I should go out there and ask him why he has a problem with going down to the bottom and relieving us.” Welsh got out of his vehicle and approached Gillen. Gillen likewise exited the end loader and rapidly moved towards Welsh. As Welsh started to ask Gillen what his problem was, Gillen pushed him to the ground, causing him to fly back several feet and land on the gravel to the side of the road. Welsh got up. Gillen approached Welsh again and pushed him against his truck. At that point, Welsh decided to defend himself, and a fistfight ensued. Welsh’s supervisor broke up the fight.

The city manager subsequently demoted Welsh to an entry-level position paying \$2.63 less per hour. The Dubuque civil service commission affirmed the decision.

On appeal to the district court following a statutorily-prescribed de novo trial, the court reversed, concluding the city failed to prove that Welsh committed misconduct. This appeal followed.

II. Analysis

Iowa Code section 400.18 (2009), governing civil service, states that “[a] person holding civil service rights . . . may be removed, demoted, or suspended after a hearing by a majority vote of the civil service commission, for . . . misconduct.” The statute does not define “misconduct.” The burden of proving misconduct rests with the city. *Smith v. Des Moines Civil Serv. Comm’n*, 561 N.W.2d 75, 77 (Iowa 1997); *see also* Iowa Code § 400.27.

The city and civil service commission argue that Welsh committed misconduct by “engaging in violence against another employee which is a violation of [its] policy.” Welsh counters that “there was no evidence showing [he] did anything during the physical altercation except defend himself from the attack of a subordinate employee.” In assessing these arguments we are to review the district court’s decision de novo. *Lewis v. Civil Serv. Comm’n*, 776 N.W.2d 859, 861 (Iowa 2010).

On our de novo review, we are persuaded that the district court got it right. Gillen did not testify at the de novo trial before the district court, nor was his written statement about the incident admitted into the record. That left Welsh’s testimony as the only first-hand account of what transpired. Welsh clearly and

unequivocally testified Gillen started the fight and he responded in self-defense. Based on this unrefuted evidence, we conclude that his conduct on the day of the incident did not amount to “misconduct.”

Even if we were to assume that Welsh’s conduct could be construed as misconduct, we would conclude the sanction was arbitrary. *See Dolan v. Civil Serv. Comm’n*, 634 N.W.2d 657, 664 (Iowa 2001) (addressing appropriate sanction after affirming finding of misconduct). The city public works director stated that after learning about the incident he determined “it was one of the tougher things that’s come across [his] desk in over 30 years.” In his view, “someone observing from the side . . . would perceive equal guilt” because Welsh and Gillen each “asserted that the other person had essentially started the fight.” He noted that both individuals had “very good work records” and “[t]here was no clear and obvious black sheep.” Despite the he said/he said nature of the incident, he recommended a one-week suspension without pay for Gillen and a demotion to an entry-level position for Welsh.

The city contends Welsh deserved a more onerous sanction given his position as a foreman and his exercise of poor judgment in exiting his vehicle. The district court addressed this argument and found that it was reasonable to expect Welsh would get out of his truck and converse with Gillen precisely because Welsh was a foreman. We agree with this assessment.

We conclude Welsh did not commit misconduct, and, even if he did, the sanction was arbitrary. Accordingly, we affirm the district court order reversing the civil service commission’s demotion decision.

AFFIRMED.