

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1210**

Kenneth Zepeda,
Appellant,

vs.

City of Saint Paul,
Respondent.

**Filed March 11, 2024
Affirmed
Larkin, Judge**

Ramsey County District Court
File No. 62-CV-22-6557

Christopher K. Wachtler, Wachtler Law Office, Stillwater, Minnesota (for appellant)

Lyndsey M. Olson, St. Paul City Attorney, Anthony G. Edwards, Assistant City Attorney,
St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Bjorkman,
Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant, a military veteran, challenges an arbitrator's decision under Minnesota's
Veteran's Preference Act upholding respondent-city's termination of his employment. We
affirm.

FACTS

Appellant Kenneth Zepeda is an honorably discharged veteran who worked as a St. Paul Fire Engine Operator for respondent City of St. Paul (the city). On January 17, 2021, at approximately 1:30 a.m., Zepeda responded to a medical call in downtown St. Paul, along with a captain of the fire department, two emergency medical technicians, and two paramedics. The patient was outdoors near the downtown transit station, disoriented, wearing hospital scrubs, and without shoes. The patient was also wearing a bloody face mask.

Initially, the patient was cooperative, but the circumstances changed when the responders attempted to direct the patient to the inside of an ambulance for evaluation and care. The patient did not cooperate with the crew's instructions. Instead, he became combative and attempted to punch one of the responders with his fist. Once the responders were able to get the patient inside of the ambulance, he swore at them and physically resisted their attempts to restrain him by kicking and spitting at them. The six responders were able to subdue the patient after Zepeda manipulated a pressure point on the patient. Once the patient was restrained and placed in a spit hood, he was transported to a hospital.

Portions of the incident were captured on the body-worn camera of a transit police officer who was present at the scene, including Zepeda's manipulation of the patient's pressure point to cause his submission in the ambulance. Zepeda's employer reviewed the body-worn camera video footage, placed the responders on paid administrative leave, and arranged for another county to investigate the incident. The results of the investigation were presented to the Minneapolis City Attorney's office for consideration of criminal

charges. That office considered the possibility of a fifth-degree assault charge but ultimately did not file any charges.

On January 24, 2022, the city gave notice of its intent to terminate Zepeda's employment based on his use of "verbal aggression and physical force to restrain and apply pressure to the neck of the patient, prior to and after the patient was fully restrained to an ambulance stretcher." A three-day evidentiary hearing was held before an arbitrator regarding the city's attempt to terminate Zepeda's employment. The parties submitted evidence, including the body-worn camera video footage, and several witnesses testified, including Zepeda.

Zepeda testified that, in his intersections with the patient, he relied on a "use of force continuum" that he learned when he was a military police officer, which progressed from physical "presence," to "verbal commands," to "louder verbal commands." Zepeda testified that despite his use of those approaches, the patient was fighting with the responders the entire time and that he "use[d] the minimum amount of force necessary to gain compliance . . . [,] which was a pressure point technique." Zepeda also testified that he could have "gone up with strikes," but the patient was never struck and the patient was never rendered unconscious. Zepeda further testified that the patient was not "sprayed with any OC spray," a "K9" was not available to assist, and "at no point was deadly force used." In sum, Zepeda testified that there were "four more levels of force that could have been used."

Zepeda admitted that he had never been trained on the use of pressure points by the city and that his pressure-point training occurred when he was a military police officer. He also testified that the objective of pressure points is to “gain compliance.”

The arbitrator found that the city had grounds to terminate Zepeda’s employment. Zepeda appealed to the district court, which affirmed the arbitrator’s decision.

Zepeda appeals.

DECISION

Under the Minnesota Veterans Preference Act (VPA), an honorably discharged veteran may not be terminated from his or her position of public-sector employment “except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.” Minn. Stat. § 197.46(a) (2022). The Minnesota Supreme Court has interpreted incompetency or misconduct in this context as the equivalent of a “just cause” standard for discharge. *AFSCME Council 96 v. Arrowhead Reg’l Corr. Bd.*, 356 N.W.2d 295, 297-98 (Minn. 1984). The supreme court explained:

The cause [for discharge] must be one [that] specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold office.

Ekstedt v. Village of New Hope, 193 N.W.2d 821, 828 (Minn. 1972) (quotation omitted).

The necessary hearing under the VPA may be before a civil service board or commission or merit system authority, if one exists in the relevant governmental

subdivision, or before an arbitrator. Minn. Stat. § 197.46(c) (2022).¹ “In conducting a veterans preference hearing, the task of the [decision-maker] is twofold: first, to determine whether the employer has acted reasonably; second, to determine whether extenuating circumstances exist justifying a modification in the disciplinary sanction.” *In re Schrader*, 394 N.W.2d 796, 801-02 (Minn. 1986). The burden of proof is on the employer to show that “the employer acted reasonably.” *Id.* at 802. “In determining whether the employer has acted reasonably, the [decision-maker] is to be guided by such considerations as the veteran’s conduct, the effect upon the workplace and work environment, and the effect upon the veteran’s competency and fitness for the job.” *Id.*

In an appeal from the decision of a district court reviewing a decision in a case heard under the VPA, this court independently reviews the administrative decision and gives no deference to the district court. *Myers v. City of Oakdale*, 461 N.W.2d 242, 244 (Minn. App. 1990). We will sustain the decision-maker’s findings of fact if they are supported by substantial evidence. *Id.* at 244-45. We review the decision-maker’s ultimate decision for an abuse of discretion. *Id.* at 244.

“An appellate court’s scope of review of administrative decisions is narrow, and if a [] decision [under the VPA] is supported by substantial evidence on the record and not affected by errors of law, it must be sustained.” *Caldwell v. City of Minneapolis*, 486 N.W.2d 151, 155 (Minn. App. 1992), *rev. denied* (Minn. Aug. 4, 1992). “A court may

¹ The ability to hold a VPA hearing before an arbitrator replaced the option to hold it before a three-person panel. See 2016 Minn. Laws ch. 189, art. 13, § 55 (amending Minn. Stat. § 197.46 (2014)). Neither party asserts that the standards and procedures governing a hearing under the VPA are different if the hearing is before an arbitrator.

not substitute its own findings for those of the [VPA] [decision-maker].” *Pawelk v. Camden Township*, 415 N.W.2d 47, 50 (Minn. App. 1987).

I.

Zepeda contends that the arbitrator abused his discretion by failing to apply “the correct standard of proof.” Zepeda argues that because the city treated the conduct underlying his discharge as potentially criminal, the arbitrator should have required the city to prove that termination was reasonable by clear and convincing evidence or by proof beyond a reasonable doubt. Zepeda argues that although most arbitrators apply a preponderance-of-the-evidence standard to “ordinary discipline and discharge cases, in cases involving criminal conduct or other stigmatizing behavior, many arbitrators apply a higher burden of proof.” Zepeda states that the arbitrator here “ostensibly applied an incorrect preponderance-of-the-evidence standard of proof in this case.” Zepeda insists that because the case involved “potentially unlawful conduct,” it “favors at least a ‘clear-and-convincing evidence’ standard” or a “beyond-a-reasonable-doubt standard.”

The VPA does not assign a specific burden of proof to the employer at a discharge hearing. If “the legislature has not specified a standard of proof for a statutorily created cause of action, courts presume that the legislature intended the preponderance-of-the-evidence standard to apply.” *T.E.S. Const., Inc. v. Chicilo*, 784 N.W.2d 392, 397 (Minn. App. 2010), *rev. denied* (Minn. Sept. 21, 2010). Zepeda does not cite, and we are not aware of, any precedential authority requiring use of a higher burden of proof at a VPA hearing. Instead, Zepeda’s arguments are policy-based. He argues that first responders are neither trained nor armed in anticipation of situations like

the one in this case and that they are “being forced [to] deal with chaos and violence far beyond the scope of anticipated fire and medical service.”

Although Zepeda may raise a valid concern, “this court is limited in its function to correcting errors,” and “it cannot create public policy.” *LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000), *rev. denied* (Minn. May 16, 2000). We therefore do not consider whether a different burden of proof would be appropriate in certain discharge cases under the VPA based on public-policy grounds.

In sum, our function is “limited to identifying errors and then correcting them.” *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Because no authority required the arbitrator to use either of the higher burdens of proof that Zepeda requests, the arbitrator did not abuse his discretion by failing to do so.

II.

Zepeda contends that the “[a]rbitrator exceeded his authority by issuing a [d]ecision [that] was factually inconsistent, and therefore contradictory or irrational.” He argues that courts have recognized that if an arbitrator issues an award that is contradictory or irrational, “the arbitrator’s authority has been exceeded[,] making vacatur appropriate.”² An abuse of discretion occurs if a decision is inconsistent with logic and the facts in the record. See *State v. Thomas*, 891 N.W.2d 612, 618 (Minn. 2017) (quotation omitted) (stating standard in context of a district court decision).

² As support, Zepeda cites multiple cases, but none is from Minnesota’s appellate courts.

Zepeda identifies “three glaring factual inconsistencies” and claims that they “mandate vacatur.” First, Zepeda points to two of the arbitrator’s findings regarding the video recording of the events in the ambulance. On one hand, the arbitrator found that the patient “posed no serious safety risk to the crew during this critical 22 second portion of the video or at any time after that” and that “it was clear that this patient was in no position to inflict harm on the crew.” On the other hand, the arbitrator found that “[d]uring the most critical 20 seconds of this video the crew was furiously working to restrain a combative patient who was screaming, spitting[,] and doing all [that] he could to counteract the crew’s efforts.” We do not view the arbitrator’s findings as factually inconsistent. Despite the patient’s physically combative behavior in the ambulance, the video supports the arbitrator’s statement that the patient was, nonetheless, not in a position to inflict harm on the responders at that point.

Second, Zepeda points to the arbitrator’s findings regarding whether the patient lost consciousness because of Zepeda’s actions. On one hand, the arbitrator found that he was “in no position to conclude one way or another” whether the patient lost consciousness. On the other hand, the arbitrator found that the video showed that during Zepeda’s attempt to subdue the patient in the ambulance, the patient’s “head goes limp[,] and he goes silent.” The arbitrator also found that the testimony of one of the responders suggested that “Zepeda was cutting off or at least squeezing one [of the patient’s] carotid arter[ies].”

The arbitrator was referring to the testimony of one of the paramedics who was in the ambulance. That paramedic testified that it is “scientifically impossible to choke someone out by occluding one carotid artery. You have to occlude both carotid arteries for

someone to lose consciousness from a choking.” The arbitrator noted that he was “in no position to know if that is indeed correct,” but that the testimony suggested that Zepeda’s actions interfered with *one* of the patient’s carotid arteries. As the arbitrator explained, “[W]hy else would [the witness] make that comment?” Contrary to Zepeda’s assertion, the arbitrator’s finding that he could not determine whether the patient lost consciousness is not inconsistent with the arbitrator’s statements regarding what he viewed on the video or his interpretation of the witness’s testimony.

Third, Zepeda points to an alleged inconsistency regarding whether he can be discharged based on conduct resulting from a lack of training. On one hand, the arbitrator found that “[t]he record showed a glaring lack of training for these workers related to dealing with patients with behavior issues” and “a lack of recent training prior to the time of the incident on the topics such as use of force, restraint, and de-escalation.” Zepeda therefore argues that “[a] finding of just-cause is negated . . . by the lack of notice to [Zepeda] that his actions might result in discipline, as evidenced by the acknowledged absence of an applicable policy and by the documented training deficiencies.”

But the arbitrator logically explained why just cause exists in this case despite the lack of training, reasoning that although “there may not be a specific policy to follow as Zepeda suggests there should be, there is sufficient documentation to establish that Zepeda’s conduct was not acceptable.” The arbitrator reasoned that “the rest of the crew, having received the same level of training, knew not to interact with the patient as Zepeda did,” that Zepeda’s behavior on the video “reflects someone who did not control their anger rather than someone who did not know better,” and that “supporting documentation” is not

necessary to establish that behaviors such as “yelling, taunting, belittling and physically abusing a patient” are prohibited and could be considered misconduct.

In sum, we do not discern any material inconsistencies in the arbitrator’s findings or any logical disconnect between those findings and the arbitrator’s ultimate decision.

III.

Zepeda contends that the arbitrator failed to acknowledge evidence of mitigating circumstances and thereby abused his discretion. The decision-maker’s task at a VPA hearing includes determining “whether extenuating circumstances exist justifying a modification in the disciplinary sanction.” *Schrader*, 394 N.W.2d at 801-02. Zepeda complains that the arbitrator ignored the following mitigating circumstances: (1) he was forthright about his conduct and cooperated with the city’s investigation, (2) he was a longtime employee of distinguished service and a 32-year veteran of the armed forces, and (3) he was the victim of “disparate treatment” within the department. Zepeda also noted that he was neither charged with nor convicted of a crime based on his conduct.

The arbitrator thoroughly explained why just cause for termination existed even though Zepeda had not been charged with or convicted of a crime. The arbitrator acknowledged Zepeda’s assertions that he was a veteran with “over 14 and a half years of service in the St. Paul Fire department,” that he had “received a long list of commendations for his work,” and that he had “frequently participated in various charitable activities on behalf of the department making him a very valuable asset to the department.” However, the arbitrator also noted that Zepeda had an “aggravated history of misconduct.” Specifically, Zepeda was previously discharged under circumstances that led the arbitrator

in that case to find that his conduct “was reprehensible, immoral[,] and rose to the level of incompetency and misconduct under the VPA.”³ Nonetheless, Zepeda’s previous discharge was mitigated to a demotion, based in part on his lack of prior disciplinary action. The city argues that the fact that Zepeda engaged in misconduct after a previous demotion supports a finding of just cause.

Although the arbitrator referenced the mitigating and aggravating circumstances when summarizing each party’s position, the arbitrator did not expressly mention them in his discussion and analysis. But given Zepeda’s prior disciplinary history, we cannot say that the arbitrator’s failure to expressly discuss Zepeda’s work and disciplinary history was an abuse of discretion. Instead, the record reflects an implicit determination that mitigating circumstances did not warrant another modification in the disciplinary sanction imposed by the city.

IV.

Zepeda generally suggests that the factual findings supporting the arbitrator’s decision are not supported by substantial evidence. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 180 N.W.2d 175, 178 (Minn. 1970) (quotation omitted). When reviewing a decision under the VPA, “[c]onflicts in the testimony and the weight to be given facts and circumstances as well as

³ According to the city, Zepeda was initially terminated from employment by the St. Paul Fire Department in 2018 “following an incident in which he had sexual relations on a fire truck within his fire station.”

the inferences reasonably to be drawn therefrom are matters to be resolved by the [administrative decision-maker], not the courts.” *State ex rel. Jensen v. Civ. Serv. Comm’n*, 130 N.W.2d 143, 146 (Minn. 1964).

Although the evidence was conflicting, the arbitrator was entrusted to resolve those conflicts and to weigh the evidence. *See id.* We discern no error in the arbitrator’s resolution of the conflicting evidence. The arbitrator acknowledged that his decision was inconsistent with the testimony of the responders who were present in the ambulance with Zepeda and explained why he rejected that testimony:

During the most critical 20 seconds of this video[,] the crew was furiously working to restrain a combative patient who was screaming, spitting[,] and doing all he could to counteract the crew’s efforts. Each crew member was focused on their assignment in this team effort to control the combative patient. It is not hard to understand under these circumstances that the specific details of the actions of their coworker [Zepeda], which had occurred weeks prior, might be hard to accurately recall. Conversely, I had the opportunity to painstakingly review a video over and over until I had a full grasp of what exactly happened. I was not hampered by the speed at which things occurred as I could continually replay the video. Also, I was not distracted by having to focus on anything other than the actions of [] Zepeda. Given all these advantages[,] I believe my accounting of what happened is more accurate than the facts recalled by the staff during their testimony.

The arbitrator provided examples of testimony from the other responders that was “blatantly refuted by the video.” Based on the video, the arbitrator concluded that “Zepeda’s actions were clearly wrong and needed to be addressed.” The arbitrator also relied on several documents describing the policies that govern the provision of emergency

medical services. Those policies include not positioning “a patient in such a way that could impact the patient’s respiratory or circulatory status.”

This record provides substantial support for the arbitrator’s findings, which in turn support the arbitrator’s determination that the city had just cause to terminate Zepeda’s employment.

Affirmed.