

SUPREME COURT OF NEW JERSEY
NO. 66,097

IN THE MATTER OF ANTHONY
STALLWORTH, CAMDEN COUNTY
MUNICIPAL UTILITIES
AUTHORITY

ON PETITION FOR CERTIFICATION OF
THE FINAL ORDER OF THE SUPERIOR
COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1446-08T3

CIVIL ACTION

PETITION FOR CERTIFICATION

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STATEMENT OF THE MATTER INVOLVED

The Appellate Division judgment in this case stands at irreconcilable odds with this Court's longstanding precedent limiting the scope of judicial review of final decisions by administrative agencies, in this case the Merit Systems Board ("MSB"). The question presented is whether, contrary to the deferential standard oft-repeated by this Court in cases like In Re Polk, 90 N.J. 550 (1982) and In Re Carter, 191 N.J. 474 (2007), the Appellate Division erred by reversing the MSB's well reasoned progressive discipline analysis and increasing that penalty from a four-month suspension to termination. The Appellate panel's opinion clearly shows that the panel impermissibly substituted its judgment for that of the MSB.

It is well settled that in reviewing disciplinary penalties issued by administrative agencies, "the question for the courts is 'whether such punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'" Carter, 191 N.J. at 484, quoting Polk, 90 N.J. at 578. Here, the Appellate Division agreed with the MSB that the precipitating offense - an extended break in a company vehicle - was not, standing alone, so egregious or offensive as to require termination without considering

mitigating factors, i.e., a progressive discipline analysis. Nor was there any dispute as to the extent of Petitioner's discipline record which included one "major" disciplinary action and several "minor" penalties over the Petitioner's seventeen year tenure.

The Appellate Division opinion presents a disagreement with the MSB's result, but not its method. The panel agreed that a progressive discipline analysis was necessary, but disagreed with the MSB that a progressively harsh penalty - a four-month suspension without pay - should precede termination under these facts. The panel believed that Petitioner's history of "minor" sanctions should be afforded more weight. The decision of the amount of weight to be afforded "minor" sanctions is fully within the MSB's purview. For the Appellate Division to engage in such deep scrutiny of what is essentially a "judgment call" by the MSB constitutes a clear abuse of the deference owed to the MSB under this Court's longstanding jurisprudence.

The Appellate panel did not find that the MSB's analysis was "arbitrary, capricious, or unreasonable or [] not supported by substantial credible evidence in the record." Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). Nor was there any assertion that a reversal of the MSB was necessary to "to bring the agency's action into

conformity with its delegated authority." Polk, 90 N.J. at 578. Nor was there any finding that the MSB "mistakenly exercised its discretion or misperceived its own statutory authority." Id. Nor was there any finding that the MSB's four-month suspension without pay was "shocking to one's sense of fairness." Id. The Appellate Division merely stated that the MSB's judgment regarding penalty was "difficult to conceive." In Re Stallworth, 2010 WL 1656062 at *4 (App. Div. 2010). Be that as it may, "[d]eference controls even if the court would have reached a different result in the first instance." In Re Herrmann, 192 N.J. 19, 28 (2007).

By reversing the MSB's judgment without finding error in anything but the judgment itself, the Appellate Division opinion threatens the legitimacy of the MSB and its prominent role in "effectively implement[ing] a comprehensive personnel management system." N.J.S.A. 11A:2-6(d). The MSB is not just an adjudicative body. It is also charged with guiding employers of civil servants across the state with respect to discipline. In its final judgments, the MSB must consider the facts of a particular case but also the implications of the judgment *vis a vis* the agency's state-wide policy concerns. The MSB's quasi-judicial application of progressive discipline is still

evolving, and that evolution must be the MSB's to manage. As this Court's precedent has repeated numerous times, only in rare cases in which the MSB makes a clear and dramatic error in its analysis should the courts interfere with the MSB's development of state-wide standards for employee discipline. This is not one of those rare cases.

The panel's opinion in this case stands out because it informs employers across the state that, despite what this Court has repeatedly held, the Appellate Division is willing to review the MSB's discipline judgments *de novo*, providing another "bite at the apple" in virtually every discipline case in which the MSB undertakes a fact-driven progressive discipline analysis. If upheld, this case will resonate across the State, promising a new era of automatic appeals in employee-discipline cases due to erosion of the substantial deference that is due to agency determinations.

Whether to uphold the termination of a civil service employee with a moderate disciplinary history is a "judgment call" that this Court has properly left to the MSB, the executive agency whose very existence is dedicated to the difficult task of balancing the interests of employees and employers throughout the State. This Court has purposely restricted appellate review of such "judgment calls" to "weeding out" only those rare agency decisions

which shock the court's "sense of fairness." Nothing is shocking about this case. Certainly, reasonable minds could differ as to the proper penalty in this case. But, by reversing the MSB on these relatively benign facts, the Appellate panel decision sets a new course for the courts: virtual *de novo* review of everyday agency decision-making.

The relevant facts of this case are straightforward and undisputed. Petitioner left the work site in an MUA truck and stayed on break for an unauthorized amount of time. Over his seventeen year career, Petitioner had several prior "minor" disciplinary sanctions, which are defined by Civil Service as a reprimand or suspension of fewer than five days. Those sanctions were chosen by the employer. Petitioner also had a "major" penalty several years earlier. It was the MUA's choice not to progressively increase Petitioner's penalties.

The precipitating offense, standing alone, did not require termination without considering mitigating factors. The Respondent terminated Petitioner on the basis of his disciplinary history in which Respondent did not penalize Petitioner with consistently progressive severity. The Administrative Law Judge ("ALJ") agreed with MUA's decision to terminate.

After adopting the ALJ's factual findings and applying the concept of progressive discipline, the MSB concluded that a four-month suspension without pay was a sufficiently severe penalty that would serve as a "warning" to Petitioner "that future offenses may result in his removal from employment." (MSB Opinion, AA-751).¹ The MSB decided, as a policy matter, that because the MUA chose not to issue a "major" penalty more than once before, a progressively severe punishment was appropriate as a final warning to Petitioner to shape up. Though reasonable minds could differ on the extent of the penalty, the MSB's execution of its evolving progressive discipline policy was reasonable. Indeed, this is precisely the kind of judgment the MSB is called upon to make everyday.

The MSB's progressive discipline analysis in this case reaffirms the message to employers of civil servants that, as a matter of policy, termination should typically follow two or more progressively severe "major" disciplinary sanctions. This Court's precedent is consistent with that policy.

In sum, if the Appellate Division is permitted to intervene in cases like this, the message will be clear to

¹The pages of the MSB's opinion, attached as Tab C, are cited as they appear in the Appendix submitted by the MUA in the Appellate Division.

employers that the dictates of Polk and its substantial progeny have been eroded into a virtual nullity.

QUESTIONS PRESENTED

Whether the Appellate Division erred by exceeding the proper scope of its review when it reversed a four-month suspension imposed by the Merit Systems Board and substituted termination as its preferred penalty.

ERRORS COMPLAINED OF

1. The Appellate Division erred in reversing the MSB's four-month suspension and increasing it to termination without a clear showing that the MSB decision was arbitrary, capricious, illegal, or unsupported by the record.
2. The Appellate Division erred by essentially reviewing the MSB's analysis *de novo*.
3. The Appellate Division erred by rejecting long-standing precedent requiring substantial deference to the expertise of the MSB in matters of employee-discipline.

REASONS FOR CERTIFICATION

The Appellate Division opinion in this case "is in conflict with" prior Appellate Division decisions and this Court's long-standing precedent. Such a dramatic departure from precedent requires this Court's intervention and re-

affirmation of well settled case law. This case involves an issue of substantial public importance.

Civil Service disciplinary cases are adjudicated everyday by the MSB and ALJ's across the State. Until this case, deference to agency decisions by the courts has been the rule. The MSB has been overruled very few times and only when the MSB's decision was clearly irrational. The opinion under review will encourage unmeritorious appeals by employers who will read this opinion as evidence that the Appellate Division will provide *de novo* review of disciplinary penalties for employees with moderate disciplinary histories.

Second, the Appellate Division decision clouds this Court's precedent by reversing the MSB's judgment without pointing to any deficiencies with respect to fact or law.

