

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1887-14T1

IN THE MATTER OF DYWON KELSEY,
MERCER COUNTY SHERIFF'S
DEPARTMENT.

Argued October 6, 2016 — Decided March 7, 2017

Before Judges Alvarez and Accurso.¹

On appeal from the Civil Service Commission,
Docket No. 2013-1552.

Dywon Kelsey, appellant, argued the cause pro
se (Paul L. Kleinbaum and Marissa A. McAleer,
on the brief).

Stephen E. Trimboli argued the cause for
respondent Mercer County Sheriff's Office
(Trimboli & Prusinowski, L.L.C., attorneys;
Mr. Trimboli, of counsel and on the brief;
Jinkal Pujara, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent Civil Service

¹ Hon. Carol E. Higbee was a member of the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal remains one that shall be decided by two judges. Counsel has agreed to the substitution and participation of another judge from the part and to waive reargument.

Commission (Pamela N. Ullman, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Dywon Kelsey appeals the November 6, 2014 final administrative decision by the Civil Service Commission (Commission) upholding his ninety-day suspension. For the reasons stated by the administrative law judge (ALJ) in her August 26, 2014 decision, which was accepted and adopted in full by the Commission, we affirm. We add the following brief comments.

I.

Kelsey is a Mercer County sheriff's officer. He was issued a preliminary notice of disciplinary action on May 14, 2012, charging him with: conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6) (charge one); "MCSO Rules & Regulations 4.1.10 Insubordination (a) STEP 2" (charge 2); "MCSO Rules & Regulation 4.1.3. Cooperation" (charge 3); "MCSO Rules & Regulations 6.5.1 Discipline/Internal Investigation" (charge 4); and V4C02 ProceduresA1.(f)(sic)[.]" (charge 5). The charges were upheld at an October 22, 2012 hearing. The December 7, 2012 final notice of disciplinary action (FNDA) suspended Kelsey without pay, for ninety days from December 10, 2012, to April 12, 2013.

The Commission transferred Kelsey's appeal to the Office of Administrative Law (OAL) as a contested case under the

Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15 and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. On August 26, 2014, with the exception of charge five, the ALJ found that the charges were substantiated and the suspension justified. In her cogent twenty-five-page written decision, the judge reviewed the testimony in detail and analyzed the relevant law.

The ALJ's decision included the finding that Kelsey's 2011 employment-related lawsuit against the Mercer County Sheriff's Office played no role in this incident. These charges arose when Kelsey was captured on video, when called to testify, dressed in informal civilian clothing, contrary to Mercer County Sheriff's Office Rules and Regulations. When Kelsey was initially brought in to discuss that charge, he demanded the opportunity to be represented by an attorney. The interview was rescheduled for the following day to accommodate his request. Kelsey declined representation by his union, as he had disagreements in the past with his union representative.

The first day Kelsey appeared, he argued with one of the internal affairs officers and refused to enter the office. When he returned the next day, he again argued with the officer, refused to sit down, leaned over her desk, raised his voice, and continued to say "no comment." He refused to even sign a document

acknowledging his receipt of the charges. Eventually, Kelsey was told he was being charged with insubordination and was asked to leave. He claimed his lawyer was in court and therefore could not appear.

In reviewing the applicable law, the ALJ noted that "[l]aw enforcement officers are held to the highest standards of personal integrity and dependability[,]" and cited to relevant caselaw in support of that principle. She found that Kelsey's behavior during the course of the interview was entirely "unbecoming a public employee and was totally inappropriate and disrespectful[.]" She therefore held that the Mercer County Sheriff's Office had proven by a preponderance of the credible evidence that Kelsey's conduct violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming an employee. The ALJ further found that his behavior constituted insubordination and violated the requirement that he cooperate with internal investigations.

In fashioning appropriate discipline, the ALJ took into account that Kelsey's disciplinary history included: an April 1, 2012 reprimand, a reprimand letter issued on January 3, 2010, an employee counseling form on May 3, 2007, another on March 30, 2007, and an FNDA imposing a seven-day suspension on January 17, 2007. The earlier suspension was imposed because Kelsey "le[ft] his post," "showed unruly behavior" towards a supervisor by

"raising his voice, interrupting and walking away . . . while he was spoken to[,]" and calling his supervisor a "fool and an idiot[.]" (internal quotation marks omitted). In part because the 2007 matter also went to insubordination and disobedience of orders, she accorded it great weight in fashioning an appropriate penalty for these charges. Given "that he had already received a seven-working-day suspension for similar behavior in 2007," she concluded a ninety-working-day suspension was appropriate. The Commission adopted these findings of fact and conclusions.

II.

It is well-established that our review of the Commission's decision is limited. We accord a strong presumption of reasonableness to the "agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014). In order to reverse, we would have to "find the agency's decision to be 'arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole.'" In re Stallworth, 208 N.J. 182, 194 (2011) (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). The burden rests on the appellant to establish that the administrative decision was unlawful, arbitrary, or capricious. See In re Foglio, 207 N.J. 38, 47 (2011).

The ALJ's decisions regarding the charges rested on her unexpressed credibility findings. "[C]redibility findings need not be explicitly enunciated if the record as a whole makes the findings clear." In re Taylor, 158 N.J. 644, 659 (1999) (citing State v. Locurto, 157 N.J. 463, 474 (1999)). The record as a whole made her findings clear.

On appeal, Kelsey also argues that the ALJ erred in characterizing his right to an attorney for the initial hearing as merely an accommodation. We disagree. Kelsey was afforded the opportunity to obtain counsel and for reasons best known to him, neither requested a second delay, or had the attorney or the attorney's office reach out to the investigating officers to reschedule. That the ALJ used the word "accommodation" does not negate the fact that Kelsey was extended the opportunity to appear with counsel but chose not to do so.

Kelsey also contends that the ALJ's ninety-day suspension was unduly harsh and did not give adequate consideration to the concept of progressive discipline. This contention lacks merit.

"In matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction." In re Carter, 191 N.J. 474, 485 (2007). A 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 order to have the respect of the public." Id. at 486 (quoting Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)); In re Phillips, 117 N.J. 567, 576 (1990). "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 into the public service.'" Phillips, supra, 117 N.J. at 577 (quoting In re Emmons, 63 N.J. Super. 136, 142 (App. Div. 1960)). Therefore, "courts should take care not to substitute their own views of whether a particular penalty is correct for those of the body charged with making that decision." Carter, supra, 191 N.J. at 486.

Kelsey's inappropriate response to the investigation into the initial incident caused it to mushroom into far more serious charges. Kelsey's conduct does not meet the standard expected of a sheriff's officer.

Kelsey had worked as a sheriff's officer since March 1, 1999, so he was well aware of departmental rules and regulations. In rendering her penalty decision, the prior infraction that the ALJ weighed most heavily was the 2007 incident. On that occasion, Kelsey was suspended seven days for "le[aving] his post," "show[ing] unruly behavior" towards a supervisor by "raising his

voice, interrupting and walking away . . . while he was spoken to[,] and calling his supervisor a "fool and an idiot[.]" The similarity between the first incident and this one, unfortunately, is striking.

Thus Kelsey's prior disciplinary record supports the finding that suspension was warranted. As the ALJ noted, insubordination can lead to termination, a potential consequence that has not deterred Kelsey to this date. The ninety-day suspension took into account not only the high standard of conduct to be expected of a law enforcement officer, but concepts of progressive discipline.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION