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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5611-14T4

NEW JERSEY STATE POLICE,

Petitioner-Respondent,

v.

TROOPER NICOLE CUSANELLI #6166,

Respondent-Appellant.

Argued January 25, 2017 – Decided February 22, 2017

Before Judges Simonelli, Carroll and Gooden
Brown.

On appeal from New Jersey Division of State
Police.

John C. Eastlack, Jr. argued the cause for
appellant (Weir & Partners, LLP, attorneys;
Mr. Eastlack, on the briefs).

Christine K. Neeman, Deputy Attorney General,
argued the cause for respondent (Christopher
S. Porrino, Attorney General, attorney;
Christina M. Glogoff, Assistant Attorney
General, of counsel; Ms. Neeman, on the brief).

PER CURIAM

Nicole Cusanelli appeals from a July 1, 2015 final agency
decision by the Superintendent of the New Jersey State Police

(NJSP) terminating her employment as a NJSP trooper after lengthy disciplinary proceedings. Cusanelli argues that her statutory and due process rights were violated by the NJSP's dual failure to timely file and conclude a hearing on the disciplinary charges. She further contends that the Superintendent's findings are against the weight of the evidence, and the penalty of removal is excessive. For the reasons that follow, we affirm.

I.

The events that form the basis of the disciplinary charges are set forth at length in the Superintendent's extensive thirty-page written opinion. We highlight the most pertinent facts, and recount the procedural history in detail to lend context to the procedural issues raised on appeal.

The Motor Vehicle Accident/Investigation

Cusanelli was the registered owner of a red Ford Mustang that ran a red light at a Philadelphia, Pennsylvania intersection at approximately 11:45 p.m. on May 3, 2009. The red Mustang struck a vehicle driven by Jason Belfiore¹ and then left the scene. The collision resulted in damage to both vehicles, and the front bumper and license plate detached from the Mustang and were found at the

¹ At times Mr. Belfiore's name appears as Bellfiore in the record. We adopt the spelling used in the accident report.

accident scene. Belfiore and a passenger in his car complained of injuries and were taken to a local hospital.

The red Mustang traveled over the Ben Franklin Bridge into New Jersey until eventually it stopped on the shoulder of State Highway 42 South, approximately eight miles from the accident site. The Mustang pulled up behind another vehicle that was disabled for reasons unrelated to the accident. Cusanelli, who was off-duty at the time, claimed that the driver of that disabled vehicle, Sandra Shute, told her she had called the NJSP and they were responding. Shute denied telling Cusanelli that she called the police, and Shute's phone records corroborated her version that she called her husband for assistance. Rather than calling the NJSP, Cusanelli's phone records revealed she called her friend/neighbor, Mark Lynch, who owned a towing company, thirteen times between 11:54 p.m. on May 3, 2009, and 12:08 a.m. on May 4, 2009.

The Delaware River Port Authority (DRPA) police were given a description of the red Mustang and found it stopped on Highway 42 South shortly after midnight. Upon arriving, DRPA Sergeant Christopher Bell observed Cusanelli and her brother standing outside the Mustang and Esther Morales exiting the driver's side. Morales and Cusanelli both claimed Morales was driving the car

when the accident occurred. Bell and other police officers who responded observed that Cusanelli appeared intoxicated.

Cusanelli, her brother, and Morales were transported back to Philadelphia where an eyewitness to the accident identified Cusanelli as the driver. Cusanelli was detained in a Philadelphia Police Department (PPD) patrol car while the accident investigation continued. Cusanelli grew agitated, began banging on the windows, and screamed and directed profanity at the officers. Cusanelli was placed under arrest for disorderly conduct, handcuffed, and placed back in the patrol car. Several officers testified that Cusanelli aggressively resisted arrest. Shortly thereafter, Cusanelli slipped out of her handcuffs and resumed banging on the window. She was again removed from the patrol car, and continued to struggle with the officers while she was handcuffed a second time.

The police placed Cusanelli in a police wagon out of concern that she would break the windows of the patrol car. Cusanelli continued yelling and kicking while in the police wagon. She also complained that she had trouble breathing. Consequently, she was transported to Jefferson Hospital, where Belfiore identified her as the driver of the Mustang at the time of the accident. The results of a blood sample taken at the hospital revealed that

Cusanelli had a 0.14% blood alcohol content (BAC), which exceeded the legal limit to operate a motor vehicle in Pennsylvania.

The Criminal Charges

At the conclusion of the accident investigation, the PPD charged Cusanelli with driving under the influence (DUI), resisting arrest, and disorderly conduct. On May 5, 2009, the NJSP suspended Cusanelli without pay pending resolution of the criminal charges.

Trial was conducted in the Municipal Court of Philadelphia County on December 30 and 31, 2009. Cusanelli was convicted of disorderly conduct, sentenced to a three-month term of probation, and ordered to perform thirty hours of community service. Because the judge concluded he "had no idea who was driving," he acquitted Cusanelli of the DUI charge. He also found her not guilty of resisting arrest.

Cusanelli appealed and a new trial was conducted in the Commonwealth of Pennsylvania Court of Common Pleas. She was again found guilty of disorderly conduct on May 3, 2010. At sentencing, Cusanelli's attorney misinformed the court that she had been fired by the NJSP when in fact she had only been suspended. Based on counsel's misrepresentation, to which Cusanelli allegedly assented, the judge lowered her sentence to a \$300 fine and no probation.

The NJSP Internal Investigation

The PPD notified the NJSP of Cusanelli's criminal charges on May 4, 2009. The next day, the NJSP Office of Professional Standards (OPS) opened an internal affairs investigation into the incident and assigned the matter to Detective Sergeant First Class William Scull.

The internal investigation was stayed pending resolution of the criminal proceedings in Pennsylvania. In June 2010, after her appeal was concluded, Scull scheduled Cusanelli's interview for June 7, 2010. Scull subsequently learned of the misinformation Cusanelli's attorney presented to the court regarding her employment status with the NJSP and ordered the May 3, 2010 trial transcript. Scull received the transcript on October 31, 2010, reviewed it, and forwarded it to the New Jersey Attorney General's Office, Division of Criminal Justice (DCJ) for its consideration. On December 31, 2010, Scull received a letter from the DCJ declining to pursue additional criminal charges against Cusanelli. Scull then contacted Cusanelli's attorney and re-scheduled her interview for January 19, 2011. During the interview, Scull questioned Cusanelli about a list of allegations. On the advice of her attorney, Cusanelli opted to submit written responses to Scull's questions, which Scull received on February 8, 2011.

Scull completed his investigation on April 7, 2011, and submitted the investigation report to his immediate supervisor, Lieutenant Parenti, OPS Internal Affairs Investigations Unit Head, South, for review. Parenti completed his review of the report on May 5, 2011. He then forwarded it to the OPS main office, Internal Affairs Investigations Bureau in West Trenton, which finished reviewing the report on May 24, 2011. Thereafter, the report went to the Bureau Chief, Captain Crisologo, who completed his review on June 3, 2011.

After this supervisory review process concluded, the report was sent to the OPS Administrative Internal Proceedings Unit (AIPU). AIPU staff reviewed it and prepared the file for legal review by the Attorney General's Office of Law Enforcement Professional Standards (OLEPS). OLEPS completed its legal review on September 20, 2011. The file was then hand-delivered to the Superintendent's office on September 27, 2011. That same day, the Superintendent charged Cusanelli with five violations of NJSP Rules and Regulations. Cusanelli was served with the charges and supporting specifications ten days later.

The Disciplinary Hearing

Cusanelli contested the charges and the matter was scheduled for a disciplinary hearing before the Superintendent on November 4, 2011. Cusanelli sought and was granted an adjournment to obtain

an accident reconstruction expert report. OLEPS received the report on April 12, 2012, and forwarded it to NJSP's Accident Reconstruction Unit, which issued a rebuttal report in December 2012. The hearing was rescheduled for December 5, 2012. However, due to an emergent matter, the hearing was postponed until January 9, 2013, and continued on January 30 and February 13, 2013.

Hearing dates scheduled for February 20 and 27, 2013, were adjourned at Cusanelli's request to allow her to file a mid-hearing motion to dismiss. On March 19, 2013, Cusanelli moved to recuse the Superintendent as hearing officer or, alternatively, to dismiss the charges for violation of the "forty-five day rule," N.J.S.A. 53:1-33. The NJSP filed its opposition on April 19, 2013, and on May 2, 2013, Cusanelli submitted a reply brief. On June 18, 2013, the Superintendent denied the motion, finding that, as agency head, he was statutorily authorized to hear contested disciplinary matters, and rejecting Cusanelli's claims of bias. The Superintendent further found that, because the charges were filed the same day he received the completed investigation report, they were timely filed pursuant to N.J.S.A. 53:1-33.

On July 9, 2013, Cusanelli filed a motion for reconsideration of the June 18, 2013 decision. On August 23, 2013, the Superintendent denied the motion. On September 16, 2013, Cusanelli sought leave to appeal, which we denied on October 8, 2013.

The disciplinary hearing continued on November 26, 2013, December 11, 2013, and February 12 and 19, 2014. On April 7, 2014, Cusanelli filed a motion to suppress Belfiore's testimony identifying her as the driver of the vehicle at the time of the accident. The NJSP filed opposition on May 8, 2014, and the Superintendent denied the motion on June 24, 2014. The Superintendent explained that the Rules of Evidence and criminal procedural protections are not applicable in administrative proceedings. Accordingly, Belfiore's identification of Cusanelli as the driver was ruled admissible.

The disciplinary hearing continued on July 31, September 24, October 8, November 5, and December 18, 2014; and January 7, January 14, February 4, and February 18, 2015. Counsel for both parties submitted written summations on May 5, 2015.

The Final Agency Decision

The Superintendent issued his final decision on July 1, 2015, finding Cusanelli guilty of all five disciplinary charges. Charge One asserted that Cusanelli violated Article XI, Section 4 of the NJSP Rules and Regulations when she was arrested and convicted for disorderly conduct. The Superintendent found that Cusanelli's behavior was "outrageous" and that the nine law enforcement officers who testified established by a preponderance of the evidence that the disorderly conduct occurred. The Superintendent

found the officers "testified credibly and their testimony and statements were consistent not only with the testimony and statements of other law enforcement officers, but with the testimony and statements made by uninvolved civilian witnesses." In contrast, the Superintendent found Cusanelli "was not credible in light of the substantial evidence that ran contrary to her testimony."

As to Charge Two, the Superintendent found that Cusanelli violated Article VI, Section 2.b by behaving in an unofficial capacity to her personal discredit and to the discredit of the NJSP. He first concluded that the preponderance of competent and credible evidence showed that Cusanelli operated her vehicle while under the influence of alcohol. He cited the testimony of the uninvolved eyewitness and Belfiore's identification of Cusanelli as the driver of the vehicle at the time of the accident. Second, he found it "undisputed that [] Cusanelli's vehicle was involved in a hit-and-run motor vehicle accident that resulted in injuries, [] Cusanelli failed to check the condition of the other motorists involved in the accident, and she did not report the incident to law enforcement." Third, he again noted Cusanelli's disorderly conduct toward the investigating police officers. Fourth, Cusanelli "obstructed a PPD accident investigation by having her vehicle towed from the highway prior to the accident

investigation," and falsely reported that the NJSP was contacted about the accident. In sum, the Superintendent determined that Cusanelli's conduct "from the moment the motor vehicle accident occurred, through this investigation and hearing, [was] consistent with an attempt to cover up the accident and obstruct a police investigation."

With respect to Charge Three, the Superintendent held that Cusanelli violated Article V, Section 7 by:

fail[ing] to report the motor vehicle accident and take proper police action – whether that action be to remain at the scene of the accident, return the vehicle to the scene or order Morales to stop the vehicle under color of law. She likewise failed to take proper police action by causing her vehicle to be towed prior to the accident being investigated.

The Superintendent reiterated that "the credible, substantial evidence reveals that it is much more likely that [] Cusanelli was in fact the driver of the vehicle." Even if she was not, she had a duty to report the collision but failed to do so.

Charge Four alleged that Cusanelli violated Article V, Section 15 of the Rules and Regulations by making false statements. In sustaining this charge, the Superintendent cited Cusanelli's statements to the DRPA police officers that the NJSP had been contacted. He also cited her testimony that she thought Shute had called the NJSP, when in fact Shute made no such representation

to Cusanelli nor had she called the police. The Superintendent further found that Cusanelli's continued insistence throughout the accident investigation, criminal trial, and internal investigation that she only had two drinks was false based on the results of her blood alcohol test. He also noted that Cusanelli "permitted her attorney to make misrepresentations to the court regarding her employment status with the NJSP, which she concedes may have resulted in a lower penalty being assessed to her regarding her conviction."

The Superintendent found the same evidence supported Cusanelli's guilt on Charge Five for making false statements in violation of Standing Operating Procedure B-10, Section XI, Paragraph D. He concluded:

In short, [] Cusanelli[] made intentionally false or misleading statements that hindered a law enforcement investigation, misled a court of law, and interfered with a NJSP internal investigation. Her statements to the police, court[,] and NJSP internal investigators are directly contradicted by the overwhelming credible evidence – testimony and statements of nine law enforcement officers, the opposing driver, and three uninvolved witnesses, and the physical evidence.

The Superintendent determined that the totality of the circumstances compelled the conclusion that Cusanelli's conduct was so egregious as to warrant removal. He noted Cusanelli's lack of remorse and found that her conduct was "destructive of the

public trust and respect for the [NJSP]." Such conduct, he found, was "inexcusable" and "cannot be tolerated in the para-military atmosphere of the [NJSP]." Consequently, the Superintendent ordered Cusanelli removed from her position. This appeal followed.

II.

We first address Cusanelli's procedural challenges to the disciplinary proceedings. Cusanelli alleges a violation of N.J.S.A. 53:1-33, which provides in pertinent part:

A complaint charging a violation of the internal rules and regulations established for the conduct of the State Police shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based[.]. . . The applicable time limit shall not apply if an investigation of an officer or trooper for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that person for a violation of the criminal laws of this State. The applicable time limit shall begin on the day after the disposition of the criminal investigation[.]

A failure to comply with the provisions of this section concerning the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

In Division of State Police v. Maguire, 368 N.J. Super. 564, 570 (App. Div.), certif. denied, 181 N.J. 545 (2004), we noted that N.J.S.A. 53:1-33 is "unambiguous and clear on its face, and

consequently we apply it as written." (Citing State v. Butler, 89 N.J. 220, 226 (1982)). In Maquire, a NJSP trooper argued that the statutory forty-five day rule was violated because the disciplinary charges were not filed until "more than [100] days after the incident." Id. at 569-70. Rejecting this interpretation, we held that the statutory time period begins to run when the Superintendent receives the investigative report. Id. at 570.

In Roberts v. State, Div. of State Police, 191 N.J. 516 (2007), the statutory time limitation for the filing of disciplinary charges was further clarified. In that case, the girlfriend of Roberts, a NJSP trooper, accused him of breaking her arm. Id. at 518. Based on this report, the NJSP began an internal investigation. Ibid. The girlfriend advised that Roberts planned to file an insurance claim for her medical bills by falsely claiming she broke her arm in a fall at his home. Ibid. Given this information, the NJSP turned the matter over to the New Jersey Office of Insurance Fraud Prosecutor (OIFP). Ibid. After conducting an investigation, the OIFP declined to prosecute, and the NJSP resumed its internal investigation. Id. at 519. Upon completion, the investigators forwarded their report to the Superintendent, who proceeded to file disciplinary charges against Roberts three days later. Ibid.

Roberts argued that because the charges were filed more than forty-five days after the disposition of the criminal investigation, they should be dismissed pursuant to N.J.S.A. 53:1-33. Ibid. Our Supreme Court looked to the legislative history of the statute for clarification, and determined "the Legislature intended to balance three competing considerations." Id. at 523. "Those considerations are the need for a complete and thorough internal investigation, the need for deference to a related criminal investigation, and the interests of the particular trooper to be free of undue delay in being charged." Ibid.

The Court observed that "it is not the happening of the event giving rise to discipline that starts the clock for purposes of evaluating timeliness, but the receipt of 'sufficient information' by the one who is authorized to file the charge that is significant." Id. at 524 (citations omitted). Moreover, "only the Superintendent can file a charge, and his receipt of the investigative report satisfies the statutory requirement of the receipt of sufficient information." Ibid. (citing Maquire, supra, 368 N.J. Super. at 570) (citations omitted). The Court noted that it

[did] not understand the statute's time frame to require the filing of charges within forty-five days of the completion of the criminal

matter when the criminal investigation has ended in a decision not to proceed. We decline to interpret the statute to require the Superintendent to conduct his investigation in an abbreviated manner simply to meet a deadline over which he had no control. Rather, in light of the legislative history, we interpret the reference to the "applicable time frame" to subsume the earlier reference to the Superintendent's receipt of sufficient information on which to base a charge. We agree . . . that "[i]t would be illogical for the Legislature to have provided the necessary investigative period to determine whether disciplinary charges should issue when no criminal conduct has been alleged, but to have shortened that period when potential criminal conduct is under investigation. We decline to infer an intent to achieve such an unreasonable result."

[Id. at 525-26 (quoting Roberts v. State, Div. of State Police, 386 N.J. Super. 546, 552-53 (App. Div. 2006)).]

Applying the statute, the Court denied Roberts's argument that the disciplinary action against him was untimely. Id. at 526. In dictum, the Court indicated that its interpretation of the statute was subject to a possible exception if there were excessive delays in the Superintendent's internal review, after the completion of a criminal investigation. Ibid. The Court stated, "[h]ere we do not confront a situation in which an internal investigation was unnecessarily delayed or protracted[.]" Ibid.

To be sure, the NJSP investigation of the matter, after Cusanelli's criminal charges were resolved, was a lengthy one. It

entailed the examination of numerous police investigation reports from DRPA and the PPD, phone records, court transcripts, and interviews with numerous police and lay witnesses. Following the completion of Scull's voluminous investigative report on April 7, 2011, it then went through three levels of supervisory review by June 3, 2011. The file next underwent a comprehensive legal review by a Deputy Attorney General from the OLEPS until September 20, 2011. Upon completion, the file was hand-delivered to the Superintendent's Office on September 27, 2011. It was at that point that the Superintendent obtained sufficient information to file disciplinary charges against Cusanelli, and he did so the very same day. Under the facts presented, we conclude that the internal investigation was not unnecessarily delayed or protracted, and that the disciplinary charges were timely filed.

Cusanelli next argues that the manner in which the Superintendent conducted the disciplinary hearing violated her due process rights. First, she asserts that the Superintendent should have referred the case to the Office of Administrative Law (OAL) to be heard by an Administrative Law Judge (ALJ).

In Maquire, supra, 368 N.J. Super. at 572, we explained that after the OAL was created in 1978, the Legislature required the OAL Director to assign ALJs, rather than hearing officers, to preside over contested cases. See N.J.S.A. 52:14F-6. However,

"[t]he Legislature also allowed agency heads to retain contested cases and 'conduct the hearing directly and individually.'" Maquire, supra, 368 N.J. Super. at 572 (quoting N.J.S.A. 52:14F-8(b)). Consequently, we stated "[t]here is no question that the Superintendent of the State Police as the agency head of the Division, a state agency, may hear these disciplinary matters himself, 'directly and individually.'" Ibid. (citations omitted).

In this case, the Superintendent as the agency head of the NJSP was statutorily authorized to conduct the disciplinary hearing. Cusanelli's argument that he was required to appoint an ALJ to hear the case lacks merit.

Second, Cusanelli contends that, even if the Superintendent had the authority to conduct the hearing, he did so in a manner that was "arbitrary, capricious and unreasonable." We agree with Cusanelli that the Superintendent only had limited availability, which resulted in the matter being tried in piecemeal fashion rather than in extended blocks of time.

Here, however, Cusanelli is equally to blame for the delay in concluding the hearing in a more timely fashion. As noted, she was granted a prolonged adjournment at the start of the proceedings to secure an accident reconstruction report, to which the NJSP then had to respond by securing its own expert report. During the hearings, Cusanelli filed motions to dismiss the charges; for

recusal of the Superintendent; for reconsideration; for leave to appeal; and to suppress the identification testimony, each of which further delayed the proceedings. Throughout the hearing, the Superintendent afforded Cusanelli a full and fair opportunity to present witnesses and advance all of her arguments in defense of the charges. Under the facts presented, we discern no due process violation.

III.

Turning to the merits, Cusanelli argues that the Superintendent's findings are against the weight of the credible evidence. She also challenges the penalty imposed as disproportionate and contrary to the concept of progressive discipline. These arguments warrant little discussion.

Appellate review of an administrative agency decision is limited. See In re Herrmann, 192 N.J. 19, 27 (2007). A strong presumption of reasonableness attaches to the Commission's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div.), certif. denied, 170 N.J. 85 (2001). The burden is on the appellant to demonstrate grounds for reversal. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002); see also Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304 (App. Div. 1993) (holding that "[t]he burden of showing the agency's action was

arbitrary, unreasonable, or capricious rests upon the appellant"), certif. denied, 135 N.J. 469 (1994).

"Appellate courts ordinarily accord deference to final agency actions, reversing those actions if they are 'arbitrary, capricious or unreasonable or [if the action] is not supported by substantial credible evidence in the record as a whole.'" N.J. Soc'y for the Prev. of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 384-85 (2008) (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). Under the arbitrary, capricious, and unreasonable standard, our scope of review is guided by three major inquiries: (1) whether the agency's decision conforms with relevant law; (2) whether the decision is supported by substantial credible evidence in the record; and (3) whether in applying the law to the facts, the administrative agency clearly erred in reaching its conclusion. In re Stallworth, 208 N.J. 182, 194 (2011).

When an agency decision satisfies such criteria, we accord substantial deference to the agency's fact-finding and legal conclusions, while acknowledging the agency's "expertise and superior knowledge of a particular field." Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). We will not substitute our own judgment for the

agency's even though we might have reached a different conclusion. Stallworth, supra, 208 N.J. at 194; see also In re Taylor, 158 N.J. 644, 656 (1999) (discussing the narrow appellate standard of review for administrative matters).

This same deferential standard applies to our review of the agency's choice of a disciplinary sanction. Stallworth, supra, 208 N.J. at 195. We review discipline only to determine whether the "punishment is so disproportionate to the offense, in the light of all of the circumstances, as to be shocking to one's sense of fairness." Ibid. (quoting In re Carter, 191 N.J. 474, 484 (2007)).


Here, the Superintendent had the opportunity to assess the credibility of the witnesses and expressly found that Shute, Belfiore, Lynch, and the investigating police officers all testified credibly while Cusanelli did not. Indeed, Cusanelli in her brief concedes she violated NJSP Rules and Regulations with respect to Charge One by virtue of her disorderly conduct conviction. We find no basis to disturb the Superintendent's comprehensive written decision in which he concluded that the remaining four disciplinary charges also were proven by a preponderance of the credible evidence.

Further, the Superintendent's reasoning, that Cusanelli's termination was required to serve the policy that State troopers

must present an image of personal integrity and dependability to maintain the respect of the public, is sound. We discern no lack of proportionality in the sanction imposed, nor does it shock our sense of fairness, given the egregiousness of Cusanelli's conduct.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION