COLORADO COURT OF APPEALS

DATE FILED: July 24, 2014
CASE NUMBER: 2013CA1352

Court of Appeals No. 13CA1352
City and County of Denver District Court No. 12CV4983
Honorable Shelley I. Gilman, Judge

City and County of Denver, a municipal corporation,

Plaintiff-Appellant,

v.

Mathew Carothers and the Career Service Board of the City and County of Denver,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE ROMÁN
Booras and Vogt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced July 24, 2014

D. Scott Martinez, City Attorney, Franklin A. Nachman, Assistant City Attorney, Denver, Colorado, for Plaintiff-Appellant

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No Appearance for Defendant-Appellee Career Service Board of the City and County of Denver

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2013.

Plaintiff, the City and County of Denver (City), appeals the district court's judgment affirming the decision of defendant, the Career Service Board of the City and County of Denver (Board), that reinstated the employment of defendant, Mathew Carothers, and modified his discipline from termination to a ten-day suspension. We affirm.

I. Background

Carothers is employed as a deputy sheriff with the Denver Sheriff's Department (Department). On November 20, 2009, Carothers and another deputy, Compton, were assigned to pick up an inmate from the Denver Police Department. While in a holding cell, the inmate was given water in a Styrofoam cup. After drinking some of the water and dumping some on the ground, the inmate used a lighter to set the cup on fire.

Carothers entered the cell and observed smoke and ash from the fire. He then searched the inmate and found a lighter in his pocket. After cuffing both of the inmate's hands, Carothers started to lead him out of the cell, but at some point jerked on the chain between the inmate's handcuffs. The inmate hit his head on the hallway wall and sustained a laceration that required nine stitches.

The entire incident was recorded by surveillance video from two different cameras.

An internal investigation ensued, but was delayed for reasons unrelated to Carothers; meanwhile, Carothers continued his normal duties, including full contact with inmates. On March 3, 2011, approximately fifteen months after the incident, Carothers was placed on investigatory leave. Following the investigation, the Department determined that Carothers used excessive force with the inmate, departed from the truth during the investigation, and violated several other Board rules. Carothers' employment was terminated on March 24, 2011.

Carothers appealed his termination to a hearing officer. After conducting a two-day hearing, the hearing officer found that (1) Carothers used excessive force with the inmate, (2) Carothers' use of force was a cause of the inmate's injuries, and (3) Carothers was careless in the performance of his duties. However, the hearing officer also found that termination was too severe a penalty because (1) Carothers did not intend to harm the inmate, (2) the Department failed to prove that Carothers was dishonest, (3) the fact that Carothers was not terminated until fifteen months after the incident

demonstrated that the Department did not consider the incident severe until late in its investigation, (4) Carothers' record and commendations from superiors were otherwise exemplary, and (5) the Department did not consider whether Carothers could be rehabilitated by a lesser degree of discipline. Therefore, the hearing officer modified the Department's termination decision to a ten-day suspension.

The hearing officer's decision was affirmed by the Board. In its order, the Board stated

> Petitioner's Brief [the Department of Safety, Denver Sheriff's Department, and the City and County of Denver] is replete with factual assertions with no citation to the record. It is not enough for a petitioner to simply order a transcript and designate hearing exhibits, including videos and recordings, as the record on appeal; an appellant must provide specific citations to the record to support his argument. It is not the Board's responsibility to sift through the record looking for evidence that may support or refute an argument made on appeal. Here, the Board elects not to strike Petitioner's brief, but determines that nothing before the Board supports Petitioner's assertion that the Hearing Officer's decision is not supported by the record and is clearly erroneous.

In a detailed order, the district court affirmed the Board's

decision.

II. C.R.C.P. 106(a)(4) Review

The City challenges the Board's decision under C.R.C.P. 106(a)(4), on two specific grounds: (1) the Board misapplied the effect of videotaped evidence, and (2) the Board acted arbitrarily and capriciously in reducing Carothers' termination to a ten-day suspension. We perceive no error.

A. Legal Standards

C.R.C.P. 106(a)(4) provides that relief may be obtained in a district court when a governmental body exercising judicial or quasi-judicial functions "has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law." In an appeal from a judgment entered in a C.R.C.P. 106 proceeding, this court is in the same position as the district court, and we review the decision of the governmental body, not the district court. *City of Colorado Springs v. Givan*, 897 P.2d 753, 756 (Colo. 1995); *Lieb v. Trimble*, 183 P.3d 702, 704 (Colo. App. 2008); *Stamm v. City & Cnty. of Denver*, 856 P.2d 54, 58 (Colo. App. 1993) ("The role of this court is to consider whether there is sufficient evidentiary support in the record for the decision

of the administrative tribunal, and not whether there is evidence to support the decision of the district court.").

Additionally, because C.R.C.P. 106(a)(4) provides for review of an action by "any governmental body or officer" who exercises "quasi-judicial functions," we review the actions of the hearing officer and the Board, not the actions of the Department. *See Givan*, 897 P.2d at 756; *Colo. Airport Parking, LLC v. Dep't of Aviation of City & Cnty. of Denver*, 2014 COA 17, ¶ 10.

C.R.C.P. 106(a)(4) honors a governmental entity's decisions. *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 526 (Colo. 2004). Therefore, we reverse only if the entity abused its discretion, which occurs when there is no competent evidence to support the decision. *Id.*; *Givan*, 897 P.2d at 756. A record lacking "competent evidence means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Widder*, 85 P.3d at 526-27.

We presume validity and regularity in a governmental proceeding, and resolve all reasonable doubts as to the correctness of the governmental entity's rulings in favor of the entity. *Colo.*

Airport Parking, ¶ 9; *Lieb*, 183 P.3d at 704. The burden is on the party challenging the governmental body's action to demonstrate an abuse of discretion. *Colo. Airport Parking*, ¶ 10.

The Board vests authority in its hearing officers to decide all appeals: "Hearing Officers shall have authority to hear and decide all appeals . . . and shall perform the functions necessary to implement and maintain a fair and efficient process for appeals." CSA Rule 19-30(A). The Board's review of a hearing officer's decision is limited by CSA Rule 19-61(A)-(E), which provides only five grounds for such review: (1) new evidence, (2) erroneous rules interpretation, (3) policy-setting precedent, (4) insufficient evidence, and (5) lack of jurisdiction.

B. Videotaped Evidence

The City contends the Board and the district court misapplied the effect of the videotaped evidence. We disagree.

The City cites cases holding that where videotaped evidence "completely and clearly contradicts" witness testimony, the testimony becomes incredible. *See Morton v. Kirkwood*, 707 F.3d 1276, 1276 (11th Cir. 2013); *see also Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (court of appeals "should have viewed the facts in the

light depicted by the videotape" where party's version of events was "so utterly discredited by the record that no reasonable jury could have believed him").

Here, however, we do not conclude that the videotape "clearly contradicts" Carothers' version of events or that his version is "utterly discredited by the record." Indeed, Carothers admits that he pulled too hard on the inmate.

The City makes several assertions to support its position that the video- and audio-taped evidence proves Carothers' dishonesty:

(1) *Carothers claimed the inmate fell backward.* But, the hearing officer found that Carothers disputed making the statement. Although the video proves that the inmate did not fall backward, it does not prove that Carothers made a dishonest statement. A sergeant quoted Carothers as stating the inmate fell backward, but the hearing officer found that Carothers made similar consistent statements that the inmate pulled back rather than fell back. The hearing officer also found that the sergeant testified that Carothers' written report on the night of the incident — stating that the inmate pulled his hands back and up

and that Carothers pulled the inmate forward — was consistent with what Carothers reported by phone. The hearing officer's credibility determination findings are binding on appeal. *See Martinez v. Bd. of Comm'rs*, 992 P.2d 692, 696 (Colo. App. 1999) (The "credibility of the witnesses, and the weight of their testimony, are committed to the discretion" of the fact finder in an administrative hearing.).

(2) *Carothers claimed the inmate's hands slid down or moved off the wall in a threatening manner.* But the hearing officer found, and we agree, that the video shows some movement of the inmate's hands. *See People v. Adkins,* 113 P.3d 788, 790 n.2 (Colo. 2005) (Even where the appellate court has access to audio material, "we are in no better position than the trial court to evaluate the audio portion of the videotape."). Moreover, the hearing officer found that Carothers was preoccupied with frisking the inmate and Compton was primarily focused on the inmate's hands. Carothers explained that he thought the inmate failed to keep his hands on the wall

because he heard Compton repeatedly ordering the inmate to keep his hands on the wall. Therefore, the video does not discredit Carothers' statements.

(3) *Carothers claimed the inmate was tensing and flexing his muscles.* The video does not discredit this statement because it shows some movement by the inmate. The video is not precise enough to definitively show whether a person is flexing and tensing.

(4) *Carothers claimed the inmate was trying to hit him or may have been going for a gun.* On the audiotape, however, Carothers stated that he did not know what the inmate's intentions were at the time the inmate pulled away from him. He did not state that the inmate was actually going for his gun or trying to hit him.

(5) *Carothers claimed the inmate was verbally aggressive.* During the predisciplinary action meeting, Carothers stated that the situation was very tense because of the smoke and ash and he felt a lot of movement from the inmate. The hearing officer found that the inmate was verbally resistant to Carothers' commands. The video

shows the inmate lighting a cup on fire while in the holding cell and cursing at the officers.

(6) *Carothers claimed the inmate slipped on a puddle of water.* The hearing officer found it "plausible as one part of the reason [the inmate] fell." We agree with the hearing officer that the video does not conclusively show that the water was not involved in the incident. *See Stamm*, 856 P.2d at 58 ("If evidence is conflicting, a hearing officer's findings are binding on appeal, and the reviewing court may not substitute its judgment for that of the fact finder.").

(7) *Compton claims the inmate pulled back.* The City asserts that the video proves that Compton could not have seen whether the inmate pulled his hands back. However, we cannot make such a conclusion after reviewing the video because it is not as definitive as the City suggests. The City also claims it was error for the hearing officer to rely on Compton's statement because she did not testify at trial. However, the Board rules do not prohibit the evidence. *See* CSA Rule 19-50(A) ("The Hearing Officer

shall conduct the hearing in as informal a manner as is consistent with a fair and efficient presentation of the appeal. Strict rules of evidence shall not apply.").

The record contains competent evidence to support the hearing officer's findings. And, the video- and audio-taped evidence does not clearly contradict witness statements or otherwise prove Carothers' dishonesty. Therefore, we perceive no abuse of the Board's discretion. *See Widder,* 85 P.3d at 526.

We turn next to whether the hearing officer had the authority to modify the termination to a ten day suspension.

C. Hearing Officer's Authority to Reinstate Carothers

We reject the City's contention that the Board's decision to reduce Carothers' dismissal to a ten-day suspension was arbitrary and capricious.

Whether discipline is excessive is "a matter of ultimate fact." *See Vukovich v. Civil Serv. Comm'n*, 832 P.2d 1126, 1128 (Colo. App. 1992). An ultimate fact is a conclusion of law or a mixed question of law and fact that settles the rights and liabilities of the parties. *Id.* (noting that the distinction between evidentiary and ultimate facts can be applied to C.R.C.P. 106 review even though

the language is statutory).

We agree with the City that the Board was not bound by the hearing officer's finding of ultimate fact concerning whether the discipline was excessive. *Id.* However, the Board was free to affirm the hearing officer's finding of ultimate fact and disciplinary decision, and that is what it did here.

Several important factors support the hearing officer's ultimate finding that termination was too severe a penalty. First, the hearing officer found that Carothers lacked intent to injure the inmate. Second, the hearing officer considered Carothers' record and positive reviews. Third, the hearing officer noted the delayed investigation and the Department's decision to continue Carothers' contact with inmates for fifteen months and the division chief's testimony that he would not have allowed Carothers to work around inmates if he had felt Carothers was abusive or assaultive.

The hearing officer also considered the Board's purpose of discipline, which states:

> The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related

> to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

CSA Rule 16-20. The hearing officer found that the appointing authority here — the Department — failed to consider the purpose for discipline and the requirement that the Department impose discipline needed to correct the situation and achieve the desired behavior. Instead, the hearing officer found that the Department took a "zero tolerance" policy to excessive force and dishonesty.

Therefore, the record contains competent evidence to support the Board's decision, and we will not disturb it. *See Widder*, 85 P.3d at 526 (We reverse the decision of a governmental body only when there is no competent evidence to support the decision.); *see also* C.R.C.P. 106(a)(4) (providing review of an action by "any governmental body or officer" who exercises "quasi-judicial functions").

Vukovich, a case that the City cites to support its position that termination was warranted, actually reiterates the standard of review applicable here: appellate review of the Board's decision is

limited to whether the record contains competent evidence to uphold that decision. *Id.* Therefore, although the Civil Service Commission in *Vukovich* reversed the hearing officer's decision, another division of this court concluded that the Commission did not abuse its discretion. *Id.* Likewise, here, in reviewing the Board's decision to affirm the hearing officer, we conclude that the Board did not abuse its discretion.

In so concluding, we reject the City's assertion that the Board's decision should be reversed because it lacks an adequate explanation. In its order, the Board specifically "determine[d] that nothing before [it] support[ed] [the City's] assertion that the hearing officer's decision [was] not supported by the record." We agree with the Board that the hearing officer's decision was supported by competent evidence.

Finally, the City relies on *Adkins v. Division of Youth Services*, 720 P.2d 626 (Colo. App. 1986), to support its contention that the Board abused its discretion in altering the appointing authority's termination decision.[1] *Adkins*, however, is a State Personnel Board

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[1] The City also relies on an unpublished opinion by another division of this court to support its position. However, we do not consider

case and such cases are governed by statute. *See* § 24-50-101, C.R.S. 2013. In *Adkins*, the hearing officer determined the penalty of termination was too harsh and reduced a state employee's termination to a suspension. *Adkins*, 720 P.2d at 628. The personnel board, however, upheld the appointing authority's decision to terminate the employee, concluding that termination was "within the range of alternatives available to a reasonable and prudent administrator." *Id.* In personnel board cases, section 24-50-103(6), C.R.S. 2013, specifically limits reversal of appointing authority action to circumstances in which the action was "arbitrary, capricious, or contrary to the rule of law." *See Colo. Dep't of Human Servs. v. Maggard*, 248 P.3d 708, 712 (Colo. 2011).

Here, on the other hand, there is no statute or rule limiting the review of the appointing authority. Rather, the Board rules contemplate broad discretion on the part of the hearing officer. *See* CSA Rule 19-61(A)-(E) (limiting review of hearing officer's decision).

Therefore, even if we believe that more severe discipline is warranted, we must uphold the Board's decision where, as here, it

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the facts of that case because the hearing officer's decision in this case is supported by competent evidence.

is supported by competent evidence. *See Givan*, 897 P.2d at 756.

Finally, we deny the City's request for attorney fees incurred in responding to Carothers' motion to strike portions of the reply brief.

The judgment is affirmed.

JUDGE BOORAS and JUDGE VOGT concur.