2016 IL App (1st) 153262-U

FOURTH DIVISION
September 15, 2016

No. 1-15-3262

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANTHONY RITACCO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CH 2527
	)	
RETIREMENT BOARD OF THE MUNICIPAL EMPLOYEES', OFFICERS', AND OFFICIALS' ANNUITY AND BENEFIT FUND OF CHICAGO,	)	
	)	Honorable
	)	Mary Mikva,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held:* When the record failed to establish a clear and specific connection between an employee's municipal employment as a cement mixer and saw operator and his felony conviction for possession of narcotics with intent to deliver, he is not disqualified from pension benefits pursuant to section 8-251 of the Illinois Pension Code (see 40 ILCS 5/8-251 (West 2012)).

¶ 2 The Retirement Board of the Municipal Employees', Officers', and Officials' Annuity and Benefit Fund of Chicago (the Board), appeals from the circuit court's reversal of the Board's decision denying the application of Anthony Ritacco for a retirement annuity pursuant to section 8-251 of the Illinois Pension Code (the Code) (see 40 ILCS 5/8-251 (West 2012)). On appeal, the Board contends that it properly denied Ritacco benefits based upon its finding that his felony conviction for possession with intent to deliver two kilograms of mixtures containing cocaine arose out of or in connection to his employment with the City of Chicago (the City). For the reasons that follow, we affirm the judgment of the circuit court and reverse the decision of the Board.

¶ 3 Ritacco worked for the City from September 28, 1984 until June 7, 2005. He was employed by the Board of Education and then by the Department of Transportation (DOT). He worked as a seasonal cement mixer and saw operator for the DOT.

¶ 4 On June 8, 2005, Ritacco was arrested by federal agents for allegedly participating in a plan, orchestrated by George Prado, to distribute narcotics. Prado worked for the City's Water Department. Ritacco agreed to enter a guilty plea and a presentence investigation was conducted. The presentence investigation report stated, with regard to Ritacco's conduct, that:

> "on or about May 27, 2005, the defendant contacted Prado to arrange for the delivery of cocaine from a supplier, Javier Hernandez, to the defendant. On May 27, 2005, at approximately 9:38 a.m., the defendant called Prado and stated that he (the defendant) would be ready to buy two kilograms of cocaine the following day. On or about May 28, 2005, the defendant, at the

> direction of Prado, drove to a Burger King parking lot *** where he met with the drug courier. The defendant gave the courier $40,000 in exchange for two kilograms of cocaine."

Ultimately, Ritacco entered a plea of guilty to Count 13 of the indictment, which alleged that on May 28, 2015, he "did knowingly and intentionally possess with intent to distribute a controlled substance, namely, approximately 2 kilograms of mixtures containing cocaine." He was sentenced to 46 months in federal prison.

¶ 5 In 2007, the City's Corporation Counsel sent a letter to the Municipal Employees' Annuity and Benefit Fund of Chicago, stating that Ritacco was convicted as part of a federal prosecution and that the felony conviction arose out of or in connection with his employment with the City. The letter further stated that it was the opinion of the Office of the Corporation Counsel that Ritacco had forfeited his pension.

¶ 6 In November 2013, Ritacco applied for a retirement annuity. On August 21, 2014, a hearing was held before the Board to determine whether Ritacco's felony conviction rendered him ineligible for annuity benefits pursuant to section 8-251 of the Code. Ritacco appeared and was represented by counsel.

¶ 7 Ritacco testified that beginning in 1995 he worked for the DOT. His workday was usually 7 a.m. to 3:30 p.m. In 2005, he was indicted by a federal grand jury. The offense to which he entered a plea of guilty occurred on May 28, 2005. May 28, 2005 was a Saturday and he did not work for the City on the weekends. Although Ritacco admitted his responsibility for the offense, he denied committing any crimes during his hours of employment. He did not have a City-issued cell phone or vehicle, and he used his personal car and cell phone in the commission

of the offense. He denied that there was any involvement between the offense and his employment with the City. The person he delivered the cocaine to was not a City employee. Although Ritacco's involvement with the drugs was initiated through George Prado, another City employee, he denied that his relationship with Prado was related to his employment with the City. He explained that had known Prado, his former brother-in-law, for his "whole life." Prado had no involvement with Ritacco getting a job with the City.

¶ 8 During cross-examination, Ritacco testified that he was a seasonal employee and never worked with the Water Department. Generally, as a cement mixer, he would report to work, be told an assignment and drive his own car to the job site. If he worked as a "saw functioner," he would ride on the truck with the saw and other employees to the job site. Ritacco understood that he entered a plea of guilty to a felony. The following exchange then took place:

> "Q: Now, as part of your guilty plea, you admitted that on May 27, 2005, at approximately 9:30 a.m. you arranged with Prado by phone to purchase cocaine on May 28th, which was a Saturday, right?
>
> A: No. I admitted to talking on the phone with him on my break, and that's all I admitted. Whatever they deciphered from that was not true.
>
> Q: Okay. That's your position.
>
> A: That wasn't what was said. That's what they thought or put down that was said. That was never said. But we did speak."

¶ 9 Although Ritacco admitted, at the hearing, that he spoke to Prado on the morning of May 27, 2005, he denied that the conversation concerned the delivery of cocaine the following day as was stated in the presentence report and the government's version of the facts in the federal proceeding. He agreed, however, that "[a]s part of the plea arrangement, that's what *** they wanted me to say, yes." He also agreed that May 27, 2005, was a Friday. At the time that he spoke to Prado, he was on a break. Ritacco acknowledged that the "Defendant's Version of [the] Offense," which was submitted to the federal court during the sentencing process and signed by Ritacco, stated that he had "lost" his job and pension. Ritacco explained that was what his lawyer "thought was going to happen" but that she was not "sure *** of the rules."

¶ 10 During redirect, Ritacco testified that he thought he had "no rights" because he was a seasonal employee and did not have a chance to retire. However, he and his attorney did not know "what was going on," and he "always remained steadfast" that he would receive a pension.

¶ 11 In finding Ritacco ineligible for benefits, the Board determined that the evidence in the record established that on the morning of May 27, 2005, while "on duty" with the DOT, Ritacco called another City employee in order to purchase cocaine. The Board concluded that Ritacco's admission that he placed at least one phone call to purchase cocaine from his car while at work established that he took advantage of his position with the City to further the commission of the felony for which he was convicted.

¶ 12 The Board determined that Ritacco's representation through counsel during sentencing in the federal matter that he had lost his pension due to his actions "further" demonstrated that Ritacco "considered his actions to have been connected to his employment with the City." The Board also noted that the City's Corporation Counsel, in a 2007 opinion letter, concluded that

Ritacco's felony conviction arose out of or in connection with his employment with the City, and therefore, he was not entitled to his pension. Accordingly, the Board denied Ritacco's application for pension benefits based upon its conclusion that the evidence established a nexus between his "felonious acts" and the performance of his official duties with the City.

¶ 13 Ritacco sought a review of the Board's decision in the circuit court of Cook County pursuant to the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2012)). The circuit court found that the Board's decision was clearly erroneous and reversed the decision of the Board. This appeal followed.

¶ 14 In an appeal from a decision of the circuit court on a complaint for administrative review, we review the administrative decision rather than the circuit court's decision. *Romano v. The Municipal Employees Annuity & Benefit Fund of Chicago*, 384 Ill. App. 3d 501, 503 (2008). The standard of review that determines the degree of deference given to an agency's decision turns on whether the issue presented is a question of fact, a question of law, or a mixed question of law and fact. *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 216 Ill. 2d 455, 471 (2005).

¶ 15 When reviewing an administrative decision, we accept the agency's factual findings as *prima facie* true and correct. 735 ILCS 5/3-110 (West 2012); *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998). This court will not reverse those findings unless they are against the manifest weight of the evidence. *Romano v. The Municipal Employees Annuity & Benefit Fund of Chicago*, 402 Ill. App. 3d 857, 860 (2010). An administrative agency's factual findings are against the manifest weight of the evidence only when an opposite conclusion is clearly evident. *Abrahamson v. Illinois Department of Professional Regulation*,

153 Ill. 2d 76, 88 (1992). The fact that a conclusion opposite that reached by the agency is reasonable or that a reviewing court might have ruled differently does not justify reversal. *Id*.

¶ 16 A mixed question of law and fact asks the legal effect of a given set of facts, that is, "a reviewing court must determine whether established facts satisfy applicable legal rules." *Comprehensive Community Solutions*, 216 Ill. 2d at 472. We review an agency's conclusion on a mixed question of law and fact for clear error. *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130, 143 (2006). Clear error review affords significant deference to an agency's experience in construing and applying the statutes that it administers. *Id*. An agency's decision is clearly erroneous only when a reviewing court, based upon the entire record, is left with the definite and firm conviction that a mistake has been made. *Comprehensive Community Solutions*, 216 Ill. 2d at 472.

¶ 17 Section 8-251 of the Code states that: "[n]one of the benefits provided for in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as a municipal employee." 40 ILCS 5/8-251 (West 2012).

¶ 18 Our supreme court held, in *Devoney v. The Retirement Board of the Policemen's Annuity & Benefit Fund for the City of Chicago*, 199 Ill. 2d 414, 419 (2002), that when applying a pension disqualification statute the pivotal inquiry is whether there is a nexus between the felony of which the employee was convicted and the performance of his official duties. In that case, the court found that the nexus requirement was satisfied because "but for" the fact that the employee was a high-ranking police officer, he would not have been selected to participate in the behavior which led to his conviction. *Id*. at 423. See also *Taddeo v. The Board of Trustees of the Illinois*

Municipal Retirement Fund, 216 Ill. 2d 590, 597 (2005) (there must be a "clear and specific connection between the felony committed and the participant's employment").

¶ 19 This court, in *Bloom v. Municipal Employees' Annuity & Benefit Fund of Chicago*, 339 Ill. App. 3d 807, 814-16 (2003), discussed the various "tests" used by courts to determine if the required nexus has been established. We noted that although our supreme court in *Devoney* cited with approval the "but for" approach, the court did not mandate the application of that test to every nexus analysis. *Id.* at 815, citing *Devoney*, 199 Ill. 2d at 423. We further discussed the use of other "causation formulations," such as the "substantial factor" test. *Id.* We also noted an approach parallel to the "substantial factor" analysis which found a nexus between behavior and a person's " ' "employment if its origin is in *some* way connected with the employment so that there is a causal connection between the employment and the * * * injury." ' " (Emphasis in original.) *Id*., quoting *Goff v. Teachers' Retirement System of the State of Illinois*, 305 Ill. App. 3d 190, 195 (1999), quoting *Consolidated Rail Corp. v. Liberty Mutual Insurance Co.*, 92 Ill. App. 3d 1066, 1068-69 (1981). We ultimately concluded that "precedents indicate that the 'but for' causation test is merely one acceptable method of establishing the nexus between crime and public employment required for forfeiture under the pension statutes and that other means of establishing this link are equally permissible." *Id.* at 816.

¶ 20 In the case at bar, the Board contends that the record supports its conclusion that a nexus existed between the felony to which Ritacco entered a plea of guilty and his job with the City when he was able to "place his drug-related phone call" because his job permitted him to take breaks during the day during which he could use his own phone. In other words, "Ritacco's

knowledge that he would be free to make the phone call could only have arisen out of his past on-the-job experience."

¶ 21 Ritacco responds that there was "no connection at all" between his felony conviction and his employment by the City, "outside of a single phone call the Board claims was drug-related that Ritacco made from his personal vehicle, on his personal phone, during a break." He also argues the Board is improperly attempting a *post hoc* rationalization of the denial of benefits because the Board's decision did not rely upon his knowledge that he would have breaks during the workday to establish the required nexus between his employment and his felony conviction.

¶ 22 Here, the Board based its decision, in part, on the fact that Ritacco made a drug-related phone call to Prado during the workday on May 27, 2005, the day before the events which led to his federal conviction. Although Ritacco testified at the hearing that he was on a break at the time of the phone call and denied that the conversation concerned the next day's drug transaction, he admitted that he made such an admission as part of his plea deal. This court cannot say that the Board's factual finding that the May 27, 2005, phone call was drug-related was against the manifest weight of the evidence (*Romano*, 402 Ill. App. 3d at 860), because, based upon the record before us, the opposite conclusion was not clearly evident (*Abrahamson*, 153 Ill. 2d at 88).

¶ 23 However, we cannot agree with the Board's determination that the May 27, 2005 phone call, even if drug-related, established a clear and specific connection between the felony of which Ritacco was convicted and his employment by the City. Ritacco was a seasonal cement mixer and saw operator who did not have a City-issued car or cell phone and the offense was committed on the weekend with Ritacco's personal car. None of the facts in the record support

the inference that Ritacco was recruited into Prado's operation because he was a City employee; rather, Ritacco testified that he had known Prado, his former brother-in-law, his entire life. The record also does not contain any facts indicating that Ritacco ever used his position as a City employee for the benefit of Prado or Prado's operation. See *Devoney*, 199 Ill. 2d at 423 (the employee used his "police connections" to benefit a coconspirator). Although it is undisputed that Ritacco and Prado were both City employees, Ritacco testified that he was a seasonal employee and did not work with the Department of Water. He also denied that Prado helped him to obtain a job with the City or that his relationship with Prado was related to his employment with the City.

¶ 24 We are unpersuaded by the cases cited by the Board in support of its conclusion that there was a nexus between Ritacco's employment and his felony conviction. See, *e.g.*, *Devoney v. The Retirement Board of the Policemen's Annuity & Benefit Fund for the City of Chicago*, 199 Ill. 2d 414 (2002); *Bauer v. The State Employees' Retirement System of Illinois*, 366 Ill. App. 3d 1007 (2006).

¶ 25 In *Devoney*, 199 Ill. 2d at 423-24, for example, our supreme court found that the employee's participation in the scheme for which he was convicted was the product of his employment as a police officer based upon its finding that he would not have been selected to participate in the scheme "but for" the fact that he was a high-ranking police officer who used his position to benefit his coconspirator "in a variety of ways over a protracted period of time." In *Bauer*, 366 Ill. App. 3d at 1020-21, the court found that, "but for" the employee's former position as the State's Inspector General, he would not have been in a position to try to convince his former secretary to conceal or destroy documents relevant to a federal investigation, thus

establishing a nexus between his felony conviction for obstruction of justice and his employment.

¶ 26 Initially, we reject the Board's argument that the nexus is established because Ritacco knew, due to his previous work with the City, that he would be able to make telephone calls from his personal phone on his break and that he used this knowledge to further the arrangements for the underlying felony. We cannot agree with the Board's conclusion that an employee's knowledge that he would get a break during the workday during which he could make personal phone calls was specialized knowledge inherent to Ritacco's employment with the City. Rather, the fact that employees often get breaks during which they can conduct personal business is general knowledge.

¶ 27 In the case at bar, there is no evidence in the record that Ritacco used his position as a City employee to benefit Prado or that he was asked to take part in Prado's drug operation because of his City employment. Additionally, there is no evidence in the record that Ritacco's specialized knowledge as a cement mixer and saw operator was related to his actions of driving to pick up certain narcotics on the weekend. See *Siwek v. The Retirement Board of the Policemen's Annuity and Benefit Fund*, 324 Ill. App. 3d 820, 829 (2001) (the employee's specialized knowledge gained as a police officer and his relationship with a police informant, which were used to set up the drug transactions underlying his felony convictions, related to his service as a police officer and therefore justified forfeiture of his pension benefits).

¶ 28 Even accepting the Board's conclusion that the May 27, 2005 phone call was drug-related, we cannot agree that the mere fact that the call was made during the workday created the required nexus between Ritacco's employment and the underlying conviction.

¶ 29 *Goff v. Teachers' Retirement System of the State of Illinois*, 305 Ill. App. 3d 190 (1999), is instructive. In that case, a retired teacher pled guilty to the aggravated sexual abuse of students at the school where he had worked. Although the conduct underlying the convictions did not take place on school property, Goff used his position as a teacher to take sexual advantage of his victims, and, consequently, the court found that he "used and abused" his position in order to commit the felonies to which he pled guilty, which justified the forfeiture of his pension. *Id*. at 195-96.

¶ 30 Unlike *Goff*, nothing in the record supports a conclusion that any activity on the part of Ritacco as a City employee aided Prado's drug operation or permitted him to commit the actions which led to his conviction. Ultimately, the question is not whether Ritacco, a City employee, was convicted of a felony. Rather, the question is whether the evidence in the record supports a finding that he was convicted of a felony " 'relating to or arising out of or in connection with his service as a municipal employee.' " See *Romano*, 402 Ill. App. 3d at 865, quoting, 40 ILCS 5/8-251 (West 2004). Based upon the foregoing analysis, we find that the evidence before the Board did not support such a finding when Ritacco, a seasonal cement mixer and saw operator, transported narcotics in his own car on the weekend. Accordingly, because the record on appeal does not establish a nexus between Ritacco's position as a City employee and the offense, the Board's conclusion that the Ritacco's felony conviction arose out of or in connection with his employment with the City (see 40 ILCS 5/8-251 (West 2012)), was clearly erroneous (see *Comprehensive Community Solutions*, 216 Ill. 2d at 472), and must be reversed.

¶ 31 Finally, we recognize that that Board argues that it "offends basic notions of justice" for Ritacco to receive a pension funded by the very public whose trust he breached when he

committed a felony. However, the language of Section 8-251 of the Code only applies to an employee convicted of a "felony relating to or arising out of or in connection with his service as a municipal employee" (see 40 ILCS 5/8-251 (West 2012)); if the legislature had intended any felony conviction to bar a municipal employee from receiving a pension, it could have adopted such language. In the absence of such language, we will enforce the statute as written. See *Goff*, 305 Ill. App. 3d at 193 (when the language of a statute is clear and unambiguous, courts must enforce the statute as written).

¶ 32 For the reasons stated above, we affirm the judgment of the circuit court reversing the decision of the Board.

¶ 33 Affirmed.