APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

Greg Simmons,
Plaintiff-Appellant.
v.
Pekin Police and Fire Commission,
an Administrative Agency, and
Ted Miller, Chief of Police,
Defendants-Appellees.

No. 3-08-0944
2009 Ill. App. Lexis 4146

October 13, 2009, Filed

Appeal from the Circuit Court of the Tenth Judicial Circuit Tazewell County, Illinois. No. 07-MR-100. Honorable John A. Barra, Judge, Presiding.

Reversed, Lytton, J. with McDade, J., concurring. Carter, J., dissenting.

ORDER

In 2007, the Pekin Chief of Police, Timothy Gillespie,[1] filed a complaint against plaintiff Greg Simmons, a Pekin Police Officer, alleging that plaintiff was insubordinate. The Pekin Board of Fire and Police Commissioners (Board) found that plaintiff failed to follow valid and lawful orders issued by Chief Gillespie and suspended plaintiff for 20 days without pay. The trial court affirmed the Board's decision. On appeal, plaintiff argues that the Chief's orders were unlawful. We reverse.

Plaintiff was hired as a City of Pekin police officer in 1995. On March 23, 2006, Chief Gillespie ordered plaintiff to submit to a psychological evaluation. The examination was performed by Dr. Michael Campion, a psychologist employed by the City of Pekin. The day after the examination, Pekin Police Department employees informed plaintiff that he had been found unfit for duty and was prohibited from entering the police department.

On April 18, 2006, Dr. Campion issued his written report in which he found that plaintiff was unfit for duty because of a personality disorder, including narcissistic and aggressive features and paranoia. Dr. Campion recommended that plaintiff seek treatment from a licensed psychologist once every two weeks for 12 months and undergo a psychiatric examination.

On May 5, 2006, Deputy Chief Brecher provided plaintiff with a redacted copy of Dr. Campion's report. According to Brecher, he ordered plaintiff to comply with Dr. Campion's treatment recommendations and instructed plaintiff to have his therapist communicate with Dr. Campion to document his progress.

On May 18, 2006, plaintiff obtained an independent psychological examination from Ted Mathews, a licensed clinical psychologist. Mr. Mathews concluded that plaintiff did not have a personality disorder. He referred plaintiff to a therapist, Dr. Joel Eckert, to determine what, if any, treatment was appropriate.

On June 13, 2006, Chief Gillespie wrote a letter to plaintiff, ordering him to:

> "[I]nstruct your private therapist to consult with Dr. Campion, and provide Dr. Campion with a report of your progress by June 30, 2006[;]
>
> [I]nstruct your therapist to update Dr. Campion with additional progress reports on a monthly basis commencing not later than July 31, 2006[;]
>
> [I]nstruct your therapist to advise him in writing as and when he complies with these requirements by giving me notice he is reporting to Dr. Campion[;] and
>
> [A]uthorize Dr. Campion to release to me reports of your progress."

On June 20, 2006, Mathews sent a letter to Chief Gillespie informing him that he called Dr. Campion in order "to confer with Dr. Campion in regard to Greg Simmons." The letter stated that it was sent "[i]n accord with the request set forth in your correspondence to Greg Simmons dated June 13, 2006."

On July 18, 2006, plaintiff saw Dr. Joel. Eckert. Dr. Eckert concluded that plaintiff did not have any serious pathological problems, such as narcissism or aggression, and determined that plaintiff did not need treatment.

Chief Gillespie wrote plaintiff a letter on September 6, 2006, ordering him to comply with his previous orders or provide a written explanation for his failure to do so. On September 26, 2006, Dr. Eckert wrote a letter to Chief Gillespie explaining that he did not agree with Dr. Campion's psychological evaluation of plaintiff and stated: "I cannot in good conscience proceed with implementation of Dr. Campion's recommendation."

In November 2006, plaintiff saw Dr. John Day, a licensed clinical psychologist, for another independent psychological assessment. Dr. Day concluded that plaintiff was fit for duty with no need for psychological counseling. Plaintiff provided Chief Gillespie a report from Dr. Day, which opined that plaintiff was fit to report for duty.

On January 24, 2007, Chief Gillespie ordered plaintiff to "instruct[] and authoriz[e] John R. Day, and each of the other practitioners referenced by Day to submit all reports, evaluative data and supporting documentation concerning you to Dr. Campion."

