

2012 IL App (1st) 111200-U

No. 1-11-1200

FIFTH DIVISION
August 3, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANIEL COLEMAN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 97 CR
)	
ILLINOIS DEPARTMENT OF HUMAN SERVICES)	
and ILLINOIS CIVIL SERVICE COMMISSION,)	Honorable
)	Rita Mary Novak,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice McBride concurred in the judgment.

MODIFIED ORDER UPON DENIAL OF REHEARING

¶ 1 *Held:* Where plaintiff received notice of pre-discharge hearing one day prior to hearing and was unable to attend and where plaintiff was not informed of the ability to present additional documentation, the decision of the Civil Service Commission that plaintiff should be discharged from his employment was unreasonable; the decision of the Commission was reversed and the case remanded.

¶ 2 Plaintiff Daniel Coleman appeals *pro se* an order of the circuit court of Cook County affirming the decision of the Illinois Civil Service Commission (the Commission) that plaintiff's discharge from his employment was warranted because he failed to return to work or take the required steps to extend his leave of absence. Plaintiff contends the evidence did not support the Commission's decision to discharge him from employment. We reverse the decision of the Commission and remand.

¶ 3 From September 1995 until September 6, 2009, plaintiff was employed by the Illinois Department of Human Services (the Department) as a maintenance worker at the Howe Developmental Center (Howe) in Tinley Park. From February to December 2008, plaintiff took a medical disability leave due to anxiety, hypertension, sleeplessness and an elevated heart rate.

¶ 4 In March 2009, plaintiff took a second medical disability leave after he experienced chest pains and had difficulty breathing during a work-related incident. Plaintiff submitted documentation from his doctor to extend his disability leave into April 2009.

¶ 5 On April 17, 2009, plaintiff's disability leave expired, and he did not return to work. Plaintiff was placed on suspension pending discharge for: (1) conduct unbecoming a State employee, specified as "use of profane and threatening language," and (2) abuse of time, or unauthorized and unreported absences. On May 16, 2009, plaintiff was discharged from his employment at Howe.

¶ 6 In July 2009, a grievance was filed with plaintiff's union, and plaintiff was returned to a "non-service leave of absence" pending his return to work. The grievance resolution, dated July 1, 2009, stated that plaintiff's discharge was expunged and set out two options: (1) plaintiff could return to work on July 2, 2009; or (2) if unable to return to work due to his medical condition, plaintiff was required to submit a Physician Statement form by July 10 to extend his non-service leave.

¶ 7 On July 8, Jeri Gulli, Howe's human resources director, sent plaintiff a copy of the grievance resolution along with a blank Physician Statement form. Plaintiff did not receive those documents until July 10, the date by which he needed to request an extension of his leave.

¶ 8 On July 16, Gulli sent a letter to plaintiff advising him that his leave of absence had expired on July 10 and he was expected to return to work on that date. The letter stated that plaintiff had to return from leave or request an extension of his leave by "close of business" on July 22. If plaintiff did not take either action, a "pre-disciplinary meeting" would be held on July 23 "to discuss contemplated disciplinary action which you and/or your union representative are expected to attend. Failure to attend will result in the appropriate disciplinary action being taken." The letter stated the time and place of the July 23 meeting. Plaintiff received that letter on July 22 and consulted an attorney, Daniel Brennan, who contacted Gulli and unsuccessfully sought an extension of the July 22 deadline. No request for an extension of plaintiff's leave was filed.

¶ 9 On July 23, the pre-disciplinary meeting was conducted with three people present: Gulli, a labor relations administrator and a union representative. Plaintiff did not attend. Following that hearing, the Department brought the following two charges against plaintiff, as set out in a Statement of Charges: (1) Failure to Return from Leave, specified as plaintiff's failure to either return to work on July 2, 2009, or provide documentation to extend his leave by July 10, 2009, as those options were set out in the grievance resolution, and (2) Abuse of Time, for unauthorized, unreported absences on nine workdays between July 13 and July 23. On September 6, 2009, plaintiff was discharged for cause.

¶ 10 At hearings on October 15 and December 15, 2009, an administrative law judge (ALJ) heard testimony from Gulli, plaintiff and Brennan setting out the factual background stated above. Plaintiff was represented by counsel at those hearings.

