

FILED: January 25, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JUDITH E. LUCKE,
Petitioner,

v.

DEPARTMENT OF PUBLIC SAFETY STANDARDS AND TRAINING,
Respondent.

Department of Public Safety Standards and Training
40340

A142956

Argued and submitted on May 10, 2011.

Thomas K. Doyle argued the cause for petitioner. With him on the briefs was Bennett, Hartman, Morris & Kaplan, LLP.

Judy C. Lucas, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Jerome Lidz, Solicitor General.

Before Haselton, Presiding Judge, and Brewer, Chief Judge, and Armstrong, Judge.*

BREWER, C. J.

Affirmed.

*Brewer, C. J., *vice* Duncan, J.

1 BREWER, C. J.

2 Petitioner seeks judicial review of a final order of the Department of Public
3 Safety Standards and Training (DPSST) that revoked her corrections certificates based on
4 a finding that she had "been discharged for cause from employment as a public safety
5 officer." ORS 181.662(4). Petitioner asserts that DPSST erred in deciding the case on
6 summary determination because genuine issues of material fact existed and that neither
7 substantial evidence nor substantial reason supports DPSST's decision. As explained
8 below, we conclude that DPSST properly revoked petitioner's corrections certificates,
9 and, accordingly, we affirm.

10 A brief description of the procedural history of the case is necessary before
11 we turn to the facts. In October 2007, DPSST initiated this contested case proceeding by
12 issuing a notice of its intent to revoke petitioner's certificates pursuant to ORS 181.662(4)
13 and OAR 259-008-0070(2)(a),¹ on the ground that petitioner had been discharged from
14 employment with the Multnomah County Sheriff's Office for cause. The event that
15 precipitated the termination involved petitioner having left a loaded firearm unsecured on
16 a bench in an unlocked locker room at the jail, where it remained undiscovered for
17 approximately eight hours. This proceeding was held in abeyance while petitioner
18 pursued a grievance of her termination. The grievance ultimately resulted in an
19 arbitration decision upholding petitioner's dismissal for "just cause" as that term is

¹ OAR 259-008-0070 has undergone significant substantive amendment since this case was initiated. All references in this opinion are to the 2006 version of the rule which was in effect when DPSST initiated this contested case proceeding.

1 defined by the collective bargaining agreement between petitioner's employer and her
2 union.

3 After the conclusion of the arbitration proceeding, DPSST--which utilizes
4 the Office of Administrative Hearings (OAH) for its contested case proceedings--moved
5 for summary determination of the legal issues pursuant to OAR 137-003-0580 and
6 submitted as exhibits numerous documents pertaining to petitioner's employment history
7 with the Multnomah County Sheriff's Office, as well as the decision and various exhibits
8 from the arbitration proceeding. DPSST asserted that there was no genuine issue as to
9 any material fact and that it was entitled to a favorable ruling as a matter of law.

10 Petitioner did not oppose DPSST's motion for summary determination. The matter was
11 assigned to an administrative law judge (ALJ) from the OAH, who issued a ruling on
12 summary determination and a proposed order concluding that petitioner's certifications
13 should be revoked pursuant to ORS 181.662(4) and OAR 259-008-0070(2)(a). Petitioner
14 filed exceptions to the proposed order, arguing, in part, that "the evidence regarding
15 standard of care all support[s] [petitioner's] position in this matter. * * * [T]he standard of
16 care was in dispute. Thus, this issue cannot, and should not, be resolved through a
17 summary determination." Petitioner further argued that the proposed order was not
18 supported by substantial evidence or substantial reason. DPSST rejected petitioner's
19 exceptions and adopted the proposed order.

20 On judicial review, petitioner raises various challenges to the order. Before
21 turning to petitioner's specific arguments, we describe our standard of review as well as

1 the pertinent facts viewed under that standard. OAR 137-003-0580 provides for an
2 administrative "summary determination" proceeding that is akin to a trial court summary
3 judgment proceeding under ORCP 47. It provides, in pertinent part, that an ALJ "shall
4 grant the motion for a summary determination if * * * [t]he pleadings, affidavits,
5 supporting documents (including any interrogatories and admissions) and the record in
6 the contested case show that there is no genuine issue as to any material fact that is
7 relevant to resolution of the legal issue as to which a decision is sought; and * * * [t]he
8 agency or party filing the motion is entitled to a favorable ruling as a matter of law."
9 OAR 137-003-0580(6). The ALJ is required to view the evidence in the light most
10 favorable to the nonmoving party. OAR 137-003-0580(7).²

11 In the proposed order, the ALJ included in his findings of fact the following
12 findings that had been made in the arbitration proceeding:

13 "[Petitioner] left her loaded firearm unsecured in the women's locker
14 room of a Multnomah County Jail facility with no awareness of its absence.
15 [Petitioner] carried an off-duty weapon under the authority of the
16 Multnomah County Sheriff's Office. In order to carry the weapon, she had
17 to receive Multnomah County Sheriff Office training and meet Sheriff's

² Additionally, OAR 137-003-0580(10) provides that, "[w]hen a motion for summary determination is made and supported as provided in this rule, a non-moving party or non-moving agency may not rest upon the mere allegations or denials contained in that party's or agency's pleading," and that the ALJ "must explain the requirements for filing a response to any unrepresented party or parties." As noted, petitioner did not oppose the agency's motion. However, because DPSST did not take the position that petitioner's failure to comply with OAR 137-003-0580(10) precluded consideration of her exceptions to the ALJ's proposed order, and, in fact, DPSST considered those exceptions, we reject DPSST's argument, made for the first time on judicial review in this court, that petitioner's failure to oppose the motion for summary determination precludes her from challenging the summary determination on review.

1 Office qualifications. On January 23, 2007, [petitioner] was assigned to
2 work at a Multnomah County Jail facility. She completed her shift and
3 went home. A supervisor found a black fanny pack on the bench in the
4 women's locker room. The supervisor picked up the pack and could tell it
5 contained a weapon. The weapon had no identification. The supervisor
6 took the weapon to another supervisor, who checked the firearms records
7 and discovered it belonged to [petitioner]. [Petitioner] had forgotten and
8 left her weapon in the locker room. Although the locker room had a lock
9 on the door, the door was rarely locked. Those who had access to that area
10 included female deputies, civilian staff, contractors, volunteers, a
11 supervised female inmate janitorial crew, and occasionally staff who
12 brought members of their families (public members) for lunch.

13 " * * * * *

14 "Correction officers can be authorized to carry on duty or off duty
15 firearms, depending on the standard operating procedures of their agency
16 and their assignment. Corrections [officers] are responsible generally for
17 the security and safe storage of any firearm in their custody."

18 The ALJ also adopted numerous additional factual findings that the arbitrator had made
19 concerning five previous incidents for which petitioner had received sanctions, including
20 reprimands and suspensions without pay. The ALJ concluded:

21 "[Petitioner] engaged in gross negligence by leaving a firearm
22 unsecured in an area accessed by non-authorized persons and inmates.
23 [Petitioner's] conduct placed persons in danger and was a deviation from
24 the standard of care that a reasonable public safety professional would
25 observe. Her conduct demonstrated poor judgment and placed innocent
26 lives at stake.

27 "[Petitioner's] actions or failures to act created a danger or risk to
28 persons, property or the efficient operation of the sheriff's office, and
29 constituted a gross deviation from the standards of care that a reasonable
30 public safety officer would have observed in similar circumstances."

31 The ALJ also concluded that each of the five previous incidents had involved gross
32 negligence. As explained below, we need not reach the parties' arguments concerning
33 whether the ALJ properly considered those five incidents, because we conclude that

1 DPSST's revocation of petitioner's certifications was justified based on the incident
2 involving the unattended firearm that precipitated her termination from employment with
3 the sheriff's office.

4 As noted, DPSST adopted the ALJ's proposed order and, in a final order,
5 rejected petitioner's exceptions. In the final order, DPSST noted that petitioner disputed
6 "whether cause for *termination* existed" (emphasis added) but held that that question was
7 not within its jurisdiction, citing *Huesties v. BPST*, 95 Or App 17, 767 P2d 465, *rev den*,
8 307 Or 658 (1989). After an independent review of the factual basis for the discharge,
9 DPSST further concluded that petitioner's "conduct constituted discharge for cause under
10 the applicable statutory and regulatory standards."

11 Petitioner makes numerous arguments on judicial review. Initially,
12 petitioner asserts that the order lacks substantial reason because the board "abdicated its
13 jurisdiction" to determine whether petitioner was terminated "for cause." As explained
14 below, we conclude that petitioner's understanding of the final order is incorrect.

15 ORS 181.662(4) provides:

16 "[DPSST] shall deny, suspend or revoke the certification of any
17 public safety officer or instructor * * * after written notice and hearing * *
18 * based upon a finding that the public safety officer or instructor has been
19 discharged *for cause* from employment as a public safety officer."

20 (Emphasis added.) DPSST promulgated OAR 259-008-0070(2)(a), which defined
21 discharge "for cause" for these purposes as follows:

22 "(A) Gross Negligence: means where the public safety
23 professional's act or failure to act creates a danger or risk to persons,
24 property, or to the efficient operation of the department, recognizable as a

1 gross deviation from the standard of care that a reasonable public safety
2 professional would observe in a similar circumstance;

3 "(B) Insubordination: means a refusal by a public safety
4 professional to comply with a rule or order where the rule or order was
5 reasonably related to the orderly, efficient, or safe operation of the public or
6 private safety agency and where the public safety professional's refusal to
7 comply with the rule or order constitutes a substantial breach of that
8 person's duties; or

9 "(C) Incompetence or Gross Misconduct: in determining what
10 constitutes 'incompetence or gross misconduct,' sources the Department
11 may take into account include but are not limited to practices generally
12 followed by the profession, current teaching at public safety training
13 facilities, and technical reports and literature relevant to the fields of law
14 enforcement, telecommunications, or emergency medical dispatch."

15 In *Huesties*, we considered a petitioner's challenge to DPSST's predecessor
16 agency's revocation of his certificates based on a finding of "gross misconduct" under
17 ORS 181.662 and a predecessor administrative rule that is similar in pertinent respects to
18 OAR 259-008-0070(2)(a)(C). 95 Or App at 19. On judicial review, the petitioner argued
19 that the discharge was "invalid" because it was retaliatory and that the employer had
20 failed to abide by various procedural requirements. *Id.* at 20. The agency argued that its
21 role was to independently review the factual basis for the discharge in order to determine
22 whether it was "for cause" as required by ORS 181.662. We agreed with the agency,
23 stating that "nothing in the statutory scheme is consistent with petitioner's view that the
24 legislature intended that [the agency] have authority to review the employer's discharge
25 decision, as distinct from determining whether the decision was or could have been for
26 sufficient cause." *Id.*

27 Read in context and in light of its citation to *Huesties*, we understand

1 DPSST to have indicated in its final order in this case that it was not considering
2 petitioner's numerous arguments that she should not, in fact, have been terminated from
3 employment. Rather, DPSST limited its inquiry to whether the termination decision was
4 or could have been "for cause" as that term is defined by ORS 181.662 and OAR 259-
5 008-0070(2)(a). We reject without further discussion petitioner's argument that DPSST
6 "abdicated" its role to make a determination of cause under the pertinent statute and rule.

7 In a related argument, petitioner suggests that DPSST failed to fulfill its
8 statutory duties because it "gave preclusive effect" to the arbitration decision, which, as
9 noted above, the ALJ had relied on for certain factual findings. We disagree with
10 petitioner's assertion. Although it adopted certain factual findings of the arbitrator, the
11 ALJ's proposed order also contained numerous citations to exhibits in the summary
12 determination record that support the ALJ's findings of fact. In particular, the ALJ relied
13 on the affidavit of an expert--a "Professional Standards Coordinator" with DPSST who
14 had more than 28 years' experience in law enforcement--to support his conclusion that the
15 firearms incident described above constituted "gross negligence" for purposes of OAR
16 259-008-0070(2)(a)(A).

17 Petitioner next argues that summary determination was inappropriate
18 because there were disputed issues of material fact related to
19 "what was the basis for termination itself, the factual circumstances of the
20 firearm being unattended, the standard of care relating to firearms in
21 correction officer's locker rooms, the degree of access by the public and the
22 potential for danger to fellow officers or the public. Moreover, there was
23 evidence that unsecured weapons were a frequent occurrence--certainly the
24 standard of care was in dispute."

1 We conclude that, although not *per se* fatal to her claims, *see* ___ Or App at
2 ___, (slip op at 3 n 2), petitioner's failure to file a response to the motion for summary
3 determination defeats her argument. That is, DPSST's evidence on each of those points
4 was uncontradicted because petitioner failed to adduce any evidence at all. Thus, the
5 question is whether DPSST's evidence, viewed in the light most favorable to petitioner,
6 demonstrates that there is any genuine issue of material fact as to any of those points. We
7 consider each point in turn.

8 First, petitioner asserts that there is a question as to "the basis for the
9 termination itself." Petitioner argues that the five previous incidents for which she was
10 disciplined were not the basis for her termination and that the ALJ, and subsequently,
11 DPSST, erred in concluding otherwise. A review of the record reveals no genuine issue
12 of material fact as to the basis for petitioner's termination. The event that precipitated the
13 termination was the incident concerning the loaded gun left unattended in the locker
14 room. That was the ground for termination cited in the sheriff's letter terminating
15 petitioner's employment, and no evidence to the contrary was presented. The evidence
16 demonstrates that the sheriff's office has a system of progressive corrective action and
17 that the five previous incidents that had resulted in corrective action played a significant
18 part in the sheriff's decision to terminate petitioner, rather than impose a lesser sanction.
19 However, the record does not reveal any genuine issues of material fact concerning the
20 basis for the termination.

21 Petitioner next argues that there are genuine issues of material fact

1 concerning "the factual circumstances of the firearm being unattended." She does not
2 explain what those facts are, nor does the record reveal any dispute concerning the
3 historical facts. Indeed, the factual findings concerning the circumstances in which the
4 weapon was left unattended were based in large part on petitioner's own admissions as to
5 what had happened.

6 Petitioner next asserts that there is a genuine issue of material fact as to "the
7 standard of care relating to firearms in correction officer's locker room." Specifically,
8 petitioner asserts that "the evidence regarding standard of care all support[s] [petitioner]
9 in this matter." We disagree. DPSST introduced an uncontested affidavit from an
10 expert indicating that petitioner's conduct in leaving the gun unattended in these
11 circumstances placed people at risk and "was a deviation from the standard of care that a
12 reasonable public safety professional would observe." Petitioner's failure to controvert
13 that evidence defeats her argument on judicial review. *Cf, Perry v. Rein*, 215 Or App
14 113, 126, 168 P3d 1163 (2007) ("Uncontradicted testimony cannot be controverted on
15 summary judgment simply by asserting that it should not be believed.").

16 Petitioner also suggests that there is a genuine issue of material fact as to
17 "the degree of access by the public and the potential for danger to fellow officers or the
18 public." Again, we disagree. The record reveals no factual dispute concerning that issue.
19 The evidence showed that the locker room in which the weapon was left is connected by
20 a door to a restroom in the jail that is used by police officers, civilian staff, contractors,
21 volunteers, and people who visit the staff, and that the door is propped open most of the

1 time. The locker room and restroom are accessed once a day by a supervised inmate
2 work crew. Although petitioner asserts, without citation to the record, that the door
3 between the restroom and the locker room "was supposed to be locked but was left open
4 by other officers on the day in question," we find no support in the record for that
5 assertion. The uncontradicted evidence in the record was that the door was propped open
6 nearly all the time; no evidence was presented as to who had propped the door open on
7 any particular occasion.

8 Finally, petitioner asserts that "there was evidence that unsecured weapons
9 were a frequent occurrence." We find no such evidence in the record. In her decision,
10 the arbitrator mentioned several other instances of violations of the sheriff's rules
11 concerning the safe storage of firearms that had resulted in sanctions other than
12 termination of the employees involved, but the arbitrator explained at length why those
13 "incidents are not substantially similar to the circumstances of this case." Moreover,
14 even if petitioner were correct that such evidence had been presented, we fail to see how
15 evidence that other officers had engaged in the same type of rule violation that had
16 resulted in petitioner's termination would create a genuine issue of material fact that is
17 pertinent to the issues presented here. At most, such evidence would serve as the basis
18 for a claim of unequal treatment by the employer, which is the purpose for which it was
19 introduced during the arbitration. However, as noted, it is not DPSST's function to
20 second-guess the employer's termination decision. *See Huesties*, 95 Or App at 20.

21 In sum, petitioner was terminated as a result of her conduct involving the

1 loaded weapon left unattended in the jail locker room. DPSST found that that conduct
2 constituted "gross negligence" for purposes of ORS 181.662(4) and OAR 259-008-
3 0070(2)(a). DPSST presented uncontradicted evidence that petitioner's conduct created a
4 danger to people and that it was a "gross deviation from the standard of care that a
5 reasonable public safety professional would observe in a similar circumstance." OAR
6 259-008-0070(2)(a)(A).

14 We conclude that substantial evidence and substantial reason support
15 DPSST's decision.

16 Affirmed.