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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0050**

In re the Matter of:
Paul Jerdee, employee,
Relator,

vs.

The City of Albert Lea, employer,
Respondent.

**Filed January 13, 2009
Affirmed
Schellhas, Judge**

City of Albert Lea

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Considered and decided by Schellhas, Presiding Judge; Minge, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

By writ of certiorari, relator argues that (1) the hearing officer applied an incorrect
evidentiary standard at the hearing following his employment termination, (2) he was

denied the right to procedural due process, and (3) the hearing officer's decision was not supported by substantial evidence. We affirm.

FACTS

Relator Paul Jerdee was employed by respondent City of Albert Lea for 28 years, the last seven of which as superintendent of streets. In 2004, respondent conducted an investigation of its scrap-metal disposal procedures, based on citizens' concerns regarding the efficiency and fairness of its scrap-metal handling procedures. The investigation uncovered no wrongdoing in the handling of scrap-metal, but during the course of conducting employee interviews, respondent received several complaints about relator's work performance.

City Manager Victoria Simonsen and Public Works Director Steven Jahnke met with relator to discuss these complaints without identifying the names of the complaining employees. The employees' complaints about relator were summarized in a memorandum in May 2005, which was placed in relator's personnel file. Simonsen and Jahnke concluded that the complained-of behavior was "unacceptable and very destructive to the morale of [relator's] department" and directed relator to (1) attend a "management/supervision training program," (2) demonstrate cooperation with other departments, and (3) obtain written permission from the department head for all purchase orders and any trades with vendors. Simonsen and Jahnke also concluded that respondent would handle its own scrap-metal hauling from that point forward.

In June 2005, Simonsen and Jahnke met with relator again to discuss relator's purchasing practices which, according to a separate memorandum from Simonsen and

Jahnke to relator, were “misleading” and in some cases “border[ed] on falsification of financial records.” Simonsen and Jahnke stated in their memorandum that they believed relator was “not being completely honest or forthcoming” when respondent investigated these activities and accused relator of having a “lack of candor.” The memorandum informed relator that he was “required to act in a professional manner and serve as a representative of the City” and directed him to inventory all equipment and tools valued \$500 or greater, to “[f]ollow all financial procedures as identified by the City and State,” and to “[c]onsider public image and necessity in every purchase.” Relator signed the memorandum, which stated that it would serve as a written warning, and it was placed in relator’s personnel file.

In August 2005, Jahnke met with the owner of the Clark’s Grove recycling facility after a member of respondent’s utility department reported that when he brought scrap metal to Clark’s Grove, he was asked “something along the order of, well, do you want us to not give you any money for the scrap metal like the street department asked us to?” During the meeting, the facility owner told Jahnke that relator had instructed him to pay “as little as you can” for scrap metal that the city brought to the facility so that relator could later argue that it was not cost-effective for respondent to haul its own scrap-metal. An investigation ensued, and Simonson, Jahnke, and relator met to discuss the incident. The notes of the meeting indicate that relator explained that his instruction to the Clark’s Grove recycling facility reflected his intention to convince Clark’s Grove to take all of the scrap metal, regardless of quality, and that he “thought it was in the best interest of the City.”

Respondent terminated relator's employment. Simonson notified relator of the termination in a letter, dated August 30, 2005, in which Simonson stated:

The City has taken this action pursuant to the results of an investigation, your performance and recent behavior. Specifically, the City is terminating your employment because of your actions and statements surrounding the load of scrap metal brought to Clark's Grove on/or around . . . August 1, 2005. This statement, along with the other issues we have discussed over the past several months, lead to our decision.

.....

The Personnel Policies of The City of Albert Lea also includes a provision for a termination hearing if requested (Section X—Suspension and Dismissal B.4.).

A request for a hearing concerning your termination must be made in writing and submitted to Mike Zelenak, Human Resource Director, by mail or personal service. Failure to request a hearing within sixty (60) days of receipt of the notice shall constitute a waiver of your rights to a hearing.

Relator requested a post-termination hearing before an administrative law judge. Respondent granted relator's request for a hearing, but rejected his request to appoint an administrative law judge. Instead, respondent selected Olmstead County Human Resources Manager David Mueller to preside over a hearing. David Mueller conducted a two-day evidentiary hearing on June 28, 2007 and July 31, 2007. Jahnke, Simonson, and Zelenak testified at the hearing that relator's instruction to the recycling facility was an attempt to, as the hearing officer described, "sabotage a directive by asking a vendor to provide an artificially low price for metal brought there for recycling." They further testified that relator was not terminated because of one incident, but because of the

totality of issues and concerns pertaining to his behavior and conduct. The hearing examiner also heard relator's testimony.

In his decision, the hearing officer explained that he ascribed little or no weight to certain pieces of evidence because they weren't supported by direct testimony or were weakened by other testimony. For example, while the hearing officer gave limited or no weight to the complaints summarized in the May 2005 memorandum, which were "generalizations not backed by direct testimony," he gave substantial weight to the memorandum's written directives to relator. The hearing officer concluded that respondent's concerns about relator's purchasing practices, as described in the June 2005 memorandum, were adequately addressed by the memorandum serving as a written warning, and that they therefore did not rise to the level of "Just Cause" for termination.

The hearing officer found that "an exhibit and hearsay testimony," pertaining to Jahnke's meeting with the Clark's Grove recycling facility's owner, "provided the final and most critical basis for [respondent's] case." The hearing officer noted that respondent should have called the recycling facility's owner as a witness, and that its failure to provide the facility owner's direct testimony "placed a greater burden on [respondent] to prove 'Just Cause'" and required the hearing officer to "more closely evaluate the credibility of witnesses." But the hearing officer "could not dismiss the significance of how [respondent] became aware of the potential misconduct by [relator] in the first place." Noting that an unnamed worker in the utility department initially reported the recycling facility incident and that while "this too was hearsay testimony," the unnamed worker's report corroborated respondent's witnesses' testimony.

The hearing officer concluded that even considering relator's length of service and limited disciplinary record, the written warning and the evidence of the recycling facility incident met the just-cause standard required for respondent to terminate relator's employment. The hearing officer based his decision "heavily on [relator's] action relating to the Clark's Grove incident and the recent written warning he received from his employer," which "detracted substantially from the trust and professional image" expected of relator and "directly conflicted with the best interest" of respondent.

Relator appeals the hearing examiner's decision.

D E C I S I O N

Standard of Review and Law

"Review by certiorari is limited to an inspection of the record" to determine the propriety of the city's jurisdiction and procedures and to determine whether its decision was arbitrary, oppressive, unreasonable, fraudulent, or unsupported by evidence or applicable law. *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992). This court does not retry the facts or make credibility determinations. *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996). The decision will be upheld if the city "furnished any legal and substantial basis for the action taken." *Id.* (quotation omitted).

Relator argues that under *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 50 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994), respondent had the burden to prove "just cause" by clear and convincing evidence, and that the hearing officer erred in applying a lower evidentiary standard. Relator's reliance on *Deli* is misplaced. In *Deli*, based on its own "Rules of Procedure for Grievance Appeals," the employer was bound to apply a

“clear and convincing evidence” standard. 511 N.W.2d at 52. Here, respondent’s personnel rules do not require a “clear and convincing evidence” standard, and relator provides no other support for his argument that the “clear and convincing evidence” standard should apply.

Procedural Due Process

Relator argues that he did not receive due process because he was not given the names or specific facts behind the allegations against him. When a public employee who has a protected interest in his employment¹ is terminated, due process requires “notice and an opportunity to respond” prior to termination. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495 (1985). Specific requirements of due process in such cases include: (1) notice of the reasons for termination in sufficient detail to enable the terminated employee to present relevant evidence; (2) notice of both the names of those who have made allegations against the employee and the specific nature and factual basis for the charges; (3) a reasonable time and opportunity for the employee to present testimony in his own defense; and (4) a hearing before an impartial board or tribunal. *Deli*, 511 N.W.2d at 50.

Relator argues that the second due-process requirement described in *Deli* was not met because the May 2005 memorandum omitted the names of the complaining employees and the specific nature and factual basis for the complaints and his termination

¹ Respondent argued in its brief that relator was an at-will employee and therefore “just cause” was not required for his termination. Because respondent brought this argument for the first time on appeal, we will not consider it. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court will generally not consider issues raised for the first time on appeal).

letter failed to include the specific nature and actual basis for the complaints or the names of the complaining persons regarding relator's alleged instructions to the recycling facility owner. But the hearing officer gave "limited or no weight" to the charges in the May 2005 memorandum precisely because they were generalizations not backed by direct testimony. And the record shows that relator met with Simonson and Jahnke before his termination to discuss the recycling-facility incident and, at the meeting, relator took the opportunity to explain his actions regarding the recycling facility. Relator has therefore not shown that his substantial rights were prejudiced by procedural error, and his due-process rights as to the recycling-facility complaints were satisfied. *See id.* ("Generally, an agency's decision which is made upon unlawful procedure mandates reversal only if a party's substantial rights have been prejudiced."); *Pelerin v. Carlton County*, 498 N.W.2d 33, 36 (Minn. App. 1993), *review denied* (Minn. May 18, 1993) (stating that an informal meeting between employee and supervisor where unacceptable performance is discussed satisfies due process requirements).

Relator also argues that respondent failed to provide substantial evidence to justify his termination for cause. "Cause" or "just cause" means "legal cause" and "must relate to the manner in which the employee performs his duties." *Ekstedt v. Village of New Hope*, 292 Minn. 152, 162-63, 193 N.W.2d 821, 828 (1972) (quotation omitted) (discussing case law defining the terms "cause" and "sufficient cause"). "[E]vidence showing the existence of reasons for dismissal must be substantial." *Id.* at 163 (quotation omitted). Substantial evidence means: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence;

(3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety. *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984).

The hearing officer based his conclusion that relator's termination was justified "heavily" on relator's actions in the Clark's Grove recycling-facility incident. Relator argues that because respondent only introduced a hearsay statement in support of its version of events, it failed to support its position with substantial evidence. While we embrace the hearing officer's concern with respondent's hearsay evidence, the hearing officer did not err in considering the hearsay evidence. A hearing officer in a contested-case hearing under the Administrative Procedure Act "may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 1400.7300, subp. 1 (2007). Here, the hearing officer considered Jahnke's and Zelenak's testimony about their conversation with the recycling-facility owner and a written summary Zelenak prepared of that conversation on the day it occurred. The hearing officer also considered Jahnke's testimony that an unidentified member of respondent's utility department reported being asked by the recycling-facility owner whether he, like relator, wanted to not be paid for the scrap metal. We will not disturb the hearing officer's determinations of respondent's witnesses' credibility. *See Senior*, 547 N.W.2d at 416 ("The reviewing court is not to retry the facts or make credibility determinations."). We conclude that the hearing officer's reliance on the

hearsay evidence, which served to corroborate respondent's claim of good cause to terminate relator, was reasonable.

Affirmed.