¶ 11 Gulli testified she sent the July 8 and the July 16 letter to plaintiff via certified mail, with a signature required for delivery, and also sent duplicate letters on those dates by regular mail. After the July 23 pre-disciplinary meeting, Gulli did not begin processing plaintiff's discharge until "the first part of August" because plaintiff's union contract allowed plaintiff a five-day rebuttal period following the pre-disciplinary meeting for plaintiff to submit further documents. She testified that no documents were filed before or after July 23 on plaintiff's behalf to extend his leave beyond its July 22 expiration.

¶ 12 Gulli testified that when plaintiff failed to return to work on July 2 or request further leave after his leave period expired on July 10, plaintiff stood in violation of various rules, including Section 303.153 of the State of Illinois Central Management Services Personnel Rules (the CMS Rules), which provides that a "[f]ailure to return from leave within 5 days after the expiration date may be cause for discharge." Gulli also testified plaintiff violated Section 303.350 of the CMS Rules, which states: "An employee shall, whenever possible, provide advance notice of absence from work. Absence of an employee for five consecutive workdays without reporting to the operating agency may be cause for discharge." Gulli also testified plaintiff's absences on work days from July 13 to July 23 violated a Howe personnel rule that an employee who did not report to work or contact a supervisor to request time off accrued an unauthorized, unreported absence and that the accumulation of such absences for six consecutive workdays "may be cause for discharge."

¶ 13 Plaintiff testified that from February 2008 to and including July 2008, he was treated by Dr. Paul Kennedy, a clinical psychologist. In March 2009, Dr. Kennedy provided documentation that plaintiff used to extend his disability leave into April 2009 as the doctor had done "so many times in the past." Plaintiff testified the April 2009 expiration of his disability leave "was a shock."

¶ 14 Plaintiff testified he was familiar with the Howe attendance policy and acknowledged receiving an employee handbook. When plaintiff received a copy of the grievance resolution and the letter from Gulli on July 10, he was unable to reach Dr. Kennedy. Plaintiff contacted his union representative and Brennan, who both advised plaintiff to seek clarification from the union.

¶ 15 Plaintiff said that on July 21 or July 22, he received the letter that required documentation to be submitted by July 22 and set out the July 23 pre-disciplinary meeting. Plaintiff contacted Dr. Kennedy's office to move up an appointment he had scheduled for July 23. Plaintiff could not obtain an earlier appointment, and he attended his appointment on July 23.

¶ 16 Plaintiff testified Brennan contacted Gulli about extending the July 22 date and Brennan reported back to plaintiff that the deadline would not be extended. Plaintiff said he did not attend the July 23 meeting because he would have had no union representation.

¶ 17 Plaintiff acknowledged he did not work on the days for which he was charged with unexcused absences and that he did not contact his supervisors at Howe during the pendency of his grievance because his impression was that his union would be handling the matter.

¶ 18 Consistent with plaintiff's account, Brennan testified that Gulli denied his request for an extension of the July 22 deadline. Brennan said he contacted Gulli as a favor to plaintiff and advised plaintiff that his union should represent him at the July 23 hearing.

¶ 19 Gulli was recalled as a witness and testified that Brennan called her on July 21 and told her that plaintiff's doctor was unavailable and that plaintiff had a July 23 appointment. Gulli told Brennan the deadline for plaintiff to submit medical documentation would not be extended and she "had to end the conversation because [Brennan] was argumentative with me."

¶ 20 Gulli said the July 23 pre-disciplinary meeting was attended by Ron Olson, who was a representative of plaintiff's union, and also by a labor relations administrator. According to

Gulli, Olson asked her if medical documentation would be accepted after that date, and Gulli responded it would be accepted and taken under consideration.

¶ 21 The ALJ asked Gulli why any documentation would be considered at or after the pre-disciplinary meeting given her earlier refusal to extend the July 22 deadline, and the ALJ also asked how Gulli arrived the July 22 date. Gulli said plaintiff had five working days beyond the date of her July 16 letter to respond to its contents. When asked if she had discretion in setting that date or extending the deadline, Gulli replied she did not know and "that's something I would have to go up the chain [*sic*]." Gulli said plaintiff had five days after the July 23 hearing to submit additional information before a decision was made in his case.

¶ 22 Dr. Kennedy testified via evidence deposition that he saw plaintiff 19 times in 2008 for depression and a panic disorder. Plaintiff's medical disability leave in 2008 was due to plaintiff's "perceptions of being mistreated, efforts to fire him, feelings of stress and discomfort" and "having conflicts with other people and his difficulty in coping with those conflicts."

¶ 23 Dr. Kennedy again treated plaintiff for his panic disorder in March 2009. The doctor said he approved plaintiff's medical disability leave on April 2, 2009, but did not release plaintiff to return to work because plaintiff exhibited "[c]ontinued distress about the way he had been treated." Dr. Kennedy saw plaintiff on July 2, and plaintiff indicated his union notified him an agreement had been reached regarding his May 16 discharge and that he was looking forward to returning to work. Plaintiff did not request any documentation from the doctor on July 2.

¶ 24 Dr. Kennedy stated he was out of the office from July 9 to July 20. According to Dr. Kennedy's records of plaintiff's July 23 appointment, plaintiff described the recent events "as a set-up to fail." Plaintiff told the doctor he was "inclined to reject" the conditions for his return to work and was "willing to continue to contest the issues."

¶ 25 The statement of charges against plaintiff listed three instances of prior discipline: (1) a five-day suspension in 2004 for conduct unbecoming a State employee; (2) a three-day suspension in 2006 for conduct unbecoming a State employee, and (2) the 76-day suspension starting in April 2009 as noted earlier for (a) conduct unbecoming a State employee and (b) abuse of time.

¶ 26 On February 5, 2010, the ALJ issued its written factual findings and recommendations. The ALJ found the initial grievance against plaintiff was resolved on July 1 but plaintiff was not present and did not receive a copy of the grievance resolution from Gulli or the union. Plaintiff received on July 21 the letter sent by Gulli imposing the July 22 deadline. The ALJ stated the July 22 deadline was not mandated by any rule and no evidence was provided that date "was somehow an intractable deadline that could not have been extended to fit the circumstances" of plaintiff's situation. The ALJ also noted Gulli's testimony as to her basis for setting the July 22 date was contradictory in that she testified it was based on the July 10 date on which plaintiff's leave expired but later stated it reflected five working days beyond the date of the July 16 letter.

¶ 27 The ALJ nevertheless found plaintiff did not submit medical documentation to extend his leave. Plaintiff acknowledged he did not work on the days for which he was charged with unauthorized absences or contact his employer or supervisor to explain his absences. The ALJ found plaintiff offered credible testimony that he had not been suspended for a five-day period in 2004, contrary to the disciplinary record listed in the statement of charges. The ALJ concluded the Department proved the charges against plaintiff because plaintiff did not return to work on July 2, 2009, or take the required steps to extend his leave of absence.

¶ 28 As to the appropriate level of discipline, the ALJ concluded the facts did not warrant plaintiff's discharge. The ALJ noted that in most cases "of this nature (failure to return from or extend leave of absence), discharge would be automatic." Factors in favor of discharge included

plaintiff's disregard for his personal responsibility in providing the necessary documentation, his failure to contact Howe directly, and his "misplaced reliance" on his union. However, the ALJ voiced concern with the arbitrary setting of a July 22 deadline and Gulli's refusal to extend the deadline upon plaintiff's request. The ALJ concluded that the "maximum penalty short of discharge" was appropriate and recommended that plaintiff receive a 90-day suspension from employment. The Department filed an objection to that decision, arguing that plaintiff's discharge was the appropriate and necessary punishment.

¶ 29 On February 19, 2010, the Commission issued its decision that the written charges against plaintiff had been proven and that plaintiff's discharge from his employment was warranted. The finding and decision of the Commission stated as follows:

"FINDING: It is hereby determined that the written charges for discharge approved by the Director of the Illinois Department of Central Management Services have been proven and discharge is warranted. The respondent [plaintiff] was given multiple opportunities to comply with the agency's requests to submit the appropriate documentation to extend his leave of absence. The respondent failed to comply with the July 1, 2009 grievance resolution. He missed several deadlines to submit documentation to extend his leave of absence. He failed to attend his pre-disciplinary hearing. He failed to file a rebuttal to the pre-disciplinary hearing. Moreover, his performance record and prior discipline indicates that [plaintiff] has been previously suspended for the same type of behavior. For these reasons, discharge is warranted.

DECISION: Therefore, said proven charges warrant discharge.

This is a final administrative order subject to the administrative review law."

¶ 30 Plaintiff filed a complaint for administrative review in the circuit court, requesting reversal of the Commission's decision and reinstatement to his job. Following a hearing, the circuit court affirmed the Commission's decision on March 22, 2011. Plaintiff now appeals.

