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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-628**

In the Matter of the Recommendation
for Discharge of Joey Lash.

**Filed February 21, 2012
Affirmed
Toussaint, Judge***

Minneapolis Civil Service Commission

Marshall H. Tanick, Mansfield, Tanick & Cohen, P.A., Minneapolis, Minnesota (for relator Joey Lash)

Karin E. Peterson, Rice, Michels & Walther, LLP, Minneapolis, Minnesota (for respondent Minneapolis Park and Recreation Board)

Considered and decided by Schellhas, Presiding Judge; Johnson, Chief Judge; and Toussaint, Judge.

UNPUBLISHED OPINION

TOUSSAINT, Judge

Relator Joey Lash challenges a decision by respondent Minneapolis Civil Service Commission (the commission) sustaining the termination of his employment as a park police officer by respondent Minneapolis Park and Recreation Board (MPRB). Lash argues that (1) the evidence does not support a finding that there was cause to terminate his employment; (2) the commission acted arbitrarily and capriciously in declining to

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

impose a lesser sanction than discharge; and (3) the commission violated his procedural due-process rights. We affirm.

D E C I S I O N

“Generally, decisions of administrative agencies, including cities, enjoy a presumption of correctness and will be reversed only when they reflect an error of law or where the findings are arbitrary, capricious, or unsupported by substantial evidence.”

CUP Foods, Inc. v. City of Minneapolis, 633 N.W.2d 557, 562 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). A decision is arbitrary and capricious if it represents the “agency’s will, rather than its judgment, or if the decision is based on whim or is devoid of articulated reasons.” *Id.* at 565. Substantial evidence means:

- (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety.

Id. at 563. “Where the evidence is conflicting or more than one inference may be drawn from the evidence, findings must be upheld.” *Id.* at 562.

I.

Lash challenges the commission’s finding that the MPRB had cause to discharge him from employment. Under Minnesota caselaw, cause for discharge “must relate to the manner in which the employee performs his duties, and the evidence showing the existence of reasons for dismissal must be substantial.” *Hagen v. Civil Serv. Bd.*, 282 Minn. 296, 299, 164 N.W.2d 629, 632 (1969). Lash asserts that the substantial evidence does not support the commission’s findings that he was terminated for “double

dipping”—collecting pay from the MPRB for time during his scheduled shifts that he was actually off duty and being paid by educational institutions for teaching law-enforcement classes. We disagree.

The evidence that Lash was double dipping includes testimony from Kevin Hinrichs, who investigated an anonymous complaint that Lash was double dipping; a spreadsheet created by Hinrichs comparing the number of hours, regular and overtime, that Lash claimed to have worked each day with the days and times on which the educational institutions reported that he had been teaching; Lash’s admission after the investigation had begun that his time records were “messed up” and that he would do whatever it took to keep his job; and Lash’s failure to disclose to a new supervisor that he was teaching classes during his scheduled shifts. The commission rejected Lash’s assertion that he had made up, either at the beginning or end of his shifts, the time that he took off to teach classes, explaining that “it is implausible that any person could consistently work the kind of intensely rigorous 18- and 19-hour workdays that would be required to make the [time records] accurate, unless the teaching hours were double-counted.” On this record, we conclude that substantial evidence supports the commission’s finding that the MPRB had cause to terminate Lash’s employment.

II.

Lash asserts that the commission acted arbitrarily and capriciously in declining to impose a lesser sanction than discharge. Much of Lash’s argument in this regard is premised on the characterization of his conduct as mere negligence in failing to properly complete his time records. But the commission found that Lash had intentionally claimed

pay for hours that he spent off duty teaching. Lash also argues that lesser sanctions have been imposed against officers employed by the Minneapolis Police Department (MPD) who have committed similar misconduct, and that extenuating circumstances, including Lash's longtime service to the MPRB, warrant a lesser sanction. The commission considered and rejected both of these arguments. With respect to the MPD disciplinary records, the commission relied on the testimony of MPRB's human resources manager that MPRB's practice is to "recommend termination of employment in cases of falsely claiming pay for work that was not actually performed." The commission also noted that MPRB "is not bound to follow the practices of the [MPD], which is separately administered." With respect to extenuating circumstances, the commission explained:

Length of service and work record are factors to be considered in determining whether discharge of a public employee is appropriate. Weighed against these factors here, however, is the fact that Mr. Lash improperly claimed pay for hours he did not work, over a period of three years. He was entrusted with significant responsibility, and performed remarkably in many areas. But his lapse in judgment over a three-year period is very serious. [MPRB] is justified in recommending discharge of a sworn police officer who is held to the highest standards of integrity and honesty in his dealings with the [MPRB] and the community.

The commission did not act arbitrarily or capriciously in declining to impose a lesser sanction than termination.

III.

Lash asserts violations of his right to procedural due process. "In general, due process requires notice and a meaningful opportunity to be heard before a fair and impartial decisionmaker." *State ex rel Marlowe v. Fabian*, 755 N.W.2d 792, 794 (Minn.

App. 2008). The sufficiency of procedure is assessed under the balancing test enunciated by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976), which weighs (1) the private interest at stake, (2) the risk of erroneous deprivation of that interest and probable value of additional safeguards, and (3) the governmental interests involved. *Id.* A party asserting a due-process violation must demonstrate prejudice in order to obtain relief on that ground. *State v. Cannady*, 727 N.W.2d 403, 408-09 (Minn. 2007).

Lash asserts that his due-process rights have been violated because the hearing on his discharge was limited to two days, rather than the three that he requested, and because the loss of some audiotapes precluded a complete transcript from being prepared. But Lash has failed to demonstrate any prejudice arising out of either of the alleged violations. He has not specified what additional witnesses he would have presented at the hearing or what relevant, noncumulative testimony those witnesses would have given. And he has not explained how the jointly prepared and submitted supplemental statement of the record is insufficient to apprise this court of the missing portions of the record. *See* Minn. R. Civ. App. P. 110.03 (providing procedure for submission of statement of proceedings when transcript is not available); *cf. U.S. ex rel. Luzaich v. Catalano*, 401 F. Supp. 454, 460 (W.D. Pa. 1975) (holding, in criminal context, that lack of transcript does not warrant new trial when the record is “sufficient to present an adequate picture of what transpired below”). Accordingly, we reject Lash’s assertion that his due-process rights have been violated.

Affirmed.