FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-343 / 93-1393

THOMAS SIMMS VAN BAALE,

Appellant,

vs.

CIVIL SERVICE COMMISSION OF DES MOINES, IOWA, and CITY OF DES MOINES, IOWA,

Appellees.

Appeal from the Iowa District Court for Polk County, Darrell Goodhue, Judge.

Thomas Van Baale appeals from a district court judgment affirming his termination from the Des Moines Police Department. **AFFIRMED BY OPERATION OF LAW.**

Alfredo Parrish and Maggi Moss of Parrish, Kruidenier, Moss & Dunn, Des Moines, for appellant.

Nelda Barrow Mickle, City Solicitor, Des Moines, for appellees.

Heard by Donielson, C.J., and Cady and Huitink, JJ., but decided en banc.

PER CURIAM

The court being equally divided, the judgment is affirmed by operation of law. Iowa Code § 602.5106(1) (1993).

AFFIRMED.

For affirmance: Sackett, Habhab and Huitink, JJ.

For reversal: Donielson, C.J., and Hayden and Cady, JJ.

Huitink and Cady, JJ., write separately.

HUITINK, J. (writing separately)

Thomas Van Baale appeals a district court judgment affirming his termination from the Des Moines Police Department. I would affirm.

In February 1992 Thomas Van Baale, a seventeen-year veteran of the Des Moines police force, pleaded guilty to interference with official acts by use of a weapon and was found guilty of domestic abuse assault by use of a dangerous weapon. These charges stemmed from a December 1991 incident which occurred at Van Baale's home.

Van Baale received deferred judgments for both charges. He was subsequently terminated from his position as a Des Moines police officer on June 29, 1992. Van Baale's termination was affirmed on appeal by the Civil Service Commission in October 1992 and by the district court in September 1993.

On appeal Van Baale contends his termination was disproportionately harsh in view of Police Chief William Moulder's prior disciplinary decisions. Van Baale also claims he had a clear agreement with the chief that he would receive no more than a suspension and that the City is therefore equitably estopped from terminating him because of Moulder's assurances. Finally, Van Baale claims Moulder changed his mind about the suspension and decided to terminate after being unduly influenced by adverse media coverage.

Our review in cases such as this is de novo. In City of Des Moines v. Civil Service Commission, 513 N.W.2d 746 (Iowa 1994) our supreme court stated:

> Under section 400.27, the commission and court are free to make an independent determination regarding the disciplinary measures taken. In re Kios, 346 N.W.2d 25, 29 (Iowa 1984). Therefore, we are not obliged to presume the correctness of the chief's decision, but must determine anew whether the evidence as a whole justifies an officer's discharge. Seig v. Civil Service Commission, 342 N.W.2d 824, 829 (Iowa 1983).

Id. at 748. We independently construe the factual record as a whole to determine if the officer's discipline was warranted. City of Des Moines, 513 N.W.2d at 748.

I first address Van Baale's claim that Police Chief Moulder is equitably estopped from terminating him from his position. Van Baale claims his intention was to proceed to trial on the criminal charges because he believed he would be found not guilty. He contends, however, that he abandoned his defense solely because Moulder promised he could keep his job.

The doctrine of equitable estoppel is not generally applied against a municipality in the exercise of governmental functions. See Alexander v. Randall, 133 N.W.2d 124, 127-28 (Iowa 1965). If applied, it is done so only in exceptional circumstances. See City of Lamoni v. Livingston, 392 N.W.2d 506, 511-12 (Iowa 1986); see also Sioux City v. Johnson, 165 N.W.2d 762, 768 (Iowa 1969).

The party asserting estoppel has the burden of establishing each of its elements by clear, satisfactory,

and convincing proof. Bricker v. Maytag, 450 N.W.2d 839, 841 (Iowa 1990). Equitable estoppel may not be established if any one of the elements is lacking. Fernandez v. Iowa Dep't of Human Servs., 375 N.W.2d 701, 708 (Iowa 1985).

Equitable estoppel requires (1) a false representation or concealment of material facts; (2) a lack of knowledge of the true facts on the part of the one seeking to apply the doctrine; (3) an intention to act on the basis of the representation or the concealment; and (4) reliance upon the misrepresentation or concealment to one's prejudice or injury. See Folkers v. Britt, 457 N.W.2d 578, 582 (Iowa 1990). However, the representation must relate to some present or past fact, as distinguished from a promise or statement as to the future. 28 Am. Jur. 2d Estoppel and Waiver § 46 (1966). A truthful statement as to the present intention of a party with regard to their future act cannot support a claim of estoppel. Id.

Initially, I question whether this is a case in which equitable estoppel is or should be allowed. Iowa Code section 400.19, the statutory provision regarding the termination of police officers for misconduct, is not merely punitive; it also serves to protect the community from police officers who breach the public trust. See Seig v. Civil Serv. Comm'n, 342 N.W.2d 824, 829 (Iowa 1983) (citation omitted). Van Baale's reinstatement based solely on equitable considerations would conflict with the public interest so implicated and frustrate the strong rule of public policy this statute represents.

In any event, I conclude the district court was correct in finding Van Baale failed to prove the facts necessary to establish each of the above elements of estoppel. A de novo review convinces me the facts known to Chief Moulder at the time of the commitment and the circumstances which surrounded the making of that commitment were clearly different than the facts known to Moulder at the time of the termination. Van Baale has not proved Moulder's representations were false at the time they were made or that Moulder concealed any material fact from him. I would therefore affirm the district court on this issue.

Next Van Baale contends his termination was disproportionately harsh in comparison with penalties received by other officers in similar situations. I disagree.

Iowa Code section 400.19 grants a police chief the authority to "peremptorily suspend, demote or discharge a subordinate" for "misconduct. . ." A chief's suspension or dismissal must be for "conduct detrimental to the public interest." City of Des Moines, 513 N.W.2d at 748 (citations omitted). The image presented by police personnel to the general public is vitally important to the police mission. Millsap v. Cedar Rapids Civil Serv. Comm'n, 249 N.W.2d 679, 686 (Iowa 1977). Off-duty conduct may form the basis for dismissal of an officer. See id. at 686 (citation omitted).

Although Van Baale denies pointing a gun at his wife, the criminal trial court specifically found, "Thomas Van Baale, without justification, grabbed Cathi Van Baale by the hair and stuck a gun in her chin." Van Baale also interfered with official acts by use of a dangerous weapon and in the process posed a serious threat to the safety of the officers and the public.

This off-duty conduct clearly falls within the meaning of "misconduct" which implicates the public interest. See e.g. Johnson v. Civil Serv. Comm'n, 352 N.W.2d 252, 255 (Iowa 1984). Disparate treatment is relevant in some cases, but when an officer's conduct poses a serious threat to the safety of the public, evidence of disparate treatment is not determinative. Id. Even if other officers in similar situations may have been wrongfully retained, I would not compound the harm in this case by preventing Moulder from dismissing Van Baale based on that fact. See id.

Van Baale's violent conduct is a direct reflection on his temperament and judgment, both of which are inconsistent with the public's expectations of police officers' conduct either on duty or off duty. I would therefore affirm the trial court on this issue.

Finally, Van Baale contends the decision to terminate him from the Des Moines Police Department was influenced by public opinion and the adverse media coverage which followed the December 1991 incident. Even if we assume

Moulder was influenced by these considerations, it does not necessarily follow that reinstatement is required.

Van Baale is protected from any resulting prejudice by the very nature of the appellate process afforded to him under Iowa Code section 400.20-400.27. See In re Kjos, 346 N.W.2d 25, 28 (Iowa 1984). If Moulder was influenced by public opinion and adverse media coverage, it does not follow the commission or the district court were similarly influenced.

Van Baale has had the benefit of an independent review of the circumstances resulting in this termination by the commission and the district court. In each instance his conduct was found to justify termination.

I would find, based on a de novo review, substantial evidence supporting Van Baale's termination pursuant to section 400.19. I agree with the trial court's statement

> [w]hether or not the public outcry, the concern of the county attorney, the mayor or city council had an effect on the Chief's decision is not a critical factor under these circumstances.

I would affirm the decision of the district court in its entirety.

CADY, J. (writing separately)

I would reverse the decision of the civil service commission. I would do so not because Van Baale's horrendous criminal conduct did not justify termination. It did. I would reverse because I believe our principles of law estopped police Chief Moulder from reneging on the promise he made to Van Baale that he would not be terminated.

Our law recognizes the important principle that a person who makes certain representations should not later be permitted to change his or her position to the prejudice of another person who has reasonably relied upon the representations. Johnson v. Johnson, 301 N.W.2d 750, 754 (Iowa 1981). This principle is known as "equitable estoppel." It is rooted in the venerable and universal concepts of public policy, fair dealing, good faith, and justice. Id. When the representations embody an agreement or promise, the doctrine is called "promissory estoppel," and is properly applied to promises involving future acts. 28 Am. Jur. 2d Estoppel and Waiver § 48, at 657-58 (1966).

A fair reading of the evidence in this case reveals Chief Moulder promised Van Baale he would only face a suspension as a result of his conduct if granted a deferred judgment in the criminal prosecution against him. Based on that unequivocal promise, Van Baale gave up his right to a trial and allowed a finding of guilt to be entered against him in the criminal case. He then sought and was granted a

deferred judgment. Notwithstanding, Chief Moulder subsequently terminated Van Baale. This action followed a period of adverse public response to the affair.

I understand the reluctance to apply the estoppel doctrine against Chief Moulder. This reluctance is derived from the long-standing general rule that estoppel may not be invoked against a governmental entity or municipality. See City of Lamoni v. Livingston, 392 N.W.2d 506, 511-12 (Iowa 1986).

The rationale for precluding the use of estoppel against a government entity is that it may defeat or impair the operation of a policy designed to protect the public. 31 C.J.S. Estoppel § 138, at 675 (1964). The idea is that the mistakes or errors in judgment of a public official should not jeopardize the paramount public interest by preventing government from taking action to protect the public. Id. This rationale is clearly applicable to a police termination case since the public interest may be adversely impacted when a police chief is prevented from terminating an unfit police officer.

The rule disfavoring the application of estoppel against government, however, is not absolute. City of Lamoni, 392 N.W.2d at 511-12. It may be invoked if justified by compelling circumstances Id. In considering the type of circumstances which would invoke estoppel against government, it has been observed that "government must not be allowed to deal dishonorably or capriciously

with it's citizens, and must not play an ignoble part or do a shabby thing. . . ." 31 C.J.S. Estoppel §138, at 676.

I believe the circumstances of this case fall within the exception.

The primary purpose of the legislation governing the removal of public employees is to protect employees from arbitrary sanctions or discharge by their superiors. Bevel v. Civil Service Comm'n, 426 N.W.2d 380, 382 (Iowa 1988). Thus, just as Van Baale's reinstatement on estoppel grounds may be viewed as a threat to the public interest, it may, at the same time, serve to protect the worthy statutory goal of protecting employees from the ignoble actions of their superiors. The public has a strong interest in integrity trust, and honesty in government. These are essential ingredients to the basic operation of government, and must not be considered secondary to other interests of the public in the operation of their government.

The shocking conduct of Van Baale clearly impacted on his fitness to serve as a police officer. On the other hand, Van Baale contributed seventeen years of distinguished law enforcement service to his community prior to the incident. He was also amenable to treatment and counseling for his behavior.

Under the circumstances, it is not clear to me that the public interest and safety would truly be jeopordized by invoking the doctrine of estoppel to prevent termination. Moreover, Van Baale gave up a fundamental right in reliance

upon the promise made by Chief Moulder. Accordingly, I believe the public interest suffers more harm by the refusal to apply the doctrine of estoppel in this case than by using it to prevent a public official from reneging on such a weighty promise. Integrity and trust are essential in government. Our affirmance of the commission's decision tarnishes these essential attributes.

Estoppel does not necessarily create rights, but it can operate to extinguish rights. I would hold that Chief Moulder's promise prevented him from asserting his statutory right to terminate Van Baale.