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Aaron Rosen v. City of Saratoga Springs : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

AARON ROSEN, an individual, Petitioner, v. CITY OF SARATOGA SPRINGS, a Utah municipal corporation, and CITY OF SARATOGA SPRINGS EMPLOYEE APPEALS BOARD, Respondents.	REPLY BRIEF OF PETITIONER Appeal No. 20110497

APPEAL FROM THE CITY OF SARATOGA SPRINGS EMPLOYEE APPEALS BOARD DECISION DATED MAY 10, 2011

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I. THE APPEAL BOARD FAILED TO ANALYZE PROPORTIONALITY AND INCONSISTENCY AND TO ISSUE APPROPRIATE FINDINGS.

The City contends (a) Rosen failed to put on prima facie evidence of inconsistent discipline and, therefore, that the Appeal Board was not required to conduct a proportionality analysis; and (b) in the alternative, that the Appeal Board's conclusion that "the discipline was warranted" was an adequate proportionality analysis. Both arguments should be rejected.

A. The Appeal Board failed to issue findings on proportionality; that failure was arbitrary and capricious and mandates reversal.

The City contends Rosen's burden was to prove that other officers, in factually identical circumstances, were disciplined differently. Because Rosen failed to do so, the City asserts, the Appeal Board was not required to perform a proportionality analysis. The City's argument is incorrect because even assuming *arguendo* Rosen did not put on a prima facie case of inconsistency, the Appeal Board was still required to analyze and issue findings on proportionality, which is separate and distinct from consistency.

City appeal boards are charged with making two inquiries: (1) whether the facts are supported by the evidence; and (2) whether the charges warrant the discipline imposed. *Lucas v. Murray City Civil Service Com'n*, 949 P.2d 746, 758 (Utah App. 1997). The second inquiry, sometimes referred to as the proportionality prong, can be broken down into two subparts: "First, is the sanction proportional; and second, is the sanction consistent with

previous sanctions imposed by the department pursuant to its own policies. *Kelly v. Salt Lake City Civil Service Com'n*, 2000 UT App 235, ¶ 21, 8 P.3d 1048; *see also Boston v. Salt Lake City Civil Service Com'n*, 2009 WL 2568690 at *2 (Utah App. 2009) (unreported) (citing *Harmon v. Ogden City Civil Serv. Com'n*, 2007 UT App 336, 171 P.3d 474)). With proportionality, a police chief may abuse his discretion "if the punishment exceeds the range of sanctions permitted by statute or regulation, or if, in light of all the circumstances, the punishment is disproportionate to the offense." *Lucas*, 949 P.2d at 761. In other words, a proper proportionality analysis determines whether the punishment fits the crime, independent of how others may have been disciplined. Regarding consistency, the appropriate analysis is whether the discipline is "consistent with previous sanctions imposed by the [D]epartment pursuant to its own policies." *Guenon v. Midvale City*, 2010 UT App 51, ¶ 14, 230 P.3d 1032 (citing *Kelly*, 2000 UT App 235 at ¶ 21). While both are critical to determining whether "the charges warrant the discipline imposed," the proportionality and consistency analyses are very distinct. *Lucas*, 949 P.2d at 758.

The only way a city appeal board can properly analyze proportionality and consistency is by propounding findings of fact and conclusions of law. Furthermore, those findings and conclusions must be sufficiently detailed so as to allow an appellant the opportunity for meaningful appellate review:

> This court has emphasized that an administrative agency must make findings of fact that are sufficiently detailed so as to permit meaningful appellate review. For us to meaningfully review the Board's findings, the findings must be 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.' The failure of an agency to make adequate findings of fact in material issues renders its findings 'arbitrary and capricious' unless the evidence is 'clear, uncontroverted and capable of only one conclusion.

Lucas, 949 P.2d at 755 n.5. Thus an appeal board must, at a minimum, analyze the evidence and explain why the discipline is proportional and/or consistent or not.[1]

Again, the City argues Rosen failed to show inconsistency of discipline and, therefore, that the Appeal Board was not required to perform a consistency analysis. Rosen asserts that he did put on a prima facie case of inconsistency (discussed below). However, taking the City's argument at face value, the Appeal Board was still required to analyze and issue findings of fact on proportionality, or whether demotion was proportionate discipline for

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[1] For example, in *Boston* the civil service commission based its conclusion that termination was appropriate at least in part on the following specific factual findings:

> 10. Boston received three disciplinary actions over a relatively short period of time.
>
> 11. By the time the two incidents occurred which precipitated Boston's termination, she had been properly warned and was on notice that any further misconduct on her part may result in termination.
>
> 12. The series of violations were similar in nature and progressive discipline had been ineffective.

Boston, at *2.

Rosen's alleged actions. It did not. That failure impedes Rosen's ability to obtain meaningful appellate review. Indeed, neither Rosen nor this Court is in a position to speculate how the Appeal Board would have analyzed proportionality or whether such analysis would have been sound or faulty.

"The failure of an agency to make adequate findings of fact in material issues renders its findings arbitrary and capricious unless the evidence is clear, uncontroverted and capable of only one conclusion." *Id.* At the hearing, the parties disputed the proportionality of Rosen's demotion. Thus, the evidence was not "clear, uncontroverted and capable of only one conclusion," and the Appeal Board's failure to issue findings was arbitrary and capricious and mandates a reversal.

B. Rosen put on a prima facie case of inconsistency; therefore, the Appeal Board was required to analyze and issue findings on consistency.

It is true Rosen carried the initial "burden of showing some meaningful disparity of treatment between [himself] and other similarly situated employees." *Kelly,* 2000 UT App 235 at ¶ 30. However, Rosen's burden was not to prove disparate treatment in factually identical situations but, rather, disparate treatment in factually similar situations. There is a big difference.

No two incidents giving rise to discipline are ever identical. Every incident is factually unique in some way. Under the City's narrow interpretation of *Kelly*, no officer could ever prove inconsistent application of discipline. Such a strict interpretation is not

consistent with Utah law. This Court has stated the appropriate analysis for consistency is whether the discipline is "consistent with previous sanctions imposed by the [D]epartment pursuant to its own policies." *Guenon*, 2010 UT App 51 at ¶14 (citing *Kelly*, 2000 UT App 235 at ¶ 21). Moreover, "[m]eaningful disparate treatment can only be found when similar factual circumstances led to a different result without explanation." *Kelly*, 2000 UT App 235 at ¶ 31. Thus, to put on a prima facie case of inconsistent discipline, Rosen needed only to show that other officers who engaged in similar conduct were treated differently. Rosen accomplished this.

Rosen showed that the vast majority of all discipline meted out by the City consisted of verbal reprimands and written reprimands. The City had never demoted an officer prior to Rosen. R. 59: 255:25-256:2. Rather, it was the City's practice to issue verbal and written reprimands, as opposed to demotion or termination, regardless of what the underlying allegations were. At the hearing, Rosen introduced evidence of three officers who had failed to appear at court hearings or trials to which they had been subpoenaed. R. 42-43. Such actions are akin to insubordination, which the City defines as the failure "to follow a lawful order". R. 34. However, all three officers received verbal reprimands. R. 42-43. Rosen was charged with insubordination, but was demoted. This evidence raises at least a prima facie case of inconsistency.

"The failure of an agency to make adequate findings of fact in material issues renders its findings arbitrary and capricious unless the evidence is clear, uncontroverted and capable

of only one conclusion." *Lucas*, 949 P.2d at 755 n.5. Because Rosen submitted evidence that put the consistency of his discipline into question, the Appeal Board should have issued findings of fact on the issue of consistency. Its failure to do so was arbitrary and capricious and mandates a reversal.

C. The Appeal Board's conclusory statement that Rosen's discipline was "warranted and supported by the evidence" is not a proportionality analysis.

The City asserts that if the Appeal Board was required to conduct a proportionality analysis, it did so by stating in its decision that Rosen's demotion was "reasonable under the circumstances, and the discipline was warranted and supported by the evidence." R. 58. That argument should be rejected because the Appeal Board's brief sentence is conclusory. It certainly is not an analysis "sufficiently detailed and includ[ing] enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Lucas*, 949 P.2d at 755 n.5. It provides no meaningful information for Rosen to challenge on appeal, which is the very reason articulated in *Lucas* for requiring appeal boards to issue findings in the first place. Thus, the brief sentence is not a proper proportionality analysis.

II. THE APPEAL BOARD ABUSED ITS DISCRETION BY DENYING ROSEN'S MOTION FOR ADVERSE INFERENCE.

Rosen was disciplined in part because he allegedly violated Sgt. Cole's order of January 19, 2011. Because the City failed to produce the audio recording of the order upon request by Rosen, Rosen asked the Appeal Board to infer that Rosen's account of the January

19 interview was correct. The Appeal Board denied the motion, stating it did not believe the City had intentionally destroyed the evidence.

The City argues that the adverse inference sought by Rosen is a permissive remedy subject to the discretion of the Appeal Board. While Rosen generally agrees, he respectfully submits that the Appeal Board does not have unfettered discretion. The Appeal Board's discretion to grant or deny the motion should be reviewed by this Court for abuse of discretion. *State v. Gallup*, 2011 UT App 422, ¶ 12, 267 P.3d 289 (holding that lower courts are granted broad discretion on evidentiary issues and such rulings may overturned only for abuse of discretion, which may be demonstrated by showing a reliance on an erroneous conclusion of law or that there was no evidentiary basis for the ruling.)

The City also asserts that, since the audio recording was not in the City's exclusive control, the City should not be punished for failing to produce it. However, the City was in fact in exclusive control of the recording, as there is no evidence that anyone other than City employees, including Rosen, had access to it. The City is responsible for maintaining and protecting its records and instructing its employees accordingly. The fact that the City's own employees had access to the recording should not relieve the City from the obligation to preserve it.

III. THE APPEAL BOARD'S RECEIPT OF EXHIBITS IN ADVANCE OF THE HEARING WAS PRESERVED AND CAUSED ROSEN PREJUDICE.

Rosen contends the Appeal Board's advance review of the City's proposed exhibits,

much of which was objected to and never introduced, tainted the hearing and caused irreversible prejudice to Rosen. In response, the City argues Rosen failed to preserve this argument for appeal purposes because he did not "specifically raise this argument to the Board and did not introduce any supporting evidence or relevant legal authority to support his claim." Resp. Brief at 39. The City also argues the error, if any, was harmless.

Utah Code Ann. § 10-3-1106 is the sole statutory authority governing municipal appeal boards. It provides that "[t]he method and manner of choosing the members of the appeal board, the number of members, the designation of their terms of office, and the procedure for conducting an appeal and the standard of review shall be prescribed by the governing body of each municipality by ordinance." That is the extent of the Appeal Board's authority. Notably, § 10-3-1106 does not grant an appeal board authority to hear, consider, or rule on motions, including what in this case would essentially be a motion to recuse and/or a motion for a new hearing.

Although the City fails to suggest what remedy Rosen could have sought from the Appeal Board, the only conceivable remedy would have been to move for the recusal of all the Appeal Board members and the appointment of new members. However, as noted above, the Appeal Board did not have authority to consider such a request. Additionally, the Appeal Board members could not have chosen their replacements, as appeal board members are selected by the "governing body of each municipality," usually pursuant to a city ordinance. Thus, even if Rosen had moved for a recusal, the motion would have been futile.

Furthermore, the questionable, prejudicial comments[2] made by the Appeal Board members occurred during closed door deliberations after the parties had been excluded. R. 59: 18:10-19. Rosen only became aware of those comments and the extent of the prejudice after reviewing the transcript following appeal to this Court.