Third, the Appellate Division decision is simply wrong. The Petitioner's conduct and background were not so severe as to demand termination before the issuance of a second, progressively severe "major" sanction. To be sure, employing progressive discipline in such a case is not a scientific calculation. Ultimately, the final decision requires an exercise in judgment. The MSB, while considering the state-wide implications of its decision in addition to the case at hand, exercised its authority in

fashioning a penalty. The Appellate Division simply disagreed and improperly substituted its judgment.

COMMENTS ON THE APPELLATE DIVISION OPINION

I. THE RELEVANT FACTS ARE UNDISPUTED.

Petitioner is a pump station operator for MUA. On November 15, 2006, Petitioner left work in a company vehicle and went to the Stop and Stop two blocks away. He was there for an hour and fifteen minutes. Stallworth, 2010 WL at *1.

The ALJ sustained two violations, each of which was sustained by the MSB. Petitioner was found guilty of "leaving the work area without permission during work hours and being in possession of the County vehicle for more than the allotted 15 minute break time." (MSB Opinion, AA-749).

The MSB overruled the ALJ with respect to penalty. Instead of termination, the MSB found that

a four-month suspension is the proper penalty in this matter. . . [T]he Board recognizes that appellant's conduct is unacceptable and emphasizes that, in imposing a major disciplinary action, it is not acting to minimize the seriousness of the offense. The Board is mindful that this penalty should serve as a warning to the [Petitioner] that future offenses may result in his removal from employment.

(MSB Opinion, AA-751). This substantial penalty was a reasonable result, even if another result would also have been reasonable.

**II. THE APPELLATE DIVISION FOUND NO ERROR BY THE MSB,
EXCEPT FOR THE RESULT.**

This Court has consistently emphasized the substantial deference due to agency judgments. In Herrman, the Appellate Division improperly reversed the MSB's recommendation of termination. In reversing the Appellate Division, this Court re-emphasized the "well recognized principles of judicial review of administrative agency decisions." Herrmann, 192 N.J. at 27. This Court stated, "[a]n administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Id., citing Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963); see also, In Re Zahl, 186 N.J. 341, 353-355 (2006). This is a highly deferential standard. When an agency follows the law, points to record evidence in support of its decision, and reasonably applies the law to the facts, a reviewing court "owes substantial deference to the agency's expertise and superior knowledge of a particular field." Herrman, 192 N.J. at 28. Indeed, a reviewing court "should alter a sanction imposed by an administrative agency only when necessary to bring the agency's action into conformity with its delegated authority." Id. Most importantly, "the

Court has no power to act independently as an administrative tribunal or to substitute its judgment for that of the agency." Polk, 90 N.J. AT 578. In light of this substantial deference, agency decisions should be altered only when the penalty "is so disproportionate to the offense, as to be shocking to one's sense of fairness." Herrmann, 192 N.J. at 28-29, citing Polk, 90 N.J. at 578. This Court has repeatedly reminded the Appellate Division that, while it is difficult to determine when one's sense of fairness is "shocked," it is not enough that a reviewing court "would have reached a different result." Herrmann, 192 N.J. at 29. See also, Carter, 191 N.J. at 483.

As this Court has stated, "the MSB is the entity charged with keeping State-government-wide standards of employee performance relatively consistent in disciplinary matters." Herrmann, 192 N.J. at 37. N.J.S.A. 11A:2-6(d) mandates the MSB to "adopt and enforce rules to carry out this title and to effectively implement a comprehensive personnel management system." In fulfilling its mission, the MSB has a longstanding policy of employing progressive discipline where appropriate in order to effect consistency and a measure of predictability in the disciplinary setting. The role of the courts is to intervene only at the margins of the MSB's discretion, where a clear mistake

has serious public policy implications. It is not for the courts to second guess the MSB in ordinary cases like this one.

Prior to reaching its preferred result, the Appellate Division acknowledged that the MSB judgment should not be disturbed unless it is "arbitrary, capricious or unreasonable." Karins v. City of Atlantic City, 152 N.J. 532, 540 (1998). Yet, it disturbed the MSB's judgment without making such a finding. The Appellate Division also purportedly recognized that "courts should take care not to substitute their own views of whether a particular penalty is correct for those of the body charged with making that decision." Carter, 191 N.J. at 486. Yet, that is precisely what the panel did.

