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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3045-21

IN THE MATTER OF
MICHAEL JOHNSON,
ELMWOOD PARK,
POLICE DEPARTMENT.

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Argued February 28, 2024 – Decided June 18, 2024

Before Judges Accurso and Walcott-Henderson.

On appeal from the New Jersey Civil Service Commission, Docket No. 2020-1744.

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

Kyle J. Trent argued the cause for respondent Borough of Elmwood Park (Apruzzese, McDermott, Mastro & Murphy, PC, attorneys; Arthur Richard Thibault, Jr. and Kyle J. Trent, of counsel and on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent New Jersey Civil Service Commission (Eric A. Reid, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Michael Johnson appeals from an April 27, 2022 final agency decision of the Civil Service Commission upholding the decision of the Elmwood Park Police Department to remove him as a police officer for conduct unbecoming, failure to perform his duties, neglect of duty, insubordination, and other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a), as well as violation of several Departmental Rules and Regulations arising out of an unlawful stop he made as a personal favor for another officer to deliver a message to the driver, a letter he wrote on Department letterhead for a motorist stating he had issued a summons to her in error, which was not true, and that he used derogatory and disrespectful terms for two commanding officers.

Johnson admits the stop was improper, that he should've probably not written the letter, and that he had said the words alleged, although not in any seriously derogatory or disrespectful sense. He claims the Department failed to consider his prior unblemished record and the lack of any malicious intent in his actions, and that termination was too harsh a penalty. The Commission affirmed the initial decision of the Administrative Law Judge rejecting

Johnson's explanations for his actions and finding Johnson's removal appropriate under the circumstances.[1] We affirm.

The essential facts developed before the ALJ are undisputed. Johnson had served twelve years as a police officer, three in Elmwood Park, with no disciplinary history of any significance when he pulled over a motorist to deliver a message to her from another officer. Johnson told the motorist she should contact the other officer. When the motorist asked why, Johnson told her he didn't know, he was just delivering the message. The motorist was disquieted by the unusual stop, but admitted Johnson's manner had been cordial and not in any way over-bearing. When the motorist contacted the

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[1] Johnson also raises several issues not raised in the OAL or before the Commission, including that the investigating officer had a disabling conflict, that the Department violated the Attorney General's Guidelines in conducting the internal affairs investigations, that the recording of the telephone conversation in which Johnson made the remarks about his commanding officers should have been suppressed in the absence of proof it was legally obtained, and that notwithstanding the poor taste of defendant's comments about his commanding officers, they were uttered in a private conversation and thus entitled to First Amendment protection. We decline to consider these arguments, none of which would change the analysis or result here. See Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012) (noting our Supreme Court's long held view that "our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest") (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1977)).

officer, she wanted to know why the motorist had "friended" the officer's husband on Facebook. Later in the afternoon when the motorist picked up her son from school, she claimed Johnson followed her around the block as she searched for parking, bringing his fingers to his eyes and then pointing them at her. She testified Johnson's actions made her feel alarmed and intimidated.

Internal affairs officers investigating the incident after the motorist complained could find no record of the stop beyond a truncated video recorded on the squad car's mobile video recorder. Johnson admitted he'd pulled the motorist over without reasonable suspicion or probable cause to deliver a message to the motorist simply as a favor for another officer. He claimed he'd turned on the mobile video recorder in his squad car when he activated his overhead lights "but shut it off because it wasn't a stop," although he believed "it was still on." He also admitted he hadn't run the car's license plate through the NCIC (National Crime Information Center) database, or called in the stop to dispatch and couldn't remember whether he had turned on his body-worn camera — all Department requirements for conducting a car stop.

At the hearing in the OAL, Johnson insisted the stop was merely improper, not illegal, and that he could have pursued the motorist's "improper" display of police union shields on her windshield. He also denied turning off

the car's video recorder when he got out of the car to approach the motorist, and he insisted he'd viewed a longer video in the course of the internal affairs investigation than the truncated version produced by the Department at the hearing. He was also certain he'd turned on his body worn camera.

Johnson claimed he'd only motioned the motorist to move on at school pick-up after the crossing guard asked him to address her daily habit of double-parking in front of the school. He admitted it might have appeared he followed the motorist around the block but did so simply to resume his post across from the school.

Johnson testified that when he later asked the other officer why she wanted to get a message to the motorist, the officer told him the motorist had been stalking the officer's husband on Instagram. Johnson claimed he was upset and told her had he known what it was about, he never would've gotten involved.

Besides the motorist, the internal affairs investigators and the Chief of Police, the Department presented the expert testimony of a representative of the manufacturer and installer of the mobile video recorders used in Elmwood Park. The representative explained the system is engaged when the car's ignition is switched on and remains in standby mode until activated by the

officer or automatically activated when the officer turns on his overhead lights. To turn off the recorder, the officer pushes a button on the unit, which produces a drop-down menu, allowing him to continue to press the stop button to select a category, such as "no citation", "citation", "DUI", "arrest" and "other" that classifies the recording for different evidentiary purposes and retention times.

The expert explained the only video of Johnson's stop of the motorist was a minute and fourteen seconds long with the first minute being the one minute pre-record event without audio the system automatically captures when the video recorder is activated. The expert testified the video recorder in Johnson's car was functioning normally, and that he would have had to have pressed the stop button over five times to select the category he chose to classify the stop as "other."

The letter incident arose out of a ticket Johnson wrote after seeing a woman using a hand-held mobile phone in violation of N.J.S.A. 39:4-97.3. The information in the summons was populated by a license plate scanner and the ticket autogenerated. Johnson failed to notice before mailing it out that the summons was directed to a car rental company and not an individual. After the driver missed two court appearances, possibly attributable to the delay in

receiving the ticket, a bench warrant was issued for her arrest, and she was picked-up and detained on the warrant. She eventually pleaded guilty in municipal court.

Sometime later, the driver appeared at the police station asking for Johnson. She told him the ticket had impaired her ability to make a living driving for Uber because her driving privileges had been suspended by the company, and asked whether there was something he could do to help her out. While the driver waited, Johnson got a sheet of the Chief's letterhead from the Chief's secretary and wrote the following letter, "To whom it may Concern," over his own name and signature, which he handed to the driver.

> This letter is written on behalf of the registered owner [V.H.]. Ms. [H.] was issued a summons E16-006509. It was later determined that summons was issued in error. This officer is writing this letter to show that the above individual should not be penalized for a summons written in error.
>
> In closing, the practice of writing a letter on behalf of someone is uncommon. In this line of work although we as police officers are held to high standards, we too do make mistakes. I strongly feel that Ms. . . . is a good driver based on her driving history. If you have any questions, please feel free to contact me.

A few weeks later, the driver appeared in municipal court with the letter demanding that her guilty plea be vacated and the summons dismissed. The

court administrator contacted Johnson to ask if he wanted the ticket dismissed. He told her the ticket was properly issued and should not be dismissed. After two more court hearings, the driver again pleaded guilty, and the municipal matter was closed. In the interim, however, the court administrator reported the incident to the Chief and provided him a copy of the letter.

In the ensuing internal affairs investigation, Johnson acknowledged he had not received permission to use Department letterhead but claimed there was no false information included in the letter. When asked what was in error about the summons, Johnson replied there was no error but "[t]he way the letter should have been written was — it was later determined that this issued summons — there was an error with the issued summons. But that was my mistake here."

At the OAL hearing, Johnson testified he told the driver that there wasn't anything he could do about the summons, but he thought he could "help her out" with her employer by writing a letter for her to give to Uber to see if it would reinstate her driving privileges. He did not intend or expect that she would submit the letter to the municipal court and was not attempting to assist her in voiding the ticket. He claimed the "error" referred to in the letter was

the driver's failure to receive the summons in a timely manner because the summons was initially directed to the rental car company.

Johnson testified he received nothing in return for the letter; he simply felt bad that the driver had suffered so many adverse consequences, including being arrested on a warrant and losing her job, because she didn't receive the summons promptly. He claimed that were he faced with the situation again, he would certainly request a supervisor's permission and assistance in properly wording such a letter or sending it at all.

On cross-examination, Johnson acknowledged he had not reviewed the driver's abstract before sending the letter, having relied instead on the record generated for the license plate issued to the car rental company. Asked to review the driver's abstract, he was forced to concede the driver's record was not good, revealing accidents and almost a dozen moving violations. The Chief testified the driver's record was "horrendous." Although acknowledging the letter could lead a reader to believe the summons was issued in error, which was not true, Johnson insisted he "had nothing to do with what happened in court" regarding the driver's efforts to have the ticket dismissed.

In the course of unrelated litigation between the officer for whom Johnson had delivered the message to the motorist and the Department, the

Department learned the officer had taped a telephone conversation between herself and Johnson. On the tape, Johnson could be heard referring to the Chief and the captain who had conducted the earlier internal affairs investigations using anti-gay slurs. Johnson admitted to the conversation and the epithets. During the internal affairs investigation, however, he claimed he was angry and only meant "idiot, dummy, or fool." At the OAL hearing, Johnson, who was born in the United States and raised in Paterson, claimed he was unaware of the anti-gay connotations of the terms as in Jamaica, where his family came from, the terms refer to "a burning cigarette" or "a hot cigarette."

After considering the evidence, the ALJ concluded Johnson's testimony was self-serving and wholly incredible, and that there was ample proof in the record to sustain each of the charges. Specifically, the ALJ found Johnson had illegally stopped the motorist not for a law enforcement purpose but to deliver a personal message to the motorist at the behest of another officer. The ALJ also found Johnson was not truthful about not turning off the mobile video recorder or seeing a longer video than was presented at the hearing. The judge accepted the testimony of the manufacturer's representative that the recorder was functioning normally, and that Johnson would have had to push the stop button multiple times to turn it off.

In addition, the ALJ found it beyond dispute that Johnson had improperly used the Chief's letterhead to write a letter that included two demonstrably false statements: that the ticket had been issued in error and the driver's history demonstrated she was a good driver. Finally, the judge found Johnson's effort to explain away the anti-gay slurs he used to refer to two superior officers was "farcical," and it was "clear that those terms were used in a derogatory fashion."

The ALJ found the Department had easily carried its burden to establish Johnson's conduct was unbecoming a police officer, that he had failed to perform his duties, neglected his sworn duties and established other sufficient cause. Finally, although finding it less serious than the other two matters, and accepting that Johnson may have been rightfully confused by some of the questions put to him in the internal affairs investigation of the incident, the judge concluded the Department had sustained the charge of insubordination as to the slurs heard on the recorded phone conversation. The language was derogatory and disrespectful, and Johnson's attempt to excuse its use utterly unbelievable. The ALJ found both the stop and the letter put the Department potentially at risk and that "each standing alone, warrant removal."

The Commission affirmed the ALJ's findings, rejecting Johnson's exceptions to the decision. The Commission highlighted that the ALJ's findings were based on his assessment of Johnson's credibility, which he found seriously wanting. The Commission expressed its wholehearted agreement with the ALJ that Johnson's "egregious misconduct as a police officer was deserving of removal from employment."

Johnson appeals, reprising his arguments to the ALJ and the Commission that the Rule and Regulations violations, but not the administrative charges, see McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 394 (App. Div. 2008), should be dismissed, it was fundamentally unfair for internal affairs officers not to have advised him that they had a tape recording of his conversation with another officer before questioning him about the slurs he uttered about commanding officers, errors in judgment in connection with the car stop and the letter do not equate with him being untruthful in either case, and the "notion of progressive discipline" is not served by his removal. None of these arguments are of sufficient merit to warrant extended discussion. See R. 2:11-3(e)(1)(E).

Our review of administrative agency actions is limited. In re Herrmann, 192 N.J. 19, 27 (2007). We will not upset an agency's final quasi-judicial

decision absent a "clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Id. at 27-28. This same deferential standard applies to our review of the agency's choice of a disciplinary sanction. Id. at 28. We review discipline only to determine 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.'" In re Stallworth, 208 N.J. 182, 195 (2011) (quoting In re Carter, 191 N.J. 474, 484 (2007)).

Although the concept of progressive discipline, which promotes uniformity and proportionality in the discipline of public employees, has long been a recognized and accepted principle, see West New York v. Bock, 38 N.J. 500, 523-24 (1962), our courts have also long acknowledged that "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter, 191 N.J. at 484 (citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993)). In cases involving the discipline "of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction." Id. at 485.

Finally, we give "due regard to the opportunity of the one who heard the witnesses to judge their credibility." Logan v. Bd. of Review, 299 N.J. Super. 346, 348 (App. Div. 1997). We will not disturb the ALJ's credibility findings unless they were "arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Bd. of Trs. of PERS, 368 N.J. Super. 527, 537 (App. Div. 2004).

Applying those standards here, Johnson has provided us no reason to reverse the findings of the ALJ adopted by the Civil Service Commission. Johnson admitted the critical facts justifying his removal, and the ALJ, who had the opportunity to hear the testimony of the witnesses and to evaluate their credibility, found Johnson's attempt to explain away those events entirely incredible and not worthy of belief. We also agree there was no violation of the 45-day rule, N.J.S.A. 40A:14-147. The law is clear that only an appointing authority, here the Chief, may take action to charge a permanent employee with major discipline, and the 45 days runs from the date on which he "obtained sufficient information to file the matter upon which the complaint is based." N.J.S.A. 40A:14-147; N.J.S.A. 11A:2-20. Having reviewed the record, we are satisfied the charges here were filed well within those limits and

the only delay was based on the Department's accommodation of Johnson's request to hold the early charges in abeyance as he searched for another job.

Our review makes plain the decision of the Civil Service Commission is supported by sufficient credible evidence in the record as a whole and the sanction of removal was justified. See R. 2:11-3(e)(1)(D); Carter, 191 N.J. at 484. Johnson's arguments to the contrary are without sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.