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Eric Fleming and Fraternal Order of Police Lodge No. 8, appellants, v. Civil Service Commission of Douglas County, Nebraska, and Douglas County, Nebraska, appellees.

792 N.W.2d 871

Filed January 14, 2011. No. S-10-166.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
5. **Administrative Law: Appeal and Error.** The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
6. **Administrative Law: Words and Phrases.** Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.
7. **Contracts: Intent.** Parties are generally bound by the terms of their contract, even though their intent might be different from what is expressed in the agreement.
8. **Administrative Law: Due Process.** Procedural due process requires a neutral, or unbiased, adjudicating decisionmaker.
9. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
10. **Administrative Law: Recusal: Presumptions: Proof.** The party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.
11. **Administrative Law: Presumptions.** Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship.
12. **Administrative Law: Recusal: Presumptions.** An adjudicator should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the adjudicator's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Steven E. Achelpohl for appellants.

Timothy K. Dolan, Deputy Douglas County Attorney, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Eric Fleming, a Douglas County corrections officer, was terminated from his employment by the Director of Corrections. The Douglas County Civil Service Commission (Commission) upheld the termination. Fleming and the Fraternal Order of Police Lodge No. 8 (Union) filed a petition in error in the district court for Douglas County. The court denied the petition and affirmed the termination of Fleming's employment.

SCOPE OF REVIEW

[1] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Scott v. County of Richardson, ante* p. 694, 789 N.W.2d 44 (2010).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

FACTS

Fleming was employed as a corrections officer by the Douglas County Department of Corrections (Department). On June 11, 2008, while on duty, Fleming had a physical altercation with a pretrial detainee. The detainee was seated in a waiting area and

was making noise. A corrections employee became annoyed and asked the detainee to stop. When the detainee did not stop, corrections officers were called to deal with the detainee. The officers, including Fleming, attempted to remove the detainee to a holding cell.

The detainee claimed that in the holding cell, one officer held him down while another punched and kneed him in the face and on the head. The corrections officers testified that the detainee had grabbed Fleming's collar and was repeatedly asked to let go. Fleming testified that he hit the detainee's arms in an attempt to get him to release Fleming's collar. In any case, after the incident, the detainee required medical treatment.

The sheriff's report stated that the detainee had numerous lumps on his forehead and a large knot on the left side of his head just behind his ear. He had a gash in his right eyebrow, and his right eye was bloodshot and swollen. The detainee's nose was swollen and had dried blood in and around it. He also had an abrasion on his chin.

Fleming and the other officers involved failed to file a report about the incident. The Director of Corrections deemed the altercation a violation of the Department's excessive force policy. As a result of this violation, he fired Fleming on July 11, 2008.

Criminal charges were filed against Fleming as a result of the incident. On November 17, 2008, Fleming entered a plea of no contest in the county court for Douglas County. As a result of that plea, the court convicted Fleming of the Class I misdemeanor of assault and battery. Sentencing was scheduled for March 26, 2009.

On December 4, 2008, Fleming appealed his July 11 termination to the Commission. There were two issues presented: (1) whether Fleming violated the Department's use of force policy and (2) whether Fleming violated Department policy in failing to file a report about the incident. The Commission found insufficient evidence to establish that Fleming had used excessive force and ordered Fleming reinstated. However, because Fleming failed to follow procedure by not filing a report about the incident, Fleming was not awarded backpay and an accrual of benefits.

On March 26, 2009, Fleming was sentenced by the county court to 3 days in jail, 24 hours of community service, and 6 months of probation as a result of his conviction of assault and battery. After this sentence, the Director of Corrections again terminated Fleming's employment and Fleming appealed to the Commission. There were two issues before the Commission: (1) whether Fleming had been convicted of a felony or crime that rendered him unfit to perform the duties of his position and (2) whether Fleming had violated Department regulations. The Department's "Employee Code of Conduct" provides that employees "shall conduct themselves, both on or off duty, in a manner that will not discredit the Department or the County."

Preliminary motions before the Commission included a request by Fleming that Commissioner Timothy Dunning be disqualified from participating in the appeal because he was the Douglas County sheriff. The incident involving Fleming and the detainee resulted in a criminal investigation and citation by a deputy of the Douglas County sheriff's office. The Department objected to the motion. Dunning stated that he was not directly involved with Fleming's investigation and that he could be fair in hearing the appeal. He declined to recuse himself.

Fleming also alleged that the Commission had heard the same case in December 2008 in which Fleming's employment was terminated for use of excessive force and that, therefore, this case should be dismissed because it constituted double jeopardy. The Commission disagreed, and following the presentation of exhibits and witnesses, it voted to uphold Fleming's termination of employment.

Fleming and the Union filed a petition in error in the district court for Douglas County. They alleged that the Commission's decision was arbitrary and capricious, that it violated agreed-upon procedural due process, that it violated contractual double jeopardy, and that the participation of Dunning violated Fleming's right to have an impartial and unbiased tribunal.

The district court denied the petition in error and affirmed the Commission's decision that upheld the termination of employment. The court found the Commission had sufficient evidence to support its decision and, therefore, did not act

arbitrarily and capriciously. The disciplinary procedure was satisfied because the Department disciplined Fleming for his conviction of assault and battery within 30 days of the disposition of the criminal matter. The court also concluded that Fleming's contractual double jeopardy claim failed because it was not a recognized doctrine in Nebraska. The court found that Fleming was not able to overcome the presumption that Dunning acted in an impartial manner while sitting on the Commission and that, therefore, Fleming was not denied his due process rights.

ASSIGNMENTS OF ERROR

Fleming and the Union assert, summarized and restated, the following as error: (1) The district court erred as a matter of law in finding that the decision to terminate Fleming's employment was supported by competent evidence and was not arbitrary and capricious, (2) the court erred when it found that evidence that other employees were not fired for conviction of crimes was irrelevant, (3) the court erred in not finding that termination of Fleming's employment twice for the same misconduct was contractual double jeopardy, and (4) the court erred in not finding that participation by the Douglas County sheriff as a member of the Commission violated Fleming's due process rights to a fair and unbiased tribunal.

ANALYSIS

Termination of Employment Was Supported by Evidence and Was Not Arbitrary and Capricious

[4-6] The following procedural standards govern our review: In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Scott v. County of Richardson, ante* p. 694, 789 N.W.2d 44 (2010). See *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007). The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.

Barnett v. City of Scottsbluff, 268 Neb. 555, 684 N.W.2d 553 (2004). The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000). Finally, agency action is "arbitrary and capricious" if it is "taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion." *Hickey*, 274 Neb. at 565, 741 N.W.2d at 657. Accord *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

Fleming and the Union first claim the Commission's decision was arbitrary and capricious and not supported by competent evidence. They advance two subarguments with respect to this point. First, they claim that Fleming engaged in no additional misconduct after he was reinstated and, thus, there was no evidence of wrongdoing. Second, they argue that the Department did not comply with the time restraints imposed by the disciplinary procedure required by the collective bargaining agreement (CBA) and incorporated documents.

The first argument of Fleming and the Union fails. Fleming's employment was terminated the second time for violating two provisions of article 22 of the Commission's personnel policy manual. Under article 22, section 5, the following are grounds for discipline: "1. The employee has been convicted of a felony or crime which renders him unfit to perform the duties of his/her position," and "4. The employee has violated any department, division, or institution regulation or order, or failed to obey any proper direction made and given by a supervisor." The department regulation that Fleming violated stated: "Staff shall conduct themselves, both on or off duty, in a manner that will not discredit the Department or the County."

The record includes the bill of exceptions from Fleming's criminal proceedings. It shows that Fleming was convicted of assault and battery, a Class I misdemeanor. There is clearly sufficient evidence showing that Fleming was convicted of a crime which renders him unfit to be a corrections officer.

Fleming and the Union argue it is undisputed that Fleming committed no additional act of misconduct after he was

reinstated following the first attempted termination. The first attempted termination of employment was based upon Fleming's alleged violation of the Department's excessive force policy as well as his failure to file a report regarding the incident with the detainee. The Commission found that there was insufficient evidence to support the termination of employment based on excessive force. Although the Commission knew that Fleming had been charged with assault at the time it heard his first appeal, the issue of whether Fleming had violated the rule against being convicted of crimes that render a person unfit for duty was not before the Commission. When that issue was later presented to the Commission, there was sufficient evidence to conclude that Fleming had violated the workplace rule against being convicted of certain crimes.

To the extent Fleming argues that he is impermissibly being punished twice for the same acts, this argument overlaps with his argument based on contractual double jeopardy, which is an argument we address later in our opinion.

The second argument by Fleming and the Union, that the Department did not comply with the time requirements, is similarly without merit. Article 27, section 2, of the CBA states that the "County must take action on a criminal complaint within thirty days of the disposition of the criminal matter." Fleming argues that this 30-day period commenced on November 17, 2008, the date he pleaded no contest and was convicted. Fleming was not sentenced until March 26, 2009. He received his termination letter on April 23. If Fleming and the Union are correct that the period commenced in November 2008, Fleming's termination of employment was untimely. However, if the "disposition of the criminal matter" did not occur until sentencing, then the termination of employment was timely.

A "disposition" is defined as "[a] final settlement or determination." Black's Law Dictionary 539 (9th ed. 2009). Our court has previously held that a conviction does not become final until a sentence is pronounced. See, e.g., *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006); *Kennedy v. State*, 170 Neb. 193, 101 N.W.2d 853 (1960). Accordingly, the disposition

of a criminal case cannot come before sentencing. Therefore, Fleming's termination of employment was timely.

Our review is whether the Commission acted within its jurisdiction and whether sufficient relevant evidence supports the decision appealed from. The evidence is sufficient to support the decision of the Commission. And the decision is not arbitrary or capricious. Fleming's conviction for assault and battery, which became final upon his sentence, supports the decision to terminate his employment.

Other Employees' Criminal Convictions

Fleming and the Union next argue that the district court erred in finding that other employees' criminal convictions and the discipline imposed as a result of the convictions were irrelevant. They argue that to ignore the criminal convictions of others renders the Commission's decision arbitrary and capricious.

Fleming's employment with the Department was governed by a CBA. The CBA, by its terms, incorporated the "Douglas County Civil Service Regulations and the [Department's] Standard Operating Procedures." See CBA article 6, section 2. Included within article 13 of the Commission's personnel policy manual is a section which requires that like penalties be imposed for like offenses. And article 22 of the same personnel policy manual establishes a rule against being "convicted of a felony or crime which renders him unfit to perform the duties of his/her position."

Fleming was convicted of assault and battery, which was charged as a Class I misdemeanor. This crime involved bodily injury. The other corrections officers to whom Fleming asks that his discipline be compared were all convicted of driving under the influence offenses in Iowa.

We conclude it was not error for the Commission to disregard the convictions of the other employees. Article 22 establishes a rule against being convicted of a crime that renders a person unfit to be a corrections officer. It is not a rule prohibiting people from just being convicted of a crime. It was not arbitrary to refuse to compare a conviction that involved violence and bodily injury imposed by a corrections officer

upon a detainee to the driving under the influence conviction of another employee. Corrections officers operate in a unique work environment in which there is always a potential for violent altercation. Selecting personnel who refrain from excessive or unnecessary violence is a reasonable practice for a corrections department. Imposing discipline on those who commit violent offenses without regard to what discipline was imposed on those who do not was not arbitrary. It was not error to refuse to consider the other employees' discipline.

The cases Fleming and the Union cite are of little use to Fleming's position. In *Schulz v. Board of Education*, 210 Neb. 513, 519, 315 N.W.2d 633, 637 (1982), we mentioned the performance records of other teachers only because we were at a loss as to how a teacher who routinely received "above average" ratings could be found to be incompetent. *Schulz*, by no means, stands for the proposition that employee discipline must always be compared to that imposed on other employees.

Lynn v. Deaconess Medical Center-West Campus, 160 F.3d 484 (8th Cir. 1998), is similarly inapposite. *Lynn* is a Title VII discrimination case. Under the body of case law regarding Title VII, when an employee does not put forward direct evidence of discrimination, the case is analyzed under a tripartite, burden-shifting framework. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The last part of the analysis allows an employee to demonstrate that a legitimate reason for the employment action offered by the employer is merely a pretext for the discrimination. Under the case law, "[i]nstances of disparate treatment can support a claim of pretext, but [the plaintiff] has the burden of proving that he and the disparately treated [employees] were 'similarly situated in all relevant respects.'" *Lynn*, 160 F.3d at 487, quoting *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968 (8th Cir. 1994). In this case, Fleming has not brought a claim under any employment discrimination statute, so this route of analysis is inapplicable. See *Nebraska Dept. of Health & Human Servs. v. Williams*, 16 Neb. App. 777, 752 N.W.2d 163 (2008). And further, Fleming and his fellow officers are not similarly situated; their acts were not of "'comparable seriousness.'" *Lynn*, 160 F.3d at 488. They were convicted of very different criminal

offenses. In sum, we find the arguments by Fleming and the Union to be meritless.

Contractual Double Jeopardy

Fleming and the Union argue that termination of Fleming's employment violated the concept of contractual double jeopardy. While our courts have never recognized this doctrine, other courts have. See, e.g., *Zayas v. Bacardi Corp.*, 524 F.3d 65 (1st Cir. 2008); *Rochon v. Rodriguez*, 293 Ill. App. 3d 952, 689 N.E.2d 288, 228 Ill. Dec. 416 (1997); *Lundy v. University of New Orleans*, 728 So. 2d 927 (La. App. 1999).

The doctrine of contractual double jeopardy "enshrines the idea that an employee should not be penalized twice for the same infraction." 51A C.J.S. *Labor Relations* § 382 at 68 (2010). See, also, 48A Am. Jur. 2d *Labor and Labor Relations* § 2389 (2005 & Cum. Supp. 2010). Its protections are generally imported into a contract because they are "intrinsic to the notion of just cause or otherwise implicit in the labor contract." *Zayas*, 524 F.3d at 68.

[7] As we mentioned, the relationship of the parties in this case is governed by the CBA and incorporated documents. In pressing his double jeopardy argument, Fleming, in essence, is asking us to read or "import" into the CBA a term that he, or the Union, could have negotiated for but did not. This we refuse to do. Parties are generally bound by the terms of their contract, even though their intent might be different from what is expressed in the agreement. See *Professional Serv. Indus. v. J. P. Construction*, 241 Neb. 862, 491 N.W.2d 351 (1992). Only in a few limited circumstances may a court properly imply contractual terms not expressly provided for by the parties. See *id.* One of these rare implied terms is the covenant of good faith and fair dealing, which exists in every contract. See, *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003); *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002); *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000); *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995). However, the scope of protection offered by the covenant is curtailed by the purposes and express terms of the contract. See *Spanish Oaks, supra.*

In other words, the nature and extent of the covenant's protections are measured by the justifiable expectations of the parties. See *id.*

The terms of the CBA seem to allow for two forms of discipline that could be applied to the same underlying facts. Article 27, section 2, of the CBA provides different timeframes in which discipline must be brought for noncriminal complaints and criminal complaints. Nothing in the CBA convinces us that the same underlying facts could not serve as a basis for criminal and noncriminal complaints and, thus, two different occasions for discipline.

In sum, the district court was correct in refusing to apply the doctrine of contractual double jeopardy.

Procedural Due Process

The final argument by Fleming and the Union is that Fleming's right to procedural due process was violated when Dunning, the Douglas County sheriff, sat on the Commission. They claim that Dunning's participation deprived Fleming of his right to an unbiased adjudicator. As evidence of bias, they point to two things. First, the accusation that Fleming had committed an assault was investigated by sheriff's deputies who work under Dunning. Second, Fleming and the Union point out that Dunning excused himself from the first Commission hearing because he said he had a "conflict," although Dunning later claimed that this was merely a scheduling conflict.

[8-12] Procedural due process requires a neutral, or unbiased, adjudicating decisionmaker. See *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010). Administrative adjudicators serve with a presumption of honesty and integrity. *Id.*; *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004). The party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality. *Murray*, *supra*; *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002). Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship. *Murray, supra.*

An adjudicator should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the adjudicator's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. *Urwiller, supra*.

Courts, including the U.S. Supreme Court, see *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975), have generally rejected the idea that the combination of investigatory and adjudicatory functions is a per se denial of due process. See, *Murray, supra*; *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988). Without a showing to the contrary, state administrators are assumed to be persons of conscience, capable of judging a particular controversy fairly on the basis of its own circumstances. *Murray, supra*.

The argument by Fleming and the Union seems to be that Dunning would be too deferential to the sheriff's report because his employees were the officers who wrote it. This argument fails for at least two reasons. First, the combination of investigatory and adjudicative functions is not a per se violation of due process. See, *id.*; *Dieter, supra*. Fleming and the Union have failed to show why this rule should not apply. Second, and more important, after Fleming's conviction, the details of the sheriff's report became irrelevant. Fleming's employment was terminated because he was convicted of a crime to which he pleaded no contest. Any factual issues investigated by the sheriff's office were resolved by the conviction and sentence. Thus, Dunning's supervision of the investigation would not have any effect upon the determination of whether Fleming had been convicted of a crime which rendered him unfit to perform the duties of his position. Dunning's role on the Commission was to determine whether there was sufficient evidence to support the decision to terminate Fleming's employment. A simple examination of court records would indicate that there was sufficient evidence. There was no need to even consider the reports of the deputies.

Fleming and the Union also point to the fact that Dunning had recused himself from the first hearing because of a "conflict." Dunning later claimed that this was just a scheduling conflict. Fleming and the Union have put forth no evidence to

the contrary. Nor have they shown that Dunning would have been required to recuse himself at the first hearing because of bias. Under our case law, it is Fleming's burden to show partiality. See, *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002). He has failed to make this showing. Accordingly, this assignment of error is without merit.

CONCLUSION

We conclude that none of the assignments of error asserted by Fleming and the Union have merit. The Commission's findings were supported by sufficient evidence. Accordingly, we affirm its termination of Fleming's employment.

AFFIRMED.