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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4068-14T3
A-0376-15T3

TOMORY BOYER,

Petitioner-Appellant,

v.

DIVISION OF CRIMINAL
JUSTICE TRAINING ACADEMY,

Respondent-Respondent.

IN THE MATTER OF TOMORY BOYER,
NEW JERSEY STATE PAROLE BOARD.

Submitted January 25, 2017 – Decided April 27, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the Police Training Commission
and Civil Service Commission, Docket No. 2015-
2245.

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appellant (Michael Confusione, of counsel and
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Christopher S. Porrino, Attorney General,
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Christopher S. Porrino, Attorney General, attorney for respondent New Jersey State Parole Board (Lisa A. Puglisi, Assistant Attorney General, of counsel; Alex J. Zowin, Deputy Attorney General, on the brief).

PER CURIAM

In these consolidated appeals, appellant Tomory Boyer appeals from two final agency decisions. He appeals the April 8, 2015 and the July 30, 2015 final administrative decisions of the Police Training Commission (PTC) and the Civil Service Commission (CSC), respectively. The PTC accepted and adopted the initial decision of an Administrative Law Judge (ALJ) upholding Boyer's dismissal from the police training academy for being absent without leave (AWOL), and failing to follow written procedures for notification of emergent circumstances and reporting back to the academy. The CSC accepted and adopted the initial decision of a different ALJ sustaining Boyer's removal from employment with the New Jersey State Parole Board (Board) based upon a violation of N.J.A.C. 4A:2-2.3(a)(12) stemming from his dismissal from the academy and resulting failure to complete the required training program. We affirm.

In January 2014, Boyer was hired by the Board as a parole officer recruit. His appointment to a permanent position was contingent on his successful completion of a training program approved by the PTC. Boyer enrolled in the basic course for

investigators conducted at the Division of Criminal Justice Training Academy (Academy), an academy certified by the PTC. Boyer attended orientation on January 27 or 28, during which he was provided with the Recruit Student Guide, containing the Academy rules and regulations, and instructed that recruits would be held accountable for its contents. Pursuant to the rules and regulations, a recruit was required to call the Academy main number or the class coordinator to request leave in emergent circumstances. Disciplinary action for violating Academy rules and regulations was determined by a demerit system, and discipline ranged from a reprimand to dismissal depending on the accumulation of demerits. Being "absent without official leave" was assigned fifteen demerits, requiring an appearance before the Academy Director, immediate suspension from class, and a recommendation for dismissal from the Academy.

Classes commenced on February 10, 2014. Following a snow storm during which the Governor declared a state of emergency, the Academy closed on February 13 and, through its squad leaders, notified recruits of a 10:15 a.m. delayed opening the following morning. Boyer arrived at the Academy approximately one half hour late on the morning of February 14 due to weather conditions, traffic, and his obligation to shovel snow to clear paths for his tenants and to comply with a municipal ordinance. Boyer did not

call the Academy main number or his class coordinator to report his anticipated late arrival as required under the Academy rules and regulations. Upon his arrival, Boyer reported directly to class rather than the administrative office in Building 14, also in violation of Academy rules and regulations. When questioned by the Academy Director about his late arrival, Boyer responded that he "had to shovel out his tenant." When asked why he did not notify his squad leader about being late, Boyer did not respond. As a result, Boyer was dismissed from the Academy on February 14 pursuant to N.J.A.C. 13:1-7.2(a)(8). He was charged with being absent without leave, failing to follow written procedures regarding notification of emergent circumstances and failing to follow written procedures for reporting back to the Academy as set forth in the Student Guide, section III, subsection B (page 6).

