

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000553-001 DT

07/29/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
T. Melius
Deputy

PUBLIC SAFETY PERSONNEL RETIREMENT SYSTEM PAIGE A MARTIN

v.

TEMPE POLICE PUBLIC SAFETY
PERSONNEL RETIREMENT BOARD (001)
KATHRINE A WELKER (001)

CYNTHIA K KELLEY
DALE F NORRIS

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

The Public Safety Personnel Retirement System asks this Court to review the December 10, 2009, order of the Tempe Police Public Safety Retirement Board granting Kathrine Welker a Killed in the Line of Duty pension. For the following reasons, this Court affirms the order of the Tempe Police Public Safety Retirement Board.

I. FACTUAL BACKGROUND.

Russell E. Welker was an Officer with the Tempe Police Department assigned to the Auto Theft Task Force. On March 21, 2006, as part of his duties, he injured his back lifting an engine. As a result, he was in considerable pain, and had three back surgeries in an attempt to relieve that pain. He was cleared to return to work in June 2007, but continued to have severe back pain. After the third surgery, he was prescribed Neurotin. On May 12, 2009, he saw his pain specialist and received an epidural injection as was prescribed Hydrocodone and Neurotin. On May 15, 2009, he was still in severe pain, so he went to Nextcare/Urgent Care and was prescribed Oxycodone. He began taking the Oxycodone on May 16, in the morning and the evening. He went to bed that night, and about 2:30 a.m. on May 17, Kathrine awoke and discovered her husband was cold to the touch. She called 9-1-1 and emergency personnel arrived but were unable to revive him. They pronounced Russell Welker dead at 2:47 a.m. The autopsy report identified the cause of death as "combined toxicity of multiple drugs."

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On November 4, 2009, Kathrine applied for Killed in the Line of Duty benefits. At its December 10, 2009, meeting, the Tempe Police Public Safety Retirement Board (the Board) granted Kathrine's application and ordered that she receive a Killed in the Line of Duty pension. The Public Safety Personnel Retirement System (the System) filed a timely motion for rehearing. At its June 10, 2010, meeting, the Board denied the System's motion for rehearing and affirmed its order granting Kathrine a Killed in the Line of Duty pension. On July 16, 2010, the System filed a Complaint for Review of Administrative Decision. This Court has jurisdiction pursuant to A.R.S. § 12-124(A) and A.R.S. § 12-905(A).

II. GENERAL STANDARDS FOR REVIEW:

The Arizona statutory authority and case law define the scope of administrative review as follows:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12-910(E).

In reviewing an administrative agency's decision, the superior court examines whether the agency's action was arbitrary, capricious, or an abuse of discretion. The court must defer to the agency's factual findings and affirm them if supported by substantial evidence. If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.

Gaveck v. Arizona St. Bd. of Podiatry Exam., 222 Ariz. 433, 215 P.3d 1114, ¶ 11 (Ct. App. 2009) (citations omitted).

[I]n ruling on the sufficiency of the evidence in administrative proceedings, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members.

Croft v. Arizona St. Bd. of Dental Exam., 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (Ct. App. 1988).

A trial court may not function as a "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.

DeGroot v. Arizona Racing Comm'n, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (Ct. App. 1984). The reviewing court must view the evidence in a light most favorable to upholding the agency's decision and affirm that decision if it is supported by any reasonable interpretation of the record. *Baca v. Arizona D.E.S.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998). While the

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reviewing court is not bound by the agency's conclusions of law or statutory interpretations, an agency's interpretation of statutes or regulations that it implements is entitled to great weight. *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (Ct. App. 1991); *Baca v. Arizona D.E.S.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998).

However, the agency's interpretation is not infallible, and courts must remain final authority on critical questions of statutory construction.

U.S. Parking Systems v. City of Phoenix, 160 Ariz. 210, 211, 772 P.2d 33, 34 (Ct. App. 1989).

III. ISSUE: WAS THE ACTION OF THE BOARD SUPPORTED BY SUBSTANTIAL EVIDENCE, AND WAS IT CONTRARY TO LAW, ARBITRARY AND CAPRICIOUS, OR AN ABUSE OF DISCRETION.

Plaintiff asks this Court to reverse the order of the Board and remand this matter with instructions to award Kathrine a pension for a spouse who was not killed in the line of duty. Both sides are in substantial agreements with the facts of this case. Both sides also agree that the Board used the proper legal test to determine whether Russell was killed in the line of duty. The System contends the Board misapplied the proper legal test, while the Board and Kathrine contend the Board correctly applied the proper test. This Court has review the record in this matter and concludes the Board correctly applied the proper test.

In its Answer filed October 1, 2010, the Board asks this Court to award to the Board the costs it incurred in this action, and in her Answer filed October 3, 2010, Kathrine asks this Court to award to her attorneys' fees and costs she incurred in this action. This Court concludes those requests are appropriate.

IV. CONCLUSION.

Based on the foregoing, this Court concludes the Board made the proper decision and that the Board and Kathrine are entitled to costs and attorneys' fees as discussed above.

IT IS THEREFORE ORDERED affirming the order of the Board awarding Kathrine a Killed in the Line of Duty pension.

IT IS FURTHER ORDERED remanding this matter to the Board.

IT IS FURTHER ORDERED that, by **August 18, 2011**, either Cynthia Kelley or Dale Norris (or both), as attorneys for the Board and Kathrine, shall lodge with this Court a proposed form of judgment for this Court's signature.

IT IS FURTHER ORDERED that, if either the Board or Kathrine wish this Court to award costs and attorneys' fees as discussed above, they shall include in the proposed form of judgment a place for this Court to do so, and shall submit to this Court documentation supporting any request.

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