



DEBORA AGUILAR-GONZALEZ v. DAVID SHINN; ARIZONA DEPARTMENT OF CORRECTIONS REHA

2022 | Cited 0 times | Court of Appeals of Arizona | July 14, 2022

IN THE ARIZONA COURT OF APPEALS DIVISION TWO

DEBORA AGUILAR-GONZALEZ, Appellant,

v.

DAVID SHINN IN HIS CAPACITY AS DIRECTOR OF THE ARIZONA DEPARTMENT OF CORRECTIONS, REHABILITATION & REENTRY; DEPARTMENT OF CORRECTIONS, REHABILITATION & REENTRY, AN AGENCY OF THE STATE OF ARIZONA, Appellees.

No. 2 CA-CV 2021-0103 Filed July 14, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. NOT FOR PUBLICATION See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County No. C20203505 The Honorable Kellie Johnson, Judge

AFFIRMED

COUNSEL

Bihn & McDaniel P.L.C., Phoenix By Martin A. Bihn and Donna M. McDaniel Counsel for Appellant

Mark Brnovich, Arizona Attorney General By Kirstin A. Story, Assistant Attorney General, Phoenix
Counsel for Appellees Jeffrey W. Toppel, Tucson Counsel for Amicus Curiae Arizona State
Personnel Board

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Vice Chief Judge Staring concurred.

B R E A R C L I F F E, Judge:



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¶1 Debora Aguilar-Gonzalez appeals the superior affirming the decision of Director David Shinn, in his capacity as Director

of the Arizona Department of Corrections, Rehabilitation and Reentry (the , to dismiss her from her position and rejecting the recommendation of) to overturn the dismissal. We affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to affirming D decision. *Lewis v. Ariz. State Pers. Bd.*, 240 Ariz. 330, ¶ 15 (App. 2016). Aguilar-Gonzalez was employed by the Department as a Community Corrections Officer.

¶3 Aguilar-Gonzalez and Marcos Pereida have one child in common, Paul. 1 Pereida has an order of protection against Aguilar- Gonzalez that includes him and another of his children, Anne, as protected persons. The order of protection allows Aguilar-Gonzalez to communicate with Pereida about parenting time and to arrange the exchange of Paul. On December 15, 2019, Pereida drove to Aguilar- home to pick up Paul. A couple minutes after Pereida pulled up to the home, Aguilar-Gonzalez drove up next to him in her vehicle with Paul in the car. Pereida then put Paul in his car and, while he did that, Aguilar-Gonzalez drove away. Pereida then started driving and, upon coming to a turn in the road, he saw Aguilar- parked and facing his vehicle. Pereida then turned, and Aguilar- Pereida pulled over on the right side of the road and

stopped to let her pass, but Aguilar-Gonzalez pulled her vehicle behind his

1 Minors are referred to herein by pseudonyms. and stopped. After a couple of minutes, Aguilar-Gonzalez passed Pereida on the left side of his vehicle and drove away. Pereida then continued on to a bank where he planned to meet his wife, Sarah Pereida; she was to take Paul so Pereida could go to work.

¶4 Moments later, Sarah, who was already at the bank, called told him that Aguilar- vehicle in circles around her in the bank parking lot. Aguilar-Gonzalez

appeared to be recording Sarah and pointing a finger at her. According to Aguilar-Gonzalez, as she did this, Sarah had two children in the car,

daughter Anne and other daughter, Amy. Pereida and Sarah were Pereida so they could exchange Paul there. Sarah pulled out from the bank and, seeing Pereida in the road ahead, pulled behind car; Aguilar-Gonzalez then pulled behind her. Aguilar- causing her to Sarah said she heard one of her

daughters Debora is behind us. Momma why is she doing that? . . . Sarah ultimately called the police to report that Aguilar-Gonzalez was following them.



