IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

REGINALD ADOLPH,

Appellant/Petitioner

v. **No. 31,816**

THE CITY OF ALBUQUERQUE,

Appellee/Respondent.

PETITIONER'S REPLY BRIEF

Petition from the Second Judicial District
County of Bernalillo
Honorable Beatrice Brickhouse
Bernalillo County Cause No. D-202- CV-2011-05592

YOUTZ & VALDEZ, P.C.
Shane Youtz
Stephen Curtice
900 Gold Avenue S.W.
Albuquerque, NM 87102
Telephone: (505) 244-1200
Facsimile: (505) 244-9700
Attorneys for Appellant/Petitioner Reginald Adolph

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COMES NOW Reginald Adolph, by and through his counsel of record, Youtz & Valdez, P.C. (Shane Youtz, Stephen Curtice), and files this Reply Brief.

INTRODUCTION

The City of Albuquerque's ("City") entire argument succeeds or fails on its claim that the Personnel Board had no discretion but to mechanically apply the punishment provided in the substance abuse policy in conducting its just cause review of Mr. Adolph's termination. For, if the Personnel Board—the administrative entity entrusted with making that determination—had discretion, the reviewing court is not authorized under the appropriate standard of review to substitute its judgment for that of the Personnel Board.

The City claims that the 1999 substance abuse policy, which was not in effect at that the time of the incident, provides binding law which governs and limits the decision-making power of the Personnel Board. This is false. The Personnel Board is governed by the City's Merit System Ordinance, passed by the City Council. That Ordinance gives the Personnel Board the discretion the City claims it lacks. The policy—unilaterally implemented by the City's Chief Administrative Officer—was not passed by the council, but is instead an expression of the employer's preference for human resources. The Board is charged by the City Council with determining whether, in each instance, the

application of the policy is just. Were the employer's expression of intent in the policy binding on the Personnel Board, there would be no need for the Board itself.

The Personnel Board, as the City concedes, was tasked with determining whether Mr. Adolph's termination was supported by just cause. "Just cause" is a term of art in labor relations, not subject to easy definition. For that reason, the determination of just cause is often left to expert decision-makers such as the Personnel Board. The City's Merit System Ordinance entrusts the Personnel Board with this decision and gives it the discretion to reject or modify discipline imposed by the employer—whether or not consistent with any pre-existing policy—when the level of discipline is not supported by just cause. That is precisely what happened here. The District Court erred in substituting its sense of just cause with that of the Personnel Board.

I. The Substance Abuse Policies at Issue Are Expressions of the Employer's Intent, not Ordinances Adopted by the City Council; as Such, They Do Not Remove Authority from the Personnel Board, as Granted by the Merit System Ordinance, to Modify Discipline Where Not Supported by Just Cause.

The correct appropriate standard of review is not at issue. A district court reviewing the action of an administrative agency may only reverse the agency if it acted "fraudulently, arbitrarily or capriciously," if the decision is "not supported by substantial evidence" based on the whole record, if the action of the agency was "outside the scope of [its] authority," or if it was "otherwise not in accordance with

the law." Rule 1-074(R) NMRA. In conducting that review, the court must be careful not to "substitute its judgment for that of [an administrative agency]." *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, ¶17, 133 N.M. 97, 61 P.3d 806 (quoting *Groendyke Transp., Inc. v. N.M. State Corp. Comm'n,* 101 N.M. 470, 476, 684 P.2d 1135, 1141 (1984)). This Court utilizes the same standard of review as the District Court. *Sierra Club*, 2003-NMSC-005, ¶ 16.

Because the standard would not ordinarily allow the court to substitute its sense of just cause for that of the agency primarily responsible for making that determination—the Personnel Board—the City attempts to recast this appeal as presenting a question of *authority*, not expert agency decision-making. Thus, the City argues that the Personnel Board and the Hearing Officer lacked the authority to fail "to apply the mandated termination under both policies and the rules and regulations[,]" *see* City Br. at 14, that "[o]nce the PHO found just cause, he did not have discretion to deviate from the punishment mandated [by the substance abuse policies]," *id.* at 15, that the Personnel Board "has no authority to deviate from the mandated discipline by creating its own," *id.* at 20, and in fact only has the authority "to find facts by adopting the recommendation of the hearing officer and applying the City's policies to those facts." *Id.* In so arguing, the City implicitly—and at times explicitly—conflates the substance abuse policies

unilaterally issued by its Chief Administrative Officer with City ordinances adopted by the Council. *See* City Br. at 16 ("No other provision allows the PHO to impose discipline not authorized in the City's *ordinances*." (emphasis added)); *Id.* at 26 (arguing that the question presented is whether "Personnel Board applied the applicable *law*" (emphasis added)).

Fatal to the City's argument, however, the various substance abuse policies are neither "ordinances" nor "law." They were not adopted or approved by the City Council. *Cf. City of Albuquerque v. Montoya*, 2012-NMSC-007, ¶¶ 17-20, 274 P.3d 108 (the City Council is the legislative arm of City government). Instead, they are expressions of intent from the City's Chief Administrative Officer regarding issues of discipline. Such policies indicate, generally, intended responses by the executive branch, as employer, to future human resources circumstances.

The Personnel Board, by contrast, was established and empowered by the Merit System Ordinance, legislation which was passed by the City Council. That Ordinance expressly authorized the Personnel Board to "render a decision upon the appeal of classified employees of the city who have been suspended without pay for more than five days, demoted for disciplinary reasons or discharged, as provided in § 3-1-25." MSO, § 3-1-5(B). Moreover, the Board is expressly authorized, by the Ordinance, to "[r]everse or modify the recommendation of the

Hearing Officer" regarding that discipline. Our Supreme Court has determined that, under the Merit System Ordinance, the Personnel Board "may accept, reverse or modify the [disciplinary] action" and that "methods of modifying that action include ordinary reinstatement with back pay and reducing dismissal to suspension without pay." *Conwell v. City of Albuquerque,* 97 N.M. 136, 139, 637 P.2d 567, 570 (1981); *see also Sais v. NM Dept. of Corrections*, 2012-NMSC-009, ¶¶ 17-18, 275 P.3d 104 (reaffirming that discipline, even if pursuant to a policy, can be arbitrary and capricious if that employee has been treated differently from other similarly situated employees).

Policies regarding discipline, unilaterally implemented by the Chief Administrative Officer without Council input, cannot tie the hands of the Personnel Board in deciding whether a particular incident of discipline was supported by just cause. Were it otherwise, it would disrupt the manifest will of the City Council, through the Merit System Ordinance, to provide for independent evaluation of the City executive's disciplinary determinations. *See* MSO, § 3-1-4(A) (establishing the Personnel Board to be comprised of "two members ... appointed by the Mayor" with "significant management or personnel experience[,]" "two members ... selected by the employees by election" and a fifth member "selected by the other four members").

An absurd example shows just how draconian the City's argument is. Suppose the City's Chief Administrative Officer adopted a policy that any employee who wore a purple shirt on a Thursday would be terminated and then proceeded to terminate an employee pursuant to that policy. Under the City's view, the Personnel Board would be limited to determining whether the employee wore the correct colored shirt on the correct day, and would have no discretion or ability to determine whether terminating an employee under these circumstances would be supported by just cause. This, despite the fact that the City concedes that the proper standard for review of the termination decision is "just cause." City Br., at 15. *See also City of Albuquerque v. AFSCME Council 18*, 2011-NMCA-021, ¶ 11, 149 N.M. 379, 249 P.3d 510 ("As a general principle of due process law, public employees with a legitimate expectation of continued employment are protected from termination without just cause, notice and opportunity to be heard.").

There may be times when the employer's policy is absurd or unjust. There may be other times when the policy is ordinarily just, but unjust when applied to a specific situation. In either case, the Personnel Board is empowered by the Merit System Ordinance to review the employment decision and reverse or modify it if that decision is not supported by just cause. *Conwell,* 97 N.M. at 139, 637 P.2d at 570; *see also State ex rel. New Mexico State Highway Dept. v. Silva*, 98 N.M. 549,

553, 650 P.2d 833, 837 (Ct. App. 1982) (under State Personnel Act "the Board could find there was employee misconduct and could also determine the agency's action was inappropriate for the misconduct found by the Board. Specifically, the statute does not limit the Board to two choices, that of agreeing or disagreeing, with the agency's action taken. The Board may also modify the agency's action and this includes reinstatement of a dismissed employee.").

The City's executive branch cannot override this power granted by the Council to the Personnel Board through the unilateral implementation of a policy. In arguing to the contrary, the City relies on *Chavez v. City of Albuquerque*, 1998-NMCA-004, 124 N.M. 479, 952 P.2d 474 (decided 1997). In *Chavez,* the issue before the Court of Appeals was whether a decision of the Personnel Board regarding violations of the state Open Meetings Act and constitutional claims by the employee would be given preclusive effect in a subsequent district court decision. While the court found the Board to be precluded from exercising jurisdiction over the constitutional claims, because the Open Meetings Act vested exclusive jurisdiction in the District Court, the Court of Appeals went on to point out:

> The personnel board renders the final decision in the process, *see* MSO, § 3-1-23(E)(4)(b), by exercising a limited number of options all directly related to the disciplinary action which is the subject of the grievance: accept or reverse the disciplinary action; *modify the disciplinary action*; or, remand the matter to the hearing officer for further hearing or for a more detailed report. MSO, § 3-1-23(E)(4)(a).

Id. ¶ 7 (emphasis added). Clearly, then, *Chavez* cannot stand for the proposition that the Personnel Board lacks the discretion to review discipline and determine that it lacks just cause.

II. The Personnel Board's Determination that the City Lacked Just Cause to Terminate Mr. Adolph, but Had Just Cause for a Lesser Discipline, Was Not an Abuse of the Discretion Entrusted to it.

There can thus be no question that the Personnel Board had the authority to review Mr. Adolph's termination against a just cause standard and to modify his discipline if, even though consistent with the Policy, it was unjust under the circumstances. That being the case, the only question for this appeal is whether the Personnel Board's determination that the City lacked just cause to terminate Mr. Adolph was arrived at "fraudulently, arbitrarily or capriciously." Rule 1-074(R). A thorough consideration of the facts shows that it was not.

Here, the Hearing Officer's conclusion that the City's actions and behavior fell short of the standards of industrial fair play are well founded. As stated above, Judge Huling's opinion and the City's failure to state a clear substance-abuse policy amid various contract negotiations and disciplinary actions led to the unique, onerous punishment in this case: Mr. Adolph was terminated in February 2009 under a policy later declared invalid by the courts and by the city itself; then, a month before a hearing was scheduled before the Personnel Board, the city reversed course and reinstated Mr. Adolph, making him whole in every way,

including ordering him to submit to a return-to-work physical; the City, however, then again placed Mr. Adolph on administrative leave and served him notice of a predetermination hearing under a second policy that wasn't in force at the time of the infraction and discipline in 2009; the City then terminated him a second time; finally, the City—three after the original infraction and discipline—is arguing before this Court that it was the Hearing Officer and Personnel Board who acted in an arbitrary and capricious manner.

The Hearing Officer and Personnel Board had serious, valid concerns about the City's use of two separate policies to exact two different terminations of Mr. Adolph over the course of 18 months, based on the facts of the case and the process the City utilized. Mr. Adolph considered the matter settled when he was reinstated in June 2010 and only agreed to vacate the pending Personnel Board hearing of July 2010 with the understanding that Mr. Adolph would be made whole in every way. (ROA:296). At least one of the suspensions relied on by the City to justify the second termination was executed without proper notice to Mr. Adolph. (ROA:305-06). Mr. Adolph also testified that he didn't receive an immediate offer of counseling in February 2009. (ROA:305). In fact, the City's policy states that the employee who fails a drug test "shall be immediately referred to a Substance Abuse Profcssional for assessment." (ROA:158, City Substance Abuse Policy Manual, §3-13(Q)(4)). However, the City didn't contact Mr.

Adolph and refer him to a Substance Abuse Professional until June 9, 2009, or four months after the infraction and positive drug test result. (ROA:281). Even then, the mailed notice to Mr. Adolph was returned to the City marked "Unable to Forward" by the U.S. Postal Service. (ROA:282). These mitigating factors led the Personnel Board to find termination to be an excessively harsh punishment in this case.

Given the city's attempt to terminate Mr. Adolph by using two different policies, its failure to provide him notice of a suspension the City intended to use against him, and its failure to send him promptly for a substance-abuse assessment, it is reasonable and appropriate for the Hearing Officer and Personnel Board to question the City's behavior and adherence to its own policies and procedures. The Hearing Officer's concerns about "industrial fair play" are well-founded and his actions were not arbitrary or capricious or otherwise not in accordance with the law.

In support of its arbitrary conduct, the City claims, incorrectly, that termination was required under the 1999 Policy. That policy, however, required termination only if the employee had a certain number of suspension days in the previous two years. (RP:7). It did not specify whether the previous discipline was measured from the date of the positive drug test or the date of the termination, which in this case was a significant variation. The relevant termination occurred

on August 5, 2010—the date after which the City had reinstated Mr. Adolph after having terminated him under an illegally-adopted policy only to reinstate him to terminate him under the prior policy. In the two-year period from that date, Mr. Adolph did not have sufficient discipline to require termination even under the 1999 Policy. (RP:7-8; ROA:30-31, 219, 222). Under this interpretation of the 1999 policy, the prior discipline did *not* total ten days of suspension and, therefore, termination was not mandated.

This shows that the question of notice to Mr. Adolph was not insignificant, and the due process violation inherent in not providing that notice was serious. In addition to the fact that the 1999 policy was not in effect at the time of the termination, there is also the issue of whether Mr. Adolph had notice when he was terminated on August 5, 2010 that discipline imposed more than two years prior to his termination would be used to support his termination. Neither the Pre-Determination Hearing Notice (ROA:210-213) or the Pre-Determination Hearing Results (ROA:219-223) explained how the two years of prior discipline were calculated.

Lastly, the City claims that the Personnel Board lacks the discretion to reinstate Mr. Adolph to a non-safety sensitive position. As the case law discussed above demonstrates, however, the Personnel Board has wide latitude in fashioning remedies. Moreover, given the City' arguments below, this position is ironic in the

extreme. On appeal from the Hearing Examiner's recommendation to the Personnel Board, the City argued that reinstating Mr. Adolph to a driving position presented a "safety issue." (ROA:27). Now, after the Personnel Board accommodated that concern by requiring his reinstatement to a non-safety sensitive position, the City tries to use that fact to have the Courts overturn the Personnel Board. This Court should not condone the City's legal maneuverings, which seem a continuation of the type of process it afforded Mr. Adolph in the administrative context. *Cordova v. Taos Ski Valley, Inc.*, 1996-NMCA-009, 121 N.M. 258, 263, 910 P.2d 334, 339 ("A party who has contributed, at least in part, to perceived shortcomings in a trial court's ruling should hardly be heard to complain about those shortcomings on appeal").

CONCLUSION

On balance, a reviewing court cannot find the Personnel Board's determination fraudulent, arbitrary or capricious. Given that fact, this Court should reverse the District Court and remand with instructions to confirm the decision of the Personnel Board.

Dated: November 13, 2012

Respectfully Submitted,

YOUTZ & VALDEZ, P.C.

Shane Youtz

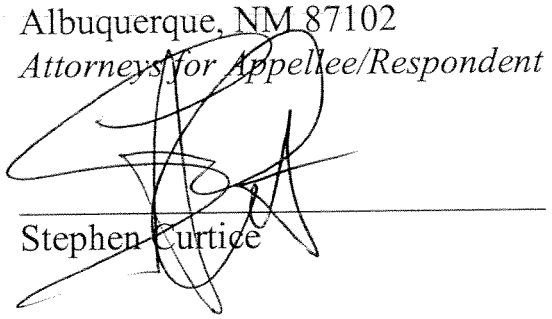
Stephen Curtice
900 Gold Avenue S.W.
Albuquerque, NM 87102
Telephone: (505) 244-1200
Facsimile: (505) 244-9700

Attorneys for Appellant/Petitioner
Reginald Adolph

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief was mailed, via regular U.S. mail, postage pre-paid and affixed thereto, this 13th day of November, 2012 to:

Paula Forney
French & Associates, P.C.
500 Marquette Avenue NW, Ste. 500
Albuquerque, NM 87102
Attorneys for Appellee/Respondent City of Albuquerque



Stephen Curtice