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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1602-21

IN THE MATTER OF MALIKAH
SPENCER, ESSEX COUNTY,
DEPARTMENT OF
CORRECTIONS

Argued April 25, 2023 – Decided May 2, 2023

Before Judges Geiger and Susswein.

On appeal from the New Jersey Civil Service
Commission, Docket No. 2021-677.

Jeanne-Marie Scollo, Assistant County Counsel,
argued the cause for appellant Essex County
Department of Corrections (Office of the Essex County
Counsel, attorneys; Jeanne-Marie Scollo, on the brief).

Luretha M. Stribling argued the cause for respondent
Malikah Spencer.

Matthew J. Platkin, Attorney General, attorney for
respondent, New Jersey Civil Service Commission
(Levi Klinger-Christiansen, Deputy Attorney General,
on the statement in lieu of brief).

PER CURIAM

The Essex County Department of Corrections (Department) appeals from a final decision of the Civil Service Commission (CSC) reversing the removal of Essex County Correctional Police Officer Malikah Spencer, dismissing the disciplinary charges filed against her, and directed the appointing authority to immediately reinstate Spencer to her permanent position. The final decision also determined Spencer was entitled to mitigated back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10, and an award of reasonable counsel fees pursuant to N.J.A.C. 4A:2-2.12. We affirm.

Spencer was hired by the Department as a county correctional police officer in February 2016. Spencer is a single mother with two children, who were nine years old and seven months old, respectively, in August 2019. Her mother lives near her and assists with childcare. Dasheek Touchstone is the father of the children. He was also employed by the Department.

On December 18, 2019, Spencer was charged with conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6), other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12), and for violating the following department rules and regulations: obedience to laws and regulation, 3:1.13; knowledge of the laws and regulations, 3:1.23; truthfulness, 3:10.5; and standard of conduct, 3:1.1.

The Preliminary Notice of Disciplinary Action (PNDA) stated Spencer wrongfully utilized the Family Medical Leave Act (FMLA) while on vacation in Mexico in August 2019. It specified that Spencer failed to report to her shift commander that she was involved in a domestic violence incident on August 17, 2019. On August 19, 2019, Spencer told an Internal Affairs Investigator that she was out of the country and would not return until August 25, 2019. On August 22, 2019, Spencer was absent without leave (AWOL) from work. When contacted that day, Spencer told a lieutenant she was in Mexico and forgot to call out. The PDNA further stated: "Spencer then called out of work on August 23, 24, 25, and 26, stating she was taking FMLA leave. Spencer's use of FMLA leave was clearly fraudulent as she notified both Investigator Pomponio and Lt. Pires that she was in fact out of the country until August 25, 2019."

The Department issued a Final Notice of Disciplinary Action (FNDA) sustaining each of the charges and removed Spencer effective November 25, 2020. Spencer appealed the removal to the Office of Administrative Law, contesting the charges and termination.

The appeal was assigned to an Administrative Law Judge (ALJ), who conducted a testimonial hearing and received written summations. Associate Warden Antonio Pires testified for the Department. Spencer testified on her

own behalf and presented the testimony of her mother, Shirley Smith. The ALJ found all three witnesses credible and noted most of the facts were not in dispute.

The ALJ recounted their testimony and found the following facts.

Spencer has been employed as a Corrections Officer with the Corrections Department from 2016 to her effective termination on November 25, 2020. Spencer has received positive evaluations during her time of employment with the Corrections Department and was suspended once without pay for five-days for being consistently tardy to work over a period of time. Spencer resides in Newark, is a single parent and has two minor age children. Spencer relies upon her mother, Smith, to assist her in taking care of her children.

On August 19, 2019, and August 22, 2019, Spencer called her employer and reported that she would not be in to work on said dates as she was using an FMLA day as follows: August 19 use of FMLA No Pay and August 22 use of FMLA vacation day. Spencer was approved by the Department of Corrections for FMLA and [New Jersey Family Leave Act] for 2018 and 2019.

Spencer was a victim of an alleged domestic violence incident on August 17, 2019, and August 19, 2019, when Touchstone allegedly assaulted her on both dates[] at her home on August 17 and at her mother's home on August 19. The Newark Police [D]epartment were called on both alleged domestic violence incidents. On August 17, the Newark Police called the Department of Corrections to report that Spencer was a victim of an alleged domestic violence. Additionally, on August 22, 2019, Spencer spoke with her supervisor Pires, who was a Lieutenant and her shift supervisor at

the time, and advised him that she had forgotten to call out prior to the start of the shift and that she was in Mexico and Lieutenant Pires responded okay.

On August 19, while she was in Cancun, Spencer called Internal Affairs and spoke with Lieutenant Bologne, who informed her to speak with Officer Pomponio. Spencer informed Officer Pomponio of the alleged domestic violence incidents and that she was in Cancun to be away from Touchstone.

As a result of the alleged domestic violence of Spencer by Touchstone, Spencer was afraid for her safety and left Newark for Cancun with Smith and her family on August 19 on a planned family vacation. Spencer's two children remained in Newark with a best friend, as they could not travel because they did not have passports.

Spencer would return to Newark from Cancun on August 23, 2019, because one of her two children was ill. The child was hospitalized in Beth Israel Hospital on August 23 and discharged on August 24. Spencer had to remain at home taking care of her child until August 26. Spencer called the Department of Corrections on August 23, 24, 25, and 26, 2019, to report that she would be out on said dates due to her child being sick. Spencer used FMLA sick days for her days out from August 24 through August 26.

Upon her return to work after August 26, 2019, Spencer was asked by Internal Affairs to provide a copy of the flight itinerary to Cancun. Spencer was never questioned by Internal Affairs or her supervisor regarding her use of FMLA time on August 19 and August 22; the alleged domestic violence incidents that occurred on August 17 and August 19 and being AWOL

from work between August 19 through August 26, 2019.

The first time that Spencer knew that her employment status was in jeopardy was when she received the PNDA on December 19, 2019.

The ALJ provided the following analysis. "In a civil service disciplinary case, the employer bears the burden of sufficient, competent, and credible evidence of facts essential to the charge." The employer must "establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged."

The ALJ found the record did not support the charge that Spencer was guilty of conduct unbecoming a public employee. Regarding the charge that Spencer was AWOL from work, the ALJ stated:

[T]he record reveals that Spencer took an FMLA day on August 19, 2019, and August 22, 2019, which were initially approved by the Department of Corrections. In addition, the record further reveals that she spoke with Pires on August 19 and informed him of the domestic violence incident and that she was in Cancun and followed his instructions to contact Investigator Pomponio regarding the domestic violence incident. The record further reveals that Spencer called in on August 24, 25 and 26, 2019, and took FMLA days to tend to her child who was sick. The Department of Corrections does not refute Spencer calling in and using her FMLA days in August 2019, and they did not present any proofs that Spencer was AWOL as contained in the FNDA.

The ALJ found the Department failed to prove by a preponderance of the credible evidence that Spencer was AWOL on August 22, 2019, or any other dates.

As to the charge that Spencer fraudulently used the FMLA, the ALJ found the record did not support the allegation that Spencer fraudulently notified Pires that she was out of the country until August 25, 2019, and then called out of work on August 23 to 26, stating she was taking FMLA leave. He reasoned:

Pires' testimony did not state that Spencer's conduct was "fraudulent" because she called in on August 23, 24, 25 and 26 to use her FMLA days. Pires stated that Spencer's "use" of FMLA while she was in Cancun was not "truthful" because she did not state she was in Cancun when she first called in on August 19, and the FMLA Sick Call Form provided her "address" as being home.

Pires' testimony is not consistent with the charges in the FNDA and what occurred.

The ALJ found the Department failed to prove by a preponderance of the credible evidence that Spencer's conduct was fraudulent.

Based on these findings, the ALJ denied the conduct unbecoming a public employee charge. The ALJ explained:

[T]he record reveals that the Department of Corrections failed to conduct any investigation of the charges contained in the FNDA. The FNDA Specifications

state that the Department of Corrections commenced an Internal Affairs investigation because Spencer failed to report the domestic violence incident, which the record reveals to be incorrect, and that as a result it determined that she fraudulently used FMLA time for August 19, 21, and August 23 through August 26, because she told Investigator Pomponio on August 19, that she would be out on FMLA until August 25. I CONCLUDE there is no testimony or evidence that supports this specification, Pires' testimony and the documents submitted reveal that the Department of Corrections was simply dismayed that Spencer was in Cancun when she requested FMLA time. Had the Department of Corrections conducted an investigation it would have realized that Spencer had a mitigating reason to go to Cancun with her mother and family, which was the result of the alleged domestic violence that occurred on August 17 and August 19.

As to the second charge that Spencer's conduct constituted "other sufficient cause" under N.J.A.C. 4A:2-2.3(a)(12), the ALJ explained:

[T]he Department of Corrections has not provided any substance to the allegations that Spencer violated department Rules and Regulations 3:1.13 Obedience to Laws and Regulations; 3:1.23 Knowledge of the Laws and Regulations; 3:1.1 Standard of Conduct and 3:10.5 Truthfulness. Pires provided testimony that Spencer violated all the aforementioned policies and procedures by simply reading the same into the record without providing any specific instance of how Spencer violated the Rules and Regulations. Pires did not provide any knowledge of why Spencer had been approved for FMLA and therefore how she was in violation of the same because she was in Cancun. Pires even admitted that an employee could use a vacation day when calling . . . out for FMLA. In essence, Pires'

testimony was devoid of any knowledge of FMLA requirements and how Spencer had violated the same because she was in Cancun while on FMLA.

As stated previously, Pires testified that Spencer violated regulations 3:10.5 Truthfulness, when he stated that Spencer was not "truthful" in failing to state on August 19 that she was in Cancun when she used a "no pay" day for her FMLA. Pires did not provide any additional testimony regarding Spencer violating the remaining Rules and Regulations. . . . Pires' testimony was insufficient to establish that Spencer violated regulation 3:10.5, and that the Department of Corrections has failed to prove by a preponderance of the credible evidence that Spencer's conduct was violative of the Rules and Regulations cited in the FNDA.

. . . [W]hile Spencer's reasons for going to Cancun was a result of her fear for her safety and that of her children because of the two alleged domestic violence incidents involving Touchstone, and the same may or may not be an approved FMLA reason, the Department of Corrections has failed to provide proof by a preponderance of the credible evidence that Spencer conduct was conduct unbecoming a public employee, and a violation of the Rules and Regulations for other sufficient cause.

The ALJ issued an initial decision that reversed Spencer's termination and restored her to her permanent position with back pay and seniority, pursuant to N.J.A.C. 4A:2-2.10. No exceptions were filed to the initial decision.

Upon considering the record and independently evaluating the record, the CSC accepted and adopted the factual findings and conclusion made by the ALJ

in his initial decision. The CSC found that Spencer's removal "was not justified" and granted Spencer's appeal. The CSC directed the Department to immediately reinstate Spencer to her permanent position. Because the charges were dismissed, the CSC determined Spencer was entitled to mitigated back pay, benefits, and seniority as provided for in N.J.A.C. 4A:2-2.10, and an award of reasonable counsel fees pursuant to N.J.A.C. 4A:2-2.12. This appeal followed.

The Department raises the following points for our consideration:

I. THE CIVIL SERVICE COMMISSION'S DECISION WAS ARBITRARY, CAPRICIOUS, UNREASONABLE AND LACKED FAIR SUPPORT IN THE RECORD, AS THE ALJ REPEATEDLY MADE AN INAPPROPRIATE AND IMPERMISSIBLE LEAP FROM "VALID LEAVE REQUEST" TO "FMLA TO COVER ANYTHING."

II. THE COUNTY DISCIPLINED SPENCER BASED ON A LEGITIMATE, NON-DISCRIMINATORY FINDING THAT SHE ENGAGED IN MISCONDUCT WHEN SHE CLAIMED SHE WAS TENDING TO A MEDICAL CONDITION INVOLVING HER SON BUT WAS ACTUALLY ON VACATION IN MEXICO WITHOUT HER CHILDREN.

III. FRAUDULENT USE OF FMLA IN A TIMELY MANNER DOES NOT CONSTITUTE LAWFUL BEHAVIOR. RATHER IT CONSTITUTES CONDUCT UNBECOMING A PUBLIC EMPLOYEE.

IV. REMOVAL IS THE APPROPRIATE PENALTY.

We affirm substantially for the reasons expressed by the ALJ in his initial decision, which were accepted and adopted by the CSC. We add the following comments.

Our scope of review of the CSC's final administrative decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011). We will not disturb an agency's final decision unless it is "arbitrary, capricious or unreasonable or [is] not supported by substantial credible evidence in the record as a whole." Ibid. (quoting Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980)). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." In re Adoption of Amends. to Ne., Upper Raritan, Sussex Cnty. & Upper Del. Water Quality Mgmt. Plans, 435 N.J. Super. 571, 582-83 (App. Div. 2014) (alteration in original) (quoting In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006)).

In determining whether a final agency decision is arbitrary, capricious, or unreasonable, a reviewing court examines:

- (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.

[Id. at 583 (quoting Mazza v. Bd. of Trs. Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995)).]

A strong presumption of reasonableness attaches to the CSC's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001). "A reviewing court 'may not substitute its own judgment for the agency's even though the court might have reached a different result.'" Stallworth, 208 N.J. at 194 (quoting In re Carter, 191 N.J. 474, 483 (2007)). "This is particularly true when the issue under review is directed to the agency's special 'expertise and superior knowledge of a particular field.'" Id. at 195 (quoting In re Herrmann, 192 N.J. 19, 28 (2007)).

Applying these principles, our careful review of the record reveals that it amply supports the ALJ's detailed factual findings and the decision of the CSC, which was not arbitrary, capricious, or unreasonable. Accordingly, we discern no basis to disturb the CSC's final decision.

The Department's arguments lack sufficient merit to warrant further discussion in a written opinion. 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.

A handwritten signature in black ink, appearing to be 'JMA', written over the printed text.

CLERK OF THE APPELLATE DIVISION