SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2497-14T4

IN THE MATTER OF TIMOTHY LONDON AND EDMUND JOHNSON, CITY OF TRENTON.

Submitted March 22, 2017 – Decided April 7, 2017

Before Judges Simonelli and Carroll.

On appeal from the Civil Service Commission, Docket Nos. 2012-2183 and 2012-1462.

Katz & Dougherty, LLC, attorneys for appellants Timothy London and Edmund Johnson (George T. Dougherty, on the briefs).

Saponaro Law Group, attorneys for respondent City of Trenton (Justin J. Yost, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent Civil Service Commission (Pamela N. Ullman, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Timothy London and Edmund Johnson (collectively, appellants) appeal the December 17, 2014 final administrative decision of the Civil Service Commission (Commission). The Commission's decision substantially accepted and adopted the initial decision of an

Administrative Law Judge (ALJ) sustaining disciplinary charges of insubordination and conduct unbecoming a public employee, but modified the penalty to a thirty-day suspension without pay. We affirm.

Appellants are long-time employees of the City of Trenton (City). Both had previously served in the capacity of water systems distribution technicians. However, as part of a layoff plan implemented by the City in September 2011, London and Johnson, along with a third technician, John Patten, were demoted to the position of water meter reader.

Appellants were each served with a preliminary notice of disciplinary action on September 29, 2011, charging them with insubordination, N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and neglect of duty, N.J.A.C. 4A:2-2.3(a)(7). Specifically, the City asserted that they refused to perform their newly-assigned duties in the construction and maintenance office on various dates between September 19, 2011, and September 28, 2011. Appellants in turn maintained that the charges were brought in retaliation for their cooperation in the investigation of corruption charges against certain City employees. After a departmental level hearing on October 3, 2011, the City issued final notices of disciplinary

action sustaining the charges and removing appellants from their positions effective the next day.

London and Johnson appealed their removals and the matters were transferred to the Office of Administrative Law as contested cases where they were subsequently consolidated. On March 19, 2013, the City issued amended final notices of disciplinary action reducing the discipline from removal to a six-month suspension. The ALJ held hearings on April 30, 2013, May 13, 2013, June 6, 2013, June 10, 2013, June 13, 2013, December 11, 2013, December 19, 2013, January 17, 2014, March 4, 2014, and March 27, 2014.

In his comprehensive fifty-page written decision, the ALJ reviewed the testimony in detail, made credibility determinations and factual findings, and analyzed the relevant law. We need not repeat the ALJ's findings and conclusions in the same level of detail here. Rather, the Commission aptly summarized them in its December 17, 2014 decision as follows:

> In [his] initial decision, the ALJ extensively recounted the testimony of the witnesses and his findings of fact. In pertinent part, the ALJ found the [City's] witnesses more credible than the appellants. In particular, the ALJ credited the testimony of Harold Hall, a former Manager, Public Works; Tyrone Meyers, a General Supervisor, Water; and Ben Brown, a former Meter Worker Supervisor, that [] appellants had refused orders given to them to perform Laborer and Water Meter Reader duties. The thrust of [] appellants' defense is that they were demoted

and disciplined in retaliation for not collaborating with Mayor Tony Mack's plans and for contacting the Mercer County Prosecutor's Office.

In July 2010, Mayor Tony Mack took office. In September 2011, a conflict arose regarding who had oversight and direction for assigned overtime hours for construction and maintenance workers. As a result, Mack's brother, Stanley Davis, allegedly threatened Johnson by telling him that he would be unemployed shortly as Mack would disband the engineering division. Johnson spoke confidentially to a representative of the Mercer County Prosecutor's Office regarding Davis. London testified before the grand jury that indicted Davis. The ALJ noted that two other employees who had spoken with the Prosecutor's Office were not demoted as part of the 2011 layoff, which included three individuals from the Water Department, the appellants and John Patten, who were all demoted to the title of Water Meter Reader. However, Mack told Hall that [] appellants and Patten were to be moved to construction and maintenance. Mack also told Hall that he wanted to save the positions of Charles Hall (Harold Hall's nephew), David Brigel[,] and Henry Page. Based on the foregoing, Johnson believed his inclusion in the layoff plan was retaliatory based upon Davis'[s] statements. As a result, Hall ordered London, Johnson[,] and Patten to the construction and maintenance office as Laborers, and assigned Charles Hall, Brigel[,] and Henry Page as Water Meter Readers. Hall and Dave Tallone, the Union President, testified that Tallone advised Hall that a move from Water Meter Reader to Laborer was not a demotion as there was no loss in salary, and because Tallone did not believe that either appellant could perform Charles Hall's duties in the parks division. Thereafter, on several occasions, [] appellants refused to perform Laborer duties,

performed duties that they were not assigned to perform instead of the Laborer duties, and did not tell their supervisor when they left the area. The ALJ noted that although Johnson was a [u]nion [r]epresentative during this time, neither he nor London filed any grievances regarding the change to their job duties. Rather, [] appellants indicated that they believed that the complained of actions were not appropriate for an internal grievance, and instead should be filed with the Commission. With regard to [] appellants' claims that the [City's] actions were retaliatory, the ALJ determined that the [City] had articulated legitimate, nondiscriminatory reasons for the adverse employment action of assigning [] appellants Laborer duties. Specifically, the ALJ found that the assignment of Laborer duties to [] appellants was simply Hall's attempt[] to comply with Mack's directive to save the positions of Charles Hall, Brigel[,] and Page. Moreover, as previously noted, Hall believed that [] appellants' assignments as Laborers were not a demotion since there was no loss in salary.

The ALJ concluded that although both appellants' refusals to perform their duties on September 19, 2011, constituted conduct unbecoming a public employee and insubordination, it did not constitute negligence. With regard to September 26, 2011, the ALJ determined that Johnson's refusal to watch the parking lot and leaving to get a doctor's note constituted conduct unbecoming and insubordination. The ALJ also determined that London's conduct in advising his supervisor that digging holes was not the job of a Water Meter Reader and then after being told to go to the storehouse, London merely sat outside of the storehouse constituted conduct unbecoming. The ALJ concluded that London's actions on September 28, 2011, in forwarding an outline of the job

> specification for a Water Meter Reader to his supervisor, and advising his supervisor that he was physically able to perform only certain duties, constituted conduct unbecoming and insubordination. However, the ALJ found that [] appellants' actions on September 20, 21, 22, 23, [and] 27 did not constitute conduct unbecoming, insubordination[,] or neglect of duty, and thus dismissed the charges related to those dates. The ALJ also determined that Johnson's leaving work on September 28, 2011[,] after being told he would not be paid did not constitute conduct unbecoming, insubordination[,] or neglect of duty, and thus dismissed the charges related to that date for Johnson. Based on the foregoing, the fact that [] appellants were not afforded an opportunity to make any adjustments to their behavior, and their lack of prior discipline, the ALJ modified the six[-]month suspensions to three[-]month suspensions.
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> [(Footnotes omitted).]

Appellants filed exceptions to the ALJ's initial decision, arguing that the ALJ erred in finding Hall credible, and that his testimony was incompatible with the undisputed material evidence, which failed to support the ALJ's findings that appellants' conduct on several occasions was either unbecoming or insubordinate. Following a de novo review, the Commission "agree[d] with the ALJ regarding all of the sustained and dismissed charges." It found "there is nothing in the record or in [] appellant[s'] exceptions which convinces the Commission that the ALJ's assessment of the credibility of the witnesses, including Hall, was not based on the

evidence, or was otherwise in error, or that that his conclusions were improper."

Thus, with limited exceptions, the Commission adopted the ALJ's findings and conclusions. Specifically, the Commission did not adopt the ALJ's determination that appellants' layoffs were made in good faith. Also, the Commission did "not agree that Hall had presented a 'legitimate' business reason for the assignment of out-of-title Laborer duties to [] appellants." Nonetheless, the Commission concluded that, "regardless of whether or not the assignment of the out-of-title duties was 'legitimate,' many of [] appellants' subsequent actions were still inappropriate or insubordinate, and as such, the ALJ correctly upheld the associated charges."

The Commission also conducted a de novo review of the penalty imposed. Applying the doctrine of progressive discipline, the Commission concluded:

> Although the sustained charges of conduct unbecoming and insubordination were serious, the Commission agrees with the ALJ that [] appellants' six-month suspensions should be modified based on the circumstances and their records. However, the Commission finds that a [thirty] working day suspension for each appellant is a more appropriate penalty. In this regard, . . . neither employee had a disciplinary history in their many years of service. Further, the [City's] actions in how it handled the assignments given to [] appellants were, at best, questionable.

> However, [] appellants are reminded that a [thirty] working day suspension is a severe penalty and should place them on notice that any further incident may result in their removal from employment.

On appeal, appellants urge that we adopt a de novo standard of review of the record and reverse the Commission's adoption of the ALJ's credibility findings, most notably with respect to Hall and Meyers. They also continue to argue, as they did before the ALJ and the Commission, that they were improperly disciplined and treated differently than Patten in retaliation for cooperating in the investigation of the mayor's brother. We conclude from our review of the record that these arguments are clearly without merit, and we affirm substantially for the reasons stated by the Commission. R. 2:11-3(e)(1)(D) and (E). We add only the following comments.

Our scope of review of an administrative agency's final determination is limited. In re Carter, 191 N.J. 474, 482 (2007). We accord to the agency's exercise of its statutorily delegated responsibilities a "strong presumption of reasonableness." City of Newark v. Nat. Res. Council, 82 N.J. 530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980). The burden of showing the agency's action was arbitrary, unreasonable, or capricious rests upon the appellant. See Barone v. Dep't of Human

Servs., Div. of Med. Assistance & Health Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987).

The reviewing court "should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008); see also Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9-10 (2009). Absent arbitrary, unreasonable, or capricious action, or a lack of support in the record, "[a]n administrative agency's final quasi-judicial decision will be sustained[.]" In re Herrmann, 192 N.J. 19, 27-28 (2007) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). The court "may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result," but is "obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs." In re N.J. Pinelands Comm'n Resolution PC4-00-89, 356 N.J. Super. 363, 372 (App. Div.) (citing Brady v. Bd. of Review, 152 N.J. 197, 210 (1997)), certif. denied, 176 N.J. 281 (2003).

An ALJ's factual findings and legal conclusions are not "binding upon [an] agency head, unless otherwise provided by statute." N.J.A.C. 1:1-18.1(d). Accordingly, an agency head reviews an ALJ's decision "de novo [] based on the record" before the ALJ. In re Parlow, 192 N.J. Super. 247, 248 (App. Div. 1983). However, "[a]n agency head reviewing an ALJ's credibility findings relating to a lay witness may not reject or modify these findings unless the agency head explains why the ALJ's findings are arbitrary or not supported by the record." S.D. v. Div. of Med. Assistance & Health Servs., 349 N.J. Super. 480, 485 (App. Div. 2002); see also N.J.S.A. 52:14B-10(c) (An agency head may only reject the ALJ's credibility findings after he or she determines "from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." In doing so, "the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.").

In reviewing administrative adjudications, an appellate court must undertake a "careful and principled consideration of the agency record and findings." Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985) (citing Mayflower

Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). "If the Appellate Division is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result itself." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988). If, however, our review of the record leads us to conclude that the agency's finding is clearly erroneous, the decision is not entitled to judicial deference and must be set aside. L.M. v. Div. of Med. Assistance & Health Servs., 140 N.J. 480, 490 (1995). We may not simply rubber-stamp an agency's decision. In re Taylor, 158 N.J. 644, 657 (1999).

In the present matter, the ALJ's findings and conclusions, which the Commission substantially adopted, are sufficiently supported by the record. To the limited extent that the Commission disagreed with the ALJ's findings, we are satisfied that it adequately explained its reasons for doing so. S.D., supra, 349 N.J. Super. at 485. Further, although not specifically challenged on appeal, the reduced penalty imposed by the Commission is entirely appropriate in light of appellants' ongoing misconduct during the timeframe in question. Consequently, there is no basis to intervene.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION