SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0881-16T1

TEACHERS' PENSION AND
ANNUITY FUND,

Petitioner-Respondent,

v.

CAROL ZIZNEWSKI,

Respondent-Appellant.

Submitted January 17, 2018 – Decided April 13, 2018

Before Judges Fisher and Moynihan.

On appeal from the Board of Trustees of the Teachers' Pension and Annuity Fund, TPAF No. 1-10-147561.

Carol A. Ziznewski, appellant pro se.

Gurbir S. Grewal, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Amy Chung, Deputy Attorney General, on the brief).

PER CURIAM

Carol Ziznewski appeals from the September 15, 2016 final decision of the Board of Trustees of the Teachers' Pension and

Annuity Fund (the Board) adopting the August 4, 2016 initial decision of the administrative law judge (forfeiture ALJ) "which affirmed the Board's determination of a partial forfeiture of service and salary from January 1, 2006 through June 30, 2010[,] due to dishonorable service."

We briefly review some of the long procedural history of this matter and its predecessors. Ziznewski was dismissed from her tenured position after over thirty-five years of service in the Edison school district (Edison) following the Acting Commissioner of the New Jersey State Board of Education's adoption of an ALJ's (tenure ALJ's) initial decision upholding tenure charges of insubordination and two counts of unbecoming conduct. The tenure ALJ rendered his 220-page decision after a forty-three-day hearing over fifteen months, during which he heard testimony from twenty-two witnesses and considered 190 documentary exhibits. Ziznewski appealed and we affirmed the Acting Commissioner's decision. In re Tenure Hearing of Carol Ziznewski, No. A-0083-10 (App. Div. Apr. 13, 2012) (slip op. at 12), certif. denied, 211 N.J. 608 (2012).

Approximately four days after Edison dismissed her,[1] Ziznewski submitted an application for service retirement to be

[1] Edison dismissed Ziznewski on August 23, 2010, retroactive to the August 3 decision of the Commissioner.

effective on September 1, 2010. The Board approved Ziznewski's application but determined her pension and salary would be forfeited pursuant to N.J.S.A. 43:1-3(b) beginning in the "year of the offense" — January 1, 2006 — through the last date on which pension contributions were remitted on her behalf — June 30, 2010. The matter was transmitted to the Office of Administrative Law following Ziznewski's appeal. In those proceedings, the forfeiture ALJ, on July 10, 2015, granted in part the motion for summary decision first filed by the Board (MSD1) as to the imposition of a partial forfeiture, but denied it as to the period of the forfeiture. Thereafter, the forfeiture ALJ granted the Board's second-filed motion for summary decision (MSD2) on August 4, 2016, and imposed a forfeiture from January 1, 2006 through June 30, 2010. The Board adopted the August 4, 2016 initial decision in its September 15, 2016 final decision, from which Ziznewski appeals.

Ziznewski's notice of appeal and accompanying civil case information statement (CCIS), and an amended notice of appeal, specify she is appealing only the September 15, 2016 decision; her amended CCIS designates "September 15, 2016 Order on Motion for Summary Decision 2 ('MSD2')" as the order being appealed. We have made clear "it is only the judgment or orders designated in the notice of appeal which are subject to the appeal process and

review." 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004). We will not consider an order if the appellant "did not indicate in his notice of appeal or case information statement that he was appealing from the order." Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 460-61, 461 n.1 (App. Div. 2002). We will not, therefore, consider any arguments about the adoption of the tenure ALJ's initial decision and the forfeiture ALJ's decision on MSD1 except as they directly relate to the adoption of the forfeiture ALJ's decision on MSD2.

On appeal Ziznewski argues:

> Point I
>
> THE ALJ ERRED IN GRANTING SUMMARY DECISION WITHOUT CONDUCTING A FACT[-]FINDING HEARING WHERE MATERIAL FACTS REGARDING DEFENDANT'S FINAL YEARS OF EMPLOYMENT REMAIN IN DISPUTE.
>
> Point II
>
> THE ALJ ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER IN DETERMINING THAT A PERIOD OF FORFEITURE OF FOUR YEARS AND SIX MONTHS WAS NOT EXCESSIVE.

We affirm that portion of the adopted summary decision order granting partial forfeiture of service and salary through June 30, 2010, but remand the case for a determination of the commencement date of the forfeiture.

Our review of an administrative agency's final determination is limited. In re Carter, 191 N.J. 474, 482-83 (2007). We accord

a strong presumption of reasonableness to the agency's exercise of its statutorily delegated responsibilities. City of Newark v. Nat. Res. Council, Dep't on Envtl. Prot., 82 N.J. 530, 539 (1980). The petitioner challenging the agency's action bears the burden of showing it was arbitrary, unreasonable, or capricious. 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).

We will "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). "We may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result," In re N.J. Pinelands Comm'n Resolution PC4-00-89, 356 N.J. Super. 363, 372 (App. Div. 2003) (citing Brady v. Bd. of Review, 152 N.J. 197, 210 (1997)), but are "obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs," ibid.

We reject Ziznewski's argument that the forfeiture ALJ erred by granting MSD2 without an evidentiary hearing. The forfeiture ALJ correctly applied the doctrine of collateral estoppel in incorporating the tenure ALJ's summary of facts.[2] As our Supreme Court observed

> collateral estoppel, also known as "issue preclusion," . . . is an equitable principle that arises
>
> > [w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.
>
> [Winters v. N. Hudson Regional Fire and Rescue, 212 N.J. 67, 85 (2012) (alteration in original) (quoting Restatement (Second) of Judgments § 27 (Am. Law. Inst. 1982)).]

The determinative question "is whether the issues in the two proceedings were aligned and were litigated as part of the final judgment in the administrative action." Id. at 88.

[2] The forfeiture ALJ noted the tenure ALJ did not designate his "very detailed summary of the testimony given in the [tenure] hearings" as findings of fact, but that he credited Edison's proofs as persuasive — and did not so credit Ziznewski's evidence. The forfeiture ALJ concluded that the tenure ALJ's factual summary was intended to serve as findings of fact and she treated them as such.

After careful consideration, the forfeiture ALJ found all five factors necessary to invoke the doctrine met:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
>
> [Id. at 85 (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521 (2006)).]

The forfeiture ALJ reiterated her ruling in MSD1, finding Ziznewski was a party represented by counsel at the tenure proceedings at which she had "a full and fair opportunity to litigate the issues" related to her conduct while employed by Edison; she incorporated her MSD1 findings of fact — based on various findings of the tenure ALJ as adopted by the then-Acting Commissioner — in her MSD2 decision.

We are also convinced that the tenure proceedings involved the same facts considered in the forfeiture proceedings: Ziznewski's conduct as a teacher. Public pension or retirement benefits are "expressly conditioned upon the rendering of honorable service by a public officer or employee," N.J.S.A. 43:1-3(a), and the Board is "authorized to order the forfeiture of all or part of the earned service credit or pension or retirement

benefit of any member of the fund or system for misconduct occurring during the member's public service which renders the member's service or part thereof dishonorable," N.J.S.A. 43:1-3(b). In determining whether a member's misconduct is dishonorable and whether total or partial forfeiture of the member's earned service credit is appropriate, N.J.S.A. 43:1-3(c) requires the Board to consider and balance the factors enunciated in Uricoli v. Bd. of Trs. of PFRS, 91 N.J. 62 (1982),

> in view of the goals to be achieved under the pension laws:
>
> (1) the member's length of service;
>
> (2) the basis for retirement;
>
> (3) the extent to which the member's pension has vested;
>
> (4) the duties of the particular member;
>
> (5) the member's public employment history and record covered under the retirement system;
>
> (6) any other public employment or service;
>
> (7) the nature of the misconduct or crime, including the gravity or substantiality of the offense, whether it was a single or multiple offense and whether it was continuing or isolated;

> (8) the relationship between the misconduct and the member's public duties;
>
> (9) the quality of moral turpitude or the degree of guilt or culpability, including the member's motives and reasons, personal gain and similar considerations;
>
> (10) the availability and adequacy of other penal sanctions; and
>
> (11) other personal circumstances relating to the member which bear upon the justness of forfeiture.

Most of these factors were also germane to Ziznewski's tenure hearing, especially facts relating to her conduct; the tenure charges involved insubordination and unbecoming conduct. The tenure hearing provided Ziznewski with the "significant procedural and substantive safeguards" to warrant the application of collateral estoppel. Winters, 212 N.J. at 87 (quoting Olivieri, 186 N.J. at 524). As the forfeiture ALJ found:

> The tenure charges alleged that [Ziznewski] violated her responsibilities as a tenured teacher by willfully failing to provide services to her students, engaging in improper conduct toward other teaching staff members and supervisors, and engaging in insubordination, which actions constituted unbecoming conduct and other just cause for termination. Ziznewski was charged with two counts of unbecoming conduct and one count of insubordination.
>
> The first count of unbecoming conduct alleged that respondent engaged in "willful

> refusal to provide services to students." More specifically, the [Board of Education] alleged that [Ziznewski] ignored administrative directives and peer recommendations regarding [Basic Skills Instruction]; consistently "refused to follow procedures for student referrals, use required forms, or use appropriate assessment tool"; did not believe that there was a need for the [English as a Secondary Language] program; "actively" discouraged "student participation" in it; and "engaged in inappropriate communication with parents." The second count of unbecoming conduct averred that Ziznewski engaged in "improper conduct toward other staff members and supervisors." The specifications were that "over time", she "harassed, intimidated, and bullied fellow colleagues and has been disrespectful to supervisors"; she "berated, discredited and embarrassed others in front of parents, students, and peers"; and she "had been disciplined for the above conduct and directed to cease such behavior, but she failed to comply." The third count alleged that respondent has "repeatedly disregard[ed] administrative directives and Board policies over the past several years."

We see no reason to disturb the forfeiture ALJ's application of the tenure-hearing factual conclusions to the forfeiture proceedings.

That factual record fully supports the forfeiture ALJ's comprehensive decision that a partial forfeiture was warranted. Although we are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973), if

substantial evidence supports the agency's decision, "a court may not substitute its own judgment for the agency's even though the court might have reached a different result," Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992). "That deferential standard applies to the review of disciplinary sanctions as well." In re Herrmann, 192 N.J. 19, 28 (2007) (citing Knoble v. Waterfront Comm'n of N.Y. Harbor, 67 N.J. 427, 431-32 (1975)). "In light of the deference owed to such determinations, when reviewing administrative sanctions, the test . . . is whether such punishment is so disproportionate to the offense, in . . . light of all the circumstances, as to be shocking to one's sense of fairness." Id. at 28-29 (first alteration in original) (quoting In re Polk License Revocation, 90 N.J. 550, 578 (1982)). "The threshold of 'shocking' the court's sense of fairness is a difficult one, not met whenever the court would have reached a different result." Id. at 29.

The forfeiture ALJ's thorough review of the eleven statutory factors, N.J.S.A. 43:1-3(c), the weight she ascribed to each — especially factors seven and eight — and the balance she gave to all, deserves our deference. We note the forfeiture ALJ, in assessing the factors, also considered evidence favorable to Ziznewski, including periodic performance reports. Our review of the record convinces us that the Board's decision to partially

forfeit Ziznewski's service and salary was not arbitrary, unreasonable, or capricious.

We turn last to the calculation of the forfeiture period.[3] We recognize that if the Board determines that only a partial forfeiture is warranted, N.J.S.A. 43:1-3(d) requires that the member's pension or retirement benefits be calculated "as if the accrual of pension rights terminated as of the date the misconduct first occurred."

The findings supporting the commencement date of January 1, 2006, bear scrutiny. The forfeiture ALJ adopted the tenure ALJ's observation that, following Ziznewski's transfer to John Marshall School in the 2004-2005 school year (SY), "[d]ifficulties developed 'rather quickly' during the [ensuing] 2005-2006 SY." After the forfeiture ALJ detailed those "difficulties," she continued:

> Ziznewski exhibited a "pattern of egregious conduct" that escalated[] during the 2005-2006 and 2006-2007 school years, including "routinely" disregarding supervisors' requests and refusing to "accept" that the

[3] The June 30, 2010 termination date is clearly supported. As the forfeiture ALJ found, "Ziznewski was on unpaid suspension from April 16, 2008 through September 4, 2008"; and "on paid suspension through June 30, 2009, and from September 1, 2009 through June 30, 2010, with pension deductions taken and submitted. She was thereafter placed on an unpaid suspension." June 30, 2010 was, as the forfeiture ALJ concluded, "the last date pension contributions were remitted on Ziznewski's behalf."

> elementary supervisors, who were her "direct" supervisors, were, in fact, her supervisors . . . However, [Ziznewski] had had difficulties with other educators in the [d]istrict prior to the 2005-200[6] SY. Ziznewski exhibited a "pattern of misconduct and/or failure to follow the directives of at least three prior administrators in other schools."
>
> [citations omitted.]

The tenure ALJ found that the 2005-2006 "[SY] became horrible, heated, argumentative and a 'travesty' and it got so bad that [the principal] indicated it was difficult to describe the extent of it"; and

> after September[] 2005, [the principal] claimed that he periodically did mention complaints to [Ziznewski] about her not coordinating with teachers generally, and in particular, [one student's teacher]. [The principal] tried to mediate meetings in order to address those concerns, but those attempts would frequently fail when Ziznewski would fail to show up and/or cooperate at those meetings. Then teachers would not even want to meet because of their fears of hostility from her. As a result, the problems began to build in the 2005-[20]06 [SY] as a result of those teacher concerns.

The forfeiture ALJ did not specifically incorporate those facts in her findings.[4]

[4] The Board argues Ziznewski's persistent improper cell phone use "beginning in 2004 or 2005" was mentioned by the tenure ALJ in the context of determining the commencement date. The forfeiture ALJ briefly referred to that issue, and issues related to Ziznewski's

The forfeiture ALJ concluded:

> [C]ommencement of a forfeiture effective January 1, 2006[,] is consistent with the pertinent statutory and regulatory provisions. As found, the behaviors of Ziznewski which [led] to the tenure charges started before January 1, 2006[,] and steadily escalated. As [the Board] also notes, it arguably could have commenced a forfeiture prior to that date.

We perceive proofs that indicate Ziznewski's actionable conduct began during the 2005-2006 SY, but find no real support that it began on January 1, 2006. We are constrained to remand this case for the sole purpose of having the Board either set forth the findings that support the given commencement date or to revise same based on the evidence.

We conclude the forfeiture ALJ's thorough analysis relating to the possible excessiveness of the penalty renders meritless Ziznewski's claim of error regarding that issue. If termination of the determined commencement date "would[,] in light of the nature and extent of the misconduct[,] result in an excessive pension or retirement benefit or in an excessive forfeiture," the Board may instead adopt "a date reasonably calculated to impose a forfeiture that reflects the nature and extent of the misconduct

---

tardiness, in determining whether the forfeiture was excessive; but she did not rely on those issues in determining the commencement date.

and the years of honorable service." N.J.S.A. 43:1-3(d). When a partial forfeiture based upon the time of the misconduct would result in minimal or no reduction in retirement benefits, as compared with "the nature and extent of the misconduct and the years of honorable service, the Board may, in its sole discretion, provide a more equitable relief." N.J.A.C. 17:1-6.1(c). The forfeiture ALJ correctly observed "nothing in the record [provided] support [for] a conclusion that the proposed forfeiture would be 'excessive' . . . or that alternative methods for calculating benefits are applicable." In that the forfeiture period after remand will not increase, we affirm that portion of the adopted opinion.

We determine Ziznewski's remaining arguments to be without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.