

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2656-11T1

IN THE MATTER OF THALIA
MENDOZA, HUDSON COUNTY.

Submitted June 5, 2013 – Decided August 28, 2013

Before Judges Sapp-Peterson and Haas.

On appeal from the Civil Service Commission,
Docket No. 2011-3152.

Thalia Mendoza, appellant pro se.

Chasan, Leyner & Lamparello, attorneys for
respondent Hudson County (Cindy Nan
Vogelman, of counsel and on the brief;
Robert E. Finn, on the brief).

Jeffrey S. Chiesa, Attorney General,
attorney for respondent Civil Service
Commission (Todd A. Widger, Deputy Attorney
General, on the statement in lieu of brief).

PER CURIAM

Appellant, Thalia Mendoza, is a corrections officer employed by the Hudson County Department of Corrections (HCDOC), who appeals from the final administrative agency decision of the Civil Service Commission (Commission) imposing a six-month suspension without pay for neglect of duty and insubordination due to her failure to provide HCDOC with a timely written report

of her arrest and supporting documentation regarding the disposition of the criminal charges against her. We reverse.

On February 7, 2010, Jersey City Police arrested Mendoza and charged her with aggravated assault, N.J.S.A. 2C:12-1b, and possession of a weapon for unlawful purpose, N.J.S.A. 2C:39-4d. The charges stemmed from Mendoza's alleged attack upon her live-in boyfriend, Robert Hernandez, during a domestic altercation. When police arrived, Hernandez was bleeding from lacerations to the back of his head but refused medical attention.

The next day, HCDOC served a Preliminary Notice of Disciplinary Action (PNDA) upon Mendoza, charging her with neglect of duty, N.J.A.C. 4A:2-23a(7); conduct unbecoming a public employee, N.J.A.C. 4A:2-23a(6); insubordination, N.J.A.C. 4A:2-2.3(a); and "other sufficient cause," in violation of N.J.A.C. 4A:2-2.3(a)(11). The incident giving rise to the charges was described in the PNDA as follows:

On February 8, 2010, at about 2353 hours, Officer Thalia S. Mendoza was arrested by Jersey City Police[] for assaulting her live[-]in boyfriend, Mr. Roberto Hernandez. Mr. Hernandez stated his girlfriend struck him in the back of his head with a[n] air freshener can. According to the [p]olice [r]eport submitted by Jersey City Police Officers Hickey and Burroughs[,], Officer Mendoza stated she struck her boyfriend (Mr. Hernandez) in the back of his head with a can of air freshener because he would not let her go to the store to buy cigarettes.

At that time, Officer Mendoza was placed under arrest and removed from the residence.

. . . .

According to the report (10-003464) submitted by Jersey City Police Officers[] Hickey and Burroughs[,] at approximately 2353 hours, they responded to a domestic violence dispute in a basement apartment at 31-33 High Street[] in Jersey City. Once they arrived at the location, the[y] witnessed Mr. Roberto Hernandez suffering from bleeding lacerations to the back of his head. Mr. Hernandez was questioned and stated, after a loud argument with his [c]orrection [o]fficer girlfriend (Thalia Mendoza)[,] she struck him in the back of his head with a can of air freshener. According to the [p]olice report, Officer Mendoza stated[] she struck Mr. Hernandez with a can of air freshener because he would not let her go to the store to buy cigarettes. At that time, the can was placed into evidence (Bag #JM024042). Officer Mendoza['s] firearms identification card was also confiscated and Mendoza was placed under arrest.

Officer Thalia Mendoza was charged with [a]ggravated [a]ssault, [d]omestic [v]iolence, [and p]ossession of a [w]eapon for [u]nlawful [p]urposes[,] in violation of N.J.S. 2C:51-2 ([f]orfeiture of [p]osition). As well as, Hudson County Correctional Center Policy & Procedures and Rules and Regulations. (See attached [p]olice [r]eport).

Mendoza was immediately suspended and a departmental hearing scheduled for February 16, 2010. A revised PNDA, listing the same charges and description of the range of penalties was issued to Mendoza on February 12, 2010. A

Loudermill¹ hearing was held on February 17, 2010, after which Mendoza's suspension was continued pending disposition of the criminal charges and a final hearing on the merits of the administrative charges. On March 17, 2010, the original criminal charges were downgraded to simple assault, and that charge was dismissed on May 20, 2010.

On July 1, 2010, Mendoza was reinstated to her position. However, one week and one day later, HCDOC served a PNDA upon Mendoza, once again charging her with neglect of duty, conduct unbecoming an employee, insubordination, and other sufficient cause. The incident giving rise to these new charges was described as follows:

On 2/7/10, Thalia Mendoza was arrested by Jersey City Police Department and charged with [a]ggravated [a]ssault (2C:12-1b) and [p]ossession of a [w]eapon for [u]nlawful [p]urpose (2C:39-4d). Thalia Mendoza failed to notify the Hudson County Department of Corrections of her arrest in a timely manner, in violation of department rules and regulations. On 6/25/10, Thalia Mendoza admitted[,] during a subsequent administrative investigation, that she assaulted Mr. Robert Hernandez specifically,

¹ Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494, 506 (1985) (holding that prior to termination, a tenured public employee is entitled to notice of the charges, an explanation of the employer's evidence and an "opportunity to present reasons, either in person or in writing," why the proposed disciplinary action should not be taken).

by hitting him in the head with a Febreze can causing him to sustain injuries.

. . . .

On 2/7/10, Thalia Mendoza was arrested by Jersey City Police and [c]harged with [a]ggravated [a]ssault (2C:12-1b) and [p]ossession of a weapon for [u]nlawful [p]urpose (2C:39-4d). Thalia Mendoza also failed to notify the Hudson County Department of Corrections of her arrest in a timely manner in violation of the Custody Rules and Regulations Manu[a]l dated December 2009 Section H (A8)[,] which indicates any arrest or receipt of any summons received from a law enforcement agency or court[] should be reported by the next scheduled work day and no later than twenty-four hours after receiving the summons.

During the investigation, Thalia Mendoza admitted that she failed to submit a report. When asked why, she stated "they didn't ask me for one." Thalia Mendoza's conduct in the assault of Mr. Roberto Hernandez is in violation of the following General Rules and Regulations, Chapter One[,], 1.3 Conduct Unbecoming a Custody Staff member[;] 1.4 Respect of Constitutional Rights[;] 1.5 Integrity[;] 1.6 Courtesy[;] 1.10 Discipline[;] Chapter One A1. Unethical Behavior[;] A2. Conduct Unbecoming an Officer[;] A4. Incompetent Performance of Duty.

[Emphasis added.]

HCDOC conducted a departmental hearing, at which Mendoza appeared with counsel, over two non-consecutive days in September 2010 and January 2011. The hearing officer sustained the charges contained in the July 9, 2010 PNDA, and Mendoza was

removed from her position, effective February 4, 2011. Mendoza appealed her termination to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 40A:14-202d. The matter was treated as a contested case and assigned to an Administrative Law Judge (ALJ).

At the hearing, Sergeant Ariestides Lambos, the Internal Affairs (IA) supervisor, Officer Tyrone Hickey, the arresting officer on the criminal charges, and Mendoza testified. In addition, a transcript of the IA interview conducted of Mendoza on June 25, 2010 was introduced as an exhibit, as well as HCDOC rules and regulations.

Officer Hickey, who testified on behalf of HCDOC, stated that when he arrived at Mendoza's home on February 7, 2010, he observed Hernandez bleeding from a head wound. He spoke with Mendoza and she did not accuse Hernandez of slamming her head into a door, nor did he observe damage to the bedroom door. He explained that while he did not witness the altercation, based on his observations at the scene and Mendoza's admission that she struck Hernandez with the aerosol can, he concluded she was the aggressor and arrested her.

Sergeant Lambos, HCDOC's other witness, testified that on January 9, 2010, Mendoza submitted a Receipt of Acknowledgment form certifying that she was given a copy of the Department of

Corrections' rules and regulations. He stated Mendoza did not submit a written report of her arrest or the disposition of her criminal charges. He admitted that HCDOC was aware of her arrest before she reported it, as Jersey City Police notified HCDOC of the domestic violence incident and her arrest "within hours" of her arrest. He also acknowledged that although Mendoza never filed a written report of her arrest or the disposition of the charges, she kept HCDOC apprised of the status of her case orally.

In her testimony, Mendoza described Hernandez as drunk and aggressive at the time of the incident. She testified that he attacked her as she was attempting to leave their apartment and that she struck him with the can in an effort to defend herself. At her arraignment the next day, she saw two members of HCDOC's IA and was served with suspension papers at that time. She testified that she called her supervisor and inquired whether she needed to submit a report and was told that she did not need to do so. She stated that she then contacted Sergeant Aviles of IA and advised him of her arrest and the incident. According to Mendoza, she asked the sergeant whether she needed to give him anything else and he responded, "No, I have everything I need."

The ALJ issued an initial decision on September 7, 2011. He concluded that Hernandez was the aggressor in the domestic

violence incident and determined that Mendoza struck him with the aerosol can in self-defense. He found that while Mendoza orally informed her superiors of her arrest and the development of her criminal charges, she failed to submit a written report of her arrest or supporting documents pertaining to the subsequent disposition of her criminal charges as required by the HCDOC rules and regulations, of which she was properly apprised. He determined that even though IA learned of her arrest through independent sources before her verbal report, it was "clear and unambiguous" that she was required to augment her verbal report with a written one within twenty-four hours. He found Mendoza failed to establish a good cause for violating the requirement.

The ALJ sustained the administrative charges of neglect of duty and insubordination, but found there was insufficient evidence to sustain the charge of conduct unbecoming a public employee. Addressing the penalty, the ALJ reasoned that removal was "unduly harsh" given Mendoza's unblemished prior record and the nature of her violations. Consequently, he reduced her punishment to a six-month suspension without pay, which he deemed "sufficient to impress upon [Mendoza] that her conduct fell below that expected of a correction officer and cannot be countenanced."

Both parties filed exceptions with the Commission, which issued a decision on November 3, 2011, after an independent review of the record. The Commission adopted the ALJ's initial decision in its entirety, including the recommended six-month suspension without pay. The Commission found that Mendoza's removal was unjustified and that the ALJ's reduction of the penalty was in accord with the "concept of progressive discipline." Finally, the Commissioner rejected Mendoza's contention that HCDOC's reporting requirement is vague as well as her request for counsel fees. This appeal followed.

Mendoza raises the following points for our consideration:

POINT I

PLAINTIFF WAS NOT REQUIRED BY HUDSON COUNTY POLICY TO SUBMIT A WRITTEN REPORT TO INTERNAL AFFAIRS.

POINT II

SINCE 2004 DEFENDANT HUDSON COUNTY HAS NOT REQUIRED THE WRITTEN SUBMISSION OF REPORTS TO INTERNAL AFFAIRS.

POINT III

DEFENDANT HUDSON COUNTY DID NOT SUPPLY ANY DIRECT TESTIMONY IN SUPPORT OF THEIR CASE.

POINT IV

PLAINTIFF SHOULD HAVE BEEN PERMITTED TO CALL HER WITNESS, SGT. JOSHUA FELDMAN[,] AND SHOULD NOT BE PENALIZED FOR THE ACTIONS OF HER ATTORNEY.

POINT V

SHOULD THE CHARGE OF FAILURE TO REPORT BE UPHELD[,] THE PENALTY IS TOO SEVERE AND NOT IN KEEPING WITH PROGRESSIVE DISCIPLINE.

POINT VI

THE DEPARTMENT HAD FULL NOTIFICATION REGARDING OFFICER MENDOZA'S ARREST, AND THE PROCEEDINGS TO FOLLOW, THUS THE CHARGES REGARDING FAILURE TO NOTIFY WERE MADE IN BAD FAITH AND SHOULD BE DISMISSED.

We agree with Mendoza that the regulation at issue did not clearly state that she was required to submit a written report of her arrest. Therefore, we need not address the remaining points raised in her brief.

Our scope of review of an administrative agency's final determination is limited. In re Carter, 191 N.J. 474, 482 (2007). We accord to the agency's exercise of its statutorily delegated responsibilities a "strong presumption of reasonableness." City of Newark v. Natural Res. Council, 82 N.J. 530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980). The burden is upon the appellant to demonstrate grounds for reversal. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002); see also Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304 (App. Div. 1993) (holding that "[t]he burden of showing the agency's action

was arbitrary, unreasonable, or capricious rests upon the appellant"), certif. denied, 135 N.J. 469 (1994).

To that end, we will "not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008); see also Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9-10 (2009). We are not, however, in any way "bound by the agency's interpretation of a statute or its determination of a strictly legal issue[,]" Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973), if substantial evidence supports the agency's decision, "a court may not substitute its own judgment for the agency's even though the court might have reached a different result." Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992).

Correction officers employed by HCDOC are subject to the "Custody Staff Rules and Regulations Manual" (Manual). Section H of the Manual, captioned "Standards of Conduct," subsection A8 requires a custody staff employee such as Mendoza to

report any arrest, or receipt of any summons received from a law enforcement

agency or court, and subsequent disposition, including conviction, to the Internal Affairs Unit on or by the next scheduled work day following the disposition, but no later than twenty-four (24) hours after the disposition or receiving the summons. This requirement shall not apply to a summons received for minor traffic violations. A custody staff member shall submit supporting documentation of arrest, receipt of summons or disposition, including conviction, to the HCDOC Internal Affairs Unit within twenty-four (24) hours.

[Emphasis added.]

The ALJ found that Mendoza orally notified both her supervisor and IA of her arrest within twenty-four hours and that she kept HCDOC apprised of all developments in her case thereafter, to include submitting a copy of the downgraded charges to IA. Subsection A8 does not clearly and unambiguously state that the report of an arrest must be in writing. The Manual defines "report" as: "A written or oral communication that relates to [HCDOC] matters." Neither the ALJ nor the Commission addressed the clear and unambiguous definition of "report" contained in the Manual. Having reported her arrest within the meaning of the word "report" set forth in the Manual, the charge of failing to timely report her arrest cannot be sustained as a matter of law. Accordingly, the Commission's decision to suspend Mendoza based upon her failure to report in writing that the incident occurred within twenty-four hours of

her arrest was clearly mistaken and erroneous and must be set aside.

We make one further observation. Subsection A8 under the Standards of Conduct requires submission of "supporting documentation of arrest . . . to the HCDOC Internal Affairs Unit within twenty-four (24) hours." Both the ALJ, in his initial decision, and the Commission, in its final decision, reference this requirement. However, the PNDA dated July 9, 2010 describes the actual incident giving rise to the charges against Mendoza as her "fail[ure] to notify the Hudson County Department of Corrections of her arrest in a timely manner[.]" There is no charge in the PNDA that she failed to provide written documentation of her arrest within the required twenty-four hours, which, under the regulation, is a duty imposed upon custody staff employees separate from the duty to "report" an arrest within twenty-four hours. It is undisputed that IA was present at Mendoza's arraignment the morning following her arrest and served her with the suspension notice, which contained the factual allegations supporting the "Notice of Immediate Suspension":

On February 8, 2010, at approximately 2353 hours[,] Officer Thalia Mendoza[] was arrested by Jersey City Police[] on a domestic violen[ce] dispute[] for assaulting her live[-]in boyfriend[,] Mr. Roberto Hernandez. According to a report submitted

by Jersey City Police, Mr. Hernandez stated his girlfriend (Officer Mendoza) struck him in the back of his head with a can of air freshener. Officer Mendoza was charged with [a]ggravated [a]ssault, [d]omestic [v]iolence and [p]ossession of a [w]eapon for [u]nlawful [p]urposes,] in violation of N.J.S. 2C:12-1b & 2C:39-4d.

Absence of the charge that she failed to submit written documentation of her arrest, doubtless, was because HCDOC was in possession of the documentation. It utilized that documentation to lodge the initial disciplinary charges against her, which also did not include an allegation that she failed to report her arrest, a charge which only surfaced four months later after the criminal charges were dismissed and Mendoza was reinstated to her position.

As we noted earlier, our role in reviewing a final administrative agency decision is limited. In re Taylor, 158 N.J. 644, 656 (1999); Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988). We must defer to a final agency decision unless it is arbitrary, capricious, unsupported by substantial credible evidence in the record, or in violation of express or implicit legislative policy. Taylor, supra, 158 N.J. at 656-57.

If, however, our review of the record satisfies us that the agency's finding is clearly mistaken or erroneous, the decision is not entitled to judicial deference and must be set aside. L.M. v. State of N.J., Div. of Med. Assist. & Health Servs., 140

N.J. 480, 490 (1995). We may not simply rubber-stamp an agency's decision. Taylor, supra, 158 N.J. at 657.

"An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline. . . ." N.J.A.C. 4A:2-2.5(a). In other words,

[p]roperly stated charges are a sine qua non of a valid disciplinary proceeding. It is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority. The de novo hearing on the administrative appeal is limited to the charges made below.

[W. New York v. Bock, 38 N.J. 500, 522 (1962).]

Because Mendoza was never given notice that, in addition to failing to report her arrest, the disciplinary charges were also based upon her failure to "submit supporting documentation of [an] arrest, receipt of summons or disposition, including conviction, to the HCDOC Internal Affairs Unit within twenty-four (24) hours," the agency decision may not be sustained based upon her violation of this additional HCDOC regulatory requirement.

Reversed.

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


CLERK OF THE APPELLATE DIVISION