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 BRIEF IN CHIEF

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

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ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page**

New Mexico Statutes & Rules **Page**

Other Authorities **Page**

COMES NOW Petitioner Reginald Adolph, by and through its attorneys of record, Youtz & Valdez, P.C. (Shane Youtz), and files this Brief in Chief.

Can a city terminate an employee based on a policy and then, when that policy has been invalidated, reinstate the employee only to terminate him again for the same infraction under a different policy? The City of Albuquerque's Personnel Board, following the recommendation of its Hearing Officer, determined that the answer was no. It is the entity primarily entrusted with making these determinations under the City's Merit System Ordinance. The District Court on appeal, however, substituted its own judgment for that of the City Personnel Board and ordered the employee terminated under a misreading of a policy *that was not even in effect* when the infraction occurred. Petitioner respectfully asks that this Court reinstate the finding of the City of Albuquerque's Personnel Board and reverse the District Court.

I. SUMMARY OF PROCEEDINGS

Mr. Adolph is a motor coach operator for the City of Albuquerque Transit Department, considered a safety-sensitive position under City of Albuquerque and Federal Department of Transportation rules. (RP:6; ROA:29). Based upon reasonable suspicion, (RP:5-6, 8; ROA:28-29, 31, 84), [1] which Mr. Adolph

[1] References herein are to the Record Proper filed with the Court of Appeals ("RP") and also to the Record on Appeal, filed with the District Court by the Personnel Board of the City of Albuquerque ("ROA").

explained was caused by lack of sleep, (RP:6; ROA:29), he was submitted to a drug test on February 9, 2009. The results came back on February 10, 2009 as positive for metabolites of cocaine. (RP:6, 8; ROA:29, 31, 91, 93) Mr. Adolph told the Medical Review Officer that he had been around people who had smoked cocaine. (RP:6; ROA:29) On February 17, 2009, the positive cocaine results were confirmed on a subsequent test of the split sample. (RP:6, 8; ROA:29, 31)

On February 11, 2009, Mr. Adolph was given notice of pre-determination hearing, alleging violations of city policies and procedures, and the hearing was held on February 17, 2009. (RP:6; ROA:29) Mr. Adolph was placed on administrative leave with pay. (RP:6; ROA:29, 96) The city determined that Mr. Adolph had violated the policies and procedures in the city's Substance Abuse Policy Manual and in the city's Personnel Rules and Regulations. Specifically, Mr. Adolph was terminated pursuant to the city's recent zero-tolerance policy provided for in the city's Administrative Instruction 7-1 dated February 7, 2006. (RP:6-7; ROA:29-30, 103)

Mr. Adolph timely appealed the termination order by the city. (RP:7; ROA:30) The city Personnel Board was scheduled to hear the appeal in July 2010. (RP:9; ROA:32) In November 2009, District Court Judge Valerie Huling invalidated the 2006 Substance Abuse Policy on the grounds that the City had

failed to bargain the issue of the amendment in good faith to impasse with the city's unions. (RP:7; ROA:30) Judge Huling remanded the issue to the City's Labor Board to make findings and conclusions consistent with her opinion. (RP:7; ROA:30) [2] The city's Labor Board acknowledged the court's ruling and the policy's invalidity in December 2009. (RP:7, 9; ROA: 30, 32)

Accordingly, the 2006 amendment could not be used to support Mr. Adolph's termination. (RP:7; ROA:30) The city, recognizing this fact, rescinded its discipline of Mr. Adolph on June 29, 2010, and made him whole, reinstating him to his position as motor coach operator, with back pay, and ordering him to take a return-to-work physical. (RP: 7, 9; ROA: 30, 32, 209) That same day, however, Mr. Adolph was issued a notice of investigation and notice of pre-determination hearing based on the same conduct, neither of which referred to the 2006 or 1999 city drug policy. (RP:7, 9; ROA:30, 32,210-213) He was placed on administrative leave. (RP:7, 9; ROA:30, 32, 214)

A pre-determination hearing was held July 8, 2010. (RP: 7,9; ROA:30,32, 215) On August 6, 2010, the results of the hearing were issued, and Mr. Adolph was again terminated by the City. (RP:8-9; ROA:31, 32, 219-223) Mr. Adolph

[2] Judge Huling's opinion is included as an appendix to the City's Statement of Appellate Issues. (RP:123-130)

timely filed an appeal of his termination with the city's Chief Administrative Officer. (RP:11; ROA:34)

After a hearing on January 18, 2011, the Hearing Officer issued a written opinion in which he recommended reinstatement for Mr. Adolph as a motor coach operator provided that he first serve a 40-day suspension and comply with the current Substance Abuse Policy. (RP:12; ROA:35)

In his recommendation, the Hearing Officer noted that the 2006 policy, under which Mr. Adolph was first fired and which was invalidated by the district court subsequent to his termination, was a zero tolerance policy requiring termination for the first instance of a positive drug test. (RP:7). The Hearing Officer also noted that the 1999 policy, which was not in effect when Mr. Adolph was terminated, contained criteria based on previous discipline in the past two years that would determine whether termination was appropriate. (RP:7).

The Hearing Officer looked at the two years prior to Mr. Adolph's positive drug test (given on February 9, 2009) and determined that Mr. Adolph met the criteria for termination under the 1999 policy based on a two day suspension imposed on July 29, 2008; a three day suspension imposed on July 30, 2008; and a five day suspension imposed on November 24, 2008. (RP:7; ROA:30, 222).

Despite these findings, the Hearing Officer noted that "there was no direct reference to the 1999 policy in the Predetermination Hearing Notice provided to Mr. Adolph." (RP:10; ROA:33) The Hearing Officer was rightly concerned about the city's shifting basis for the termination:

> Of greater importance to the hearing officer are concerns of whether any justice was served when the Substance Abuse Policy of 2006 (under which Adolph was tested and found in violation of) was abandoned by the city and the 1999 Substance Abuse Policy was substituted in its stead to support in part the termination of Mr. Adolph. The best that can be said is that an invalidated policy cannot be used to sustain a termination nor can another policy not in service at the time of the infraction be substituted to support a later effort to terminate an employee.

(RP:12; ROA:35)

The Personnel Board adopted the recommendations of the Hearing Officer on April 13, 2011, but amended the recommendation by ordering that Mr. Adolph shall not be returned to a safety-sensitive position. (RP:13; ROA:6) On May 4, 2011, the City filed a motion for reconsideration, which was denied by the Personnel Board on May 11, 2011. (RP:106; ROA:8, 322) At the May 11, 2011 Personnel Board hearing a board member observed:

> [T]he City's been trying to apply two policies at once and not clarifying which policy applies at any time. And so our hands have been tied. And this isn't the first time that I've said this. I said this to Mr. Mosher about exactly a year ago that I know that it's taken some time because there have been labor negotiations going on and so forth. ... I think the City needs to clarify its policy[.]

(RP:140; ROA:319-320)

The City itself was unclear about which policy – 1999 or 2006 – applied in this exchange at the April, 13 2011, hearing before the Personnel Board:

> MS. FORNEY [Counsel for City]: The point was that we can't just go back to the 1999 policy in total. We had to – the 2006 policy incorporated dated Federal regulations.
> UNIDENTIFIED MALE SPEAKER: Right.
> MS. FORNEY: That's what I'm saying. Judge Huling only dealt with the discipline on the 2006 policy.

(RP:141; ROA:311)

Also, as shown in this exchange with the Personnel Board on April 13, 2011, the City acknowledged that it didn't clarify its intent until February 2011—well after the second termination hearing—that it intended to rely only on the 1999 policy when disciplining employees in the wake of Judge Huling's ruling:

> UNIDENTIFIED MALE SPEAKER: So then at the time of the second termination, the City had not somehow announced its intent to revert to the '99 policy, right?
> MS. FORNEY: But it was – it was common knowledge. We – the union advocated to refer applications in its case of the 1999 discipline. They advocated to apply that one.
> UNIDENTIFIED MALE SPEAKER: Okay.
> MS. FORNEY: So that's – that could be applied.
> UNIDENTIFIED MALE SPEAKER: Okay.
> MS. FORNEY: And you're right. We didn't correct it – didn't clarify it until February 2011.

(RP:141; ROA:311)

The City appealed the decision of the Personnel Board in the Second Judicial District Court. (RP:1-14) The City filed its Statement of Appellate Issues and Reginald Adolph filed his Response in the District Court. (RP:99-130, 135-151) Thereafter, the Honorable Beatrice Brickhouse issued her decision on November 29, 2011 reversing the City Personnel Board's decision and ordering the termination of Reginald Adolph. (RP:170-177)

In her decision, Judge Brickhouse was not concerned with which policy Mr. Adolph was terminated under: "Termination was appropriate under either the 1999 or the 2006 SAP." (RP:174). Her concern was that the Hearing Officer and the Board exercised discretion that she thought they had no authority to exercise when they reinstated Mr. Adolph:

> There is no provision for a HO's discretion in this matter. Not only did the HO permit Appellee to retain his employment as a City bus driver but he also ordered a forty-day suspension without pay. This was outside of his authority because (1) Appellee should have been terminated; and (2) If Appellee qualified for retention (which he did not), he was subject only to a twenty day suspension without pay. . . . [B]ecause neither the HO nor the Board had the authority to reinstate Appellee, the reach of the Board's possible additional powers is irrelevant. The Board's adoption of the HO's recommendation that Appellee not be terminated but rather, be placed in another position is arbitrary and capricious and outside the scope of its authority.

(RP:174-176, citations omitted).

Judge Brickhouse was also not concerned with Mr. Adolph's due process rights: "Whether the 1999 or the 2006 SAP was used, there were no surprises. . . . Appellee received all [due process] to which he was entitled." (RP:176-177). Judge Brickhouse concluded that termination was the only appropriate disciplinary action "given the seriousness of the offense." (RP:177). She remanded the matter to the Board "to terminate Appellee." (RP:177).

II. ARGUMENT

A. Standard of Review.

The appellate court conducts the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal. *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, ¶16, 133 N.M. 97, 103, 61 P.3d 806, 812 (citing *Rex, Inc. v. Manufactured Hous. Comm.*, 119 N.M. 500, 504, 892 P.2d 947, 951 (1995)); *Rauscher, Pierce, Refsnes, Inc. v. Taxation and Revenue Dep't*, 2002-NMSC-013, ¶¶ 1 & 9, 132 N.M. 226, 46 P.3d 687.

The appellate court must apply the same standard of review that the district court applied in the matter and must review the administrative order to determine if it is arbitrary, capricious, or an abuse of discretion; not supported by substantial

evidence in the record; or, otherwise not in accordance with law. *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, ¶17, 133 N.M. 97, 104, 61 P.3d 806, 812.

A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record. *Id.* (citing *Snyder Ranches, Inc. v. Oil Conservation Comm'n,* 110 N.M. 637, 639, 798 P.2d 587, 589 (1990)); *see also Hobbs Gas Co. v. N.M. Serv. Comm'n,* 115 N.M. 678, 680, 858 P.2d 54, 56 (1993) (stating that burden on review of administrative decision under arbitrary and capricious standard is to show that the decision is "unreasonable or unlawful."). In making these determinations, the Court must remain mindful that "in resolving ambiguities in the statute or regulations which an agency is charged with administering, the Court generally will defer to the agency's interpretation if it implicates agency expertise." *Sierra Club,* 2003-NMSC-005, ¶17, 133 N.M. at 104, 61 P.3d at 812 *citing Atlixco,* 1998-NMCA-134, ¶ 30, 125 N.M. 786, 965 P.2d 370. Further, "[t]raditionally, cases have uniformly held the hearing of an administrative appeal at the district court level is an appellate procedure, *not a trial de novo.*" *Sierra Club,* 2003-NMSC-005, ¶17, 133 N.M. at 104, 61 P.3d at 812 *quoting Groendyke Transp., Inc. v. N.M. State Corp. Comm'n,* 101 N.M. 470, 476, 684 P.2d 1135, 1141 (1984)

(emphasis added). "It is not the function of the trial court to retry the case ... admit new evidence unless under an [statutory] exception ... or substitute its judgment for that of [an administrative agency]." *Id.* (internal citations omitted). However, the Court should not defer to the administrative agency's or the district court's statutory interpretation, as this is a matter of law that is reviewed de novo. *Sierra Club,* 2003-NMSC-005, ¶17, 133 N.M. at 104, 61 P.3d at 812 (citing *Mutz v. Mun. Boundary Comm'n,* 101 N.M. 694, 697-98, 688 P.2d 12, 15-16 (1984)).

B. The District Court's decision to terminate Reginald Adolph after the Personnel Board had ordered his reinstatement was contrary to the law because the Personnel Board had the authority to reinstate Reginald Adolph after finding that the City terminated him based on conflicting City policies.

The New Mexico Supreme Court has acknowledged that the City's Personnel Board "is empowered to decide on appeal the merits of any disciplinary action taken by a department head," 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). Courts have also found room for discretion on the part of the Hearing Officer and Personnel Board. In a dismissal action against a state employee, stemming from an analogous state statute which shares language similar to the City's municipal ordinance, the Court of Appeals has stated:

> This legislative scheme does not limit the Board's decision to agreeing with the action taken by the agency if the Board finds there was employee misconduct. Under § 10-9-18(F), *supra,* 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.

