

I

Facts and Travel

The facts of this case are not in dispute.² Marchant is a twenty-one year veteran of the PPD. Decision at 8. At approximately 9:00 A.M. on December 27, 2014, Marchant and other members of the PPD were dispatched to the Brown University mailroom in response to a report of a suspicious package. Id. at 13. Marchant, Officer Khari Bass, and Officer Raymond Majeau were first on the scene. Id. Marchant is Caucasian, and Officer Bass is African-American. Id. Escorted by personnel from Brown University Police and Security, Marchant and Officer Bass investigated a package in the mailroom that appeared to be mailed from Germany. Id. at 8, 13. The package was wrapped in brown paper and had a small amount of a white powdery substance on it. Id. at 8, 13. Marchant inspected the package by peeling back the brown paper with a pen. Id. at 8, 13.

Shortly thereafter, Officer Frank Moody, a member of the PPD's Special Response Unit with special training in weapons of mass destruction, arrived at the mailroom. Id. at 2, 13. Upset that Marchant had peeled back the brown paper, Officer Moody expressed his concerns that the situation had not been handled properly. Id. at 2, 13. Apparently in an attempt to ease the tension, Marchant responded by noting that Officer Bass had also touched the package and referred to Officer Bass's race. Id. at 13. Marchant testified that this comment to Officer Moody was, "How I handled it was OK because I had the one black officer open the package." Id. Officer Moody remembered the comment slightly differently, noting that Marchant said, "I had the Black guy do it," and then motioned towards Officer Bass. Id. Officer Bass claimed that Marchant said, "If he [Officer Bass] gets sick . . . you know, it won't be a problem, because he's

² Neither party disputes the factual findings of the Committee. See, e.g., Mem. of Law of Pet'r David Marchant at 2-5.

a black guy anyway . . . It's not a big deal anyway.” Id. Officer Bass claimed that Marchant repeated this comment twice to Officer Moody. Id.³

In response to Marchant's comment, Officer Moody said, “That's not right,” and walked away. Id. Officer Bass felt upset and disgusted by the comment. Id. Officer Bass left the mailroom and told his assigned partner, Officer Majeau, that Marchant had made an off-color racial joke. Id. Officer Majeau did not hear Marchant's comment but stated that Officer Bass was “definitely uncomfortable about it.” Id.

After an internal investigation, the Chief of the PPD, Colonel Hugh T. Clements, Jr. (Colonel Clements), issued a complaint to Marchant on July 22, 2015, charging him with seven violations of the PPD Rules and Regulations. Id. at 1. The complaint cited breaches of the following regulations:

- (1) Discriminatory Remarks (sec. 200.17)
- (2) Conduct Toward Personnel and Department (sec. 200.14)
- (3) Demeanor (sec. 200.13)
- (4) Courtesy (sec. 200.12)
- (5) Duty Responsibilities (sec. 200.8)
- (6) Rules Governing Conduct (sec. 200.6)
- (7) Standard of Conduct (sec. 200.5)⁴ Id. at 12–39.

The PPD recommended that Marchant be terminated. Id. at 1. In response, Marchant submitted a timely request for a LEOBOR hearing before a committee. Id.

On August 24, 2015 the matter proceeded to a hearing before the Committee. Id. On September 14, 24, and 25, and October 14, 15, and 16, 2015, the Committee heard testimony from twelve witnesses and oral arguments from counsel for the PPD and Marchant. Id. at 1–12. Officers Moody, Bass, and Majeau testified as to the series of events that took place at the

³ Notably, the Committee did not resolve the differing accounts. See Decision at 13 (recounting all three versions of the comment). However, the Court notes that the differences in the three versions of Marchant's comments are semantic, not substantive.

⁴ See generally July 22, 2015 Complaint.

Brown University mailroom on December 27, 2014. Id. at 2–3. Officer Bass indicated that Marchant’s comments were disrespectful and degrading, particularly because they came from a supervisor. Id. at 3. Officer David Iamarone then testified as to a prior incident involving Marchant and racial comments. Id. at 4. Major Thomas Verdi and Colonel Clements opined that Marchant did not have a stellar record as a member of the PPD and that his behavior was egregious. Id. at 4–5.

Appellant then called several defense witnesses. Id. at 5. Officers Thomas Rose, Anibal Baez, and David Morgan testified that Marchant had no known history of discriminatory remarks and that he was professional in his job. Id. at 5–7. Lieutenant Alyssa DeAndrade testified that Marchant was currently an asset to the Records Bureau and that he had a great attitude. Id. at 7. However, all of the officers who testified for Appellant stated that racially disparaging remarks were not to be tolerated. Id. at 6–8.

Marchant then testified before the Committee. Id. at 8. He explained the incident at the Brown University mailroom on December 27, 2014 and stressed that his comments were intended as a non-malicious joke. Id. at 9. Marchant noted that he had personally apologized to Officer Bass. Id. However, Marchant admitted that some comments can cause great harm even if they are not intended to do so. Id.

Mr. James Vincent, President of the Providence Chapter of the NAACP, testified as a rebuttal witness. Id. at 10. Mr. Vincent opined that Marchant’s comments were hurtful and that racial remarks should not be tolerated in the PPD. Id.

On November 10, 2015, the Committee issued a Decision sustaining all seven charges against Marchant and imposing a penalty of termination. Id. at 1, 42. Marchant filed the instant timely appeal.

II

Standard of Review

“The Law Enforcement Officers’ Bill of Rights, enacted in 1976, is the exclusive remedy for permanently appointed law-enforcement officers who are under investigation by a law-enforcement agency for any reason that could lead to disciplinary action, demotion, or dismissal.” City of E. Providence v. McLaughlin, 593 A.2d 1345, 1348 (R.I. 1991) (citing Lynch v. King, 120 R.I. 868, 870 n.1, 391 A.2d 117, 119 n.1 (1978)). LEOBOR “was enacted to protect police officers from infringements of their rights in the course of investigations into their alleged improper conduct.” In re Sabetta, 661 A.2d 80, 83 (R.I. 1995) (quoting In re Denisewich, 643 A.2d 1194, 1196 (R.I. 1994)). Under LEOBOR, any law enforcement officer facing charges that could result in punitive action may request a hearing before a committee comprised of three active law enforcement officers. Secs. 42-28.6-1 and 42-28.6-4. The committee is afforded broad discretion to sustain, modify, or reverse the charges brought by the investigating authority. Sec. 42-28.6-11; see also Culhane v. Denisewich, 689 A.2d 1062, 1064–65 (R.I. 1997) (citing State Dep’t of Env’tl. Mgmt. v. Dutra, 121 R.I. 614, 401 A.2d 1288 (1979) (citations omitted)).

LEOBOR provides that officers may appeal adverse decisions by the committee to the Superior Court. Sec. 42-28.6-12. For the purposes of such an appeal, the committee is “deemed an administrative agency and its final decision shall be deemed a final order in a contested case within the meaning of §§ 42-35-15 and 42-35-15.1 [of the Administrative Procedures Act (APA)].” Sec. 42-28.6-12(a); see also City of Pawtucket v. Laprade, 94 A.3d 503, 513 (R.I. 2014) (“[T]he standard of review set forth in the APA, as specified in § 42-28.6-12 of LEOBOR,

is the correct standard of review”). Accordingly, in reviewing LEOBOR committee decisions, this Court must apply the standard of review as set forth in § 42-35-15(g):

“The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- “(1) In violation of constitutional or statutory provisions;
- “(2) In excess of the statutory authority of the agency;
- “(3) Made upon unlawful procedure;
- “(4) Affected by other error or law;
- “(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- “(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Sec. 42-35-15(g).

The Court may not substitute its judgment for that of the agency regarding the credibility of witnesses or the weight of evidence concerning questions of fact. See Ctr. for Behavioral Health, R.I., Inc. v. Barros, 710 A.2d 680, 684 (R.I. 1998). The Court’s review is therefore confined to “an examination of the certified record to determine if there is any legally competent evidence therein to support the agency’s decision.” Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 804–05 (R.I. 2000) (quoting Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992)); see also Newport Shipyard v. R.I. Comm’n for Human Rights, 484 A.2d 893, 896–97 (R.I. 1984). Competent evidence is defined as evidence which a reasonable mind might accept to support a conclusion. See Newport Shipyard, 484 A.2d at 897 (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). In so reviewing, this Court “may reverse [the] findings [of the administrative agency] only in instances wherein the conclusions and the findings of fact are totally devoid of competent evidentiary support in the record, or from the reasonable inferences that might be drawn from such evidence.” Bunch v. Bd. of Review, R.I. Dep’t of Emp’t and

Training, 690 A.2d 335, 337 (R.I. 1997) (citations omitted) (emphasis added). Accordingly, the Court’s review is both limited and highly deferential. Culhane, 689 A.2d at 1064.

III

Discussion

A

Parties’ Arguments

Marchant argues that the Committee’s Decision to terminate his employment was arbitrary and capricious.⁵ Importantly, Marchant does not dispute the Committee’s Decision to sustain all seven violations of the PPD Rules and Regulations and, indeed, admits his wrongdoing. See Mem. of Law of Pet’r David Marchant at 1. Rather, Marchant maintains that a penalty of termination was too severe given his actions and, therefore, that the punishment was arbitrary and capricious pursuant to § 42-35-15(g)(6). Id. at 1. In support, Marchant argues that the Committee’s justifications for the punishment—that it was necessary to preserve the reputation of the police department and that Marchant prevented himself from working for the

⁵ Marchant’s Memorandum of Law consists solely of the argument that the Committee’s Decision was arbitrary and capricious. See generally Mem. of Law of Pet’r David Marchant. However, in his Reply Memorandum, Marchant states that “provisions (4) [affected by other error or law], (5) [clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record], and (6) [arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion] of § 42-35-15(g), are implicated” Reply Mem. of Law of Pet’r David Marchant at 2. In his Reply Memorandum, Marchant also states, “[i]n the case at bar, Marchant has primarily argued the arbitrary and capricious nature of the hearing committee’s decision” Id. at 1. The Reply Memorandum then proceeds to only argue that the Committee’s Decision was arbitrary and capricious. Id. at 11. Because Marchant has not fully argued provisions (4) or (5) of § 42-35-15(g), but has instead focused only on provision (6) (arbitrary and capricious), the Court will only consider Marchant’s arguments with respect to provision (6). See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (finding “no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.”) (citing Brown v. Trustees of Boston Univ., 891 F.2d 337, 353 (1st Cir. 1989)); see also Ferreira v. Culhane, 736 A.2d 96, 97 (R.I. 1999) (mem.) (“Issues that are neither briefed nor argued are considered waived.”) (citation omitted).

PPD—were devoid of evidentiary support in the record, and thus arbitrary and capricious. *Id.* at 14–15. Additionally, Marchant points to the PPD’s policy of progressive discipline, which Marchant contends necessitates a penalty less than termination for a single incident. *Id.* at 6–7.

The City asserts that the Committee’s Decision to terminate Marchant’s employment is neither arbitrary nor capricious. The City contends that substantial evidence supported the Committee’s Decision and that the Committee acted rationally and reasonably. The City also maintains that termination on the basis of a single incident is not inapposite to the PPD’s stated policy of progressive discipline.

B

Arbitrary and Capricious

The Court may reverse the agency’s decision if it is “[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Sec. 42-35-15(g)(6). However, the Court’s arbitrary and capricious inquiry is limited, and the administrative decision must be upheld “as long as the administrative interpreters have acted within their authority to make such decisions and their decisions were rational, logical, and supported by substantial evidence.” Goncalves v. NMU Pension Trust, 818 A.2d 678, 682–83 (R.I. 2003) (citing Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998)). An agency’s decision is not arbitrary or capricious “[w]hen it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome.” Coleman v. Metro. Life Ins. Co., 919 F. Supp. 573, 581 (D.R.I. 1996) (quoting Perry v. United Food and Commercial Workers Dist. Unions 405 and 442, 64 F.3d 238, 242 (6th Cir. 1995)). A decision is supported by substantial evidence where there is “evidence reasonably sufficient to support such a conclusion.” Doyle, 144 F.3d at 184; see also Perry, 64 F.3d at 242 (describing arbitrary and capricious review as “the least

demanding form of judicial review’’) (quoting Davis v. Ky. Fin. Cos. Ret. Plan, 887 F.2d 689, 693 (6th Cir. 1989)).

Here, Marchant has not met his high burden to prove that the Committee’s Decision was arbitrary and capricious. The record is replete with evidence supporting the Committee’s findings. See Coleman, 919 F. Supp. at 581. In a detailed forty-two page Decision, a majority of the Committee sustained all seven charges levied against Marchant. Decision at 41. The Committee scrutinized the voluminous testimony of twelve witnesses prior to making its final evaluation. Id. at 1–2. The Committee summarized the testimony of each witness, specified each separate violation of the PPD Rules and Regulations, and listed what testimony supported each and every violation. Id. at 12–39. The Committee found that Marchant’s behavior negatively impacted the reputation of the PPD and “disabled” Marchant from continuing to work in a diverse law enforcement agency and city. Id. at 41–42. Based on the uncontested evidence, a majority of the Committee imposed the penalty of termination. Id. at 42.

Marchant contends that the record is devoid of evidence that the termination was necessary to preserve the reputation of the PPD or that he was unable to continue working for the PPD effectively. The Court disagrees. The Committee specifically delineated how Marchant’s actions impacted the PPD and the community. Decision at 5, 41 (quoting Colonel Clements: “[the comments] had a significant adverse impact on the Police Department, not only on the entire Police Department . . . [but also] outside the Police Department’’). The Committee found that Marchant’s superiors thought Marchant’s behavior reflected poorly on the PPD. Id. at 4 (quoting Major Thomas Verdi: “[A]ny incident that adversely impacts the image of the [PPD] certainly impacts the trust of the community.’’). The Committee also noted that Colonel Clements had lost confidence in Marchant’s ability to continue to perform as a sergeant. Id. at

40 (quoting Colonel Clements: “I feel that he [Marchant] has impacted his ability to work further not only within the ranks of the Providence Police Department but within the community.”). Colonel Clements did not believe that Marchant’s behavior would cease. Id. at 5 (noting that Colonel Clements “does not feel that [] Marchant would be able to conform/set an example and [sic] to the standards of the [PPD]”). Thus, the record amply supports the Committee’s finding that Marchant’s comment affected the reputation of the PPD and prevented Marchant from continuing his employment. See Goncalves, 818 A.2d at 682–83.

Marchant further argues that the Committee erred in not following the PPD’s progressive discipline policy. Progressive discipline metes out increasingly severe punishment for successive minor infractions of the PPD’s Rules and Regulations. See PPD General Order 130.03 (describing progressive discipline as “[m]inor infractions of rules and regulations that merit disciplinary action”). Having sustained all seven charges levied against Marchant, the Committee did not find Marchant’s actions to be minor infractions of the PPD’s Rules and Regulations. Decision at 41. Substantial evidence supports this conclusion. See Goncalves, 818 A.2d at 682–83. The Committee noted that Marchant’s comments were “hurtful, demeaning, degrading, and racist.” Decision at 41 (noting that Officer Bass felt “hurt[,]” “disgusted[,]” and “speechless” in response to Marchant’s comments). The Committee also described the considerable testimony on the outrageous nature of the comments. See, e.g., id. at 40 (citing testimony from Colonel Clements that Marchant’s “actions are so egregious that I am impressing upon this panel for termination”). Moreover, the Committee noted that Colonel Clements had a zero tolerance policy towards racially disparaging remarks. Id. at 5. Furthermore, the Committee emphasized the fact that Marchant’s comments were made by a supervising officer to a subordinate officer. Id. at 4 (quoting Major Thomas Verdi: “An

example of what should not be—what a Supervisor—how a Supervisor should not at any time conduct himself.”). In light of these facts, the Committee’s conclusion that a single incident warranted termination was not “totally devoid of competent evidentiary support in the record” Bunch, 690 A.2d at 337; see also Rogers v. Bd. of Educ. of City of New Haven, 749 A.2d 1173, 1184 (Conn. 2000) (“Whether termination is justifiable on the basis of a single incident is a qualitative not quantitative analysis; one serious incident can suffice.”) (citations omitted). Rather, the Court finds the Committee’s penalty of termination to be rational, logical, and supported by substantial evidence. See Goncalves, 818 A.2d at 682–83.

The Court is therefore satisfied that the Committee’s Decision is not arbitrary or capricious. In so holding, the Court is mindful that its review is limited and highly deferential. See Culhane, 689 A.2d at 1064; see also In re Denisewich, 643 A.2d at 1198 (“Officers carrying out the daily routine of police work contemporaneously with the alleged infraction will be in the best position to judge another officer’s actions.”).

IV

Conclusion

After reviewing the record as a whole, the Court finds that the Committee’s Decision was not arbitrary or capricious. Substantial rights of the Appellant have not been prejudiced. Therefore, the Court affirms the Committee’s Decision. Counsel shall submit appropriate judgment for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Marchant v. Calise, et al.**

CASE NO: **PC-2015-5341**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **June 30, 2016**

JUSTICE/MAGISTRATE: **Gibney, P.J.**

ATTORNEYS:

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