

NOT DESIGNATED FOR PUBLICATION

No. 126,053

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JAMES GREGG,  
*Appellant,*

v.

KANSAS UNIVERSITY MEDICAL CENTER,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Wyandotte District Court; TIMOTHY L. DUPREE, judge. Oral argument held October 17, 2023. Opinion filed December 1, 2023. Affirmed.

*Mark J. Galus*, of The Aubry Law Firm, P.A., of Overland Park, for appellant.

*Eric J. Aufdengarten*, office of the general counsel, University of Kansas, and *Noel Z. Fisher*, law fellow, of Husch Blackwell LLP, of Kansas City, Missouri, for appellee.

Before ISHERWOOD, P.J., GREEN and PICKERING, JJ.

PER CURIAM: After the University of Kansas Medical Center (KUMC) terminated James Gregg's employment, Gregg petitioned the district court for judicial review. Gregg alleged that KUMC erroneously interpreted or applied the law, failed to follow prescribed procedure, and his termination was otherwise unreasonable, arbitrary, or capricious. Gregg appeals the district court's denial of his petition for judicial review. Two consecutive, unsatisfactory, performance ratings are the key to this case, and thus, Gregg's termination was brought on by his own actions. Because KUMC applied the

proper standard and followed the proper procedure, we affirm the district court's denial of Gregg's petition for judicial review.

## FACTS

Gregg worked in the public safety department of KUMC from 1995 to 2013. Gregg attained the rank of University Police Corporal and was the most senior and highly compensated corporal in the department when he was terminated. Gregg was a bargaining unit member of the Fraternal Order of Police, Lodge No. 37 (Union), the exclusive bargaining representative of university police officers and university police corporals. The Union and KUMC were parties to a memorandum of agreement (Contract) that governed the terms and conditions of employment for bargaining unit members like Gregg.

Article 2 of the Contract stated that, except as otherwise provided in the Contract, KUMC retains the right to "discharge employees for proper cause" and to promulgate personnel policies. Article 39 of the Contract—titled "Disciplinary Action"—stated the following: "Employees may be disciplined only for proper cause." Article 39 also provided a mechanism for an employee to appeal his or her termination to a KUMC Hearing Board (Hearing Board), giving the employee the burden of proof to show that the terminating authority did not act reasonably in dismissing the employee.

Beyond the requirements outlined in the Contract, the KUMC Policies of the University Support Staff (USS Policy) also governed the employment relationships between KUMC and USS employees, such as Gregg. Under the USS Policy, an employee may be terminated due to "poor performance, misconduct, or other good cause." When an employee's performance failed to meet expectations, the USS Policy required supervisors to first work with the employee to encourage superior performance and encouraged supervisors to use both informal and formal counseling. If performance did not improve,

the USS Policy required a performance improvement plan (PIP) with specific reference to the employee's performance shortfalls and a required time frame for improvement. While a PIP could not be less than 30 days long, the opportunity period "must be long enough to be fair and appropriate in the matter of giving the employee the chance to show required improvement."

In January 2012, Gregg failed to attend a driver's license hearing held by conference call. His explanation was that he forgot about the hearing. In March 2012, Gregg lost his department-issued baton. In May 2012, Gregg signed for a subpoena requiring him to attend a driver's license hearing in June. Gregg failed to attend the June hearing and explained to his supervisor that he got the dates confused. On his mid-year review in July 2012, Sergeant Michael James counseled him on his police reports. James explained: "I would also like you to work on reducing the number of reports returned to you by the records unit for correction. You currently lead the department in returned reports which are returned at a rate of 28%." James set a goal for Gregg of 12% returned reports by year's end.

In August 2012, Gregg failed to follow the proper procedure for seized drug evidence, resulting in another officer moving suspected drugs into the correct evidence locker. Gregg's supervisor also advised Gregg that he had taken five sick days in conjunction with regular days off, which could be considered a pattern of abusing the time off system.

Also in August 2012, Gregg mishandled a speeding ticket. After Gregg wrote the ticket, the driver explained that she "was being followed." Apparently, a man in dark clothing approached her vehicle at an intersection and asked her for money. Gregg later found the man, who turned out to be an individual that Gregg was familiar with because of numerous calls in the area about panhandling. Gregg asked the Fairway Police Department to contact the driver, who lived in Fairway, and let her know that Gregg

wanted to void the speeding ticket. Gregg had Fairway police tell the driver to bring her copy of the ticket back to Gregg at the KUMC police desk so that he could void the ticket. Gregg did not tell his supervisor that he was going to void the ticket nor that he asked Fairway police to speak to the driver. Gregg never voided the ticket. The driver failed to appear in court on October 30, 2012. The court issued a warrant for her arrest. The driver received a letter on November 5, 2012, that a warrant had been issued for her. Police records e-mailed Gregg. Gregg called city prosecutors on November 6, 2012, and managed to get the warrant set aside and the case dismissed.

On November 8, 2012, Gregg received an unsatisfactory performance rating and was placed on a "special evaluation period," giving him from November 8, 2012, to May 8, 2013, to improve his job performance. James conducted the evaluation, covering the period from December 31, 2011, to November 8, 2012. James commented as follows: "Cpl. Gregg brought discredit on the department by failing to void a ticket resulting in a warrant being put out for a subject's arrest." James also noted that Gregg "placed blame on the violator placing the department in a liable situation."

James pointed to the department's attempts to address Gregg's performance in the form of a Report of Employee Guidance/Discipline (REGD). Specifically, James noted that Gregg "received three REGD and four training and guidance letters during this evaluation period." James also noted Gregg's failures to attend the driver's license hearing by conference call and to appear in court when subpoenaed.

Gregg also received an unsatisfactory performance rating for communication. James explained his rating for Gregg as follows: "Cpl. Gregg's reports are still returned for correction at a much higher rate than the department's average." James also documented Gregg's loss of baton, his failure to attend hearings and court dates, and his refusal to take responsibility for the ticket which resulted in a warrant being issued for the driver. James attached to the evaluation the REGDs associated with each incident. Each

REGD specified the following: "EMPLOYEE IS HEREBY ADVISED THAT FAILURE TO SHOW IMPROVEMENT MAY BE GROUNDS FOR DISCIPLINARY ACTION."

Gregg appealed his unsatisfactory evaluation in December 2012.

KUMC did not implement a PIP until January 11, 2013. In the PIP, James outlined some ways that Gregg could achieve a satisfactory evaluation by the end of the special evaluation period. James set a plan of action for Gregg's report return rate and required Gregg to use a daily planner to ensure that he would not miss court hearings. James also required Gregg to read all the department's policies and procedures.

In January 2013, Gregg continued to make reporting errors on the job. An analysis of his reports for the second half of 2012 showed return rates of 30.4%, well above the department average of 12.6%. During a traffic stop in January 2013, Gregg took a driver's passport and failed to return it, requiring the driver to return to KUMC to retrieve the passport. One day, Gregg forgot to time out and another day he timed out twice. He forgot to log statistics on days when he was a supervisor. And he failed to write an information report on a vehicle stop where the driver refused a preliminary breathalyzer test. Gregg argued that the department never wrote information reports on those stops in the past, even though James indicated the department had always written reports on those type of stops.

On January 30, 2013, James gave Gregg another letter requiring Gregg to read all 10 articles of the Manual of Operations. After reading each article, Gregg was required to initial and date the letter and return it to James. Gregg read 7 out of 10 articles by the March 10, 2013 deadline and completed the last 3 articles shortly after the deadline.

In February 2013, Gregg continued to have problems with timing out. He instructed an uninsured driver with a suspended license to drive home. Gregg did not know the location of a protected research laboratory even though, as James noted, "the lab has been there for years." Gregg asked dispatch to give the lab's location over the radio, which would breach the security protocols for the lab.

On March 7, 2013, James had a performance and progress review with Gregg. James told Gregg that he had very little improvement in his returned reports and that his errors in judgment persisted. When James did this progress check-in with Gregg, Gregg had two months left on his special evaluation period.

On April 6, 2013, Gregg's trainee arrested a driver for driving under the influence. When the driver started crying, Gregg uncuffed him and gave him a tissue. Shortly afterwards, Gregg's trainee became concerned about the driver's behavior and cuffed him back up.

On April 17, 2013, before the special evaluation period had expired, KUMC issued Gregg his second unsatisfactory performance rating. James noted in his review some of the incidents leading up to the unsatisfactory rating as follows:

"Over the course of this special evaluation[,] Corporal Gregg has made errors in judgment and procedure; instructing a suspended uninsured driver to drive her vehicle home, not knowing the locations of the BSL labs and attempting to ask for its [*sic*] location over the radio, un-cuffing a crying suspect to give him a tissue, officer safety issue. He has fallen short in his job responsibilities as a corporal by failing to approve reports and log in statistics when he was the supervisor. Incorrectly telling a recruit to use civilian time on reports (am/pm) when military time is the protocol. Calling the on-call administrator in the middle of the night on more than one occasion when the call did not meet the criteria to call. He also has failed to time in or out over eight times since January

with one of those failures resulting in him being eight hours short on pay for the pay period. He has not effectively managed shift operations in the absence of the sergeant."

James also documented Gregg's report return rate. The return rate was 26.6%, which was still above the 12.6% department average. James also stated that many of the same errors were repeated. Gregg's overall performance level was unsatisfactory, defined on the performance review form as follows: "Employee is not making the contributions expected of an employee in this role. Employee may not be appropriately placed in the job or the agency. Immediate improvement is required."

On April 29, 2013, KUMC recommended Gregg's termination from employment.

Gregg administratively appealed both the November 2012 and April 2013 unsatisfactory performance ratings and the proposed termination. The associate vice chancellor upheld both performance ratings and the proposed termination. KUMC terminated Gregg's employment effective July 31, 2013.

The Hearing Board met in August 2021 to hear Gregg's appeal. A footnote in Gregg's brief explains that the eight years between termination and Hearing Board proceedings related to discovery issues and to other proceedings not relevant to this appeal. KUMC does not dispute this explanation or otherwise challenge timeliness. The Hearing Board received testimony from six witnesses and written exhibits from the KUMC Police Department and from Gregg. The parties also provided the Hearing Board with written statements of fact.

KUMC Police Chief Darlene Santiago testified that two consecutive unsatisfactory performance ratings constituted grounds for termination. Santiago testified that Gregg had a "very large or high return of reports. His kickback rate was very high." KUMC Police Department's Records Manager testified that Gregg's 30.4% report kickback rate

was "definitely excessive" compared to the department average. Captain Robert Gibson testified that Gregg's report return rates should have been closer to the department average because he was a corporal and a trainer, and his level of experience was higher than the rest of the department.

Captain Kurt Reinhardt highlighted Gregg's other performance issues. Reinhardt testified that missing a court hearing, losing department-issued equipment, failing to properly submit drug evidence, failing to properly void a ticket, and using sick leave in conjunction with days off were all violations of department policy. Santiago also testified that Gregg's actions documented in his evaluations were violations of department policy and that Gregg's actions warranted termination.

The Hearing Board upheld Gregg's termination, stating the following: "KUMC policy provided that if an employee received two consecutive unsatisfactory performance ratings, then the employee may be disciplined up to and including termination." The Hearing Board found that "the Associate Vice Chancellor did act reasonably in dismissing Corporal Gregg and that Corporal Gregg did not prove by a preponderance of [the] evidence that the disciplinary action taken was arbitrary, unreasonable or without appropriate factual basis."

On September 7, 2021, the executive vice chancellor upheld the termination, finding that the associate vice chancellor had "acted reasonably in dismissing [Gregg], and that the evidence did not prove that the disciplinary action taken was arbitrary, unreasonable, or without factual basis."

Gregg petitioned for judicial review in October 2021. The district court held oral argument in November 2022. A week later, the district court denied Gregg's petition for judicial review.



Gregg timely appeals.

#### ANALYSIS

*Did KUMC erroneously interpret or apply the law?*

Gregg argues that KUMC did not apply the appropriate standard when terminating his employment for proper cause. He asserts that KUMC should have applied a seven-part test to determine whether it had proper cause to terminate Gregg. KUMC argues that the test proposed by Gregg does not apply and that KUMC had proper cause to terminate him.

The Kansas Judicial Review Act (KJRA) defines the scope of judicial review of state agency actions unless the agency is specifically exempted from application of the statute. K.S.A. 77-603(a); *Bd. of Cherokee County Comm'rs v. Kansas Racing & Gaming Comm'n*, 306 Kan. 298, 318, 393 P.3d 601 (2017).

On appeal, the burden of proving the invalidity of the agency action rests on the party asserting the invalidity. K.S.A. 77-621(a)(1); *EagleMed v. Travelers Insurance*, 315 Kan. 411, 419, 509 P.3d 471 (2022).

Appellate courts exercise the same statutorily limited review of the agency's action as does the district court, as though the appeal had been made directly to the appellate court. *Kansas Racing & Gaming Comm'n*, 306 Kan. at 318.

Gregg claims that KUMC erroneously interpreted or applied the law. K.S.A. 77-621(c)(4). Gregg cites our Supreme Court's discussion of proper cause in *City of Coffeyville v. IBEW Local No. 1523*, 270 Kan. 322, 14 P.3d 1 (2000). He asserts that KUMC was required to analyze proper cause under the following test:

"(1) Did the employer give the grievant forewarning or foreknowledge of the possible or probable disciplinary consequences of the grievant's conduct? (2) Was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business and the performance that the employer might properly expect from the employees? (3) Did the employer, before administering discipline to the grievant, make an effort to discover whether the grievant did in fact violate or disobey a rule or order of management? (4) Was the employer's investigation conducted fairly and objectively? (5) Did the investigator obtain substantial evidence or proof that the grievant was guilty as charged? (6) Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? and (7) Was the degree of discipline administered by the employer reasonably related to the seriousness of the grievant's proven offense and the record of the grievant's service to the employer?" 270 Kan. at 330.

The difficulty with Gregg's argument is readily apparent from the language of the seven-part test. The test refers to the employer in the third person and does not seem to be a test that the employer would apply to its own actions. On the face of the seven-part test, its questions seem designed to guide a neutral third party, like an arbitrator, through an analysis of a disciplinary dispute between an employer and an employee. On the other hand, we venture to say that an employer would unlikely be completely neutral and impartial in evaluating its conduct when answering questions like number 4: "Was the employer's investigation conducted fairly and objectively?" or number 6: "Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?" 270 Kan. at 330. Unlike an arbitrator, an employer would not generally be considered a neutral or detached third party in resolving a dispute between the employer and the employee.

Gregg argues that KUMC needed to analyze or justify the disciplinary action through the prism of this seven-part test for proper cause. But as Gregg acknowledges, the test was developed by an arbitrator in a dispute over an employment contract which

did not define just cause or proper cause. If the test seems less suited for an employer and better suited for use by an arbitrator, that is because it is.

The test was first articulated when arbitrator Carroll R. Daugherty denied an employee's grievance in *Enterprise Wire Co. v. Enterprise Independent Union*, 46 Lab. Arb. Rep. (BNA) 359 (1966). In the absence of a contractual definition of just cause, Daugherty established this seven-part test to determine whether just cause existed for employee discipline. Other arbitrators adopted these standards, and they became known as the Daugherty test. "So well respected and widely adopted have Daugherty's views become that the seven prongs are now an integral part of arbitral common law. [Citation omitted.]" *Hartford Municipal Employees Ass'n v. City of Hartford*, 128 Conn. App. 646, 662, 19 A.3d 193 (2011) (Flynn, J., dissenting).

The Daugherty test is not the only test for proper cause that arbitrators are free to employ. Another arbitrator has defined the test as whether: "A reasonable man taking into account all relevant circumstances, would find sufficient justification in the conduct of the employee to warrant discharge." 1 Lit. Wrong. Discharge Claims § 3:2 (2023) (quoting *RCA Communications, Inc.*, 29 Lab. Arb. Rep. [BNA] 567 [1957]). But the seven-part Daugherty test is the analysis that Gregg argues should be used here.

Gregg cites *City of Coffeyville* but—as KUMC correctly argues—Gregg overstates its holding. Gregg states that our Supreme Court has recognized the Daugherty test as "the correct tool" for analyzing proper cause. But the holding of *City of Coffeyville* was not that the test was "the" correct tool, but "a" correct tool. And even the use of the word "correct" might be overstating the matter because the *City of Coffeyville* court only held that the test was not so egregiously incorrect as to require the court to set aside the arbitration award. 270 Kan. 322, Syl. ¶ 2.

In *City of Coffeyville*, the city had terminated Harry Thomas. The parties submitted the issue of "just cause" for termination to a private arbitrator. 270 Kan. at 323. The arbitrator applied the Daugherty test and stated that Thomas was entitled to reinstatement with back pay. The City of Coffeyville petitioned for judicial review. The issue before the *City of Coffeyville* court was whether the district court erred in setting aside the arbitrator's decision. The *City of Coffeyville* court laid out the rules for disturbing an arbitration award as follows:

"Once the parties have decided to settle their dispute through arbitration and once they have chosen a mutually acceptable arbitrator, the courts have only disturbed an award for the most egregious of breaches by the arbitrator. For all practical purposes, the arbitrator's award—assuming that it does not involve fraud or overreaching—must be counter-factual or directly contrary to the plain language of the contract to merit judicial intervention." 270 Kan. 322, Syl. ¶ 2.

And the *City of Coffeyville* court explained deference to the arbitrator as follows:

"The fact that the arbitrator made erroneous rulings during the hearing, or reached erroneous findings of fact from the evidence, is no ground for setting aside the award, because the parties have agreed that the arbitrator should be the judge of the facts. Even an arbitrator's erroneous view of the law would be binding, for the parties have agreed to accept his or her view of the law. Error of law renders the award void only when it would require the parties to commit a crime or otherwise violate a positive mandate of the law." 270 Kan. 322, Syl. ¶ 3.

The *City of Coffeyville* court held that courts must affirm arbitration awards if the arbitrator acts within the scope of his or her authority. "The court is bound by an arbitrator's findings of fact and conclusions of law so long as any error is not in bad faith or so gross as to amount to affirmative misconduct." 270 Kan. 322, Syl. ¶ 4. After laying out this "very limited scope of review" for setting aside an arbitrator's decision, the *City of Coffeyville* court analyzed whether the arbitrator erred. 270 Kan. at 334.

The *City of Coffeyville* court reinstated the arbitrator's award, without explicitly endorsing the arbitrator's use of the Daugherty test. 270 Kan. at 336. The implication of this holding is that an arbitrator's use of the Daugherty test is not "the most egregious of breaches by the arbitrator," nor is it "fraud or overreaching," nor is it "commit[ting] a crime or otherwise violat[ing] a positive mandate of the law," nor is it "bad faith or so gross as to amount to affirmative misconduct." 270 Kan. 322, Syl. ¶¶ 2-4. If the Daugherty test failed to clear any of these low bars, then the *City of Coffeyville* court would not have reinstated the arbitrator's award. The arbitrator's use of the test was not so egregiously wrong that it required intervention by the courts. But the *City of Coffeyville* court did not affirmatively state that the test was correct, let alone that its use was mandatory for anyone, whether court or arbitrator or employer. Thus, the *City of Coffeyville*'s holding is devoid of any essential facts that would require KUMC to utilize the seven-part test to determine whether Gregg was discharged for proper cause.

Gregg also misstates this court's holding in *Unified Gov't of Wyandotte County/KCK v. IBEW Local 53*, 48 Kan. App. 2d 128, 286 P.3d 570 (2012). Gregg claims that the Daugherty test is "the correct tool for analyzing proper cause under a labor contract." His citation points to this court's holding that the test is "a proper tool for arbitrators to use." 48 Kan. App. 2d at 135. This court cited *City of Coffeyville* in stating that our Supreme Court "recognized" the test, not that our Supreme Court mandated or required use of the Daugherty test. *Unified Gov't of Wyandotte County/KCK*, 48 Kan. App. 2d 128, Syl. ¶ 5.

In short, Gregg misstates the law. He takes the seven-part test in the *City of Coffeyville* holding, which arbitrators *may* use, and recreates it as a test employers *must* use. He provides no authority to support his unwarranted leap from permissive to mandatory or his unwarranted leap from arbitrators to employers. Gregg erroneously interprets or applies the law in this instance. Cf. K.S.A. 77-621(c)(4). The seven-part test used in the cases Gregg cites in his brief are used in arbitration proceedings. The KUMC

disciplinary process does not involve arbitration, and thus, the seven-part test for proper cause is not applicable. Because Gregg fails to show that KUMC erroneously interpreted or applied the law, we affirm the district court's denial of Gregg's petition.

*Did KUMC fail to follow prescribed procedure?*

Gregg argues that KUMC did not follow proper procedure before terminating his employment. KUMC argues that it gave Gregg notice and opportunity to improve his performance and that the performance improvement plan included enough time for Gregg to improve his work performance.

As stated above, on appeal, the burden of proving the invalidity of the agency action rests on the party asserting the invalidity. K.S.A. 77-621(a)(1); *EagleMed*, 315 Kan. at 419.

Gregg argues that KUMC failed to follow prescribed procedure. K.S.A. 77-621(c)(5). He cites the USS Policy as stating that supervisors should "encourage superior performance" when performance is deficient. The USS Policy authorized the use of a performance improvement plan, with specific reference to performance shortfalls and a required time frame for improvement. Within the university support staff, the KUMC Police Department used a performance review system which included a mid-year review between supervisor and employee and an annual review. But Gregg argues that there is no provision for a special evaluation period.

Gregg's argument fails because he has the burden of showing the invalidity of the agency action. Gregg states that no provision allows for a special evaluation period but, as KUMC correctly argues, nothing in the USS Policy prevents the use of special evaluation periods either. The timing of events suggests why KUMC started the special evaluation period. On November 6, 2012, Gregg had to call municipal prosecutors and

explain why a driver's ticket should have been voided and why the warrant for her arrest should be recalled. On November 8, 2012, KUMC began his special evaluation period, with multiple mentions of the voided ticket incident. It is readily apparent that KUMC viewed the warrant as a significant issue and sought to address it immediately.

Further, Gregg contests only the special evaluation period, not the mid-year or annual evaluations. If those semi-annual reviews were the only two permissible periods for correction, then KUMC would not be able to address performance issues as they arose. If an officer made a serious error on December 30, then KUMC could address it as part of the annual review ending on December 31. But if the same error occurred on January 2, then KUMC would need to wait six months to address the problem or correct the performance at the mid-year review. Gregg provides no rationale for challenging special evaluation periods but not mid-year or annual reviews, nor does he explain why KUMC would need to wait up to six months to address performance failures.

Gregg argues that the performance plan he received from James did not identify consequences or potential discipline. But Gregg received three REGDs which did warn him of disciplinary action. Gregg knew or should have known that continued unsatisfactory performance could result in discipline. Indeed, the three REGDs stated in all capitalizations: "EMPLOYEE IS HEREBY ADVISED THAT FAILURE TO SHOW IMPROVEMENT MAY BE GROUNDS FOR DISCIPLINARY ACTION."

Gregg also complains that his PIP focused on his report return rate, but no one reviewed his reports for improvement. The last review of his reports was in February 2013, and he was terminated in April 2013. He argues that KUMC did not follow procedure because no one followed up to see if he had fewer reports sent back to him for corrections between February and April 2013. But policy required KUMC to give Gregg 30 days to improve. From the beginning of the special evaluation period in November, or the PIP in January, more than 30 days had already passed before the February review of

his report return rate. Further, KUMC did not rely solely on Gregg's report return rate. KUMC included several other factors in its decision to terminate him, with James noting 17 different incidents of Gregg exercising poor judgment or inattention.

Finally, Gregg argues that KUMC failed to follow prescribed procedure when it concluded that two consecutive unsatisfactory performance evaluations required termination. This argument fails for two reasons. First, it misstates the record. Gibson testified that it was department policy to refer two unsatisfactory evaluations to human resources "for further review/termination." Santiago testified that two consecutive unsatisfactory performance evaluations would be "grounds for termination." In both cases, the testimony does not support Gregg's argument that KUMC confused may with must or permissive with mandatory. The testimony shows that an employee with two unsatisfactory evaluations would be subject to further review and, given sufficient grounds, the employee may be terminated. Nothing in the record states that Gregg was terminated because someone thought he *must* be terminated after two unsatisfactory ratings.

Second, Gregg fails to address the permissive aspect. He asserts that KUMC erred by concluding that Gregg must be terminated. But he presents no argument on whether he may be terminated for two consecutive unsatisfactory evaluations. Based on the record before this court, KUMC may terminate an employee after two consecutive unsatisfactory evaluations if it chooses. Gregg points to no policy or contractual provision in the record which would prevent KUMC from terminating an employee after two unsatisfactory evaluations. And, as stated previously, two consecutive unsatisfactory performance ratings are the key to this case, and thus Gregg's termination was brought on by his own actions. Because Gregg fails to show that KUMC erred procedurally, this court should affirm the district court's denial of his petition.



*Was KUMC's decision unreasonable, arbitrary, or capricious?*

Gregg argues that KUMC's decision was unreasonable, arbitrary, or capricious. KUMC argues that Gregg's poor performance justified termination.

Again, on appeal, the burden of proving the invalidity of the agency action rests on the party asserting the invalidity. K.S.A. 77-621(a)(1); *EagleMed*, 315 Kan. at 419.

Under K.S.A. 77-621(c)(8), a court grants relief if it determines that the agency action is unreasonable, arbitrary, or capricious. When analyzing claims under K.S.A. 77-621(c)(8), courts determine "the reasonableness of the agency's exercise of discretion in reaching its decision based upon the agency's factual findings and the applicable law." *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 891, 451 P.3d 459 (2019) (quoting *Wheatland Electric Cooperative v. Polansky*, 46 Kan. App. 2d 746, 757, 265 P.3d 1194 [2011]).

"Useful factors that may be considered include whether: (1) the agency relied on factors that the legislature had not intended it to consider; (2) the agency entirely failed to consider an important aspect of the problem; (3) the agency's explanation of its action runs counter to the evidence before it; and (4) whether the agency's explanation is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Wheatland Electric Cooperative*, 46 Kan. App. 2d at 757.

Rather than present new factors showing caprice, arbitrariness, or unreason, Gregg recites the same arguments listed as his first two issues. Gregg argues that the decision to terminate him "was unreasonable, arbitrary, or capricious to the extent that it failed to adequately address proper cause." He also asserts that it was "unreasonable, arbitrary, or capricious for KUMC to ignore prescribed procedure." But KUMC had proper cause and did not ignore procedure. Because Gregg presents nothing new of substance for this issue, he fails to show that KUMC's termination of Gregg was unreasonable, arbitrary, or

capricious. Because Gregg fails to meet his burden to show the invalidity of the agency's action, this court should affirm the district court's denial of Gregg's petition.

For the preceding reasons, we affirm the district court's denial of Gregg's petition for judicial review.

Affirmed.