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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1617-15T1

IN THE MATTER OF FERNANDO
SANCHEZ, CITY OF PLAINFIELD
POLICE DEPARTMENT.

Submitted January 18, 2018 – Decided February 13, 2018

Before Judges Currier and Geiger.

On appeal from the Civil Service Commission,
Docket No. 2015-1019.

Alan Dexter Bowman, attorney for appellant
Fernando Sanchez.

Gurbir S. Grewal, Attorney General, attorney
for respondent Civil Service Commission
(Melissa H. Raksa, Assistant Attorney General,
of counsel; Melanie R. Walter, Deputy Attorney
General, on the statement in lieu of brief).

Rainone Coughlin Minchello, LLC, attorneys for
respondent City of Plainfield (Amanda E.
Miller, of counsel; Brian P. Trelease, on the
brief).

PER CURIAM

Fernando Sanchez, a police officer with the City of Plainfield
Police Department, appeals from the Civil Service Commission's
(the Commission) October 7, 2015 final agency decision, upholding

Sanchez's removal from employment for engaging in sexual acts with a civilian in his marked police car, while on duty. We affirm.

The parties stipulate to the following facts pertinent to this appeal:

1. On May 9, 2013, Plainfield Police Officer Fernando Sanchez was interviewed by the Union County Prosecutor's Office in connection with a criminal investigation involving Sergeant Samuel Woody.

2. The victim in the Sergeant Woody Investigation was civilian, K.C.¹

3. During the interview with Officer Sanchez, he revealed that he had a previous sexual relationship with K.C. and they had sex while on duty.

4. During the interview, when asked if he had sexual relations in his patrol car, Officer Sanchez said, "I honestly don't think so."

5. When Lt. Troy Edwards took over control of Plainfield's [Internal Affairs] section, in November of 2013, from discussions with Sgt. Gray and Det. Barrio at the time, he became aware as to their knowledge of the statement to the Prosecutor's Office by Officer Sanchez and of the fact that it was a basis for possible charges against Officer Sanchez.

6. At the conclusion of the Woody criminal trial on April 9, 2014, Internal Affairs Sergeant Gray was provided with the transcript of the Union County Prosecutor's interview with Officer Sanchez.

¹ We identify the victim by initials to protect her identity.

. . . .

9. On May 7, 2014, Internal Affairs Detective Nora Berrio interviewed Officer Sanchez and obtained a sworn statement from him.

10. During the May 7, 2014 Internal Affairs interview, Detective Barrio asked Officer Sanchez, "Did you have sexual intercourse with [K.C.] in your marked/unmarked police vehicle?"

11. Officer Sanchez responded, "No."

12. On May 9, 2014 Officer Sanchez requested to give, and gave a second interview to Detective Berrio which produced a second sworn statement.

13. During the May 9, 2014 statement, Officer Sanchez admitted that he had sex with [K.C.] in his patrol car.

On May, 17, 2014, Sanchez received a Preliminary Notice of Disciplinary Action (PNDA) charging him with the following violations of Division rules and regulations: (1) failing to conduct himself in accordance with high ethical standards on and off-duty, 3.1.6; (2) violating his duties, 4.1.1; (3) failing to obey all applicable Federal and State laws, City ordinances, rules, policies, procedures, and directives, 4.1.3; (4) failure to disclose pertinent information in a report, 4.3.3; (5) engaging in prohibited activities, 4.6.4; (6) failure to truthfully disclose pertinent information in reports, 4.12.6; (7) conduct subversive to the good order and discipline of the division,

6.2.22; (8) failure to remove keys from a City vehicle when unattended, 6.2.400; and (9) allowing an unauthorized person in a radio car, 6.2.59.

The PNDA also charged Sanchez with the following violations of the New Jersey Administrative Code: (1) conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); misuse of public property, N.J.A.C. 4A:2-2.3(a)(8); and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12).

On September 23, 2014, Sanchez received a Final Notice of Disciplinary Action (FNDA) removing Sanchez effective September 22, 2014. Sanchez appealed his removal to the Commission. The parties agreed the matter could be decided in the Office of Administrative Law (OAL) without an evidentiary hearing on cross-motions for summary judgment because there were no genuine issues as to any material fact. The City did not pursue any charges of untruthfulness before the administrative law judge (ALJ).

The parties further stipulate that the alleged sexual activities, which form the basis of the complaints against Officer Sanchez, occurred prior to July 24, 2011. In addition, they stipulate that Sanchez had been suspended on one prior occasion, receiving a forty-hour suspension on unrelated charges.

On September 14, 2015, ALJ Leslie Z. Celentano issued a detailed twenty-four page written initial decision: (1) dismissing

charges four, six, and eight; (2) denying dismissal of the remaining charges as time-barred or without sufficient basis; (3) denying consolidation of the charges 1, 2, 3, 5, 7, 9, 10, 11, and 12; (4) upholding the removal of Sanchez based on the City proving the remaining charges; (5) denying an award of back pay; and (6) denying a stay of penalties.

On October 7, 2015, the Commission adopted the ALJ's findings of fact and conclusions. Finding the removal of Sanchez to be justified, the Commission affirmed that action and dismissed the appeal. This appeal followed.

On appeal, Sanchez argues the Commission erred in affirming his removal from employment because a substantial suspension, rather than removal, was warranted. Sanchez further argues the charges should have been dismissed because they were time-barred by N.J.S.A. 40A:14-147, did not have a sufficient basis, and should have been consolidated because they were predicated on a single event.

I.

"The scope of [our] review is limited. An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007) (citations omitted). We

accord the agency's decision substantial deference "even if [we] would have reached a different result in the first instance." Id. at 28. That deference extends to decisions relating to employee discipline and punishment, including termination. Ibid.; see also In re Carter, 191 N.J. 474, 486 (2007). An agency head's choice of sanction is a matter of broad discretion, particularly where considerations of public policy are implicated. Division of State Police v. Jiras, 305 N.J. Super. 476, 482 (App. Div. 1997).

We affirm substantially for the reasons expressed by ALJ Celentano in her comprehensive and well-reasoned initial decision, which were accepted and adopted by the Commission. We add only the following comments.

Sanchez argues the charges were time-barred by N.J.S.A. 40A:14-147, which provides:

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 ALJ concluded the forty-five-day period did not commence until May 9, 2014, when Sanchez admitted he had sex with K.C. in his patrol car. The record supports the ALJ's finding that Sanchez's false statements to investigators of the County

Prosecutor on May 9, 2013, and to the Internal Affairs investigator on May 7, 2014, "delayed revelation of the severity of his behavior" because Sanchez "effectively concealed his conduct from investigators." Therefore, the City did not have "sufficient information" to file the charges until Sanchez revealed the extent of his misconduct on May 9, 2014. The ALJ also correctly concluded N.J.S.A. 40A:14-147 did not apply to the Administrative Code violations. Accordingly, the charges are not time-barred.

Sanchez further argues his misconduct did not warrant removal from office, contending a substantial suspension was the appropriate penalty. We disagree.

A reviewing court may "alter a sanction imposed by an administrative agency only 'when necessary to bring the agency's action into conformity with its delegated authority. The Court has no power to act independently as an administrative tribunal or to substitute its judgment for that of the agency.'" Herrmann, 192 N.J. at 28 (quoting In re Polk, 90 N.J. 550, 578 (1982)). "[W]hen 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 Polk, 90 N.J. at 578) (citations omitted). Moreover, an agency's choice of discipline "is made weightier when, as in this instance, it is the penalty

imposed by the appointing authority and affirmed by the ALJ." Id.
at 36.

"Our appellate courts . . . have upheld dismissal of employees, without regard to whether the employees have had substantial past disciplinary records, for engaging in conduct that is unbecoming to the position." Id. at 34. As the Court has explained:

[P]rogressive 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." "Thus, 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."

[In re Stallworth, 208 N.J. 182, 196-97 (2011)
(citations omitted).]

Law enforcement officers are held to a higher standard of responsibility and conduct than other public employees. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). "Nor can a police officer complain that he or she is being held to an unfairly high standard of conduct. Rather, 'it is one of the obligations he undertakes upon voluntary entry in the public service.'" In re Phillips, 117 N.J. 567, 577 (1990) (quoting In re Emmons, 63 N.J. Super. 136, 142 (App. Div. 1960)).

Although progressive discipline is a recognized and accepted principle, incremental discipline does not have to be applied in every disciplinary setting. Herrmann, 192 N.J. at 33. "Instead, we have recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter, 191 N.J. at 484. As explained by the Court in Herrmann,

progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty 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.

[192 N.J. at 33.]

Sanchez's improper conduct was sufficiently egregious and unbecoming to his office so as to warrant removal even if he had no prior disciplinary history. Here, however, Sanchez had previously served a forty-hour suspension. The Commission's determination that Sanchez's removal was justified is supported by substantial credible evidence in the record and was not arbitrary, capricious, or unreasonable.

Sanchez's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(D).

Affirmed.

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

