



Chitwood v. Lawson

2004 | Cited 0 times | Nebraska Court of Appeals | November 9, 2004

(not designated for permanent publication)

INTRODUCTION

Deputy Sheriff Jeffrey Chitwood appeals the order of the Scotts Bluff County District Court affirming the decision of the Scotts Bluff County Merit Commission, which found sufficient evidence to uphold Chitwood's 30-day suspension without pay.

FACTUAL BACKGROUND

On April 1, 2000, Manuel Salazar was stopped in the eastbound lane of U.S. Highway 26, waiting to turn left, when a pickup truck struck the rear of his vehicle, pushing him into the westbound lane of oncoming traffic. Chitwood, while on duty, was driving his patrol car in the westbound lane and struck Salazar's vehicle. As a result of the collisions, Salazar and Chitwood both suffered extensive injuries and Salazar's passenger died.

The Scotts Bluff County Sheriff's Department began conducting an internal investigation on the day of the accident. The investigator completed his "Internal Investigation Findings Report" in November 2000, finding that Chitwood violated the following policies and procedures of the sheriff's department:

- (1) Failing or refusing to wear a seat belt properly,
 - (2) Failing to drive defensively, resulting in a chargeable motor vehicle accident, in nearly causing a motor vehicle accident or in the department's receiving a substantiated complaint and,
 - (3) Unsafe and/or improper handling of equipment that carries a reasonable risk of endangering persons or property and,
- (1) Committing non-exempted infractions of traffic codes (e.g. driving over the speed limit, failing to observe traffic control devices, parking in unauthorized locations, failing to wear [s]eat belts, etc.)

Salazar filed a civil suit against Scotts Bluff County under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2000). The district court entered a partial summary judgment in favor of Salazar, finding that Chitwood was negligent as a matter of law, that



Chitwood v. Lawson

2004 | Cited 0 times | Nebraska Court of Appeals | November 9, 2004

Chitwood's negligence was a proximate cause of the collision, and that the collision was a proximate cause of some damage to Salazar. Following a trial on the remaining issues, the district court found Chitwood 49 percent negligent and entered a judgment on May 17, 2002, against the county for \$1 million. The Nebraska Supreme Court affirmed the judgment. See *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003).

On August 8, 2002, Scotts Bluff County Sheriff Jim Lawson met with Chitwood and informed him that a meeting was scheduled for August 13 in which Lawson planned to take administrative action regarding the April 1, 2000, accident. On August 13, Chitwood, along with the chief deputy sheriff and a representative of the Fraternal Order of Police, met with Lawson. Lawson read the "Administrative Proceedings Warning" and the Internal Investigation Findings Report. The meeting minutes state that Lawson asked Chitwood "to plan his response" because they were to meet again on September 4, 2002. Chitwood prepared his response and submitted it to Lawson. On September 11, another meeting was held to ascertain if Chitwood "had copies of the three major documents that were used in the compilation" of the Internal Investigation Findings Report, i.e., the "Standard Operating Procedure Manual," the "Uniform Standards of Conduct," and the "Internal Incident Investigation Report." Lawson then issued an order dated September 24, 2002, in which he found that Chitwood violated the standard operating procedure policies of (1) failing to drive defensively and (2) unsafe and/or improper handling of equipment. He also found that Chitwood violated the Uniform Standards of Conduct by "[c]ommitting non-exempted infractions of traffic codes." Thus, Lawson ordered Chitwood suspended from duty for a period of 30 days without pay.

Chitwood appealed Lawson's order to the Scotts Bluff County Merit Commission (hereinafter the Commission), an administrative body created pursuant to Neb. Rev. Stat. § 23-1722 (Reissue 1997). After a hearing on the matter, the Commission upheld the suspension but modified it to be distributed equally over a 4-month period. Chitwood then filed a petition in error with the Scotts Bluff County District Court. The district court conducted a hearing and affirmed the decision of the Commission suspending Chitwood for 30 days without pay over a 4-month period. The court reasoned, "The procedure used conformed with due process, conforms to the law, and is supported by sufficient evidence. The decision is not arbitrary, capricious, or unreasonable." Chitwood appeals.

ASSIGNMENTS OF ERROR

Chitwood asserts, reassigned and restated, that (1) the decision to suspend him was arbitrary and capricious and not supported by substantial evidence, (2) he was denied due process of law because he was not given the opportunity to respond to the evidence relied upon by Lawson and the Commission, (3) he was denied due process because he was not informed at the predetermination hearing what the anticipated discipline was, (4) his substantive due process rights were violated because there was not good cause for suspending him, (5) his due process rights were violated because an unexplained and unnecessary amount of time passed between the alleged wrongful act and the disciplinary action, and (6) the decision to suspend him was based upon retribution for not



Chitwood v. Lawson

2004 | Cited 0 times | Nebraska Court of Appeals | November 9, 2004

supporting Lawson in a political campaign.

STANDARD OF REVIEW

In reviewing the decision of an administrative board on a petition in error, both the district court and the appellate court review the decision of the board to determine whether it acted within its jurisdiction and whether the decision of the board is supported by sufficient relevant evidence.

Cornett v. City of Omaha Police & Fire Ret. Sys., 266 Neb. 216, 664 N.W.2d 23 (2003). The evidence is sufficient, as a matter of law, if an administrative board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Id.*

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998).

ANALYSIS

In *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997), the Department of Correctional Services (the Department) investigated Lt. Angelo Vinci for his use of racially and sexually offensive language. Following the investigation, Vinci received notice and a disciplinary hearing was held. The disciplinary committee found that Vinci had violated the Department's rules and an administrative regulation, and the committee recommended demotion. Vinci appealed the disciplinary committee's decision to the Nebraska State Personnel Board. At the hearing, Vinci admitted to the board that he had had prior disciplinary violations. However, those violations had been removed from his personnel file because they were time barred under the State of Nebraska's personnel rules and regulations, which provided in part, "'At the request of the employee, records of disciplinary action shall be removed from the employee's personnel file after two years after the discipline was imposed.'" *Id.* at 435, 571 N.W.2d at 61, citing 273 Neb. Admin. Code, ch. 11, § 004.03 (1993). With the past disciplinary violations excluded from consideration, the district court affirmed in part and reversed in part, ordering that Vinci be reinstated to his former rank and remanding the cause for a determination of discipline. The Department appealed.

On appeal and relevant to our purposes here was the Department's argument that the district court erred in refusing to consider Vinci's past disciplinary violations. The district court found that "'it was improper to consider disciplinary material that previously had been removed from Vinci's personnel file in determining the degree of discipline to be imposed.'" *Id.* at 434, 571 N.W.2d at 61. The Nebraska Supreme Court agreed, finding:

The rule [§ 004.03] clearly provides that records may be removed, but says nothing about the consideration of such records after removal. If the Department wants to consider records that have been removed from an employee's file in accordance with its own regulation, the Department should



Chitwood v. Lawson

2004 | Cited 0 times | Nebraska Court of Appeals | November 9, 2004

explicitly provide for such action.

253 Neb. at 435, 571 N.W.2d at 61. Thus, Vinci supports the notion that an agency's own statute of limitations-type provision regarding what evidence may be considered when disciplining an employee is enforceable.

A similar issue arose in *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003). In *Stejskal*, James A. Stejskal was terminated from his position at the Department of Administrative Services (DAS) for insubordination. Upon termination, Stejskal followed the employee grievance procedure for the State of Nebraska. His grievance was denied, so he appealed to the Nebraska State Personnel Board, which affirmed the denial. Stejskal then appealed to the district court, which reversed the board's decision, due to insufficient evidence and unfairness of the proceedings. DAS appealed the district court's decision to the Nebraska Supreme Court.

The portion of the *Stejskal* decision that is relevant here is in regard to what offenses may be considered in order to determine the severity of the discipline imposed. It was undisputed that DAS must have just cause to discipline an employee. However, before considering whether just cause existed, the district court in *Stejskal* found it necessary to consider which acts may form the basis for that just cause. The district court found that because the State's labor contract does not permit acts occurring over 1 year earlier to form the basis for initiating discipline, the district court would not consider acts occurring 1 year before the action was initiated. The Nebraska Supreme Court agreed, stating that such finding was not erroneous. Based on the evidence that could be considered, the district court found that DAS did not establish just cause. The Supreme Court affirmed the decision, finding there was insufficient evidence to show just cause to discipline Stejskal.

Here, the Scotts Bluff County sheriff's office also must have just cause to discipline an employee. This arises out of the bargaining agreement between the sheriff's office and the Fraternal Order of Police. Thus, in deciding whether just cause existed to discipline Chitwood, we must first look at what act or acts could form the basis for just cause.

The only act for which disciplinary proceedings have been implemented is the accident on April 1, 2000. However, the Uniform Standards of Conduct of the Scotts Bluff County sheriff's office contain a statute of limitations-type provision, which states:

When imposing discipline, infractions of the standards that occurred more than two years beforehand will not be the determining factor in the final decision to discipline. That does not mean that this Department limits its right, power and authority to take whatever disciplinary or termination action it feels is appropriate under given circumstances.

Neither the Commission nor the district court addressed the impact of this 2-year limitations provision, but Chitwood raises it here, as he did below, by alleging in his petition in error that the



Chitwood v. Lawson

2004 | Cited 0 times | Nebraska Court of Appeals | November 9, 2004

decision to impose discipline was "grossly untimely."

In determining the applicability of this limitations provision, we consider the rest of the Uniform Standards of Conduct. The "Introduction and Orientation" portion of the Uniform Standards of Conduct states:

The manual contains our current 21 standards of conduct for each member. Each member is responsible for knowing about and complying with these standards and for directing any questions or misunderstandings about them to an appropriate supervisor. . . .

In publishing the uniform standards manual, management recognizes that members too have a need for job security and to be treated fairly in administrative decisions affecting their employment status, particularly in discipline and termination actions. Therefore, when regular members perform in a manner contrary to the Uniform Standards of Conduct, they can expect that management will: . . . provide fair discipline based on facts

The Uniform Standards of Conduct promote the concept of procedural justice. This concept requires that management follow its own policies, procedures and practices when exercising its rights, particularly in disciplinary and termination procedures. . . . In understanding procedural justice, it is helpful to think of it as an agreement between management and its members that, in cases of disciplinary or termination actions, management will follow its own processes, and in return members will affirmatively work to promote this Department's image, mission, goals and objectives.

(Emphasis supplied.)

Thus, in cases of disciplinary or termination actions, the sheriff's office management has clearly agreed to follow its own processes, including the statute of limitations provision. To the extent that consideration by the employees may be necessary to bind management to such agreement, we find that it is present in the fact that the employees continue to work for the sheriff's office. See *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 738, 408 N.W.2d 261, 266 (1987) ("by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer"). Therefore, management should have adhered to the limitations provision.

Administrative disciplinary proceedings against Chitwood began on August 13, 2002, more than 2 years after the accident on April 1, 2000--the only conduct of Chitwood giving rise to the discipline. Thus, based on the 2-year limitations provision, the Uniform Standards of Conduct bar the April 1 accident from being the "determining factor" in imposing discipline. See *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003). Because there is no other conduct that shows just cause for disciplinary action against Chitwood, we find the evidence insufficient to support the Commission's decision to discipline him. Having determined the dispositive issue, we need not consider Chitwood's other assignments of error.



Chitwood v. Lawson

2004 | Cited 0 times | Nebraska Court of Appeals | November 9, 2004

CONCLUSION

The decision of the district court affirming the decision of the Commission is not supported by sufficient evidence, because there is no evidence of misconduct by Chitwood within the 2 years prior to the disciplinary proceedings instituted on August 13, 2002. Therefore, we reverse the order of the district court affirming the 30-day suspension and remand to the district court with directions to reverse and vacate the order of the Commission.

Reversed and remanded with directions.