State ex rel. New Mexico State Highway Dept. v. Silva, 98 N.M. 549, 553, 650 P.2d 833, 837 (Ct. App. 1982). New Mexico courts acknowledge that administrative bodies are "quasi-judicial" in nature and as such, in their roles of gathering facts, holding hearings and rendering decisions, have the authority "to exercise discretion of a judicial nature." *Zamora v. Village of Ruidoso Downs,* 120 N.M. 778, 781, 907 P.2d 182, 185 (1995).

The Personnel Board is tasked with rendering a decision based on the Hearing Officer's recommendation, under the City's Merit System Ordinance, § 3-1-25(D). The Board may accept the recommendation, remand the matter or "modify the recommendation" of the Hearing Officer. MSO § 3-1-25(E)(1-3). Nowhere in the ordinances is the Board limited to being a rubber stamp for either the Hearing Officer's recommendation or the decisions of administrative agencies.

The evidence submitted at Mr. Adolph's termination hearing supports the Board's conclusion that Mr. Adolph's termination was an inappropriate

punishment that was based on conflicting City policies. The Hearing Officer found just cause to discipline Mr. Adolph for testing positive for cocaine metabolites in February 2009, but also questioned the process by which the City sought to terminate him two separate times under two different sets of rules, regulations and policies, raising legitimate "concerns of whether any justice was served" by the City's actions. The Hearing Officer faulted the City for reversing direction on its 2006 policy, restoring Mr. Adolph to his position and making him whole, and then reverting to the 1999 policy–not implemented by the City at the time of the infraction–to terminate Mr. Adolph a second time for the same infraction. The Hearing Officer instead recommended to the Personnel Board that Mr. Adolph be given a 40-day suspension, followed by reinstatement after Mr. Adolph complied with the version of the Substance Abuse Policy that had been restored subsequent to his infraction. In reaching its decision, the Personnel Board acted well within its authority. The District Court, ignoring the functions and authority of the Personnel Board recognized by the New Mexico Supreme Court, acted contrary to the law when it reversed the Personnel Board and ruled that the Personnel Board acted outside its authority.

The issue of whether the Personnel Board had authority to modify the discipline issued by the City was raised by Reginald Adolph in the district court his Response to Statement of Appellate Issues.

C. The District Court decision to terminate Reginald Adolph after the Personnel Board had ordered his reinstatement was contrary to the law because the Court does not have the authority to substitute its judgment for that of the Personnel Board.

Judicial review of an administrative decision is limited to a determination of whether the agency acted fraudulently, arbitrarily, or capriciously, and whether the agency's order is supported by substantial evidence. *See Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 115 N.M. 678, 680, 858 P.2d 54, 56 (1993) *citing Llano, Inc. v. Southern Union Gas Co.,* 75 N.M. 7, 11–12, 399 P.2d 646, 651 (1964). The Court has no power to modify the order appealed from because amending or modifying administrative orders would be substituting the Court's judgment for that of the agency and thus would be acting legislatively and not judicially. *See Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 115 N.M. 678, 680, 858 P.2d 54, 56 (1993) *citing Transcontinental Bus Sys., Inc. v. State Corp. Comm'n,* 56 N.M. 158, 169, 241 P.2d 829, 836 (1952). "It is not the function of the trial court to . . . substitute its judgment for that of [an administrative agency]." *Sierra Club,* 2003-NMSC-005, ¶17, 133 N.M. at 104, 61 P.3d at 812.

The District Court in this case improperly substituted its judgment for that of the Personnel Board when it ruled "given the seriousness of the offense in light of Appellee's position with Appellant, [termination] was the only appropriate disciplinary action." (RP:177). This decision *may* have been appropriate under the invalidated 2006 City Policy, but runs counter to the 1999 Policy, the basis for the second attempt to terminate Mr. Adolph, which explicitly recognizes that lesser discipline is often appropriate.

This issue of whether the District Court improperly substituted its judgment for that of the Personnel Board was not specifically raised below but is part of the standard of review to be applied by the reviewing court and Appellee will not be prejudiced if the Court considers it. NMRA Rule 12-213(A)(1)(The appellant may raise issues in addition to those raised in the docketing statement or statement of the issues unless the appellee would be prejudiced.)