Boyer appealed his dismissal. He argued that the weather conditions which resulted in the declaration of a State of Emergency, the de minimus nature of the infraction, the confusion in the Student Guide about reporting procedures, the severe sanction of dismissal from the Academy, and concomitant loss of employment, rendered the dismissal unsustainable. On March 28, 2014, the matter was transferred to the Office of Administrative Law (OAL) as a contested case and the ALJ, Joseph A. Ascione, held a hearing on November 24, 2014. On January 28, 2015, Judge Ascione

issued a comprehensive written decision in which he reviewed in detail the testimony of Detective Lisa Moore, the class coordinator, Captain (Ret.) Dion Feltri, the Director of the Academy, and Boyer. After making credibility determinations and factual findings, Judge Ascione upheld the dismissal based on his analysis and application of the relevant law.

Judge Ascione made the following factual findings:

1. Boyer enrolled in the Academy as a parole officer, he attended orientation on January 27 or 28, 2014, and started classes on February 10, 2014.
2. On February 12, 2014, the Academy advised Boyer the Academy would be closed on February 13, 2014, in anticipation of a winter storm, where the Governor of the State of New Jersey declared a State of Emergency.
3. The State of Emergency continued until February 14, 2014, at 10:30 a.m.
4. The Academy, through Moore, advised the squad leaders of the closure and on February 13, 2014, advised of the reopening for 10:15 a.m. on February 14, 2014.
5. The squad leaders informed the recruits, including Boyer, of the reopening and if there were problems with attending to contact the squad leader, so that Moore could be informed.
6. The Academy, through Moore, at the orientation on January 27 or 28, 2014, advised the recruits of the procedures to follow in the event of an absence or tardiness. The procedure included contacting the main Academy number or Moore's cell number. The main

number appearing in the Student [Guide] Boyer received.

7. Boyer did not communicate to the squad leader, Moore, or the main number, any anticipated lateness or problems with arriving at the Academy timely on February 14, 2014. Boyer failed to appear for accountability formation on February 14, 2014.

8. Boyer communicated at 7:16 a.m. on February 14, 2014, that he thought he might be late to a co-recruit, Ross.

9. Boyer arrived at the Academy at sometime between [10:45] a.m. and [11:00]¹ a.m. on February 14, 2014, and went directly to class.

10. On Academy staff and Feltri becoming aware of Boyer's presence at the Academy, staff directed him to Feltri's office.

11. At Feltri's office[,] discussion ensued between Feltri and Boyer. Boyer limited his explanation for his absence to the fact that he shoveled the walk for his tenants pursuant to the requirements of the City of Newark's local ordinance.

12. Boyer at the time on February 14, 2014, meeting did not advise Feltri of any issues with the Newark streets not being plowed or that the plowing resulted in his vehicle being blocked in by the plow.

13. Feltri determined to dismiss Boyer for being absent without leave and failing to notify the Academy of emergent circumstances or following procedures on the return from an

¹ The ALJ's written decision incorrectly noted that Boyer arrived "sometime between 9:45 a.m. and 10:00 a.m." This was clearly a clerical error as Boyer did not dispute his arrival time.

unauthorized leave of absence, in accordance with Student Guide, Section III, Subsection A or B (Page 6).²

14. Boyer has made no showing of discrimination, bad faith or invidious behavior.

The ALJ concluded that "Boyer's unauthorized communication through another recruit does not relieve him of the obligation to notify the Academy of an anticipated absence or lateness" and "[t]he fact that he could not call before 7:00 a.m., does not relieve [him] of calling in when he can[,]" particularly since "Boyer knew that he might not get in timely at 7:16 a.m. when he sent the text message to Ross." The ALJ rejected Boyer's argument that complying with Newark's shoveling ordinance and motor vehicle requirements prevented him from calling in, and determined that

² Regarding authorized Academy leave, Section III, Subsection A of the Student Handbook provides, in pertinent part:

In an emergent situation, authorized leave may be granted. Trainees must call the [A]cademy at (732)282-6060 before 07:00am each day and notify the [c]lass [c]oordinator as to the reason for the absence. If the [c]lass [c]oordinator is not available, a message will be left on the voice mail at that telephone. Failure to notify the class coordinator will result in unauthorized leave.

Subsection B provides "[u]nauthorized absence from the Academy will not be tolerated and may subject the trainee to disciplinary action, including, but not limited to, dismissal from the Academy." Subsection C places responsibility on the trainee for notifying the agency "when returning from leave."

"Boyer could have notified the Academy sometime before he left Newark." According to the ALJ, Boyer's explanation that he failed to do so "because he did not readily have their number" was "just not credible." Rather, his failure to do so was a manifestation of Boyer prioritizing his "personal and business responsibilities" over the Academy and evidenced "an intentional and willful judgment not to communicate with the Academy[.]" After noting that the "burden of persuasion falls on the [Academy] to show that [Boyer] either could not be certified or exhibited unacceptable behavior, or that the [Academy] had other good cause to terminate him[,]" Judge Ascione concluded that the Academy met its burden "by a preponderance of the credible evidence" and established both the factual basis for the dismissal and the propriety of the sanction imposed.

Boyer filed exceptions to the ALJ's initial decision, arguing that Judge Ascione made significant and material factual and legal errors. Specifically, Boyer asserted that the ALJ "improperly reviewed the penalty imposed, did not consider the circumstances attendant to [Boyer's] late arrival, improperly shifted the burden of proof to [Boyer], and applied incorrect legal standards to the determination of the appropriate amount of discipline." Following a de novo review, on April 8, 2015, the PTC adopted the ALJ's

findings of fact and conclusions of law and upheld Boyer's dismissal.

In March 2014, Boyer was served with a revised Preliminary Notice of Disciplinary Action (PNDA) charging him with a violation of N.J.A.C. 4A:2-2.3(a)(12),³ which authorizes removal for "[o]ther sufficient cause." Specifically, Boyer was charged with violating Disciplinary Process Policy 02.007.F due to Boyer's failure to complete the required training program for a parole officer recruit occasioned by conduct which resulted in his dismissal from the Academy. Boyer waived a departmental hearing and, on January 14, 2015, a final notice of disciplinary action (FNDA) sustained the charge and terminated Boyer's employment.

Boyer appealed and on February 3, 2015, the matter was transferred to the OAL as a contested case. On June 26, 2015, the ALJ, Robert Bingham II, granted the Board's motion for summary decision, N.J.A.C. 1:1-12.5(b), finding no genuine issue regarding Boyer's failure to complete the training program, and the requirement that his appointment to a permanent position as a parole officer was conditioned on his successful completion of the program. Judge Bingham then determined that based on Boyer's

³ The charge was written as "N.J.A.C. 4A:2-2.3(a)(11)." However, that regulation was re-codified as N.J.A.C. 4A:2-2.3(a)(12), effective March 5, 2012.

dismissal from the training program, the Board was legally entitled to remove him from employment pursuant to the Board's disciplinary policy requiring removal for failure to complete the training program. Boyer filed exceptions to the ALJ's initial decision. Following a de novo review, on July 30, 2015, the CSC accepted and adopted the ALJ's findings of fact and conclusions and upheld the removal.

On appeal, Boyer urges us to reverse the final agency decisions dismissing him from the Academy and terminating his employment as a parole officer. Boyer continues to argue, as he did before the Commissions, that "[t]he incorrect legal standard was applied," "[t]here [was] not substantial credible evidence to support the findings on which the agency based its action," and "[t]here was not a demonstration of good cause to impose the ultimate penalty of dismissal."

Our scope of review of an administrative agency's final determination is limited. In re Carter, 191 N.J. 474, 482 (2007). A reviewing court "should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194

N.J. 413, 422 (2008); see also Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9-10 (2009).

We accord to the agency's exercise of its statutorily delegated responsibilities a "strong presumption of reasonableness." City of Newark v. Nat. Res. Council, 82 N.J. 530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980). The burden of showing the agency's action was arbitrary, unreasonable, or capricious rests upon the appellant. See Barone v. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987). Absent arbitrary, unreasonable, or capricious action, or a lack of support in the record, "[a]n administrative agency's final quasi-judicial decision will be sustained[.]" In re Herrmann, 192 N.J. 19, 27-28 (2007) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). We "may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result[,]" but are "obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs." In re N.J. Pinelands Comm'n Resolution PC4-00-89, 356 N.J. Super. 363, 372 (App. Div.) (citing Brady v. Bd. of Review, 152 N.J. 197, 210 (1997)), certif. denied, 176 N.J. 281 (2003).

Nonetheless, we must undertake a "careful and principled consideration of the agency record and findings." Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985) (citing Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). "If . . . [we are] satisfied after [our] review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then [we] must affirm even if [we] feel [] that [we] would have reached a different result" Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988). If, however, our review of the record leads us to conclude that the agency's finding is clearly erroneous, the decision is not entitled to judicial deference and must be set aside. L.M. v. Div. of Med. Assistance & Health Servs., 140 N.J. 480, 490 (1995). We may not simply rubber-stamp an agency's decision. In re Taylor, 158 N.J. 644, 657 (1999).

An ALJ's factual findings and legal conclusions are not "binding upon [an] agency head, unless otherwise provided by statute." N.J.A.C. 1:1-18.1(d). Accordingly, an agency head reviews an ALJ's decision "de novo [] based on the record" before the ALJ. In re Parlow, 192 N.J. Super. 247, 248 (App. Div. 1983). However, "[a]n agency head reviewing an ALJ's credibility findings relating to a lay witness may not reject or modify these findings unless the agency head explains why the ALJ's findings are

arbitrary or not supported by the record." S.D. v. Div. of Med. Assistance & Health Servs., 349 N.J. Super. 480, 485 (App. Div. 2002); see also N.J.S.A. 52:14B-10(c) (An agency head may only reject the ALJ's credibility findings after he or she determines "from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record."). In doing so, "the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record." Ibid.

Here, the ALJs' findings and conclusions, which the Commissions adopted, are sufficiently supported by the record. Contrary to Boyer's argument, the record shows that Judge Ascione applied the proper burden of proof and the correct legal standard in rendering his decision. We also reject Boyer's argument that good cause was not shown for his dismissal from the Academy, and that Judge Ascione and the PTC failed to account for Boyer's previously unblemished record as a corrections officer for over five years and his commendations for meritorious service.

N.J.A.C. 13:1-7.2(a)(8) authorizes the Commission to "dismiss a trainee who has demonstrated that he or she will be ineligible for Commission certification, for unacceptable behavior or for

other good cause." "[A]lthough the good-cause standard eludes precise definition," as long as the asserted ground is relevant to job performance, it can withstand a challenge that the action was "arbitrary or unreasonable." Greenwood v. State Police Training Ctr., 127 N.J. 500, 510 (1992). A parole officer, like a police officer, "is a special kind of public employee" who "must present an image of personal integrity and dependability in order to have the respect of the public." Carter, supra, 191 N.J. at 485-86 (quoting Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)). Further, "[t]he obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official[.]" In re Phillips, 117 N.J. 567, 576 (1990).

We agree with Judge Ascione's acknowledgment that "as an academy-training personnel for a para-military organization, where strict discipline and adherence to rules and regulations are especially important, a good degree of deference must be accorded to the Academy's decisions as to candidates that it deems unfit for service." Given these considerations, the record amply supports the determination that Boyer's breach of the Academy's rules and regulations established good cause for dismissal.

We also reject Boyer's contentions that his conduct was not egregious enough to warrant dismissal and that progressive

discipline was required. Our Supreme Court has held "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. While "progressive discipline is a worthy principle[,] . . . it is not subject to universal application when determining . . . [the] quantum of discipline." Herrmann, supra, 192 N.J. at 36. On this record, we find no basis to intervene.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION