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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LYN WILSON,

Plaintiff and Respondent,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Defendant and Appellant.

H037281

(Monterey County

Super. Ct. No. M108851)

Respondent Lyn Wilson was employed as a correctional officer with appellant California Department of Corrections and Rehabilitation (CDCR). She was dismissed from service after testing positive for marijuana in a random drug test. Wilson admitted having used the drug but claimed that she had done so upon the recommendation of a medical doctor. Wilson believed that her use was consistent with state law and would not be grounds for discipline so long as she did not use it while at work. She appealed her dismissal to the State Personnel Board (SPB), which ruled in her favor, ordering CDCR to revoke the dismissal. The superior court upheld the SPB ruling. We shall affirm.

I. FACTS¹

Wilson worked at the Correctional Training Facility in Soledad (CTF Soledad). In or about April 2007 Wilson began experiencing “massive” headaches. In May 2007,

¹ We take our recitation of the facts from the hearing before the administrative law judge (ALJ) who conducted the hearing for the SPB.

Wilson consulted her primary care doctor, Dr. Hoffman. Hoffman diagnosed migraine and prescribed a series of medications, none of which relieved the headaches. Hoffman also suggested that Wilson see a doctor about using marijuana as a treatment. Wilson was aware that California voters had passed the Compassionate Use Act (CUA) of 1996 (Health & Saf. Code, § 11362.5 et seq.), which decriminalized the use of medicinal marijuana in California. Wilson researched the CUA and had previously consulted Dr. Malka, a physician she found listed with the California Department of Health, about using marijuana for her asthma. Malka had given Wilson a written recommendation for marijuana on April 20, 2007. Wilson understood the recommendation to be a prescription for the drug. Wilson did not begin using the marijuana until after the conventional headache treatments had failed to provide relief. Wilson obtained a state-issued cannabis card and started using marijuana toward the end of May 2007. She inhaled the drug in vaporized form three times a week after work. The marijuana made the headaches better so she continued to use it.

On July 2, 2007, Wilson was selected at random to submit a urine sample for drug testing. On July 4, 2007, Wilson wrote a letter to the president of the local chapter of the California Correctional Peace Officers Association to let him know that her test would be positive because she had a “legal prescription” for medical marijuana. Wilson placed the letter in an intra-facility mailbox but the chapter president never received it. As it turned out, the test was, indeed, positive for marijuana. Wilson was removed from her correctional officer position on July 17, 2007 and placed in the mailroom. Wilson knew the transfer was related to her positive drug test. Nevertheless, she continued taking the marijuana because it was still working to relieve her headaches. Up to that point Wilson had not been given a chance to explain why she tested positive and she believed that once she was able to do so the discipline would be rescinded. Wilson stopped using the drug in September 2007, when it no longer relieved her symptoms.

According to CDCR, its drug-free workplace policy always prohibited the use of marijuana for medicinal reasons. Lieutenant Douglas King taught the majority of discipline and ethics courses to new employees in 2003 when Wilson was first hired. One thing he taught was that where there is a conflict between federal and state law, federal law takes priority. He also specifically taught that marijuana use, whether recreational or medicinal, was not allowed. There was no evidence that King taught the classes Wilson attended.

After the CUA was passed, questions had arisen about whether CDCR policy prohibited its correctional officers from using marijuana for medicinal reasons. On January 16, 2007, CDCR Undersecretary K.W. Prunty issued a memorandum in which Prunty sought to clarify that CDCR's drug-free workplace policy prohibited all use of marijuana, including use for medicinal purposes (the Prunty memo). Warden Ben Curry ordered the Prunty memo attached to all paychecks and direct deposit statements issued on January 30, 2007. CDCR employees described how the Prunty memo was stapled to paychecks and direct deposit statements that month. One CDCR employee recalled receiving the Prunty memo with her January 30, 2007 paycheck. Another did not recall having received it, although he admitted it was possible. Wilson, who had her pay directly deposited, did not recall having received the Prunty memo. Wilson first heard about the Prunty memo in October 2007, when Special Agent John Kett brought it to her attention during his investigation of her positive drug test.

II. PROCEDURAL BACKGROUND

Wilson was accused of incompetency, inexcusable neglect of duty, willful disobedience, and failure of good behavior either during or outside of duty hours, which is of such a nature that it causes discredit to the appointing authority or the person's employment. (Gov. Code, § 19572, subds. (b), (d), (o), (t).) She was dismissed from service on February 25, 2008.

Wilson appealed her dismissal to the SPB. The ALJ who heard Wilson's appeal found Wilson to be credible and concluded that she did not believe at the time she was using the drug to treat her headaches that medicinal use of marijuana was a violation of CDCR policy. The ALJ recommended revocation of the disciplinary action. After receiving the ALJ's initial findings and conclusions, the SPB remanded the matter to the ALJ for further findings regarding CDCR's standard practice for disseminating policy decisions to its employees. Ultimately, the ALJ found that, although CDCR required its employees to provide written acknowledgement of receipt of its drug testing policy, it "did not require verification of the policy regarding medicinal marijuana." Rather, the standard practice at CTF-Soledad was to have all such memoranda attached to the employees' paychecks or direct deposit statements; employees are not usually required to sign an acknowledgment of having received these memoranda. The ALJ concluded that attaching a memo to a paycheck "is not an adequate method" to notify an employee of a policy clarification. The ALJ cited *Valenzuela v. State Personnel Bd.* (2007) 153 Cal.App.4th 1179, 1187 (*Valenzuela*) as "instructive," noting that in *Valenzuela*, evidence that the medical review officer generally told employees not to take Mexican diet pills was insufficient to prove that an officer who used the drugs had been on notice that his use was a violation of published standards.

The ALJ concluded that Wilson did not know that medicinal marijuana was prohibited until after she ceased using it. The ALJ found that Prunty had issued his memorandum in January 2007 and the warden had ordered it to be distributed to all employees, but Wilson had not received it. There was no evidence that any of Wilson's superiors had relayed the information contained in the Prunty memo to her any time before the investigatory interview of October 2007. "[Wilson] conducted research regarding the legality of medicinal marijuana, sought medical advice, and obtained a State issued identification card prior to using the medicinal marijuana for her medical condition. Furthermore, during the investigatory interview, [Wilson] stated that she had

not received the Prunty memo, and admitted that she had continued to use the medicinal marijuana until September 23, 2007, months after her positive drug test and redirection on July 17, 2007. This is not the behavior of someone who had knowledge that the use of medicinal marijuana could result in her dismissal.”

As a second basis for concluding that Wilson should be reinstated, the ALJ found that the Prunty memo itself was ambiguous. Although it stated that use of marijuana for medicinal purposes was prohibited under the drug-free workplace policy, it also suggested that employees who are “taking marijuana for medical reasons discuss with their physicians their ability to do their job safely and effectively.”

The ALJ concluded that CDCR had failed to establish that Wilson had “notice of a clear policy against officers using medicinal marijuana, to justify discipline under Government Code section 19572” and, therefore, recommended revocation of Wilson’s dismissal. The SPB adopted the ALJ’s findings and conclusions.

When CDCR refused to reinstate her, Wilson petitioned the superior court for a writ of mandate. (Code Civ. Proc., § 1085.) CDCR filed a cross-petition for administrative mandate (*id.* § 1094.5) challenging the SPB’s conclusion. The superior court analyzed CDCR’s cross-petition and concluded that there was substantial evidence to support the ALJ’s finding that “[CDCR] failed to establish that it gave [Wilson] sufficient notice of a clear policy against officers using medicinal marijuana to justify discipline under Government Code section 19572.” (Italics removed.) The superior court denied CDCR’s petition and granted Wilson’s. CDCR has timely appealed.

III. DISCUSSION

A. Contentions

CDCR argues that its disciplinary action should stand because (1) it is undisputed that Wilson violated the drug-free workplace policy, (2) there is no substantial evidence to support the finding that Wilson was credible, (3) there is no substantial evidence that Wilson did not know about the medicinal marijuana policy, (4) the ALJ applied the

wrong standard of proof, and (5) the ALJ erroneously applied *Valenzuela, supra*, 153 Cal.App.4th 1179.

B. Standard of Review

The parties do not agree upon the proper standard of review. CDCR maintains that we apply a de novo standard because the facts are undisputed. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.) Wilson argues that we review the record pursuant to the substantial evidence standard. Wilson is correct.

When an employee appeals an employer's disciplinary decision to the SPB, the SPB may conduct a hearing itself or assign an authorized representative to do so. (Gov. Code, §§ 19578, subd. (a), 19582, subd. (a).) In most instances, the SPB assigns an ALJ to conduct the hearing and prepare a proposed decision which the SPB may adopt or reject. (*Id.* § 19582, subd. (b).) The SPB may revoke an employer's discipline for one of three reasons: (1) the evidence does not establish the fact of the alleged cause for discipline; (2) the employee was justified; or (3) cause for discipline is shown but is insufficient to support the level of punitive action imposed. (*Department of Parks & Recreation v. State Personnel Board* (1991) 233 Cal.App.3d 813, 827.) The SPB, or its designee, the ALJ, weighs the evidence and determines the facts and exercises discretion in determining the sufficiency of the charges. (*Ibid.*) Since the SPB derives its adjudicatory power from our state Constitution (Cal. Const., art. VII, § 3, subd. (a)), its decisions are entitled to deference. (*Department of Parks & Recreation v. State Personnel Board, supra*, at p. 823.) "[A] superior court considering a petition for administrative mandate must defer to the board's factual findings if they are supported by substantial evidence." (*State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512, 522.) The appellate court stands in the same shoes as the superior court, which means that we review the underlying administrative decision under the substantial evidence standard. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632.) "We do not reweigh the evidence; we indulge all presumptions and resolve

all conflicts in favor of the [administrative] decision.” (*Camarena v. State Personnel Bd.* (1997) 54 Cal.App.4th 698, 701.) Only when the case presents a question of law do we apply the de novo standard of review. (*California Dept. of Corrections v. State Personnel Bd.* (2004) 121 Cal.App.4th 1601, 1611.)

In urging the de novo standard of review, CDCR ignores the factual dispute and argues, in effect, that violation of its drug-free workplace policy is a strict liability infraction warranting dismissal without regard to whether Wilson knew her conduct was prohibited. In light of the charges against her, the principal issue before the SPB was whether the evidence established the causes for discipline, which were that Wilson was incompetent and engaged in inexcusable neglect of duty, willful disobedience of a directive, and conduct that discredited her employer. (Gov. Code, § 19572, subds. (b), (d), (o), (t).) These are purely factual questions. Accordingly, as the superior court correctly held, the substantial evidence standard applies.

C. *Analysis*

There was no evidence that Wilson was incompetent, that she had neglected her job duties, or that her marijuana use had caused any discredit to CDCR. The principal issue for the SPB was whether Wilson’s marijuana use was a *willful* violation of CDCR’s drug-free workplace policy. There is no question that Wilson violated the policy. But that alone is not cause for discharge unless the violation was willful. The ALJ believed Wilson when she said that she did not think she was violating the policy and that she had been unaware of the clarification contained in the Prunty memo until after she ceased her use of marijuana. The ALJ recognized that Wilson continued to use marijuana after she knew that she was being disciplined for having tested positive. The fact that she readily admitted that she continued to use the drug suggested to the ALJ that she honestly believed that her use was not a violation of CDCR policy. If she did not know the policy prohibited medicinal use of marijuana, her violation was not willful.

CDCR argues that there is no substantial evidence to support the finding that Wilson was credible. But credibility is not a finding of fact subject to review for substantial evidence. Credibility is the determination made by the finder of fact that the witness is telling the truth. The finder of fact (the court or the jury) may base that determination upon “any matter that has any tendency in reason to prove or disprove the truthfulness of [the witness’s] testimony at the hearing, including but not limited to . . .” (Evid. Code, § 780) “[the witness’s] demeanor while testifying.” (*Id.* subd. (a).) A reviewing court defers to the factfinder’s credibility determination because the reviewing court has only the written record before it. It is in no position to assess demeanor, tone of voice, or any other matter that only those present at the hearing can assess. Thus, the reviewing court does not make a credibility determination; that is the exclusive purview of the factfinder. (*People v. Jackson* (1992) 10 Cal.App.4th 13, 20.) It follows that we must reject CDCR’s argument that the ALJ erred in believing Wilson. We accept as true Wilson’s statement that she believed, until sometime in October 2007, that her use of marijuana for medicinal purposes was not prohibited. We also accept as true her statement that she did not recall receiving the Prunty memo with her January 30, 2007 direct deposit receipt and that she was unaware of the clarification it contained until after she ceased using the marijuana.

Although CDCR argues that there is no substantial evidence that Wilson did not know about the Prunty memo, Wilson’s testimony is all that was needed. It is true that there was evidence from which one could infer that Wilson received the Prunty memo with her paycheck in January 2007, but the evidence was not conclusive. The manner in which the memo was distributed showed that CDCR intended to reach every employee but the process (stapling the memo to the monthly paycheck or direct deposit statement) is not foolproof. In order to ensure that an employee receives clarification of an important institutional policy, CDCR could have used the process it used for the underlying drug-testing policy (requiring a written acknowledgment of receipt). It did

not do that in this case. And, although there was evidence that one trainer taught new employees that medicinal marijuana use was prohibited, no one could say whether Wilson had attended his classes.

CDCR argues that the ALJ applied the wrong standard of proof because in one footnote the ALJ wrote, “The evidence is not conclusive that [Wilson] was put on notice of the policy regarding medicinal marijuana during her [training and orientation].” But the ALJ did not require CDCR to produce conclusive evidence in support of its position. Rather, the ALJ’s point was that the evidence CDCR did submit was not such that the ALJ was required to reject Wilson’s testimony. The ALJ weighed CDCR’s evidence against Wilson’s testimony and found the preponderance of the evidence favored Wilson. Wilson’s testimony is substantial evidence in support of the ALJ’s finding that she was not willfully disobedient.

Finally, CDCR argues that the ALJ erroneously applied *Valenzuela, supra*, 153 Cal.App.4th 1179. Again we disagree. In *Valenzuela*, the appellate court rejected an SPB finding that the employee willfully violated CDCR drug policy by using certain diet pills. (*Id.* at p. 1187.) As that court noted, CDCR has “the burden to demonstrate ‘the employee engaged in the conduct on which the disciplinary charge is based and that such conduct constitutes a cause of discipline under the applicable statutes. [Citations.]’ [Citation.] ‘The employee may avoid the adverse action by establishing that the conduct was justified.’ ” (*Id.* at pp. 1185-1186, quoting *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153.) In *Valenzuela*, as here, the prohibited conduct may be justified by showing that the employee lacked knowledge of the employer’s promulgated standards of conduct. (*Valenzuela, supra*, at p. 1186.) In *Valenzuela* there were no published standards; the policy was passed along by word of mouth and by way of memoranda that were not systematically distributed. Here, although the policy clarification was disseminated in a more systematic manner than it

was in *Valenzuela*, the ALJ found that the system was inadequate to refute Wilson's claim that she had not received it.

In short, the evidence is sufficient to support the ALJ's ultimate conclusion, adopted by the SPB, that Wilson did not willfully violate CDCR policy. Accordingly, the superior court did not err in denying CDCR's cross-petition for administrative mandamus (Code Civ. Proc., § 1094.5) and granting Wilson's petition for writ of mandate (*id.* § 1085), directing CDCR to reinstate her.

IV. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.