SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0494-21

IN THE MATTER OF WAYNE PEARSON, BAYSIDE STATE PRISON, DEPARTMENT OF CORRECTIONS.

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Argued January 19, 2023 – Decided May 9, 2023

Before Judges Enright and Bishop-Thompson.

On appeal from the New Jersey Civil Service Commission, Docket Nos. 2021-1250.

Arthur J. Murray argued the cause for appellant Wayne Pearson (Alterman & Associates, LLC, attorneys; Arthur J. Murray, on the brief).

Kendall J. Collins, 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; Kendall J. Collins, 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 Wayne Pearson appeals from a September 29, 2021 final agency decision by the Civil Service Commission (CSC) removing him as a senior corrections police officer with the New Jersey Department of Corrections (DOC). We affirm.

Pearson was employed from June 2001 until February 2021 at South Woods State Prison (SWSP). On June 22, 2020, less than one month after the murder of George Floyd, Pearson posted an image of an African American man standing on the gallows, surrounded by Caucasian males and a crowd of onlookers. From his personal computer, Pearson posted the picture on Facebook while he was off duty, added the written comment "[w]e need to bring this back." The post also contained a link to another web page depicting an image of Rainey Bethea, an African American man, who was the last person publicly executed in the United States. Pearson's public Facebook profile listed his occupation as "Animal Caretaker at Magic Forest." Pearson's post was "liked" by Sergeant Robert Curry, a DOC employee, assigned to Bayside State Prison.

A civilian complained to the DOC about Pearson's public Facebook posts and comment. The DOC's Special Investigations Division (SID) reviewed the materials submitted by the civilian, determined the materials were "controversial" and initiated an investigation. The materials were allegedly

social media posts made by Pearson. During the interview with SID Investigator Timothy Gonzalez, Pearson admitted to posting the image and comment on Facebook. He acknowledged anyone in the public who may have viewed his Facebook profile could perceive the terms "Animal Caretaker" as describing inmates and "Magic Forest" as SWSP but denied any correlation. He also admitted that his occupation listed on his Facebook profile page as "Animal Caretaker" could cause people to believe that he harbored racist beliefs and could not be impartial in discharging his duties as a law enforcement officer.

Brian Morris, a training lieutenant at SWSP, testified at a hearing before an administrative law judge (ALJ) at the Office of Administrative Law ( OAL). DOC law enforcement officers are obligated to comply with the rules and regulations on and off duty. Additionally, he explained DOC personnel are held to a higher standard of conduct twenty-four hours a day, seven days week. Therefore, DOC law enforcement personnel are expected to exercise good judgment, follow the rules, regulations, policies, and procedures, and not engage in conduct that discredits the employee, the DOC, or causes the public to lose confidence in law enforcement personnel.

According to Morris, Pearson acknowledged he received a copy of HRB 84-17, Law Enforcement Personnel Rules and Regulations, Code of Ethics and the annual Ethics Briefing throughout his employment with the DOC.

As to Pearson's Facebook post, from the DOC's perspective, Morris explained that Pearson was referring to the inmates as animals and SWSP as Magic Forest. Morris believed a person viewing the post would perceive that Pearson or any other DOC staff member viewed the inmates as animals rather than human beings. Contrary to the DOC's rules, regulations, policies, and procedures, a member of the public reading Pearson's post could interpret Pearson as supporting public execution of African American men. Because the public reading Pearson's post could interpret Pearson had a racial bias and therefore was unable to fulfill his duties impartially, that matter was referred to the SID. The DOC also found Curry's "like" of Pearson's post problematic because the actions of two employees from different institutions sharing racially insensitive posts might suggested a systemic bias within the DOC.

According to Morris, the DOC also considered the adverse impact of Pearson's post on inmates and personnel within SWSP. The inmates at SWSP are predominately African American. If officers are racially biased, Morris

testified prison security could be compromised due to the risk of inmate demonstrations at any DOC prison as a result.

El-Rhonda Williams Alston, Director of the DOC's Equal Employment Division and Ethics Unit (EED), also investigated the Facebook post and comment. She stated her office reviews investigatory materials and conducts investigations into violations of the DOC's Policy Prohibiting Discrimination in the Workplace (Discrimination Policy).

The Discrimination Policy prohibits the use of derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category. The Discrimination Policy, a zero-tolerance policy, may subject a violator to a range of discipline, up to and including termination. Alston confirmed that corrections officers must comport with all provisions of the Discrimination Policy at the workplace and off-site. The Discrimination Policy specifically applies to electronic communications, which includes Facebook and other social media.

Following the investigations, the DOC issued a Preliminary Notice of Disciplinary Action (PNDA) to Pearson, charging him with: N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming an employee, N.J.A.C. 4A:2-2.3(a)(6) (count one); N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, (count two); Human

Resources Bulletin (HRB) 84-17(C)(11), conduct unbecoming an employee, (count three), as amended; HRB 84-17(C)(31) violation of DOC policy prohibiting discrimination, harassment or hostile environments in the workplace, (count four); and HRB 84-17(E)(1), violation of a rule, regulation, policy, procedure, order or administrative decision, (count five). An amended PNDA was issued on August 3, 2020, removing count five.

Following a departmental hearing, a Final Notice of Disciplinary Action (FNDA) was issued on February 22, 2021, finding violations on all counts. The disciplinary sanction was removal from employment.

Pearson appealed to the CSC. The matter was transferred to the OAL- and tried before an ALJ. Before the OAL hearing, Pearson stipulated to and admitted his Facebook post and comment violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and HRB 84-17(E)(1), violation of a rule, regulation, policy, procedure, order, or administrative decision. However, he contested the following charges: N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, and HRB 84-17(C)(31), violation of DOC policy prohibiting discrimination, harassment, or hostile environment in the workplace. He also challenged the sanction imposed.

At the hearing, the DOC presented testimony from Gonzalez, Morris, and Alston, which the ALJ found to be credible.

Pearson testified, admitting that he violated the conduct unbecoming a public employee regulation and a DOC rule when he made the post off-duty; however, the privacy setting on his Facebook page was public. He stated he did not know at the time that there were privacy settings available on Facebook because the DOC did not provide training on social media use. Nor were there written policies on the use of social media.

Pearson testified he should not have posted the image or the comment because "it was a stupid thing to do." He stated the post was about his "belief" that public execution needed to be reinstated. He took down the post two days later when he learned the post was viewed as "racially motivated" or "racially biased."

Pearson claimed the "Animal Caretaker at Magical Forest" occupation listing was taken down for the same reason as the posted image and comment. Pearson claimed he had not previously listed his occupation on Facebook and did not replace a listed occupation. He explained how he made up "Animal Caretaker at Magic Forest" as his occupation. Pearson claimed six to nine months before the post, he had a couple of incidents with animals at work,

including being bit by a mouse and having a bat land on him. The term "Magic Forest" came from a song by a 1960's band. He thought about the two incidents and posted the name. Pearson testified that he understood, without explanation, how the listed occupation on Facebook related to his position at SWSP and the reference to animals reflected inmates at SWSP.

The ALJ discredited Pearson's testimony. She found it "difficult" to believe Pearson's explanation for the post was that he "actually advocat[ed] for the return of public executions of criminals in general" and "not the lawless lynching of African Americans that previously had occurred in our country's history." The ALJ further found Pearson's explanation regarding his listed occupation as "Animal Caretaker at the Magic Forest" not credible. The judge determined Pearson's listed occupation was "offensive" and "derogatory" to SWSP inmates, their families, the DOC, fellow correctional officers, and the public.

On August 9, 2021, the ALJ issued her Initial Decision, sustaining all of the charges. The ALJ modified the original penalty of removal to a 180-day suspension without pay. She further directed that Pearson complete mandatory diversity and tolerance training, as well as undergo a fitness for duty psychological examination before reinstatement.

In modifying Pearson's penalty, the ALJ explained she was guided by the then-recent final decisions of the CSC which imposed major discipline on corrections officers for racially offensive social media posts.

Here, the ALJ reasoned progressive discipline should be followed since Pearson had "never been charged with or been the subject of any prior complaints regarding discrimination, harassment[,] or hostile work environment by any inmates, staff[,] or the public." She explained Pearson's conduct warranted major discipline; however, the "DOC's lack of a formal written policy on the acceptable use of social media by its corrections officer[s] [was] problematic and . . . considered as a mitigating factor in this case." The ALJ concluded the DOC should have a written policy explaining "appropriate" and "prohibited" social media use and provide training to corrections officers on the use of social media.

The CSC upheld the ALJ's decision sustaining the charges, but determined removal was the appropriate penalty given the "egregious" nature of Pearson's conduct. Regarding Pearson's post, the CSC explained:

> As noted in the appointing authority's exceptions, the appellant did not merely "like" the offensive post. Rather, on June 22, 2020, not even a month after the George Floyd murder by a police officer, the appellant posted on Facebook a scene depicting an African American male on the gallows surrounded by

> Caucasian males and a crowd of onlookers with the written comment, "We need to bring this back." As noted by the ALJ, given the climate that existed at the time he made his Facebook postings, it is strains [sic] credulity to believe his explanation that he was advocating for the return of public executions of criminals in general, and not the lawless lynching of African Americans that previously occurred in our country's history. He also indicated on Facebook that his occupation was "Animal Caretaker at Magic Forest." Therefore, the Commission agrees with the appointing authority that the appellant's actions are sufficiently egregious to warrant his removal.

The CSC concluded:

> Moreover, the appellant's disciplinary history, while remote in time, is significant, as it contains a six-month suspension - the highest penalty an appointing authority can impose short of removal. Accordingly, the Commission finds that the penalty imposed by the appointing authority was neither unduly harsh nor disproportionate to the offense and should be upheld.

Pearson raises the following arguments on appeal:

> POINT I
>
> THE DETERMINATION OF WHAT CONSTITUES "SUFFICIENTLY EGREGIOUS" OR "ESPECIALLY EGREGIOUS" BEHAVIOR DOES NOT FALL WITHIN THE TECHNICAL EXPERTISE OF THE CSC. (Not Argued Below).
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> POINT II
>
> THE CSC'S HOLDING THAT PEARSON'S POST WAS "SUFFI[CIEN]TLY EGREGIOUS" TO

WARRANT REMOVAL IS INHERENTLY INCONSISTENT WITH [OTHER CSC DECISIONS] AND GOVERNING JURISPRUDENCE.

In Points I and II, for the first time on appeal, Pearson contends we need not "defer "to the CSC's finding of "'sufficiently egregious" or "especially egregious" conduct. Pearson further contends the CSC is no more a "technical specialist" than the DOC in evaluating whether his behavior was "sufficiently egregious" or "especially egregious" in a correctional setting. We reject Pearson's unsupported contentions.

In addition, Pearson failed to raise these arguments before the ALJ. Therefore, we need not consider them. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234-35 (1973).

Nonetheless, for the sake of completeness, we address Pearson's contentions. Judicial review of agency determinations is limited. Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011); In re Herrmann, 192 N.J. 19, 27 (2007). Reviewing courts presume the validity of the "administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014).

A "strong presumption of reasonableness attaches" to an agency's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001) (internal

quotation marks omitted) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993)). An appellate court reviews legal questions de novo. See Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 55 (2022). However, we are not "relegated to a mere rubber-stamp of agency action." Williams v. Dep't of Corr., 330 N.J. Super. 197, 204 (App. Div. 2000). An agency's determination "is entitled to affirmance so long as the determination is not arbitrary, capricious, or unreasonable, which includes examination into whether the decision lacks sufficient support in the record or involves an erroneous interpretation of law." Melnyk v. Bd. of Educ. of Delsea Reg'l High Sch. Dist., 241 N.J. 31, 40 (2020); see also In re Young, 471 N.J. Super. 169, 176-77 (App. Div. 2022) (applying an arbitrary-and-capricious standard when reviewing a final decision of the CSC). The party challenging an agency's action bears the burden of proving the action was arbitrary, capricious, or unreasonable. Id. at 177.

We are not persuaded by Pearson's argument that CSC lacked the "technical expertise" to review his Facebook post and comment. It is well established "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). Further, N.J.A.C. 4A:2-2.3 provides for employee discipline for

both "conduct unbecoming a public employee" and "other sufficient cause." This civil service regulation applies to discipline related to off-duty behavior or speech. See Karins v. City of Atlantic City, 152 N.J. 532, 543, 546 (1998).

Where appropriate, the CSC utilizes progressive discipline. West New York v. Bock, 38 N.J. 500, 526-27 (1962). However, it is well settled that the theory of progressive discipline is not a "fixed and immutable rule" to be followed. In re Carter, 191 N.J. 474, 484 (2007).

Under these circumstances, the CSC determined Pearson's conduct was sufficiently egregious which warranted removal, regardless of Pearson's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

Here, Pearson admitted the Facebook post of a public execution of an African American man was conduct unbecoming of a public employee under the civil service regulation and DOC's rules and regulations. We agree with the CSC that it "strain[ed] credulity" that Pearson was advocating in the post for the return of public executions of criminals and not "lawless lynching." Further, we are satisfied the CSC's resolution of Pearson's removal, which involved the agency's understanding of the nature of his position as a corrections officer and the public perception that Pearson "may harbor racist

beliefs," fell well within its expertise and superior knowledge in this field. See Herrmann, 192 N.J. at 28.

We also reject Pearson's contention that removal was not warranted because the DOC did not provide training on social media use. Pearson did not provide any law to support the contention that an employer must provide training on social media for personal use. Moreover, the use of social media was not an essential function of a senior corrections officer. The record reflects Pearson was capable of navigating his Facebook account and distinguishing between public and private settings. Therefore, we are satisfied the CSC properly concluded that Pearson's social media post was inappropriate, inflammatory, and discriminatory, and fell short of the high standards required of a senior corrections officer.

Pearson's contentions that the CSC failed to adhere to principles of progressive discipline and that removal "shocks a sense of fairness" are entirely without merit. We are persuaded the CSC appropriately determined progressive discipline need not be employed since Pearson's "inappropriate" and racial content was "egregious" and "unbecoming" to his position as a senior corrections officer. The penalty of removal imposed here was not disproportionate to the charges, considering Pearson's position, the high

standard of conduct expected of law enforcement officers, his prior disciplinary record, and the seriousness of the departmental charges. Given our deferential standard of review, the record amply supports Pearson's removal as the appropriate disciplinary penalty.

To the extent we have not specifically discussed any remaining arguments raised by Pearson, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.