TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00355-CV

Blair B. McCall, Appellant

v.

Hays County Constable Precinct Three, Appellee

FROM THE 261ST DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-16-005619, THE HONORABLE DARLENE BYRNE, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

In this appeal, Blair McCall, a licensed peace officer, seeks judicial review of the Decision and Order (Order) of the Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH) on his petition to correct his "general discharge"—as stated in the employment termination report (the F-5 Report)—to an "honorable discharge" from his position as a volunteer reserve deputy with the Hays County Constable Precinct Three (Constable). *See* Tex. Occ. Code §§ 1701.452 (requiring employment termination report stating whether license holder was "honorably discharged, generally discharged, or dishonorably discharged" for licensed person who is terminated or separated from law enforcement agency), .4525 (providing petition process for contesting information contained in employment termination report); 37 Tex. Admin. Code § 217.8 (Tex. Comm'n on Law Enforcement, Contesting an Employment Termination Report) (same). Following a hearing (the F-5 Hearing),

the ALJ concluded in the Order that the Constable had established by a preponderance of evidence that McCall's termination was appropriately categorized as a "general discharge" and should not be changed to "honorable discharge," and the district court affirmed. *See* Tex. Occ. Code § 1701.4525(d) (providing that proceeding to contest information in employment termination report is contested case under chapter 2001 of Texas Government Code), (e) (setting preponderance of evidence burden); Tex. Gov't Code § 2001.171 (providing for judicial review). For the following reasons, we also affirm.

BACKGROUND[1]

This appeal arises out of McCall's September 14, 2015 petition to correct his "general discharge," as stated on the Constable's F-5 Report filed with the Texas Commission on Law Enforcement (the Commission), to "honorable discharge." *See generally* Tex. Occ. Code §§ 1701.452 (describing "[g]enerally discharged" as separation related to disciplinary investigation of conduct not included in definition of dishonorably discharged or documented performance problem and "[h]onorably discharged" as separation while in good standing and not because of disciplinary actions or documented performance problem), .4525 (providing for petition and hearing for correction of report); 37 Tex. Admin. Code § 217.8. After McCall filed his petition, the Commission referred it to SOAH for a hearing. *See* Tex. Occ. Code § 1701.4525(a); 37 Tex. Admin. Code § 217.8(c). The SOAH ALJ conducted the F-5 Hearing on June 13, 2016. At the F-5 Hearing, the Constable presented three witnesses: McCall,

[1] Because the parties are familiar with the facts of the case and its procedural history, we recite them only as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

Constable Darrell Ayres, and Chief Deputy Ray Helm. McCall was the only witness who testified on his behalf. The relevant evidence from the F-5 Hearing showed as follows.

McCall began working with the Constable on April 14, 2015, as a volunteer reserve officer. On August 24, 2015, the Constable issued the F-5 Report stating that McCall was separated as of that date and received a general discharge. At the time of his separation, McCall was still within his 180-day probation period, having only worked for the Constable for approximately four months.[2] The evidence at the hearing showed that a dinner at a certain restaurant on July 5, 2015, with McCall's fiancée Vivian Sanchez and his parents David and Pam triggered the events that led to his termination.

McCall had been dating Sanchez since February 2014, when Sanchez was 18. In March or April 2015, she and McCall began living together. McCall was then 26 and Sanchez 19, and they were engaged to be married in August 2016. McCall had been going to the same restaurant with his family most Sunday evenings "for years," and Sanchez would accompany them. McCall testified that Sanchez would "[n]ot always" have alcohol at the dinners, but he "assume[d] that most times she did," and she would "go up to the bar and get it herself, order it at the table." He also explained that he believed his mother Pam had authority to let Sanchez drink alcohol under the doctrine of in loco parentis and therefore he never objected to her drinking in his mother's presence. But when asked if he provided alcohol to Sanchez outside of his mother's presence, he invoked his Fifth Amendment privilege and declined to answer.

[2] Under Hays County Policy 2.17, "[t]he first 180 days of employment with Hays County is considered a probation period both for new employees and rehires," and "[i]f at any time during this period, the employee is unable to adapt successfully to the requirements of the position, the department or Hays County, employment will be terminated immediately."

McCall testified that on July 5, he did not see Sanchez drinking alcohol during the meal, but he realized when they walked out of the restaurant to get in his truck and go home that "she must've had a lot to drink." When asked what occurred after Sanchez and McCall got home, McCall stated that he was "gonna take the Fifth Amendment on anything related to the criminal case" and that "[a]nything related from the time that we left [the restaurant] to the time of July the 9th when I was contacted, I'm not gonna answer any questions about that." McCall testified that on July 9 Detective Mark Opiela called him, identified himself as a detective with the Hays County Sheriff's Office, and wanted to talk about something that had happened at McCall's house. But "Detective Opiela gave [McCall] no reason to believe [he was] under investigation at that time" and never mentioned him as being a suspect in any crime. Nevertheless, McCall told Detective Opiela that "you have to talk to my attorney." McCall then called his lawyer but admitted that he did not immediately call the Constable.

Deputy Helm testified that he received a call from Constable Ayers on July 10. According to Deputy Helm, Constable Ayers said he had learned from Detective Opiela that McCall was being investigated for assault/family violence and asked Deputy Helm to call McCall. Deputy Helm made three calls to McCall that day. Although Deputy Helm testified that Detective Opiela had told him that he waited 24 hours from the time he contacted McCall to contact the Constable's office, McCall claimed that Deputy Helm's initial call to him occurred only two to three hours after Detective Opiela called McCall on July 9.[3]

[3] McCall produced his cell phone records that showed incoming calls received on July 9, but the phone records listed the call as coming from McCall's own cell phone number, not from the Constable's office. McCall explained that he had "add[ed] an iPad to a data blend" with his cell phone account so that when he receives a call "it shows up as [McCall's] telephone number."

In Deputy Helm's initial call to McCall, McCall told him that he was being investigated for assault/family violence but that "it's gonna get cleaned up." Deputy Helm then said he would talk with Detective Opiela. Detective Opiela told Deputy Helm that Sanchez had filed a complaint for assault/family violence a day or two after the July 5 dinner. Realizing it was a serious matter, Deputy Helm called Constable Ayers, and they concluded that McCall should be placed on administrative leave and return his ID and badge until the issue was cleared. Deputy Helm then called McCall a second time that day and said that he had received "a call from Detective Mark Opiela with the Sheriff's Office investigating -- you're a suspect in an assault and so until everything is cleared up we're gonna have to put you on administrative leave" and that "[w]e're gonna be looking into the -- the policy and procedure manuals and stay in contact with me." Deputy Helm testified that he asked McCall to bring his ID and badge back at that time and that McCall said he would bring them in that week. McCall claimed he did not recall being asked to turn in his equipment prior to his termination on August 24. Deputy Helm testified that he asked McCall for the equipment two or three times from then to the separation, but it was never returned until August 25.

After returning home from the office on July 10, Deputy Helm again called McCall to see what happened. Deputy Helm testified that McCall told him that Sanchez got intoxicated at the July 5 dinner at the restaurant; that after he and Sanchez returned home, they got into an altercation where she fell and hit her head on the truck; that she then barricaded herself in the house and Pam McCall tried to give her some alcohol to calm her down; and that someone in a vehicle arrived and Sanchez got in the vehicle and went away. McCall also testified that Sanchez left the house because he broke up with her, kicked her out, and said "[p]ack your shit and leave." Later that week, Deputy Helm and Constable Ayers were

discussing Deputy Helm's phone call with McCall when Constable Ayers raised the point that Sanchez is "under age." Constable Ayers reached out to Sanchez, and Sanchez confirmed that "she was intoxicated on that [July 5] night and, in fact, on several occasions [McCall] had furnished her alcohol."

In late August, Deputy Helm had another conversation with Detective Opiela in which Detective Opiela told him that assault/family violence charges were being filed against McCall and that his arrest was imminent. Constable Ayers and Deputy Helm met and considered what to do. Deputy Helm said, "Well, we do have some policy violations" and that they should look through the F-5 and separate McCall "if all of this is -- is getting stacked up." Constable Ayers testified that the basis for the decision was that "there were several policy violations," including McCall "allowing or [] not interfering . . . with a minor being in possession of alcohol and a minor consuming of alcohol" and McCall not returning his equipment when Deputy Helm had requested. Because of the policy violations, Constable Ayers and Deputy Helm concluded that "a general discharge was appropriate," rather than an honorable discharge.

On August 24, Deputy Helm called McCall and told him that he was being let go with a general discharge. On August 25, Deputy Helm asked McCall to come in because he needed to give him the F-5 Report. McCall texted him back and said he had returned all the equipment. Helm then responded that he would fax or mail the F-5 Report to McCall, which he did. Deputy Helm also prepared another report summarizing his investigation of the matter and identifying the ways McCall violated the rules of conduct applicable to all peace officers employed by the Constable (the Department Guidelines), including not immediately disclosing to the Constable's office that Detective Opiela had contacted him and furnishing or allowing others to furnish alcohol to Sanchez.

After the F-5 Hearing, the ALJ concluded that "the F-5 Report should not be changed" because:

> By providing Ms. Sanchez with alcohol and failing to prevent others from providing her with alcohol, Mr. McCall: (1) failed to abide by all laws, in violation of Department Guideline 2.1; and (2) failed to comply with "reasonable rules of good conduct and behavior" and engaged in acts "tending to bring reproach or discredit upon" himself and the Constable, in violation of Department Guideline 3.1. Moreover, by refusing to disclose the facts of the night of July 5, 2015, to Detective Opiela, he failed to report all crimes and concealed the facts of such crimes, in violation of Department Guideline 4.12.

McCall appealed the Order, and the district court affirmed. McCall now appeals to this Court.

STANDARD OF REVIEW

Our review of the ALJ's Order is a substantial evidence review governed by section 2001.174 of the Texas Administrative Procedure Act. *See* Tex. Occ. Code § 1701.4525(d) (providing that proceeding to contest information in employment termination report is contested case under chapter 2001, Texas Government Code); Tex. Gov't Code § 2001.174 (setting forth substantial evidence review standard); *see also Stacks v. Burnet Cty. Sheriff's Office*, 565 S.W.3d 860, 865 (Tex. App.—Austin 2018, no pet.) (applying substantial evidence standard of review); *City of Rice v. Texas Comm'n on Law Enf't Officer Standards & Educ.*, No. 03-11-00047-CV, 2013 WL 3186194, at *2 (Tex. App.—Austin June 21, 2013, no pet.) (mem. op.) (describing substantial evidence review). This standard requires that we reverse or remand a case for further proceedings "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" were made through unlawful procedure; are affected by other error of law; are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

are arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, among other things. Tex. Gov't Code § 2001.174(2). We presume that the administrative decision is valid and supported by substantial evidence, and the complaining party bears the burden of showing otherwise. *City of Rice*, 2013 WL 3186194, at *2 (citing *Sanchez v. Texas State Bd. of Med. Exam'rs*, 229 S.W.3d 498, 510 (Tex. App.—Austin 2007, no pet.)). In reviewing the decision, we are concerned with the reasonableness of the administrative order, not its correctness. *Id.* (citing *State v. Public Util. Comm'n*, 883 S.W.2d 190, 203 (Tex. 1994)). With this standard in mind, we turn to the parties' dispute.

DISCUSSION

On appeal, McCall raises eight issues. In his first four issues, McCall asserts that the ALJ and the district court should have considered the Constable's alleged violations of chapter 614 of the Texas Government Code, which set forth procedures for a termination based on a complaint. In his fifth issue, McCall complains that the Constable raised additional grounds for McCall's general discharge at the F-5 Hearing, other than the original two grounds initially provided to McCall. In his sixth issue, McCall challenges the ALJ's reliance on hearsay evidence. In his seventh issue, McCall argues that his mother was acting in loco parentis to Sanchez, and therefore there was no violation of section 106.06 of the Texas Alcoholic Beverage Code. In his final issue, McCall raises a substantial evidence challenge to the ALJ's findings of fact.

Although the Constable raised multiple grounds for the general discharge, we consider only the ground that we conclude is dispositive: that McCall, in violation of the Department Guidelines, either provided or failed to prevent others in his presence from providing

alcoholic beverages to his girlfriend Sanchez, who was under twenty-one years old.[4] *See* Tex. R. App. P. 47.1, 47.4. We begin with the legal question of whether the doctrine of in loco parentis permitted McCall's mother to authorize Sanchez's drinking when McCall's mother was present. We then turn to McCall's substantial evidence challenge and consider whether substantial evidence supports the ALJ's finding. Finally, we consider McCall's issues related to chapter 614 of the Texas Government Code.

In Loco Parentis

Under section 106.06 of the Texas Alcoholic Beverage Code, a person commits a misdemeanor offense if that person "purchases an alcoholic beverage for or gives . . . an alcoholic beverage to a minor," statutorily defined as a person under 21 years of age. Tex. Alco. Bev. Code §§ 106.01, .06(a), (c). However, a person may provide alcohol to a minor if that person is "the minor's adult parent, guardian, or spouse, or an adult in whose custody the minor has been committed by a court, and is visibly present when the minor possesses or consumes the alcoholic beverage." *Id.* § 106.06(b)(1).

At the hearing, McCall admitted that his mother Pam McCall is not related to Sanchez as her natural or adopted mother, a guardian appointed by a court of law, or an adult in whose custody Sanchez has been committed by a court. Nevertheless, in his briefing and at the

[4] The other grounds raised at the hearing include McCall's failures (1) to promptly report the alleged assault on Sanchez, (2) to report contacts with law enforcement officers, and (3) to bring in his equipment when requested. Because we do not consider these other grounds, we do not address McCall's fifth issue that concerned the addition of new grounds at the hearing. McCall also asserts in his fifth issue that the Constable should have identified the ground that he "furnished Sanchez alcohol on multiple other occasions" than July 5, 2015. McCall's concern as to this ground in his fifth issue, however, is that chapter 614 of the Texas Government Code required disclosure of this ground in a particular manner to McCall. But, as discussed below, chapter 614 does not apply to this specific ground.

hearing, McCall argued that his mother has the same rights as Sanchez's "adult parent[s]" for purposes of section 106.06 due to the doctrine of in loco parentis. McCall testified that the doctrine applies because his mother provided a place for Sanchez to live; assisted her with doctor visits, driving lessons, food, clothing, and education; was referred to as "Mom" in public by Sanchez; was the confidante for Sanchez's confidential medical information; and attended Sanchez's medical examinations with her. Thus, McCall contended that because McCall's mother was present at the dinners where alcohol was provided to Sanchez, no violation of the Texas Alcoholic Beverage Code occurred. The ALJ, however, concluded that "[t]he common law doctrine of in loco parentis is not relevant to the determination of who may legally provide alcohol to a person younger than 21."

"In loco parentis" means "in the place of the parent," and the doctrine "generally refers to a person in the role of a parent who assumes the obligations incident to the parental relationship, though without the formality of a legal adoption." *McCullough v. Godwin*, 214 S.W.3d 793, 807 (Tex. App.—Tyler 2007, no pet.). The doctrine has had a long life and been applied in various common law and statutory contexts. *See, e.g.*, Tex. Penal Code § 9.61(a) (providing justification defense for actor in loco parentis to child who uses non-deadly force against child younger than 18 years); *Schrimpf v. Settegast*, 36 Tex. 296, 302–03 (1872) (explaining in loco parentis doctrine); *Cunningham v. Ansorena-Cunningham*, No. 03-08-00493-CV, 2009 WL 2902718, at *3 n.2 (Tex. App.—Austin Aug. 26, 2009, no pet.) (mem. op.) (citing cases applying doctrine in various contexts). But McCall does not cite any

authority—nor have we found any—applying the doctrine to section 106.06 of the Texas Alcoholic Beverage Code.[5]

Even if the doctrine did apply to section 106.06, McCall's mother would not be in loco parentis to Sanchez given the facts here. In Texas, "[t]he duty of a parent to support his or her child exists while the child is an unemancipated minor and continues as long as the child is fully enrolled in a secondary school in a program leading toward a high school diploma." Tex. Fam. Code § 151.001(b). For purposes of the Texas Family Code, "minor" is generally defined as a person under eighteen years old. *Id.* § 101.003(a). It is undisputed that Sanchez was eighteen or older at all relevant times and no longer enrolled in a secondary school—in fact, McCall testified that they did not start dating until Sanchez was eighteen and that his mother was helping her with paying for college courses. All acts committed by McCall's mother that McCall construes as assuming the parental obligations occurred after any parental duty to support Sanchez had expired. Accordingly, McCall's mother did not assume any parental obligations, duties, or responsibilities under law towards Sanchez. On this record, no in loco parentis relationship could have existed between Sanchez and McCall's mother. *See Coons-Andersen v. Andersen*, 104 S.W.3d 630, 635 (Tex. App.—Dallas 2003, no pet.) ("The in loco parentis relationship arises when a non-parent *assumes the duties and responsibilities of a parent* and normally occurs when the parent is unable or unwilling to care for the child." (emphasis added)). We overrule McCall's seventh issue.

