

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0130-07T2

IN THE MATTER OF  
MARK MONCHO

---

Argued September 16, 2008 - Decided October 16, 2008

Before Judges Wefing, Parker and LeWinn.

On appeal from a Final Decision of the  
Department of Law and Public Safety,  
Division of State Police, Docket No. 2003-  
0507.

Charles J. Sciarra argued the cause for  
appellant, Mark Moncho (Sciarra &  
Catrambone, L.L.C. attorneys; Mr. Sciarra,  
of counsel and on the brief; Matthew R.  
Curran, on the brief).

Phillip Dowdell, Deputy Attorney General,  
argued the cause for respondent, Division of  
State Police (Anne Milgram, Attorney  
General, attorney; Mr. Dowdell and Nina D.  
Bonner, Deputy Attorney General, of counsel  
and on the brief).

PER CURIAM

Appellant Mark Moncho appeals from a final decision of the  
Division of State Police (the Division) rendered on August 2,  
2007, finding him in violation of Article VI, Section 2.a of the

Division's regulations (Performance of Duties), and imposing a ten-day suspension.

Moncho is a Sergeant First Class in the Division, assigned to the State Police Construction Inspection Unit (the Construction Unit). The Division charged Moncho with violating a series of rules and regulations involving billing and overtime. It is undisputed that between January 1, 2002, and April 18, 2003, Moncho earned approximately \$101,000 in overtime. Evidence in the record indicated that this amount was approximately two and one-half times the amount of all other individuals who received overtime.

The Construction Unit is a component of the Traffic Bureau and operates as a partnership between the New Jersey State Police and the New Jersey Department of Transportation. It is staffed by a contingent of twenty-five to thirty state troopers who are specially trained in construction practice safety. These troopers oversee highway work-zone sites for traffic enforcement activities; they also provide site safety supervision. The troopers escort construction equipment and monitor roadway traffic to assist construction workers.

During the period of time in question, Moncho was the Assistant Head of the Construction Unit. In that capacity Moncho was responsible for overseeing five sergeants, who in

turn supervised subordinate troopers. Moncho's responsibilities included: (1) reviewing the patrol charts and weekly reports of the sergeants and the subordinates; (2) time-keeping; and (3) day-to-day supervision of the Construction Unit.

Moncho also participated in field activities such as conducting inspections of various work sites. Site inspections focused on the safety of the operation and oversight of the personnel assigned to the site. The record established that a site inspection could take anywhere between fifteen minutes to two hours.

Sometime in April 2003, a concern arose about possible double overtime payments to troopers in the Unit due to a system error. Seventeen individuals from the Unit, including Moncho, were identified as individuals who might have received double payments. An audit was then conducted to determine whether these individuals had in fact received such double payments.

The Division did not identify any double payments paid out to personnel. However, Moncho became the focus of special attention because he was the highest overtime earner during the period under review.

As a result of the audit, the Division lodged the following five disciplinary charges against Moncho:

Charge #1

Violation of Article VI, Section 2.a, of the Rules and Regulations of th[e] Division (Performance of Duties), which states:

No member shall act or behave in an official capacity to the personal discredit of the member or to the discredit of the Division.

Specification #1 - Accumulation of overtime hours without verification of presence on site inspections

Specification #2 - Violation of order not to bill time for sites previously inspected

Specification #3 - Submission of 8.5 hours for shift differential pay hours [to which] he was not entitled

Specification #4 - Failed to complete, or incorrectly completed patrol charts documenting his inspections

Specification #5 - Improperly identified the funding source while attending court off duty

Charge #2

Violation of Article V, Section 5, of the Rules and Regulations of th[e] Division, which states:

No member's duty shall be performed in a culpably inefficient manner. As used in this Section, culpably inefficient manner is that efficiency for which there is no reasonable or just excuse.

See specifications 1-5 above.

Charge #3

Violation of Article IV, Section 3.b, of the Rules and Regulations of th[e] Division, which states:

A member shall: Not willfully disobey any lawful verbal or written order of any superior commissioned officer, superior non-commissioned officer, or other member placed by competent authority in a position of supervision over such member.

See specification 2 above.

Charge #4

Violation of Article V, Section 16, of the Rules and Regulations of th[e] Division, which states:

No member shall knowingly make false or misleading official reports, or knowingly enter or cause to be entered in any Division books or records, any inaccurate, false, improper or misleading information or matter.

Specification #1 - Improperly cited construction supervision on his weekly activity reports, failed to sign patrol charts of troopers he inspected, and admitted to billing time for not actually being physically present at the sites.

Charge #5

Violation of Article IV, Section 3.b, of the Rules and Regulations of th[e] Division, which states:

A member shall: Not willfully disobey any lawful verbal or written order of any superior commissioned officer, superior non-commissioned officer, or other member placed by competent authority in a position of supervision over such member.

See Specification #4 above.

Moncho pled not guilty to the charges. On June 28, 2004, the Division transmitted the matter to the Office of Administrative Law for a hearing. An Administrative Law Judge (ALJ) held a hearing on several dates between February 24, 2006, and May 21, 2007.

Sixteen witnesses testified before the ALJ, in addition to Moncho. We need not dwell at length on the testimony of the individual witnesses, as the ALJ succinctly summarized their testimony in his initial decision of June 22, 2007:

Numerous witnesses testified credibly in this case, and have reached opposite conclusions as to dual site inspections, submission of patrol charts, and correct billing sources. . . . The testimony of . . . credible witnesses revealed confusion, ambiguity, and multiple interpretations of policy regarding dual site inspections, submission of patrol charts, and correct billing sources. When [Moncho] submitted his paperwork, no questions were asked or clarification requested as to these issues. His overtime requests and paperwork were approved through several levels of the administration. The record is devoid of any allegation that any of the overtime paid to

[Moncho] was in any way fraudulent or manufactured. Therefore, **I CONCLUDE** that since the policies concerning dual site inspections, submission of weekly patrol charts . . . , and proper billing sources were not clear, [Moncho] did not violate any of these policies.

Regarding the five specifications underpinning the disciplinary charges, the ALJ found as follows:<sup>1</sup>

Substantial questions arose as to specification 1, involving the accumulation of overtime hours without verification of presence on site inspections, and specification 4, failure to complete or incorrectly completing patrol charts documenting his inspections.

There was conflicting testimony from several witnesses as to whether these were a violation of policy. Additionally, there were systemic problems with the billing system in place at that time, which apparently have been corrected. Almost every witness had a different idea as to what could be billed and to whom, when patrol logs were required, and other billing practices.

Based on those factors, **I FIND** that the [Division] has not proved specifications 1 and 4 of Charge One.

Specification 2 involves the violation of an order not to bill time for sites previously inspected. . . . **I FIND** that this order was never given at any of the traffic meetings. Several troopers testified that they were not aware of any order prohibiting dual site inspections . . . . No written order or minutes of any meetings were

---

<sup>1</sup> Specifications 3 and 5 were withdrawn prior to the hearing.

produced . . . . [Moncho], on the other hand, has produced several credible witnesses to substantiate that no such order was communicated to him. Based on these factors, **I FIND** that the [Division] has not proved specification 2.

Regarding Charge #2, the ALJ found: "The record is devoid of any evidence that [Moncho] acted in an inefficient manner. If anything, [Moncho] was very efficient to the point of being overzealous." The ALJ dismissed Charge #3 based on his findings with respect to specification #2.

Regarding Charge #4, the ALJ found:

The record is devoid of any false or misleading actions on the part of [Moncho]. [Moncho] is certainly hard working, and perhaps overzealous at times in the performance of his duties and taking advantage of overtime programs available to him. None of his paperwork was questioned by the reviewing authorities prior to this investigation.

Regarding Charge #5, the ALJ found:

There were systemic problems with the billing system in place at that time for overtime. Almost every witness had a different idea as to what could be billed and to whom. Lieutenant Sowers, [Moncho]'s immediate supervisor, testified that he did not recall having disagreements with [Moncho]'s completion of his patrol charts. It should be further noted that all billing was submitted to Judy DiMemmo to enter and record, and at no time was [Moncho]'s paperwork challenged.



The ALJ dismissed Charges #2 through #5, and found that the Division had not proven the specifications of Charge #1. Notwithstanding these findings, the ALJ concluded that "one key issue must still be examined, the amount of overtime accrued by [Moncho]." Based on the amount of that overtime, the ALJ concluded that although Moncho "appears to be an excellent trooper, he did not exercise good judgment in this situation. . . . Although no policy has been violated, and no fraud or misleading conduct committed by [Moncho], this amount of overtime does serve to personally discredit the Division." For these reasons the ALJ found that Moncho had violated Charge #1.

On August 2, 2007, the Division issued a final decision upholding the ALJ's initial decision in its entirety, stating:

Systemic issues notwithstanding, the staggering amount of overtime accrued by [Moncho] in the fifteen-month period while he was supervisor, \$101,000, cannot be ignored. There is a strong sense both inside and outside of the law enforcement community that overtime is overused, abused and only halfheartedly controlled. . . . This case has brought to light deficiencies in the system regarding the management of overtime which have been and will continue to be addressed, with the goal of producing a tighter, more accountable system. . . . [T]hus, while I do not disagree that [Moncho] is an extremely industrious trooper, I also cannot condone use of a supervisory position for opportunistic gain. Given the amount of overtime lodged by this

sergeant, it begs the question whether this was genuine dedication or whether respondent used his leadership position to take advantage of the system to create opportunities for himself; putting aside any of the allegations in the specifications, which I agree with [the ALJ] are not supported by the requisite level of proof, this is the overarching discrediting nature of the offense. [Moncho]'s contention that he was not precluded and had unlimited authority to conduct construction site inspections and receive overtime payments for the same, exudes of entitlement and a definite loss of objectivity. If a supervisor encounters a loose system, it is an opportunity to make a difference[,] not for financial windfall. When it comes to good decision making on the job, it must be realized that decisions can be influenced by personal gain, and the line between dedicated overtime and greed, is a fine one. When that line is crossed, a Trooper has lost his ability to make judgments that best serve the interests of the Division and the public to which we are accountable, and creates perceptions, in this case measured in dollar signs almost twice as much as the average salary in this state, that the public has a hard time seeing past.

On appeal, Moncho raises the following arguments:

POINT I

THE COURT SHOULD REVERSE THE FINAL DECISION AND DISMISS THE DISCIPLINARY CHARGE AGAINST APPELLANT AS THE DIVISION FAILED TO PROVIDE S.F.C. MONCHO PLAIN NOTICE THAT IT COULD OR SOUGHT TO DISCIPLINE HIM FOR MERELY ACCRUING OVERTIME.

POINT II

THE DIVISION'S DECISION TO DISCIPLINE S.F.C. MONCHO FOR ACCRUING OVERTIME ABSENT A

SHOWING THAT HE ENGAGED IN FRAUD, MISLEADING CONDUCT, OR THE VIOLATION OF A POLICY IS ARBITRARY AND CAPRICIOUS; AS SUCH, THE COURT SHOULD REVERSE THE FINAL DECISION AND DISMISS THE DISCIPLINARY CHARGE AGAINST APPELLANT.

A. The Court should rule as a matter of law that an employer cannot discipline its employee where the only basis for discipline is an employee's accrual of overtime, which was approved by the employer and not violative of the employer's own policy.

B. Based upon the record below, the Administrative Law Judge's decision to impose discipline against S.F.C. Moncho is arbitrary, capricious and unreasonable, and not supported by the credible evidence.

Our scope of review of an administrative agency's decision is limited. Brady v. Bd. of Review, 152 N.J. 197, 210 (1997).

As we have consistently stated, our role, in general, is limited to determining:

"(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its actions; and (3) 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."

[In re Carter, 191 N.J. 474, 482 (2007)(quoting Mazza v. Bd. of Trs. 143 N.J. 22, 25 (1995)).]

Having thoroughly reviewed the record, we conclude that the record does not support the Division's decision. This conclusion is compelled by the ALJ's incongruous findings that: (1) Moncho violated none of the specifications underlying the disciplinary charges; but (2) nonetheless, he was guilty of the first disciplinary charge based solely upon the amount of overtime he had earned.

At no time was Moncho ever notified that the accrual of overtime, in and of itself, could subject him to disciplinary action. We agree with Moncho's argument that, "when the [ALJ] found in his Initial Decision that 'petitioner has not met its burden of proof as to the specifications in the charges,' the [ALJ] dismissed all bas[e]s for liability of which . . . Moncho had notice." The ALJ's anomalous decision contradicts his own statement during the hearing that, "We're here to see if there's specific violations of charges, if the system had flaws that allowed them to take advantage of it, that's not why we're here." No "specific violations of charges" were found to exist. Thus, the ALJ in effect created a new basis on which to justify disciplinary action after hearing and rejecting the official charges and specifications lodged against Moncho.

"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." West New York v. Bock 38 N.J. 500, 522 (1962). "'Plain notice' is the standard to be applied when considering the adequacy of disciplinary charges filed against public employees. . . . These principles emanate from the concept of affording due process and fairness to proceedings which impact so significantly on an employee." Pepe v. Twp. Of Springfield, 337 N.J. Super 94, 97 (App. Div. 2001). The finding that Moncho violated Charge #1, based upon none of the five specifications submitted on that charge, but rather upon the ALJ's conclusion that the amount of overtime Moncho earned "serve[s] to personally discredit the Division[,]" does violence to these principles.

In his Initial Decision, the ALJ noted that "no policy has been violated, and no fraud or misleading conduct committed" by Moncho. In adopting that decision, the Division "agree[d] with the [ALJ]" that the "allegations in the specifications . . . are not supported by the requisite level of proof . . . ." The Division has thus vitiated any claim that "the record contains substantial evidence to support the findings on which the agency based its actions . . . ." Mazza, supra, 143 N.J. at 25.

We will affirm an administrative agency's action only if we are "satisfied after [our] review that the evidence and the inferences to be drawn therefrom support the agency head's decision . . . ." Clowes v. Terminix Intern., Inc., 109 N.J. 575, 588 (1988).

But if the appellate tribunal is thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction . . . then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions. While this feeling of "wrongness" is difficult to define, . . . it can well be said that that which must exist in the reviewing mind is a definite conviction that the [agency] went so wide of the mark, a mistake must have been made. This sense of "wrongness" can arrive in numerous ways - from manifest lack of inherently credible evidence to support the finding, obvious overlooking or under-evaluation of crucial evidence, a clearly unjust result, and many others.

[State v. Johnson, 42 N.J. 146, 162 (1964).]

For the reasons stated, we are "thoroughly satisfied" that the Division's decision is "clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction." Ibid. If the Division is dissatisfied with the efficacy of its policies and procedures governing overtime, it behooves the Division to amend and rectify those policies and procedures. No legitimate purpose is served, however, and a

great disservice is done to the interests of justice, to punish an otherwise exemplary employee for adhering to extant policies and procedures.

In conclusion, we find the decision of the Division to be arbitrary, capricious and unreasonable. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980), Moreover, "it is not supported by substantial credible evidence in the record as a whole." Ibid. Therefore, we reverse that decision and vacate the penalty imposed.

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

  
CLERK OF THE APPELLATE DIVISION