On February 14, 2007, Chief Gillespie ordered plaintiff to comply with the January 24, 2007 directive. On February 21, 2007, plaintiff's attorney sent a letter to Chief Gillespie explaining that although plaintiff executed the necessary releases, Dr. Day, Mathews and Dr. Eckert refused to forward their reports to Dr. Campion because it would be "contrary to standards of practice for licensed psychologists."

On March 21, 2007, Chief Gillespie filed a complaint against plaintiff with the Pekin Police and Fire Commission, alleging that plaintiff was insubordinate for failing to comply with orders issued by Deputy Chief Brecher and himself on May 5, 2006, June 13, 2006, January 24, 2007 and February 14, 2007.

In July 2007, a three-day hearing was held before the Board. At the hearing, plaintiff testified that he signed releases on his first or second visit with each of his psychologists and intended that his records be sent to Dr. Campion. According to plaintiff, he "personally gave the orders from Chief Gillespie to Mr. Mathews, Dr. Eckert and Dr. Day." He signed additional releases on January 31, 2007, to ensure that Dr. Campion would receive his records.

Mathews testified that plaintiff requested that he keep chief Gillespie "posted on events of significance in the course of the work that we were doing together." Mathews admitted that he did not turn over his report to Dr. Campion until June 2007, even though he knew that Dr. Campion wanted it prior to that.

Dr. Eckert testified that plaintiff signed releases for him "a couple of different times." Dr. Eckert spoke to Dr. Campion on September 11, 2006, and suggested that they "exchange data[,]" but Campion refused. Dr. Eckert admitted that he did not release all of plaintiff's records to Dr. Campion until June 2007 "when it was understood that there would be a mutual exchange of information between all parties including Campion and myself." Plaintiff never directed Dr. Eckert not to release his records to Dr. Campion.

Dr. Day testified that plaintiff signed a release on November 9, 2006 that "authorized me to release to Dr. Campion." He admitted that he did not send any of plaintiff's records to Dr. Campion until March 2007 "[b]ecause Dr. Campion didn't follow the law and request it."

Following the hearing, the parties filed post-hearing briefs. In his brief, plaintiff questioned the legality of Chief Gillespie's orders, stating:

> "Both state and federal laws strictly protect a person's medical and mental health information. Such information and decisions regarding medical treatment are clearly considered private and personal. *** [F]or an employer to order an employee to turn over personal and confidential medical and mental health information may be illegal and is certainly at a minimum contrary to the intent of laws like HIPAA which strictly protect such information."

Plaintiff also argued that he was not at fault for Dr. Campion not receiving his medical records until after Chief Gillespie filed his complaint. According to plaintiff, his doctors refused to give the records to Dr. Campion unless he was willing to provide his records to

them. Plaintiff explained: "[T]he Illinois Mental Health Development Act and HIPAA are very specific about how practitioners can share mental health data. Thus, when a practitioner releases data to another licensed clinical psychologist, the practitioner has the absolute right to expect data in return."

On November 21, 2007, the Board issued its decision. The Board found that plaintiff was not required to follow Dr. Campion's recommended treatment or provide monthly progress reports to him. However, the Board found that plaintiff was required to follow Chief Gillespie's orders to instruct his doctors to forward information to Dr. Campion. According to the Board, plaintiff "failed to fully obey valid and lawful orders of Chief Gillespie" because Dr. Campion did not receive records from Mr. Mathews, Dr. Eckert and Dr. Day until after the complaint was filed. The Board explained: "While the delay in providing information was not solely the fault of Officer Simmons, he bears ultimate responsibility because he could have required the release of his medical information to Dr. Campion." The Board suspended plaintiff for 20 days without pay.

Plaintiff filed a complaint for administrative review in the circuit court. The court affirmed the Board's decision.

ANALYSIS

Plaintiff argues that Chief Gillespie's orders were unlawful because they violated the Mental Health and Developmental Disabilities Confidentiality Act (Act) (740 ILCS 110/1 et seq. (West 2006)). Defendants respond that plaintiff forfeited his right to raise the Act as a defense by failing to raise it before the Board. Defendants alternatively argue that the Chief's orders did not violate the Act.

When reviewing a decision of an administrative agency, we review the decision of the agency, not the circuit court. Vincent v. The Department of Human Services, 392 Ill. App. 3d 88, 93, 910 N.E.2d 723, 728, 331 Ill. Dec. 314 (2009). Our standard of review depends on whether the issue presented is a question of fact, a question of law, or a mixed question of fact and law. Vincent, 392 Ill. App. 3d at 93, 910 N.E.2d at 728. The issues presented here, i.e., whether waiver applies and whether the Chief's orders violate the Act, are questions of law that we review de novo. See Home Insurance Co. v. Cincinnati Insurance Co., 213 Ill. 2d 307, 326, 821 N.E.2d 269, 282, 290 Ill. Dec. 218 (2004) (whether waiver has been established is a question of law); Robertson v. Sky Chefs, Inc., 344 Ill. App. 3d 196, 202, 799 N.E.2d 852, 858, 279 Ill. Dec. 49 (2003) (whether certain conduct violates a statute is a question of law).

I. Forfeiture

If an argument, issue or defense is not presented in an administrative hearing, it is generally considered forfeited or waived and cannot be raised for the first time on appeal of the administrative decision. Cinkus v. Village of Stickney Municpal Officers Electoral Board, 228 Ill. 2d 200, 212, 886 N.E.2d 1011, 1019, 319 Ill. Dec. 887 (2008). A "key purpose of

the waiver doctrine is to prevent unfair prejudice to an opposing party: If one party neglects to raise an argument at the trial level, the adversary may be forestalled from presenting evidence in rebuttal, and thus it is proper to bar the first party from springing the argument at the appellate level where the presentation of evidence is no longer available." Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc., 378 Ill. App. 3d 437, 453, 879 N.E.2d 512, 527, 316 Ill. Dec. 445 (2007).

"Waiver *** is not impediment to an appellate court's ability to address issues of law." Cambridge Engineering, Inc., 378 Ill. App. 3d at 453, 879 N.E.2d at 526. When an issue involves solely a question of law that can be resolved without further input from the trial court and there is no indication that the defendant will suffer prejudice, a reviewing court should decline to employ waiver. See In re Jamarqon C. , 338 Ill. App. 3d 639, 645, 788 N.E.2d 344, 350, 273 Ill. Dec. 35 (2003); O'Brien v. O'Donoghue, 292 Ill. App. 3d 699, 704, 686 N.E.2d 688, 691, 226 Ill. Dec. 905 (1997). In the interest of justice, a court may consider an issue that a party has forfeited. Zaabel v. Konetski, 209 Ill. 2d 127, 136, 807 N.E.2d 372, 377, 282 Ill. Dec. 748 (2004).

Here, plaintiff did not specifically mention the Act at the Board hearing. However, in his post-hearing brief, plaintiff questioned the legality of the Chief's orders, suggesting that the orders may violate "[b]oth state and federal laws [which] strictly protect a person's medical and mental health information." Additionally, in his post-hearing brief, plaintiff mentioned the Act by name, stating that it contains specific rules regarding how practitioners may share mental health data. In light of these references, we find that plaintiff did not forfeit his right to argue on appeal that the Chief's orders violate the Act.

II. Confidentiality Act

The Act provides that all mental health records and communications "shall be confidential and shall not be disclosed except as provided in the Act." 740 ILCS 110/3(a) (West 2006). The disclosure of mental health records and communications is prohibited except in the specific circumstances enumerated in the Act. Sassali v. Rockford Memorial Hospital, 296 Ill. App. 3d 80, 84-85, 693 N.E.2d 1287, 1290, 230 Ill. Dec. 536 (1998). According to our supreme court, "the Act constitutes a 'strong statement' by the General Assembly about the importance of keeping mental health records confidential." Norskog v. Pfiel, 197 Ill. 2d 60, 71-72, 755 N.E.2d 1, 10, 257 Ill. Dec. 899 (2001). Courts must "zealously guard against erosion of the confidentiality privilege." Norskog, 197 Ill. 2d at 72, 755 N.E.2d at 10. Anyone seeking the release of mental health information faces a formidable challenge and must show that disclosure is authorized by the Act. Norskog, 197 Ill. 2d at 72, 755 N.E.2d at 10.

Courts have specifically examined whether the Act is violated when a police chief orders a police officer to undergo a psychiatric exam and turn over his mental health records. See Sangirardi v. Village of Stickney, 342 Ill. App. 3d 1, 793 N.E.2d 787, 276 Ill. Dec. 28 (2003); McGreal v. Ostrov, 368 F.3d 657 (7th Cir. 2004). According to those cases, a police chief does not violate the Act by ordering a police officer to submit to a fitness exam and release the ultimate finding of fitness for duty. See Sangirardi, 342 Ill. App. 3d at 16, 793

N.E.2d at 799 (2003). However, a chief violates the Act by compelling a police officer to release mental health records other than an ultimate fitness for duty recommendation. See McGreal, 368 F.3d at 690; see also Sangirardi, 342 Ill. App. 3d at 16, 793 N.E.2d 799 (finding the Act was not applicable because the chief "did not compel the release of plaintiff's mental health records, but only the ultimate fitness for duty recommendation.").

