FILED
DEC 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LARRY DAVID DIETSCH,	)	
Plaintiff-Appellant,	)	Filed December 29, 1982
vs.	)	2-259 137 2-67296
CIVIL SERVICE COMMISSION, Burlington, Iowa,	)	
Defendant-Appellee.	)	

Appeal from Des Moines District Court, Dick R. Schlegel, Judge.

Plaintiff appeals from the trial court judgment affirming the decision of the Burlington Civil Service Commission to approve of the discharge of the plaintiff from the Burlington Police Department. AFFIRMED.

T. K. Ford for plaintiff-appellant.

Michael M. Phelan of Johnson, Phelan & Skewes, Fort Madison, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, and Johnson, JJ.

Schlegel, J., takes no part.

The plaintiff appeals from the trial court judgment affirming the decision of the Burlington Civil Service Commission to approve of the discharge of the plaintiff from the Burlington Police Department. The plaintiff claims that the causes for his removal from the police force as set out in Iowa Code section 400.19 (1981) were not proven and that his discharge was arbitrary and disproportionate to the offenses alleged even if proven. We affirm.

Plaintiff Larry David Dietsch had been employed as a police officer by the city of Burlington for approximately ten years. Prior to March 31, 1980, when he was discharged, the Chief of Police, Theodore Arthur Behne, set forth the grounds for Dietsch's termination in a document dated April 8, 1980. The general grounds for Dietsch's discharge were neglect of duty, disobedience to orders, failure properly to perform his duties, and misconduct.

Among other things, Dietsch was involved in at least five traffic accidents with patrol cars which he was driving. The last of these occurred when he went to sleep at the wheel of a squad car.

The evidence establishes that he frequently called in sick and did not report for work. These incidents occurred with such frequency that he was ordered to bring a doctor's excuse when he returned to work. On one occasion, when a superior officer called him at home while he was on sick leave and told him to bring a doctor's excuse, Dietsch replied, "Bullshit, I am not going to get one." He refused to bring the doctor's excuse as ordered.

On a number of other occasions, he fell asleep on duty.

His record is replete with complaints of rudeness in dealing with the public. On one occasion, a citizen complained that after Dietsch had given him a traffic ticket, he was leaning into Dietsch's patrol car trying to talk to him when Dietsch abruptly drove away.

Dietsch was warned a number of times that his conduct would have to be improved or that he would no longer be working at the Burlington Police Department. In a written reprimand by the Chief of Police, he was warned about being curt, rude, disrespectful or discourteous toward the public, and was told that if there were further complaints, he would be dismissed immediately.

The trial court determined that Dietsch failed to back up a fellow officer in a tavern fight.

The trial court also found that Dietsch avoided the chain of command or the grievance procedure set forth in the police manual and these were intolerable examples of failure to follow orders or procedures.

Dietsch stopped two sheriff's deputies who had stopped at a red light and had proceeded to turn right against the sign prohibiting a right turn on a red light, refused to allow them to proceed, and stated that he would physically arrest the driver after the driver identified himself with his badge and stated that he was on official business. This incident caused a serious strain in relations between the Sheriff of Des Moines County and the Chief of Police.

Dietsch offers a variety of excuses and explanations for each of the incidents described above.

Dietsch's appeal of his discharge to the Civil Service Commission resulted in an affirmance. After trial at the district court, to which Dietsch appealed, the action of the Civil Service Commission was affirmed.

I. Scope of Review.

Our review is governed by Iowa Code section 17A.19(8). Dietsch is arguing, in effect, that the decisions of the Commission and of the district court were unsupported by substantial evidence or that they were unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion. Iowa Code § 17A.19(8)(f-g). In our review we will give due weight to the district court's findings of fact,

although we are not bound by them. Millsap v. Cedar Rapids Civil Service Commission, 249 N.W.2d 679, 683 (Iowa 1977). Iowa R. App. P. 4. See also Hoffman v. Iowa Department of Transportation, 257 N.W.2d 22, 25 (Iowa 1977).

II. Substantiality of the Evidence.

We must determine whether, on the record presented, the facts found by the commission constitute misconduct under 370 I.A.C. § 4.32(1)(a), which defines misconduct. Holt v. Iowa Department of Job Service, 318 N.W.2d 28, 29 (Iowa App. 1982).

Misconduct is defined in the job services rules at 370-4.32(1)(a), Iowa Administrative Code as

> a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Under rule 370-.32(4), Iowa Administrative Code, the burden is on the employer to prove employee misconduct.

From an examination of the record, we are inexorably driven to the conclusion that there is ample evidence to support the conclusions of the Commission and the district court. The record is replete with testimony and documentary evidence from which the commission and the court could reasonably conclude that there was a pattern of behavior on the part of officer Dietsch that justified the conclusions drawn by his superiors and affirmed by the commission and the court.

III. Abuse of Discretion

We find that neither the commission nor the court were arbitrary, capricious, or engaged in an abuse of discretion in reaching the conclusion that Dietsch's conduct constituted neglect of duty, disobedience of orders, misconduct, and failure properly to perform his duties pursuant to section 400.19 of the code of Iowa.

Sleeping on duty surely constitutes neglect of duty. Dietsch's excuses are unacceptable since it was always open to him to call for relief from his post if he was too ill to remain awake. His failure to do so constitutes neglect of duty. The same is true of failing to report for duty.

His refusal to bring a doctor's excuse when he called in sick and was ordered to bring such an excuse constitutes disobedience of orders.

Each of the incidents described above also constitutes misconduct, as does Dietsch's failure to correct those forms of behavior about which he was reprimanded and which he was ordered to correct. Dietsch's conduct in detaining the deputy sheriff's officers constituted misconduct and "conduct detrimental to the public service." Matter of Fairbanks, 287 N.W.2d 579, 581 (Iowa 1980).

The supreme court, in Millsap v. Cedar Rapids, Civil Service Commission, 249 N.W.2d 679, 687 (Iowa 1977), cited an Illinois court with approval:

> ". . . Should a police officer engage in misconduct which is detrimental to the service it would be absurd to say that he is clothed with a cloak of immunity if such misconduct occurred during 'off-duty' hours. By the very nature of his employment a police officer is in the eyes of the public and for the good of the department must exercise sound judgment and realize his responsibilities to the department and the public at all times."

Davenport v. Board of Fire & Police Com'rs of Peoria, 2 Ill. App. 3rd 864, 870, 278 N.E.2d 212, 216 (1972).

In Millsap, the court held that off-duty intoxication or other forms of off-duty misconduct were sufficient to justify the suspension or dismissal of a police officer. The court said: "Public confidence is destroyed in a public official when he ceases to effectively carry out the duties he is assigned." Id.

We find that there is ample evidence to justify the conclusion drawn by Dietsch's superiors, by the commission, and by the district court that Dietsch's misconduct was detrimental to the department and to the community which he was serving, and that a proper remedy for his persistent misconduct was his removal from the department.

There was nothing arbitrary, capricious, or unreasonable about the conclusion thus reached. Hence, we affirm.

AFFIRMED.