D. The District Court violated Reginald Adolph's due process rights when it ordered his termination because Mr. Adolph was never given notice that the 1999 policy was used to terminate him.

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. *City of Albuquerque v. AFSCME Council 18 ex rel. Puccini*, 2011 -NMCA- 021, ¶ 11, 149 N.M. 379, 249

P.3d 510 *citing Cockrell v. Bd. of Regents of N.M. State Univ.*, 1999–NMCA–073, ¶ 10, 127 N.M. 478, 983 P.2d 427. This Court has ruled that in fulfilling the essential due process requirements of notice and an opportunity to be heard, a tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Boespflug v. San Juan County,* 114 N.M. 771, 772, 845 P.2d 865 (Ct. App. 1992) (citing *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541, 546, 105 S.Ct. 1487, 1495 (1985)).

Mr. Adolph had a protected property interest in his employment with the City of Albuquerque which requires that he be afforded due process of the law prior to deprivation. The City's punishment of Mr. Adolph, which left him in limbo for more than two and a half years, raised legitimate due process concerns. While acknowledging that Mr. Adolph was in violation of Albuquerque Rules and Regulations, the Hearing Officer and Personnel Board—the body primarily entrusted with the implementation of the City's Merit System Ordinance—each expressed concerns about the City's procedures in the face of conflicting policies in general and the severity of punishment imposed in this case.

Of particular concern in this case is the fact that the two drug policies at issue, the 2006 policy and the 1999 policy, set forth different standards for

determining whether termination is appropriate. The 2006 policy, under which Mr. Adolph was first fired and which was subsequently invalidated, was a zero tolerance policy requiring termination for the first instance of a positive drug test. (RP:7). The 1999 policy, which was not in effect when Mr. Adolph was first terminated, required termination only if the employee had a certain number of suspension days in the previous two years to determine whether termination was appropriate. (RP:7). The 1999 policy, however, did not specify whether the previous discipline was measured from the date of the positive drug test or the date of the termination.

The Hearing Officer looked at the two years prior to Mr. Adolph's positive drug test (given on February 9, 2009) to determine whether he met the criteria for termination under the 1999 policy and found that he met that criteria based on a two day suspension imposed on July 29, 2008; a three day suspension imposed on July 30, 2008; and a five day suspension imposed on November 24, 2008. (RP:7; ROA:30, 222). A review of the prior discipline, however, shows that the Hearing Officer might not have reached the correct conclusion because the second termination did not take place until August 5, 2010. This would mean that only the five day suspension was imposed within the two years of the termination. (RP:8; ROA: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.

The District Court glossed right over the notice issue concluding that Mr. Adolph received all the process that was due because "[w]hether the 1999 or the 2006 SAP was used, there were no surprises." The District Court's oversimplification of the due process analysis is contrary to the above-cited Supreme Court and Court of Appeal decisions outlining the requirements of the due process clause. The issues of fairness were raised by Reginald Adolph in his Response to Statement of Appellate Issues. The District Court first raised the issue

of due process on pages 7-8 in the final Memorandum Opinion and Order when it addressed the issues of fairness.

III. CONCLUSION

Reginald Adolph respectfully requests that the Court reverse the decision of the District Court and remand to that Court to confirm the City Personnel Board's decision to uphold the recommendation of the Hearing Officer to revoke the termination of Reginald Adolph; to have him placed in a non-safety-sensitive position; to provide back pay, benefits, and seniority; and to remove the termination decision from the City's system of records.

IV. ORAL ARGUMENT

Due to the fact that this case involves important issues of due process and proper court review of administrative decisions, decided in a factually-charged setting,.resolution of these issues would benefit from oral argument before the Court and oral argument is hereby requested pursuant to NMRA 12-214(B)(1).

V. STATEMENT OF COMPLIANCE

In compliance with Rule 12-213(F)(3), the foregoing Brief in Chief consists of 4,136 words, as counted by the Microsoft Word 2007 Word Count function.

Dated: September 10, 2012 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Chief was mailed, via regular U.S. mail, postage pre-paid and affixed thereto, this 10th day of September, 2012 to:

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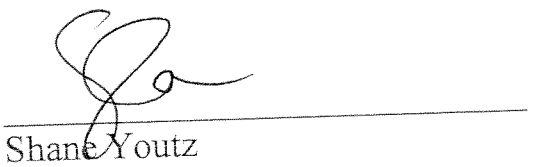

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