The Appellate Division's "deeper review" of the MSB's penalty determination was essentially *de novo*. Stallworth, 2010 WL at *3. Yet, *de novo*-level scrutiny of the MSB's judgment is not the role of the Appellate Division. The Appellate Division cited no case law supporting such a "deeper review" because it is inconsistent with the well settled deferential standard.

III. THE MSB'S PROGRESSIVE DISCIPLINE ANALYSIS WAS REASONABLE AND SUPPORTED BY THE EVIDENCE.

In rendering its decision, the MSB considered "the nature of [Petitioner's] offense, the concept of progressive discipline, and the employee's prior record." (MSB Opinion, AA-750). The Board properly balanced the nature of the offense with the Petitioner's disciplinary history. First, the MSB determined that Petitioner's taking an unauthorized hour-long break was not of "such an egregious nature so as to impose a penalty of removal regardless of any mitigating factors." (MSB Opinion, AA-751). Therefore, the MSB conducted a progressive discipline analysis.

The MSB found Petitioner's seventeen years of service to be a significant mitigating factor. In addition, the Petitioner's disciplinary record "evidences one major disciplinary action, a 15-day suspension, and several minor disciplinary actions." (MSB Opinion, AA-751). By issuing a second "major" penalty as a "last chance", the MSB clearly demonstrated its policy preference for recommending termination when, at a minimum, (1) an employee has engaged in extremely egregious misconduct, or (2) the employer has previously instituted at least two progressively "major" disciplinary actions. Neither is the case here.

IV. THE APPELLATE DIVISION MISUNDERSTOOD THE SIGNIFICANCE OF "MINOR" VERSUS "MAJOR" DISCIPLINARY SANCTIONS.

N.J.A.C 4A:2-2 defines "major" discipline as termination, a disciplinary demotion, or a suspension of five (5) days or more at the same time. Any other form of discipline is considered "minor." The distinction between "major" and "minor" discipline is significant, since only "major" discipline can be reviewed by the MSB under N.J.A.C. 4A:2-2.9.² Thus, the term "minor" does not necessarily mean the conduct was "minor." It means the punishment chosen by the employer was less severe than a five-day suspension.

This distinction was lost on the panel, which complained that the Petitioner's prior offenses were "not minor in nature." Stallworth, 2010 WL at *4. The "nature" of the alleged conduct was not the point of the "minor" versus "major" analysis. Rather, the MSB was determining the progressive nature of the MUA's chosen penalties and whether they reflected a progression that put the employee on notice that termination was next.

² "Minor" disciplinary infractions can be adjudicated under this statute if the person disciplined has aggregated fifteen (15) days in "minor" suspensions in a calendar year.

In this case, the MUA chose not to impose more than a fifteen-day suspension prior to seeking the ultimate punishment: termination. Stallworth, 2010 WL at *2. The MSB opinion informs the MUA and employers state-wide that before seeking to terminate an employee for aggregate misconduct over time, they must issue progressively "major" punishment. There is nothing "arbitrary or capricious" about that policy or its application to these facts.

The Appellate Division stated that "[i]t is difficult to conceive how the [MUA] could be expected to maintain a competent and dedicated workforce if it is not permitted to remove an employee with the work history of [Petitioner]." Stallworth, 2010 WL at *4. What the panel misunderstood was that the MSB judgment informs the MUA exactly "how to maintain a competent and dedicated workforce" - by consistently adhering to the core policy of progressive discipline.

V. ONLY IN RARE CASES SHOULD THE COURTS REVERSE MSB JUDGMENTS BASED ON PROGRESSIVE DISCIPLINE.

The concept of progressive discipline requires a fact-sensitive analysis of (1) the severity of the alleged conduct and (2) the employee's discipline record. It is not a science, but an exercise in judgment that is consistent with the agency's broader policy goals. An

employee's discipline record reflects past behavior by the employee, but it also reflects the employer's treatment of such behavior. If, for example, an employee commits the same offense three times, the penalty should progressively increase. The MSB must employ this concept across an infinite array of fact-patterns and circumstances. Establishing state-wide disciplinary consistency through the subjective tool of progressive discipline is a complex endeavor for which the MSB is particularly well suited, and for which the courts are not.

As noted above, any progressive discipline analysis begins with an assessment of the underlying offense. The MSB first considers whether, standing alone, the violation is so serious that termination should be upheld regardless of the employee's prior disciplinary record. In Herrmann, for example, the MSB dispensed with a progressive discipline analysis altogether because the abusive conduct of the social worker was so severe that "progressive discipline would not be appropriate in this matter." Herrmann, 192 N.J. at 38.

In this case, the MSB found that Petitioner's conduct was not so egregious on its face to preclude a progressive discipline analysis. (MSB Opinion, AA-751). The Appellate panel agreed, but, as illustrated below, it improperly

substituted its judgment by recommending termination.

Stallworth, 2010 WL at *4.

State-Operated School District of the City of Newark v. Gaines, 309 N.J. Super. 327 (App. Div. 1998) presents a rare case in which the Appellate Division correctly reversed a reduction in penalty by the MSB. In five years of employment, Gaines, a security guard, was disciplined numerous times for "numerous instances of absences without leave, neglect of duty, failure to perform, and insubordination." Gaines, 309 N.J. Super. at 330. Those penalties included "four major disciplinary actions." Id. at 331. Gaines' employer issued three progressively severe "major" disciplinary penalties in the two years prior to his termination: a fifteen-day suspension and two thirty-day suspensions. During the year after those three major suspensions, Gaines accumulated forty-four more days of absences not counting thirty-days in "minor" suspensions. The ALJ recommended an eighty-day suspension. Id. at 331. The MSB increased the penalty to a six-month suspension. Id.

The Appellate Division found that the MSB's "decision was clearly a mistaken one and was so plainly unwarranted that the interests of justice demand intervention and correction." Id. at 332. In particular, the Appellate

Division held that the MSB "did not give sufficient weight to Gaines' appalling disciplinary record," which included four major disciplinary actions. Id. at 333.

In contrast to the case at bar, the court in Gaines explicitly found that the MSB's judgment was "mistaken" and "plainly unwarranted." Id. at 332. According to the panel, the MSB "went so wide of the mark that a mistake must have been made." Id. The panel asserted that the MSB had "lost sight" of the goals of the civil service laws by not terminating Gaines. Id. No such findings were made in this case.

Petitioner's disciplinary history over seventeen years was far less egregious than the employee's five-year record in Gaines. Petitioner had one major disciplinary action in seventeen years, whereas Gaines had four in five years. Gaines' termination after four major disciplinary actions is consistent with the MSB's policy requiring more than one major disciplinary action before termination.

Another case evidencing this policy is In Re Hall, 335 N.J. Super. 45 (App. Div. 2000). There, a police officer was found guilty of (1) attempting to bribe a tow-company to obtain an impounded vehicle's stereo system, (2) threatening retaliation for the company's refusal, and (3) lying about the episode. Hall's prior record included

seven disciplinary actions in a three-year period including two major disciplines (a ten- and a thirty-day suspension). The MSB found termination to be excessive and imposed a fifteen-day suspension.

The Appellate Division castigated the MSB's analysis on two fronts. First, the Appellate Division found that the precipitating offense "and its intentional and criminal nature," standing alone, necessitated termination. Id. at 49-51. Moreover, the Panel found that the MSB's penalty was not "progressive" because the MSB's recommended fifteen-day suspension was substantially less than the thirty-day suspension previously incurred.

As in Gaines, the Hall court specifically found that the MSB's decision was "arbitrary, capricious, unreasonable, and unsupported by the record." Id. at 51. Indeed, the MSB's decision conflicted with its own precedent. Hall committed an offense that clearly demanded termination, and he had been previously issued two progressively "major" disciplines.

The Appellate Division in Hall and Gaines performed the proper judicial role of altering agency decisions that clearly went "so wide of the mark" that judicial intervention was necessary. And, those panels amply demonstrated that fact by exposing the clear flaws in the

MSB's analysis, as opposed to simply decrying the result. Here, the MSB enforced its progressive discipline policy in finding that the MUA did not progressively discipline Petitioner. It is not the role of the Appellate Division to alter that judgment.

CONCLUSION

For the foregoing reasons, the Petition for Certification should be granted.

CERTIFICATION OF COUNSEL

Undersigned counsel for Petitioner hereby certifies that this petition present substantial questions for resolution by this Court, and that this petition is filed in good faith and not for purposes of delay.

Respectfully submitted,

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