The City's argument that the error was harmless is without merit. A brief review of the Appeal Board members' comments strongly indicates they had been swayed by the City's evidence long before the hearing had started. One board member stated: "I'm trying not to let the whole pants thing bother me and influence me. But I've got one hand, and my pants aren't falling down all the time."[3] R. 59: 20:22-25. This comment was made even though certain proposed exhibits – which the City intended to introduce for the purpose of proving Rosen had intentionally dropped his pants on a second occasion – were ultimately excluded upon objection by Rosen. R. 59: 37:5-14.

Another board member commented on Rosen's guilt at the very outset of the hearing, stating: "It seems to me that we are talking about insubordination, and he was insubordinate in my opinion – or allegedly."[4] R. 59: 24:9-11. Because no evidence had been introduced at that point, the board member could only have formulated his opinion of guilt from his

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[2] Identified in more detail in Rosen's opening brief. Brief Petr., at p. 20-21.

[3] This comment was made during closed-door deliberations to which Rosen and his counsel were not privy.

[4] This comment was also made while the parties were excluded from the proceeding.

review of the City's materials. These comments alone show the Appeal Board's review of the City's proposed exhibits in advance was not harmless and in fact prejudiced Rosen's right to a fair hearing by impartial board members.

The City's submission of proposed exhibits to the Appeal Board weeks prior to the hearing violated Utah Code Ann. § 10-3-1106 and prejudiced Rosen. For these reasons, the Appeal Board's decision should be reversed or, in the alternative, the decision should be reversed and remanded for a new hearing before impartial board members.

IV. THE APPEAL BOARD'S ERRONEOUS FINDINGS WERE HARMFUL.

The City admits that the following two findings of the Appeal Board are erroneous and not supported by the record:

1. On an unspecified date between January 19 and February 2, Rosen "was again instructed by Sgt. Cole to stay away from [Soper] and to leave her alone" and "was instructed to give the situation time to cool off" R. 55.

2. "On or about January 28, 2011, Chief Hicken met with officer Rosen regarding the pants incident and to close the IA investigation. During that meeting, he verbally counseled Officer Rosen and instructed him to limit his contact with [Soper] to "professional" contact only. R. 55.

Although these erroneous findings describe two phantom orders that were never given, the City claims they are harmless to Rosen. That is not true.

Rosen entered Soper's name into a radio contest for tickets after the two phantom orders were allegedly given. R. 3; 59: 322:8-14. This is relevant because in the Appeal Board's mind, Rosen was instructed three separate times (rather than the one time alleged by

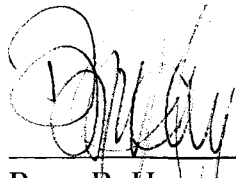
the City) to limit his contact with Soper prior to entering Soper's name in the contest. The purported number of orders Rosen violated could have directly impacted the Appeal Board's perception of the proportionality of Rosen's discipline. Also, if the Appeal Board believed Rosen violated three direct orders rather than one, it would have had more reason to find Rosen's actions were purposefully insubordinate rather than the result of a misunderstanding, as Rosen argued at the hearing. However, one can never know precisely what impact those erroneous findings had on the Appeal Board's decision, particularly in light of the Appeal Board's failure to make findings regarding proportionality. For this reason, the Appeal Board's ruling should be reversed or the matter should be remanded for a new hearing.

CONCLUSION

For the foregoing reasons, Petitioner Aaron Rosen respectfully requests that he be reinstated to his former position as corporal with the City of Saratoga Springs Police Department, together with applicable back pay and benefits from February 26, 2011, the date of his demotion. In the alternative, Rosen requests that the Court reverse and remand the matter for a new hearing before impartial appeal board members.

DATED this 27 day of March 2012.

KESLER & RUST



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RULE 24(f)(1)(C) CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1)(A) because it contains 3,333 words.

DATED this 27 day of March 2012.

KESLER & RUST

Ryan B. Hancey

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method(s) and to the person(s) indicated below a true and correct copy of **REPLY BRIEF OF PETITIONER** this 27th day of March 2012.

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____ HAND DELIVERY
____ TELEFAX TRANSMISSION

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