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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

COUNTY OF SAN BERNARDINO, Plaintiff and Respondent, v. CIVIL SERVICE COMMISSION OF THE COUNTY OF SAN BERNARDINO, Defendant and Respondent; KENNETH HOLTZ, Real Party in Interest and Appellant.	E046299 (Super.Ct.No. CIVSS703549) OPINION

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco, Judge. Affirmed.

Silver, Hadden, Silver, Wexler & Levine and William J. Hadden for Real Party in Interest and Appellant.

Liebert Cassidy Whitmore, Jeffrey R. Freedman and Jennifer R. Hong for Plaintiff and Respondent.

No appearance for Defendant and Respondent.

1. Introduction

Defendant and real party in interest, Kenneth Holtz (Holtz), appeals from a judgment of the trial court granting the petition for writ of mandate by the County of San Bernardino (County).

After the County terminated Holtz's employment as a deputy sheriff, an administrative hearing officer upheld the termination. The County's three-person Civil Service Commission (Commission) reviewed the hearing officer's decision and rejected the recommendation for termination. The County then sought a petition for writ of mandate and the superior court granted the writ, upholding Holtz's termination.

On appeal, Holtz argues the trial court erred in finding that the County's Personnel Rules, and not the MOU[1] applying to sheriff's deputies, controlled the authority of the Commission to accept or reject the findings and recommendation of the hearing officer to terminate Holtz's employment. We agree with the trial court that the Commission abused its discretion by rejecting the recommendation for termination. We affirm the judgment.

2. Factual and Procedural Background

a. Termination of Employment by the County

More than eight years ago, Holtz was first charged with alleged misconduct in the performance of his duties, specifically a verbal altercation with a prison cook. In October

[1] Memorandum of Understanding, Safety Unit 2005-2009. The Personnel Rules were effective as of February 2002.

2001, based on this incident and others, Holtz and the sheriff's department entered into a five-year "Last Chance Agreement" to resolve the related disciplinary actions in lieu of immediate termination. Under the agreement, Holtz agreed to complete an anger management course and not to violate department policy. Examples of misconduct included "Acts . . . which are discourteous, intimidating, harassing, derogatory, or disrespectful."

In July 2006, the sheriff notified Holtz he was being terminated for violating the agreement based on three incidents occurring in January and February 2006 and other earlier incidents from 2000, 2001, and 2004. In January 2006, Holtz had not complied with Sergeant Lackman's request for a department videotape and behaved with disrespect and discourtesy, speaking in a "loud, confrontational, and challenging manner." In February 2006, Holtz jabbed his finger against Deputy Joshua Conley's chest and threatened, in effect, "'Mother fucker, I'm putting you on notice'" and "'that's right , I'm touching you.'" Holtz also poked a finger at Deputy Kevin Warner, referred to his "'combat'" and "'lawsuit' experience," and warned he was "coming at [Warner] 'like a man' and not a 'mangina.'"[2] The 2006 incidents apparently involved Holtz having arrested a fellow deputy for driving while intoxicated.

b. Commission's Decision Rejecting Hearing Officer's Recommendation

After Holtz appealed his termination, a hearing officer conducted an administrative hearing and issued a recommendation the termination be upheld. The

[2] We understand the latter to be a vulgar distortion of the word "vagina."

Commission rejected the recommendation for termination based on its interpretation and application of the MOU and the Personnel Rules.

In its decision rejecting the hearing officer's recommendation, the Commission acknowledged two sets of provisions in the MOU and the Personnel Rules. The provisions of the MOU take precedence over the Personnel Rules when the two differ. The MOU provides the hearing officer's recommendation "shall be subject to review by the Civil Service Commission on its own initiative only as described below." The MOU further provides the Commission shall either accept or reject the recommendation within 60 days of receipt by the Commission. If it rejects the hearing officer's decision, it shall conduct an evidentiary hearing. There are no provisions explaining what is meant by the Commission's "own initiative."

The Personnel Rules provide that a recommendation shall not become effective until approved by the Commission, except as otherwise provided in the MOU, within 30 days of receipt by the Commission. The enumerated reasons to reject the hearing officer's decision are:

"a. The recommendation was procured by corruption, fraud, or other undue means;

"b. There was corruption in the hearing officer;

"c. The rights of the party were substantially prejudiced by the misconduct of the neutral hearing officer;

"d. The hearing officer exceeded his/her powers on the matter submitted; or

"e. The rights of a party were substantially prejudiced by the refusal of the hearing officer to postpone the hearing upon sufficient cause being shown therefore, or by the refusal of the hearing officer to properly include or exclude evidence material to the controversy.

"Should such be the case, the Commission must state in writing specific reason(s) for the decision (a, b, c, d, or e) and subsequently conduct and complete a full and fair evidentiary hearing . . . ."

The Commission's decision recognized Holtz's argument that the MOU was silent as to the standards for acceptance or rejection of the hearing officer's recommendation. It also recognized the County's argument that "the Personnel Rules do not 'differ' from the MOU, that the MOU is silent as to standards, and that the Personnel Rules provide the standards absent from the MOU."

The Commission observed the MOU language was "ambiguous" but concluded the Commission was not bound by the standards in the Personnel Rules. Although the Commission would have upheld Holtz's termination if it had applied the Personnel Rules, it decided it could exercise its own discretion and reject the hearing officer's decision based on its criticism of the hearing officer's findings, and its independent determination that the witnesses against Holtz were not credible and Holtz was not disrespectful to Sergeant Lackman.

c. Trial Court's Ruling

The trial court performed a different analysis. It reasoned that if the Commission was allowed to ignore the Personnel Rules, it could reject a hearing officer's decision for

any reason or no reason at all. It held the Personnel Rules defined the grounds upon which the Commission could reject the hearing officer's recommendation and the MOU was not ambiguous or in conflict with the Personnel Rules. The trial court found that the Personnel Rules, not the MOU, should have been applied. Therefore, the Commission abused its discretion by rejecting the hearing officer's decision. The trial court granted the petition for writ of mandate, ordering Holtz's termination to be upheld.

3. Discussion

The central issue on appeal is whether the standards set forth in the Personnel Rules govern the authority of the Commission to accept or reject the hearing officer's recommendation to terminate Holtz's employment. As both parties recognize, the standard of review involves undisputed facts and the resolution of the legal question of whether the Commission abused its discretion. (*Silver v. Los Angeles County Metropolitan Transportation Authority* (2000) 79 Cal.App.4th 338, 348; *Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 700; *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1217.)

As recently stated in *Munroe v. Los Angeles County Civil Service Com.* 2009 WL 1016601, 3 (Cal.App. 2 Dist., 2009): ""A traditional writ of mandate under Code of Civil Procedure section 1085 is a method for compelling a public entity to perform a legal and usually ministerial duty. [Citation.] The trial court reviews an administrative action pursuant to Code of Civil Procedure section 1085 to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the

agency failed to follow the procedure and give the notices the law requires. [Citations.] 'Although mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion. [Citation.] In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld. [Citation.]' [Citation.]" [Citation.]' (*American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 261.)"

The Personnel Rules and the Commission are established by the County Board of Supervisors. The Commission has special and limited jurisdiction expressly authorized by the enabling statute. (*Hunter v. Los Angeles County Civil Service Com.* (2002) 102 Cal.App.4th 191, 194-195.) It cannot act outside its jurisdiction. (*Wheeler v. City of Santa Ana* (1947) 81 Cal.App.2d 811, 815.) When a course of conduct is mandatory, it eliminates any element of discretion. (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 460 citing *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 504-505.) And, "'[g]enerally, a writ will lie when there is no plain, speedy, and adequate alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right to performance.' (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 925.)" (*Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 584.)

In the present case, the Commission had no discretion to reject the hearing officer's recommendation to terminate Holtz's employment except for the reasons set forth in the Personnel Rules. We agree with the trial court that the MOU and the

Personnel Rules do not provide different grounds for rejecting a hearing officer's recommendation.

Holtz interprets the obscure language "on its own initiative only as described below" in the MOU to mean that the Commission has unfettered discretion to reject a recommendation. We cannot locate any case law that addresses the meaning and use of "own initiative" in an MOU or approves it as a substitution for the term "discretion." We read the disputed language to apply more reasonably to the Commission's power and procedures for reviewing a recommendation, whether or not review was actually requested by one of the parties. Otherwise, the MOU offers no instruction on the proper grounds for rejection of a hearing officer's recommendation. Those standards are supplied by the Personnel Rules, which augment, but do not contradict the MOU.

The Commission admitted that, if it had applied the Personnel Rules, it would have accepted the recommendation to terminate Holtz. Under these circumstances, the Commission should have performed its ministerial duty and upheld the termination.

The Commission's view of a regulation that it enforces is entitled to great weight unless clearly erroneous or unauthorized. (*Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 484.) Here, the Commission's interpretation of the MOU allowing it to reject Holtz's termination constituted an abuse of discretion. (*Family Planning Associates Medical Group, Inc. v. Belshé* (1998) 62 Cal.App.4th 999, 1004.) Therefore, the trial court properly granted the County's writ petition.

4. Disposition

We affirm the judgment and order the County as prevailing party to recover its costs on appeal.

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s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Miller
J.