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¶5 saw Aguilar-Gonzalez drive past the street. Once Pereida believed

Aguilar-Gonzalez had driven away and law enforcement was on the way, they put Paul , and Pereida left for work. After Pereida left, Sarah called him and told him that she had seen Aguilar-Gonzalez pass Shortly thereafter, law enforcement arrived. Later that day, Aguilar-Gonzalez was arrested and charged with violating the order of protection.

¶6 As a Community Corrections Officer, Aguilar-Gonzalez also required, as a condition of employment, to conform to the Standards

of Conduct for state employees outlined in A.A.C. R2-5A-501. Additionally, A.R.S. § 41-773(A)(11) al.

¶7 The Department conducted an administrative investigation into Aguilar- A special investigator with the administrative investigations unit issued a report detailing the circumstances of the arrest and its interview of Aguilar-Gonzalez. In that interview, and throughout these proceedings, Aguilar-Gonzalez claimed that she had not followed Pereida to the bank, but rather had already intended to go to the bank to get money. And, she said, once at the bank, Pereida had used his vehicle to block her from leaving. She further said that once Pereida and Sarah had left the bank she did not follow them, but merely caught up to them at a stoplight. She claimed she had then called 9-1-1 and the dispatcher had informed her she was in violation of the order of protection and told her to stop following the vehicles. She did so and . Aguilar-Gonzalez claimed to have never driven

¶8 After the investigation concluded, the Department issued a Notice of Charges of Misconduct to Aguilar-Gonzalez, listing the following charges: violation of the Standards of Conduct for state employees, conducting oneself in an offensive and/or discourteous manner, commission of a serious misdemeanor while off-duty, and commission of a felony. In a written response to the notice, she repeated her account of the incident. While acknowledging the existence of the order of protection, Aguilar-Gonzalez denied any wrongdoing, asserting, among other things, that she had never followed Pereida.

¶9 The Department then submitted to the Arizona Department ADOA Discipline and Dismissal Guidance Worksheet. The worksheet provide [the employer] with guidance on important factors to consider

In the worksheet, the Department stated behavior or performance iss relative to Aguilar-Gonzalez was that she had violated an order of protection. Further, that Aguilar-Gonzalez has an 2

¶10 Almost one month later, the Department made its final disciplinary decision and issued a written Notice of Dismissal. In the Notice of Dismissal, the Department removed the criminal activity charges (that is, any claim of a violation of the order of protection) as a basis for dismissal, but maintained that Aguilar- conduct constituted insubordination for violation of the Standards of



Conduct for state employees and discourteous treatment of the public. As the Notice of

2 that was not included as an exhibit. In its answering brief, the Department

claims the attached letter was a draft of the Notice of Dismissal. Charges and Notice of Dismissal explained, the factual basis for each was Aguilar- on December 15, 2019. In both the Notice of Charges and the Notice of Dismissal, the Department stated that Aguilar- which included thirteen disciplinary actions taken between 2009 and 2015 was considered in her dismissal.

¶11 Aguilar-Gonzalez timely appealed her dismissal to the under A.R.S. § 41-783(A). Pursuant to § 41-783(C)(1), the Board must decide whether the Department has a preponderance of the evidence the material facts on which the discipline

it has, the Board Id.

If it finds that the Department failed to prove the material facts on which the discipline was based by a preponderance of the evidence or that the disciplinary decision was arbitrary and capricious, it may recommend modifications of the disciplinary action. § 41-783(C)(2).

¶12 The Board assigned a Hearing Officer, as provided in § 41- 783(B), who conducted an evidentiary hearing at which Aguilar-Gonzalez and the Department were allowed to call, examine, and cross-examine witnesses; provide documentary evidence; and otherwise fully participate in the hearing. Following the hearing, the Hearing Officer issued his Findings of Fact, Conclusions of Law, and Recommendation, recommending that Aguilar-

¶13 The Hearing Officer found that, after exchanging Paul, Aguilar-Gonzalez had intended to go to the bank in order to get money from the ATM but when Aguilar-Gonzalez saw Sarah in the parking lot, ed The Hearing Officer found that after Aguilar- Gonzalez left the bank, she began driving in the same direction as Sarah, and, , He found that Aguilar-Gonzalez had then called 9-1-1 to report Sarah as a suspicious person because of her presence in the bank parking lot and that Sarah had also called 9-1-1 and told the dispatcher that Aguilar-Gonzalez was harassing her.

¶14 The Hearing Officer ultimately concluded that no competent evidence existed that (1) Aguilar-Gonzalez had violated an order of protection or that Sarah had been included as a protected person on the order of protection, (2) Aguilar-Gonzalez had followed Pereida to the bank, or (3) that Aguilar-Gonzalez had driven The Hearing Officer also determined that there was no competent or credible evidence that Aguilar-Gonzalez had any contact with either Sarah or Pereida. And he further found that Aguilar-Gonzalez had no way of knowing that her dismissal could arise from a private, off-duty incident that The Hearing Officer recommended that the dismissal be rescinded and that Aguilar-Gonzalez be restored to her position with full back pay and benefits.

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¶15 Following the issuance of that recommendation, the Department filed a written objection to it, to which Aguilar-Gonzalez responded. The Department objected, claiming that the Hearing Officer had improperly considered that the agency originally asserted a violation of an order of protection as a ground for the agency action. It asserted that , Conclusions of Law, and Despite the the Board adopted the Hearing Officer s Findings of Fact, Conclusions of Law, and Recommendation action was then referred to Director Shinn pursuant to § 41- 783(E).

¶16 action to Director Shinn, the Department, through its counsel, sent a letter to Shinn requesting that he It asserted that the decision had arisen from its (adopted) finding that the evidence did not support that Aguilar- Gonzalez violated an order of protection. This was erroneous, according to the Department, because that charge had not been included in Aguilar- final Notice of Dismissal. It further asserted that the Board had namely, own statements supported that she conducted herself in a discourteous and

offensive manner towards Sarah and violated the Standards of Conduct for state employees. The Department recommended that Shinn find that the were arbitrary and without reasonable justification. Aguilar-Gonzalez responded in her own letter to Shinn Shinn was improper, she recommendation.

¶17 , concluding that conclusions of law and findings of fact had been based on allegations not incorporated into the final disciplinary action and that the Board had ignored incontrovertible evidence namely, Aguilar- own statements and admissions about her conduct. He further determined

that the Board had applied the wrong standard in determining whether the Shinn ultimately determined that the Department had that

[t]he decision to dismiss [Aguilar-Gonzalez] was not arbitrary or Shinn affirmed the dismissal.

¶18 Pursuant to § 41-783(F), Aguilar-Gonzalez filed a notice of

Ariz. R. Civ. P. Aguilar-Gonzalez appealed the judgment. We have

jurisdiction under § 41-783(G).

Analysis

¶19 The gravamen of Aguilar- that the standard of review applied by both Director Shinn and the superior

court was incorrect. She argues that Shinn erred by failing to give deference to the Board s decision and that the superior court erred in giving deference to Shinn s decision to terminate her



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employment rather than the Board's decision recommending reinstatement. She further claims that Shinn's decision violated her due process rights because he did not provide adequate notice of the specific grounds and evidence relied upon in reaching his decision and his decision was arbitrary and capricious, factually incorrect, and contained errors of law. We conclude that both Shinn and the superior court applied the proper standard of review and that the

¶20 In reaching our conclusion, we examine all matters of law de novo. See *Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, ¶ 13 (App. 2007); , 195 Ariz. 66, ¶ 6 (App. 1998). Furthermore, we review the superior the record contains evidence to support the judgment, and in doing so, we

reach the underlying issue of whether the administrative action was illegal, *Ariz. v. State Pers. Bd.*, 202 Ariz. 598, ¶ 8 (App. 2002) (citation omitted). We must

action if any reasonable interpretation of the record supports it. *Lewis*, 240 Ariz. 330, ¶ 15. court may substitute its judgment for that of the agency on factual questions

or matters of agency expertise, but we apply our independent judgment . . . to questions of law, including questions of statutory interpretation and *Carlson*, 214 Ariz. 426, ¶ 13 (citations omitted).
Standard of Review

¶21 In its judgment, the superior court stated the following principles, derived, in part, from *Lewis*:

A.R.S. § 38-1106(H) requires an employer amending, modifying, rejecting, or reversing a Neither applicable statute [§ 41-783(E) nor § 38-

1106(H)] requires an employer to make its own detailed factual findings. See *Lewis*, 240 Ariz. at 335 ¶ 18, 379 P.3d at 232. Additionally, Director Shinn is not obligated to apply a deferential standard of review when reviewing the recommendations of the Board. *Id.* at ¶ 19. Finally, Director Shinn is not bound by the findings or legal conclusions. *Id.* at ¶ 20.

¶22 The superior court then note findings and recommendations, Director Shinn issued a written decision

stating his reasons for doing so and explained his basis for finding the

justif Aguilar- interpretation of *Lewis* deferential standard of review, not binding him to factual and legal

conclusions of the Board, and not requiring him to make findings of his -Gonzalez argues We disagree.



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¶23 In Lewis, under circumstances akin to those here, a former corrections officer appealed an order of the Department of Corrections dismissing him from his position and rejecting the recommendation of the Arizona State Personnel Board to overturn the dismissal. Id. ¶ 1. Lewis claimed that A.R.S. § 38-1106(H) limits the Department to a purely objective role, which requires deference to the Board unless the Board acts arbitrarily or without reasonable justification. Id. ¶ 19. Lewis claimed that the standard that substitute its judgment for that of the agency on fa apply to the Department. Id. ¶ 21 (quoting Carlson, 214 Ariz. 426, ¶ 13). The

Lewis court the Department is an agency and is not obligated to apply the same deferential standard of review as this Court or the superior court when reviewing the Id. ¶ 23.

¶24 Notably, Aguilar-Gonzalez does not cite to any support for her argument that Director Shinn was barred from rejecting the factual findings of the Board, as well as its recommendation, and we find none. 3 Section 38-1106(H) provides that an employer or a person acting on behalf of an employer may amend, modify, reject or reverse the portion of a Section 38- a It therefore sets no limit

See also , 211 Ariz. 219, ¶ 14 (2005) lacks evidence sufficiently strong to justify a reasonable person in believing

the acts charged are true).

¶25 Additionally, findings and conclusions, he need not make detailed findings of his own,

as Aguilar-Gonzalez suggests. Section 38-1106(H) merely requires that the Lewis accurately provides, Director

Shinn need only have stated the reasons, without more, why he rejected the as he stated, was arbitrary and without reasonable justification. 240 Ariz. 330, ¶ 18.

Contrary to Aguilar- authority to reject the

3 Aguilar-Gonzalez also claims that Director Shinn had no authority to determine if the Board applied the correct legal standards. Shinn has the arbitrary or without reasonable justification. See § 38-1106(H). A decision

, 211 Ariz. 219, ¶ 14 (2005) (quoting

)). Thus, in his review, Shinn must in regards to its review. We find no error in Shinn determining that the

Board had applied the wrong standard in deciding whether the Notice of Dismissal was arbitrary.



Superior

¶26 Similarly, Aguilar-Gonzalez argues that the superior court erred rather than the . She claims the superior court was obligated, in its appellate review, to We disagree.

¶27 Section 12-910(A), A.R.S., provides the scope of review in -910(F) states that, in reviewing an administrative decision, the superior court action is contrary to law, is not supported by substantial evidence, is

See § 12-901(1) authorized by law to exercise rule- Unless provided

otherwise in a statute, rule, or ordinance, a final administrative determination, by an agency, in the case of a termination or disciplinary proceeding, is the final determination of the particular government agency employer. § 38-1106(H).

