SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3111-14T4

IN THE MATTER OF
ANGELO ANDRIANI,
CITY OF HOBOKEN,
DEPARTMENT OF PUBLIC SAFETY.

Argued November 27, 2017 – Decided February 9, 2018

Before Judges Ostrer and Whipple.

On appeal from the New Jersey Civil Service Commission, Docket No. 2011-1054.

Gerald D. Miller argued the cause for appellant Angelo Andriani (Miller, Meyerson & Corbo, attorneys; Gerald D. Miller, of counsel and on the briefs).

Paul Condon argued the cause for respondent City of Hoboken (Law Offices of Condon & Theurer, attorneys; Paul Condon, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent New Jersey Civil Service Commission (Valentina M. DiPippo, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Appellant Angelo Andriani challenges the February 4, 2015 final administrative decision of the Civil Service Commission (Commission) terminating his employment as a police officer with the Hoboken Police Department (HPD). We affirm.

We discern the following relevant facts from the record.[1] Appellant became a HPD officer in August 1984. In the early 2000s, appellant was a sergeant and also served as the weapons instructor and commander of the elite SWAT team at the HPD.

In response to the devastation caused by Hurricane Katrina, Hoboken passed a resolution adopting the City of Kenner, Louisiana, as a Sister City, to provide support and relief after Hurricane Katrina. Hoboken collected various donations from its residents and delivered those donations to Kenner. The HPD SWAT team was assigned to escort the donation truck. Appellant, along with other members of the team, including Chief of Police Carmen LaBruno, traveled to Kenner.

In 2005, while in Kenner, appellant and other HPD envoys attended a dinner party at a private residence. During the dinner

[1] The record contains a litany of charges leveled against appellant, listing twenty-one incidents occurring both in Louisiana and New Jersey. Because the Commission and the Administrative Law Judge determined most of those charges were not proven by a preponderance of evidence, we do not repeat them here. Instead, we focus on the charges deemed proven, which resulted in appellant's termination.

party, appellant took out his service weapon, unloaded the bullets, and handed the weapon to the female host.

A year later, in 2006, the HPD was invited back to Kenner to provide additional police resources during Mardi Gras. The HPD accepted the invitation and assigned the SWAT team to return. They utilized the SWAT bus and rented two other vehicles for the drive to Kenner. The trip lasted five or six days.

During the trip, appellant was at a restaurant with the SWAT team members, a Kenner councilwoman, and two other Kenner representatives. At one point during dinner, appellant placed a napkin against his head, imitating a Ku Klux Klan makeshift hood, and uttered some words under it, which the testifying witness could not hear. The Kenner councilwoman and other representatives were upset by appellant and reprimanded him.

On their way back to Hoboken, appellant and other members of the SWAT team stopped at a Hooters restaurant to eat. While there, Hooters employees posed for pictures with the SWAT team members, who were in police uniforms. Some SWAT team members retrieved their weapons from the vehicles and handed them over to female Hooters employees, who then posed for pictures with the weapons inside the restaurant and in front of the SWAT bus.

In October 2007, HPD Officer Timothy McCourt received a package consisting of documents and tape recordings related to

numerous complaints against appellant. McCourt contacted Chief LaBruno and recommended the package be forwarded to the Hudson County Prosecutor's Office. Pending the investigation, appellant was prohibited from using the firing range, and SWAT team operations were suspended.

After requesting additional documents to review and interviewing various HPD officers, the Hudson County Prosecutor's Office returned the case to the City of Hoboken for administrative review. According to a letter issued by the Hudson County Prosecutor's Office, the investigation into appellant's alleged misconduct was terminated effective January 14, 2008. On January 22, 2008, appellant was reassigned to the Homeland Security team and was instructed to work out of the Inspectional Services Bureau.

On February 8, 2008, appellant was served with a Preliminary Notice of Disciplinary Action from the Hoboken Department of Public Safety Director's Office (Director's Office). In that notice, the Director's Office charged appellant, under N.J.A.C. 4A:2-2.3(a), with: incompetency, inefficiency or failure to perform duties; insubordination; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. He was also charged with eight violations of police departmental rules and regulation, including: standards of conduct; neglect of duty; performance of duty; reporting violations of law, ordinances, rules or orders; use of

derogatory terms; conduct towards the public; impartial attitude; and truthfulness. Appellant was also accused of surrendering his weapon to another individual other than a law enforcement officer, in violation of regulations pertaining to firearms.

After a series of departmental hearings, the Commission served appellant with a Final Notice of Disciplinary Action on August 24, 2010. In that notice, the Commission sustained four of the charges under N.J.A.C. 4A:2-2.3(a), including: incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. Accordingly, appellant was removed from his position as a police officer effective February 28, 2008.

Appellant appealed the Commission's decision to the Office of Administrative Law and an Administrative Law Judge (ALJ) conducted hearings on the matter between August 2011 and May 2013.

After hearing testimony from thirteen individuals, including appellant, on October 3, 2014, the ALJ rendered an initial decision, addressing each charge and making credibility findings about each witness. The ALJ rejected numerous charges as unsupported by the evidence. However, the ALJ found appellant had failed to perform the duties of a police officer and engaged in conduct unbecoming a public employee for his participation in the Hooters incident as well as the napkin incident and recommended

appellant be removed effective February 28, 2008. The ALJ concluded appellant's behavior as "memorialized in numerous photographs, is so egregious, that it warrants removal."

Appellant timely filed an exception to the ALJ's recommendation on November 13, 2014, and Hoboken filed its exception shortly thereafter. On February 4, 2015, the Commission conducted a de novo review of the record and issued its final administrative decision, finding the action in removing appellant was justified, affirming the ALJ's decision, and dismissing appellant's appeal. The Commission agreed with the ALJ's determination that the majority of the charges were unproven. It, however, did not agree with the ALJ's dismissal of the allegation and corresponding charges regarding the improper handling of appellant's firearm at the Kenner dinner party and included it as a basis for removal.

This appeal followed. On appeal, appellant argues the charges were untimely because they were not filed within forty-five days of the alleged incidents, and the inaction of the previous HPD Chief and Director estopped any future Chief and Director from instituting disciplinary actions. He also argues he was treated differently than others who attended the 2005 and 2006 Louisiana trips and termination was an inappropriate form of discipline.

I.

Our review of a final agency decision is limited, and we "do not ordinarily overturn such a decision 'in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence.'" In re Carter, 191 N.J. 474, 482 (2007) (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). Moreover, we may not substitute our judgment for that of the agency's when "substantial credible evidence supports [the] agency's conclusion . . . ." Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992) (citations omitted).

Deference to agency decisions applies to the review of disciplinary sanctions. In re Herrmann, 192 N.J. 19, 28 (2007). "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 (quoting In re Polk, 90 N.J. 550, 578 (1982)) (alteration in original). "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. Accordingly, we modify a sanction only "when necessary to bring the agency's action into conformity with its delegated authority."

Id. at 28 (quoting Polk, 90 N.J. at 578). Moreover, we will affirm a sanction that is not illegal or unreasonable. Ibid.

II.

Appellant asserts the failure of the HPD to file the disciplinary charges within forty-give days of the alleged incidents warrants the dismissal of the current charges. We disagree. Under N.J.S.A. 40A:14-147:

> [a] complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the [forty-fifth] 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 [forty-five]-day time limit shall not apply if an investigation of a law enforcement officer 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 officer for a violation of the criminal laws of this State. The [forty-five]-day limit shall begin on the day after the disposition of the criminal investigation.
>
> [emphasis added.]

Although all of the charged incidents occurred in either 2005 or 2006, and the preliminary notice of disciplinary action was not issued until February 28, 2008, the statutory forty-five-day rule was not violated. N.J.S.A. 40A:14-147 allows for a tolling of the forty-five-day rule in the event of a criminal investigation.

The statutory time clock began running once McCourt received the package detailing the allegations against appellant, providing "sufficient information" to file the complaint. The complaints were first referred to the Hudson County Prosecutor's Office in 2007 to investigate appellant's alleged misconducts, tolling the forty-five day deadline.

After requesting additional documents for review and interviewing various HPD officers, the Hudson County Prosecutor's Office returned the case to Hoboken for administrative review sometime between December 2007 and January 2008 and terminated its criminal investigation effective January 14, 2008. The preliminary notice of disciplinary action was issued on February 28, 2008, forty-five days after January 14, 2008, and was thus, timely.

III.

Appellant next argues because the Director and Chief LaBruno knew about his behavior in 2005 and 2006, but did not discipline him, the subsequent HPD Chief and Director[2] are estopped from taking a different position two years later. This argument lacks merit.

[2] The same HPD Chief, Carmen LaBruno, remained in the office during the time of the incidents and when appellant was subject to investigations and discipline. The Director, on the other hand, changed from Mayor David Roberts to William Bergin.

Equitable estoppel is

> the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed . . . as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse.
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> [Segal v. Lynch, 211 N.J. 230, 254 (2012) (quoting Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979)) (alterations in original).]

"Although rarely invoked against public entities, . . . it may be applied against them to prevent manifest injustice." State, Dep't of Environmental Protection and Energy v. Dopp, 268 N.J. Super. 165, 176 (App. Div. 1993). "Equitable estoppel does not require a definite promise, but may be invoked when there is 'conduct, either express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law.'" Segal, 211 N.J. at 254 (quoting McDade v. Siazon, 208 N.J. 463, 480 (2011)).

Appellant and Hoboken agree the incidents that gave rise to the disciplinary actions occurred in 2005 and 2006, and Chief LaBruno was present during the 2005 trip to Louisiana. Complaints against appellant were referred to McCourt in October 2007, who informed the chief of the complaints. Chief LaBruno then contacted the Hudson County Prosecutor's Office, removed appellant from the

firing range, and suspended SWAT team operations. Further, in 2008, it was the chief who signed an order reassigning appellant to a different unit. As such, the same individual, who witnessed some of appellant's conduct, instituted the subsequent disciplinary actions and engaged in no conduct that could have reasonably misled appellant.

Moreover, even if appellant relied on Chief LaBruno's and the Director's actions as an implicit communication that he was in the clear, he suffered no detriment. Appellant continued to render services as a police lieutenant, and he was justly compensated for his service until his removal.

IV.

Appellant argues because he was the only police officer disciplined as a result of the 2006 Hooters incident, he was subject to disparate treatment. "Disparate treatment is demonstrated when a member of 'a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion' under the antidiscrimination laws." Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 74 (App. Div. 2004) (quoting EEOC v. Metal Serv. Co., 892 F.2d 341, 347 (3d Cir. 1990)). A party only needs to demonstrate that "it is more likely than not that the employer's actions were based on unlawful considerations" in order to carry

his or her burden of showing a prima facie case. Id. at 75 (quoting Dixon v. Rutgers, 110 N.J. 432, 443 (1988)).

Here, appellant did not present sufficient evidence to establish a prima facie case of disparate treatment because he did not demonstrate he was singled out because of his membership in a protected group.

We also recognize a more general obligation of public employers to assure "fairness and generally proportionate discipline imposed for similar offenses . . . ." In re Stallworth, 208 N.J. 182, 192 (2011). "[T]he responsibility . . . to assure such fairness and responsibility" resides in one agency, the Civil Service Commission. Ibid. Fairness must take into account not only the nature of the offense, but also the position of the offender.

As the ALJ and the Commission both stated, appellant was disciplined for the Hooters incident because he was the most senior ranking officer traveling on that trip. As such, it was his duty to ensure all of the other officers conduct themselves appropriately, and he failed to do so.

V.

Lastly, appellant argues even if the Commission properly determined he violated statutes and regulations, he should have received progressive discipline, not termination.

Progressive discipline is not "'a fixed and immutable rule to be followed without question' because 'some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.'" Stallworth, 208 N.J. at 196 (quoting Carter, 191 N.J. at 484). Further, progressive discipline can be used in two ways: (1) "the imposition of a more severe penalty for a public employee who engages in habitual misconduct"; and (2) "to mitigate the penalty for a current offense where . . . an employee has little or no record of misconduct." In re Restrepo, Dep't of Corr., 449 N.J. Super. 409, 424 (App. Div.), certif. denied, 230 N.J. 574 (2017) (quoting Herrmann, 192 N.J. at 30).

Here, although appellant had no prior disciplinary record, we agree that his behavior, which involved handing his service weapon to a civilian, allowing other police officers to do the same in a public place, and mimicking an offensive, racist symbol in a public place, which was "memorialized in numerous photographs, is so egregious, it warrants removal." The Commission carefully evaluated the decision and agreed with the ALJ, noting a municipal police officer is a special kind of public employee who "represents law and order to the citizenry and must present an image of personal integrity and dependability."

In light of the record, and the deferential review standard applied to administrative sanctions, terminating appellant's employment was not disproportionate to the offenses, is not illegal or unreasonable, and does not rise to the level of shocking the court's sense of fairness.

Affirmed.