¶ 31 As a preliminary matter, the Department and the Commission, who are both appellees in this case, ask this court to strike the statement of facts contained in plaintiff's *pro se* brief. They contend that section of plaintiff's brief contains factual assertions that are contradicted or unsupported by the record, several facts lack accompanying citations to the record and the section is argumentative, all in violation of Illinois Supreme Court Rule 341(h)(6) (eff. July 1, 2008). Although a *pro se* litigant is held to the same standards as a litigant represented by counsel (*In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1067 (2009)), this court nevertheless retains the discretion to consider an appellate brief notwithstanding an appellant's failure to comply with Rule 341(h)(6). *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, ¶ 21 (reviewing court would disregard any improper or unsupported statements).

¶ 32 On appeal, plaintiff contends the evidence heard by the ALJ did not support the Commission's decision that discharge from his employment was warranted by his failure to return to work before July 22, 2009, the date by which he was required to request an extension of his leave. Plaintiff acknowledges he did not request an extension before July 22 but asserts he could not have met that deadline because he was unable to reschedule his July 23 appointment. Plaintiff further argues he was not told he could present documentation after the July 23 meeting had occurred. He also challenges the credibility of most of Gulli's testimony.

¶ 33 When reviewing an administrative agency's decision in a case involving discharge, the agency's determination will not be reversed unless it is arbitrary or unreasonable. *Illinois Department of Juvenile Justice v. Illinois Civil Service Comm'n*, 405 Ill. App. 3d 515, 521 (2010) (appellate court's role is to review the decision of the administrative body, not of the circuit court). The review of a discharge case involves a two-step process in which this court first considers whether the administrative agency's factual findings are against the manifest weight of the evidence. *Department of Juvenile Justice*, 405 Ill. App. 3d at 522, citing *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998). An administrative agency's findings and conclusions on questions of fact shall be held to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 2008). In examining an agency's factual findings, this court will not weigh the evidence or substitute its judgment for that of the agency. *Department of Juvenile Justice*, 405 Ill. App. 3d at 522, citing *City of Belvidere*, 181 Ill. 2d at 204; see also *Kouzoukas v. Retirement Board of Policemen's Annuity and Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 464 (2009) (it is not a court's function on administrative review to make an independent determination of the facts).

¶ 34 This court considers whether the findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge does or does not exist. *Department of Juvenile Justice*, 405 Ill. App. 3d at 521. Where, as here, the Commission's punishment differs from the recommendation of the ALJ, the key inquiry is whether the Commission sufficiently substantiated its decision or whether the Commission's departure from the ALJ's recommendation was arbitrary, unreasonable or unrelated to the requirements of service. See *Department of Juvenile Justice*, 405 Ill. App. 3d at 524-25; see also *Williams v. Illinois Civil Service Comm'n*, 2012 IL App (1st) 101344, ¶ 9 (where Commission decides cause for discharge exists, that decision should be upheld unless it is arbitrary or unreasonable).

¶ 35 In determining plaintiff should be discharged from his employment, the Commission noted that plaintiff "missed several deadlines to submit documentation to extend his leave of absence" and that he also failed to attend or file a rebuttal to the July 23 pre-disciplinary hearing. We agree with plaintiff, however, that the Commission's decision was unreasonable based on the evidence presented to the ALJ. Plaintiff, who had been employed by Howe for more than 10 years, requested an extension of the July 22 deadline by which he had to seek additional medical leave. Plaintiff's attorney was told, with no apparent explanation, that the July 22 deadline would not be extended. Plaintiff then attempted to reschedule his slated July 23 doctor's appointment so he could attend the pre-disciplinary meeting; however, plaintiff could not secure a different appointment date. The record further establishes that after Gulli refused to extend the July 22 deadline, she stated at the July 23 meeting that medical documentation would be accepted after that date, which proved to be of no aid to plaintiff because he was absent from the meeting and thus did not hear that announcement (though a representative of plaintiff's union did attend). In light of those facts, the decision of the Commission that plaintiff should be discharged from employment was arbitrary and unreasonable.

¶ 36 Accordingly, the Commission's decision that the facts warranted plaintiff's discharge from employment is reversed. This case is remanded to the Commission with directions to issue a decision consistent with the ALJ's recommendation that plaintiff receive a 90-day suspension from employment.

¶ 37 Commission's decision reversed; cause remanded with directions.