



In re Lyons

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Submitted February 23, 2010

Before Judges Wefing and Messano.

Jane Lyons, employed by the New Jersey Department of Transportation as a Senior Engineer, appeals from a Final Decision of the Civil Service Commission finding her guilty of one charge of insubordination and one charge of conduct unbecoming a public employee and imposing a five-day suspension for each charge. After reviewing the record in light of the contentions advanced on appeal, we affirm.

Four disciplinary charges were filed against appellant, all dating back to the years 2000 and 2001. There is no clear explanation in the record for the delay in prosecuting these charges, which were finally heard before an administrative law judge between October 2003 and January 2007. Following the conclusion of that hearing, the administrative law judge issued his findings of fact and conclusions of law, dismissing two charges (one alleging unauthorized absences and one alleging making a false report to a supervisor) and sustaining two charges. On the charge of insubordination, the administrative law judge recommended a five-day suspension; on the charge of conduct unbecoming, he recommended a one-day suspension. Lyons appealed to the Merit System Board.¹

In 2000 Lyons was assigned to supervise the construction by Robert Charles Enterprises, Inc. ("RCE") of a noise wall at Exit 19 on Route 295. During the course of the work, Lyons had a contentious relationship with RCE, and particularly with Joseph Daniel, RCE's liaison on the project. On March 13, 2000, Lyons became involved in a dispute with Daniel, who was pouring concrete into a caisson through a chute. Lyons was dissatisfied with the appearance of the concrete and told Daniel to stop the pour. He did not do so, and she repeated the instruction several times. When he still did not stop the pour, she picked up a nearby shovel to try to stop the pour; this did not completely obstruct the flow of concrete but merely slowed it down. She then put down the shovel and pushed the chute away from the caisson. The chute struck Daniel, knocking him off balance. He grabbed hold of the chute and pushed it away from himself. The chute struck appellant in the thigh. Although they disclaimed any injury immediately afterward, both later claimed they were injured in the incident. Appellant's conduct in this incident was the basis for the charge of conduct unbecoming a public employee.

The charge of insubordination was based upon a course of conduct summarized in a memorandum



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dated June 5, 2000, from Charles Young, the Department's Director of Construction. He noted that appellant failed to respond to her supervisor's two separate requests that she compile a list of issues with the contractor; that there were repeated instances of her failing to follow the chain of command; and that she had refused to answer questions Young had posed to her. He noted that she had "difficulty dealing with the often confrontational and subjective nature of construction management" and that she would become "combative and confrontational." He also wrote that she resisted "supervisory interaction if that intervention challenges or corrects her position."

The administrative law judge concluded the following with respect to the charge of insubordination:

[I]t is clear that Petitioner did not have the appropriate respect for her supervisors and, accordingly, did not follow their instructions. Many times Petitioner's supervisors requested Petitioner to provide documentation about absences, incidents with Daniels, grievances, etc. Petitioner either did not comply with these requests, or did so in an untimely and incomplete manner.

Petitioner did not appear credible in her defense of these charges. It was clear that she did not respect her supervisors' authority. Her testimony was consistent with many of her written responses to her supervisors that were untimely, incomplete or unresponsive.

By the time the administrative proceedings had concluded, Lyons had already served a fifteen-day and a three-day suspension for the two charges which were ultimately dismissed. Based upon that, the Board ruled that she was entitled to back pay, benefits and seniority lost as a result of that suspension together with counsel fees for services rendered in connection with those two items. She was given thirty days to submit an affidavit with respect to any income earned during the period of suspension and an affidavit with respect to counsel fees. Because she failed to submit an affidavit separating out counsel fees attributable to those suspensions, although given more than a year to do so, the Board ultimately issued a decision denying any counsel fees.

On appeal, she challenges the rulings upholding the disciplinary charges and the ultimate denial of counsel fees and raises the following contentions for our consideration:

I.

THIS COURT SHOULD REVERSE THE RULING OF THE MERIT SYSTEM BOARD REGARDING LYONS' FIVE DAY SUSPENSIONS AND DENIAL OF ATTORNEY FEES BASED UPON A DENIAL OF DUE PROCESS CREATED BY THE APPELLANT'S COUNSEL BEING PERMITTED TO INFORMALLY "DROP OUT" OF THE CASE AND THE RECORD NOT BEING PROPERLY CLOSED.

II.



THE DECISIONS BELOW WERE NOT BASED UPON SUBSTANTIAL CREDIBLE EVIDENCE.

III.

THIS COURT SHOULD REVERSE THE RULING OF THE MERIT SYSTEM BOARD REGARDING LYONS' FIVE DAY SUSPENSION, ONE DAY SUSPENSION, AND DENIAL OF ATTORNEY FEES BASED ON THE HARMFUL ERRORS COMMITTED DURING THE ADMINISTRATIVE PROCEEDINGS.

Before proceeding to an analysis of the issues presented, we note the limited scope of our review in a matter such as this. In re Taylor, 158 N.J. 644, 656 (1999). A final decision of an administrative body such as the Civil Service Commission should not be disturbed on appeal unless it is "arbitrary, capricious or unreasonable." Karins. v. City of Atlantic City, 152 N.J. 532, 540 (1998). An appellate court should undertake a "careful and principled consideration of the agency record and findings." Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985). The agency's findings should be affirmed if they "could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole . . . with due regard also to the agency's expertise" Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) (citations omitted). It is not appropriate for an appellate court to "engage in an independent assessment of the evidence as if it were the court of first instance." Taylor, supra, 158 N.J. at 656 (quoting State v. Locurto, 157 N.J. 463, 471 (1999)).

In Karins, the Supreme Court restated the four questions to be considered by a court reviewing a final administrative determination:

(1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) 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.

[Karins, supra, 152 N.J. at 540 (quoting George Harms Constr. Co. v. New Jersey Turnpike Auth., 137 N.J. 8, 27 (1994)).]

This same limited standard applies to review of an agency head's imposition of sanctions. In re License Issued to Zahl, 186 N.J. 341, 353 (2006). The New Jersey Supreme Court has acknowledged that such deference is appropriate both because of the expertise and knowledge of an agency in its specialized field and the deference due to actions of another branch of government. Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992); Matturri v. Bd. of Trs. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002) (stating that "[c]ourts have only a limited role to play in reviewing the actions of other branches of government") (citation omitted). Thus, a penalty imposed by an agency head should

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only be modified if the agency mistakenly "exercised its discretion or misperceived its own statutory authority" or if modification is "necessary to bring the agency's action into conformity with its delegated authority." *In re Polk License Revocation*, 90 N.J. 550, 578 (1982).

We do not find support in the record for appellant's first point. It is evident that her attorney suffered various health problems during the litigation, including a brain aneurism and a fractured ankle. On the next to last day of testimony, appellant's counsel made an oral application to permit appellant to proceed pro se in light of the financial strain of the litigation. While the deputy attorney general representing the Department indicated his consent to this request, the administrative law judge properly told the attorney to put her request in writing. There is no indication in this record that she ever did so and in fact she appeared for appellant without any further comment on the issue when the hearing resumed the following day. If appellant is dissatisfied with how her attorney handled this issue, her recourse is against the attorney, not a new administrative proceeding.

As to appellant's remaining points, we are satisfied that they do not warrant discussion in a written opinion, for it would have no precedential value. See R. 2:11-3(e)(1)(D) and (E).

Affirmed.

1. The Merit System Board is now known as the Civil Service Commission; it adopted the findings and conclusions of the administrative law judge but increased the penalty for conduct unbecoming from a one-day suspension to a five-day suspension.

