SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3497-14T2

IN THE MATTER OF VENUS YOUNG,
EAST JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS.

Submitted March 21, 2017 – Decided April 4, 2017

Before Judges Yannotti and Fasciale.

On appeal from New Jersey Civil Service Commission, Docket No. 2014-819.

Law Offices of Gina Mendola Longarzo, L.L.C., attorneys for appellant Venus Young (Ashley V. Whitney, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent Department of Corrections (Lisa A. Puglisi, Assistant Attorney General, of counsel; Alex J. Zowin, Deputy Attorney General, on the briefs).

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

PER CURIAM

Senior Corrections Officer Venus Young (Young) appeals from a February 23, 2015 Civil Service Commission (Commission) amended

determination upholding a Department of Corrections' (Department) decision to suspend Young from employment for twenty days after her Department-issued Oleoresin capsicum spray (OC spray) and utility belt were stolen from her personal vehicle. We affirm.

We discern the following facts from evidence adduced at the hearing before the administrative law judge (ALJ). Young has been a corrections officer since 2001. Young testified before the ALJ that she received her OC spray around June or July 2013. On August 6, 2013, Young arrived home from work, opened her locked gate, pulled into the driveway, locked the gate, and retrieved her personal items from the car, including her utility belt with the OC spray. Young hung her personal items on a coat rack near the front door, locked her door, and turned on her home alarm.

On August 7, 2013, at approximately 12:00 p.m., Young prepared to work the 2:00 p.m. to 10:00 p.m. shift. She put her personal items in her vehicle, including the utility belt with the OC spray, and then locked her car to go back inside to use the restroom. Young stated that she was inside for less than fifteen minutes and heard a "smash" but did not think it was at her house. She returned to her car, opened the locked gate, and proceeded to drive to work. On her way to work, Young turned to get coins for a toll and realized that her rear passenger window was broken and her utility belt, including the OC spray, was gone. She called

911 and her work to report that her car was broken into and decided to go to work and file a police report later. Lieutenant Salort testified on behalf of the Department that Young properly initially reported the theft of her OC spray.

When she arrived at work, Young prepared a Special Custody Report. The report stated that the OC spray was stolen that day after she put the items in her car, locked the car, and went inside to use the bathroom. Young indicated that she would file a police report and provide it to the Department.

When she arrived home from work that night, Young called the police department at approximately 10:30 or 11:00 p.m. to report the break-in to her vehicle. The police responded to her home at approximately 2:00 or 2:30 a.m. The police officers stayed in their patrol car and took Young's statement. She could not see what they typed and they told her she could pick it up at the station later.

Young testified that she told the police officers she locked the items in her car and went inside to use the bathroom. The police report reflected that Young locked her car at 10:00 p.m. on August 6, and as she approached her vehicle on August 7 at 1:00 p.m., she noticed her car's passenger window was broken and items were missing, including the utility belt and OC spray.

On August 9, 2013, a Department lieutenant filed an Unusual Incident Report, stating that Young "was preparing to depart for work and had locked her belt inside of the car while she returned inside her home to retrieve another item. When she returned, her vehicle had been broken in[to] and the belt and chemical agent were missing."

Salort assigned the Department investigation to Sergeant McGill. McGill received the police report, Special Custody Report, and Unusual Incident Log. McGill felt the police report contradicted the other reports and spoke with one of Young's union representatives. On August 21, 2013, McGill interviewed Young. McGill advised Young of her Weingarten[1] rights and Young's two union representatives were present. Young reiterated how she lost her OC spray and stated that she did not remember receiving any training or paperwork on how to properly store her OC spray.

On September 3, 2013, Young tried to amend the police report to indicate she put the items in her car on August 7, locked the car, and went inside to use the bathroom when they were stolen. The amended report states that Young "locked and secured her vehicle on 8/6/13 at 2300HRS. [Young] stated that her window was broken into between 1200HRS and 1300HRS on 8/7/13." Young

[1] NLRB v. J. Weingarten, Inc., 420 U.S. 251, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975).

testified that the police refused to provide another amended report after this.

