

No Shepard's Signal™

As of: July 6, 2015 7:59 AM EDT

In re Smalls

Superior Court of New Jersey, Appellate Division

April 8, 2013, Argued; July 12, 2013, Decided

DOCKET NO. A-3766-11T3

Reporter

2013 N.J. Super. Unpub. LEXIS 1822

IN THE MATTER OF ALFRED SMALLS, DEPARTMENT OF CORRECTIONS.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from Civil Service Commission, Docket No. 2012-1425.

Core Terms

credibility, encounters, inmate, accusation, witnesses, kissing

Counsel: Joseph M. Wenzel argued the cause for appellant Alfred Smalls.

Peter H. Jenkins, Deputy Attorney General, argued the cause for respondent Department of Corrections (Jeffrey S. Chiesa, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Mr. Jenkins, on the brief).

Jeffrey S. Chiesa, Attorney General, attorney for Civil Service Commission (Todd Wigder, Deputy Attorney General, joins in the brief of respondent Department of Corrections).

Judges: Before Judges Espinosa and Guadagno.

Opinion

PER CURIAM

Alfred Smalls, a former Senior Corrections Officer at Edna Mahan Correctional Facility for Women (Edna Mahan),

appeals from the final decision of the Civil Service Commission to terminate his employment. We affirm.

Smalls was employed by the Department of Corrections (DOC or the Department) in 2005 and was transferred to Edna Mahan in July 2007. During the course of an investigation by DOC into a separate matter in 2010, an inmate reported that Smalls was engaged in a sexual relationship with an inmate, C.B. Smalls denied any impropriety. Smalls was served with a Preliminary Notice of Disciplinary Action on November [*2] 23, 2010, and, after a departmental hearing, a Final Notice of Disciplinary Action was issued, removing him effective December 30, 2010. Smalls appealed and the matter was transferred to the Office of Administrative Law.

The charges against Smalls were conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(11),¹ namely, the violation of the Department's policies on inmate familiarity. During the course of two days of hearings, Laura Sanders, Acting Director and Chief Administrative Law Judge (the ALJ), heard testimony from C.B., Smalls, and Captain Allen Tompkins, who was in charge of the maximum security compound at Edna Mahan and all employee disciplinary hearings.

Tompkins described the concept of "undue familiarity" within a correctional facility as follows:

Undue familiarity is not to become undue [sic] familiar with an inmate, their parolees or their families. You're not supposed to give them any special favors. Give them any items or accept any items that [*3] are not approved by the facility or the Department of Corrections. You're not supposed to contact them off duty hours or really discuss anything with them or their families of a personal nature. It's supposed to be work related.

¹ N.J.A.C. 4A:2-2.3(a)(11) was the applicable regulation at the time the ALJ's opinion was rendered. "Other sufficient cause" is now governed by N.J.A.C. 4A:2-2.3(a)(12).

2013 N.J. Super. Unpub. LEXIS 1822, *4

Tompkins explained that such preferential treatment could create a security issue because the inmate could use such treatment as leverage to get the officer to bring in drugs or weapons by threatening to expose the preferential treatment. In addition, this conduct can be demoralizing to other staff and jeopardize public confidence in the facility.

C.B. testified that she knew Smalls since 2009, when she was returned to Edna Mahan for a violation of parole. He obtained the nickname, "Cherry," because he brought her cherry tobacco twice. He had also given her gum and chocolate candies, and told her he brought the items in for her because he liked her. C.B. sold the cherry tobacco to other inmates because she preferred menthol cigarettes and "[m]ade a lot of money on that."

C.B. also testified to physical encounters with Smalls. She said the first time, Smalls asked her to come into an officers' bathroom in North Hall, saying he wanted to kiss her. They went to the [*4] last stall in the bathroom where Smalls grabbed her breast. There was "[n]o intercourse" or "penetrations of any kind." She said, "We were kissing and I made a joke out of it. I said now I stink like you because he wore a lot of cologne Muslim oil and stuff. You could smell it all over me." The second time occurred in "a little nook" in the entrance area where there is no camera, where they "engaged in kissing and everything again." C.B. testified that there were "[m]aybe four kissing and all" interactions. C.B. also testified that Smalls gave her notes that stated he loved her, wanted to marry her, and asked her for a kiss.

Smalls denied giving C.B. any tobacco, rolling papers, or love notes. He also denied having any improper relationship or romantic or sexual encounters with C.B. He also specifically disputed C.B.'s testimony, providing explanations regarding the logistics of the locations where C.B. stated the encounters occurred to show that her accusations were improbable. He testified further that, after he wrote up a disciplinary charge against a member of the Bloods, Felicia Dwight a/k/a Momma Blood, she threatened him that "she was going to get [him] thrown out of the unit [*5] if not out of the institution."

As the ALJ noted, the evidence "consist[ed] largely of testimony by the accuser and the accused." She observed,

A case such as this, in which two witnesses give diametrically opposed versions of events, rests entirely upon a credibility determination. Both witnesses were strong, and at least on the face, both stories potentially true.

The ALJ noted that C.B. had made a prior false accusation and had a criminal record, both factors to be considered in assessing her credibility. She found the prior false accusation, which involved persons not a party, to have little probative weight. But, the ALJ stated,

Aside from [C.B.]'s criminal record, neither side offered much in the way of supporting evidence to corroborate its primary witness's testimony. Demeanor also was not particularly helpful in assessing truth.

As a result, the ALJ elected to visit the scene of the alleged incidents to "determin[e] whether any physical evidence tended to support either version." After this inspection, the ALJ found, "The bathroom is not large, but it is not terribly well lit. An encounter in the last stall would have been exceedingly risky, but not impossible." As for the allegation [*6] that another encounter occurred in a little nook in the entrance area, the ALJ described this as a "dead spot," and noted, "Absent a relationship with someone with knowledge, an inmate would have no way to identify that as a place offering privacy." The ALJ gave substantial weight to "the specialized knowledge required to know that a dead spot existed in the entrance corridor," describing it the "one compelling piece of evidence supporting [C.B.]'s testimony[.]" The ALJ found that "Smalls and [C.B.] had a brief tryst in that corridor"; "a second encounter occurred in the bathroom"; and "the wooing behavior began with the small gifts of tobacco, candy, and gum[.]"

In her Initial Decision, the ALJ concluded that Smalls was guilty of conduct unbecoming a public employee, a charge she termed "an elastic phrase" that encompassed undue familiarity, and that the conduct was sufficiently egregious to warrant removal. She did not, however, find that the Department had provided sufficient evidence to prove "other sufficient cause." The Civil Service Commission adopted the ALJ's findings of fact, conclusions, and recommendation to uphold Smalls's removal.

In this appeal, Smalls argues that the [*7] Civil Service Commission acted unreasonably in concluding that he should be terminated because the conclusion was based upon findings of fact that were mistaken. The thrust of his argument is that both the ALJ and the Civil Service Commission incorrectly determined that C.B. was more credible than he.

The scope of our review in an appeal from a final decision of an administrative agency is limited. *Circus Liquors, Inc. v. Governing Body of Middletown Twp.*, 199 N.J. 1, 9, 970 A.2d 347 (2009). This court may not reverse an agency's

2013 N.J. Super. Unpub. LEXIS 1822, *7

decision unless: "(1) it [is] arbitrary, capricious, or unreasonable; (2) it violate[s] express or implied legislative policies; (3) it offend[s] the State or Federal Constitution; or (4) the findings on which it [is] based [are] not supported by substantial, credible evidence in the record." Univ. Cottage v. N.J. Dep't of Envtl. Prot., 191 N.J. 38, 48, 921 A.2d 1122 (2007). Review of an agency's factfindings are limited to

whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility and with due regard [*8] also to the agency's expertise where such expertise is a pertinent factor[.]

[Jackson v. Concord Co., 54 N.J. 113, 117, 253 A.2d 793 (1969)] (internal quotation marks omitted).]

See also Sager v. O.A. Peterson Constr. Co., 182 N.J. 156, 164, 862 A.2d 1119 (2004); Klusaritz v. Cape May Cnty., 387 N.J. Super. 305, 313, 903 A.2d 1095 (App. Div. 2006), certif. denied, 191 N.J. 318, 923 A.2d 232 (2007). In addition, N.J.S.A. 52:14B-10(c) states,

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of

the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

Under this statute, it is not for this court "or the agency head to disturb [a] credibility determination, made after due consideration of the witnesses' testimony and demeanor during the hearing." H.K. v. State, 184 N.J. 367, 384, 877 A.2d 1218 (2005) (finding the agency's expertise irrelevant because the ALJ's credibility decision mandated a finding based on settled law); see also Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587, 538 A.2d 794 (1988).

In this case, the ALJ demonstrated considerable sensitivity to the fact that [*9] her credibility assessment was critical to determining the facts. She carefully reviewed the testimony of Smalls and his accuser and used her inspection of the physical plant to assist her in deciding which version of events to accept. Her decision to accept C.B.'s testimony as the more credible was not arbitrary, capricious, or unreasonable. Once that determination was made, C.B.'s account of gifts, love notes, and physical encounters provided a sufficient factual basis for both the factual findings and the conclusion that removal was warranted. See In re Carter, 191 N.J. 474, 924 A.2d 525 (2007).

Affirmed.