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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3282-14T1

IN THE MATTER OF TAMIEKA
DWYER, CITY OF EAST ORANGE
POLICE DEPARTMENT.

Submitted December 14, 2016 – Decided March 28, 2017

Before Judges Alvarez and Accurso.

On appeal from the Civil Service Commission,
CSC Docket No. 2014-480.

Caruso Smith Picini, PC, attorneys for
appellant Tamieka Dwyer (Steven J.
Kaflowitz, on the brief).

Khalifah L. Shabazz, Corporation Counsel,
attorney for respondent City of East Orange
Police Department (Marlin G. Townes III,
Assistant Corporation Counsel, on the
brief).

Christopher S. Porrino, Attorney General,
attorney for respondent Civil Service
Commission (Todd A. Wigder, Deputy Attorney
General, on the statement in lieu of brief).

PER CURIAM

Tamieka Dwyer appeals from a February 5, 2015 final agency decision of the Civil Service Commission upholding the decision of the City of East Orange Police Department to remove her as a

police officer for using over 100 unexcused sick days in 2011, visiting a bar in a neighboring city while on duty and in uniform, falsifying patrol logs and driving a police car while her license was suspended in contravention of a direct order from a superior.

Dwyer claims the charges should have been dismissed because the Department lacks rules defining excessive sick time use, her visit to the bar was reasonable and excusable, and the record does not support she falsified patrol logs or operated a cruiser when her license was under suspension. Dwyer also claims the Department's decision to group these charges together was improper and resulted in a sanction that was unfair and should not have been sustained. We affirm.

This matter was tried over the course of five days in the Office of Administrative Law. The Administrative Law Judge heard testimony from a dozen witnesses, including Dwyer. He found all ten of the Department's witnesses, including the Chief of Police, credible, and termed the evidence presented by the Department "believable and well organized." He found the testimony of the one witness Dwyer presented, an information technology staffer from the Department, then under suspension, who was questioned about malfunctions in the Department's CAD (computer-aided dispatch) and GPS (global positioning system)

software "interesting," but ultimately irrelevant as she was without information as to any malfunctions in the police cruisers Dwyer drove. He termed Dwyer "not credible" and found "her admissions can lead to substantiation of a number of the charges."

The ALJ substantiated the Department's charges of excessive absenteeism, being in a bar on duty and in uniform and operating a police car while her license was suspended in whole or part based on Dwyer's admissions. Regarding the charge of absenteeism, a Department witness testified to the general order regarding sick leave, which was put in evidence. The policy provides that "[c]hronic use of sick leave may be symptomatic of an employee's not fitness for duty," and warns that "any member who exceeds their yearly sick time allotment or exhibits a pattern of sick leave abuse may face Department charges." Dwyer acknowledged she was absent 105.63 days in 2011 and was aware that officers in the Department were allotted twenty days sick time annually, leading the ALJ to conclude there was "little doubt that Dwyer used an excessive amount of sick time [in] 2011."

Dwyer also admitted that she was in a bar outside the city limits, while in uniform and on duty. That incident, which led to a conduct unbecoming charge, was reported by the Chief of

Police. The Chief was touring the City with an aide when he saw an East Orange squad car parked at a Hess station next door to a bar in the neighboring town of Orange. While the two communicated with dispatch in an effort to identify the officer assigned to the car, a man walked out of the bar. Spotting the Chief's cruiser, the man immediately turned and walked back inside. Less than a minute later, Dwyer emerged from the bar, where she was confronted by the Chief, his aide, and minutes later by Dwyer's supervisor and members of Internal Affairs who the Chief had summoned to the scene.

Dwyer admitted being in the bar and that she had not requested permission to leave her assigned patrol zone, exit the city limits, or go on break. She testified she had an urgent need to use the bathroom, which is why she had not asked permission, and the bathroom at the nearby Burger King in East Orange was occupied. When Dwyer spotted the owner of the bar opening for the day, a woman she knew, she asked to use the facilities. The owner assented and offered to heat up Dwyer's lunch, which the owner saw in the front seat of the police cruiser. Dwyer testified she was only in the bar for eleven to twelve minutes and had not consumed any alcohol.

Dwyer admitted on cross-examination that she was aware of the policy against officers being in bars in uniform and that

she could have used the bathroom at the Hess station where she parked the police cruiser. The ALJ concluded on the basis of Dwyer's admissions that "Dwyer left the City of [East] Orange while on duty without permission and entered a liquor establishment while on duty and in uniform" in violation of the Department's rules and regulations. He found "Dwyer's explanation of having a bathroom emergency lacked credibility as Dwyer admitted that the Hess gas station located in East Orange had a bathroom, was not a liquor establishment, and was accessible." He concluded "Dwyer had a number of alternatives to deal with her bathroom emergency and to heat her food without violating rules and regulations."

Dwyer's charge of falsifying patrol logs was also prompted by observations of the Chief. He testified he was driving through the City monitoring operations when he spotted an East Orange police cruiser pull into a parking lot and stop. The officer did not get out of the car. The Chief pulled over to watch the cruiser and called a Captain responsible for the identity of the officer assigned to the car and the type of call the officer was on. The Captain advised the car was assigned to Dwyer, who was supposed to be on directed patrol handing out flyers. The Chief testified that Dwyer sat in the car for ten minutes before driving away.

The Chief caught sight of the same squad car a short time later parked in another parking lot. After watching Dwyer again sit in the car for several minutes, the Chief called the Captain back to learn what Dwyer was then supposed to be doing. When the Captain advised that Dwyer was on another directed patrol handing out flyers, and that the GPS locator for Dwyer's squad car was working properly, the Chief ordered him to open an investigation.

At the hearing, Dwyer's patrol log for the day in question was admitted in evidence. During the time the Chief watched Dwyer sit in her car, her patrol log claimed she was performing a directed patrol for theft at another location. The Chief testified that the patrol log was fabricated as he watched Dwyer sitting in the parking lot during that time. Dwyer testified she performed the tasks on her patrol log that day and that the mobile data terminal in her cruiser was not working. The ALJ found Dwyer's patrol log "failed to accurately reflect her whereabouts" on the day in question. He concluded she had "fabricated reports she submitted to her superiors," putting herself at risk "as her superiors had no idea of her location" and "did not properly execute her duties as a police officer while on duty."

As for the charge of driving a police car while her license was under suspension, an Internal Affairs officer testified for the Department that he received an anonymous call on Christmas Eve in 2012 that Dwyer was driving a squad car with a suspended license. When a check of motor vehicle records revealed the information was accurate, Dwyer's supervisor advised her of the suspension. The supervisor testified he immediately assigned Dwyer to a post where she was not required to drive and ordered her not to drive until her privileges were restored. On January 3, 2013, Dwyer was observed driving a patrol car in the parking lot while her license was still under suspension.

At the hearing, Dwyer testified on direct that she was unaware that her license and registration were suspended when her supervisor advised her of the fact on December 24, 2012. She claimed the suspension was based on a ticket her son received, of which she was unaware because she was "in the transition of moving." She admitted her supervisor ordered her not to drive until her license was reinstated.

Dwyer testified that she "had to pay the summons first and then do a restoration fee to reinstate [her] license." When asked by her counsel when she did that, Dwyer replied, "I believe I did it the 24th of December, to check online and then the actual date was then the 3rd that the payment was made."

When the Department's counsel asked her to repeat what she said as he had been unable to hear, Dwyer testified, "The 3rd – I did the restoration on – I actually made the check out for the 3rd, the 3rd of January." When her counsel asked whether she made the payment online or made out a check, Dwyer replied, "I paid it – no, I paid it online I'm saying." Dwyer admitted driving a police cruiser for "two or three minutes" down the block on January 3, 2013 to get to the "walking post" where she was assigned, but testified she believed her license was restored effective that date.

On cross-examination, Dwyer testified she drove the police cruiser a "little bit after 8[a.m.]" and made the online payment to restore her license at "around 1:00, I think, or 12:00, I'm not sure." When counsel for the Department asked, "[s]o you operated your vehicle a little bit after 8 but you didn't pay your fine and restoration fee until 12 or 1:00," Dwyer responded, "No. The rest – I apologize. The date – I got it confused, I didn't – my restoration was done on – when I was notified that day, the 24th, that I went online, I think it's in one of my documents, the actual date and the confirmation because I gave it to them that day."

Counsel for the Department showed Dwyer a memo she sent to her supervisor on January 3, 2013 in which she wrote that she

had been advised by her supervisor at 11 a.m. that her license was still under suspension. The memo stated that Dwyer "took further steps to confirm my license was restored and I confirmed that my driver's license was in fact restored at 13:00 hours." Dwyer testified she only confirmed the restoration on that date and that she actually made her payment on December 24. On re-direct, Dwyer insisted there was another memo to her supervisor dated December 24 confirming she made the payments on that date, and was thus confused as to why the motor vehicle records reflected payment as being posted in January. Both Dwyer and her counsel confirmed for the ALJ that the memo Dwyer was referring to was not among the documents identified for the record.

Based on the motor vehicle records and the testimony of the witnesses, the ALJ found Dwyer not credible on when she paid the sums necessary to restore her license. Specifically, he found it "not credible that she would pay the summons and the restoration fee and then 'assume' that she was restored after receiving an order not to drive until her license was restored." The ALJ concluded that at the time Dwyer "drove the police vehicle on January 3, 2013, her license had NOT been restored despite her statement that she had paid 'a restoration fee.'"

Our review of administrative agency actions is limited. In re Herrmann, 192 N.J. 19, 27 (2007). We will not upset an agency's final quasi-judicial decision absent a "clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Id. at 27-28. This same deferential standard applies to our review of the agency's choice of a disciplinary sanction. Id. at 28. We review discipline only to determine whether the "'punishment is so disproportionate to the offense, in the light of all of the circumstances, as to be shocking to one's sense of fairness.'" In re Stallworth, 208 N.J. 182, 195 (2011) (quoting In re Carter, 191 N.J. 474, 484 (2007)).

Although the concept of progressive discipline, which promotes uniformity and proportionality in the discipline of public employees, has long been a recognized and accepted principle, West New York v. Bock, 38 N.J. 500, 523-24 (1962), our courts have also long acknowledged that "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter, supra, 191 N.J. at 484. In cases involving the discipline "of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction." Id. at 485.

Finally, we give "due regard to the opportunity of the one who heard the witnesses to judge their credibility." Logan v. Bd. of Review, 299 N.J. Super. 346, 348 (App. Div. 1997). We will not disturb the ALJ's credibility findings unless they were "arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Bd. of Trs. of PERS, 368 N.J. Super. 527, 537 (App. Div. 2004).


Applying those standards here, Dwyer has provided us no reason to reverse the findings of the ALJ, adopted by the Civil Service Commission. The ALJ had the opportunity to hear the testimony of the witnesses and to evaluate their credibility. He made express findings that the Department's witnesses were credible and their testimony clear, cogent and without bias toward Dwyer. Moreover, he found them more credible than Dwyer, who our own review of the record confirms was evasive and contradictory in her testimony.

Dwyer cites no rule or case to support her novel argument that the Department was prohibited from combining her multiple instances of misconduct in its final notice of disciplinary action and proceeding on them in a single hearing. Nor did she raise any such argument before the ALJ. Thus we need not consider it here. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Our review convinces us that the decision of the Civil Service Commission is supported by sufficient credible evidence on the record as a whole and the sanction of termination was justified. R. 2:11-3(e)(1)(D); Carter, supra, 191 N.J. at 484. Dwyer's arguments to the contrary are without sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION