

**NOT FOR PUBLICATION WITHOUT THE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-0573-21**

**IN THE MATTER OF
BRIAN AMBROISE.**

Argued December 7, 2022 – Decided February 24, 2023

Before Judges Bishop-Thompson and Puglisi.

On appeal from the New Jersey Civil Service Commission, Docket No. 2021-1014.

Rimma Razhba, Deputy Attorney General, argued the cause for appellant New Jersey Department of Corrections (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Ryan J. Silver, Deputy Attorney General, and Rimma Razhba, on the briefs).

James R. Wronko argued the cause for respondent Brian Ambroise (Wronko Loewen Benucci, attorneys; James R. Wronko, of counsel and on the brief).

Pashman Stein Walder Hayden, PC, attorneys for respondent New Jersey Civil Service Commission (Timothy P. Malone, on the statement in lieu of brief).

PER CURIAM

The New Jersey Department of Corrections (DOC) appeals the Civil Service Commission's (CSC) September 9, 2021 final agency decision affirming in part an Administrative Law Judge's (ALJ) initial decision but modifying the sanction to a six-month suspension. We affirm.

I.

The DOC sustained disciplinary charges against Brian Ambroise, a Senior Correctional Police Officer (SCPO) assigned to the Edna Mahan Correctional Facility for Women (Edna Mahan), and imposed a sanction of removal. The December 4, 2020 Final Notice of Disciplinary Action (FNDA) describes the incident that resulted in the charges:

On October 6, 2016, SCPO Brian Ambroise was arrested at [Edna Mahan], by the Special Investigations Division and charged with sexual assault, specifically by engaging in oral sex with an inmate at [Edna Mahan], a crime of the second degree. SCPO Brian Ambroise was also charged with official misconduct, specifically by engaging in sexual conduct with an inmate while employed as a correction officer at [Edna Mahan].¹

The FNDA reflects the sustained charges were conduct unbecoming an employee, N.J.A.C. 4A:2-2.3(a)(6); and improper or unauthorized contact with

¹ A jury found Ambroise not guilty of the criminal charges on November 12, 2018.

inmate - undue familiarity with inmates, parolees, their families or friends, N.J.A.C. 4A:2-2.3(a)(12); and violations of DOC policies. Ambroise appealed the DOC's decision and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ considered testimony from Altarique Washington, DOC corrections lieutenant; Jerome Scott, principal investigator in the DOC's Special Investigations Division (SID); Aaron Lacey, detective sergeant in the Hunterdon County Prosecutor's Office (HCPO); Kathryn Meakim, forensic scientist in the New Jersey State Police; and Ambroise.

In her initial decision, the ALJ determined the DOC had not established by a preponderance of the credible evidence charges of conduct unbecoming and undue familiarity and dismissed these charges. She found the DOC had established a charge of violation of a rule, regulation, policy, procedure, order, or administrative action, "in the form of failing to report an unusual incident," and sustained the charge. She ordered a twenty-day suspension for the infraction and Ambroise's reinstatement as a SCPO with back pay. The DOC filed exceptions to the ALJ's determination, to which Ambroise filed a reply.

The CSC upheld the dismissal of the conduct unbecoming charge and sustained the failure to report charge but disagreed with the dismissal of the

undue familiarity charge. The CSC also disagreed with the ALJ's imposition of a twenty-day suspension and the DOC's proposed sanction of removal, and instead imposed a six-month suspension. The CSC further ordered Ambroise's reinstatement with back pay. This appeal followed.

II.

The allegations against Ambroise arose on October 3, 2016, when J.O.,² an inmate at Edna Mahan, reported to Scott that she was engaged in a sexual relationship with Ambroise, who was assigned to her housing unit. Scott and HCPO Lieutenant Kristen Larsen interviewed J.O., which was video recorded. J.O. stated Ambroise shared with her personal information about his financial problems and his child's mother. She reported Ambroise delivered messages from her to an inmate in a different housing unit, after which he asked J.O. what she would do for him in exchange for delivering the message. She stated the relationship turned physical with kissing, and Ambroise brought condoms into Edna Mahan so they could have sex, but they never followed through.

J.O. further reported that on September 25, 2016, Ambroise told her to meet him in the housing area's storage unit to have sex. She said she went into the storage unit wearing only a nightgown and no undergarments. She reported

² We use initials to protect J.O.'s identity pursuant to Rule 1:38-3(c)(12).

she and Ambroise kissed and he performed oral sex on her for three to four minutes before he became nervous and left the closet. J.O. said she then returned to her bed area and wiped her mouth and vaginal area with swabs, which she hid in her property. J.O. consented to a buccal swab to collect her DNA for comparison.

J.O. did not testify at the OAL hearing. After reviewing the recorded interview of J.O., the ALJ found J.O. not credible because her statements were "inconsistent, unreliable, and uncorroborated." The ALJ also noted the DOC did not offer J.O.'s sworn testimony from the criminal trial nor did it offer any explanation why she did not testify. In adopting the ALJ's findings, the CSC gave due deference to her credibility determinations because she had "the benefit of hearing and seeing the witnesses" firsthand.

After taking J.O.'s statement, Scott summoned Ambroise for an interview but did not tell him what it was about. Prior to entering the interview room, Ambroise asked Scott if he could have a union representative present, to which Scott answered no. It was Scott's understanding Ambroise was not entitled to union representation because the interview was a criminal investigation. Scott, however, advised Ambroise statements made during the interview "may affect" his employment.

Present at the interview were Lacey, Larson, Scott and another SID investigator. The interview lasted 110 minutes and began with Lacey reading Ambroise his Miranda³ warnings. Ambroise acknowledged he understood and voluntarily waived his rights, and Lacey informed him that he could terminate the interview at any time.

At first, Ambroise denied having any sexual contact with J.O. but admitted to passing a verbal message from J.O. to another inmate. As to the incident in the storage closet, he initially denied any contact, later said J.O. came up to him from behind and surprised him, and he kissed her for only a second or two; then later in the interview he said it may have been longer than that and he may have put his tongue in her mouth, but he was unable to remember. After continuously denying he engaged in oral sex with J.O., he ultimately said while he was bent down unlocking a footlocker in the closet, J.O. came into the storage unit with no undergarments on and "he only licked her vagina for a second or two." The interview was then concluded and Ambroise was arrested and charged with second-degree sexual assault, N.J.S.A. 2C:14-2(c)(2); and second-degree official misconduct, N.J.S.A. 2C:30-2(a).

³ Miranda v. Arizona, 384 U.S. 436 (1966).

Ambroise testified before the ALJ he did not have a sexual relationship with J.O. and the only inappropriate conduct occurred when she gave him a "quick kiss" in the storage closet, which he did not think rose to the level of reporting as an unusual incident. He stated if anything else had happened, someone would have witnessed it because the storage closet is a busy area and it was a busy time of day. He said he never shared any personal information with J.O. or any other inmate, but his family situation was common knowledge among the corrections staff. Ambroise admitted to delivering a verbal message from J.O. to another inmate.

Ambroise testified he told the truth "over and over" during the interview but after an hour and a half, he was "freaking out" and "had no choice but to tell them what they wanted to hear" just to "get out of there." He said he was told if he confessed he would get a lighter sentence and might be able to see his children again.

The ALJ viewed the entire videotaped interview of Ambroise and gave it no weight based on the "interrogation techniques that were utilized." She found the DOC violated Ambroise's Weingarten⁴ rights by telling him he could not have union representation during the interview.

⁴ NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

The ALJ also found law enforcement had fabricated evidence to coerce Ambroise's confession by saying they "had DNA evidence against him . . . and juries love DNA evidence." She noted the detective told Ambroise he was "toast" because the swabs would be tested for his DNA and said, "if you tell me nothing happened, there is nothing I can do for you." She also found detectives improperly promised Ambroise a reduced sentence in exchange for a confession,

The DOC called Meakim to testify as a fact witness regarding the DNA evidence. Although Meakim prepared the report of the results she was not involved in the collection of the swabs, and the DOC did not call the officer who had collected the swabs. The ALJ noted, "There was no source of the collection identified, or any testimony about chain of custody of the specimens," including "chain of custody of the DNA evidence, or its mode of collection, or when each sample was collected or where it had been stored."

The HCPO sent two sets of swabs to the State Police lab for DNA testing, along with comparator buccal swabs from J.O. and Ambroise. The first set, which contained two swabs J.O. said were from her mouth, did not produce any DNA evidence. The second set, which contained three swabs J.O. said were from her vaginal area, contained DNA that matched both J.O. and Ambroise. However, because the DOC did not provide any testimony about collection or

chain of custody, the ALJ found the DNA evidence to be "questionable at best" and did not find it persuasive regarding Ambroise's misconduct.

Although the ALJ found the DOC's witnesses were credible, she concluded they had no evidence and no firsthand knowledge of any policy violations. She found Ambroise's testimony during the hearing credible and consistent with his videotaped statements made prior to what she deemed "inappropriate interrogation techniques."

Although Ambroise admitted to relaying a message from J.O. to another inmate, the ALJ did not sustain the undue familiarity charge based on this incident because the message "ha[d] no bearing on the safety and security of the facility." Ambroise also testified J.O. and other inmates routinely asked for contraband, but he never brought anything into the facility for her and would not have reported her for asking him to do so because it was a commonplace occurrence that officers do not report.

The ALJ sustained the other charge to which Ambroise admitted, that he failed to report J.O.'s "giving him a peck" on the cheek in the storage closet. She gave weight to Ambroise's lack of any disciplinary history and recommended a twenty-day suspension.

Over a month after the ALJ issued her initial decision, the DOC filed a motion asking the CSC to reopen the hearing pursuant to N.J.A.C. 1:1-18.5(b), based on what it deemed "newly discovered, highly relevant evidence." The DOC sought to have the ALJ consider a July 19, 2017 order entered by the Law Division judge at the start of Ambroise's criminal trial, which resolved a motion to suppress his recorded statement. The order notes Ambroise sought to withdraw the motion to suppress and reflects he "stated on the record that his statement was given knowingly and voluntarily," and he did not object to its admission at trial.

In its final decision, the CSC denied the motion to reopen because the statement contained in the order was "not persuasive in demonstrating that the ALJ's credibility determinations regarding the testimony about the confession was in error." The CSC noted the statement did not "overcome the credible testimony that the confession was extracted in such a [manner] from [Ambroise] as to make its accuracy seriously in question." The CSC also noted Ambroise had been found not guilty of the criminal charges. Acknowledging that the standard of proof in the criminal matter was higher than the administrative matter, the CSC found:

[I]t cannot be ignored that the jury in that matter must have determined that there was at least reasonable

doubt that appellant's confession was not reliable evidence of his guilt. In the present matter, an independent authority, the ALJ, as well as the [CSC] is similarly finding that there is not a preponderance of the evidence to support that the confession reliably demonstrated that [Ambroise] engaged in the sexual activity. Therefore, it does not overcome the credibility findings made by the ALJ and adopted by the [CSC].

In affirming the ALJ's findings of fact, the CSC found the ALJ's credibility determinations were not arbitrary, capricious, or unreasonable. It noted the DOC did not call J.O. to testify at the hearing to corroborate her allegations, "nor did it establish that [Ambroise's] testimony did not hang together." The CSC found it was "not unreasonable for the ALJ to credit [Ambroise's] consistent testimony from his criminal interview prior to the use of what can only be described as heavy-handed, and arguably inappropriate, tactics by the interviewers." The CSC further noted, "[w]hile the DNA evidence, if it had been more reliable, may have borne on [Ambroise's] credibility," the ALJ did not err in lending that evidence little weight because the DOC did not produce any "testimony or evidence regarding the chain of custody, mode of collection, time of collection or where it was stored," which rendered the evidence "questionable, at best."

The CSC further agreed with the ALJ's determination Ambroise violated policy by not reporting the kiss, but found the gravity of this situation was much more severe, stating it

cannot fathom how any custodial staff in a correctional facility for women could reasonably interpret an unwanted kiss from an inmate as anything but an unusual incident that needed to be reported. In this regard, the [CSC] is highly dubious of [Ambroise]'s indication that he did not report the kiss because he did not deem it necessary.

The CSC also disagreed with the ALJ's decision finding Ambroise's delivering a message from one inmate to another did not constitute undue familiarity. The CSC found that regardless of the content or context of the message, it could not

imagine any circumstance where the relaying of a personal message between inmates by a [SCPO] would be appropriate. Contrary to the ALJ's finding, any such occurrence could potentially affect the safety and security of the facility. For example, once the message was passed, at least two inmates knew that [Ambroise] was willing to violate policy on their behalf. Surely, should such information be passed to other inmates, [Ambroise]'s authority, as well as the potential safety and security of the facility, would thereafter be compromised.

While it found Ambroise's actions to be "clearly serious and highly concerning, especially in a correctional setting," and his failure to report contact of a sexual nature with an inmate was "puzzling at best," the CSC determined the

circumstances warranted a penalty "less than removal." The CSC noted it was "in no way minimizing [Ambroise]'s highly improper conduct," but "given the way this entire matter proceeded and acknowledging that the most serious misconduct was not proven," the CSC imposed a six-month suspension, which is the most severe sanction absent removal. Because the CSC modified the sanction of removal to a suspension, it awarded Ambroise back pay.

On appeal, the DOC raises the following points for our consideration:

THE CIVIL SERVICE COMMISSION'S DECISION TO MODIFY AMBROISE'S REMOVAL TO A 180-DAY SUSPENSION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE, AND NOT SUPPORTED BY THE SUBSTANTIAL, CREDIBLE EVIDENCE IN THE RECORD

A. The CSC Erred in Reducing the Penalty of Removal to a 180-[d]ay Suspension Given the Sustained Charges of Undue Familiarity and Failure to Report.

B. The CSC's Dismissal of the Charges Relating to Ambroise's Sexual Contact with an Inmate is Against the Weight of Evidence in the Record and Based on Legal Error.

C. The CSC Erred in Failing to Reopen the Record Based on Newly Discovered Evidence.

III.

We must hew to our standard of review. "Appellate courts have 'a limited role' in the review of [CSC] decisions." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). "An appellate court affords a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014) (citation omitted). "In order to reverse an agency's judgment, an appellate court must find the agency's decision to be 'arbitrary, capricious, or unreasonable, or . . . not supported by substantial credible evidence in the record as a whole.'" Stallworth, 208 N.J. at 194 (quoting Henry, 81 N.J. at 579-80).

Our review of the CSC's factual findings is limited to

whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility, and . . . with due regard also to the agency's expertise where such expertise is a pertinent factor.

[Sager v. O.A. Peterson Constr. Co., 182 N.J. 156, 164 (2004) (citation omitted).]

"We will not interfere with [the CSC's] determination, regardless of whether we, in the first instance, would have reached the same conclusion." In re Herrmann, 192 N.J. 19, 38 (2007).

IV.

The DOC asserts that because prisons are "highly charged and dangerous," the sustained charges of failure to report and undue familiarity warrant Ambroise's removal. The DOC argues there should be no gradation of offenses for undue familiarity and any sustained charge must result in termination. It challenges the CSC's use of progressive discipline, arguing the charges are "egregious and clear violation[s] of the DOC's policies."

The principle of deference extends to the sanction chosen. Id. at 28 (citing In re Polk, 90 N.J. 550, 578 (1982)). We cannot alter a penalty unless we determine the "punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." Id. at 28-29 (quoting Polk, 90 N.J. at 578); see also Belleville v. Coppla, 187 N.J. Super. 147, 155 (App. Div. 1982) ("The fact that a more serious penalty . . . might also be supportable does not require that we overrule the [CSC]'s action."). While the DOC argues Ambroise should be removed, we do not find the imposition of

a six-month penalty to be "so wide of the mark" as to justify substituting our judgment for that of the CSC's judgment. See Herrmann, 192 N.J. at 36.

We recognize "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." In re Carter, 191 N.J. 474, 484 (2007). However, the CSC explained its reasons for determining that is not the case here. The CSC considered the nature and circumstances of the charges, which it acknowledged "touch at the heart of the safety and security of correctional facilities," but also weighed Ambroise's lack of a disciplinary record. The CSC further found, "given the way this entire matter proceeded and acknowledging that the most serious misconduct was not proven, the [CSC] cannot find that [Ambroise] should be removed without a second opportunity to demonstrate his competence." We discern no reason to disturb this decision.

We next turn to the DOC's argument the ALJ mistakenly applied the law concerning voluntary confessions, and therefore the CSC erred in adopting the ALJ's conclusion regarding the lack of proofs of the sexual contact charge because Ambroise confessed to having sexual contact with J.O.

In considering Ambroise's videotaped interview, the ALJ correctly noted "law enforcement may not fabricate evidence in order to coerce a confession," citing

State v. Patton, 362 N.J. Super. 16 (App. Div. 2003). In Patton, investigators recorded a fake witness interview implicating the defendant and then played it for him to induce his confession. Id. at 19. While we acknowledged law enforcement's continued authority to use trickery, deception and false representations, we held "the use of police-fabricated evidence to induce a confession that is then used at trial to support the voluntariness of a confession is per se a violation of due process." Id. at 49; see also State v. Chirokovskic, 373 N.J. Super. 125, 129, 134 (App. Div. 2004) (fabricated DNA lab report is false tangible evidence warranting suppression of defendant's confession).

Here, detectives told Ambroise they had swabs they were going to send to the lab for testing, and juries "love DNA." The detective did not make misrepresentations about the swabs, nor did they fabricate any physical evidence because they actually had the swabs.

Likewise, the ALJ noted law enforcement may not promise a reduced sentence in exchange for a confession, citing State v. L.H., 239 N.J. 22 (2019). In L.H., detectives told the defendant he would not receive any jail time and would only get treatment if he confessed to sexual assault. Id. at 28. "The detectives' assurances and suggestions that defendant would receive help and counseling, stay out of jail, and be there for his daughter if he cooperated were

aimed at assuaging the reluctance defendant repeatedly expressed about giving up the right to remain silent." Id. at 33. However, the Court did not establish the definitive rule as articulated by the ALJ here; it reached its conclusion based on a totality of circumstances in that case. Here, the interview techniques used by detectives did not amount to a "promise" of a lesser sentence and therefore the ALJ was mistaken in her application of L.H.

However, the ALJ's misapplication of the criminal law does not undermine her credibility determinations. Whether a statement is freely and voluntarily given, and therefore admissible at trial, is a legal question decided by the trial judge; but even when admissible, the determination of its credibility and reliability lies with the factfinder. See State v. Rosales, 202 N.J. 549, 561 (2010). Here, even though Ambroise knowingly and voluntarily waived his Miranda rights and gave a statement the criminal court determined to be admissible, the ALJ as factfinder may consider the circumstances surrounding the statement in ascribing what weight, if any, to give to it.

The DOC argues the CSC erred in "rubber-stamp[ing]" its approval of the ALJ's determination to give no weight to Ambroise's video-recorded statement. The record shows otherwise. In adopting the ALJ's determination of credibility

and reliability, the CSC conducted its own review and made its own findings.

The final decision states:

The [CSC] also notes that [Ambroise] was found not guilty of the associated serious criminal charges. While the standard [of] proof in that matter was different from the present matter, it cannot be ignored that the jury in that matter must have determined that there was at least reasonable doubt that [Ambroise's] confession was not reliable evidence of his guilt. In the present matter, an independent authority, the ALJ, as well as the [CSC] is similarly finding that there is not a preponderance of the evidence to support that the confession reliably demonstrated that [Ambroise] engaged in the sexual activity. Therefore, it does not overcome the credibility findings made by the ALJ and adopted by the [CSC].

Thus, the ALJ's credibility determinations can be traced to a sufficient basis in the record and the CSC's adoption of those findings is well supported in the record.

We also reject the DOC's argument that the CSC's denial of its motion to reopen the record was in error. We first note the court's July 2017 order was not "newly discovered information," because it was readily available in the criminal docket. For the reasons articulated above, the order addressed the voluntariness of the confession and therefore its admissibility; but the credibility and reliability of the statement remained in the sound province of the ALJ as

factfinder. Therefore, the CSC did not err in declining to reopen the record to consider the document.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION