SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1239-16T3

DONJU FRAZIER,

Petitioner-Respondent,

v.

NEW JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS,

Respondent-Appellant.

Argued February 27, 2018 – Decided March 16, 2018

Before Judges Fasciale and Moynihan.

On appeal from the Civil Service Commission, Docket No. 2016-3665.

Christopher W. Weber, Deputy Attorney General, argued the cause for appellant (Gurbir S. Grewal, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Christopher W. Weber, on the briefs).

Colin M. Lynch argued the cause for respondent (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys; Colin M. Lynch, on the brief).

PER CURIAM

The New Jersey State Prison, Department of Corrections (DOC) appeals from an October 11, 2016 final agency decision by the New Jersey Civil Service Commission (CSC) upholding an initial decision by an administrative law judge (ALJ) reducing the removal of Donju Frazier to a 120-day suspension. The DOC contends that the ALJ improperly concluded that Frazier's conduct was not criminal and did not require disclosure to the DOC; and improperly modified Frazier's disciplinary penalty. We agree and vacate the 120-day suspension, and reinstate the original sanction of removal.

The DOC employs Frazier as a Senior Corrections Officer. While employed by the DOC, Frazier served as a soldier in the United States Army National Guard. The incident that triggered the DOC's investigation and disciplinary proceedings was Frazier's discharge from the Army.

Following an investigation by DOC Special Investigation Division (SID), the CSC issued a preliminary notice of disciplinary action (PNDA), charging Frazier with conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12); falsification, intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding, Human Resources Bulletin (HRB) 84-17 as amended C-8;

conduct unbecoming an employee, HRB 84-17 as amended C-11; and violation of a rule, regulation, policy, procedure, order or administrative decision, HRB 84-17 as amended E-1. After the departmental hearing, the CSC issued a final notice of disciplinary action (FNDA) sustaining all charges and imposing the sanction of removal.

Frazier appealed and the matter was transmitted to the OAL for a hearing. The ALJ issued an initial decision modifying the penalty from removal to a 120-day suspension. The ALJ's decision was later deemed adopted as the CSC's final agency decision, pursuant to N.J.S.A. 40A:14-204, due to a lack of quorum.[1]

We apply the standard of review announced in In re Hendrickson, 451 N.J. Super. 262, 272-73 (App. Div.), certif. granted, 231 N.J. 143 (2017), and will, in our limited role, affirm an ALJ's findings if "they are supported by substantial credible evidence in the record," but afford no deference to the ALJ's legal conclusions and review them de novo. As in Hendrickson,

[1] Following the filing of its initial notice of appeal, the DOC moved before the CSC for a stay of the final decision, which the CSC granted due to a clear likelihood of success on the merits. Frazier moved this court to dissolve the CSC's stay, which we denied. The CSC advised this court in August 2017 that it "lacked a quorum to do business from January through October 2016," and thus did not review the ALJ's initial decision nor the submitted exceptions; and does not take a position on the merits of this appeal.

"when the lack of a quorum attributable to vacancies caused the agency inaction, the current version of the deemed-adopted statute does not require traditional deferential appellate review of the ALJ's decision." Id. at 266. Without the CSC's review, there is no existing "particular and superior expertise in the legislative arena in which [the agency] functions." Id. at 273. Thus, we apply, not the usual "highly deferential review of agency decisions," but the less deferential bench trial standard of review. Ibid.

Applying this standard of review, we turn first to the ALJ's determination that Frazier's conduct was not criminal. During his active duty tour with the Army, in December 2014, Frazier attended a beach party in Qatar, along with other members of his platoon, where soldiers were permitted a maximum of three alcoholic drinks, policed on the honor system. Frazier violated this rule and became intoxicated. While in-line for food, Frazier stood behind L.J.,[2] a subordinate female solider, and touched her stomach, chest and buttocks. Throughout the evening, Frazier proceeded to be inappropriate with L.J., including unwanted touching and verbal sexual advances.

[2] We identify the victim by initials to protect her identity.

The United States Army Criminal Investigation Command (USACIC) investigated Frazier's conduct, and concluded that probable cause existed for charges to be filed against Frazier under the Uniform Code of Military Justice (UCMJ). Frazier requested Chapter 10 Discharge in Lieu of Trial by Court-Martial (Chapter 10 discharge), which the Army approved, resulting in the charges being dismissed, and Frazier being reduced in rank and discharged from the Army with a classification of other than honorable conditions.

We conclude the evidence does not support the ALJ's determination that Frazier's conduct was not criminal. The USACIC is the Army's principal law enforcement agency responsible for investigating criminal matters in the Army, and it specifically investigated Frazier's conduct in December 2014. Frazier was charged with crimes under the UCMJ, which governs criminal actions in the military. A conviction for violations of the UCMJ can result in serious sanctions and sentences of incarceration. See 10 U.S.C. §§ 855 to 858b. Frazier avoided court-martial proceedings, and the risk of conviction and incarceration, by requesting Chapter 10 discharge. Although Chapter 10 discharge is an administrative function, the charges underlying it are not. Frazier would not have been subject to court-martial proceedings but for the probable cause finding of criminal conduct, and Chapter

10 discharge specifically avoids court-martial proceedings. For the ALJ to have found differently is erroneous.

Witness testimony does not support the ALJ's findings and conclusion, although the ALJ found all witnesses, but L.J., credible.[3] Major John Ciulla, the Chief of Military Justice at Fort Jackson, South Carolina, testified that "because it's a [Chapter 10 discharge] . . . it has to have been a criminal conduct, because . . . you wouldn't get a [Chapter 10 discharge] if it wasn't something that you were going to get court martialed for and that you could receive a bad conduct discharge for." The ALJ ignored the judgment of military commanders who determined the seriousness of Frazier's conduct and the necessity of court-martial charges.

Furthermore, the ALJ improperly concluded that Frazier's discharge was for intoxication and disorderly behavior, and not

[3] The DOC does not challenge the ALJ's credibility findings, but instead challenges the ALJ's failure to offer any reasons for finding L.J. incredible coupled with the ALJ's determination that Frazier's conduct was not criminal. L.J.'s testimony at the OAL hearing is consistent with statements she made during the USACIC's investigation, while Frazier had been untruthful at times and described variations of the events. We recognize that credibility determinations need not be articulated in all instances as long as they are supportable by the record. State v. Locurto, 157 N.J. 463, 474 (1999). In this case, however, the ALJ's findings are so divergent from the proofs that it was necessary that she provide reasons for finding L.J. incredible. Without an explanation, and without support by substantial credible evidence in the record, we accord no deference to that credibility finding.

for his sexual misconduct against L.J. The ALJ found that "the papers do not specify which charge, nor do they indicate that such action is tantamount to a plea of guilty to any criminal offense." This finding is improper. The basis for the Army's investigation, which resulted in Frazier's discharge, was for "a possible sexual assault which occurred off-post in Qatar." The result of the investigation was "probable cause to believe [Frazier] committed the offense of Abusive Sexual Contact." The record does not provide substantial credible evidence supporting the ALJ's determination that Frazier's conduct was not criminal, but rather supports that it was criminal.

Next, we turn to the DOC's contention that the ALJ improperly found that Frazier did not fail to report his conduct to the DOC. As a corrections officer, Frazier is held to a higher standard of conduct than other public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). In the course of his employment, Frazier had been provided with HRB 84-19, dated April 3, 2000, receipt of which he acknowledged. The bulletin required that: "Employees who are summoned, arrested or incarcerated as a result of a crime or an offense as defined by N.J.S.A. 2C, Criminal Justice Code of New Jersey, must advise their superior as soon as possible, but not more than [forty-eight] hours from the date of the summons, arrest or incarceration." This requirement applies to "[s]uch matters

which occur outside the jurisdiction of the State of New Jersey . . . when the crime or offense meets the criteria in N.J.S.A. 2C, Criminal Justice Code of New Jersey."

The ALJ found that the evidence demonstrated only that military charges were brought against Frazier and dismissed, and that the DOC failed to prove beyond a preponderance of the evidence that Frazier was summoned, arrested or convicted under Title 2C. The ALJ misapprehended the triggering events for the reporting obligation. Frazier only had to be summoned, arrested or convicted as a result of a crime or offense as defined by Title 2C. The ALJ failed to complete this analysis.

Given the nature of Frazier's conduct, as a civilian, he could have possibly been subject to prosecution and conviction for aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a); criminal sexual contact, N.J.S.A. 2C:14-3(b); or assault, N.J.S.A. 2C:12-1. Frazier received a charge sheet following the USACIC's investigation, a document similar in effect to a summons or indictment. Had Frazier not been afforded Chapter 10 discharge, he would have appeared for court-martial proceedings. As such, Frazier's conduct required him to report the December 2014 incident to the DOC. The DOC did not learn of the events leading to Frazier's discharge until nearly one year after the incident — well-beyond the forty-eight hour reporting requirement. Frazier

did not follow the DOC's reporting requirement and the ALJ erred in finding that he did not have to report the December 2014 incident.

Lastly, the ALJ abused her discretion in determining that Frazier engaged in conduct unbecoming a public employee, yet imposed a less severe discipline than originally imposed. "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6), is an "elastic" phrase encompassing "any conduct which adversely affects . . . morale or efficiency . . . [or] which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services," Karins v. Atl. City, 152 N.J. 532, 554 (1998) (third alteration in original) (quoting In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). Conduct that "has the tendency to destroy public respect for [public] employees and public confidence in the operation of" the public entity is intolerable. Id. at 556-57.

The substantial credible evidence supports a finding that Frazier violated the regulation by inappropriately touching L.J.; however, it is unclear whether the ALJ relied on this evidence or evidence of Frazier's intoxication in making her determination. The ALJ should have considered all of the evidence, including Frazier's sexual misconduct, in determining that he violated the regulation.

Frazier asserts that the ALJ properly applied the concept of progressive discipline in reducing his penalty. "The concept of progressive discipline has been employed to impose severe disciplinary sanction when a public employee's misconduct is habitual, or to mitigate a penalty. When employed to mitigate, it results in incremental punishment." Hendrickson, 451 N.J. Super. at 274 (citations omitted). However, it is not a consideration "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." In re Herrmann, 192 N.J. 19, 33 (2007). Additionally, "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property." Ibid. "Termination has been affirmed where the employee's conduct was unbecoming his or her position regardless of a blameless work history." Hendrickson, 451 N.J. Super. at 275.

Here, Frazier's position with the DOC involves protecting incarcerated individuals from victimization within correctional facilities, N.J.A.C. 10A:1-1.1(a)(7), and protecting the public by providing custody, care and discipline to incarcerated

individuals, N.J.A.C. 10A:1-1.1(a)(1). Frazier's unbecoming conduct, involving his sexual misconduct against L.J. and failure to report, is at odds with his work responsibilities. The ALJ improperly considered progressive discipline in reducing Frazier's penalty in light of the record. The record indicates that Frazier lacks the ability to adhere to rules and behave professionally; and lacks candor and self-control. Frazier is a poor candidate for incremental discipline and the ALJ abused her discretion in ruling otherwise.

Reversed and the original sanction of removal is reinstated.