SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0812-21

IN THE MATTER OF
SAMANTHA CHIRICHELLO,
EDNA MAHAN CORRECTIONAL
FACILITY

Argued January 17, 2023 - Decided January 25, 2023

Before Judges Whipple and Mawla.

On appeal from the New Jersey Civil Service Commission, Docket No. 2021-872.

Donald C. Barbati argued the cause for appellant Samantha Chirichello (Crivelli, Barbati & DeRose, LLC, attorneys; Donald C. Barbati, on the briefs).

Nathaniel Levy, Deputy Attorney General, argued the cause for respondent New Jersey Department of Corrections (Matthew J. Platkin, Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Nathaniel Levy, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent New Jersey Civil Service Commission (Pamela N. Ullman, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Appellant Samantha Chirichello appeals from an October 6, 2021 final agency decision by the Civil Service Commission terminating her employment as a senior correctional officer. We affirm.

Appellant was employed from June 2019 until December 2020, around the time of the murder of George Floyd. A member of the public complained to the New Jersey Department of Corrections (DOC) about social media posts by appellant. Those posts were as follows:

> 1) Appellant shared a Facebook post, which stated: "I'm sick of hearing that the rioters are 'deeply hurting' and 'in pain' and blah blah. Shut up. They're destroying lives at random, and enjoying every second of it. They have no coherent grievance that they can articulate. They are criminals. I have no sympathy for them. None."
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> 2) Appellant shared a post, which stated: "If the police are going to be defunded, so should welfare, food stamps, and free medical care. If you don't need police, you can take care of yourself on every level."
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> 3) Appellant shared a cartoon image of Elmer Fudd wearing the confederate battle flag on his clothing, holding an assault rifle next to a "Paw Patrol" cartoon police dog character stating "I [g]ot [a] [n]ew [g]un & [f]riend."
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> 4) Appellant reposted an image of a George Floyd "meme" stating "THE MEDIA AND THE LEFT HAVE MADE GEORGE FLOYD INTO A MARTYR. BUT WHO WAS HE REALLY? 1998[, TEN] MONTHS IN

PRISON ARMED ROBBERY. 2002[, EIGHT] MONTHS IN PRISON FOR COCAINE[.] 2004[, TEN] MONTHS IN PRISON FOR COCAINE[.] 2005[, TEN] MONTHS IN PRISON FOR COCAINE[.] 2007[, FIVE] YEARS [FOR] ARMED ROBBERY OF A PREGNANT WOMAN IN HER HOME. WHEN HE WAS KILLED, HE WAS HIGH ON METH GETTING READY TO DRIVE A CAR AND POSSIBLY KILL YOUR KID. TOO BAD THE PREGNANT WOMAN DIDN'T HAVE A GUN."

5) Appellant posted an image of herself on Instagram wearing her police uniform, posing next to graffiti stating "Black Lives Matter," with "sike" underneath the slogan. The post's caption stated: "If you are testing my water, you better know how to swim."

6) Appellant posted a picture on Facebook depicting a group of people (apparently protesters) lying across a two-lane highway with their hands behind their back. Appellant's mother commented on the post "I would run them over no problem lol (laughing tears of joy emoji) didn't see it."

7) Appellant reposted an image with two panels. The first panel had a male face looking at a masked face, which had "pedophilia is a sexuality" written beneath it. The second panel depicted the masked character covered in blood spatter having been smashed with a baseball bat wielded by the male face.

8) Appellant tweeted on January 31, 2013, stating: "Newark for a game! Ghetto time"; and tweeted on February 14, 2013, stating: "Washington [H]eights is the worst show! So ghetto smh[.]"

Following an investigation, the DOC suspended appellant. The matter was ultimately transferred to the Office of Administrative Law (OAL) and tried before an administrative law judge (ALJ). The DOC presented testimony from three witnesses and nineteen exhibits, and appellant testified on her own behalf. The ALJ found all of the witnesses credible and concluded the DOC had proven appellant violated: N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming of a public employee; HRB 84-17 C-11, a DOC policy addressing conduct unbecoming; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause for violating the implicit standard of good behavior; HRB 84-17 C-31, a DOC policy prohibiting discrimination, harassment, or hostile environment in the workplace; and ADM.005.001 and E-1, a DOC policy prohibiting violation of a rule, regulation, policy, procedure, order or administrative decision.

As to the penalty, the ALJ found "appellant's disciplinary record was unremarkable prior to the incident that is the subject of this matter." However, appellant's misconduct was severe and unbecoming of her position. The ALJ reasoned "[a]lthough appellant's conduct in this case warrants major discipline, the []DOC's lack of a formal written policy on the acceptable use of social media by its corrections officer at the time of the incident is problematic and should be considered as a mitigating factor in this case." The ALJ noted appellant was

young and at the beginning of her career when she "made a severe misstep and exercised extremely poor judgment in an area where she received little to no training or guidance and policy had not yet caught up to the behavior despite it[] having been a simmering and burgeoning issue in the area." The ALJ recommended a 180-day suspension without pay, plus mandatory diversity training and a psychological examination as a prerequisite to reinstatement.

The Commission upheld the ALJ's decision sustaining the charges, but found termination rather than suspension was the appropriate penalty because of the egregious nature of appellant's conduct. The Commission reasoned as follows:

> [A]ppellant did not merely "like" one offensive post. Rather, she reposted and made many offensive and inflammatory comments and posts about those supporting defunding the police, those receiving public assistance, criminals, rioters, George Floyd's criminal history and one with confederate flags on her public Facebook page. As noted by the ALJ, regardless of her intent in making the posts, the appellant's posts expose and tie the appellant, her employment, and the sentiment reflected in the posts, to which she added no comment or context, for countless people to see. The Commission agrees that any viewer not familiar with the appellant or her personal views on the sentiment or intention in posting could reasonably presume that the sentiment expressed in the posts were a good measure of her ability to treat the people she serves in a fair and impartial manner. Clearly, the appellant's behavior in making these multiple posts could adversely affect the

> more and safety of the facility and undermine the public respect in the services provided. Moreover, the appellant was a very short-term employee at the time of her removal, having only been employed for less than two years. Perhaps, had the appellant had a lengthy and relatively unblemished record of service, the matter of the ALJ's recommended reduction in penalty could have been considered . . . . However, that is not the facts of this matter.

I.

Appellant raises the following arguments on appeal:

> POINT A
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> THE CIVIL SERVICE COMMISSION ERRED IN ACCEPTING AND ADOPTING THE INITIAL DECISION OF THE ALJ TO SUSTAIN THE DISCIPLINARY CHARGES AGAINST [APPELLANT]. EVEN ASSUMING THE DISCIPLINARY CHARGES WERE RIGHTFULLY SUSTAINED, THE COMMISSION ERRED IN UPHOLDING APPELLANT'S REMOVAL FROM EMPLOYMENT. AS SUCH, THE COMMISSION'S DECISION MUST BE REVERSED IN ITS ENTIRETY.
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> POINT B
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> THE ALJ'S FINDINGS AND/OR CONCLUSIONS THAT THE DEPARTMENT MET ITS BURDEN OF PROOF TO SUSTAIN CERTAIN DISCIPLINARY CHARGES AGAINST APPELLANT WERE NOT SUPPORTED BY THE EVIDENTIAL RECORD. AS SUCH, THE COMMISSION'S AFFIRMATION OF THESE FINDINGS AND/OR CONCLUSIONS WAS ERRONEOUS AND MUST BE REVERSED.

POINT C

THE COMMISSION ERRED IN UPHOLDING APPELLANT'S REMOVAL FROM EMPLOYMENT AND REJECTING THE ALJ'S RECOMMENDATION TO MODIFY THE SAME. SUCH A PENALTY DEFIES THE PRINCIPLES OF PROGRESSIVE DISCIPLINE AND IS "SHOCKING TO ONE'S SENSE OF FAIRNESS." AS SUCH, ANY PENALTY MUST BE SUBSTANTIALLY REDUCED AND, AT AN ABSOLUTE MINIMUM, THE ALJ'S RECOMMENDATION MUST BE IMPOSED.

II.

The "final determination of an administrative agency . . . is entitled to substantial deference." In re Eastwick Coll. LPN-RN Bridge Program, 225 N.J. 533, 541 (2016). We

> will not reverse an agency's final decision unless the decision is "arbitrary, capricious, or unreasonable," the determination "violate[s] express or implied legislative policies," the agency's action offends the United States Constitution or the State Constitution, or "the findings on which [the decision] was based were not supported by substantial, credible evidence in the record."
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> [Ibid. (alteration in original) (quoting Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env't Prot., 191 N.J. 38, 48 (2007)).]

We are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue . . . ." In re Carter, 191 N.J. 474, 483 (2007) (internal citations omitted). However, "if substantial evidence supports

the agency's decision, '[we] may not substitute [our] own judgment for the agency's even though [we] might have reached a different result . . . .'" Ibid. (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)).

III.

In Points A and B, appellant argues there was inadequate evidence showing her social media posts violated the DOC's policy on workplace discrimination. She asserts the posts were not made in the workplace and were misconstrued as racially motivated, despite the fact they were not accompanied by any commentary to such effect from her.

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). N.J.A.C. 4A:2–2.3 provides for employee discipline for both "conduct unbecoming a public employee" and "other sufficient cause." The regulation applies to discipline off-duty behavior or speech. See Karins v. City of Atlantic City, 152 N.J. 532, 543, 546 (1998). Police officials are held to a higher standard of conduct than other public employees, and a finding of misconduct by an officer need not be predicated on the violation of a departmental rule or regulation. In re Phillips, 117 N.J. 567, 576 (1990). Officers are "constantly called upon to exercise tact, restraint and good judgment

in [their] relationship with the public." Ibid. (quoting Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)).

Pursuant to these principles and our review of the record, we affirm substantially for the reasons expressed in the Commission's decision. Appellant's social media posts were inappropriate, inflammatory, and discriminatory, and fell short of the high standards required of her office. The record amply supports the conclusion appellant violated the applicable regulations and DOC policies, and her arguments to the contrary lack merit.

IV.

In Points A and C, appellant argues the Commission's decision to reinstate her termination instead of the ALJ's 180-day suspension was unfair. She reiterates that: her disciplinary record prior to this matter was clean; the DOC did not have a social media policy when she made the social media posts; and the Commission violated the principles of proportionate and progressive discipline.

We may set aside a sanction imposed by an administrative agency where the "punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." In re Polk License

Revocation, 90 N.J. 550, 578 (1982) (internal quotation marks omitted). "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." In re Herrmann, 192 N.J. 19, 28 (2007). Reasonable sanctions should be affirmed. Ibid. Progressive discipline is not a fixed or immutable rule because "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." In re Carter, 191 N.J. at 484.

Having thoroughly considered the record pursuant to these principles, we are unconvinced appellant's termination shocks our sense of fairness. Appellant was employed for a short period before she began her social media posts. Her lack of a disciplinary history is attributable more to the brevity of her employment history rather than a long unblemished track record as a corrections officer. Appellant's social media activity was not a one-off; she made several public posts on different platforms bearing racially insensitive and violent undertones. The Commission's conclusion "these multiple posts could adversely affect the . . . safety of the [correctional] facility and undermine the public respect in the services provided" underscores the gravity of appellant's misconduct and reasonableness of the discipline imposed.

Affirmed.