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[5] In the context of the Texas Wrongful Death statute, which provides a cause of action "for the exclusive benefit of the surviving spouse, children, and parents of the deceased," Tex. Civ. Prac. & Rem. Code § 71.004(a), Texas courts have consistently held that the statutory word "parents" does not incorporate a person standing in loco parentis for purposes of a wrongful death action. *See, e.g.*¸ *Davis v. Bills*, 444 S.W.3d 752, 758 (Tex. App.—El Paso 2014, no pet.); *Robinson v. Chiarello*, 806 S.W.2d 304, 310 (Tex. App.—Fort Worth 1991, writ denied); *Taylor v. Parr*, 678 S.W.2d 527, 529 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)).

Substantial Evidence Challenge

Having concluded that the doctrine of in loco parentis does not apply here, we turn to McCall's substantial evidence challenge. In the Order, the ALJ made the following relevant findings of fact:

> 11. Mr. McCall was aware of Ms. Sanchez's age, and that she was not of legal age to drink alcohol.
>
> 12. Over the period of several months, it was a regular practice for Mr. McCall, his parents David and Pam McCall, and Ms. Sanchez to eat out on Sunday evenings, typically at [a certain] restaurant in Austin, Texas.
>
> 13. During these dinners, Ms. Sanchez would often drink alcohol in the presence of Mr. McCall and his parents. The alcohol would variously be provided to Ms. Sanchez by Mr. McCall and his parents. Mr. McCall never intervened to prevent Ms. Sanchez from drinking alcohol at these dinners.
>
> 14. On Sunday, July 5, 2015, Mr. McCall, his parents, and Ms. Sanchez were at their usual Sunday dinner at [the restaurant]. Mr. McCall and/or his parents provided enough alcohol to Ms. Sanchez that she became drunk.
>
> 21. Sometime after July 10, Mr. McCall informed the Constable that Ms. Sanchez had gotten drunk during their July 5, 2015 dinner and then the two of them had gotten into a fight. The Constable also learned that Ms. Sanchez had been below the legal drinking age at the time.
>
> 22. By providing Ms. Sanchez with alcohol on multiple occasions, and by failing to prevent others from providing her with alcohol on multiple occasions, Mr. McCall: (1) failed to abide by all laws, in violation of [the Department Guidelines], specifically Department Guideline 2.1; and (2) failed to comply with "reasonable rules of good conduct and behavior" and engaged in acts "tending to bring reproach or discredit upon" himself and the Constable, in violation of Department Guideline 3.1.[6]

[6] Relevant Department Guidelines were admitted into evidence at the hearing. Department Guidelines 2.1 and 3.1 state, respectively, "Members of this Department shall abide by the Laws of the United States and the State of Texas and the general orders and rules of conduct of the Constable Department, Precinct No. 3," and "Members of this Department, whether on or off duty, shall be governed by the ordinary and reasonable rules of good conduct and behavior, and shall not commit any act tending to bring reproach or discredit upon themselves or the Department."

> 25. The Constable terminated Mr. McCall's employment because he violated multiple Department Guidelines.

From these findings of fact, the ALJ concluded, "The Constable proved that Mr. McCall's termination is appropriately categorized as a general discharge," and, "The F-5 Report for Mr. McCall should not be changed."

The statute defines "[g]enerally discharged" to mean, as relevant here, "a license holder who" "was terminated by . . . a law enforcement agency and the separation was related to a disciplinary investigation of conduct that is not included in the definition of dishonorably discharged." Tex. Occ. Code § 1701.452(b)(2)(A). At the F-5 Hearing, Constable Ayers testified that "[t]he basis for the [termination] decision was there were several policy violations," including McCall "allowing or of not interfering with a inter- -- intervening with a minor being in possession of alcohol and a minor consuming of alcohol, which is a violation of the Texas Alcoholic Code." He explained when the concern arose:

> In Deputy Helms' conversation with [McCall], [McCall] had said that [Sanchez] was intoxicated. In my looking into the policy and procedure, I called her to find out if, indeed she was intoxicated. She did not want to talk to me initially and it took some convincing to get her to talk to me because she thought I was there to side with [McCall] against her in a criminal case. I told Ms. Sanchez, "I am not here to investigate that criminal case. I have nothing to do with that." I just wanted to know if she was intoxicated and, in fact, who furnished her the alcohol.

In his call with Sanchez, Constable Ayers explained that Sanchez "said that she was intoxicated on that night and, in fact, on several occasions [McCall] had furnished her alcohol." Finally, Constable Ayers testified:

> We did not investigate her complaint about an assault other than the fact that I wanted to know if there was -- based on the testimony from [McCall] she was intoxicated that night. My issue was that if she -- she was a minor, knowing she

> was a minor, how did she get the alcohol and was it furnished to her? And that was the only -- and that came from the conversation that Deputy Helm had with [McCall]. That's what sparked my interest in the alcohol.

McCall objected to the admission of Constable Ayers's testimony about Sanchez's comments as hearsay. The ALJ admitted the evidence of those statements not for the truth of the matter, but to show that McCall's termination was related to "a disciplinary investigation of conduct that is not included in the definition of dishonorably discharged."[7] Tex. Occ. Code § 1701.452(b)(2)(A). Thus, Constable Ayers's testimony provided evidence that the termination was based on a disciplinary investigation of misconduct related to McCall either providing or failing to prevent others from providing alcohol to Sanchez. We must now determine whether substantial evidence supported the ALJ's findings of fact and conclusion that the Constable met its burden to demonstrate by a preponderance of the evidence that this misconduct occurred. *See id.* § 1701.4525(e); 37 Tex. Admin. Code § 217.8(d)–(e).

McCall claims that the ALJ improperly relied upon Constable Ayers's hearsay testimony that was not admitted for the truth of the matter. However, although McCall objected to Constable Ayers's hearsay testimony, McCall did not object to Deputy Helm's earlier testimony at the hearing that "[Sanchez] said that -- she told us that Blair and his mother had given her the alcohol; furnished it to her" on July 5. Deputy Helm explained:

> Well, Constable Ayers had come in and we had visited about the -- what had happened and I told him what -- what [McCall] -- me and [McCall] talked about

[7] Following the objection, the Constable's counsel explained, "Your Honor, it's the basis of -- of his decision ultimately. This is an employment case. The basis of [Constable Ayer's] decision to give a general discharge is based on what he heard. Now they can object that it can't come in for the truth of the matter asserted but it's certainly a reasonable basis for him to consider in making the ultimate decision." The ALJ clarified that "you're saying it wouldn't be for the truth of the matter asserted but it would be to justify his actions," and then overruled the objection.

> and he said, "Well, [Sanchez]'s under-age." And I said, "She is?" And he goes, "Yeah." I said, "I didn't even think about that." So he had made contact with [Sanchez] to see what had happened -- Vivian Sanchez -- what had happened and she said that [McCall] and -- and his mother had bought her drinks that [July 5] night and she was -- she got intoxicated and went home and the assault happened. So we went off of what she told me. I went off what [McCall] had told me; that she had been drinking. So that tells me obviously he knows about it. I went -- started the investigation into our policies and -- and as we slowly went through each and every one of them and when we came to the conclusion of what we were gonna do and he was still under his 180 days of probation. We decided to go ahead and -- and F5 him on the general --

Deputy Helm also testified that McCall told him that after "[he] and his family had went to a restaurant and his girlfriend or fiancé[e] was intoxicated," they returned home and "[Sanchez] had barricaded herself in the house and they -- he said his mother tried to give her some more alcohol to calm her down."

Because McCall failed to object to this earlier testimony from Deputy Helm, there is probative evidence that McCall provided Sanchez with alcohol and failed to prevent his mother from providing Sanchez with alcohol both on July 5 and at other times. *See* Tex. R. Evid. 802 ("Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay."); *Los Fresnos Consol. Indep. Sch. Dist. v. Vazquez*, 481 S.W.3d 742, 745 (Tex. App.—Austin 2015, pet. denied) (considering hearsay evidence in substantial evidence review and noting that "[t]he current Texas Rules of Evidence contemplate that hearsay is evidence but reflect the policy that hearsay is generally not reliable enough to be admitted as evidence in proceedings to which the Rules apply"). And as to what McCall said, even if there were a hearsay objection, his testimony would be exempt from the hearsay definition as an admission of a party opponent. *See* Tex. R. Evid. 801(e)(2)(A); *TXI Transp. Co. v. Hughes*,

306 S.W.3d 230, 241 (Tex. 2010) ("Rule 801(e)(2)(A) provides that a party admission is not hearsay."). We therefore overrule McCall's sixth issue regarding hearsay.

Additionally, McCall's own testimony provides further direct and circumstantial evidence that he failed to prevent others from providing Sanchez with alcohol. *See In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (orig. proceeding) (clarifying that circumstantial evidence "is simply indirect evidence that creates an inference to establish a central fact"). McCall testified that Sanchez would get alcohol at the bar or order it at the table when he and his family were at the restaurant they frequently visited:

> Q: Whenever Ms. Sanchez went with your family to [that restaurant] she drank alcohol, didn't she?
>
> A: I would assume that most times she did. She'd go up to the bar and get it herself, order it at the table, do whatever she wants. . . .

McCall explained that he told the wait staff at the restaurant that Pam McCall was Sanchez's mother, that he believed "Pam McCall could authorize Ms. Sanchez to drink," and that is the reason he had never objected to her drinking: "When my mother was around that's absolutely why I never objected." McCall also testified:

> Q: Okay. Now it's your contention -- well, let me -- let me ask the question -- in all of the times that you've been with Vivian Sanchez and your family at [that restaurant] there was never a single time where you said she shouldn't have liquor, she is underage? Not -- that never happened, did it, Mr. McCall?
>
> A: No.

As we have discussed above, however, the doctrine of in loco parentis did not permit McCall's mother to authorize Sanchez's drinking and thus McCall's explanation for never objecting fails.

As evidence that he did not provide or fail to prevent others from providing Sanchez with alcohol, McCall relies almost entirely on his own testimony that he did not see Sanchez drinking the alcohol. Although he admitted that Sanchez became intoxicated at his family's table at the restaurant on July 5, he testified that he did not see Sanchez drinking alcohol at the event because "when I'm sitting there at a family dinner in a large crowded restaurant I don't pay attention to what people around me are doing." He claimed he did not realize she had been drinking until they were walking out to his truck to go home and then realized that "wow, she -- she must've had a lot to drink" and that she was "drunk when she got to the truck that evening."[8] But as to the credibility of this evidence, under the substantial evidence standard of review, the ALJ is the sole judge of the weight to be accorded to McCall's testimony, and he may accept or reject it in whole or in part. *See Lamb Cty. Elec. Co-op. v. Public Util. Comm'n*, 269 S.W.3d 260, 272 (Tex. App.—Austin 2008, pet. denied).

On the record before us, we conclude that the evidence as a whole is such that reasonable minds could have reached the conclusion that the ALJ reached in order to justify its action. *See City of Rice*, 2013 WL 3186194, at *2. Substantial evidence exists to show that McCall provided Sanchez with alcohol and failed to prevent others, including his mother, from providing alcohol to Sanchez both on July 5 and at other times and that this conduct violated the Department Guidelines. We therefore overrule McCall's eighth issue.

[8] McCall also invoked the Fifth Amendment when asked whether he had provided Sanchez with alcohol at other times. The parties dispute whether the ALJ could properly make an adverse inference based on McCall's invoking the Fifth Amendment or whether the inference would be mere speculation. But because we conclude that substantial evidence exists independent of the adverse inference, we need not resolve this dispute.

Chapter 614 of the Texas Government Code

In his first four issues, McCall raises complaints regarding chapter 614 of the Texas Government Code. Under chapter 614, a licensed peace officer cannot be disciplined based on a "complaint" unless the complaint is in writing, signed by the complainant, and presented to the peace officer within a reasonable time, and termination may not be "based on the subject matter of the complaint" unless the complaint is investigated and there is evidence to prove the allegation of misconduct. Tex. Gov't Code §§ 614.021–.023; *see Colorado County v. Staff*, 510 S.W.3d 435, 438 (Tex. 2017). McCall claims that the Constable failed to follow chapter 614's requirements for his termination, that the ALJ failed to determine whether the Constable met these requirements, and that the "evidence of the alleged misconduct made the basis of these complaints could not be used by [the ALJ] to justify [McCall's] adverse termination classification."

In the Order, the ALJ noted that McCall has not filed an action for reinstatement. And in the hearing on the petition to correct information in the F-5 Report, the ALJ explained:

> The sole question that the ALJ can answer in this case is whether the preponderance of the evidence demonstrates that the alleged misconduct which formed the basis for the Constable's decision to classify Mr. McCall's departure as a general discharge on the F-5 Report took place; if it does not, then the only remedy the ALJ can provide is to change the classification on the F[-]5 Report.

See Tex. Occ. Code § 1701.4525(e) ("In a proceeding to contest information in an employment termination report for a report based on alleged misconduct, an administrative law judge shall determine if the alleged misconduct occurred by a preponderance of the evidence regardless of whether the person who is the subject of the report was terminated or the person resigned, retired, or separated in lieu of termination. If the alleged misconduct is not supported by a

preponderance of the evidence, the administrative law judge shall order the commission to change the report."). McCall claims that this "overlook[s]" *Colorado County* and that the ALJ and the district court "had authority and jurisdiction to consider [the Constable's] Government Code violations in reaching their respective decisions." However, *Colorado County* was an appeal from a summary judgment on a suit for declaratory, injunctive, and monetary relief and concerned an administrative action for reinstatement following a termination decision; it did not speak to an F-5 hearing. 510 S.W.3d at 440. An F-5 hearing is a "proceeding to contest information in an employment termination report," *see* Tex. Occ. Code § 1701.4525(d), not a proceeding to challenge "[d]isciplinary action," *see* Tex. Gov't Code § 614.023(b); *cf. Paske v. Fitzgerald*, 499 S.W.3d 465, 469 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (noting that after F-5 hearing, officer filed distinct claims in court to allege violation of state law under chapter 614). McCall has not cited—and we have not found—authority that the ALJ was authorized or required to determine whether the Constable met chapter 614's requirements in the F-5 Hearing for purposes of challenging "[d]isciplinary action." And subsection 1701.4525(e)'s limited grant of authority that the ALJ "shall determine if the alleged misconduct occurred by a preponderance of the evidence" is contrary to McCall's position that an ALJ may properly consider and determine a chapter 614 challenge to the Constable's "[d]isciplinary action[s]" in an F-5 hearing. *See* Tex. Occ. Code § 1701.4525(e).

To the extent McCall is arguing that the ALJ should have excluded "all evidence and complaints against [McCall] that should have been presented to [McCall] under [chapter] 614," we conclude that on this record chapter 614 did not prohibit the admission at the F-5 Hearing of the evidence that is relevant to the Constable's termination of McCall's employment for providing or failing to prevent others from providing Sanchez with alcohol in violation of the

Department Guidelines. As described above, Constable Ayers testified that what triggered the investigation into whether McCall provided alcohol to Sanchez was not Sanchez's assault complaint, but a conversation between Deputy Helm and McCall in which McCall said Sanchez was intoxicated. The relevant evidence outlined in the preceding sections of this opinion was not based on a "complaint" governed by chapter 614 but was based on Deputy Helm's conversation with McCall, Constable Ayers's follow-up phone conversation with Sanchez, and McCall's own testimony. *See Paske*, 499 S.W.3d at 475 ("But every termination of a law enforcement officer does not necessarily have has its genesis in a 'complaint.' If Subchapter B [of chapter 614] were meant to apply to every termination of a law enforcement officer, the Legislature presumably would have said so directly."); *see also Colorado County*, 510 S.W.3d at 446 n.39 (citing *Paske*, 499 S.W.3d at 475). Moreover, the record does not indicate that Sanchez was making a "complaint" for purposes of chapter 614—i.e., an "allegation of misconduct" or "expression of dissatisfaction"—when she responded to questions from Constable Ayers and confirmed that McCall had provided her alcohol. *See Colorado County*, 510 S.W.3d at 449 (concluding that "the word 'complaint' ordinarily means an expression of dissatisfaction, including an allegation made by one against another"). Accordingly, the relevant evidence presented at the F-5 Hearing to support McCall's violation of the Department Guidelines did not need to be in a signed writing with a copy provided to McCall to "be considered by the head of a . . . law enforcement agency," *see* Tex. Gov't Code §§ 614.022–.023, and chapter 614 therefore did not require that the ALJ exclude this evidence at the F-5 Hearing.

We overrule McCall's first four issues.

CONCLUSION

Having overruled McCall's issues, we affirm the Order denying McCall's petition to correct the "general discharge" in his F-5 Report to an "honorable discharge."

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Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Smith

Affirmed

Filed: May 21, 2020