¶28 Consequently, here, the agency action subject to deferential review by the superior court rejection of the State to the agency to reverse its decision of termination, and to reinstate Aguilar-Gonzalez. It was not, as Aguilar-Gonzalez asserts, the decision of the Personnel Board. The superior court was obligated, there absent statutory grounds to reverse. See § 12-910(F) (providing statutory grounds for superior court to reverse the agency action). We find no support for Aguilar-Gonzalez assertion that, in an appeal of final administrative decision, the

superior court

¶29 Aguilar-Gonzalez cites to JHass Group L.L.C. v. Arizona Department of Financial Institutions, 238 Ariz. 377 (App. 2015), Golob v. Arizona Medical Board of State, 217 Ariz. 505 (App. 2008), and Prebula v. Arizona Department of Economic Security, 138 Ariz. 26 (App. 1983), for the proposition that the reviewing court must give deference to the Board as the entity that reviewed the facts, applied the law, and made determinations. We do not agree that these cases stand for this proposition. In Golob and Prebula, the courts stated that, on appeal, they viewed the evidence in the light most favorable to upholding the decision of the administrative board. Golob, 217 Ariz. 505, n.1; Prebula, 138 Ariz. at 30. But, in those cases, the employee had appealed the decision of the boards and not the decision of the employer agencies. Golob, 217 Ariz. 505, ¶ 7; Prebula, 138 Ariz. at 28. Neither of these cases holds that deference is to be given to the board in a higher-level review of a final agency decision.

¶30 In JHass, the court stated that it cannot substitute its judgment for that of the administrative agency on factual matters of agency expertise. 238 Ariz. 377, ¶ 20 (reviewing the decision of an appeals board that adopted and corrections). Here, as explained above, the administrative agency is the

Arizona Department of Corrections, Rehabilitation and Reentry. And its conclusions of law of the Board, thus necessarily requiring him to review

the facts anew and apply the law to them as if in the first instance. See § 38-1106(H) (after law enforcement officer and employer are equally allowed to call and examine and cross-examine witnesses, provide documentary evidence, and participate in hearing, employer may amend, modify, reject or reverse appeals board decision).

¶31 Fully consistent with, and not contrary to Golob, Prebula, and JHass, the superior court reviews the record to determine whether the agency action in this case, decision was contrary to law, arbitrary, capricious, or an abuse of

discretion. See § 12-910(F). And it will affirm if any reasonable interpretation of the record supports decision. Lewis, 240 Ariz. 330, ¶ 15. The superior court correctly did so here.

Due Process

¶32 Aguilar-Gonzalez next argues that Director Shinn and the superior court deprived her of her right to due process. She claims that [t]here was not adequate notice of the grounds for termination of [her] as she reasons that, because the superior court did not require Shinn to make any factual findings in support of his decision, it deprived her of meaningful appellate review. She claims that she was only apprised of the superior court, after she had already filed her complaint. We disagree.

¶33 As we have already stated, Director Shinn is not statutorily required to provide detailed factual findings in rejecting the decision of the Board. Nor does due process require such findings. Due process requires apprise interested parties of the pendency of the action and afford them the

opportunity to present their case. *Comeau v. Ariz. State Bd. of Dental*, 196 Ariz. 102, ¶ 28 (App. 1999) (quoting *Iphaar v. Indus. Comm*, 171 Ariz. 423, 426 (App. 1992)). a terminated employee must be provided advance notice of the specific grounds for termination. *Carlson*, 214 Ariz. 426, ¶ 17. *See* *Comeau*, 196 Ariz. 102, ¶ 28.

¶34 Aguilar-Gonzalez received notice of the specific grounds for her termination in the Notice of Dismissal, which stated that her conduct constituted a violation of the Standards of Conduct for State Employees, Class 6; and Discourteous Treatment of the Public (To Include Inmates, Offenders and Employees) for conducting oneself in an Immediately preceding this statement is a description of the specific instance of her conduct violating these standards, specifically Aguilar- December 15, 2019. These grounds for termination and the specific instance

of conduct were also stated in the original Notice of Charges. The Department has consistently and

solely referenced Aguilar- discourteous and offensive behavior on December 15, 2019 as the reason for

her dismissal. Aguilar-Gonzalez submitted an argument to the Department and the Board as to why the instances of misconduct on December 15, 2019 had not been proven. Aguilar-Gonzalez therefore knew the charges against her and received sufficient notice of the reasons for her dismissal. 4

¶35 Aguilar-Gonzalez seems to take issue with the fact that the Notice of Dismissal did not include criminal misconduct as a reason for dismissal, while the Notice of Charges did include such a charge. She does not, however, claim that this deprived her of any opportunity to be heard. Notably, the remaining non-criminal charges in the Notice of Charges were present in the Notice of Dismissal and were sufficient, if proved, to justify termination. 5 Thus, Aguilar-Gonzalez had adequate notice and opportunity to respond to the grounds for her dismissal. Cf. Carlson, 214 Ariz. 426, ¶ 22 (inadequate notice and opportunity to be heard when

4 Aguilar-Gonzalez claims that Director Shinn expanded the basis for her dismissal after the review for the Board. She does not, however, provide any evidence or specific basis that demonstrates that Shinn did, in fact, expand the basis for her dismissal. 5 Aguilar-Gonzalez makes no argument as to whether the reasons See A.R.S. § 38- 1103(A) (law enforcement officer may only be subject to disciplinary action for just cause). dismissal was based on grounds never alleged before the post-termination hearing). Indeed, in providing employees an opportunity to be heard and contest the charges in a written response, it seems inherent that an agency may then modify response. See A.A.C. R2-5B-305(C) (in pre-dismissal procedures, agency

must provide employee with an opportunity to present a written response).

¶36 Finally, Aguilar-Gonzalez argues that, for a number of reasons, In our appellate review, ministrative action was illegal,

Ariz. , 202 Ariz. 598, ¶ 8 (quoting Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc., 167 Ariz. 383, 386 (App. 1990)).

Error in Receipt of Argument and Evidence

¶37 Aguilar-Gonzalez first claims that Director Shinn cannot have reviewed the decision of the Board when he did not request a copy of the . The record does not support this. The record contains an email Consequently, Shinn had full access to the facts

presented to the Board. 6

¶38 Aguilar-Gonzalez then asserts that, once the hearing concluded in front of the Board, Director

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Shinn had no authority to receive additional arguments or evidence. Aguilar-Gonzalez argues that Shinn was either presented with evidence or arguments that had not been presented to the Board or, at a minimum, he was presented with additional

6 Aguilar-Gonzalez also claims she was not free to submit arguments attorney. There is an email in the record from Aguilar- he was instructed to contact

the record does not contain this instruction itself. Even if true, the record shows that Shinn did receive a letter directly from Aguilar-

reiterating her arguments; thus any instruction to only arguments from the parties that he should not have heard. Although it is unclear, we presume this occurred when the Department Aguilar- counsel, sent letters to Shinn urging him, respectively,

to reject or

¶39 We are not persuaded that Director Shinn considered evidence and arguments that had not been brought before the Board in the first instance. Aguilar-Gonzalez is unable to point to any evidence or arguments that either the Department or her own counsel submitted to Shinn that had not been before the Board. Thus, the record before us does not show that Shinn considered any new evidence or arguments. 7

¶40 We also find no legal impediment to Director Shinn, once the matter had been referred to him for resolution, receiving arguments from counsel addressing, and even incorporating and attaching, the same evidence that had been before the Board. The Department, and Shinn, have the authority conferred by the legislature either expressly or by implication. See *Cracchiolo v. State Id.*

Because he is granted express final-decision making authority to , § 38-1106(H), we find no bar to Shinn receiving arguments from parties or counsel in advance of his determination to inform his exercise of that authority.

Improper Consideration of Preliminary Charge

¶41 Aguilar-Gonzalez next argues Director Shinn did not have a determination that the Board improperly focused on preliminary

determinations concerning Aguilar- The Hearing Officer, and thus the Board, made nine conclusions of law based on factual determinations, and one such conclusion was that Aguilar- Gonzalez had not violated an order of protection. The Hearing Officer further provided that his recommendation was based, in part, on the s material factual error that Sarah was a protected person in



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7 Both Aguilar-Gonzalez and the Board in its Amicus Brief claim that allowing Director Shinn to receive new evidence, we need

not reach this issue. See *Freeport McMoran Corp. v. Langley Eden Farms, LLC*, 228 Ariz. 474, ¶ 15 (App. 2011) (explaining that this court does not issue advisory opinions or decide unnecessary issues). The Hearing Officer proceeded to discuss the order - makers were fixated on [Aguilar- Order of Protection but remarkably, nothing about [Aguilar- arr

¶42 Section 41-783(C)(1), provides that the state personnel board of the evidence the materials facts As the Hearing Officer recognized, the Notice of Dismissal did not include a charge of criminal misconduct, allege that Aguilar-Gonzalez had violated an order of protection, or state that Sarah had been included in the order of protection. It was thus reasonable for Director Shinn to conclude that the Board improperly focused on the abandoned grounds in the preliminary charges and not the other sufficient reasons stated in the Notice of Dismissal. We find no legal error on this basis.

Review by Arizona Department of Administration

¶43 Aguilar-Gonzalez argues that failure to obtain approval by the ADOA Director for the specific reasons in her Discipline and Dismissal Guidance Worksheet approximately one month before it issued the that Aguilar-Gonzalez had violated an order of protection. Aguilar-

Gonzalez claims that because criminal misconduct was not included as a reason for dismissal in her Notice of Dismissal, the Department did not receive required approval by the ADOA. We do not, however, read the relevant code sections in this manner.

¶44 R2-5B-305(C), A.A.C., states: -dismissal procedures. Before an employee with permanent status can be dismissed, the agency head shall submit the proposed action to the Director for review as prescribed in R2-5A- agency head may dismiss an employee with permanent status only for cause but not before attempting to serve the employee . . . with written notice of the specific reasons for dismissal . . . , with a copy to the Director. R2-5B-305(D). R2-5A-802(B), A.A.C., provides the procedures for review

agency h agency head administers the action to an employee, the agency head shall -5A-802(C).

¶45 These sections merely require that the ADOA Director review approve the action before it may be taken. The ADOA worksheet itself

states it is merely important factors to consider when preparing to discipline or dismiss an



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employee and may also help you respond to any ADOA requests for The requirement that the proposed action be submitted to the ADOA Director for review and that the ADOA Director is given an opportunity to concur or

recommend authority to take employment action. Consequently, we do not conclude

that the failure of the Department to submit a worksheet or other notice to the ADOA identifying the ultimate precise grounds for the termination invalidate action. Moreover, Aguilar-Gonzalez does not cite to, and we do not find, any support for the proposition that an employee may assert a failure to comply with this administrative code section as a defense to termination.

¶46 Lastly, Aguilar-Gonzalez argues that Director Shinn failed to set forth a reasonable justification for his decision and that he did not identify any relevant evidence that the Board had ignored. But decision was supported by appropriate evidence in the record. Again, in

our appellate review, we do not reweigh the evidence; rather our role is only to determine whether there was substantial evidence to support the decision. *Carondelet Health Servs. v. Ariz. Health Care Cost Containment Sys. Admin.*, 182 Ariz. 502, 504 (App. 1995).

¶47 addressing Aguilar-Gonzalez, he stated that he:

reject[ed] the Personnel Fact and Conclusions of Law because . . . [it] ignore[s] incontrovertible evidence including [Aguilar- own statements, admissions, and records that [she] submitted that substantiates that . . . [she] conducted

[herself] in a discourteous and offensive manner toward [her] her in her vehicle and photographing her, and then following her in her vehicle.

The Notice of Dismissal provided the specific reasons for Aguilar- including, that she had followed Pereida to the bank, recorded Sarah with her phone, and then again followed them out of the parking lot. Contrary to Aguilar-G irrelevant facts and evidence, evidence related to these facts is clearly

related to her Notice of Dismissal.

¶48 The record contains statements by Aguilar-Gonzalez to support that she recorded or photographed Sarah in the bank parking lot and then followed Pereida and Sarah after leaving the bank. Pereida and Sarah tatements support that Aguilar-Gonzalez did, for some length of time, follow Pereida after exchanging their son, and then followed Sarah to -1-1 dispatcher told her to stop following Sarah, and that Sarah saw Aguilar-Gonzalez drive past the house. The Board, however, determined that there was no credible or competent evidence that Aguilar-Gonzalez had followed Pereida to the bank, or further she then drove past the house. In making this determination, the



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Board seems to have discredited the statements of Pereida and Sarah while crediting some statements of Aguilar-Gonzalez and essentially ignoring others.

¶49 As discussed above, Director Shinn was not bound by the factual findings of the Board, and was free to reject such findings if he found them to be arbitrary or without reasonable justification. See *Ritland v. Ariz.*, 213 Ariz. 187, ¶¶ 12, 18 (App. 2006); § 38-1106(H). Furthermore, determining whether certain actions amount to conducting oneself in an offensive or discourteous manner justifying termination is a matter of agency expertise, to which we defer. See *Carlson*, 214 Ariz. 426, ¶ 13. finding that Aguilar-Gonzalez conducted herself in a discourteous manner and his decision to reject the findings of the Board was supported by substantial evidence in the record.

¶50 because it had applied the wrong standard as set forth by our supreme

c Pursuant to § 41- a finding that the disciplinary decision was

reasons for the finding and may recommend a proposed disciplinary action in light nd thus the Board, determined professional law enforcement officer and is unreasonably related to the

mission of the Departme Further, the Hearing Officer found question every private action by an employee. The Hearing Officer found

that the conduct in this case had nothing to do with Department business. He also found that Aguilar- occurred more than five years prior, and primarily related to attendance

issues.

¶51 Our supreme court in *Maricopa County Office*, explained that an arbitrary action is one characterized as an action, without consideration and in disregard of the facts and

circu 211 Ariz. 219, ¶ 14 (quoting *Pima Cnty. v. Pima Cnty. Merit*, 189 Ariz. 566, 568 (App. 1997)). An arbitrary action is one taken capriciously or at pleasure, or . . . without adequate determining Id. (quoting *Black's Law Dictionary* 104 (6th ed. 1990)). the discipline originally imposed falls within the permissible range, it Id. ¶ 16. Notably, may differ on the appropriateness of one discipline over another. That people may differ, however, bolsters the notion that discipline, initially imposed within standards and policies set by the appointing authority, should not be disturbed merely because Id. ¶ 17.

¶52 policies, solely because it sees it as disproportionate. The Board seems to

base its decision on its disagreement with the propriety of the statute providing that Aguilar-§ 41- corrections officers e on or off duty, . . . are expected to conduct



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disciplinary action that factor in prior disciplinary actions, regardless of

when the prior disciplinary action occurred or how related the prior conduct is to the current conduct. action taken against Aguilar-Gonzalez. Dismissal was appropriate here as Shinn that the Board did not properly determine decision to dismiss Aguilar-Gonzalez was arbitrary. See Ariz. of Corr.,

202 Ariz. 598, ¶ 10

Attorney Fees and Costs on Appeal

¶53 Aguilar-Gonzalez requests attorney fees pursuant to A.R.S. § 12-348(A)(2), (5), costs pursuant to A.R.S. §§ 12-341, 12-342, and sanctions pursuant to Rule 25, Ariz. R. Civ. App. P. Because Aguilar-Gonzalez did not prevail, we deny her request.

Disposition

¶54 For the foregoing reasons, we affirm.