McGill reviewed the Department's policies and procedures on storing OC spray. A Department internal management procedure (IMP) defines "security equipment" to include OC spray. The IMP further states that "[a]ll security equipment shall be stored in a designated locked storage area or secured with a locking device when not in use." Salort testified that all officers are trained on how to use and store their OC spray. A second IMP states "Department-issued chemical and/or natural agents are not authorized to be carried while off duty with the exception of traveling to and from work while in full uniform." The IMP states that officers carrying OC spray must "properly and safely store such agent(s) immediately upon arrival at their residence and shall store it in a manner which prevents access by a/an unauthorized person(s)."

McGill's investigative report noted that the police report contradicted Young's other reports and she could not tell whether the OC spray was left in the car overnight or briefly the next day. However, McGill ultimately concluded in her investigative report and in testimony before the ALJ that whether the OC spray was left in the car overnight or briefly the next day, Young violated the Department's policy in either scenario.

On August 29, 2013, the Department served Young with a Preliminary Notice of Disciplinary Action (PNDA) charging her with neglect of duty by serious mistake due to carelessness but not resulting in danger to persons or property, N.J.A.C. 4A:2-2.3(a)(7); other sufficient causes by loss or careless control of radios, mace, or handcuffs, N.J.A.C. 4A:2-2.3(a)(12); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and other sufficient causes by violation of a rule, regulation, policy, procedure, order, or administrative decision, N.J.A.C. 4A:2-2.3(a)(12). The PNDA stated that Young reported her Department-issued OC spray was stolen from her vehicle but that the Department's investigation "revealed [Young] inaccurately reported the theft of [her] mace and failed to properly and safely store [her] OC spray as per policy."

The Department issued a Final Notice of Disciplinary Action (FNDA) imposing the twenty-day suspension, Young contested it, and the case was transferred to the Office of Administrative Law. On December 29, 2014, the ALJ issued a written opinion after conducting a thorough hearing sustaining the charges against Young and finding that the twenty-day suspension was appropriate and reasonable. The ALJ found McGill and Salort to be credible witnesses. The ALJ found Young's claim that the police reported her statement wrong twice to be "questionable." In February 2015,

the Commission accepted and adopted the ALJ's findings of fact and conclusion, affirmed the suspension, and dismissed Young's appeal. In April 2015, Young filed a notice of appeal.

On appeal, Young argues the Commission's findings are not supported by credible evidence; the ALJ's factual findings adopted by the Commission are arbitrary, capricious, unreasonable, and unsupported; the ALJ allowed inadmissible hearsay; the ALJ made erroneous legal conclusions and failed to adequately consider Young's defenses; and the penalty was disproportionate to the charges.

We have "'a limited role' in the review of [agency] decisions." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). "[A] 'strong presumption of reasonableness attaches to [an agency decision].'" In re Carroll, 339 N.J. Super. 429, 437 (App. Div.) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994)), certif. denied, 170 N.J. 85 (2001). We reverse an agency's decision only where it is arbitrary, capricious, unreasonable or unsupported by credible evidence in the record. Henry, supra, 81 N.J. at 579-80; Ramirez v. Dep't of Corr., 382 N.J. Super. 18, 23 (App. Div. 2005).

In reviewing whether an agency's action was arbitrary, capricious, or unreasonable, we consider:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Stallworth, supra, 208 N.J. at 194 (quoting In re Carter, 191 N.J. 474, 482-83 (2007))]

Furthermore, "[a] reviewing court 'may not substitute its own judgment for the agency's, even though the court might have reached a different result.'" Ibid. (quoting Carter, supra, 191 N.J. at 483). "[W]hen reviewing administrative sanctions, appellate courts should consider 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.'" Id. at 195 (quoting Carter, supra, 191 N.J. at 484).

The Commission had ample evidence to adopt the ALJ's findings that Young committed the four charges: neglect of duty by serious mistake due to carelessness but not resulting in danger to persons or property, N.J.A.C. 4A:2-2.3(a)(7); other sufficient causes by loss or careless control of radios, mace, or handcuffs, N.J.A.C. 4A:2-2.3(a)(12); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and other sufficient causes by violation of a

rule, regulation, policy, procedure, order, or administrative decision, N.J.A.C. 4A:2-2.3(a)(12).

Although Young's OC spray was stolen from her locked vehicle in her driveway behind a locked gate, the Department argues that correction officers are law enforcement officers and, as such, are held to a higher standard of conduct than other public employees. N.J.S.A. 2A:154-4; In re Phillips, 117 N.J. 567, 576 (1990). The Department IMPs did not specify exactly how to store OC spray, but rather stated the officer must "properly and safely store such agent(s) immediately upon arrival at their residence and shall store it in a manner which prevents access by a/an unauthorized person(s)." McGill and Salort both testified that officers were trained on OC spray and Young should have known to carry the spray with her if she had to go back in the house. The ALJ found these Department witnesses to be credible.

There was sufficient evidence for the ALJ and the Commission to find that Young was trained in handling her OC spray and that she violated the policies by leaving the OC spray in the car. The ALJ noted that Young was a veteran corrections officer, working as one since 2001, and should have been familiar with the use and handling of security equipment. The agency found that whether the spray was in the car overnight or for fifteen minutes, Young violated the policy because there was no proper storage.

Young further argues that the ALJ admitted inadmissible hearsay evidence when she allowed the police reports into evidence. N.J.R.E. 803(c)(6) allows

> [a] statement contained in a writing or other record of acts, events, conditions . . . made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

The ALJ properly allowed the report into evidence under this rule. The police report helped sustain the charge of conduct unbecoming a public employee because it indicated Young gave contradictory statements about the OC spray theft.

The ALJ found Young's claim that the officers incorrectly reported what she said "questionable." Young was questioned at the hearing and asked if she ever tried to explain to McGill that the police report she submitted to the Department contained incorrect information and that she could not get another amended report. Young stated that she did not make such an attempt. The ALJ considered the various reports and Young's testimony. There was sufficient evidence to sustain the charge of conduct unbecoming a public employee.

Young argues that the ALJ did not allow her to present her defense that her discipline was in retaliation for discrimination charges Young brought against the Department and that the ALJ did not properly consider the Attorney General Guidelines. This argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add the following brief remarks. The ALJ allowed Young to testify as to why she believed the charges were retaliatory, but did not allow Young to go into detail on her discrimination complaint. The ALJ found that the charges at issue were clearly established and, for that reason, found no merit in the claim of retaliation.

Young argues the investigation was not in compliance with Attorney General guidelines because McGill did not interview the police officers who took the report or the Department employee to whom Young first reported her lost OC spray and McGill did not receive documentary evidence that Young received the OC spray Department policies. Neither the police nor this Department employee were "witnesses" to the theft. McGill properly considered all the reports. The Department notes that Young was free to bring witnesses to the hearing before the ALJ and did not call any of these people. There is sufficient evidence to show the Department conducted a proper investigation.

Finally, Young argues her twenty-day suspension was disproportionate to the offenses charged and the agency improperly failed to consider mitigating factors. "[C]ourts 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. The typical discipline for a loss of OC spray is a ten-day suspension. However, that is the minimum discipline for the first infraction and the maximum punishment is removal. Here, the Department took into account Young's employment history and previous incidents of discipline and added ten days to the minimum. Considering the level of deference and discretion owed to agencies in deciding their own penalties, there is sufficient credible evidence to find that the twenty-day suspension was reasonable and appropriate.

Affirmed.