Here, Chief Gillespie ordered plaintiff to "submit all [mental health] reports, evaluative data and supporting documentation." This order violated the Act because it required plaintiff to provide more than an ultimate fitness for duty recommendation. Because the order was unlawful, plaintiff was not required to obey it. See Haynes v. Police Board of the City of Chicago, 293 Ill. App. 3d 508, 513, 688 N.E.2d 794, 798, 228 Ill. Dec. 96 (1997). Thus, the Board's decision, finding plaintiff insubordinate and suspending him for 20 days, is reversed.

CONCLUSION

The judgment of the circuit court of Tazewell County is reversed.

Reversed.

Lytton, J. with McDade, J., concurring.

DISSENT

Carter, J., dissenting:

I respectfully dissent from the majority's order in the present case for two reasons. First, I believe that plaintiff forfeited his right to argue on appeal that the Chief's order violates the Act. A review of the case indicates that plaintiff is trying to argue a different argument on appeal than was argued before the Board in the administrative proceeding. Before the Board, plaintiff represented that he had no problem with his mental health treatment information being shared with the police psychologist and that he had signed consent forms to allow that to be done. For various reasons, the information was never shared. At the hearing, testimony was presented, which gave rise to certain inferences, often competing inferences, about why the information was not shared. Thus, the issue before the Board was whether the failure to provide the information was the result of or constituted a wilful refusal to obey the Chief's orders. It must be concluded, therefore, that plaintiff's argument here is forfeited because plaintiff failed to make that argument to the Board at the administrative proceeding. See Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill. 2d 200, 212, 886 N.E.2d 1011, 1019, 319 Ill. Dec. 887 (2008) (an argument, issue, or defense that is not presented in an administrative hearing is procedurally defaulted and may not be raised for the first time before the court on administrative review). Plaintiff's assertions to the contrary-that essentially there is no waiver in an administrative proceeding and that the argument was preserved by various collateral references-has no merit and is not supported by the law. Because plaintiff's argument as to the lawfulness of the Chief's orders is forfeited, this court

should not address that argument further. Indeed, it is difficult or impossible to fairly address the issues raised by that argument because that argument was not litigated in the administrative proceeding, and thus, the facts supporting that argument were not fully brought out.

Second, even if I were to address that argument in this appeal, I respectfully believe that the Board's ruling would still have to be confirmed, because plaintiff, as a police officer, does not have the prerogative to refuse to obey an order. See Haynes v. Police Board of the City of Chicago, 293 Ill. App. 3d 508, 512-13, 688 N.E.2d 794, 798, 228 Ill. Dec. 96 (1997). As the appellate court specifically stated in Haynes.

> "[a] police officer does not have the prerogative of actively disobeying an order from a superior while the officer subjectively determines whether the order is lawful, valid or reasonable because such a practice would thwart the authority and respect which is the foundation of the effective and efficient operation of a police force and destroy the discipline necessarily inherent in a paramilitary organization such as the police department." Haynes. 293 Ill App. 3d at 512-13, 688 N.E.2d at 798.

Presumably in this case, plaintiff would have to file an immediate grievance and seek permission to delay compliance with the order pending review. Furthermore, the confidentiality requirements that plaintiff cites turn on whether the individual involved would expect the matter to remain private. Sangirardi v. Village of Stickney. 342 Ill. App. 3d 1, 15, 793 N.E.2d 787, 799, 276 Ill. Dec. 28 (2003) (under the Act and the case law, the patient's expectation of privacy is dispositive in determining the disclosure of mental health records). Here, plaintiff signed a consent for the documents to be released. Thus, plaintiff arguably would have given up his expectation of privacy in those documents for this limited purpose. See Sangirardi, 342 Ill. App. 3d at 15, 793 N.E.2d at 799.

For the two reasons stated, I respectfully dissent from the majority's order in the present case. I would confirm the Board's ruling.

Notes

1. Timothy Gillespie retired as Chief of Police for the Pekin Police Department in 2009. Ted Miller is now the acting chief and has replaced Gillespie as a party in this appeal.